This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

Digitized by Google

Digitized by Google

Court of Appeals

1912

ASSOCIATION OF THE BAR
LIBRARY
CITY OF NEW YORK

Vol. 82

Digitized by Google

Digitized by Google

380

June 10/12

IN THE
COURT OF APPEALS
OF THE STATE OF NEW YORK

375

In the Matter of the Application
of
HENRY A. HINMAN, *Petitioner,*
Appellant,

For the Removal of
VENA M. HINMAN, *Administratrix*
Respondent,
From the Office as Administratrix of the Estate of
CHARLES N. HINMAN, *Deceased.*

RETURN ON APPEAL

WILBER & YETTER,
Attorneys for Petitioner-Appellant,
Binghamton, New York.

HINMAN, HOWARD & KATTELL,
Attorneys for Administratrix-Respondent,
Binghamton, New York.

594

Appeal by Petitioner from order of 3rd App
er's, on facts & law, a decree of the Surrogate
oome County which revoked letters of admin
on granted to widow of decedent.

Digitized by Google

Digitized by Google

Index I

Pleadings

	Page
Affidavit of Maude E. Morgan	11
Affidavits of James H. LaRoche	12
Affidavit of Harry A. Yetter	14
Affidavit Regarding Giving of no opinion in the Court below, i.e., Surrogate's Court	574
Affidavit Regarding Giving of no other opinion in the Appellate Division, than the majority opinion for Reversal	593
Answer	25
Appellant's Request for Findings of Facts and Conclusions of Law	519
Citation	17
Decision	28
Decree Revoking Letters	31
Exceptions to Surrogate's Findings of Fact and Conclusions of Law	564
Exceptions to Decison	36
Decree of Reversal	581
Motion to set aside Citation	18
Motion to Dismiss Proceedings	21
Notice of Appeal, to Appellate Division	2
Notice of Appeal to Court of Appeals	594
Opinion Regarding Requests to Find	568
Order for Citation	16
Order Denying Motion to set aside Citation	19
Order Denying Motion to Dismiss Proceeding	23
Order Settling Case	518
Order Denying Requests to Find, in Appellate Division	596
Order for Reversal	577
Opinion in Appellate Division, Majority for Reversal	585
Petition for Revocation of Letters	4
Petition for Letters	8
Statement Required by Rule 41	1
Stipulation Waiving Certification, to Appellate Division	567
Stipulation for Judgment absolute in event of affirmance (included in Notice of Appeal)	594
Stipulation waiving Certification to Court of Appeal	597

This one
Z72Q-UK9-K47N
Digitized by Google

Index II

Index of Petitioner's Witnesses

		Page
Allen, Jessie	Direct	283
	Cross	284
	Re-direct	292, 297
	Re-cross	293, 299
	Direct (Recalled)	316
Allen, William	Direct	300
	Cross	303
	Re-direct	313
	Re-cross	314
Bunnell, Cooley	Direct	373
	Cross	374
	Redirect	375
Bunt, Harvey	Direct	401
	Cross	402
	Re-direct	403, 406, 409
	Re-cross	403, 406, 407
Bunt, Lillian	Direct	404
	Cross	404
	Re-direct	405
	Re-cross	406
Cadmus, Minnie	Direct	503
Dorman, T. E.	Direct	483
	Cross	485
Everett, Jennie	Direct	412
	Cross	414
Gaffney, George	Direct	378
	Cross	379
Hall, Jewell	Direct	398
	Cross	399
Heim, Hattie	Direct	336
	Cross	338
	Re-direct	344
Hinman, Mrs. Charles N.	Direct	77
Hinman, Harvey D.	Direct	280
Howland, Charles	Direct	379
	Cross	382

Digitized by Google

Index III

		Page
Hugaboon, John	Direct	359
	Cross	360
Jewell, Frank	Direct	499
	Cross	499
Johnson, Ella	Direct	357
	Cross	359
King, Catherine	Direct	435
	Cross	436
	Re-direct	438
LaRoche, James H	Direct	59
	Cross	60
	Re-direct	76
Maxwell, James F	Direct	419
	Cross	432
	Re-direct	475
	Re-cross	477
Morgan, Maude E	Direct	52
	Cross	54
	Re-direct	58
	Re-cross	59, 269
Morse, Alvah E	Direct	40
	Cross	42
	Re-direct	50
	Re-cross	50
Murphy, Nellie	Direct	375
	Cross	376
Palmer, Jeannette	Direct	344
	Cross	348
	Re-direct	356
Parker, Thomas M	Direct	409
	Cross	410
Shearer, Hattie M	Direct	317
	Cross	324
	Re-direct	331
Smith, David	Direct	363
	Cross	365
Southee, Lena	Direct	397

Digitized by Google

		Page
Sullivan, Joanna	Direct	395
	Cross	396
Thomas, Abbie	Direct	332
	Cross	335
	Re-direct	336
Thomas, George	Direct	369
	Cross	370
	Re-direct	372
Warner, John H.	Direct	389
	Cross	390
Wilson, Jean	Direct	391
	Cross	394
Wilson, Mary	Direct	501

Respondent's Witnesses

Bonnell, Asa L.	Direct	126, 268
Brink, Nelson P.	Direct	92
	Cross	93
Brown, John A.	Direct	516
Cadmus, Minnie	Direct	116
	Cross	120
	Re-direct	122
Furman, Etta	Direct	110
	Cross	110
	Re-direct	111, 112
	Re-cross	111
Gage, Charles T.	Direct	124
	Cross	125
Guilfoyle, W. P.	Direct	504
	Cross	504
Hitchcock, Charles H.	Direct	101
	Cross	102
Hooks, D. M.	Direct	109
	Cross	109
Hough, Frank	Direct	79
	Cross	81

Digitized by Google

		Page
Hughston, Bertha	Direct	113
	Cross	113
Hughston, Curtis E.	Direct	277
Hughston, Sarah	Direct	112
	Cross	113
Jones, Fred G.	Direct	99
	Cross	101
Kneeland, Harmon J.	Direct	114
	Cross	114
Lowe, Maude	Direct	512
Moses, John	Direct	505
Newing, Judson S.	Direct	87
	Cross	90
	Re-direct	91
Osterhout, John W.	Direct	505
	Cross	509, 513
Powell, Edward E.	Direct	103
	Cross	104
	Re-direct	104
Quigley, Marie	Direct	511
Seymour, Charles R.	Direct	97
	Cross	97
	Re-direct	98
	Re-cross	99
Sproul, Harvey B.	Direct	278
Stratton, Vernon D.	Direct	270
Weller, Leah	Direct	114
	Cross	115
Weller, H. Pierce	Direct	123
	Cross	123
Worthing, Harry P.	Direct	83
	Cross	85
	Re-direct	86
	Re-cross	87
Yeomans, Charles W.	Direct	104
	Cross	105
	Re-direct	107
	Re-cross	108

Digitized by Google

Exhibit Number	Contents of Exhibit	Folio admitted	Folio Printed
D	Envelope containing Ex. E.....	377	718
E	Letter dated Aug. 30, 1908.....	377	719
F	Postal card dated May 16, 1906.....	377	378
G	Envelope containing Ex. H.....	377	379
H	Letter dated May 16, 1905.....	377	380
H-1	Envelope containing Ex. H-2.....	377	383
H-2	Letter dated May 17, 1905.....	377	384
H-3	Envelope containing Ex. H-4.....	377	388
H-4	Letter dated May 18, 1905.....	377	389
H-5	Envelope containing Ex. H-6.....	377	391
H-6	Letter dated May 18, 1905.....	377	392
H-7	Envelope containing Ex. H-8.....	377	395
H-8	Letter dated May 20, 1905.....	377	395
H-9	Envelope containing Ex. H-10.....	377	403
H-10	Letter dated May 21, 1905.....	377	404
H-11	Envelope containing Ex. H-12.....	377	412
H-12	Letter dated May 25, 1905.....	377	413
H-13	Envelope containing Ex. H-14.....	377	419
H-14	Letter dated May 26, 1905.....	377	420
H-15	Envelope containing Ex. H-16.....	377	423
H-16	Letter dated May 20, 1905.....	377	424
H-17	Envelope containing Ex. H-18.....	377	427
H-18	Letter dated May 29, 1905.....	377	428
H-19	Envelope containing Ex. H-20.....	377	431
H-20	Letter dated May 31, 1905.....	377	432
H-21	Envelope containing Ex. H-22.....	377	435
H-22	Letter dated May 31, 1905.....	377	436
H-23	Envelope containing Ex. H-24.....	377	439
H-24	Letter dated June 1, 1905.....	377	440
H-25	Envelope containing Ex. H-26.....	377	442
H-26	Letter dated June, 1905.....	377	443
H-27	Envelope containing Ex. H-28.....	377	447
H-28	Letter dated June 5, 1905	377	448
H-29	Envelope containing Ex. H-30.....	377	451
H-30	Letter dated June 6, 1905.....	377	452
H-31	Envelope containing Ex. H-32.....	377	455

Digitized by Google

Exhibit Number	Contents of Exhibit	Folio admitted	Folio Printed
H-32	Letter dated June 7, 1905.....	377	456
H-33	Envelope containing Ex. H-34.....	377	459
H-34	Letter dated June 14, 1905.....	377	460
H-35	Envelope containing Ex. H-36.....	377	462
H-36	Letter dated June 16, 1905.....	377	463
H-37	Envelope containing Ex. H-38.....	377	466
H-38	Letted dated June 15, 1905.....	377	467
H-39	Envelope containing Ex. H-40.....	377	470
H-40	Letter dated June 22, 1905.....	377	471
H-41	Envelope containing Ex. H-42.....	377	474
H-42	Letter dated June 25, 1905.....	377	475
H-43	Envelope containing Ex. H-44.....	377	478
H-44	Letter dated Sunday, 1905.....	377	479
H-45	Envelope containing Ex. H-46.....	377	481
H-46	Letter dated Aug. 9, 1905.....	377	482
H-47	Envelope containing Ex. H-48.....	377	488
H-48	Letter dated Oct. 4, 1905.....	377	489
H-49	Envelope containing Ex. H-50.....	377	491
H-50	Letter dated Oct. 6, 1905.....	377	492
H-51	Envelope containing Ex. H-52.....	377	496
H-52	Letter dated Oct. 8, 1905.....	377	497
H-53	Envelope containing Ex. H-54.....	377	499
H-54	Letter dated Oct. 2, 1905.....	377	500
H-55	Envelope containing Ex. H-56.....	377	503
H-56	Letter dated Oct. 15, 1905.....	377	504
H-57	Envelope containing Ex. H-58.....	377	509
H-58	Letter dated Oct. 17, 1905.....	377	510
H-59	Envelope containing Ex. H-60.....	377	514
H-60	Letter dated Oct. 16, 1905.....	377	515
H-61	Envelope containing Ex. H-62.....	377	516
H-62	Letter dated Oct. 18, 1905.....	377	517
H-63	Envelope containing Ex. H-64.....	377	520
H-64	Letter dated Oct. 20, 1905.....	377	521
H-65	Envelope containing Ex. H-66.....	377	524
H-66	Letter dated Oct. 21, 1905.....	377	525
H-67	Envelope containing Ex. H-68.....	377	530
H-68	Letter dated Oct. 22, 1905.....	377	531

Digitized by Google

Exhibit Number	Contents of Exhibit	Folio admitted	Folio Printed
H-69	Envelope containing Ex. H-70.....	377	533
H-70	Letter dated Oct. 23, 1905.....	377	535
H-71	Envelope containing Ex. H-72.....	377	536
H-72	Letter dated Oct. 23, 1905.....	377	537
H-73	Envelope containing Ex. H-74.....	377	539
H-74	Letter dated Oct. 25, 1905.....	377	540
H-75	Envelope containing Ex. H-76.....	377	542
H-76	Letter dated Oct. 27, 1905.....	377	543
H-77	Envelope containing Ex. H-78.....	377	544
H-78	Letter dated Oct. 31, 1905.....	377	545
H-79	Envelope containing Ex. 80.....	377	550
H-80	Letter dated Nov. 1, 1905.....	377	500
H-81	Envelope containing Ex. H-82.....	377	552
H-82	Letter dated Nov. 2, 1905.....	377	553
H-83	Envelope containing Ex. H-84.....	377	556
H-84	Letter dated Nov. 5, 1905.....	377	557
H-85	Envelope containing Ex. H-86.....	377	561
H-86	Letter dated Nov. 5, 1905.....	377	562
H-87	Envelope containing Ex. H-88.....	377	567
H-88	Letter dated Nov. 13, 1905.....	377	568
H-89	Envelope containing Ex. H-90.....	377	570
H-90	Letter dated Oct. 11, 1905.....	377	571
H-91	Envelope containing Ex. H-92.....	377	574
H-92	Letter dated Dec. 14, 1905.....	377	575
H-93	Envelope containing Ex. H-94.....	377	577
H-94	Letter dated Dec. 17, 1905.....	377	578
H-95	Envelope containing Ex. H-96.....	377	581
H-96	Letter dated Nov. 23, 1905.....	377	581
H-97	Envelope containing Ex. H-98.....	377	584
H-98	Letter dated Monday, 1905.....	377	585
H-99	Envelope containing Ex. H-100.....	377	587
H-100	Letter dated Nov. 17, 1905.....	377	588
H-101	Envelope containing Ex. H-102.....	377	590
H-102	Letter dated Apr. 20, 1906.....	377	591
H-103	Envelope dated Apr. 30, 1906.....	377	594
H-104	Letter dated Apr. 21, 1906.....	377	595
H-105	Envelope containing Ex. H-106.....	377	598

Digitized by Google

Index IX

Exhibit Number	Contents of Exhibit	Folio admitted	Folio Printed
H-106	Letter dated May 1, 1906.....	377	599
H-107	Envelope containing Ex. H. 108.....	377	603
H-108	Letter dated May 7, 1906.....	377	604
H-109	Envelope containing Ex. H-110.....	377	608
H-110	Letter dated May 10, 1906.....	377	608
H-111	Envelope containing Ex. H-112.....	377	611
H-112	Letter dated May 14, 1906.....	377	611
H-113	Envelope containing Ex. H. 114.....	377	616
H-114	Letter dated June 16, 1906.....	377	616
H-115	Envelope containing Ex. H-116.....	377	618
H-116	Letter dated July 15, 1906.....	377	619
H-117	Envelope containing Ex. H-118.....	377	621
H-118	Letter dated July 10, 1906.....	377	622
H-119	Envelope containing Ex. H-120.....	377	623
H-120	Second sheet of letter.....	377	623
H-121	Envelope containing Ex. H-122.....	377	625
H-122	Letter dated July 29, 1906.....	377	626
H-123	Envelope containing Ex. H-124.....	377	629
H-124	Letter dated Aug. 1, 1906.....	377	630
H-125	Envelope containing Ex. H-126.....	377	633
H-126	Letter dated Aug. 22, 1906.....	377	634
H-127	Envelope containing Ex. H-128.....	377	637
H-128	Letter dated Aug. 24, 1906.....	377	638
H-129	Envelope containing Ex. H-130.....	377	639
H-130	Letter dated Aug. 23, 1906.....	377	640
H-131	Envelope containing Ex. H-132.....	377	641
H-132	Letter dated Aug. 24, 1906.....	377	642
H-133	Envelope containing Ex. H-134.....	377	645
H-134	Letter dated Aug. 25, 1906.....	377	646
H-135	Envelope containing Ex. H-136.....	377	648
H-136	Letter from Kingston, N. Y.....	377	649
H-137	Envelope containing Ex. H-138.....	377	650
H-138	Letter dated Aug. 27, 1906.....	377	651
H-139	Envelope containing Ex. H. 140.....	377	653
H-140	Letter dated Aug. 28, 1906.....	377	654
H-141	Envelope containing Ex. H-142.....	377	656
H-142	Letter dated Aug. 31, 1906.....	377	657

Digitized by Google

Exhibit Number	Contents of Exhibit	Folio admitted	Folio Printed
H-143	Envelope containing Ex. H-144.....	377	659
H-144	Letter dated Sept. 4, 1906.....	377	660
H-145	Envelope containing Ex. H-146.....	377	663
H-146	Letter dated Sept. 5, 1906.....	377	664
H-147	Envelope containing Ex. H-148.....	377	666
H-148	Letter dated Sept. 24, 1903.....	377	677
H-149	Envelope containing Ex. H-150.....	377	670
H-150	Letter dated Sept. 27, 1906.....	377	671
H-151	Envelope containing Ex. H-152.....	377	674
H-152	Letter dated Oct. 2, 1906.....	377	675
H-153	Envelope containing Ex. H-154.....	377	677
H-154	Letter dated Oct. 8, 1906.....	377	677
H-155	Envelope containing Ex. H. 156.....	377	682
H-156	Letter dated Oct. 9, 1906.....	377	682
H-157	Envelope containing Ex. H-158.....	377	684
H-158	Letter dated Oct. 11, 1906.....	377	685
H-159	Envelope containing Ex. H-160.....	377	688
H-160	Letter dated Oct. 13, 1906.....	377	689
H-161	Envelope containing Ex. H. 162.....	377	691
H-162	Letter dated Sept. 18, 1907.....	377	692
H-163	Envelope containing Ex. H-164.....	377	694
H-164	Letter dated Sept. 20, 1907.....	377	696
H-165	Envelope containing Ex. H-166.....	377	701
H-166	Letter dated Dec. 21, 1907.....	377	702
H-167	Envelope containing Ex. H-168.....	377	705
H-168	Letter dated Feb. 28, 1907.....	377	706
H-169	Envelope containing Ex. H-161.....	377	708
H-170	Letter dated Jan. 20, 1908.....	377	709
H-171	Envelope containing Ex. H-172.....	377	711
H-172	Letter dated Jan 22, 1908.....	377	712
H-173	Postal card dated January 22, 1908..	377	714
H-174	Envelope containing Ex. H-175.....	377	715
H-175	Letter dated January 23, 1908.....	377	716
H-176	Envelope containing Ex. H-177.....	377	718
H-177	Letter dated July 9, 1898.....	377	723
H-178	Envelope containing Ex. H-179.....	377	728
H-179	Letter dated July 9, 1898.....	377	728

Digitized by Google

Exhibit Number	Contents of Exhibit	Folio admitted	Folio Printed
H-180	Envelope containing Ex. H-181.....	377	733
H-181	Letter dated July 12, 1898.....	377	734
H-182	Army souvenir.....	377	739
H-183	Envelope containing Ex. H-184.....	377	740
H-184	Letter dated July 10, 1898.....	377	741
H-185	Postal card from San Francisco.....	377	745
H-186	Envelope containing Ex. H-187.....	377	746
H-187	Letter dated July 16, 1898.....	377	747
H-188	Envelope containing Ex. H-189.....	377	753
H-189	Letter dated August 25, 1898.....	377	754
H-190	Envelope from Hawaii.....	377	761
H-191	Letter dated Oct. 28, 1898.....	377	761
H-192	Envelope containing Ex. H-193.....	377	768
H-193	Letter dated Nov. 5, 1898.....	377	769
H-194	Envelope containing Ex. H-195.....	377	774
H-195	Letter dated Nov. 14, 1898.....	377	775
H-196	Envelope containing Ex. H-197.....	377	779
H-197	Letter dated Oct. 24, 1898.....	377	789
H-198	Envelope containing Ex. H-199.....	377	793
H-199	Letter dated January 1, 1898.....	377	794
H-200	Envelope containing Ex. H-201.....	377	797
H-201	Letter dated Dec. 11, 1900.....	377	798
H-202	Envelope containing Ex. H-203.....	377	801
H-203	Letter dated Dec. 21, 1900.....	377	802
	Record of a mortgage.....	1507	1506
	Record of a mortgage.....	1505	1504
	Record of a deed.....	833	833
H-204	Claim against estate.....	1535	1535
H-212	Record of a deed.....	1524	1514
H-213	Judgment Roll.....	1544	1541
H-214	Judgment Roll.....	1544	1544
H-215	Order of confirmance.....	1545	1545
	Record of a deed.....	1547	1547
	Record of a deed.....	1549	1548
	Record of a mortgage		
	Satisfaction of a mortgage		

Digitized by Google

Digitized by Google

1

Supreme Court

Appellate Division—Third Department

In the matter of the application of HENRY A. HINMAN for the removal of VENA M. HINMAN from office as administratrix of the estate

of

CHARLES N. HINMAN,
Deceased.

2

STATEMENT REQUIRED BY RULE 41.

This proceeding was begun on March 10, 1910, by the filing of a petition in the Surrogate's Court of Broome County. The petition and the citation issued thereon were served on or about the same day. The citation was returnable on April 25, 1910, at which time motions were made by the appellant to dismiss the proceeding. Those motions were denied and the appellant's answer was filed on April 25, 1910. The names of the original parties are as follows - Henry A. Hinman, the petitioner, Vena M. Hinman, the administratrix. No change in parties has taken place.

3

Digitized by Google

NOTICE OF APPEAL

SURROGATE'S COURT—BROOME COUNTY

In the matter of the application of HENRY A. HINMAN for the removal of VENA M. HINMAN from office as administratrix of the estate

of

CHARLES N. HINMAN,
Deceased.

TAKE NOTICE that Vena M. Hinman, a party to the above entitled proceeding, appeals upon questions of law and upon the facts to the Appellate Division of the Supreme Court in and for the Third Judicial Department from the decree of the Surrogate's Court of the County of Broome, entered in the above entitled matter on the 12th day of October, 1910, and entitled: "In the Matter of the estate of Charles N. Hinman, deceased," and that the said appellant intends to bring up for review upon said appeal the following intermediate orders entered in said proceeding, namely:

1. The order made on April 25, 1910, denying the motion made by said appellant upon her special appearance in said proceeding on said date to set aside the citation issued from said Surrogate's Court and directing said appellant to show cause before said Court on April 25, 1910, why a decree should not be made revoking the Letters of Administration issued to her upon the estate of the above named decedent, as well as to set aside the service of said citation, which order was entered on the 19th day of October, 1910.

2. The order made in said proceeding on the 25th day of April, 1910, denying the motion made

Digitized by Google

by said appellant upon her general appearance in said proceeding to dismiss the petition in said matter and to vacate and set aside the subpoena issued thereon and to discontinue said proceeding, which order was duly entered on the 19th day of October, 1910.

Dated November 5, 1910.

HINMAN, HOWARD & KATTELL,
Attorneys for Vena M. Hinman, appellant
Office and Postoffice Address,
Security Mutual Life Building,
Binghamton, N. Y.

To Hon. Robert S. Parsons,
Surrogate of the County of Broome,
And to Henry A. Hinman,
Petitioner,

And to Wilber & Yetter, Esqs.,
Attorneys for said Henry A. Hinman.

Digitized by Google

PETITION

10

SURROGATE'S COURT—BROOME COUNTY

In the Matter of the Estate

of

CHARLES N. HINMAN, *Deceased.*

The petition of Henry A. Hinman respectfully shows:

That he is a resident of the City of Binghamton, Broome County, New York, and is the brother of Charles N. Hinman, late of the City of Bingham-
11 ton in said County of Broome, now deceased; that said decedent died on or about the 17th day of September, 1908, at the City of Binghamton, and at the time of his death he was a resident of the City of Binghamton in the County of Broome.

That your petitioner alleges, upon information and belief, that said decedent died without leaving a last Will and Testament.

That said decedent left him surviving the following named persons as his only heirs at law and next of kin, as your petitioner isinformed and believes, and their relationship to said decedent and their respective places of residence or Post Office addresses are as set opposite their names respectively as follows:

12

Name	Relationship	Residence or Post Addresses
Henry A. Hinman, your petitioner	Brother	Binghamton, N. Y.
Alva E. Morse,	Half-Brother	Lakeview, N. Y.
Albert Griswold,	Half-Brother	Aztec, New Mexico.

That all of the foregoing named persons are of full age and sound mind.

Digitized by Google

13

That said decedent died possessed of certain personal property within this state, the value of which does not exceed the sum of $30,000 and the value of the real estate of said decedent does not exceed the sum of $20,000.

That on or about the 14th day of October 1908, one Vena M. Lord, calling herself therein and signing her name thereto as Vena M. Hinman, filed with this Court a petition asking that letters of administration be issued to her upon the estate of the above named decedent, which petition was verified by her on the 13th day of October 1908, a copy of which petition is attached hereto and marked Exhibit A.

That predicated upon such petition letters of 14
administration on the estate of said decedent were issued by the Surrogate of Broome County to the said Vena M. Lord, under the name of Vena M. Hinman, who since that time has assumed to act, and who is now assuming to act as such administratrix.

That, as your petitioner is informed and believes the grant of letters of administration on the estate of the said Charles N. Hinman, deceased, to the said Vena M. Lord, under the name of Vena M. Hinman, was obtained by the false suggestion or statement by her in said petition that she was the widow of said Charles N. Hinman, deceased.

That, as your petitioner is informed and believes, the said Vena M. Lord bases her claim to being the widow of said Charles N. Hinman, upon 15
an alleged marriage ceremony with him which she claims was performed by the Reverend James Henry LaRoche, a Minister of the Gospel, at the Hinman Farm in the Town of Chenango, Broome County, New York, on the 24th day of September, 1900. That said Vena M. Lord also claims that the said James Henry LaRoche issued to her a

Digitized by Google

16 certificate of such marriage, and that a notice of such marriage was published in one of the Binghamton papers directly after said 24th day of September, 1900.

That the sources of your petitioner's information and the grounds for his belief that the said Vena M. Lord bases her claim to being the widow of said Charles N. Hinman, deceased, on the alleged marriage ceremony claimed by her to have been performed at the time and place above stated and by the person above stated and that she claims that a certificate of said marriage was issued to her as aforesaid and that a notice of such marriage was published as aforesaid, is the affi-
17 davit of Maud E. Morgan, verified the 8th day of January, 1910, a copy of which affidavit is attached hereto and marked Exhibit B.

That as your petitioner is informed and believes, the said Vena M. Lord and the said Charles N. Hinman, were not married by the said James Henry LaRoche on September 24, 1900, at the Hinman residence in the Town of Chenango, Broome County, New York, or at any other time or place. That the source of petitioner's information and the grounds for his belief is the affidavit of said James Henry LaRoche, verified the 10th day of May 1909, a copy of which affidavit is annexer hereto and marked Exhibit C.

That, as your petitioner is informed and believes, no certificate of said alleged marriage be-
18 tween said Vena M. Lord and said Charles N. Hinman was ever issued to the said Vena M. Lord by the said James Henry LaRoche.

That the source of your petitioner's information and the grounds of his belief that no such certificate was ever issued as aforesaid, is the affidavit of said James Henry LaRoche, above referred to.

Digitized by Google

Petition for Revocation of Letters

That, as your petitioner is informed and believes, no notice of the said alleged marriage between the said Charles N. Hinman and Vena M. Lord was published in any newspaper published in the City of Binghamton, on or shortly after September 24, 1900. 19

That the source of your petitioner's information and the ground for his belief that no such notice was published as aforesaid, is the affidavit of Harry A. Yetter, verified the 9th day of March 1910, a copy of which is attached hereto and marked Exhibit D.

That, as your petitioner is informed and believes, no certificate of said alleged marriage between Vena M. Lord and Charles N. Hinman was ever returned to the Board of Health of the Town of Chenango within thirty days after said September 24, 1900, or at any time thereafter prior to the death of the said Charles N. Hinman. That the source of your petitioner's information and the grounds for his belief that no such certificate was ever returned to the said Board of Health as aforesaid, is the said affidavit of Harry A. Yetter above referred to. 20

WHEREFORE, your petitioner prays:

1. That the Letters of Administration issued to the said Vena M. Lord under the name of Vena M. Hinman upon the estate of the above named decedent be revoked upon the ground that the grant of such letters was obtained by the said Vena M. Hinman by the false suggestion in her petition for such letters of a material fact. 21

2. That a citation be issued to the said Vena M. Lord, otherwise known as Vena M. Hinman, requiring her to show cause why such letters should not be revoked for the reason aforesaid.

Digitized by Google

22

3. That Letters of Administration upon the estate of the said Charles N. Hinman, deceased, may be issued to your petitioner.

STATE OF NEW YORK,
CITY OF BINGHAMTON
COUNTY OF BROOME, } ss.

Henry A. Hinman being duly sworn says that he is the person named in and who signed the foregoing petition; that he has read the same and knows the contents thereof; that the same is true of his knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

23

HENRY A. HINMAN

Sworn to before me this
9th day of March, 1910.
G. L. Yetter, Com'r of Deeds,
City of Binghamton, N. Y.

EXHIBIT A.

SURROGATE'S COURT—BROOME COUNTY

In the Matter of the Application for letters of Administration on the Estate
24 of
CHARLES N. HINMAN,
Deceased.

TO THE SURROGATE'S COURT OF THE COUNTY OF BROOME:

The petition of Vena M. Hinman of the City of Binghamton, County of Broome, and State of New York, respectfully shows:

Digitized by Google

25

That your petitioner is the widow, of Charles N. Hinman, late of the City of Binghamton, in said County of Broome, now deceased; that said decedent died on or about the 17th day of September, 1908, at the City of Binghamton, and at the time of his death he was a resident of the City of Binghamton, in the County of Broome.

That your petitioner alleges upon information and belief that said decedent died without leaving a Last Will and Testament.

That said decedent left him surviving his widow, who resides at Binghamton, in the State of New York.

That your petitioner is informed and believes the following named persons are the only heirs 26
at law and next of kin of said decedent and their relationship to said decedent and their respective places of residence or Postoffice addresses are as set opposite their names respectively, as folows:

Name	Relationship	Residence or Post Office Addresses
Vena M. Hinman, your petitioner	Wife	Binghamton, N. Y.
Henry Hinman,	Brother	Binghamton, N. Y.
Emilis Morris,	Half-brother	Lake View, N. Y.
Albert Griswold,	Half-Brother	Bradford, Pa., was last known residence

That as your petitioner is informed and believes all of the foregoing named persons are of full age and sound mind except the following, who are infants, of the age set opposite their names respectively, as follows:

27

That said decedent died possessed of certain personal property within this State, the value of which does not exceed the sum of twenty-five thousand dollars, and the value of the real estate of said decedent does not exceed the sum of Thirty-five thousand dollars.

That as your petitioner is informed and believes

Digitized by Google

28

no previous application for the appointment of an Administrator of the estate of said deceased has been made and no Surrogate's Court has acquired jurisdiction of or over such estate.

WHEREFORE your petitioner prays that Letters of Administration upon the estate of said decedent may be granted to your petitioner and that all persons required to be cited by Section 2663 of the Code of Civil Procedure may be cited to show cause why a decree should not be made granting such Letters of Administration.

Dated October 13, 1908.

VENA M. HINMAN

29

COUNTY OF BROOME,
CITY OF BINGHAMTON } ss.

I, Vena M. Hinman, being duly sworn, say she the petitioner named in the foregoing petition: that she has heard the same read, know the contents thereof and that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

VENA M. HINMAN

Subscribed and sworn to before me, this
13th day of October, 1908.

30 A. L. Bonnell, Com'r of Deeds,
City of Binghamton, N. Y.

CITY OF BINGHAMTON
COUNTY OF BROOME, } ss.

I, Vena M. Hinman, do solemnly swear that I am a resident of Binghamton, in the State of New York and over twenty-one years of age; that I will

Digitized by Google

31

well, faithfully and honestly discharge the duties of the office of Administratrix upon the estate of Charles N. Hinman, late of the City of Binghamton, in said County, deceased, according to law.

VENA M. HINMAN

Subscribed and sworn to before me, this
13th day of October, 1908.
A. L. Bonnell, Com'r. of Deeds,
City of Binghamton, N. Y.

EXHIBIT B

32

SURROGATE'S COURT—BROOME COUNTY

In the Matter of the Estate
of
CHARLES N. HINMAN, *Deceased.*

STATE OF NEW YORK,
COUNTY OF CHENANGO } ss.

Maud E. Morgan being duly sworn, deposes and says that she lives and resides in the Town of Smithville, County of Chenango and State of New 33
York, that on the 29th day of April 1909, deponent in company with Alvah E. Morse called on Vena M. Lord, who also goes by the name of Vena M. Hinman; that deponent and said Morse spent about four or five hours in company with said Miss Lord or said Mrs. Hinman and that during said visit deponent, said Morse and said Miss Yord or Mrs. Hinman talked and visit-

Digitized by Google

ed together; that during said visit said Miss Lord told deponent and said Morse that she was married to Charles N. Hinman on the 24th day of September 1900, by a Mr. LaRoche, who was a Minister of the Gospel and who was also a member of the same order to which said Hinman belonged; that she told deponent and said Morse that said marriage took place at the Hinman farm house, and that she also told deponent and said Morse that she had her marriage certificate and also that her marriage or the fact of said marriage was published in one of the Binghamton papers right after such marriage, and that she had a copy of such marriage notice published in such paper and that she also told deponent and said Morse that there were no witnesses to such marriage except the Minister who performed the marriage ceremony.

MAUD E. MORGAN

Sworn to before me this
8th day of January, 1910.
Hubert C. Stratton
County Judge of Chenango County.

EXHIBIT C.

STATE OF SOUTH CAROLINA } ss.
COUNTY OF COLLETON }

James Henry LaRoche being duly sworn says that he lives and resides at Meggetts, South Carolina, and that he formerly lived in the City of Binghamton, Broome County, N. Y.. That he is a regular ordained Minister of the Gospel and that from the years 1894 to the year 1904 he had charge of the Trinity Memorial Church in the said City of Binghamton, N. Y. That he person-

Digitized by Google

ally knew Charles N. Hinman, and was chaplin in the same company in which said Charles N. Hinman served in the National Guard; deponent further says that he never performed the marriage ceremony between Charles N. Hinman and Vena Lord and that he never married said Charles N. Hinman to any woman or girl at any time or place, and that he never performed any marriage ceremony for said Charles N. Hinman and agreed to keep the name a secret for a money consideration, and that he never issued to said Charles N. Hinman any marriage certificate or any paper purporting to be a marriage certificate. Deponent further says that so far as he ever knew, said Charles N. Hinman was never married. Deponent further says that he knew said Charles N. Hinman for several years and if he had ever married said Hinman to any woman he would have remembered such fact and would have made a church and public record of such marriage as required by the Rules of the church and by the laws of the State of New York.

JAS. HEN. LAROCHE L. S.

Read over, subscribed and
sworn to before me this
10th day of May 1909.

D. H. TOWLES, L. S.
Magistrate
(SEAL) for Colleton County, S. C.

STATE OF SOUTH CAROLINA }
COUNTY OF COLLETON } ss.

I, H. D. Padgett, Clerk of said County, and State, do hereby certify that D. H. Towles, Esq., before whom the proof and acknowledgment of the foregoing instrument was taken, and whose

Digitized by Google

signature appears to the foregoing certificate of proof or acknowledgment was, at the date of said proof or acknowledgment a Magistrate in and for said County of Colleton, duly authorized to take the same, and to take and certify affidavits and oaths, and to take and certify the proof and acknowledgment of deeds to be recorded in said State; and that I am well acquainted with his handwriting, and verily believe that the signature to said certificate purporting to be his is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County, this 21st day of February, 1910.

(SEAL) H. D. PADGETT, Clerk.

EXHIBIT D.

SURROGATE'S COURT—BROOME COUNTY

In the Matter of the Estate

of

CHARLES N. HINMAN, *Deceased.*

STATE OF NEW YORK,
COUNTY OF BROOME,
CITY OF BINGHAMTON } ss.

Harry A. Yetter being duly sworn says: I am upwards of twenty-one years of age and am an attorney and counsellor-at-law and one of the attorneys for the petitioner herein. That on the 24th day of September, 1900, there were only three

Digitized by Google

43

daily newspapers published in the City of Binghamton, Broome County, New York, viz. the Binghamton Republican, the Evening Herald and the Binghamton Leader. That I have examined the files of each of said newspapers from September 24, 1900, and for upwards of ten consecutive daily publications subsequent thereto, for the purpose of finding a notice therein of the alleged marriage between Charles N. Hinman and Vena M. Lord and was unable, after a diligent search, to find any such notice in either of said newspapers during said period.

I have also examined the records of the Board of Health of the Town of Chenango, Broome County, New York from September 24, 1900 to the date 44
of the death of Charles N. Hinman and find that no certificate of the alleged marriage between Vena M. Lord and Charles N. Hinman was ever returned to said board.

HARRY A. YETTER

Sworn to before me this 9th day
of March, 1910.

G. L. Yetter, Commissioner of Deeds,
City of Binghamton, N. Y.

45

Digitized by Google

Order for Citation

46

At a Term of the Broome County Surrogate's Court held in and for the County of Broome, at the Court House in the City of Binghamton, New York on the 10 day of March 1910.

PRESENT:

Hon. Robert S. Parsons, Surrogate.

SURROGATE'S COURT—BROOME COUNTY

47

In the Matter of the Estate

of

CHARLES N. HINMAN, *Deceased.*

On reading and filing the petition of Henry A. Hinman, verified the 9th day of March 1910, and due deliberation having been had:

NOW, ON MOTION of Wilber & Yetter, attorneys for said petitioner, it is

ORDERED that a citation issue out of this Court directing Vena M. Lord, otherwise known as Vena M. Hinman, to show cause why a decree
48 should not be made revoking Letters of Administration issued to her by this Court on the estate of the above named decedent on the 14th day of October 1908.

ROBERT S. PARSONS
Broome Co. Surrogate

Digitized by Google

CITATION

49

The People of the State of New York:

To

Vena M. Hinman, (or Vena M. Lord) administratrix of the Estate of Charles N. Hinman late of the City of Binghamton in the County of Broome deceased.
GREETING:

YOU AND EACH OF YOU ARE HEREBY CITED to appear before the Surrogate of the County of Broome, at the Surrogate's office in the City of Binghamton, County of Broome, State of New York, on the 25th day of April 1910, at ten o'clock in the forenoon of that day, then and there to show cause why a decree should not be made 50 revoking letters of administration heretofore issued to you on the estate of said deceased.

IN TESTIMONY WHEREOF, We have caused the Seal of our said Surrogate's Courut for the County of Broome, to be hereunto affixed.

WITNESS, HON. ROBERT S. PARSONS, Surrogate of the County of Broome, at the City of Binghamton, in said County, the 10th day of March in the year of our Lord, one thousand, nine hundred and ten.

[L. S.] E. R. CARVER
Clerk of the Surrogate's Court

51

Digitized by Google

Motion to Set Aside Citation and Service Thereat

52

SURROGATE'S COURT—BROOME COUNTY

In the matter of the application of HENRY A. HINMAN for the removal of VENA M. HINMAN from office as administratrix of the estate

of

CHARLES N. HINMAN,
Deceased.

Vena M. Hinman, the administratrix of the es-
53 tate of Charles N. Hinmamn, deceased, hereby appears specially in the above entitled matter and moves to set aside the citation and the service of the same upon the ground—

First. That said citation contains no statement stating the grounds upon which the removal of said administratrix is sought.

Second. That said citation was improvidently issued for the reason that the petition does not state facts sufficient to justify or authorize the removal of said administratrix, nor is there any proof by affidavit or oral testimony of any facts or circumstances sufficient to justify or authorize such removal.

54 Third. That it appears upon the face of the petition upon which said citation was issued that Alvah E. Morse and Albert Griswold are interested in said application and that said citation is not directed to either of said persons.

Digitized by Google

Motion to Set Aside Citation and Service Thereat
Order Denying Motion to Set Aside Citation 55

Fourth. That the Court is without jurisdiction to entertain this proceeding.

Dated Binghamton, N. Y., April 25, 1910.

HINMAN, HOWARD & KATTELL
Attorneys for Administratrix,
Security Mutual Life Bldg.
Binghamton, N. Y.

At a Surrogate's Court held in and for the County of Broome at the office of the Surrogate in the City of Binghamton, in 56 the County of Broome and State of New York, on the 25th day of April, 1910.

PRESENT—

Hon. Robert S Parsons, Surrogate.

SURROGATE'S COURT—BROOME COUNTY

In the matter of the application of HENRY A. HINMAN for the removal of VENA M. HINMAN from office as administratrix of the estate

of 57

CHARLES N. HINMAN,
Deceased.

A citation having been issued out of this Court directed to Vena M. Hinman, administratrix of the estate of Charles N. Hinman upon the petition of Henry A. Hinman requiring her to show cause before this Court on the 25th day of April, 1910,

Digitized by Google

Order Denying Motion to Set Aside Citation

58 why a decree should not be made revoking the letters of administration issued to her upon the estate of said decedent, and upon the return of said citation the said administratrix appearing specially by Thomas B. Kattell, Esq., and moving to set aside said citation and the service of the same upon the following grounds, namely:

1st. That said citation contains no statement stating the ground upon which the removal of said administratrix is sought.

2nd. That said citation was improvidently issued for the reason that the petition does not state facts sufficient to justify or authorize the re-
59 moval of said administratrix, nor is there any proof by affidavit or oral testimony of any facts or circumstances sufficient to justify such removal.

3rd. That it appears upon the face of the petition upon which said citation was issued that Alvah E. Morse and Albert Griswold are interested in said application and that said citation is not directed to either of said persons; and

That the Court was without jurisdiction to entertain said proceeding.

And the petitioner appearing by Harry A. Yetter, Esq., in opposition to said motion, now upon reading and filing the petition herein made by Henry A. Hinman and verified on March 9, 1910,
60 the affidavit of Maud E. Morgan, verified on January 8, 1910, the affidavit of James Henry LaRoche, verified on May 10, 1909, and the affidavit of Harry A. Yetter, verified on March 9, 1910, each of which affidavits is annexed to and filed with the said petition, and upon reading and filing also the order for the issuance of said citation, made and filed on

Digitized by Google

Order Denying Motion to Set Aside Citation
Motion to Dismiss Proceedings 61

March 10, 1910, as well as the said citation issued and bearing date on March 10, 1910, together with the affidavit of G. L. Yetter, verified on April 25, 1910, showing service of said citation and filed on April 25, 1910; it is

ORDERED that said motion be, and the same hereby is denied.

ROBERT S. PARSONS
Surrogate

SURROGATE'S COURT—BROOME COUNTY 62

In the matter of the application of HENRY A. HINMAN for the removal of VENA M. HINMAN from office as administratrix of the estate

of

CHARLES N. HINMAN,
Deceased.

Vena M. Hinman, the administratrix of the estate of Charles N. Hinman, deceased, hereby appears in the proceeding upon the petition of 63
Henry A. Hinman to procure her removal from office as such administratrix and moves to dismiss said petition and to vacate and set aside the subpoena issued thereon and to discontinue the above entitled proceeding upon the following grounds:

1. That the allegations of the petition and the facts and circumstances therein set forth do not

Digitized by Google

64 establish that the administratrix is not the widow of the intestate Charles N. Hinman.

2. That the allegations of the petition and the facts and circumstances therein set forth do not show that the case is one of those specified in Section 2685 of the Code of Civil Procedure.

3. That the allegations of the petition are not supported by sufficient proof by affidavit or oral testimony of the truth of the allegations of said petition.

4. That the allegations of the petition and the facts and circumstances therein stated do not set forth sufficient grounds to warrant the removal of
65 the said administratrix.

5. That the allegations of the petition and the facts and circumstances therein seth forth do not establish that the letters of administration granted to said Vena M. Hinman on the estate of said Charles N. Hinman, deceased, were obtained by a false suggestion of a material fact, and that there is before this Court no proof by affidavit or oral testimony tending to establish any such fact or from which the existence of any such fact can be legitimately inferred.

6. That the allegations of the petition that the grant of the letters of administration heretofore made to said Vena M. Hinman upon the estate of said Charles N. Hinman, deceased, were obtained
66 by the false suggestion or statement contained in the petition of said Vena M. Hinman for the issuance of such letters that she was the widow of said Charles N. Hinman, deceased, is not supported by proof by affidavit or oral testimony before this Court.

Dated April 25, 1910.

HINMAN, HOWARD & KATTELL
Attorneys for Administratrix,
Security Mutual Life Bldg.,
Binghamton, N. Y.

Digitized by Google

Order Denying Motion to Dismiss Proceedings

67

At a Surrogate's Court held in and for the County of Broome at the office of the Surrogate in the City of Binghamton, in the County of Broome and State of New York on the 25th day of April, 1910.

PRESENT—
Hon. Robert S. Parsons, Surrogate.

SURROGATE'S COURT—BROOME COUNTY

In the matter of the application of HENRY A. HINMAN for the removal of VENA M. HINMAN from office as administratrix of the estate of CHARLES N. HINMAN, *Deceased.*

68

A citation having been issued out of this Court directed to Vena M. Hinman, administratrix of the estate of Charles N. Hinman upon the petition of Henry A. Hinman requiring her to show cause before this Court on the 25th day of April, 1910, why a decree should not be made revoking the letters of administration issued to her upon the estate of said decedent, and said administratrix appearing on the return of said citation by Thomas B. Kattell, Esq., and making a motion to dismiss said petition and to vacate and set aside the subpoena issued thereon and to discontinue the above entitled proceeding upon the following grounds: namely:

69

Digitized by Google

Order Denying Motion to Dismiss Proceedings

70

1. That the allegations of the petition and the facts and circumstances therein set forth do not establish that the administratrix is not the widow of the intestate Charles N. Hinman.

2. That the allegations of the petition and the facts and circumstances therein set forth do not show that the case is one of those specified in Section 2685 of the Code of Civil Procedure.

3. That the allegations of the petition are not supported by sufficient proof by affidavit or oral [illegible]ny of the truth of the allegations of said petition.

4. That the allegations of the petition and the
71 facts and circumstances therein stated do not set forth sufficient grounds to warrant the removal of the said administratrix..

5. That the allegations of the petition and the facts and circumstances therein set forth do not establish that the letters of administration granted to said Vena M. Hinman on the estate of said Charles N. Hinman, deceased, were obtained by a false suggestion of a material fact, and that there is before this Court no proof by affidavit or oral testimony tending to establish any such fact or from which the existence of any such fact can be legitimately inferred.

6. That the allegations of the petition that the
72 grant of the letters of administration heretofore made to said Vena M. Hinman upon the estate of said Charles N. Hinman, deceased, were obtained by the false suggestion or statement contained in the petition of said Vena M. Hinman for the issuance of such letters that she was the widow of said Charles N. Hinman, deceased, is not supported by proof, by affidavit or oral testimony before this Court.

Digitized by Google

Order Denying Motion to Dismiss Proceedings Answer

And the petitioner appearing by Harry A. Yetter, Esq., in opposition thereto, now, upon reading and filing the petition herein made by Henry A. Hinman, and verified on March 9, 1910, the affidavit of Maude E. Morgan, verified on January 8, 1910, thereto annexed, the affidavit of James Henry LaRoche, verified May 10, 1909, and also thereto annexed, as well as the affidavit of Harry A. Yetter, verified on March 9, 1910, and annexed to said petition; it is

ORDERED that said motion be, and the same hereby is, denied.

ROBERT S. PARSONS
Surrogate.

Answer

SURROGATE'S COURT—BROOME COUNTY

In the matter of the application of HENRY A. HINMAN for the removal of VENA M. HINMAN from office as administratrix of the estate

of

CHARLES N. HINMAN,
Deceased.

Vena M. Hinman, the administratrix of the estate of Charles N. Hinman, makes the following answer to the petition heretofore filed in this proceeding.

1. She denies that Henry A. Hinman, Alvah E. Morse and Albert Griswold, named in the petition, are the only surviving heirs at law and next

Digitized by Google

76 of kin of Charles N. Hinman, deceased, named in said petition, and she alleges that said Charles N. Hinman, in addition to said persons above named, left him a surviving widow, the respondent in this proceeding.

2. She denies that the grant to her of letters of administration on the estate of said Charles N. Hinman, deceased, was obtained by any false suggestion or statement.

3. She denies that she bases her claim to being the widow of said Charles N. Hinman upon the alleged marriage ceremony mentioned and described in the complaint, and alleges that she bases her
77 claim to being the widow of said Charles N. Hinman upon a valid marriage with him.

4. She denies the allegation contained in said petition that she and the said Charles N. Hinman were not married by James Henry LaRoche in said petition mentioned and described, and she denies the allegation in said petition contained that no certificate of her marriage with said Charles N. Hinman was ever issued to her by said James Henry LaRoche.

SECOND

For a second and as a separate answer and defense, the said respondent alleges that the said
78 Henry A. Hinman ought not to be heard to make this application and that he is estopped from making the same and has waived any claim that he might have had to make any such application for the reason that he has, for an unreasonable length of time, delayed the making of said application although all of the information upon which the same is founded has been in his possession for

Digitized by Google

79

nearly a year and for a much longer period, as the respondent is informed and believes, and that notwithstanding the possession of such information, he has, without objection, permitted the respondent to perform the work of the administration of said office and to incur the liabilities incident to her duties in said office and proposes to take the benefit of her efforts and labor in said office.

WHEREFORE the said administratrix prays that the petition herein may be dismissed upon the merits with costs.

HINMAN, HOWARD & KATTELL
Attorneys for Administratrix,
Security Mutual Life Bldg.
Binghamton, N. Y.

80

STATE OF NEW YORK,
COUNTY OF BROOME,
CITY OF BINGHAMTON } ss.

VENA M. HINMAN, being duly sworn, says that she is the person named in and making the foregoing answer to the petition heretofore filed herein; that said answer is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and that as to those matters she believes it to be true.

VENA M. HINMAN

81

Subscribed and sworn to before
me this 25 day of April, 1910.
Asa L. Bonnell,
Notary Public.

Digitized by Google

Decision

82

SURROGATE'S COURT—BROOME COUNTY

In the Matter of the Estate

of

CHARLES N. HINMAN, *Deceased.*

A petition having been presented herein by Henry A. Hinman, a brother of the above named decedent, and filed in this Court on March 10th, 1910, praying, among other things, that the Letters of Administration issued to Vena M. Lord, under the name of Vena M. Hinman, upon
83 the estate of Charles N. Hinman, deceased, be revoked upon the ground that the grant of such Letters was obtained by the said Vena M. Hinman by the false suggestion in her petition for such Letters of a material fact; and a citation having been duly issued to the said Vena M. Hinman, herein, returnable on the 25th day of April, 1910, and proof of service of the said citation having been duly filed on April 25th, 1910, Wilber & Yetter Esqs. appeared for the said petitioner with M. E. Page Esq. and V. D. Stratton Esq. as counsel, and the said Vena M. Hinman appeared by Hinman, Howard & Kattell Esqrs., with A. L. Bonnell Esq. as counsel, and filed an answer on said return day; and certain motions having
84 been made herein, and the said proceeding duly adjourned from time to time, and evidence having been taken herein, and the said proceeding having been duly submitted:

Now, after due consideration, I do hereby make and file the following findings of Fact and Conclusion of Law:

Digitized by Google

Decision

85

Findings of Fact

1st. That Charles N. Hinman, the above named decedent, died within the County of Broome and State of New York, on or about the 17th day of September, 1908, and at the time of his death he was a resident of the County of Broome and State of New York.

2nd. That the said Charles N. Hinman died intestate,.

3rd. That on October 14th, 1908, a petition made and executed by one Vena M. Hinman, one of the parties to this proceeding, and duly verified by her, was presented to the Surrogate of the 86
County of Broome in the matter of the Estate of Charles N. Hinman, deceased, and the said petition was duly filled in the office of the said Surrogate on the said 14th day of October, 1908.

4th. That the petition mentioned in the 3rd. finding of fact herein recites that the said Vena M. Hinman is the widow of the said Charles N. Hinman, and she prays therein that letters of administration upon his estate be granted to her.

5th. That on October 14th, 1908, upon the petition hereinbefore mentioned, Letters of Administration upon the estate of the said Charles N. Hinman, deceased, were issued by the Surrogate of the County of Broome to the aforesaid Vena M. Hinman. 87

6th. That Henry A. Hinman, the petitioner herein, is a brother of the said Charles N. Hinman, deceased, and he is one of the heirs-at-law and next of kin of the said Charles N. Hinman, deceased.

7th. That the aforesaid Vena M. Hinman is not

Digitized by Google

88 the widow of the said Charles N. Hinman, deceased.

8th. That the said Charles N. Hinman, deceased, and the aforesaid Vena. M. Hinman were never married, and the relation of husband and wife never existed between them.

9th. That the grant of Letters of Administration on the estate of the said Charles N. Hinman, deceased, to the aforesaid Vena M. Hinman, was obtained by her by a false suggestion of a material fact.

10th. That the false suggestion of a material fact, mentioned in the 9th finding of fact herein
89 is found and contained in the verified petition of the aforesaid Vena M. Hinman, upon which she obtained the Letters of Administration upon the estate of the said Charles N. Hinman, deceased, on October 14th, 1908, and the said false suggestion of a material fact is expressed in the said petition in the following terms, to wit: "Your petitioner is the widow of Charles N. Hinman, late of the City of Binghamton, in said County of Broome, now deceased."

Conclusion of Law

1st. That the Letters of Administration heretofore issued on the estate of Charles N. Hinman,
90 deceased, to the aforesaid Vena M. Hinman, on the 14th day of October, 1908, should be revoked.

A decree may be made and entered herein in accordance with the foregoing Findings of Fact and Conclusion of Law. The question of costs to be

Digitized by Google

Decision
Decree Revoking Letters 91

determined by the Surrogate upon due notice to the respective parties to this proceeding.

Dated September 13th, 1910.

ROBERT S. PARSON
Surrogate

Decree Revoking Letters

At a Surrogate's Court, held in and for the County of Broome at the Surrogate's Office in the Court House in the City of Binghamton, Broome 92
County, N. Y. on the 12th day of October, 1910.

PRESENT:

HON. ROBERT S. PARSONS,
SURROGATE.

SURROGATE'S COURT—BROOME COUNTY

In the Matter of the Estate
of
CHARLES N. HINMAN, *Deceased.* 93

A petition, duly verified, having been presented herein by Henry A. Hinman, a brother of the above named decedent, one of his heirs-at-law and next of kin, and a person interested in his estate, praying, among other things, for a decree that the Letters of Administration issued to Vena M. Lord under the name of Vena M. Hinman upon the estate of Charles N. Hinman, deceased, be revoked upon the ground that the grant of such Letters

Digitized by Google

94 was obtained by the said Vena. M. Hinman by the false suggestion in her petition for such Letters of a material fact; and proof, by affidavits, satisfactory to said Surrogate, of the truth of the allegations contained in the said petition, having been persented to said Surrogate with said petition which said affidavits were annexed to and formed a part of said verified petition; and a citation having been duly issued to the said Vena. M. Hinman to appear before said Surrogate's Court on the 25th day of April, 1910, to show cause why a decree should not be made revoking the Letters of Administration heretofore issued to her on the estate of the above named decedent; and said citation having been returned, with proof of the due
95 service thereof on the said Vena M. Hinman; and on the return day of said citation the said Henry A. Hinman, the petitioner, having appeared by Wilber & Yetter, Esqs., his attorneys, with V. D. Stratton, Esq., and M. E. Page, Esq., as counsel, and the said Vena M. Hinman having appeared by Hinman, Howard & Kattell, Esqs., her attorneys with A. L. Bonnell, Esq., as counsel, who interposed an answer herein; and the Surrogate having thereafter heard the proofs and allegations of the parties, and after due deliberation thereon, having duly made and filed his written decision containing his Findings of Fact and Conclusion of Law, as provided by law, whereby he finds as follows:

96

FIRST: That Charles N. Hinman, the above named decedent, died within the County of Broome and State of New York, on or about the 17th day of September, 1908, and at the time of his death he was a resident of the County of Broome and State of New York. "

"SECOND: That the said Charles N. Hinman died intestate."

Digitized by Google

Decree Revoking Letters

97

"THIRD: That on October the 14th, 1908, a petition made and executed by one Vena M. Hinmamn, one of the parties to this proceeding, and duly verified by her, was presented to the Surrogate of the County of Broome in the Matter of the Estate of Charles N. Hinman, deceased, and the said petition was duly filed in the office of the said Surrogate on the said 14th day of October, 1908."

"FOURTH: That the petition mentioned in the 3rd Finding of Fact herein, recites that the said Vena M. Hinman is the widow of the said Charles N. Hinman, and she prays therein that letters of administration upon his estate be granted to her."

98

"FIFTH: That on October 14th, 1908, upon the petition herein before mentioned, Letters of Administration upon the estate of the said Charles N. Hinman, deceased, were issued by the Surrogate of the County of Broome to the aforesaid Vena M. Hinman."

"SIXTH: That Henry A. Hinman, the petitioner herein, is a brother of the said Charles N. Hinman, deceased, and he is one of the heirs at law and next of kin of the said Charles N. Hinman, deceased."

"SEVENTH: That the aforesaid Vena M. Hinman is not the widow of the said Charles N. Hinman, deceased."

99

"EIGHTH: That the said Charles N. Hinman, deceased, and the aforesaid Vena M. Hinman were never married, and the relation of husband and wife never existed between them."

"NINTH: That the grant of Letters of Administration on the estate of the said Charles N. Hinman, deceased, to the aforesaid Vena M. Hinman, was obtained by her by a false suggestion of a material fact."

Digitized by Google

100 "TENTH: That the false suggestion of a material fact, mentioned in the 9th Finding of Fact herein is found and contained in the verified petition of the aforesaid Vena M. Hinman, upon which she obtained the Letters of Administration upon the estate of the said Charles N. Hinman, deceased, on October 14th, 1908, and the said false suggestion of a material fact is expressed in the said petition in the following terms, to wit: 'Your petitioner is the widow of Charles N. Hinman, late of the City of Binghamton, in said County of Broome, now deceased.'"

Conclusion of Law

101 "FIRST: That the Letters of Administration heretofore issued on the estate of Charles N. Hinman, deceased, to the aforesaid Vena M. Hinman, on the 14th day of October, 1908, should be revoked."

NOW, ON MOTION of Wilber & Yetter, Esqs., attorneys for said petitioner, it is hereby

ADJUDGED AND DECREED:

FIRST: That the said Charles N. Hinman, deceased, and the said Vena M. Hinman were never married, and the relation of husband and wife never existed between them.

102 SECOND: That the aforesaid Vena M. Hinman is not the widow of the said Charles N. Hinman, deceased.

THIRD: That the Letters of Administration heretofore issued on the estate of Charles N. Hin-

Digitized by Google

man, deceased, to the aforesaid Vena M. Hinman on the 14th day of October, 1908, be, and the same hereby are revoked. 108

FOURTH: And petitioner having served on Hinman, Howard & Kattell, Esqs., attorneys for the respondent herein, a copy of petitioner's Bill of Costs, duly verified, with notice of application for the taxation and allowance therof to be made October 14th, 1910, at 10 o'clock A. M., before the Surrogate of Broome County, duly endorsed thereon; and said attorneys for the respondent having waived service of said notice and voluntarily appeared before the Surrogate of Broome County on October 11, 1910; and after hearing Wilber & Yetter, Esqs., attorneys for the petitioner in favor of said application, and Hinman, Howard & Kattell, Esqs., attorneys for the respondent in opposition thereto; and said Surrogate having duly taxed and allowed petitioner's costs herein at $241.52, it is, 104

ON MOTION of Wilber & Yetter, attorneys for the petitioner herein,

FURTHUR ADJUDGED AND DECREED that Henry A. Hinman, the petitioner herein, recover of Vena M. Hinman the said sum of $241.52, which said sum is hereby allowed him for his costs and disbursments in this proceeding.

ROBERT S. PARSONS
SURROGATE. 105

Digitized by Google

Exceptions to Decision

106 SURROGATE'S COURT—BROOME COUNTY

In the matter of the application of HENRY A. HINMAN for the removal of VENA M. HINMAN from office as administratrix of the estate

of

CHARLES N. HINMAN,
Deceased.

Vena M. Hinman, the respondent herein, hereby
107 excepts to the decision of Hon. Robert S. Parsons, Surrogate, made herein and filed on the 13th day of September, 1910, in the following particulars:—

1. To the finding of fact numbered 7th.
2. To the finding of fact numbered 8th.
3. To the finding of fact numbered 9th.
4. To the finding of fact numbered 10th.
5. To the conclusion of law numbered 1st.
6. To the direction contained at the foot of said decision and stated in the following words, viz: "A decree may be made and entered herein in accordance with the foregoing findings of fact and conclusions of law, the question of costs to be determined by the Surrogate upon due notice to
108 the respective parties to this proceeding."

Dated October 19, 1910.

HINMAN HOWARD & KATTELL
Attorneys for Vena M. Hinman, Respondent,
Security Mutual Life Building,
Binghamton, N. Y.

To Hon. Robert S. Parsons,
Surrogate,

And to Wilber & Yetter, Esqs.,
Attorneys for Petitioner.

Digitized by Google

CASE

SURROGATE'S COURT—BROOME COUNTY

In the matter of the application of HENRY A. HINMAN for the removal of VENA M. HINMAN from office as administratrix of the estate

of

CHARLES N. HINMAN,
Deceased.

The citation in the above entitled matter was returnable before Hon. Robert S. Parsons, Surrogate of Broome County, at his office in the Court House in the City of Binghamton, County of Broome and State of New York, on April 25, 1910, at ten o'clock in the forenoon. At that time the petitioner, Henry A. Hinman appeared by Harry A. Yetter, Esq., his attorney, with Maurice E. Page, Esq., and V. D. Stratton, Esq., as Counsel. The administratrix, Vena M. Hinman, appeared specially by Thomas B. Kattell, Esq., one of her attorneys, with Asa L. Bonnell, Esq., as Counsel, and moved to set aside the citation in this matter and the service of the same, upon the following grounds:

FIRST. That said citation contains no statement stating the ground upon which the removal of said administratrix is sought.

SECOND. That said citation was improvidently issued for the reason that the petition does not state facts sufficient to justify or authorize the removal of said administratrix, nor is there any

Digitized by Google

112 proof by affidavit or oral testimony of any facts or circumstances sufficient to justify or authorize such removal.

THIRD. That it appears upon the face of the petition upon which said citation was issued that Alvah E. Morse and Albert Griswold are interested in said application and that said citation is not directed to either of said persons; and

FOURTH. That the Court was without jurisdiction to entertain said proceeding.

The said motion was denied and an exception taken by counsel for the administratrix. Thereupon the administratrix moved to dismiss
113 the proceding upon the following grounds:

ONE. That the allegations of the petition and the facts and circumstances therein set forth do not establish that the administratrix is not the widow of the intestate Charles N. Hinman.

TWO. That the allegations of the petition and the facts and circumstances therein set forth do not show that the case is one of those specified in Section 2685 of the Code of Civil Procedure.

THREE. That the allegations of the petition are not supported by sufficient proof by affidavit or oral testimony of the truth of the allegations of said petition.

FOUR. That the allegations of the petition and
114 the facts and circumstances therein stated do not set forth sufficient grounds to warrant the removal of the said administratrix.

FIVE. That the allegations of the petition and the facts and circumstances therein set forth do not establish that the letters of administration granted to said Vena M. Hinman on the estate of said Charles N. Hinman, deceased, were obtained

Digitized by Google

115

by a false suggestion of a material fact, and that there is before this Court no proof by affidavit or oral testimony tending to establish any such fact or from which the existence of any such fact can be legitimately inferred.

SIX. That the allegations of the petition that the grant of the letters of administration heretofore made to said Vena M. Hinman upon the estate of said Charles N. Hinman, deceased, were obtained by the false suggestion or statement contained in the petition of said Vena M. Hinman for the issuance of such letters that she was the widow of said Charles N. Hinman, deceased, is not supported by proof, by affidavit or oral testimony before this Court.

116

Said motion was denied and an exception taken by counsel for the administratrix. Thereupon the administratrix appeared generally and filed a written answer to the petition. Thereupon the petitioner moved that an order be made by the Surrogate requiring the administratrix to make her answer more definite and certain by specifying:

FIRST—Whether the alleged marriage between her and Charles N. Hinman, deceased, was ceremonial or non-ceremonial.

SECOND—That if the marriage was a ceremonial marriage that she be required to specify and state, when, where and by whom performed, and the witnesses present if any at said marriage; if the marriage was a non-ceremonial marriage, that an order be made by the Surrogate requiring the administratrix to state when the contract of marriage was had, whether it was in writing or verbal, and where made; and if the marriage was a non-ceremonial marriage and was made after January 1st, 1902, that she state where the contract was filed.

117

Digitized by Google

118

Said motion was taken under advisement by the Surrogate, and, after written briefs had been submitted, was denied.

With the consent of all parties adjournments from time to time were taken until July 11, 1910, at ten o'clock A. M., at which time the issues in this matter duly came on for trial before the said Surrogate at a Surrogate's Court held in and for the County of Broome at the Court House in the City of Binghamton, N. Y., on the 11th day of July, 1910, at which time the petitioner, Henry A. Hinman, appeared by Harry A. Yetter, Esq., one of his attorneys, with Maurice E. Page, Esq. and V. D. Stratton, Esq., as counsel, and the administratrix, Vena M. Hinman, apeared by Harvey D.
119 Hinman, one of her attorneys, with Asa L. Bonnell, Esq., as counsel. Mr. Yetter opened the petitioner's case to the Court. The petitioner then called as a witness ALVA E. MORSE, who being sworn, testified as follows: -

Direct Examination by Mr. Stratton -

I reside at Smithville, Chenango County, N. Y. Am half-brother of Charles N. Hinman, deceased, the intestate in this proceeding. Henry A. Hinman is an own brother of the deceased. There is still another half-brother in New Mexico. His name is Albert J. Griswold. I
120 have lived and resided in Chenango County for forty years. Will be sixty-three years old in a few days. On April 29th, last year, I had a talk and conversation with Vena Lord who is sometimes known as Vena Hinman in this proceeding, at her residence on Walnut Street in the City of Binghamton. My daughter Maud Morgan, who resides at Smithville, Chenango, County, was pres-

Digitized by Google

121 ent at that conversation. We arrived at Miss Lord's residence I should think not far from eleven o'clock—I could not tell exactly—and stayed there until between two and three o'clock, leaving in season to take the train back for Greene —the first express that goes up, I can't remember the time it goes. Eliminating all conversation with Miss Lord except the conversation as to what she said in relation to her marriage to Charles N. Hinman, our conversation was as follows: I asked her what Hank meant—that is my half-brother Henry Hinman—when he said in regard to nobody being married. She said that he claimed she was not married. I asked her if she was and she said she was and I asked her when she 122 was married and she said upon the farm the 24th of September, 1900, by Elder LaRoche. There was no witnesses only the parties concerned. It was printed in the Binghamton paper, if I remember right, that is the way I understood it. There was not much more said about it on that subject.

Q. Do you now recall anything furthur in relation to that particular subject?

A. She talked about general topics, of the death of Charlie.

Q. I will call your attention—was there anything said in reference to any certificate?

A. Yes, she said she had one and would show it when she was obliged to.

123 Mrs. Morgan was present at the time of this conversation. I had met Miss Lord before. I could not remember how long, when she lived in the brick block. It might have been six months before and before that had met her up here in the Moon Block when my mother was buried. As I recall it, (I can't remember) that was three or four years ago. Before that I met her in 1901 upon the

Digitized by Google

Alva E. Morse—Direct
124 *Alva E. Morse—Cross*

Hinman farm, situate about five miles up the State Road toward Port Dickinson, on the west side of the River, in the Town of Chenango. That is the same farm on which Charles Hinman, the father of Charles N. Hinman lived and resided for quite a number of years and the same farm on which my mother Melissa Hinman resided. When I met Vena Lord upon the Hinman farm in 1901, I had nothing to say to her about her relationship to Charles N. Hinman. She and my wife had a conversation on that subject.

Cross-examination by Mr. Hinman—My mother's maiden name was Melissa Foote. She was
125 married three times. Albert Griswold was her first husband's name. By him she had one son, Albert J. Griswold, my half-brother, who is now living in New Mexico. I could not tell how many years it has been since he was in this part of the country. It has been from twenty to twenty-five years since I saw him here. He is about sixty-five years old now. Except him there are no children of my mother's first marriage that I know of I do not know that my half-brother in New Mexico has carried on any correspondence with the Hinman's during the last twenty or twenty-five years. After the death of my mother's first husband she married a man by the name of Morse. By him she had no children except myself that I
126 know anything about. Later my mother married a man by the name of Charles Hinman. That was probably sixty to sixty-one years ago. I never knew him only when he was an old man when I was a boy. That is I called him old. He was living at Coventry when she married him. In later years they moved to Broome County. I should say thirty years ago. I was born in Broome County and lived there until I was twenty

Digitized by Google

127

years old. By Charles Hinman my mother had several children, Balis Hinman, Charles Hinman, Hank, or Henry, Hinman and Ida. Balis was born first, then Henry, then Ida and then Charlie. Charles was the youngest. Balis died in 1902, I think. I was not at the funeral. At the time of his death Balis lived on the Hinman farm, about which I have spoken. I then lived at Coventry, about twenty-five miles from the Hinman farm. Balis left no children. Ida Hinman never married. She is dead. I cannot tell when she died. It might have been 1895 to 1900, I could not tell. I did not attend her funeral. Charles Hinman died about three years ago, I think. I can't remember.

128

By counsel for both parties:

It is conceded by all parties hereto that Balis Hinman died in November, 1902, without leaving any descendants. It is furthur conceded that Charles N. Hinman died in September, 1908, and that Ida Hinman died about 1880.

Witness continuing—I attended Charles Hinman's funeral. It was held at the Moon Block in the City of Binghamton, N. Y. My step-father, Charles Hinman, died a good many years ago. I have really forgotten how long. My mother was a widow during the last years of her life. I cannot tell how long ago she dieed, three years or better. It might have been in January, 1907—three years ago last January—I would not say.

129

It is conceded by all parties that Melissa Hinman, the widow of Charles Hinman and mother of this witness, died in January, 1907.

Witness continuing— At the time of my mother's death she was living with her son

Digitized by Google

130 Charles up in the Moon Block. I attended her funeral, which was held at the home of my half-brother Charles N. Hinman in the Moon Block in the City of Binghamton. At the time of my mother's death he was keeping house in the Moon Block and my mother was living with him. He was living there with the administratrix and she was going by the name of Mrs. Hinman. That is what she was called in the family, all that I heard during the time of the funeral. The last time I saw my mother was when she was up to her son Henry's, in the Town of Triangle. I can't tell when that was, I should say ten or twelve years ago, it may be longer, or it may be less.

131 Q. You visited her there in the Town of Triangle at Henry Hinman's home?

A. I was going by and they called me in, Henry's boy called me in.

I can't tell how long before that it had been that I had seen my mother. I had visited her on the Hinman farm in the Town of Chenango. I can't tell how many years ago, I was there several times. The first time I ever visited her there was about 1870 or 1871 and then I was there frequently after that. During the last ten or twelve years I can't remember. I did not go so often after they broke up there and she was shifting around so much. 1901 was the last time I went there and she was not there. It was in the month of September. I could not tell the date. My wife was

132 with me. She is now living, but her health is not very good. She has not been out of the house very much this spring. I could not tell who was there on the Hinman farm at that time. Charlie ran it himself. I think Balis was there. It seems as if he came in there, I could not say for certain. I think I saw him. I do not remember any conversation I had with Balis. My wife and I stayed there over night. We came there from Coventry

Digitized by Google

133

on the trip around. I went to see my mother. At that time Charlie Hinman was running the farm and was running a milk route at that time. I do not know how long he continued to operate the farm. It was a big farm, about 400 acres and a large dairy. Until my mother was buried I did know that he continued to run that farm and milk route and lived there on the farm until the Spring of 1905, at which time he went away from the farm and went into the contracting business with a man by the name of Sproul. I do not know how long he had been in that business.

Q. In any event at the funeral of your mother in 1907, to all outward appearances Charles Hinman and this woman, whom you say you know as 134
Miss Lord and Mrs. Hinman, were living there as husband and wife

Petitioner's counsel—Objected to as improper, immaterial and incompetent and calls for a conclusion of the witness and the witness should state facts, and the further objection that it is no part of the cross-examination.

By the Court—Sustained.

By counsel for administratrix—Exception.

1901 is the first time I ever saw this administratrix. I was not at Charlie's funeral. Neither 135
Charles N. Hinman nor Balis Hinman ever visited me and my wife at my home. Charles N. Hinman and I never carried on any correspondence with each other, nor did Balis Hinman and I. After the funeral and sometime in 1909, I give the date as April 29, 1909, my daughter and I were at the administratrix's on Walnut Street. I am able to fix that exact date because I put it down in an

Digitized by Google

136 account book. That book is home, I did not bring it with me, but I got it. I put down nothing else in that book in reference to this transaction. I made that entry after I got home, I think the next morning. At that time my daughter Mrs. Morgan was living at Coventry, twelve miles from where I lived. We started from her house in the morning. I had gone to her house the night before to get her to go with me to Binghamton.

Q. To see whom? A. Mrs. Hinman.

Q. So you and your daughter left home for the express purpose of coming to Binghamton to see Mrs. Charles N. Hinman?

A. Yes.

137 Q. Had you ever visited Mrs. Charles N. Hinman before that time, or had you ever come to Binghamton to see her?

A. I was only there once before.

Q. You did not come then expressly to see her?

A. I went to see her.

That was six or eight months before, after Charlie died. Nobody went with me that time. I was there about the same length of time I guess. I had a meal with her. I could not say I addressed her as Mrs. Hinman when I spoke to her. I think I called her Vena. I could not tell how I did address her. When I introduced her to my daughter I introduced the administratrix as Mrs.

138 Charles N. Hinman, that is all I knew her as.

Q. And you introduced her as the widow of Charles N. Hinman, told your daughter that was Charlie's widow?

A. No, called her her Aunt, I think.

When I was there on April 29, 1909, no one else

Digitized by Google

139

was present except the administratrix, my daughter and myself.

Q. Are you sure about that?

A. Not in the room.

Q. Let me refresh your recollection—you stayed there to dinner?

A. Yes sir.

Q. Did you ever meet Mrs. Hinman's sister Minnie?

A. Yes sir, I do not know what her name is, her sister, two of them.

Q. When?

A. That day.

Q. That same day?

A. Yes sir. 140

Q. Whereabouts?

A. At the dinner table.

Q. So there, on that day, the 29th of April, 1909, you did meet Mrs Hinman and also her two sisters?

A. Yes.

I know the name of but one of them, Pearl, the youngest. The other was older and taller. Pearl was in school. She came in at noon. The other sister I did not see until we went to the dinner table. Vena introduced her, I think she did that the first time we was there. I think she was there the first time I was there. I stayed there until some time after dinner and then left there and went back home.

Q. That first time you visited Mrs. Charles N. 141
Hinman on Walnut Street, at the home where Charles N. Hinman died, did you talk with her anything about financial matters?

A. No, only she told me how things was that is all. I didn't ask her then anything about her marriage.

My daughter was not with me at that time. I went down on April 29, 1909, at the suggestion of

Digitized by Google

142 a lawyer Vern Stratton. I had my talk with the administratrix on April 29, 1909, after dinner. I do not know who first brought up the subject. I presume I did. I asked her where she was married and her reply was up on the farm. I wrote none of this conversation down and the only record I made of it was the date when I was there. As to the rest of it I am giving my best recollection. She said she was married on September 24, 1900. She did not say it was September 24, 1901. I do not think that I may have made a mistake in that date. I swear that I did not. It was 1900. She said 1900, not 1901, in my hearing. She said she was married by Elder Roche. I did not write
148 down that name. I had heard the name before a good many times. I had heard Mr. Hank Hinman here use it, my half-brother Hank, and Asa Bonnell and my lawyer has used it and a good many other parties I have heard use the name. He is the minister that used to preach here. I heard it after April 29, 1909. She told me on the 29th that there were no witnesses except the parties interested.

Q. Do you know the fact to be that from September, 1901, through the balance of that year, 1902, 1903, 1904 and 1905, until Charles Hinman left the farm to go in the contracting business, that she lived there on the farm with him and helped him in the conduct and management of the farm and was known to the people there as Mrs.
144 Charles N. Hinman?

By counsel for the petitioner

Objected to as improper, incompetent, immaterial, no part of the cross-examination and a leading question and heresay.

By the Court - Sustained.

Digitized by Google

145

By counsel for the administratrix - Exception.

Q. Do you know that after Charles N. Hinman, your half-brother, left the farm and went in the contracting business, that this administratrix, in the following year they rented the farm and the administratrix and he came to Binghamton and resided together? Do you know that they lived together on the south side?

By counsel for the petitioner - Objected to as improper, incompetent, immaterial and no part of the cross-examination.

By the Court - Overruled.

146

By counsel for the petitioner - Exception.

A. No sir.

My mother was buried in the Castle Creek Cemetery. The services were held at the house. This administratrix sat in the room with the mourners and the relatives.

Q. And on the way to the Cemetery did she ride in the wagon with Charles N. Hinman and the mourners?

Counsel for the petitioner - Objected to as improper, incompetent, immaterial, no part of the cross-examination and the counsel should not be allowed to ask leading questions.

147

By the Court - Sustained.

By counsel for the administratrix - Exception.

There at the funeral Henry Hinman was present with the administratrix, and his wife and little son Charlie. Vern Stratton, at whose suggestion I came to Binghamton on April 29, 1909, is

Digitized by Google

148 acting as attorney for me in the action and was at that time. He is in Court to-day taking part in this proceeding. The arrangement between him and me in connection with his services in this estate is on the percentage basis.

Q. The amount of his compensation depends on the amount you receive from the estate?

By counsel for the petitioner - Objected to as immaterial, incompetent, improper, no part of the cross-examination.

149 By the Court - Sustained.

By counsel for the administratrix - Exception.

Re-direct examination by Mr. Stratton -

On my return to Oxford on the evening of the 29th of April, after my visit with the administratrix, I called on Mr. Stratton and saw him.

Q. On that occasion did you tell me the conversation that you had had with Mrs. Hinman A. I did.

By counsel for the petitioner - I desire to change where I said "Mrs. Hinman" to "administratrix."

150

By counsel for the administratrix - We object to any change.

By the Court - I will permit him to substitute the word "administratrix" for "Mrs. Hinman."

Re-Cross Examination by Mr. Hinman -

Q. You and your daughter were over there at

Digitized by Google

151

the house, the home of this administratrix on Walnut Street, on the 29th day of April, 1909, breaking bread and pretending friendship to her face, friendship for her treating her in a friendly way?

By counsel for the petitioner - Objected to as improper, incompetent and immaterial.

By the Court - Sustained.

By counsel for the administratrix - Exception.

Q. Did you indicate to her in any way that your visit there at that time was anything but one of a friendly nature and character?

152

By counsel for the petitioner - Same objection.

By the Court - Sustained.

By counsel for the administratrix - Exception.

Q. Did you inform her in any way that you were there and brought your daughter there for the purpose of obtaining from her an admission you might use against her in some proceeding you may take in connection with the estate of Charles N. Hinman?

By counsel for the petitioner - Same objection.

By the Court - Sustained.

By counsel for the administratrix - Exception.

153

By Mr. Yetter -

At this time Senator Hinman, attorney for the administratrix, stated in open Court, when his attention was called to it by the Court, that, in using the term in examining the witness just retired, when he used the expression "Mrs. Hinman" it was not for the purpose of characterizing her as the widow of the decedent and that no significance

Digitized by Google

154 should be attached to it in that respect, or that in substance, and I desire that the statement be taken on the record.

By Mr. Hinman -

My statememnt was, in using that term, that I was not using it for the purpose of getting the witness into an admission that she was Mrs. Hinman, or that she was married.

MAUD E. MORGAN, being called for the petitioner, sworn and examined by Mr. Stratton, testified as follows:

I reside in the Town of Smithville. In April, 1909, I resided in Oxford. I am a daughter of the
155 last witness, Alva E. Morse. My age is thirty-eight. On April 29, 1909, I accompanied my father to Binghamton and called on the administratrix in this proceeding. We arrived at her residence shortly before noon. I can't tell just what time. It was sometime between two and four o'clock when we left. I could not tell just what time. My father and I went there together and both came away at the same time. On that occasion, at the house, I saw two sisters of the administratrix and the administratrix herself. While present there on that occasion I heard a conversation in which the administratrix took part in relation to an alleged marriage with Charles N. Hinman.

156 Q. Now Mrs. Morgan, I want you to go on and detail the conversation, whatever the administratrix said and whatever you said and whatever Mr. Morse said, if it was there in her presence, relative to this alleged marriage?

By counsel for the administratrix -

I object to her giving part of the conversation

Digitized by Google

157 as improper and incompetent, witness should go on and tell what was said there that day, giving the entire conversation, so the Court can draw its own conclusion.

By the Court -
Objection overruled because the conversation may have referred to many subjects which would tend to lumber up the record and you may take care of it on your cross-examination.

By counsel for the administratrix - Exception.

158 A. The subject was brought up about people being married and she said she did not know who else was married but that she was, that she was married to Charles Hinman on the 24th day of September, 1900, by Mr. LaRoche and that she had her marriage certificate and she would show it when she was obliged to. He further asked her where Mr. LaRoche was and she said he was not here, that he had all gone to pieces and had lost his mind.

She said she was married at the farm. It was published in one paper in Binghamton at the time. She said they did not record marriages at the time she was married, that was before they put marriages on record but that it was published in one paper in Binghamton. She said there were no witnesses present but just the parties concerned. Just at present I recall nothing further. She 159 said in relation to Dr. LaRoche being acquainted with Mr. Hinman, she said he was a brother Mason and they were great friends. That conversation took place after dinner, I can't tell just what time. My father and I stayed to dinner. At the dinner table we met the two sisters of the administratrix and herself. Prior to that time I had never met

Digitized by Google

160 the administratrix. I now recall that we talked on different subjects. My father and I went away together from where the administratrix resided and returned to Oxford. The administratrix said the marriage to which she referred took place upon the Hinman farm.

Cross-examination by Mr. Hinman.

I had never seen the administratrix before April 29, 1909, and have never seen her since until today. I last saw Charles N. Hinman alive when I was between twelve and fourteen years old. I never saw Balis Hinman. I last saw my grand-
161 mother Melissa about the same time I saw Charlie Hinman. During all the thirty-eight years of my life I lived at Coventry, Chenango County, about twenty-five miles from the Hinman farm. Coventry is on the D. L. & W. Railroad, which runs directly from Coventry to the City of Binghamton.

Q And did you become greatly interested in your relatives in Binghamton until you discovered, you and your father, that there might be some pickings around here for your end of the family?

By counsel for the petitioner - Objected to as improper, incompetent and immaterial.

162 By the Court - Sustained.

By counsel for the administratrix - Exception.

My father introduced me to the administratrix on April 29th. He introduced me as his daughter and her as Mrs. Hinman, I think. He did not speak of her as my Aunt. I heard his testimony He did not testify that he stated to me that Mrs. Hinman was my Aunt. He did not so swear. My

Digitized by Google

163

hearing is good. My memory and character are supposed to be. I was listening to my father and heard all he said.

Q. Will you swear he did not say that?

A. He did not say that she was my Aunt.

Q. Did he testify as he sat in that chair that he introduced her as your Aunt?

By counsel for the petitioner - Objected to. The record is the best evidence of what Mr. Morse swore to.

By the Court - Sustained.

By counsel for the administratrix - Exception. 164

I went down there because I was asked to go by my father to talk with her in regard to this matter. We told her there that that was what we were there for, that we had come from Coventry to find out about her marriage. We told her that in the forenoon.

Q. When did you tell her that you and your father had come there to find out whether she was married or not?

A. In the forenoon.

Q. And after that you stayed and had dinner with her, ate her food did you?

A. I suppose so.

Q. And nothing said about the marriage until some time in the afternoon? 165

A. No sir.

Q. Who first told her, and when did you tell her that your father had come all the way from Coventry to talk with her and find out whether she was married?

A. I did not tell her that.

Q. Did either one of you tell her that? A.No.

Q. Or anything of the kind?

Digitized by Google

166 A. It cannot be answered yes or no.

My father told her why we had come in the forenoon. I cannot just tell you when with reference to the time we crossed the threshold. It was after we took our things off. I can't tell you what we had talked about after we took our things off before my father told her. That was our only errand over there. That was the only reason we came from Coventry here.

Q. And yet you stayed and took dinner and stayed in her house three hours?

A. Until we found out what we went for.

In the forenoon my father told her what we went for. She said she was willing to talk over any business he wanted to talk over. Then she
167 went on to talk business. When they got ready to talk the marriage they talked over that. We talked about everything and visited. I knew I was there for the purpose of making myself a witness if possible against this woman. My father knew it.

Q. And yet you pretended outwardly to be her friend and stayed and ate dinner? A. No sir.

Q. Did you eat dinner?

A. Yes. I did not pretend to be visiting her.

I listened to what she and father talked about. I did not talk much. I did not have anything to say. I listened. It was some time after dinner when they brought up about the marriage. My father brought it up. He asked her what Henry
168 Hinman meant when he said nobody was married. Those are his words. That was after dinner in the sitting room. I suppose we ate dinner in the dining room. I cannot tell anything about what we did talk at dinner. Not a single thing. I cannot tell you what was said before dinner. I cannot tell any subject that was discussed before dinner.

Digitized by Google

169

Q. Can you tell anything said by anyone there after dinner, except about the marriage?

A. They talked about Charlie's dying and she shed a few tears and acted as if she felt bad, and she talked about settling up the estate. That is as near the substance as I can give it.

Q. This woman that day when talking about Charlie's death did shed a few tears?

A. She did a few but I do not know whether false or not.

I cannot tell anything I said, or my father, or that she said, except what I have told about the marriage. That is all I went for. I did not pay any attention to anything except that. Yes I guess it took us people nearly three hours to get 170
down to that subject. She did not tell me that the reason why her certificate of marriage was not recorded, as she understood it, was that Charles N. Hinman did not want his brother Balis Hinman to know about it. She did not tell me that when Charles Hinman died there was in the safe in the house her marriage certificate and that she thought that Henry Hinman, his half-brother had stolen it. She said something in talking over her affairs, or about the estate, as to the condition that existed between Henry Hinman and Charles N. Hinman, and the amount Henry Hinman owed Charles, but I could not tell you what it was. She said something about the amount in notes Charles N. Hinman's estate had against his brother Henry Hinman but I cannot tell what. I do not re- 171
member that she told me that after Charles Hinman died Henry Hinman came over to the house and tried to get her to enter into an arrangement whereby the notes should be destroyed and the other heirs know nothing about it. I will not swear that she did not. Part of the time she was talking in a friendly way with my father. I cannot tell you that she told my father there in my

Digitized by Google

172 presence what the amount of the estate was. I do not remember anything about it for I paid no attention to it. In any event they were talking about the estate.

Q. Did she tell you anything about the years she had been up there on the farm and here in Binghamton, and Melissa Hinman had lived with her, and the work she had done, and the care she had given your father's own mother, was that talked over?

A. Yes I think it was.

I did not talk with her with reference to her marriage. I knew nothing personally with reference to the way in which she and Charles N. Hin-
173 man had lived on the farm in 1901 or down until Charlie left the farm in 1906.

Q. Did you know that Charles N. Hinman and she did live there from 1901 to 1905, at which time he left the farm and went in the contracting business with Sproul and she remained on the farm another year and conducted the business of the farm?

A. I do not know anything about it.

I did not talk with Verne Stratton, my father's attorney about this case on the morning of April 29th or before that time. I had not had anything to say to him nor he to me. I did not attend my grandmother's funeral. I understood from what this administratrix said there on the 29th of April, 1909, that Mr. LaRoche was living and she knew
174 he was living.

Re-direct examination by Mr. Stratton -

On my return to Oxford on the evening of April 29th I called upon you (Mr. Stratton). I stated to you the substance of the conversation that occurred there. In reference to the conversation that took place on the 29th of April I do not re-

Digitized by Google

175

call anything more particular that was said with reference to who was present at the time this alleged marriage took place, only that there was no witnesses only the interested parties. I remember nothing further that she said on the subject.

Q. Did she mention any names of people present at this alleged marriage?

A. Just herself and Charlie and Mr. LaRoche that was all.

In reference to Mr. Sproul I cannot recall what was said. They talked of that and of the Good Roads and the estate and Mr. Hinman and Mr. Sproul, but I could not recall the words that was said. I could not recall or give the substance of 176
anything that was said by Mrs. Hinman in regard to Mr. Sproul.

Re-cross examination by Mr. Hinman -

Q. Did she say on that day there was no witnesses except the persons interersted? A. She did.

Q. And is that all she said with reference to who were present? A. Now I cannot tell you.

DR. JAMES H. LAROCHE, being called for the petitioner, and being sworn and examined by Mr. Yetter, testified as follows: 177

I reside near Charleston, South Carolina. Have resided there I think since 1906. I formerly resided in Binghamton. I came to Binghamton to reside in 1893 and resided here ten years. During that time was pastor of the Trinity Memorial Church of the City of Binghamton. I am a regularly ordained minister of the Gospel and was in 1893. I knew Charles N. Hinman when I lived in

Digitized by Google

178 Binghamton. How long I cannot tell exactly. I knew him very well. I think I was Chaplain of Co. H. or the Twentieth Separate Company, a military organization of the City of Binghamton from about 1896 or 1895, I do not remember exactly, until I went away. Charles N. Hinman was a member of that Company. I met him at the Armory and on the street often.

Q. Did you perform a marriage ceremony between Charles N. Hinman and Vena Lord on September 24, 1900?

By counsel for the administratrix -

179 Objected to as improper, incompetent, immaterial and irrelevant.

By the Court - Overruled.

By counsel for the administratrix - Exception.

A. I did not. I did not at any other time or at any place perform a marriage ceremony for Charles N. Hinman.

Cross Examination by Mr. Hinman -

I was ordained as a minister either in 1881 or 1882, I do not remember exactly, but about that time, in Sewanee, Tenn. and Charleston, South
180 Carolina, by Bishop Howe. In 1893 I came to Binghamton and took charge of the Trinity Memorial Church at the corner of Main and Oak Streets in the City of Binghamton, N. Y. In 1901 I was a regularly ordained minister and had charge of that Church in the City of Binghamton. I cannot tell exactly when I first knew Charles N. Hinman, but I think in connection with the Chaplainey of the 20th Separate Company, a military

Digitized by Google

181 organization in the City of Binghamton. Charles N. Hinman was lieutenant of the Company. I do not know that Mr. Hinman was lieutenant of the Company the entire time that I knew him but when he went to the Spanish-American War in 1898 he was First Lieutenant. I cannot inform you when I first met him. I have no recollection of the time nor place where it was, but it was as early as the Spanish War. I knew him very well and from that time knew him intimately until I left here in 1906. We were personal friends. I did not perform any marriage ceremony for him. There was a time when I had a sickness.

Q. Did you have any mental derangement with it?

182 A. Not anything that I know anything about.

Q. Are you sure you did not?

A. I know what my friends said.

Q. Did you know your friends said you were mentally unbalanced?

A. No.

Q. It would surprise you if they did?

A. It would very much.

Q. When were you sick and how long were you sick?

A. I do not know as I can give you that information exactly.

I do not remember when I was taken ill. I do not know how long the illness continued. I do not know as I testified to what illness or whether to inquire as to what illness you mean. I said I 183 had an illness before I went South. I was in the City Hospital two or three weeks and was sick before I went to the City Hospital. How long before I cannot tell you. Before I went to the Hospital and during that sickness my family cared for me. I mean Mrs. LaRoche and the children. After I came out of the Hospital I took a carriage and went to the train. I went to New York on the

Digitized by Google

184 train and from there to Charleston and from that day to this continued to reside there. I think my wife went from the City Hospital to the train with me. She was there but I would not be sure she rode in the carriage with me. She did not accompany me to New York or from New York to Charleston. That was sometime in November, about four years ago, 1906 when I left Binghamton. I think that it must have been in 1903 that I gave up my pastorate, but I cannot give the exact date.

Q. Why did you give it up?

By counsel for the petitioner -

185 Objected to as irrelevant, incompetent, immaterial.

By the Court - Sustained.

By counsel for the petitioner - Exception.

I have not performed any duties of a minister since I gave up my church in Binghamton in 1903, none at all. Since 1906 when I left here my wife has been south with me, not the whole time, only to visit.

Q. You never lived with her or she with you since that time?

A. No, she was only there on a visit.

Q. She stays here with the children? A. Yes.

186 Q. What is your present occupation

A. I would hardly know what to tell you. I might pass for a fisherman or a baseball fan.

Q. Have you any income? A. No.

Q. Now you say you did not marry Charles N. Hinman at any time? A. No I did not.

Q. On what do you base that?

A. On my own recollection of the case.

Digitized by Google

187

Q. What case?

A. Well, of the case you are now talking about.

I think my memory is as good as ever. My age now is fifty-five. My hair is now snow white.

Q. Have you any explanation to give or do you know the reason why you gave up the ministry in 1903 and why you are not engaged in any position now?

By counsel for the petitioner -

Objected to as improper, incompetent and immaterial.

By the Court - Sustained.

188

By counsel for the administratrix - Exception.

The question as to whether or not I married Charles N. Hinman was first brought up in a letter from Wilber & Yetter. I think they were the lawyers. I knew them when I was here. I cannot tell exactly when I got that letter from them, but two or three years ago I should say. Not long after Charles Hinman's death.

Q. Have you ever forgotten anything?

A. It depends on what it was. Some things it is better to forget.

Q. Have you forgotten things? A. Sure.

I do not know whether Charlie Hinman lived upon the farm in the Town of Chenango or not. 189
I know he owned it. After I got this letter Mr. Stratton and another man from this State came south to see me. I do not believe I now remember what the other man's name was. I had never seen him before. He is not here to-day. It was about a year ago I should say that they were there.

Digitized by Google

190 These two men were together when they visited me. I made an affidavit for them and gave it to them. I answered the letter which I received from Wilber & Yetter. I have not the letter that I received nor a copy of the one I wrote. In addition to this one letter I received from Wilber & Yetter and the letter I wrote, I received, in reference to this, a letter from Mr. Longley. I cannot tell how long ago, but should think a year or more. I did not receive a letter from any one else. I think those were the only two letters I received. I never answered Mr. Longley.

Q. Why not?

A. Could not give him the information he
191 wanted. He is pastor of one of the churches here in the City.

I knew him well. I suppose he is still pastor of Christ Church. While I was here he was pastor of the same denomination as my church. There are only three in Binghamton. I answered Wilber & Yetter and made an affidavit for Mr. Stratton and this stranger. I am here to-day because I am a witness in this case, that is why I am here. That is the main reason. Mr. Stratton sent for me. He wired me and wrote me. Yes, I received another letter. You asked me whether I had heard from anybody else but you did not ask as to the number of letters. From Stratton and Wilber & Yetter I have received three in reference to this matter, I think. One long ago that
192 I first mentioned and one he wrote me with reference to coming here and another only recently. o I have received two letters recently from Stratton. I think I have one with me in my pocket. I have no objection to showing it to you.

By counsel for the petitioner -

I will put the letter without showing it in evidence and object to showing it.

Digitized by Google

193

By the Court - Objection sustained.

By counsel for the administratrix -

Exception. We do not accept the proposition.

Q. Do you remember the affidavit you made?
A. I could not give it verbatim.
Q. I am reading now Doctor from what purports to be an affidavit verified by you May 10, 1909, in this matter, in the County of Colleton, S. C., before D. H. Towles, magistrate: "Deponent further says that he knew said Charles N. Hinman for several years, and if he had ever married said Hinman to any woman he would have remembered such fact and would have made a church and public record of such marriage as required by the rules of the Church and the Laws of the State of New York." Did you so swear in the affidavit which you signed?

194

A. I think so.
Q. I take it from the affidavit that the rules of your church of which you are a member and of which you are a minister, require the minister who performs marriage ceremonies to make a public record and a church record?

By counsel for the petitioner -

Objected to as incompetent and improper, and that the rules and regulations of the Church on that subject are the best evidence of what they require.

195

By the Court - Sustained.

By counsel for the administratrix - Exception.

Paper marked Exhibit "A" for identification shown witness.

Digitized by Google

196

That is my signature but I cannot tell you whether that is the affidavit which I made and about which I have been testifying or not. I did not sign more than one affidavit.

Q. I will ask you whether or not in 1901, while you were officiating and acting as pastor of the Church in this City, the Episcopal Church at the corner of Oak and Main Streets, a rule of that Church provided and prescribed, and you knew it, that every marriage performed by a minister of that faith and by a minister ordained in that Church, required him to make a Church record of the marriage, entering the names of the parties, the date, the names of the witnesses, and whether or not you kept there as such minister or

197 pastor at that time, or had there in that Church, or in connection with it, a book in which such records is kept?

A. The book was certainly there so far as the law of the Church goes. I thing that is a canon law, but just exactly about it I cannot testify.

Q. You say in this affidavit that you knew that he was not married, that is, that you did not marry Charles N. Hinman?

A. Yes.

Q. Because if you had you would have made a Church record of it. Did you make a Church record of all marriages you performed in 1900, 1901, 1902 and 1903?

A. So far as I know.

198 Q. Will you swear you did?

A. I cannot tell you whether I made them in those years or afterwards.

Q. This Church rule required you to make the record?

A. It stated no time for the record.

Q. Did you perform marriages in 1900, 1901,

Digitized by Google

199

1902, & 1903 that you did not make records of at that time and did make them later?

A. I cannot tell as to that.

That Church record in which was kept, or to be kept, the marriages performed by the Pastor of of the Church was a large book that was 2 feet long and 15 inches wide, bound in part cloth and part leather. That was the book that I used during all the time I was there,and is the one I left there when I severed my pastorate. I think it was called the Parish register, but would not swear to that. While I was there I had one of those books in which I kept my records. I do not think it possible that I made some marriages during that period of 1900, 1901, 1902, 1903 and 1904 200
of which I made no Church record.

Q. Will you swear that there were not?

A. Yes I would swear to that. I beg pardon I did not understand your question.

Q. Is it possible that from 1895 down to the time when you severed your connection with this Church which you say was in 1903 or 1904, 1903 I think, that you performed a marriage ceremony as pastor of that Church, of which, and as to which you made no Church record?

A. No I would not testify to that at all.

It may have occurred but my intention was certainly to make the record, because a Church rule required me to and to make it in the parish register. The parish register that I had there in that Church from the time I went there in 1893 down 201
to 1903 I left there at the Church. I have not seen it since. I remember a woman named Alice Gray. I think I married her. Yes I married her to James Beazley. I could not give the exact information as to when I did that. Usually in performing marriage ceremonies I made a certificate

Digitized by Google

202 of the marriage and left it with the married couple. I do not think that at different times I married couples that I did not give them marriage certificates. I cannot fix the year I married Alice Gray to James Beazley. I cannot tell you that I made any Church record of that marriage. I cannot tell you that I delivered a marriage certificate to Alice Gray Beazley or to her husband, or to any one of them.

Q. Don't you know the fact that you did not make any Church record and did not issue any certificate and that they have had considerable trouble about it and have tried at different times to get evidence of that marriage?

203 A. I do not know.

I know a man by the name of Walter Morse. I married him. He was not one of my parishioners. He was a Presbyterian. His wife was one of my parishioners. I cannot tell you whether I made any Church record of that marriage or whether I issued a marriage certificate. I have no recollection about it.

Q. Is it not a fact that from 1895 down to and including the time that you severed your connection with the Church that you continuously and in every marriage ceremony that you performed failed to comply with this canonical law you have mentioned and that you did not make any Church record of the marriage ceremonies performed by you, is not that a fact?

204 A. I would not be able to testify on that point. I think you understand the law of New York that we have to make a return of that to the Department of Vital Statistics. I do not know when I transferred from that record to the Church record.

Q. The rule to which you refer, the Church rule, requires you to place on the Church record,

Digitized by Google

205

on the parish register, entries of marriages performed by you?

A. I am not able to testify on that point.

Q. Which do you consider more binding to you, the canonical rule of the Church or the rule of the statute, when you are discharging your ministerial duties?

A. I think they are both important. I believe the Church of course is important, and a man ought to be a patriotic citizen and obey the laws.

Q. Does that rule say anything about transcribing from the register of vital statistics

A. It does not.

Q. The Church rule has nothing to do with the statute rule?

206

A. Nothing at all.

I cannot remember what marriage ceremonies I performed in 1903, nor 1902, nor 1901. I don't remember any of them.

Q. I did not get before the recess at noon just your view point and your own idea as to which was of more binding effect, if there was any difference, on you in your occupation as a minister of the Gospel, and in your duties and discharge of your duties as a minister, between the rule of the Church with regard to what records should be made of marriage ceremonies performed by you, and the rule of the statute law of the State as to which should be done, as to which was of more force and effect on you?

207

A. I do not exactly understand how a contrast of that kind could come up, but ordinarily I think I would hold that the Church was first.

Q. I show you a book Doctor, that has printed on the back of it "Parish Register" and which I will have asked to have marked for identification Ex. B. and call your attention to page 280 of it, under date 1894, in the left hand column, Jan. 29th,

Digitized by Google

238

and ask you if the entry extending across the page is in your handwriting and if the signature in the column marked signature of clergyman is in your handwriting?

A. I think so.

So far as I know that book Ex. B. is the book referred to here this morning, the parish register in which the marriages performed at that Church by the rector were recorded. That is the one left there when I severed my connection with the Church in 1904. The entry on page 280 under date of January 29, 1894, which has just been referred to, seems to be the first entry I made in that book of marriage ceremonies performed by
209 me. Turning to page 282, I think the first eight records there of marriages are in my handwriting. That covers the period from August 31, 1894, to and including January 27, 1895.

Q. Look in that book there and see if there are any other entries made by you of any marriage ceremony performed by you at any time between January, 1894, and the time when you severed your connection with that Church in 1903, except those appearing on pages 280, 281, 282 and 283. See if there are any other memoranda there entered by you except those?

A. I do not see any but on those pages.

Mr. Hageman followed me in the rectorship of that Church. On page 282, just below the first eight entries, I find entries of marriages begin-
210 ning December 31, 1903, in the handwriting purporting to be Mr. Hageman. I performed marriage ceremonies while I was rector of that Church after the year 1894 to the time when I severed my connection with the Church in 1904.

Q. There is a column here in this parish register, Ex. B., the heading of which is Signature of Clergyman. The clergyman performing the mar-

Digitized by Google

211

riage is supposed to and required to sign his name there?

A. I cannot tell you as to that.

Q. In any event for one you performed you did sign your name there?

A. You have the book you can see it better than I can.

Q. On pages 281 and 283 in the record of marriages performed by you, under the column, Signature of Clergyman, is the name J. H. LaRoche in each place where it appears in the column signed in your genuine handwriting?

A. I think so.

There is a ditto mark on a good many of them. Wherever the name is written that is my signature.

212

Q. Who was the cause or had the power to say whether or not you should continue in the rectorship of that Church and who discontinued your connection with it?

By counsel of the petitioner—

Objected to as incompetent, improper and immaterial.

By the Court—Sustained.

By counsel for the administratrix—Exception.

The Bishop of the Diocese did not cause my connection with that Church to be severed. I severed my connection there of my own free will.

213

Q. Did you have some conference with the Bishop in regard to it?

By petitioner's counsel—

Objected to as improper, incompetent and hearsay.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Digitized by Google

214 Q. Was your neglect and failure to make record of marriage ceremonies performed by you, was that one of the causes and reasons for your connection with the Church being severed as it was?

A. Not so far as I know. I never heard of it.

Q. Now before you severed your connection with that Church here in the City of Binghamton in 1904, as you testified, were you addicted to the use of stimulants?

By counsel of the petitioner—

Objected to as improper, incompetent and immaterial.

215 By the Court—Sustained.

By counsel for the administratrix—Exception.

A. No.

By the Court—Do you withdraw your objection?

By counsel for the petitioner—No.

By counsel for the administratrix—

I move to strike the answer out.

By the Court—It may be stricken out.

Q. While you were the rector of that Church in Binghamton during the period that you were such
216 rector, did you use intoxicants?

A. Yes.

Q. And were there times and occasions during that period when you were more or less under the influence of intoxicants?

A. Not that I know of.

Q. Will you swear that you were not?

A. I will swear that I was not.

Digitized by Google

217

Q. What do you mean by that, that you used intoxicants and they had no influence on you?

A. I should think they would have as much effect on you or anybody else.

Q. Do you think those you did use had some effect on you?

A. Not enough for me to testify that I was under the influence of intoxicants.

Q. What I want to get at is whether or not you used intoxicants without any effect on you whatever?

A. No.

Q. That is you did feel some effects?

A. Sure.

Q. While you were the rector of that Church did you use at different times profane language? 218

By counsel for the petitioner—
Objected to as improper, incompetent and immaterial.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. Are you a cigarette smoker?

By counsel for the petitioner—Same objection.

By the Court—Sustained.

By counsel for the administratrix—Exception.

219

Q. While you were rector of that Church were you mixed up and your name connected with scandals here in the City?

By counsel for the petitioner—
Objected to as improper, incompetent and immaterial.

Digitized by Google

220

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. Was your connection with that Church as rector severed by the Bishop of the Diocese on account of your habits both as to the use of intoxicants and because of rumors afloat in connection with scandals?

By counsel for the petitioner—Same objection.

By the Court—Sustained.

By counsel for the administratrix—Exception.

221 While at the City Hospital Overton was the name of the physician who attended me. He was my physician before I went to the hospital. I do not remember the names of the nurses I had at the Hospital. My wife and I had a daughter who married a man in the South. When my wife went South on the occasion that I mention she went to visit that daughter. I reached Binghamton on this trip yesterday at 3:30 o'clock. When I reached here I went to the Crandall House. I am not staying there. I stayed last night at No. 12 Park Terrace Heights, Binghamton.

Q. Since you have been in the South in 1903 have you contributed anything to the support of your wife and children here in Binghamton.

222

By counsel for the petitioner—

Objected to as improper, incompetent and immaterial.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Digitized by Google

223

Q. Have you any objection whatever, and are you willing to waive, and will you waive the right which you have to Dr. Overton testifying here in this proceeding just exactly what your condition was when he treated you and the disease for whic.. he treated you?

By counsel for the petitioner—
Objected to as improper, incompetent and immaterial.

By the Court—Overruled.

By counsel for the petitioner—Exception.

By the Court: I will explain to the witness:

224

You have a right to decline to answer any question where it pertains to a matter between you and your physician, as it is necessary that the physician should know of your condition, &c. in order to properly prescribe and treat you. He wishes to know if you will waive that?

A. No. I would not have him testify.

Almost every time that the 20th Separate Company went to camp I accompanied them but not to stay. I rememer the year when the 20th Separate Company camped on the Exposition Grounds just outside of the City of Binghamton. I was not with the boys in camp on that occasion. I was up there. I do not think the chaplain was supposed to hold services once a day in camp. I never heard that. At least I did not do that. I do not remember the date approximately, the year, when the boys camped here on the Exposition Grounds. I cannot tell about how long ago it was. I was a member of that Company while I was Chaplain. I performed my duties in connection with that p' sition so that I was in touch with the boys. I think I visited the camp. The place of the camp

225

Digitized by Google

226 on the Exposition grounds is about one-half mile from the City of Binghamton. Stow Park in the City limits I should say it was before the Spanish-American war. I recall one summer when I had a camp up the Chenango River on the Hinman farm. This same Charles N. Hinman farm. Charles N. Hinman was not living there. I obtained permission to camp on the farm from the man who was living there at that time, whose name I have forgotten. I am not sure of the date. It must have been in 1905. My son Arthur and some of my children, the girls, were with me.

Re-direct examination by Mr. Yetter—

227 12 Park Terrace, where I stayed last night, is where my family is now staying.

By counsel for the petitioner—

We have served a subpoena upon the administratrix to produce a marriage certificate and purporting to be signed by Dr. LaRoche, and we ask her to produce that certificate now while the Doctor is upon the stand.

By the Court—Do you wish to produce it

By counsel for the administratrix—

We are not producing it at this time. Of course I shall obey any injunction of the Court, but they
228 subpoenaed her as their witness.

Counsel for the petitioner then called the administratrix, designating her as Vena M. Lord.

Counsel for the administratrix objected to such designation. The administratrix was, however, required to take the stand and be sworn when the folowing proceedings occurred.

Digitized by Google

229

By counsel for the administratrix—
Before the witness is examined by them I wish the privilege of asking a question or two.

By counsel for the petitioner—
If he desires to call and examine her, all right, but if I call her I desire to examine her first.

By the Court—
I will deny you that privilege at this time, Mr. Hinman.

The witness being examined by Mr. Yetter, testified as follows:

I reside at No. 110 Main Street. I am acquainted with Rev. Harry S. Longely. I did not show 230
him some time ago an alleged marriage certificate purporting to have been signed by James H. LaRoche. I showed him a paper purporting to be a certificate of marriage. Senator Hinman has that paper.

By counsel for the petitioner—
We ask Senator Hinman to produce it.

Mr. Hinman:— Mr. Howard says it is in the safe at the office and he will go over and get it.

Mr. Howard left the Court room and after being absent ten or fifteen minutes returned and reported that he could not find the paper. Mr. Hinman then retired from the court room with Mr. Howard 231
stating that he knew where the paper was and would go over and get it, and in about fifteen or twenty minutes after Mr. Hinman and Mr. Howard left the Court room they returned and Mr. Hinman stated that he could not find the paper but would find it later and produce it.

Digitized by Google

232

By counsel for the administratrix—

It is conceded by the respondent that on the 11th day of July, 1910, there was served upon her in the City of Binghamton, in the Surrogate's Court Room, at about 3 o'clock P. M., a subpoena, and she was paid the regular fee at the time of such service, and such service was regular. The paper referred to by the witness was in my possession the last or middle of last week and I assume it is there now. Last week I took up the preparation of this case, and that paper, with some other papers which referred to the divorce of Melissa Hinman, I put them one side in a long envelope, and with other letters, and I am unable

233 to find them at this time, but expect to be able to produce them later.

It was not produced. The subpoena above referred to was marked Ex. C. for identification.

By counsel for the petitioner—

Reserving the right to examine Dr. J H. LaRoche with reference to that paper when found, if it is found, and the administratrix upon that question, we rest.

By counsel for the administratrix—

We move to dismiss the proceeding, and for an order denying the relief prayed for, upon each and all of the grounds which were stated by the attorneys for the respondent on the return of

234 the citation herein, and upon the further ground that there is no proof here which can legally satisfy the Surrogate, or satisfy the requirement of law, which shows or tends to establish any of the allegations of the petition with reference to any misstatements having been made in the petition upon which the administratrix was appointed, or tends in any way to establish that she was

Digitized by Google

235

not, as she stated in the original petition upon which she was appointed administratrix, the widow of Charles N. Hinman, deceased, and therefore entitled to administer upon his estate, and inasmuch as the burden of proof is upon the moving party here, that the burden of proof has not been sustained.

By the Court—Motion denied.

By counsel for the administratrix-Exception.

Mr. Hinman then opened the case for the administratrix.

236

DR. FRANK P. HOUGH, being called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I am a physician residing at 187 Oak Street in the City of Binghamton. Last January I had lived in the City of Binghamton twenty years. During all that time I have been praticing my profession in the City and vicinity. I knew Charles N. Hinman and Vena Hinman, this administratrix. I have known her twenty-six years. I knew her when she lived in Pennsylvania. Her people lived at Equinunk, Pa., when I first knew her. I know where the Hinman farm in the Town of Chenango was located. There was an occasion 237
when I was called there to prescribe for and attend Vena M. Hinman. I was called there by Charles N. Hinman. The first occasion was in the Fall or Winter of 1901 and 1902. I attended her there at the Hinman farm.

Q. When you went in there what was said, if anything, by Charles N. Hinman in conducting you to her into her room with reference to her being his wife? Q. Who did Mr. Hinman tell

Digitized by Google

238 you was sick and that he wanted you to see?

A. He said his wife had rheumatism, he thought, and wanted me to see her.

After he told me that he took me into a room there in the house, where I saw the woman whom I now see here at my right, the administratrix of the estate, Vena M. Hinman. I prescribed for her. That was in the Fall of 1901 or early Winter of 1902. She was suffering at that time from acute inflammatory rheumatism. As I recall I treated her for some time, visiting her at the Hinman farm.

Q. Who paid for that treatment

A. Her husband.

239 By counsel for the petitioner—

Objected to and move to have it stricken out as a conclusion.

By the Court—It may be stricken out.

By the witness—A. Charles N. Hinman.

From that time on I saw Charles N. Hinman at different times and this administratrix, whom I treated at his house, and to whom he referred as his wife. Later Charles N. Hinman left the farm and came to Binghamton, where he and this administratrix, Vena M. Hinman, resided together. I am unable positively, except as I refer to my books, to fix the year, or about the year, when
240 they came to Binghamton to reside. Approximately it was 1906, I think, when I first remember. I think they first went to live on the south side off from Conklin Ave. I know of their living together upon Lewis Street and Walnut Street. Lewis Street is in the City of Binghamton. They lived there in the Moon Block. During all the years that I visited her when I treated her for rheuma-

Digitized by Google

241

tism in 1901 or 1902 I knew her as Mrs. Charles N. Hinman. I did not know her by any other name or hear her called any other name. At the time when Charles N. Hinman was injured and killed I knew of it.

Q. Up to that time had you ever heard her spoken of in any other way, from 1901 down?

By counsel for the petitioner—

Objected to as improper, incompetent and immaterial, witness should state how he heard her spoken of.

By the Court—Sustained.

By counsel for the administratrix—Exception.

242

Q. During those years since 1901, how did you hear him speak of her on different occasions when you were there at the house and when you saw him?

A. As his wife.

Q. Always as his wife?

A. Yes.

I knew when Vena Hinman had a baby. I think that was about two years ago. At that time she and Charles N. Hinman were living on Washington Street. I attended her. They were living there together at that time. Charles N. Hinman paid me for those services. While I was there attending her neighbors came in while Charles N. Hinman was there and I heard him introduce her as Mrs. Hinman, his wife.

243

Cross Examination by Mr. Yetter—

She never had any other babies to my knowledge. I think this baby was a full grown baby, a fully developed baby. I reported it to the Reg-

Digitized by Google

244 ister of Vital Statistics of the City of Binghamton as a still birth under the name of Hinman, as a child being born of Vena and Charles N. Hinman. The administratrix has been in my office. I met her at a Mr. Allen's on Maiden Lane. I think along about 1905. She was there visiting. I called there to see her professionally once or twice. I met her several times before she came to Binghamton out around home. Since she has been in Binghamton here I do not recall any other place that I met her. So far as my memory serves me, which is fairly well, I will swear that I have not been with her at other places except those I have mentioned and places where she has been living.

245 I heard him call her his wife to several people, particularly in the Doubleday Block, the year before the child was born along about 1904. I made a record of my visit when I first attended her in the Fall of 1901 and 1902, or Winter of 1901 or 1902. That was a small petty ledger that I kept for transients and out of town people. I have not that book. I would say it was the early Winter of 1902, that it was probably January or February, 1902. The book that I speak of has been destroyed so that I have no record whatever of that visit except my recollection. The only record I have of 1902, 1903, 1904 or 1905 is that the balance was carried from the petty ledger to the large ledger. I do not think that would help me in fixing the dates when I made those calls.

246 The only written record of any kind which helps me to fix the date when I attended the respondent here is that at that time I was physician at the the County Farm. I would know by that and fix it that I was up there in 1902, by the fact that I was physician at the County Farm at that time. That Winter I was there and I think that was the last she was sick. It is not largely a guess on my

Digitized by Google

247

part as to the time, because I could refer to the County Superintendent's books and know just the year. I have not referred to them. It is largely a matter of guess on my part within a year. It might have been 1903. I think I could tell the exact time by the time I was attending the farm that Winter, because I used to go to the farm and from the farm on and make my visit to Mr. Hinman. Before the child was born I attended her several times. I have that record. I could not produce it here to-day but could and will later. I could not give the names of the people to whom I heard him introduce her on the different occasions that I attended her previously. They were 248
strangers to me and I don't think I could recall the names. I don't think I could give the name of one. The first that I heard him introduce her to anybody as his wife that occurs to me now was in the Doubleday Block on Washington Street in 1906. I have known the administratrix since she was a child. Before she went up to the Hinman farm she worked for Dr. Daley. I never went out with her from there. Shortly after she was there I met her on the road with a horse and buggy coming to town as I was going to the farm.

HARRY P. WORTHING, being called as wit- 249
ness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

My age is fifty-one years. I was Under-Sheriff of the County of Broome in 1900, 1901 and 1902 and Sheriff in 1903, 1904 and 1905. I joined the 20th Separate Company in 1885, I think, and remained a member of it ever since up to August, a year ago. I came to be its commanding officer. I knew Charles N. Hinman in his life-time and came to know Vena Hinman, who sits at my right

Digitized by Google

250 here and who is administratrix of the Charles N. Hinman, Estate. Charles N. Hinman presented her to me. Charles N. Hinman was connected with the 20th Separate Company for a good many years. We were close friends for a good many years. I think I knew him along about 1896 first I think. I was a married man along the nineties and 1900 and until my wife died. The first time Hinman ever said anything to me about his wife was in St. Louis in 1902, I think it was in April. He at that time was First Lieutenant of the Company and I was the Captain and we were going down town from the Fair Grounds in St. Louis to look over the Town a little and we passed a
251 jewelry store, and I says I am going in and buy a present for my wife, and Hinman says I will go in and buy one for my wife. We went in. He bought a diamond ring and I bought a comb and brush and brought it to my wife. I saw the ring bought at that time. The ring which you show me is one about that size. It has the same general appearance. I could not swear that the little box which you show me is the box that I saw him get there in that jewelry store in 1902 when he got the ring. The ring was in a box. This seems to be marked St. Louis. I was elected Sheriff of Broome County in 1902 on the Republican ticket and took office January 1, 1903. At that time I went to live at the jail, which is fitted up with rooms for the Sheriff and his family and with my wife I occupied
252 those rooms. Charles N. Hinman and Vena M. Hinman, the administratrix, came there to visit my wife and me in 1903. Mr. Hinman presented Mrs. Hinman to my wife. I do not remember the exact words he used, only I want you to meet my wife, or I want to introduce my wife to you Mrs. Worthing. They met there at that time under those conditions. Charles N. Hinman talked with me about his expectations regarding an heir. We were walking down from the Armory. He was

Digitized by Google

253 living in the Doubleday Block on Washington Street. He said he had got something to live for now, more than ever, and I says, what is the matter? He says, I expect a little baby down to our house and he says I have got something more to live for now and he talked about making a will. I told him that he ought to make a will, that a man with what he had should make a will, and he said he was going to make one, had made up his mind to make one, and he told me what he wanted to do. He said he was going to leave it to his wife and baby, and a little to young Charlie, he called him. He said he would not leave Hank a cent because he had tailed him up for years and he had cost him thousands of dollars and he would not 254 get a cent of what he had.

Cross Examination by Mr. Yetter—

I was a candidate for Sheriff in 1902 and took office in 1903 on the 1st of January. Charles N. Hinman first introduced the administratrix to me up at the Armory as his wife. That was sometime in the Fall of 1902 after the drill season commenced, which was the first of October. I first heard him speak of her as his wife in April, 1902, at St. Louis. Prior to that time I had met him very frequently, almost daily. I think I saw him most every day for a year. He used to stop at the store with his milk wagon. Between the Fall of 1901 and Winter of 1902, prior to this day in April when I went to St. Louis. I met him almost 255 every day. I could not tell you what time of the year it was in 1903 when my wife and I were visited at the jail by Charles Hinman and Vena Hinman. I do not think it was a considerable time after I had installed myself in office. My best judgment was it was along in March or April of 1903. The first time I saw her was at the Armory. Hinman introduced her to me as his wife in the Fall of

Digitized by Google

256 1902 I should say that the time when he spoke to me about an heir at the time he was living in the Doubleday Block was in 1907, or 1906. I remember when he moved to the City of Binghamton. He first moved over on Livingston Street, I think. I should say the year was 1904 or 1905. I could not say which. I should not think he lived there on Livingston Street a year. From there I think he moved to the Moon Block on Lewis Street. I do not think he lived there a year. I do not know where he moved from there, but it seems to me on the west side, not on Walnut Street where he lived when he died. His mother died when he lived on Lewis Sereet. I think he went over on Chapin
257 Street.

Re-Direct Examination by Mr. Hinman -

Q. After Charles N. Hinman introduced this woman to you in the Armory in 1902 as his wife, did you ever at any time subsequent hear her called by any other name than Mrs. Hinman?

Objected to as improper, incompetent and immaterial.

By the Court - He may state what names he has heard her called.

Q. What names have you heard her called from that time on?

258 A. I have heard her called Vena and Hinman called her the "kid" and everybody else called her Mrs. Hinman.

At the time I first knew Hinman and down until recent years he was running this Hinman farm and running a milk route. He left the farm in 1905. I recall that he then engaged in the contracting work in building sewarage disposal plants

Digitized by Google

and good roads. I could not tell what time it was in 1905 that he went into that business. I know he went away sometime between May and October, because we always stopped drilling in May and did not commence again until October. He first engaged in that business in Schenectady. 259

Re-Cross Examination by Mr. Yetter -

The time she was first introduced to me was at the Armory in the Fall of 1902, on the occasion of an armory dance or drill I was one of the appraisers of the estate of Charles N. Hinman. For a good many years I have been intimately acquainted and am an intimate friend of Mr. Bonnell, the 260
counsel for the administratrix. Since the death of Charles N. Hinman I do not know that you would call my acquaintance with the administratrix intimate. I have been over to the house and she has frequently called me over. Our relations are very friendly. The last time I recall being there was last Fall.

JUDSON S. NEWING, being called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I am a jewelry merchant residing in Binghamton. Have been engaged in the wholesale and re- 261
tail jewelry business in the City of Binghamton thirty years I have known Vena M. Hinman twelve or fifteen years. I knew Charles N. Hinman thirty-five years or such matter. I knew where he lived and knew what his business was. We were acquaintances. At different times he talked with me about Vena M. Lord. Prior to September, 1901, at different times he had spoken of her and bought presents for her and finally he asked me

Digitized by Google

262 what kind of a wife she would make. I told him I thought she would make a good wife. I knew her at that time. After that I recall his coming to my store in the City of Binghamton and buying a ring. Charles N. Hinman bought from me in 1900 the three opal ring which is now shown me and which is now produced by Mrs. Vena Hinman. When he bought it he said "I supose you know where it is going." I says "I do not know but I surmise." He says, "Keep it under your hat." I afterwards saw Mrs. Hinman wearing the ring. It might have been a few days and it might have been a few weeks. She showed it to me and asked me what I thought of it. There was another time when he bought a ring from me. It was a plain
263 ring. I could not say when that was. It was sometime after he bought the first ring, but he did not have the second one charged. He paid for that so I have no means of stating a date. I can fix a date when the opal ring was bought. The plain ring was a plain gold band ring. He told me that was to tie the knot with. Soon after that I saw Mrs. Hinman wearing the ring.

Q. What did Charles N. Hinman say to you, if anything, at any time with reference to his being married or having been married?

A. I say, he spoke before that he was going to marry Miss Lord and then he came in with her one day and said that she was no longer his girl but his wife, "Let her have whatever she wants
264 and put it on my bill and I will settle."

From time to time I let her have and sold to her different articles and charged them to Charles N. Hinman. Charles N. Hinman paid for them. I remember his coming there and buying silverware for the house. At the time they moved from the farm to Livingston Street and he came to the store and said, "My wife don't think the silverware we had on the farm is good enough for the

Digitized by Google

265 City and we will have to have some new." I showed him different patterns and he said he did not think he knew enough about it and would have to get his wife to come, and that same day he came in and said, "Trot out that silverware and let my wife pick out what she wants and do it up and get your pay if you can," and they did pick out a quantity of silverware and I done it up and they took it with them and later they brought it back and I engraved it and later he paid for it. When they bought the silverware I was living on the South side. Charles N. Hinman and Vena M. Hinman were then about to move in a house owned by Mrs. Dunlap on Livingston Street. I could not say exactly what year it was. It was about 266 five years ago, I should say. From that time on for some considerable time I should say Charles Hinman and Vena M. Hinman lived there in that house. I used to see them there. I did not see him a great deal because he was away. Charles Hinman was there a part of the time at least. I saw her there once and used to see an elderly lady there. I never was in the house a great many times. I remember an occasion when Charles Hinman brought Mrs. Hinman, Charles N. Hinman's mother, to my store to buy glasses for the old lady. After Charles N. Hinman moved from Livingston Street they went to live in the Moon Block. They lived there for some time. Charles Hinman's mother lived with them.

267 I could not tell exactly when it was that I sold the plain gold band ring that I have spoken of. It was some little time after I sold the other. I have no way of fixing the date as he paid cash for it. I saw the ring being worn by Mrs. Hinman. I had to change it for a narrow one. She brought it in and I did exchange it for her. The one I believe she is wearing now.

Q. From the time he brought her into that

Digitized by Google

268 store, soon after he got this plain gold ring, and told you she was no longer Vena Lord, but was Mrs. Hinman, from that time down, how did you hear Vena M. Hinman spoken of and addressed by Charlie Hinman or by people that were present?

By counsel for the petitioner -
Object to By people who were present.

By the Court - Sustained.

By counsel for the administratrix -
Q. By Charles N. Hinman?
A. Mrs. Charles N. Hinman or his wife, most
269 always spoke of her as his wife.

Cross Examination by Mr. Yetter -

Charles N. Hinman bought the first ring from me in December, 1900. I do not think there is any question about that. It was charged to him. I looked at my book before I came up here and found the date there December, 1900. That was an opal ring three stones. He asked me whether I knew where that ring was going and I said I do not but I can surmise, and he told me to keep it under my hat. The next ring was bought later. I would not say the exact time. I will not swear that it was within a year. I do not think it was as long as two years. I would not say positively
270 as to that. A short time after I sold the opal ring in December, 1900, I saw it on the hand of the respondent here. It might have been three or four days or it might have been two weeks. I would not say it was two months, I would not swear positively as to that. I do not think it was months, it might have been. When Charles N.

Digitized by Google

271

Hinman asked me whether the respondent would make a good wife, I had known her twelve or fifteen years. I had seen her at my store. I would not swear for certain where she was living at that time. She had lived with Mr. Normile's family I know. I could not say where she lived in 1900. I had seen her and Charles N. Hinman together occasionally. I have on my books the date when I sold the silverware. I can get it. I have sold Mr. Hinman many things besides those I have spoken of here. I would have to look at my books to tell what they were. I did look at the books to find the opal ring at the request of Mrs. Hinman. That was last week. The opal ring was sold on December 24th, the day before Christmas. Mr. Hinman did not say that he was buying it for a Christmas present.

272

Re-Direct Examination by Mr. Hinman -

Q. Was the first time that you ever neard any question raised about this woman Vena M. Hinman being the widow of Charles N. Hinman when you saw an account in one of the newspapers that the heirs at law or next of kin of Charles N. Hinman were raising some question about it?

By counsel for the petitioner -
Objected to as incompetent, immaterial and leading.

273

By the Court - Sustained.

By counsel for the administratrix - Exception.

Q. Did you read an account in the newspapers of the City of a proceding which had been instituted in Surrogate's Court of Broome County on the part of Henry A. Hinman, the heirs at law or

Digitized by Google

274 next of kin of Charles N. Hinman to test the question of whether Vena M. Hinman was his widow, and did you thereupon, without any suggestion or request from anybody go to the office of Hinman, Howard & Kattell and tell them facts which you knew in connection with the matter?

By counsel for the petitioner -
Objected to as improper, incompetent and immaterial.

By the Court - Sustained.

By counsel for the administratrix - Exception.

275 I do not know whether or not there was any engraving of any kind on this plain band ring. I have no recollection whatever as to that.

NELSON P. BRINK, being duly called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I live at No. 11 Orton Ave. in this City. I have lived in Binghamton about eleven years. I know where the Hinman farm is in the town of Chenango. I remember an occasion when I was there and this administratrix at my right hand, Vena M. Hinman, was there and was sick. I had met her be-
276 fore. I first met her in the Fall of 1901. Charlie Hinman's mother introduced me to her. That was in the kitchen of the farm house in the old homestead in the Town of Chenango. She introduced her as Charlie's wife, Mrs. Hinman. Charles N. Hinman was not at the house at that time, but shortly after he came in and introduced me to the lady as his wife, Mrs. Hinman, not knowing I had been previously introduced to her by his mother.

Digitized by Google

277

By counsel of the petitioner -

I move to strike out the latter part as not responsive.

By the Court - That part may be stricken out.

By counsel for the administratrix - Exception.

Witness continuing:

From that time on for at least two years I was there at the Hinman house two or three times every week. I remember an occasion when the administratrix was sick. I learned of her sickness from Charlie Hinman. He said his wife was very sick with inflamatory rheumatism one time when I came up and another time I was brought in the sick room. I went in and saw this woman 278
at my right, the same woman I had formerly been introduced to as his wife. The occasion when she had inflamatory rheumatism was late in 1901 or early in 1902.

Cross Examination by Mr. Yetter -

I first became acquainted with Charles Hinman possibly a month or so before I was introduced to the family at the house. I was there in July, 1901. I fix the date by the fact that I had done quite a little business with Charlie Hinman. I was building a telephone line from Binghamton to Syracuse and I was at that time obtaining a right of way from the people along the route on which we were building this telephons line, permission to place 279
poles and wires on various properties, and Charlie Hinman owned about 400 acres of land there on which we had a number of poles, the right of way of which we had to obtain from him. I said in July it was earlier than that. This may have been in the latter part of 1900 when I first met him. I said it was a month after I met Charlie Hinman, that I was introduced to this respondent as his

Digitized by Google

280 wife, but on second thought I know I had seen him previous to that with a man by the name of Harding from Chenango Bridge and that may have been six months before. I have the dates when I first started to work up there on the right of way for that business. They are in the form of receipts for the right of way and money given the farmers. When I received the right of way and signature granting us permission to go over the property they were always given the money. I do know that I have those papers home. I have my wife looking them up now. Whether they are there or not I do not know. There is one particular receipt I had, that was the receipt for the
281 first grant we had, which was made by Charles N. Hinman.

Q. Then there is only one there?

A. Yes sir.

Q. And you have kept that all these years?

A. Yes sir. I had it in my desk for a long while. I saw it not more than a year ago. I have been keeping it all these years for reference. I refuse to answer for what reference I wanted to use that receipt unless I may first talk to my counsel. I have another receipt for a pair of mules that I bought from Charles N. Hinman about that time. That is about the time I was introduced by Charles N. Hinman's mother or by Charles N. Hinman to this respondent. I was introduced to Mrs. Hinman before I had the dealings on the
282 mules. I fix the date when I was introduced to Mrs. Hinman at the Hinman home the first time by Melissa Hinman and later by Charlie by those receipts. By the first receipt I had for right of way that I had over Mr. Hinman's property. I do not know what the date of that receipt is. I have an idea that the date of it was in 1901, as near as I can place it, in the Fall of 1901. I could not say how late it was in the fall, it was earlier than the win-

Digitized by Google

283

ter of 1901. It might have been October or November, 1901. I was introduced about that time. I was introduced to Mrs. Hinman at the time I got this receipt. I have not seen the receipt in a year. It could not have been 1902, because I know it was 1901. I fix the date by this receipt which I have not seen in a year. Since then I have seen the administratrix at different times. I saw her on the farm after that at different times.

Q. Did you ever see her on the farm after that?

A. Yes.

Q. How often?

A. For a couple of years after that.

Q. Is that an answer to my question?

A. I never kept a book account of how often I saw her or her husband at the farm. 284

Q. Didn't you testify on your direct examination that you had seen her two or three times a week?

A. Yes.

Q. At the farm?

A. Yes. We were building the line.

Q. For two years?

A. The greater part.

Q. It took the greater part of two years to build the line by the Hinman farm

A. No, but in traveling up and down we went by the Hinman farm.

Q. You say it took you two years or thereabouts to build that line?

A. Yes. 285

Q. And that you went up there and saw her two or three times a week during that period?

A. No I did not say any such thing. I did not say I went up there and saw her two or three times a week. Suppose I go by the place, could I not see people? Suppose I stopped and talked to them. I did not go there to see her.

Q. You saw her two or three times a week for

Digitized by Google

286 about two years after the time you met her there, is that true?

A. I did not go to the Hinman farm to see her two or three times a week.

Mr. Yetter: I move to strike it out as not responsive.

Mr. Hinman: I object to its being stricken out.

The Court: It may be stricken out.

(Question read by stenographer).

A. I can not answer that question because I
287 saw the family when I went up there. When it comes to actually being two or three times a week I would not want to say I did.

Mr. Yetter: I move to strike it all out.

The Court: Answer one way or the other.

A. I cannot answer that question. It was either late in 1901 or early in 1902 when I called at the house when she was sick from rheumatism. It was from three to six months after I had been introduced to her by Melissa Hinman and Charles N. Hinman. Dr. Hough was attending her at that time for rheumatism. I think I was introduced to her about three months prior to that time. I
288 do not know that I have spoken to anybody about the facts relative to which I have given testimony here. I had not spoken to anybody before I was sworn as a witness in this case regarding what I have testified to. I never discussed the matter with the administratrix and never told her counsel anything about it. Mr. Hinman, her counsel, asked me what year I first met Mrs. Hinman but I have not spoken to anyone about these other matters.

Digitized by Google

289

CHARLES R. SEYMOUR, being called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I reside at 115 Front Street, Binghamton, N. Y. Am a physician. Have been practicing my profession in the City of Binghamton eighteen years. I was connected with the 20th Separate Company from the Fall of 1888 until three or four years ago. I remember the first occasion when I met Vena M. Hinman, this lady who sits at my right hand, the administratrix. I was acquainted with Charles N. Hinman in his life time. I first met this lady on Charles N. Hinman's farm in the Town of Chenango. Charles N. Hinman first introduced me. That introduction was in a bed 290
room on the farm. His mother was there when I was introduced. He introduced her as his wife in the presence of his mother. That was in August, 1905. I was there attending his mother, who was ill. I treated Charlie Hinman's mother for some time. Mrs. Charles N. Hinman was caring for her. I have attended Mrs. Charles N. Hinman at different times. I charged my services for that to Charles N. Hinman and he paid for it. I heard him introduce her to other persons at the fair grounds when we were here in camp up there. I mean the grounds spoken of here as the Exposition grounds inside the City limits. The 20th Separate Company camped there in 1904. I could not tell the names of the different officers to whom Charles N. Hinman introduced Vena M. 291
Hinman as his wife. They were officers who did not reside in Binghamton and were in camp.

Cross-examination by Mr. Stratton -

I first met Vena Lord or Vena Hinman in August, 1905. They were living that time on the Hinman farm in the Town of Chenango. I have

Digitized by Google

292 known Mr. Hinman twenty years. We were members of the 20th Separate Company. The first time I met Vena was the time I was called up there to their house professionally. I can fix exactly the date when that was. It was about August 29, 1905. My visit at that time was in the middle of the night. I presume I was there an hour. When I got to the house I think Mrs. Hinman was the first person I met. I met no one else there except Charles N. Hinman's mother. I cannot give the exact words that were spoken when I got inside the house. As I remember Charles N. Hinman said to me Doctor, this is Mrs. C. N. Hinman, my wife. That is practically what he
293 said to me. This introduction took place in the bed room. The next thing that I recall being said to me after Charles Hinman introduced the administratrix is, this is my mother Dr. Seymour, or something like that. I attended my patient there on several occasions, eight or ten times. I am an intimate friend and acquaintance of Charles N. Hinman, not of Vena M. Hinman. I have met her only professionally since 1905. I should think I met her professionally seven or eight times I met her when Mr. Hinman was killed I was called professionally to attend Mr. Hinman. I met her over on Livingston Street. I met her on Lewis Street.

Re-Direct examination by Mr. Hinman -

294 Charles N. Hinman came to his death by means of an accident. By external injuries which caused his death within a few hours after they were sustained. I did not see him until after they had administered chloroform to him. He was killed on the Vestal Road west of Binghamton and was brought to his house from the place of accident in an automobile. As soon as he was

Digitized by Google

295

brought to the house an operation was performed. He did not regain consciousness so far as I know. He died on the night of the same day or early the next morning. I treated Mrs. Hinman at that time. Her condition was very hysterical and entirely out of her normal mental condition.

Re-Cross Examination by Mr. Stratton -

I said normal mental condition. I mean only for the time being. There was enough then I assure you.

At this point a recess was taken until July 12, 1910, at 9:30 A. M. At that time the hearing was resumed with the same appearances. 296

FRED G. JONES, being called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman testified as follows:

I reside in the City of Binghamton, N. Y. I am in the general insurance and real estate business. I have been in business in the City of Binghamton about twelve years. I knew Charles N. Hinman in his lifetime. I knew Mrs. Charles N. Hinman, this lady who sits at your right and who is administratrix of his estate. I rented apartments in the Moon Block at the corner of Lewis and Chenango Street on commission a few years ago. I rented rooms in that block to Charles N. Hinman. It must have been three or four years ago, I cannot remember the date. He and Mrs. Charles N. Hinman moved into the rooms which I rented to them. At that time my wife and I were living in the same block on the Chenango Street side. 297

Digitized by Google

298 Charles N. Hinman's mother lived there with Charles N. Hinman and Mrs. Charles N. Hinman and died there in the same premises. In the apartments which I rented to Mr. Hinman there were six rooms, a sitting room, dining room a parlor, a kitchen and two bed rooms. Some time after that I rented to Mr. Hinman a house on Cedar Street in the City. He and Mrs. C. N. Hinman moved into that house after I rented it to them. At that house after I rented it to them and after they moved in I had a talk with Charles N. Hinman. I cannot remember the date but I should say about three years ago and in the Spring, May or June. I was called there on ac-
299 count of the fact that they were not going to stay in the rooms, and Mr. Hinman stated to me that they were going to rent better rooms, rooms that they were going to pay $25. or $30. a month for, that his wife was not satisfied with the rooms the way I had them fixed, that is the condition, paper, &c. I told him that they were $15. rooms and he said his wife had got dissatisfied with them and they had not unpacked their goods entirely, and he also stated that if his moving out would do me any damage that he would make it good to me, that he had rather rent better rooms and have his wife satisfied than to live in cheaper rooms, that his wife's comfort and happiness amounted more to him than the money, and I told him that under those circumstances it would be all right for him
300 to move out and I would rent them as soon as I could and that if I lost any money on account of his leaving I would let him know how much it was and he could pay me. He said his wife had been sick and was not well and he did not want to argue the question at all, he would rather make the change and have everything satisfactory.

Digitized by Google

Fred G. Jones--Direct and Cross and Charles H. Hitchcock—Direct

Regarding the nature of his wife's illness he said she had lost a child.

Cross Examination by Mr. Yetter -

I have known Mr. Hinman for a good many years. I first met him when he was up on the farm. I think his mother went in the Moon Block to live immediately when Charles N. Hinman moved in there. It certainly was not earlier than 1906. I don't know positively. I know of my own knowledge that she lived there. I knew that very shortly after I rented the place. I know of my own knowledge that she died there. This conversation that I have given which I had with Charles Hinman occurred after they left the Lewis Street apartments and went to live on my block on Cedar Street. I think I had this conversation with Mr. Hinman in May or June, 1907. I know it was Springtime. I was there.

CHARLES H. HITCHCOCK, being called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I am an attorney practicing my profession in the City of Binghamton, where I have lived practically all of my life. I have practiced my profession in Binghamton since 1884. I belonged to the 20th Separate Company from 1882 up to the Spring 1889. Since then the 20th Separate Company has been in the battalion and regiment that I command. At present I am in command of the First Regiment, Infantry, National Guard, State of New York. In the Spanish-American War I was Captain of the 20th Separate Company. It was then Company H. of the First New York Volunteers, Infantry. I was with that Company when it made its trip to the Hawaiian Islands.

Digitized by Google

304 Charles N. Hinman accompanied the Company there as its 2nd Lieutenant. He got to be First Lieutenant of the Company in 1899 or thereabouts. Before Charles N. Hinman's death I met Mrs. Charles N. Hinman, the administratrix who sits at your right. I recall quite distinctly my first meeting with her. It was at a camp which I had on the Fair Grounds in the City of Binghamton of the Battalion I command. It took place during the Industrial Exposition in 1904. Lieutenent Charles N. Hinman introduced her to me as his wife. I cannot remember the exact words but they were to the effect that he wished me to become acquainted with his wife and he mentioned
305 my name to her at the same time. He was with her then when he made that statement and I then greeted her and she me. There were a number of others present at the time and I saw and knew at the time of his introducing her to others. The Battalion was in camp there five days. We divided up the time and invited groups of people on successive days to attend evening parade and take dinner with the officers of the Battalion. One evening it was City Officials, another County officials, Supervisors and the last evening was what we called ladies evening, on which occasion the officers there invited their wives and lady friends. It was on the evening that I designated as ladies evening that Charles N. Hinman introduced Mrs. Hinman to me as his wife. It is my recollection
306 that she was there and took dinner with the officers on that occasion.

Cross-Examination by Mr. Yetter: I was acquainted with Mr. Hinman from the late 80's or early in the 90's, saw him almost weekly, and talked with him, more or less, practically every time I saw him. In a way I knew him well in accordance with our relations in the same organization. Weekly during the season from about September 1st to June 1st each year, from the time he

Digitized by Google

307

became a member down until 1900, we had meetings down there of the 20th Separate Company members at which he and I were present and had other social gatherings during this period, such as balls and dances, once in a while I never called at his house.

EDWARD E. POWELL, being called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I reside in Binghamton where I have lived fifteen years. My occupation is coal dealer. For 308
two or three years I was private in the 20th Separate Company. Then I was promoted to Lieutenant. I was an officer of the Company in 1904, when I camped on the Fair Grounds in the City of Binghamton. I was there in camp. At that time I was Assistant Quarter Master with the rank of 1st Lieutenant. I knew Charles Hinman. At that time he was an officer of the Company. There in camp on the Fair Grounds I met this lady at your right, Mrs. Charles N. Hinman. Lieutenant Charles N. Hinman introduced her. In introducing her he said Lieutenant Powell, I am very anxious to have you meet Mrs. Hinman. Mrs. Hinman, Lieutenant Powell. I heard him introducing her to other officers on that occasion.
When Charles N. Hinman lived here in the City 309
of Binghamton I went on one occasion to his house to see about the delivery of coal there. I first got the order from Lieutenant Hinman. When it came time to put the coal in I called on Mrs. Hinman to see if it was agreeable to her to have it put in the next day. I was to make delivery on Walnut Street in the City of Binghamton. The coal was delivered there and paid for by Lieutenant Hinman.

Digitized by Google

310

Cross Examination by Mr. Yetter -

I became a member of the 20th Separate Company eleven years ago last April. That was in 1899, after the Company returned from the Hawaiain Islands, after the Spanish-American War. The 20th Separate Company which was then called Co. H. left Binghamton for the West on the way to Hawaiian Islands in May 1898, and returned about a year afterwards. It was then that I first became acquainted with Charles N. Hinman. I did not know him very well from 1899 to 1904. I was a private and he was an officer. It was in the summer of 1908 that I furnished coal on Walnut
311 Street at the house where Charles N. Hinman lived. It was in April or May prior to the September when he died. Before seeing the administratrix at the house I had seen her after my first meeting with her. I had seen her at the armory after 1904.

Re-direct examination by Mr. Hinman -

I had knowledge of the fact that in 1908 during the Spring, summer and fall of the year, up to the time Charles N. Hinman was killed, he was engaged in the good roads construction here in the County of Broome and living on Walnut Street.

312

CHARLES W. YEOMANS, called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman testified as follows:

I reside at 53 Oak Street in the City of Binghamton, N. Y. I have lived in Binghamton about twelve years. I am a lawyer. I have been practicing my profession eight years in the City of Binghamton. I am now Assistant Corpora-

Digitized by Google

313 tion Counsel for the City of Binghamton. Prior to holding that position I was Supervisor of the Third Ward. I have been connected with the 20th Separate Company both as a private and as an officer in the regiment of which the Company is a part. I knew Charles N. Hinman for twelve years. I remember my first meeting with Mrs. Charles N. Hinman, the lady who sits at your right, the administratrix of his estate. It was at their home in upper Front Street, in their home up in the country at the Hinman farm in the Town of Chenango. I was one of the appraisers in the Balis Hinman estate and went there to appraise his personal property soon after he died. I met her at that time. Charles N. Hinman in- 314 troduced her. As near as I can recall he said, Mr. Yeomans, this is my wife Mrs. Hinman. I recall the time when the Company was in camp on the Fair Grounds in this City in 1904. I saw her at that time with Mr. Hinman, Lieutenant Hinman. I saw him introduce her to several officers there at that time.

Cross examination by Mr. Stratton -

The first time I met the administratrix here was immediately after the death of Balis Hinman in 1903. That meeting was at their home on upper Front Street. I do not know who owned that place. Charles N. Hinman and Mrs. Hinman were living there at that time. It was known as 315 the Hinman farm, the old homestead, on upper Front Street. I was an appraiser of the estate of Balis Hinman. Up there that day I appraised the personal property. He had surgical instruments, he was a veterinary surgeon I believe; an old book-case and I do not recall whether it was in the form of a note, paper of some kind, some

Digitized by Google

316 evidence of debt that Charles N. Hinman owned Balis Hinman. My recollection is that Charles N. Hinman was the executor of the Balis Hinman estate.

Further cross examination by Mr. Yetter -

I cannot state the conversation which took place at this introduction in the order in which it took place. Charles N. Hinman, Mrs. Hinman, Charlie Wales and myself were present up there at that time. I first met the administratrix in the house. I don't know what room. Mr. and Mrs. Hinman met us when we came in the house, prob-
317 ably near the door.

Q. Are you anxious to characterize this lady as Mrs. Hinman?

A. I believe she is Mrs. Hinman. I am not anxious about it at all.

By Mr. Stratton - I move to strike that out.

By the Court - It may be stricken out.

Further cross examination by Mr. Stratton -

I have no interest whatever in this case. I have not and never had a claim for something like $500. in part against the Hinman estate. I had a claim against the partnership of Hinman & Sproul I was the attorney for the surviving partner of the
318 firm of Hinman & Sproul. As a lawyer I knew my bill was to be paid out of the partnership firm. I know that some of the heirs interested in the Charles N. Hinman estate thought that my bill of $500. was high. I believe some of them thought it excessive. I am not interested in the event of this litigation. My bill has been paid by the surviving partner and taken out of the assets, a part

Digitized by Google

319

of which, I suppose, belong to this Charles N. Hinman estate. The later occasion in the year 1904, when I met the administratrix, was I think in the month of October. It was the month the fair was held on the Fair Grounds. My recollection is that it was in October, I do not recall having any conversation with the administratrix on that occasion. My best recollection is that I did not. I was not introduced to the administratrix on the Fair Grounds, I had met her before in 1903. I was present at a banquet at which she was present. I do not recall any conversation with her at that time. My wife was present on that occasion. I did not introduce my wife to Mrs. Hinman. Charles N. Hinman and I had not been great 320
friends. We were acquaintances. I was a non-commissioned officer and he was a commissioned officer and I did not think I ought to be presumtious.

Q. The reason you did not look up Charles N. Hinman and introduce your wife was because you did not think it proper?

A. In a military sense it was not proper.

Re-direct examination by Mr. Hinman -

Hinman & Sproul was a firm composed of Charles N. Hinman and Harvey D. Sproul. At the time I was dealing with Mr. Sproul he was at Peekskill. In the year 1908 Charles N. Hinman was working on the Good Roads in this County. 321
He had an automobile which he used in going to and from his work, he staying home nights and going to work in the morning. During that year I occasionally saw him and this administratrix riding in the automobile together. After he died Mr. Sproul was settling up the partnership affairs. I was employed as attorney for Mr. Sproul

Digitized by Google

322 and rendered services in that connection for which I made a charge of $500. against Mr. Sproul as surviving partner of that firm. Mr. Sproul was satisfied with the bill. Hinman & Sproul were equal partners as far as I know, Sproul was paying half my bill, knowing what my services were and being familiar with the services rendered.

Q. Was the objection made to your bill was made by the counsel, who was just cross-examining you?

A. Yes.

Mr. Stratton: concede that.

Q. The counsel who made objection and cross-examined you here represented a client who was
323 entitled to one-third of one-fourth of the partnership estate, provided Mrs. Hinman is the widow of Charles N. Hinman

By counsel for the petitioner -

Objected to as improper, incompetent and immaterial.

Q. So that the attorney who was making strenuous objections on the part of one of those heirs represented the munificent percentage of 1/12 of $500.?

By counsel for the petitioner—Objected to as improper, incompetent, immaterial.

1324 By the Court - Sustained.

By counsel for the administratrix - Exception.

Re-cross examination by Mr. Stratton -

I do not recall the first time I saw Charles N. Hinman and the administratrix riding in an automobile, nor the second time. It was frequently

Digitized by Google

about the City. I cannot give any better answer to the question. It was in 1908, that was the first I saw them riding together. I do not know how many times I saw them riding together. The best estimate I could give would be a guess. 825

DR. D. M. HOOKS, being called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I reside in the City of Binghamton. Have lived here for nearly ten years. I am one of the Coroners of Broome County. I knew Charles N. Hinman. I was connected with the 20th Separate Company. I met Mrs. Charles N. Hinman, this lady at your right, the administratrix of the Charles N. Hinman estate. It was at the State Armory. Lieutenant Hinman introduced her to me. It was at the State Armory in the City of Binghamton, N. Y., on the evening in which a dance was held there by Co. H. at which time I was a private in Co. H. and Lieutenant Hinman was an officer, and I went to him and asked the privilege of an introduction to his wife. He took me over at that time and introduced me to her, just the words he used I do not know. The woman to whom he took me and gave me the introduction which I mentioned was this lady who sits at your right and who is the administratrix of his estate. 826 827

Cross Examination by Mr. Yetter: I could not tell exactly what year this was. It was either 1904, 1905 or 1906, somewhere along there. That is as accurately as I can fix the date. I think there were three dances there that winter. I could not tell what year. I enlisted in December 1903 and it was after that.

Digitized by Google

328 MRS. ETTA FURMAN, being called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I reside in the Town of Chenango. My husband's name is Merritt Furman. I have lived in the Town of Chenango twenty-three years. I knew very well both Charles N. Hinman and his mother Melissa Hinman. I remember an occassion when I went to the Hinman farm for the purpose of transacting some business with Charles N. Hinman. I met Mrs. Charles N. Hinman, who is the administratrix of his estate. I first met her at Charles Hinman's house on the farm up in the Town of Chenango. Charles Hinman's
329 nother introduced her to me. I think that was May, 1902, or 1903, I think about the 28th. My best recollection is 1902. Mrs. Melissa Hinman, Charles mother, introduced this administratrix to me as Mrs. Hinman. I would like to state also that after the administratrix went up stairs Melissa Hinman came to me and asked me how I liked Charlie's wife. I borrowed some money from Charles N. Hinman and gave him a mortgage on a small place of twenty acres in the same town.

Cross examination by Mr. Yetter —

I am a married woman. Before marrying my present husband I was married to James Winfield. He is living. My present husband is liv-
330 ing. I live in West Chenango in the Town of Chenango. I should think it was in 1902 when I called at the Hinman homestead in the Town of Chenango. I first said 1902 or 1903. I could not be positive. I think it was 1902. At that time I went there to see Mr. Hinman about getting some money from him. I got it and gave a mortgage. That mortgage is recorded in the County

Digitized by Google

831

Clerk's Office I believe. I should think my residence was about four miles from the Hinman homestead. Except the occasion to which I have testified the only time I was ever at the Hinman homestead was once when I drove in there, just drove in and talked with Charlie.

Re-direct examination by Mr. Hinman -

The mortgage was given by me to Charles N. Hinman on about twenty acres of land which I own in the Town of Chenango. That was the last mortgage I gave him. He had one before that, twelve years ago.

832

Re-cross examination by Mr. Stratton -

The day of my first marriage was twenty-three years ago last February. I lived with my first husband thirteen years. I was married to him in February. The next time I was married I was married on the 5th day of June and the 8th day of April before I secured a divorce. I procured a divorce right here in this town. My meeting with the administratrix to which I have testified was the first until I went to her and asked her to satisfy the mortgage which Mr. Hinman never did. I would not be positive in what year that meeting occurred. It was 1902 or 1903. I won't swear positively. I won't lie about it. Mrs. Hinman, Charlie Hinman's mother, and Mrs. Charles Hinman was present up there when I went up there that time. I did not pass the Hinman house frequently during those years. From 1899 down to 1902 or 1903, I may have passed it once or twice. I won't swear that I did pass it more than once or twice. I heard that the administratrix was living there during those years.

833

Digitized by Google

334

I did not know the lady in question. I had never met her. I never heard that the administratrix was living there without being married to Charles Hinman. I lived right there within four miles.

Re-direct examination by Mr. Hinman -

By Mr. Hinman - For the purpose of fixing the transaction to which the witness has referred an the date of it, I offer in evidence a mortgage dated May 28, 1902, given by Etta Furman, of the Town of Chenango, Broome County, N. Y., formerly Etta Winfield, to Charles N. Hinman of the same place, to secure payment of $100.00, and re-
335 corded in the Broome County Clerk's Office. That is, I offer the record of the mortgage recorded in Broome Co. Clerk's Office in Book 117 of Mortgages at page 323.

The evidence was received for the purpose stated.

By the witness -

The mortgage, the record of which has just been put in evidence, is the mortgage to which I have referred. It fixes the date when that transaction took place.

336

SARAH HUGHSTON, called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I reside at No. 38 Walnut Street in the City of Binghamton. My husband is a postal clerk. I live on Walnut Street with my family. I have lived there since May 28th, this year. We bought the place of Mrs. Charles N. Hinman. I know

Digitized by Google

Sarah Hughston—Cross and Bertha S. Hughston—Direct and Cross

337 Henry A. Hinman, who sits here at your left. He took me to the house on Walnut Street to look it over and see about buying it. He introduced this administratrix, Mrs. Charles N. Hinman, to my husband, to myself and my two daughters. He introduced her as Mrs. Hinman, his sister-in-law. He did not speak of Charles Hinman, I do not think, but said this is is Mrs. Hinman, my sister-in-law. My two daughters names were Lena and Bertha. Lena is married and in Detroit. Bertha is here.

Cross Examination by Mr. Yetter -

338 We bought the place in May, 1910, but I think the introduction occurred in September, 1909.

BERTHA L. HUGHSTON, being called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I reside at No. 38 Walnut Street. Am the daughter of the lady who has just testified. I know Henry A. Hinman. I was present with my mother and Henry A. Hinman, at the Mrs. Charles N, Hinman place on Walnut Street last fall and I was introduced to Mrs. Hinman at that time. My father, mother and sister were present. 339 Mr. Henry Hinman, who sits here in Court introduced us to Mrs. Charles N. Hinman. He said, this is my sister-in-law Mrs. Hinman.

Cross Examination by Mr. Yetter -

This occurred in September, 1909.

Digitized by Google

Harmon J. Kneeland—Direct and Cross and Leah Weller—Direct

340

HARMON J. KNEELAND, being called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I reside at 123 Chapin Street, Binghamton, N. Y. I was born here and have always lived here. Am a lawyer and I have practiced my profession in the City of Binghamton over twenty-five years. I knew Charles N. Hinman in his life time. At different times I transacted some legal business for him in his life time. I became acquainted with the administratrix of his estate, Mrs. Charles N. Hinman, who sits at your right.
341 Charles N. Hinman presented her to me. He came into my office, 71 Court Street, and asked for "Bonnie," or something to that effect, and his wife was with him and I says he is about somewhere and then he turns and says, Mr. Kneeland, this is my wife, Mrs. Hinman. I moved from that office on April 1, 1905. The introduction was prior to that time.

Cross Examination by Mr. Yetter -

It is impossible for me to tell how long prior to 1905, but somewhere probably from 1902 or 1903. I cannot tell exactly when it was. It might have been 1901, but I think not. I think it was before 1904. I cannot say when it was, only it was before I left that office a year or
342 two any way.

LEAH WELLER, called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I reside at No. 4 Dwight Block in this City. I have been married a little over a year. I am the

Digitized by Google

343

wife of H. Pierce Weller, who was the City Editor of the Herald in this City. Prior to my marriage I was Leah King. I met Mrs. Charles N. Hinman during the life time of her husband. I was introduced by Mrs. Jessie Allen. She was introduced as Mrs. Hinman. After that I knew Charles Hinman. That was early in the year, 1908. It was at Mrs. Allen's home in this City. From that time on I visited Mrs. Hinman at different places. I know of Charles N. Hinman and Mrs. Charles N. Hinman living after that in the Doubleday Block on Washington Street. It was there that Mrs. Hinman was sick and had the baby. She and Charles N. Hinman was living there together.. I visited them on Cedar Street 344
while they were living there. They were there only a few weeks. That is on the west side of the Chenango River in this City. I have stayed with them all night at all three places. Charles N. Hinman and Mrs. Charles N. Hinman occupied the same room during the nights I stayed at those places. I knew about Mr. Hinman's death. I know that during 1908 he was in the contracting business here and worked for the County and stayed at home nights.

Cross Examination by Mr. Yetter -

I cannot give the date when I first met the administratrix. It was very early in 1908, shortly 345
after the holidays. I think she was ill at Mrs. Allen's home on Cedar Street. I saw her frequently after that at different places. I called at her house and she called at my house. That is during 1908 down to the time of Mr. Hinman's death in September.

Digitized by Google

346 MRS. MINNIE CADMUS, being called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I reside at Passaic, N. J. I am the wife of Garret Cadmus. I was married May 4, 1910. My maiden name was Minnie Lord. I was born at Equinunk, Pa. Am a sister of Mrs. Charles N. Hinman. I am a sister of Pearl Lord. In the Fall of 1901 I was living at home at Equinunk, Pa., with my father and mother. I first met Charles N. Hinman in 1901. It was the last of September or 1st of October in 1910. I first met him at my home in Equinunk, at my father's and
347 mother's home. He came there with my sister, Mrs. Charles N. Hinman. Her given name is Vena. They came there together. I had never seen him before. I had heard of him. They came there in the last of September or 1st of October. He was then introduced to me and to my father and mother in my presence. He was introduced to me by my sister Vena as my brother-in-law. They remained at my father's and mother's house that night and occupied the same room there. Mr. Hinman left the next morning. My sister did not go with him, she stayed home for a while. I do not just remember for how long, but I know it was for a few weeks. I saw Mr. Hinman there at my father's home again while she was there. He
348 came in the afternoon and went away again the next morning, staying over night. He and Mrs. Hinman, my sister, occupied the same room that night. My sister Pearl and my brothers visited at the Hinman farm and at Charles N. Hinman's home in Binghamton at different times. As far as I can remember my sister Vena introduced Charles N. Hinman to my father, my mother and

Digitized by Google

349 myself as Mr. Hinman, her husband. I remember the envelope marked Ex. E. for identification, postmarked Binghamton, N. Y., August 30, 11 P. M., 1908, addressed to Mrs. Dan Lord, Equinunk, Pa. and the letter marked Ex. D. for identification, dated Binghamton, N. Y., Aug. 30, 1908, being received by my mother at Equinunk at about the time it is postmarked and dated. I was home that day and I brought it from the office to my mother. She opened it and read it and then I read it. Immediately or within a few days thereafter my sister Pearl left the home at Equinunk and came to Binghamton. At Binghamton she was with Charles N. Hinman's people and lived with him and Mrs. Hinman at the time he was killed. 350 I know Charles N. Hinman's writing. The exhibits E and D are in the handwriting of Charles N. Hinman.

Exhibits D and E offered and received in evidence.

Q. Before your sister and Charles N. Hinman came to your father's and mother's home last of September or 1st of October, 1901, had your mother received a letter from your sister a short time before that with reference to whether or not she was married and which letter you read?

By counsel for the petitioner -

Objected to as improper, incompetent, immaterial, hearsay, calling for a conslusion, the letter 351 itself is the best evidence as to its contents.

By the Court - Sustained.

By counsel for the administratrix - Exception.

Digitized by Google

852

Q. Did your mother a short time before, a few days before, your sister and Charles N. Hinman were at the home of your mother, the last of September or 1st of October, 1901, did you or your mother receive a letter from your sister Vena, who was in Broome County in the State of New York, which letter you saw?

By counsel for the petitioner -

Objected to as improper, incompetent, immaterial and the further objection that it is incompetent and inadmissable under § 829 of the Code of Civil Procedure, hearsay.

By the Court - Sustained.

353 By counsel for the administratrix - Exception.

Q. Was there such a letter received at that time from Vena Lord, which you saw, your sister Vena, which letter you saw and read, and which letter has been lost or destroyed and which you are not able to produce here, and in which it was stated by her that she had been married to Charles N. Hinman?

By counsel for the petitioner -

Objected to as improper, incompetent, immaterial, inadmissable under §829 of the Code of Civil Procedure, a declaration in favor of the administratrix in her own interest and the question
354 is also leading.

By the Court -

This last question does not disclose whether this letter you are asking about was addressed to this witness or somebody else.

By counsel for the administratrix -

Digitized by Google

355

I do not think it does.

By the Court - Objection sustained.

By counsel for the administratrix - Exception.

Shortly before Charles N. Hinman and Vena Hinman came to my father's house in Equinunk, Pa., last of September or 1st of October, 1901, I received a letter from my sister, Vena. I do not know where that letter is. I have not made any search for it. I am unable to tell whether or not it is in existence without looking for it. If in existence it is at my father's and mother's home in Equinunk. So if it is in existence it is at their home.

356

I have two brothers, twins, Roy and Ray. They came to the Hinman farm after Charles N. Hinman and my sister were there at my father's home at Equinunk in the Fall of 1901. They went to live on the Hinman farm there with Charles N. Hinman and my sister. From that time on Charles N. Hinman referred to them as his two sons. Those boys are twenty two years old. They became that age in February. I was on Walnut in this City at my sister, Mrs. Charles N. Hinman's home when Mrs. Morgan and Mr. Alva Morse were there one day. It was a stormy day, raining hard a part of the time. Their clothes were wet when they got to the house and they removed them in the kitchen to dry them. We had dinner that

357

day in the kitchen. I ate with them. From the time they sat at the table there that day until they left, I heard and took part in the conversation. There at that time my sister Vena did not say to them, or either of them, that she was married to Charles N. Hinman on the 24th day of September, 1900. Nothing that I heard was said between them or by her to them with reference to her marriage to Charles N. Hinman. I heard all the talk there from the dinner time on.

Digitized by Google

358 Cross examination by Mr. Yetter -

My age is thirty-seven. My sister Vena's age is twenty-nine the 1st of June, 1910. I cannot just remember when my sister Vena came to Binghamton to live. As far as I know, it was about thirteen years ago. About 1897. She lived at Mr. Normile's when she first came to Binghamton. She corresponded with me during that time. She remained there a short time. I cannot tell how long. I think she was there six months. I cannot tell what Normile it was nor on what street. Don't know anything about it. I knew at the time. My memory is pretty fair but I cannot recall anything about that. From there she went to Dr.
359 Daley's on Washington Street. I do not remember the number. She was there for over a year. I cannot tell what year it was that she left there. I cannot tell anything about it. I think she left before 1898. I think 1896 or 1897. She went from there to the Hinman farm in the Town of Chenango. I am sure it was in 1897. I do not know it from my own knowledge. I never was at the Hinman farm. I received letters from her and know that she was there. I never visited her but I know she was there. She was there in 1898, in 1899, but not all of the time in 1900. In 1900 May and June she was not there. She was home then at Equinunk. During that time, 1897, 1898, 1899 and 1900 I was not at the farm, my father
360 was not, nor my mother was not. My sister Pearl was there. I think she was there in 1908. My brothers were not there during 1897, 1898, 1899 or 1900. No member of my family was there during that period. During all that time they all knew that she was there. She was home often

Digitized by Google

361

I did say my sister was there during that whole period, except two months in 1900, May and June, when she was at Equinunk. I fixed the date of 1901, when Charles N. Hinman and the administratrix called upon me at my home in Equinunk merely by my recollection. It is merely a matter of memory. I do not think my memory is proving very good on dates here. It is very hard for me to remember dates back so far as that when I am not expecting anything to come up like this. Certainly I might be mistaken in regard to dates. I might have been mistaken a good many times and that might have been 1902, I am not positive about it. I should think Equinunk is from 60 to 70 miles from the City of 362
Binghamton on the Erie road. The Erie runs direct from Equinunk, Pa., to Binghamton. Our station is Lordville and we have to walk a mile from the station to our home. Mr. Morse and Mrs. Morgan called on my sister on Walnut Street in the City of Binghamton, the latter part of April, 1910. I am sure it was the latter part of April, 1910. They got there at about eleven o'clock in the morning. I could not say which of them came into the house first because I was not present but was upstairs. I remained there only a few minutes. I was sewing up stairs. My sister came up and told me who was there and wanted me to help get dinner. While I was getting dinner I was in and out of the pantry and Mr. Morse and Mrs. Morgan were back and forth from the 363
kitchen, dining room or in the parlor. And during that time I remained in the kitchen or pantry, which is off from the kitchen. I did not hear all that was said. After dinner dishes were left. After dinner Mrs. Morgan and Mr. Morse went in the parlor. I did not go upstairs and sew after dinner, did not go upstairs at all. I was there all the time. They left between two and

Digitized by Google

364 three. While they were there they sat in the parlor which faces Walnut Street and is on the east side of the street. After we ate our dinner we sat and talked until it was nearly time for them to go. They left between two and three o'clock. We did not all sit at the dinner table until it was time for them to go. We retired to the other room. We sat down a few minutes there in the parlor. I cannot tell just how long I sat there in the parlor with them but it was about ten minutes. That was all the time I was with them in the parlor about ten minutes. If Mr. Morse and Mrs. Morgan and my sister were in the parlor upwards of ten minutes on that day, then
365 they were there at a time when I was not with him. It was about 1:30 when we finished our dinner, and we sat in the dining room about one-half hour after we had finished, getting up from the dining room table at about 2 o'clock. Then my sister and these two other parties went into the parlor and I stayed in the dining room. From the dining room I went in and out of the pantry putting away the dishes. The dining room and kitchen are located between the parlor and pantry and I was in and out of the pantry. My brothers Ray and Roy were up to the Hinman farm, I think, in 1905.

Re-direct Examination by Mr. Hinman -

366 My sister Pearl at that time was living there with my sister and was going to school. She came to dinner and went back to school after dinner.

Q. Is it your best recollection that from the time you sat down to dinner that day, that is Mr. Morse, Mrs. Morgan, your sister, yourself and Pearl, until Mr. Morse and Mrs. Morgan left the house, which you say was between two and three,

Digitized by Google

367

you were with them and taking part in what was said and heard what was said?

A. Yes sir. After the meal was finished I done the table. I carried the dishes in the pantry and left them for Pearl. After I had finished putting the dishes in the pantry, Mr. Morse, Mrs. Morgan and my sister went from the table into the parlor. I was in the dining room all the while they were in the parlor. There is a double door-way between the dining room and the parlor and the doors were open. I could not see them from where I was. I did not hear particularly what they were talking about at the time, I do not remember. They may have said some things I did not hear.

368

H. PIERCE WELLER, being called as witness for the administratrix, being duly sworn and examined by Mr. Hinman testified as follows:

I reside at Binghamton, N. Y. I am City Editor of the Evening Herald. I have been connected with that paper eight years. I came to know Charles N. Hinman. About a year ago I married a Miss King. With her I called during the last year or two of Charles N. Hinman's life at his residence on Walnut Street in the City of Binghamton. Prior to the death of Charles N. Hinman I became acquainted with the administratrix. I heard him speak of her and speak to her in my presence. He addressed her sometimes as Mrs. Hinman and sometimes as my wife.

369

Cross Examination by Mr. Yetter -

He did not address her in any other way. I never heard him call her Vena. I think I have heard him call her "Kid." I first became ac-

Digitized by Google

370 quainted with Charles N. Hinman something like three or three and one-half years ago. I first heard him address the administratrix as his wife, or Mrs. Hinman, about two years ago June I think, that was the June prior to the September in which he died.

CHARLES T. GAGE, being called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I reside at Binghamton. Have lived here near-
371 ly thirty years. Most of the time I have been in the cigar and tobacco business. My place of business was at 348 Chenango Street. I first opened business there October 7, 1900. I rented my place there from Charles N. Hinman. I knew Charles N. Hinman from that time on down to the time of his death. I went out of business at that place about a year ago. I had known Charles N. Hinman before I rented from him. I had known him in the neighborhood of twenty-five or thirty years. Prior to Mr. Hinman's death I met Mrs. Charles N. Hinman, this lady who sits at your right and who is administratrix of his estate. I think I first met her up at Mr. Hinman's farm in the Town of Chenango. Charles N. Hinman introduced her to me. I think it was in
372 the Fall of 1901. He introduced her as his wife, Mrs. Hinman. From the time I rented from Mr. Hinman in 1900, I paid rent for the property as long as I occupied it. I made payments of rent from time to time to Charles N. Hinman, Mrs. Charles N. Hinman and Asa L. Bonnell. Charles N. Hinman talked with me about his wife in connection with the building where I rented. He said he was going to give it to Mrs. Hinman. I cannot say when it was, may be five or six years

Digitized by Google

373

ago, something like that. He came there with her one night and told me I should pay the rent to her. She would have charge of the block the most of the time. From then on I paid the rent to her. As I made payments of rent to her she from time to time gave me receipts for rent. She signed some of them Mrs. Charles N. Hinman and some Mrs. C. N. Hinman. Those receipts, signed in that way, to which I refer, were prior to the death of Charles N. Hinman.

Cross Examination by Mr. Yetter -

I think I was upon the Hinman farm in 1901. I have not anything in particular by which I fix the date. That was the first time I met her. It 374
was in the Fall. I think it was November, 1901. It might have been November, 1902. I am testifying from my recollection as near as I can remember. I cannot remember any other particular thing I did in the Fall of 1901. I do not think it is just as liable to have been in the year following, in the Fall. It might have been. I would not swear positively, it is a good while ago. There was nothing to call it particularly to my attention. I should say that it was just before he engaged in the Good Roads work that he told me he was going to give the building to the administratrix. I did not impress my mind at all with these transactions and these dates are purely speculative with me. Mr. Hinman told me that
I should pay the rents to her a short time after 375
that. That was just before he engaged in the Good Roads work.

Digitized by Google

376

ASA L. BONNELL, being called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:

I reside in the City of Binghamton. Am an attorney at law. Have been practicing my profession about 7 years. I am counsel for the administratrix in this proceeding. I knew Charles N. Hinman in his life time. I was a member of the 20th Separate Company from 1898 until three or four years ago. I have seen Charles N. Hinman and am familiar with his handwriting. I knew that Henry A. Hinman resided at one time on Exchange Street in the City of Binghamton, but I am not sure that he resided at No. 37. It was

377 about that number. I know where the Hinman farm is located. It is located on what is known as R. F. D. Route No. 4 from the City of Binghamton. I knew that Mrs. Hinman has a brother named Dan.

The witness here identified Exhibits F, G, H, H 1 to H 181 inclusive and H 183 to H 203 inclusive, as being in the handwriting of Charles N. Hinman and said exhibits, consisting of postal cards, envelopes and letters produced by the administratrix, were received in evidence. The following are descriptions of each of the envelopes and copies of the letters, also a description of the envelope Ex. D. and a copy of the letter Ex. E.:

378

EX. F.

Ex. F. is a postal card postmarked Schenectady, N. Y., May 16, 1905, 8 A. M. and addressed Mrs. C. N. Hinman, Binghamton N. Y., R. F. D. 4, with the following written upon the back: -

Digitized by Google

Ex. F., Ex. G., Ex. H.

379

May 15th, 1905.

My dear Wife:—

Am here at Sprouls all O. K. had to go out and buy me a new dress to night. It is now 9:30 so write this but will do better tomorrow with love to all and Kisses to you will close for am verry tired all is O. K.

Hubbie.

EX. G.

Ex. G. is an envelope postmarked Schenectady, N. Y., May 17, 1905, and addressed Mrs. C. N. Hinman, Binghamton, N. Y. R. F. D. 4. 380

EX. H.

913 Victory Ave.,
Schenectady, N. Y. 16-5-05.

Mrs. C. N. Hinman,
Binghamton, N. Y.

My dear Wife:—

Last night I was so tired and it was so late when I got back from down town I simply dropped you the postal. hope you will forgive.

Well I arrived fine Harvey was down to meet me but did not see him so came up to his house 381
and from there went over to the works. the works are about 6 miles out we go and come by trolley.

We have a fair working gang and are improving them all the time. We have now working 17 men and three teams and will soon have more The work is going fine so far and think we will be

Digitized by Google

382 winners. Anyway the prospects are bright at the present writing.

Well am well working like the devil we get up at 5.30 am walk a mile then take the car to the works, work till noon tak a half hour nooning then work till 6 then home and after eating run all Schenectady for men.

Well dear I hope you and all are well I dont worry over Van for he told me what he would do and I have the most explicit trust in him after our talk and dont believe he would betray my confidence in him.

I know my successor Mr Ray is doing fine. well give my love to all. with 100 kisses and hugs for yours truly. We have no bill heads.

383 Hinman

EX. H. 1.

Ex. H. 1. is an envelope postmarked Schenectady, N. Y., May 18, 1905, 8—A. M., and addressed Mrs. C. N. Hinman, Binghamton, N. Y., R. F. D. 4.

EX. H. 2.

Schenectady, May 17th, 1905.

384

Mrs. C. N. Hinman,
Binghamton, N. Y.
My dear Kid:—

Yours at hand as I came in from work. we dont get in till 7 or after and it is dark so we have to eat by lamp light evry night the boys would think it pretty tough.

Digitized by Google

Ex. H-2

385

Well am boarding with Sproul and they use me lovely. they have fixed me everything to eat they have or could buy am feeling fine working hard long hours. and eat you would fall dead to see me. I believe it will do me good for even with my teeth and they are murdering me, am eating enough for two. the work is going on fairly well as good as we could expect. and hope to get it going better soon.

You say to Dan that he will not take Georges team away from him. he must put Treat doing something else. he has the bushes to cut and he must get the piece of ground George was plowing when I left ready at once an put in the corn. You go down to Mathews and get the best teaming corn. and ask Ike Cooley how much to put in 386
a hill. think from 3-6 kernels. he had better use the hand planters. 18 inches one way and 3 feet the other. that is he marks it 3 feet both ways then plants one way a hill in the middle. He will keep the teams going that is use his extra men to plant and let the teams plow the three cornered lot that corners on the Dapot road.

You say to dan or show him this He must either do his best for me and that best must be a good showing or go and go as soon as that record has been proven against him that is not in his favor. He promised me to do his best and I believed him and if he lies to me he goes and that will settle it for good he knows enough and he must use that knowledge for my good or go. I 387
will tolerate no deviation.

Give my love to all hoping you are all well wishing you were here give my special good will to Ray. bless the boy for me know he is loyal. tell mother hello, 1000 kisses to my ownest own and say sweet things about me please will for this time close.

Hubbie.

Digitized by Google

Ex. H. 3 and Ex. H. 4

388

EX. H. 3.

Ex. H. 3. is an envelope postmarked Schenectady, N. Y., May 19, 1905, 8—AM, and addressed Mrs. C. N. Hinman, Binghamton, N. Y., R. F. D. 4.

EX. H. 4.

Ex H 4 for iden.

Schenectady May 18th 1905.

Mrs. C. N. Hinman,
Binghamton,
N. Y.

My dear Kid:—

389

You may think it strange to hear from me every day but you must pardon me for am far from home and miss you sadly.

I hope by this time things are going nicely with you and all things lovely.

We are doing nicely with the work but it needs us both here to save on the job.

My teeth bother me like the devil but are some better now.

You ought to see me eat can put any man we ever had to the blush, although it hurts me every mouthful.

Am feeling fine never better. Harvey had a bad cold but is better at this writing.

390

Now when you send my clothes send my Masons pin. tell Jud to send my Glasses, as I have not written him and have him send them the first time you go to town.

Am writing this with Sproul sitting here reading the paper he says there is a girl down in a glove store that looks just like you and am going down to see her if you dont mind, and break the monotiny of my lonesome.

Digitized by Google

Ex. H. 4, Ex. H. 5 and Ex. H. 6

391

Well cant think of any think of any thing more to write and it being 9.00 o'clock will quit.

Hinman.

EX. H. 5.

Ex. H. 5 is an envelope postmarked Schenectady, N. Y., May 20, 1905, 8—AM and addressed Mrs. C. N. Hinman, Binghamton, N. Y., R. F. D. 4.

EX. H. 6

Schenectady, N. Y.
May 18, 1905.

392

Mrs C. N. Hinman,
Chenango Bridge, N. Y.
My dear Kid -

Your letter just received and was more than glad to hear from you am at Sprouls and shall remain if they don't fire me out and guess they wont.

To-day Mrs. Sproul put up my dinner we have been in the habit of carrying it in one pail but Sproul said he didn't get anything to eat and wanted a pail with a padlock on it so I should not eat all the dinner and of course I swore he eat it all on account of my teeth, so she gave each of us a pail this morning thought mine was light but when I came to eat dinner all I found in my pail was one clam shell and two crackers. So I eat with Sproul. I received the check from Henry but it will have to go back for the other man's signature before I can draw it.

393

I had to stop writing to help Sproul make up the envelopes to pay the men. Our pay roll last week was $216.75 so you see we are doing something. I told Sproul if that held up we would

Digitized by Google

394 soon be ruined. Well as I look at my watch and your Chin and it is 9:30 P. M.-so will have to quit. Sending my love to all and kisses galore to my only Kid hoping you are well and feeling fine will quit. Am well and tough as nails am feeling better every day, but by by with love

from

Hubbie

413 Victory Ave.

EX. H. 7

395 Ex. H. 7 is an envelope postmarked Schenectady, N. Y., May 21, 1905, 7-PM and addressed Mrs. C. N. Hinman, Binghamton, N. Y. R. F. D. 4.

EX. H. 8

Schenectady, N. Y. May 20'' 1905

Mrs C. N. Hinman,
Binghamton,
N. Y.

My dear Kid:

Have just been down town with Sproul. bought 1 Par Gloves 1 Pr socks and two collars, that is I have as you would say been shopping
396 this is quite a town No. 50000. people live here and the finest electric system in the world.

You see it is larger than B. and the works here employ thousands.

We are getting along nicely with the work there was a Contractor here that shot himself yesterday morning and we are going to try and get his plant.

Digitized by Google

Ex. H. 8

397

(that is if we can get it at bargain store prices.)

Sproul left his pie last night and said he was going to eat it to day for dinner and I eat it up and he looked sad.

The people here are lovely to me make just as pleasant as they can for me Mrs. Sproul is a nice little body and lets Harvy go where ever he wants to they have not been since I have been here. in fact it is 9 o'clock before we get through supper as a rule so you see no one has a chance to go out much.

We are thinking about letting our foreman go and are going over to Amsterdam to-morrow to see if we cannot get another gang if the men should go with the foreman.

398

There is no news to write you and the only comfort you will have in reading this is that you are not forgotten it would be much more pleasant if you could be with me but you would see but little of me if you were here. and I guess I say more to you in my letters than I could if you were here.

Am glad you are getting along nicely tell Dan I have confidence in him and I depend on him to do for me as he should do for himself Ray I know is true as steel.

Have just looked at my wach your chain and picture and it says 10 minutes to 11. and Sproul has been sitting here a sleep all the time I have been writing.

Tell Ray I will look up my book tomorrow and if possible send for his wagon.

399

I am afraid you will get tired reading my letters but it is a penalty imposed upon you by my absence.

You know how fond I am of writing so can appreciate my desire to please and affection for you or I would not bother you so much.

I have not felt so well in years as I do now and have shaved off my mustache and I dont think I

Digitized by Google

400 look bad but the rest say I look like the Devil. how say you.

My teeth are vile cant wear the under set at all for they kill me my mouth is a sight.

I dont know how much my board will be have not asked yet but if they charge me $10.00 per week I have them skinned alive for eat it would keep your own sweet self cooking all the time.

When Pearl comes up you can run up will send you mileage and we will paint this old town **Red** I would be glad to see you dear but cannot but when I do will make up for lost time.

I have not (now dont shout) taken a chew of tobacco since I left home or a single drink stronger than tea. now dont get excited but your Hubbie
401 is honestly trying to do as you would like to have him.

It is all I can do for you in your exile and am honestly trying to be as nice to you as I know you are loyal to me.

Now dear be good dont work to hard get Mrs. Pat to help you if you need help keep your health be good to mother as you love try and be your own lovable self and no one could help loveing you.

Well dear it is now 11-15 so good night give my love to mother through her daughter and remember me to Dan and Ray George and Pat. and all my love to you and 1000000 of kisses and hugs, to your own sweet self. pretty good for a fellow that always writes business letters dont you think. but
402 not half good enough for my own dear wife. well dear again good night.

P. S. I dident hear from
you today. Hubbie.

Digitized by Google

Ex. H. 9 and Ex. H. 10

403

EX. H. 9

Ex. H. 9 is an envelope postmarked Schenectady, N. Y. May 22, 1905, 8-AM and addressed Mrs C. N. Hinman, Binghamton, N. Y., R. F. D. 4.

EX. H. 10

Schenectady, N. Y.
May 21st, 1905.

Mrs C. N. Hinman,
Binghamton, N. Y.
My dear Sweatheart -

404

This is Sunday and sitting here all alone waiting for the people to come home from Church am thinking of my own little wife so far away, in pairing my Bunyon this morning I cut it badly and so am in hospital and could not go to Church.

Sproul and I went out to Amsterdam to-day by trolley about 12 miles they have 27929 inhabitants so you see it is quite a City (the City of Schenectady has 50000) we went to find a gang of Dago laborours and did not have the success we antisipated but we learned some things to our advantage so the time and money was not burned.

The Country we passed through is beautifull and we enjoyed the trip we took the Limited that is a Car with a smoking apartment fitted up like a Pullman Coach on a Railroad train and they run at Railroad speed.

405

The electric road runs along the Mohawk River and paralells the New York central which is a four track system here the Erie Canall the West Shore Railroad and you can see them all from the car.

We had dinner in a Resturant on the Main Street and it was the most rotten thing called

Digitized by Google

406 meal. I Sat down to and the service would make Rex sit up and howl after we had finished and I eat all in sight and went out Sproul said lets go down to the Canall I says what for and his reply was that he wanted to get rid of his dinner and I thought it well put.

Well wearrived home at about fouro'clock folks all gone out in the country but they arrived soon after and we had supper and they went to Church and your Hubbie is doing the propper to his sweetheart.

I do wish you could walk in on me to-night dear you don't know how much I would enjoy it but the meeting will be more sweet and the joy greater when we do.

407 Sproul says I am more like a Groom than an old married man and is inclined to give me the laugh but stick to my text but it may be I may have to skip some day but if I do twill be by force of circumstances.

We are trying to get a water job here and if we do think there will be good money in it will let you know of all that transpires as I know you are interested and would want me to.

I hope you are all well and that God of love hovers near you and that it will not be long before you can run up and make me a visit and then we will dob this old town with crimson I think this will be a good thing for me dear I am learning fast and there are some things that I look at dif-

408 ferent than I did and am trying to so live here that you will not have to blush when you meet me dear.

I am inclined to be costive but eat o my don't mention it and no Rheumatism no nothing realy have not felt so well and healthy in years. Sproul says I look like the youngest member of the firm but he dose not like to look at me as well as he did.

Mr. and Mrs. Sproul are quite kiddie together

Digitized by Google

Ex. H. 10

409

and I tell Sproul if he don't quit I will go home as he makes me homesick.

Well it is 9-10 and am still alone but have a hard days work before me to-morrow so will I guess retire and not wait for them if I do will have to sit up an hour or two and I need the sleep for I wake up at 4-30 or 4 o'clock every morning yet can't get over the fixed habit but hope to some time for it is so late every night before I can get to bed it being so late before we can get home that it does much time in bed but aggree with me am fit for anything it has been very cold here not any rain much but high winds and cold it makes ones teeth chatter that is those that have teeth I gummit.

410

They are very kind to me and believe me it is appreciated for in a City where you know no one and don't hang around grog shops and blow yourself it is tedious only my faculity for making myself contented keeps me from having the blues like the D - -

Well dear give my love to our Mother and remember me to Roy and Don tell them to be good for if they are and I succeed will be able to give them places where they can do something for themselves and I am loyal to those that are to me.

Send up my shirt stud and what shirts I have my other combination suit and what else I need I can get here so be good and tell Jud to send my gloves so by by with all my love and Millions of kisses to my ownest own be good and remember

411

that as you are good and are kind to others others will be good to you so by by they have come home and Mrs Sproul is give my fits for sleeping in Church

by by with love
Hubbie

Digitized by Google

Ex H. 11 and Ex. H 12

412

EX. H. 11.

Ex. H. 11 is an envelope postmarked Schenectady, N. Y., May 26, 1905, 8-Am and addressed Mrs C. N. Hinman, R. F. D. 4, Binghamton, N. Y., and bearing business card of Hinman & Sproul

---

EX. H. 12

(On letter head of Hinman & Sproul)

Schenectady May 25th, 1905

Mrs C. N. Hinman,

Binghamton, N. Y.

413 My dear Wifeie -

Yours of the 23rd at hand and was delighted to hear from you, you say you are lonesome dear what would you be if you were here working hard, and not going out at all but strictly on business, not knowing anyone and feeling to tired to go out to get acquainted.

Sproul is not well known here he has been away so much and not have a loud time he seems to know many men by sight but they don't speak to him.

However he is honest and I think will wear well he understands his business if he didn't don't know what the devil we would do, for the contract we have is the devil itself. we are getting along

414 nicely and will plain sailing and will I think do nicely.

You will observe the bill and letterhead. how do you like them we just got them to-night and am using some you see.

Mrs Sproul is ill has been sick for two days and not able to do anything so Harvey and I washed and wiped the dishes for Sprouls Mother in Law.

Sprouls Father in Laws step Mother came to

Digitized by Google

day and they are in a devil of a box every bed occupied and the old lady lame and very old and I told them much as I would dislike to go go I would if they were inconvenienced by my staying but they will not hear of it and what they will do search me. 415

My corns have been killing me for the last week but hope they will be better soon.

Am not going grow a mustache again that is **Except you** command it.

It is very uncertain when I can come home as we are thinking and have come to the conclusion to let the foreman go. and that being the case you see it will keep us both tied up pretty close.

However will do the best I can but don't anticipate my coming for will let you know some time ahead. 416

Am sorry Mrs Collins has died she was a good woman and it seems a pity it is not in my province to guess what the trouble was.

Dan might put the Potatoes in on this end of the plot "where George is now plowing about an Acre or an Acre and a half.

Am sure we would or I would like the cook but you know I am **boarding now** so when you do come **we** will be **boarding.**

Better give those Ladies treatment or did you give them Gin before they looked at my Photo.

Tell Jess and Will that am glad they rember me for I didn't think any one missed me at Bing. and tell them they are the only ones that have enquired. 417

You should have said to Mr Ockerman that it was $1.00 a Cubic Yard or 27 Cubic feet. Dan knows how much I give them for a $1.00.

Well dear we cant have all we want in this world if we did there would not be much pleasure, so cheer up and perhaps brighter days may come to us both if we are loyal to one other and true to

Digitized by Google

418 ourselves, treat others with kindness and courtesy, demanding the same from them we will I hope in the end get that comfort and harmony we should have and the happiness of being together will in the future be I trust appreciated by both.

Well it is 20 minutes of 10 and must close give my best regards to Dan and Ray love to Mother and all the affection of which I am capible and all the kisses and huggs that my strength will permit and yours withstand to you hoping your Rheumatism by this time is better must for this time close.

from Hubbie.

419

EX. H. 13.

Ex. H. 13 is an envelope postmarked Schenectady, N. Y., May 27, 1905, 8-AM and addressed Mrs C. N. Hinman, R. F. D. 4, Binghamton, N. Y. and bearing business card of Hinman & Sproul.

EX. H. 14

(On letter head of Hinman & Sproul)

Schenectady, 5/26, 1905

Mrs C. N. Hinman
Binghamton
420 N. Y.

My Dear Wife:-

Yours of yesterday at hand and was glad to hear from you.

It has been raining hard tonight commensed at 5:25 P.M. and is at it yet. got wet at the works, and come home am however fine as a fiddle.

Have not much to write about but expect to let our foreman go tomorrow and then will be tied up

Digitized by Google

421

worse than ever but we feel as if all must cut expences as it will leave all the more for us the work is going on well and this weeks pay roll is quite a little less than 1st it is $185.00 well dear I hope you are getting better of your rheumatism I havent felt a twinge in a week except in the tooth Decker dident cap.

My health is perfect and am tough as nails.

I washed dishes again tonight and Mrs Sproul is much better I think she has a start toward a little Sproul but Harvey has not said anything about it to me as yet.

They use me lovely and it is as pleasant as it could be away from you Harvey calls me the Groom for writing to you so much. but I guess 422
we can stand it.

In writing to you about the potatoes I ment the end of the lot toward the house, well dear rember me to all give Grove a hug for me and to my ownest own a thousand kisses and all my love so good by my dear and be good to all say to Ray and Dan and Mother my best word and keep all to yourself that you most like. by by by Hubbie.

EX. H. 15.

Ex. H. 15 is an envelope postmarked Schenectady, N. Y. May 28, 1905, 6-PM, and addressed 423
Mrs C. N. Hinman, R. F. D. 4, Binghamton, and bearing business card of Hinman & Sproul.

Digitized by Google

424

EX. H. 16.

(Written on letterhead of Hinman & Sproul)

Schenectady, N. Y. May 20, 1905

Mrs C. N. Hinman,
Binghamton, N. Y.

My dear Wife -

Yours of Friday at hand including check from Miss Lewis which I will sign and return to you, all you will have to do is to sign your name on the back the same as I do and draw the money.

This is Sunday and have been in the house all-day but am with harvey going over to Scotia to
425 look over the route the water Pipe takes for we are going to bid on the contract.

We are not going to make a large stake out of this job, but with your fine financeering at home am ok any way we ought to save a few Hundred have a lot of Lumber and cement all our stuff.

Well I must not write you a long letter for I have to go over and it will take some time to get back.

Harvey is here talking to me all the time and it is almost impossible for me to write anything.

You received the Bank Book I suppose all right so you could send for Rays wagon, tell Dan he must not be to hard on Ray but give him a chance to rest or he will get discouraged.

I hope your better dear I would have you come
426 up here now and stay a week but don't see how they could get along without you business seems to go better when I am gone then when you are.

Well dear the time will soon come when we can be together again and when we do we will benefit by this separation and if we do it will be a God-send to both.

Well dear Harvey is waiting and he says tell Mrs Hinman the Groom's busy with love and kisses 1000000 from

Hubbie

Digitized by Google

Ex. H. 17 and Ex. H. 18

427

EX. H. 17.

Ex. H. 17. is an envelope postmarked Schenectady, N. Y. May 30, 1905, 9-PM and addressed Mrs C. N. Hinman, Binghamton, R. F. D. 4, and bearing business card of Hinman & Sproul.

EX. H. 18

(On letter head of Hinman & Sproul)

Schenectady, May 29'' 1905

Mrs C. N. Hinman
Binghamton
N. Y.

428

My dear Wife.

It is 9.45 but thought I would not go to bed without writing you. I have had a hard day of it and am very tired in fact when I arrived home was too tired almost to eat supper. but am somewhat better now.

Well dear I havent much to say only am thinking of you and want you to know of it I want you to be the good girl you can be and try your best to so conduct yourself as to to be always at your best for you are my only rock of safety and if you fail to please me it makes it so much harder for me to so live that you will not be ashamed to call me husband. Now dear dont worry if things 429
dont go right dont fret for that will wear you out and I want you to look just as sweet as you do now for at least a century. You have no idea how much I love and appreciate you dear and I can see now that I should have told you so oftener than I did but you know sweet I am not much of a hand to say all I think, but am going to make a clean breast of it dear if any thing should hap-

Digitized by Google

430 pen to you God only knows what I should do, we have had our differences but you have no idea how trivial they seem to me now.

So you see it has done a hard old sinner good to be away not with the Company but so situated that he has time and things leisure that gives him food for reflection.

We expected to go down to the Engineers this evening but was to tired to go.

I hope your Rheumatism is better and that you are getting some comfort out of your forced old Bachelerhood.

Well dear give my love to Mother regards to Ray and Dan tell all the rest what you please.

431 But for yourself dear I cannot express what I would like to say to you but dear you are all in all to me with hugs and kisses by mail to you from your Hub and his continuous thoughts good by love good by **kisses kisses**

Hubbie.

EX. H. 19

Ex. H. 19 is an envelope postmarked Schenectady, N. Y. Jun. 1, 1905, 9-AM and addressed Mrs C. N. Hinman, Binghamton, N. Y., R. F. D. 4 and bearing card of Hinman & Sproul.

---

432 **EX. H. 20.**

(Written on letterhead of Hinman & Sproul)

Schenectady May 31st, 1905

Mrs C. N. Hinman
Binghamton, N. Y.

My dear Wife -

Your letter received to day and really it did me good you may do anything you wish with the

Digitized by Google

Ex. H. 20 and Ex. H. 21

433

Stones only keep this dark it might save me trouble but find out just what out lay he demands that is how much money he will be satisfied with or in other words agree to spend so much, then you see you wont get the worst of it that is you aggre to spend so much or less.

Will try to run home as soon as I can dont know at the present but will come as soon as possible.

Have enclosed cheks for Dan and Ray in full for Dan and the reason Rays is not more is that it is all there is in bank but 4 dolls so you may give Ray what he wants.

You had better pay Ray $18.00 from Apr 1st it is a little steep but it will encourage him and at least will save it.

434

Now dear I sent you a little Birthday present it was the best I could do here and did not have time to go to Albany it is a sterling Silver set.

I have made up my mind to allow you ($20.00) Twenty Dollars per month for seeing to things while I am gone to be placed to your credit in the Savings Bank, I to defray all your expenses besides. Give love to all and kisses and Hugs for my ownest.

Hubbie.

put Sproul Check in safe.

EX. H. 21.

435

Ex. H. 21 is an envelope postmarked Schenectady, N. Y. Jun. 2, 1905, 7-AM and addressed Mrs C. N. Hinman, Binghamton, N. Y., R. F. D. 4 and bearing card of Hinman & Sproul.

Digitized by Google

436

EX. H. 22

(On letter head of Hinman & Sproul)

Schenectady Ma 31 1905

Mrs C. N. Hinman
Binghamton,
N. Y.
My dear Wife.

Yours of Monday received yesterday and am writing again to-night. I wrote you this morning for last night we were going down to the Engineers Harvey was not quite ready and my feet pained me so I went into the bedroom and took of my shoes the bed looked so good to me I
437 lie down on the top with my cloths all on and dident wake up till 12. & I then put on my nightie and again retired I was so tired could have slept standing.

Well dear I hope by this time you have received your Birthday present and like it it is guarinteed sterling so ought to be good the Glass is small but could not find a larger one here in an expensive set could have got one in a thousand sets of sheap but pretty sets. but didnot think them good enough for you however you may look around in town and find you a better glass to go with it that is a larger one.

Well dear it is late and must not sit up to late tonight for I need the rest am verry sleepy.

438 But dear you ought to see me eat can digest ten penny nails.

Am not able to wear my lower teeth at all think Decker did me a bum job. the upper hurts me yet and besides they are as loose as the D- Well dearest I hope it pleased you to put you on a saliry, but it is not to make you feel under obligations but indipendent and dear if you attend to business while I am gone you ought to have it. With love and kisses to you and love to Mother Hello to all the rest. **Hugs Kisses Kisses Hugs**

Hubbie

Digitized by Google

Ex. H. 23 and Ex. H. 24

439

EX. H. 23.

Ex. H. 23 is an envelope postmarked Schenectady, N. Y. Jun. 3, 1905, 7 A. M. and addressed tonight for I need the rest am very sleepy.
Mr C. N. Hinman, Binghamton, N. Y., R. F. D. 4 and bearing the card of Hinman & Sproul.

EX. H. 24

(Written on letterhead of Hinman & Sproul)

Schenectady June 1st, 1905.

Mrs C. N. Hinman, 440
Binghamton, N. Y.

My dear Wife -

Your letter of Wensday at hand received just before supper.

Am sorry you had trouble with Pat but you must insist no back talk be carefull what you say dont say much think it all over before you talk and then if they give you any work, tell them to get and if you tell them to see that they do get.

Well I see you think it is a pudding to be a contractor but dear it is all work if you make it pay and we are not going to get rich on our first contract but will I think do quite nicely.

Am not going to write much to night for cant think of much to say. there is nothing for me to 441 tell you and nothing you care anything about.

Well I have not took a drink of anything stronger than coffee and neither have I took a Chew either, have not been out of a night except down to the Parker Building to see the Engineer.

So you see have been quite a good boy if I am away from home.

Well dear be good dont worry keep cool dont

Digitized by Google

442 fret things will come our way after a while and when they do will make it up **bey.**

Give my love to Mother hug old Grove rember me to Ray and Dan with love and kisses to my **sweetheart** by by.

Hubbie.

EX. H. 25.

Ex. H. 25, is an envelope postmarked Schenectady, N. Y., Jun. 5, 1905, 7-30 A and addressed Mrs C. N. Hinman, Binghamton, N. Y., R. F. D. 4,
443 and bearing business card of Hinman & Sproul.

EX. H. 26.

(On letter head of Hinman & Sproul)

Schenectady June 1905

Mrs. C. N. Hinman,
Binghamton
N. Y.

My dear Wife.

Yours of even date at hand and am sorry in one way you miss me so much. but dear we are going to school again and the lesson we are learn-
444 ing is the best thing for both. you must not worry, "dont" "fret" keep cool. you must not get excited for it will do no good. Just be your own sweet self and be it all the time.

I am inclined to think when you have received my letter that includes the saliry proposition you will not want tohave me home so bad for you know you have wanted to have away to increase your Bank account and now that by the sugges-

Digitized by Google

445

tion enimating from me you see the result has been obtained. and when I come home dont you see you will loose your saliry.

I hope you will like your set but by the way you have not said anything about it yet and you should have received it on your Birthday.

Now dear, because Mrs Roice died that is no reason that any one else ever will. Father time gets us all sooner or later and I hope in our case it will be later at least I am going to live to be 10000 years if I live a minute.

When you write to Pearl send my love and kisses to her and say from me if I had her here I would squeeze a pup out of her. She is all to the good.

446

Well dear I will try and run home next Saturday night if possible I think the work will be far enough along to allow me a few days could not stay more than till Monday night if I do come, but if all goes well will try and be with you then.

We are going to Amsterdam to-morrow to look up a job let Tuesday and are going bid on that.

The work is getting a little better and am not working so hard now and am tough as a bear and eat enough for two.

Well sweatheart good bye be good dont worry for when I come home you must look sweeter than honey or I shall be dissapointned love to all and kisses and hugs to **you.**

Hubbie.

447

EX. H. 27.

Ex. H. 27 is an envelope postmarked Schenectady, N. Y., Jun. 6, 1905, 5-PM and addressed Mrs C. N. Hinman, Binghamton, N. Y., R. F. D. 4. and bearing card of Hinman & Sproul.

Digitized by Google

448

EX. H. 28

(On letter head of Hinman & Sproul)

Schenectady, N. Y. June 5th 1905

Mrs C. N. Hinman,
Binghamton,
N. Y.

My dear wife .

I wrote you Saturday and Sunday we were running all day and had to submit bids for a heavy water pipe job to-day and it kept us up till 1. P. M. last night and I had no chance to write you yesterday.

449 And then did not get the work but we figured to clear 2500 on the work and the other fellow was more than that under us.

Well dear if we dont let our foreman go will try to get home for a couple of days the last of the week, however dont expect till I come

I hope you have received your Birthday present by this time and realy like it but dident think you would like the glass but could do no better.

I hope Dan got back as he said he would so it dident make you any extra trouble it seems so odd not to get my callings any more you have no idea how I miss them but when we get back together again we must cut them out dear for life is to short to have our trouble that is trouble between ourselves.

450 Well I hope you are well and enjoying life as well as you can and by this time are not worrying about yours truly, for am tough as an ass have no pains but legaches feet aches and that tired feeling, and heavens dear you would fall dead to see me eat.

Well good bye sweetheart asking you to say something kind to Mother rember me to Ray & Dan and the rest and to yourself all my love and kisses. and that you will think kindly of your absent one.

Hubbie.

Digitized by Google

Ex. H. 29 and Ex. H. 30

451

EX. H. 29.

Ex. H. 29 is an envelope postmarked Schenectady, N. Y. Jun. 7, 1905, 8-30AM and addressed Mrs C. N. Hinman, Binghamton, N. Y., R. F. D. 4.

EX. H. 30.

(On letter head of Hinman & Sproul)
Seal Dans letter before giveing it to him if you do.

Schenectady, June 6'' 1905

Mrs. C. N. Hinman, 452
Binghamton
N. Y.
My dear Wife.

Yours of Sunday at hand and was more than sorry you are feeling so badly. now dear I have only been gone three weeks and believe me I realy think it is the best thing that could happen to both for dont you think we are both a little imperfect, but I do hope it will be a lesson to both of us to bear with each other more try to give way a little both of us and struggle to make every minute count for happiness and home. So dear congratulate yourself that this has happened for it will lead to happiness for both. there were times when we were drifting away from each other 453
because we did not appreciate our opportunity for happiness. The moral is our life is what we make it.

Well dear I have enclosed a letter to Dan you may read it and if you think it best give it to him at your own pleasure in relation to the matter. I also included a letter to Mrs Darrow. you may hand that to Dan if you do the letter. on the

Digitized by Google

454 other hand you may use it yourself if you want to they must understand they have you to deal with in my absence.

Well dear I will have to say good bye am glad if I have won my case but have not heard anything about it. So it is all news to me should have thought Ray could have gotten the paper for you.

Anyway if it is true I congratulate you for you can have more that you ought to have now as far as I am concerned could have stood it but for you it would have been a hardship.

Well sweetheart rember me to Mother say hello to the rest and love and kisses huggs squeeses and sweets for yourself will close.

455 Hubbie.

EX. H. 31.

Ex. H. 31 is an envelope postmarked Schenectady, N. Y., un. 8, 1905, 1-P. M. and addressed Mrs. C. N. Hinman, Binghamton, N. Y., and bearing business card of Hinman & Sproul.

EX. H. 32

(On letter head of Hinman & Sproul)

456 Schenectady June 7'' 1905

Mrs C. N. Hinman,
Binghamton,
N. Y.

My dear Wife.

Yours received and was pleased to hear from you

Digitized by Google

Ex. H. 32 and Ex. H. 33

457

I have written Murray and Co. the letter that I think will produce results. so think you need not worry about your wagon any more.

I think Dan means all right but have that temper that needs some one that hasan even one to get along pleasantly with him .

Now dear I will come home as soon as it is possible we have had a strike on the works but have weathered it and are fairly moveing again.

We have let our foreman go and it leaves us in bad shape for me to leave but I think it will be possible for me to get home soon.

It is raining here and dont let us work only about 3/4 of the time.

I am comeing to Bing to see what the prospects 458
are for doing the Paving and any concrete work they have in view.

There is two big jobs here that we will bid on and we may get one of them if not it means sidewalk work and walls if so can get more work in Bing and are going to try it there.

You are doing nicely could not do better, you could not help but do lovely anyway.

Well good bye sweetheart will be with you soon. say love to Mother remberance to all and love kisses and hugs by the thousand to my ownest own.

Hubbie.

459

EX. H. 33.

Ex. H. 33, is an envelope postmarked Schenectady, N. Y. Jun. 15, 1905, 7 AM. and addressed Mrs. C. N. Hinman, Binghamton, N. Y., R. F. D. 4.

Digitized by Google

460

EX. H. 34.

(On letter head of Hinman & Sproul)

Schenectady Jun 14" 1905

Mrs. C. N. Hinman,
Binghamton,
N. Y.

My dear wife:

there are no news for you at this writing. I arrived on schedule time and am O. K.

Was to tired to write last night and went to bed immediately after supper. and am feeling fine.

It is now 10.05 and Harvey has just gone to Corning to bid on a job he goes through Binghamton at 4 A. M. to-morrow morning before
461 I can post this letter. so he will be back before you receive this.

Well sweetheart hope things are well with you. and not so bad as you thought they would be.

We I think will finish sooner than I thought when last I talked with you, but it will not beat you out of comeing up am so tired will close asking you to say my kindest to Mother rembered to Dan and Ray excuse pencil and love dont worry keep cool dont work to hard and let me know if they bother you mornings, so sweetheart good by my **own own love** from your sweetheart

Hubbie.

462

EX. H. 35.

Ex. H. 35 is an envelope postmarked Schenectady, N. Y., Jun. 16, 1905, 8-AM and addressed Mrs C. N. Hinman, Binghamton, N. Y., R. F. D. 4., and bearing business card of Hinman & Sproul.

Digitized by Google

463

EX. H. 36

(On letter head of Hinman & Sproul)

Schenectady N. Y. June 16"
1905

Mrs C. N. Hinman,
Binghamton,
N. Y.
My dear Wife.

Well there has been another day of heat sweat and profanity that has passed since I wrote you and am still alive and in good health.

Harvey had not gotten back yet so dont know whether we have the job or not.

464

There is nothing new we are getting along nicely and hope to get through sometime.

Am verry tired and have not worked either.

It is 10 P. M. have sat on the back porch and told stories and smoked. so you see my amusement has been inocent.

Have been thinking of you more than usual I suppose because it has been so recent since I left you and we had so good a time and everything was so delightfull in fact cannot rember when home seemed so much like home as it did this time with you and sweetheart think we have discovered the that unlocks the door of happiness and content dont you, realy dear you dont nor can I tell you how much happiness I enjoyed with you in my short stay.

465

I seems to good to be true and dear believe me if the time ever comes when I do come back for good and all am sincerely going to keep on as we have now begun for life is to short to live it in any other way dont you think so for if we can enjoy such a short time in the way we did there is no use of passing bad half hours is there.

Well enough of sermonizing, hope you are not

Digitized by Google

466 worrying and are getting along fine. give my love to Mother remember me to Dan, Ray and the rest and to yourself my ownest own all the love and kisses hugs squeeses if you like them I posess so sweetheart good bye by, by for a short time till you come up and will make a Dago or a Dogo for you I mean a Dago work for you.

Hubbie.

EX. H. 37.

467 Ex. H. 37 is an envelope postmarked Schenectady, N. Y., Jun. 20, 1905, 8-30AM and addressed Mrs C. N. Hinman, Binghamton, N. Y., R. F. D. 4.

EX. H. 38.

(On letter head of Hinman & Sproul)

Schenectady June 15'' 1905

Mrs C. N. Hinman,
Binghamton,
N. Y.

Your letter received to-night and was glad to hear from you if only a few lines.

468 I think the wagon firm will send thills O. K. However will write them.

Well we have been having the warmest ever. It was so hot here Sunday I nearly died, in fact the last 3 or 4 days have been awfull, but it is verry cool tonight.

I have received but one letter from you since my return and you cant expect me to be hilarious about that.

Harvey and Mrs Sproul went up to Acqueduct

Digitized by Google

469

yesterday and I stayed at home all day and all night, what do you think of that.

Am still being good have not drank a thing since I got back nor neither do I chew am feeling fine and in the best of health, what more is there to expect.

Well dear when are you comeing you had better get D & H mileage and I can use it up let me know and will meet you at any train so you will not be lost in this large City.

How are all the folks have you heard from Leda since and will she stay.

Give my love to Mother rember me to Dan and Roy.

And to you dear all that is best of me for you 470
and you only so sweetheart good by good by it is late and have to hike again in the morning.

With love and kisses to my ownest own that you are well and this may find you so

from

Hubbie.

EX. H. 39.

Ex. H. 39 is an envelope postmarked Schenectady, N. Y., Jun. 23, 1905, 8-AM and addressed Mrs. C. N. Hinman, Binghamton, N. Y., R. F. D. 4.

EX. H. 40. 471

(Written on letter head of Hinman & Sproul)

Schenectady, N. Y. June 22nd, 1905

Mrs. C. N. Hinman,
Binghamton, N. Y.

My dear Wife:

Yours of Wednesday at hand and was glad to

Digitized by Google

472 hear from you. The reason I have not written is because we have been very busy figuring on Contracts and working days we about 800 high of low bidder on 12500 job to-day and Sunday it was so hot here I did not do anything but mope all day and night stayed right here in fact have not been away since my return even at night.

Am glad Ray is coming to help you out you ask if I want you to come up and I say there is nothing I so much desire it will please me more and make me happier than anything on earth for dear while I do not tell you all the time you know the reason for my continuous hustle is for you that you may some time have what you ought to have you so well deserve.

473 I am glad your Garden is nice but I dont want you to work so hard and wont have it let it go to H. you must let up now don't fail Dearest but do as I say in this matter for both our good.

Am so glad about Leda I was going to have you come anyway if she had not come but this simplifies matters so for Schenectady.

You will have to go to the office and get a mileage for mine is not enough for you to make a round trip on so you buy one and I will use it up.

It is to bad about Pearl they should let her come well dear must close it is 11:00 cant find my check book but will send it to-morroe find enclosed Check for you to deposit your account.

Well sweetheart good-bye till I write again
474 my love to all and kisses and hugs to my own.

Hubbie.

EX. H. 41.

Ex. H. 41 is an envelope postmarked Schenectady, N. Y. Jun. 29, 1905, 10-PM and addressed Mrs C. N. Hinman, Binghamton, N. Y., Dan Lord, Binghamton, N. Y., R. F. D. 4.

Digitized by Google

Ex. H. 42.

EX. H. 42

475

(Written on letterhead of Hinman, & Sproul)

Schenectady, June 25th, 1905

Mrs C. N. Hinman,
Binghamton, N. Y.
My dear Wife -

That I was more than surprised when I reached Loarbacks and found you gone and my God dear you don't know how I feel, for you to go was inevitable that I expected and was prepared for but to have you go and I not there to say good-bye sweetheart I can heardly see the lines, however dear will say no more about it for the Page is now wet with tears.

476

Harvey broke his glasses and had to come up and have them fixed so told him to see you but he wrote instead he thought it was all right so dont blame him but sweetheart it will never occur again so if you can forgive me dear for I meant no wrong it will ease me up a little anyway so write me what you think about it in your first. Tell Leda she has given me the keenest enjoyment of my life and from the bottom of my heart I thank her some time it may be my pleasure to favour she had done me there are few sisters that would do so much and tell her there will always be a spot within my heart that will keep warm my thought and feelings for her kindness an courtesy to us and allowed me the great boon of having you with me even for so short a time and say to her she has made a true friend and if it should be in my power to return the great favour done even though it be in the distant future will consider it in the line of a personal obligation if she will grant me the opportunity. Send my love to Pearl rember me to Lidas Boys Ray & Dan give Mother my love and to you dear my eyes are full agan and must stop

477

Hubbie.

Digitized by Google

Ex. H. 43 and Ex. H. 44.

478

EX. H. 43.

Ex. H. 43 is an envelope postmarked Schenectady, N. Y. Aug. 7, 1905, 9-PM and addressed Mrs C. N. Hinman, Binghamton, N. Y., R. F. D. 4. and bearing the business card of Hinman & Sproul.

EX. H. 44

Schenectady Sunday 1905

My dear Wife:

Yours at hand and am sorry you worried over the collision as I was not injured at all and am all
479 right and hustling.

It is now 11:10 P. M. and had just gotten back have been away all day with Harvey getting ready for next weeks work.

Well found evrything in good shape here and expect to be in Watervleet in about 2 weeks.

We have lots of work for the present and expect will be buisy for a long time.

There is no news to write you all send their love.

It is so late will make this short give my love to mother respects to Dan Roy and Ray lots of kisses and love to Pearl. and tell her if she were here would squeese her hard.

And to you be even dont worry keep cool dont fret for that only hurts you and can do no good.
480 be kind to mother dont let anything she may do raise your anger so you will be cross with her for she is old and you ought to have better judgment than her.

Well good by sweetheart try and do as nearly as you can as I want you to if it is hard for you know how much you are to me but you dont know how much it hurts me when you dont.

by by with kisses.

Hubbie.

Digitized by Google

Ex. H. 45 and Ex. H. 46.

481

EX. H. 45

Ex. H. 45 is an envelope postmarked Schenectady, N. Y. Aug. 10, 1905, 11-30A and addressed Mrs C. N. Hinman, Binghamton, N. Y., R. F. D. 4, and bearing business card of Hinman & Sproul.

EX H. 46.

(On letterhead of Hinman & Sproul)

Mrs Sproul says those berries I brought tasted lovely.

Schenectady N. Y. Aug. 9" 1905 482

Mrs C. N. Hinman,
Binghamton,
N. Y.

My dear Wife -

Am at this writing mighty tired but want to say something to you.

Pearl wrote me you were ill dear and am so sorry it was on account of that old Barn and it was not worth it, so when anything like that happens no one can help it so there is no use of worry. if it had been one of the others there you are we were lucky let it go and be darned.

Had it been carelessness and we had lost $10.00 then would not have blamed you if you had worried. so let the tail go with the hide and keep cool 483
and you will be better for it. and life will be brighter for all.

Well dear I have enclosed something that will I think please you much we have the best of reasons to think we will clear $4000.00 or $5000.00 on the deal. in fact there is no reason why we should not make a lot of money on the contract any old way, so cheer up for we will be to the good anyway.

Digitized by Google

Ex. H. 46.

484 Tell Pearl I was more than happy to hear from her and that it was more than nice of her to write although only a few lines and those not only nicely written but well spellen and the sentences well connected.

Tomorrow I have the honor of calling on the General Electric as well as the Schenectady Street Railroad to negotiate for work. am I not getting to be a hell of a fellow. (well I guess)

Well the store on Broadway Albany of John G. Myers Co. where you purchased some of the stuff you took home has collapsed and they claim at this writing 30 killed and hundred wounded, nearly all girles, and my god is it not awfull. Pearls awful is beat to a finish.

485 Well sweetheart am verry tired so if you will excuse me will quit.

You may say at your discretion that is if you think it best that I took the matter of bringing him up here up with Harvey and he thinks him to carless and he objects to his profanity but we will have so much work on our hands soon think I can work it out all right by taking Dan with me any way if he still wants to come will do the best I can.

Remember me to Ray Roy with love to Mother.

Kisses to Pearl and to you dear all that you could wish with the hope that my health may not nor my intelligence weaken for I am going to make enough so you can have all things as you
486 want them or am going broke and then will work by the day if there is money to be made out of these contracts am after it and looking for more.

I have made up my mind to go the limit to win and if I have the brains to succeed you shall have all my income will permit for dear it hurts me in fact I feel so about it that dear I would rather loose it all and begin over than to longer keep at the slow but sure thing. for would be only miser-

Digitized by Google

487

able till you had things as you want them. so you may from look for big things of utter failure.

Well dear our prospects are much improved we have an excilent reputation the people hear look upon us as square business men and treat us as such the last contract was given to us on account of the good work done by us on our late job. we were only $195.00 lower than Degraff & Degraff and they reside in Scotia where the job is to be done and if they had not wanted us to have it they would have given it to them.

Well sweetheart good bye with hugs and kisses from your own true boy

Hubbie.

488

EX. H. 47.

Ex. H. 47 is an envelope postmarked Newton, N. J., Oct. 3, 1905, 11-30AM and addressed Mrs C. N. Hinman, Binghamton, N. Y., R. F. D. 4., and bearing business card of Hinman & Sproul.

EX. H. 48

(On letter head of Hinman & Sproul)

Oct. 4th 1905

489

My dear Wife.

Well am here and arrived in fine fettle for the battle that is but a few hours off in fact have had a preliminary skermish already.

Well dear it rained to beat the band last night did you get wet before reaching home. I hope not.

There is no news to write you so this will not be

Digitized by Google

490 verry interesting am afraid for you dear. I have met some of the people here already and am inclined to be hopefull that it may be well for us to-night but can not tell.

Well sweetheart good bye have got to hustle this now 10:40 am so you see am keeping my word about writing to you with a vengence.

Well sweetheart that the clouds of our evenings darkness may be driven away by the sunshine of our comeing hapiness and that soon we will be reunited for months and that instead of looking at tomorrows gloom let your mind rest upon the next months hapiness if we are in a mind to have it so and by the cheerfullness derived from that tide over the present gloom.

491 With love and kisses to my ownest own sweetheart and best wishes to the boys and Mother will have to close.

Hubbie.

EX. H. 49.

Ex. H. 49 is an envelope postmarked Newton, N. J., Oct 6, 1905, 4-30PM and addressed Mrs C. N. Hinman, Binghamton, N. Y., R. F. D. 4., and bearing business card of Hinman & Sproul and Hotel Newton, Newton, N. J. written under it.

492

EX. H. 50.

(On letter head of Hinman & Sproul)

Newton N. J. Oct. 6th 1905

My dear Wife.

Yours Received by last mail. and you can though I am not ususly demonstrative the news

Digitized by Google

Ex. H. 50.

could not help but produce some emotion on my part. 498

Of course we both wanted to win from a financial standpoint but that storm we could have weathered. The main issue, however, with us was our honor to a certain extent was pledged in the case at issue. that is had we been beaten in the final decision it would have looked as if we had deliberately tried to beat a woman out of her first rights and for all times it would have been thrown up to us if not openly then behind our backs.

But by this decision rendered by the Court of equity, makes it final, and says to all men and women that our cause was **just**, and that we were the agressed and not the agressor. That we were 494 simply resisting persecution and fighting for that principle held most dear to all by evry man in any civilised country that is justice with honor, and by this decision rendered by the highest Court in the State leaves our honor untarnished and our rights secure.

And further more I congratulate myself that this decission rendered by the Court clears up the way to our united hapiness for I will now feel that I can do **things** that **before** I considered a hardship, so dear, for your sake I feel the greater pleasure although putting it in near the last for it will help me to do for you what it will give me the greatest joy of all for believe me dear you come before all and it is all for you, and therein 495 lies my **greatest joy**, for I can now hand to my ownest own my name untarnished and reputation secure.

And another pleasure is that it was your hand that forwarded the glad tidings.

So be of good cheer dont crow dont get glad but simply say simple **justice has been done** and that we were certain we could get it if we went to a

Digitized by Google

496 high enough Court, and make light of it as if it was of but little moment to us eitherway. So good bye sweetheart till my next with love to Mother and kindness to Ray and Roy and tell them I expected great things of them, and kisses hugs and love to you.

Hubbie.

EX. H. 51.

Ex. H. 51, is an envelope postmarked Newton, N. J., Oct. 9, 1905, 6-30PM and addressed Mrs Chas. N. Hinman, Binghamton, N. Y., R. F. D. 4, 497 and bearing business card of Hinman & Sproul.

EX. H. 52.

(On letter head of Hinman & Sproul)

Hotel Newton Newton N. J. Oct 8 1905

My dear Wife,

Yours of this morning at hand was more than glad to hear from you but did not receive the paper in relation to Marys case, but can see same when I get home if I ever do.

Have been working all day and have not had 498 supper yet the gong has just rung and time is short for want to get this out on tonights mail.

So good by love rember me to Mother and dont forget my two sons, R. & R. with love kisses and hugs to my ownest own good bye sweetheart good bye.

Hubbie

Digitized by Google

499

EX. H. 53.

Ex. H. 53 is an envelope postmarked Newton, N. J., Oct. 9, 1905, 9 AM. and addressed Mrs Charles N. Hinman, Binghamton, N. Y., R. F. D. 4., and bearing business card of Hinman & Sproul.

EX. H. 54.

(On letter head of Hinman & Sproul)
Hotell Newton
Newton N. J. Oct 2 1905

My dear Wife.

500 Am sorry it is not my privilege to say kind things of your to-days letter, but in fact the letter has, as yet, not materialised, but am congratulating myself on my good luck in getting a half dozen lines.

Now if you rember you were quite explicit, in relation to writing, and am sure you are to be most heartily thanked, for your constancy, it seems in this case, out of sight, out of mind, and if you approve, why there is nothing to do but bear with fortitude the ommission.

Well am well, putting in all my time, prospecting for land, but the results are not as satisfactory as I could wish, but the boreing tool has arrived now so am not so much at sea as I have been and in the next two or three days expect to produce 501 results if I cando what I want to it will be time well spent if not wasted.

I am fairly well situated here and will stay on at least for a short time yet.

The object is to prod the committee in charge to get controll of the land, where the Purification Plants are situated, this, they have not as yet done. but am jaming them hard and it is produc-

Digitized by Google

502 ing results, in fact think in a few days at most will be able to commence work here.

Harvey wrote me he would like to have me take charge of the work at Schenectady, and of course if it is best, why, I will go there, but if we can secure a competent foreman to do it will remain here, for although a small town I like it here as it is quiet and the people are friendly and am making many friends.

Well this is Sunday and am in my room thinking of you as I write and dear I have been to the Post Office nearly evry mail looking for letters from you that never come.

The weather here is quite cold in fact the nights are chillie and you know how warm I am
503 dressed so am not leaving any of my cloths off.

Well I hope alls well with you and you must be haveing a good time or you would have time to write me.

but good bye sweetheart love to Mother my best wishes to the Boys and again love, kisses, hugs, and sweetest thoughts to you although you have forgotten me.

Hubbie.

Ex. H. 55.

Ex. H. 55 is an envelope postmarked Newton, N. J., Oct. 16, 1905, 6 A M and addressed Mrs
504 Charles N. Hinman, Binghamton, N. Y., R. F. D. 4, and bearing business card of Hinman & Sproul.

EX. H. 56.

(On letter head of Hinman & Sproul)
Newton N. J. Oct. 15th
1905

My dear Wife.

This is Sunday and have just had dinner am feel-

Digitized by Google

505

ing a little blue stomache a little off and so am not in good fettle.

Well I broke ground yesterday for the first and only had one team but have five tomorrow the weather here is fine at the present but they tell me today to look out for a storm soon, if it does hold fine and I get plenty of help will make a showing in a week or to.

I have just gotten back from the plants as I left my glasses on my coat yesterday afternoon and when I picked it up last night they dropped off and did not miss them till I got to the Hotell and then it was dark. So went down this morning and looked till I found them and dont think I will do it again.

506

Am all alone on the job at the present Harvey being at Schenectady and am trying to do the best I can. I held scraper all day yesterday and carried out sods on my arms so you see am exercising some.

Your last letter said the new man was monkeying dont stand it if he dosent do what is right let him go try to get some one in his place before but let him go any way if he is gay.

Tell Ray to do as he had ought to for his own sake as well as mine for as he does by me I will do by him that is if he does well for me I will return the compliment. it is up to him and for him to decide not us I thought when I left you would have no trouble with him for the time is so short when he can go with us that if he wanted

507

to go he would have a double incentive to excell. and if under these conditions he will not try then he would be a failure after it will be a pity if he does fail us like Dan for if Dan had stuck see what he would have had now we have nine months work ahead now but dont worry dear for the time is short do the best you can and not overwork let things go that tar you beyond your endurance

Digitized by Google

508 for after this year we want to take some comfort and to enjoy life one must have health.

Tell Roy to keep his head level and do the best he can for he has a heap to see to and if we avoid loss he must look sharp.

I expect to be held up here by an injunction here but if I excape that shall rush work.

Hoping Mother is still on the gain or better well sending love to her and best wishes to Roy & Ray and sincere love kisses hugs squeeses to my only love that the time may be shortened till we meet again and that no clouds darken the horison of our heaven of affection with again kisses x x x x x and another squeese.

Hubbie.

509

EX. H. 57.

Ex. H. 57. is an envelope postmarked Newton, N. J. Oct. 18, 1905, 6 AM and addressed Mrs C. N. Hinman, Binghamton, N. Y., R. F. D. 4., and bearing business card of Hotel Newton.

EX. H. 58.

(On letter head of Hotel Newton)

510 Newton, N. J., Oct 17 190—

My dear Wife.

Your just received. and was overjoyed to receive one letter last night and another tonight. did not receive yours untill I had written but did tonight.

Digitized by Google

Ex. H. 58.

511 Am sorry you are having trouble with Mother I know she is somewhat of a task for you dear but do the best you can for believe me I appreciate it all but there are things we all feel and dear I know she tries you to the limit but she is my mother and that is all I can say to you for I appreciate the conditions as they exist and believe me wish most sincerely I could make them different.

Am excavating here for the Plant and while working under difficulties am making fair progress.

And dear believe me just as soon as Harvey comes will take a run up and see my ownest own but till he gets here am of course tied to this point he will come as soon as he can get here and 512 that is as soon as he can get the work finished at Schenectady. I may have to go there to finish it for the people are yelling like mad for me to show up. am working 10 hours a day now and no time to enjoy life on the side so have to be good. and you of course appreciate that. I think we have a good thing here although it is soon to make an estimate but think it looks fine.

I would give a goodeal to be with you tonight sweetheart but its impossible so have to make the best of it and dear you must know it is true or I would not write you evry night when I am so tired if it was not true. but will be with you as soon as possible and will write you the earliest possible moment. I received the coat O. K. 513 thanks to you. Well dear give my love to Mother rember me to my bys say to Ray not to be cross for I think better things of him and to Roy I appreciate all he is doing.

And pet remember that you and you only hold all my affection now and always, so with love kisses hugs and affection also

Hubbie.

Digitized by Google

Ex. H. 59. Ex. H. 60 and Ex. H. 61.

514

EX. H. 59.

Ex. H. 59 is an envelope postmarked Newton, N. J., Oct. 17, 1905, 6 AM and addressed Mrs Charles N. Hinman, Binghamton, N. Y., R. F. D. 4., and bearing business card of Hinman & Sproul

---

EX. H. 60.

(On letter head of Hinman & Sproul)

Oct. 16'' Newton N. Y. 1905

My dear Wife.

515 Have just come from work and it is 6.40 and have not had supper yet so must make this short.

I wanted you to know I was thinking of you and that my ownest own was not forgotten.

Give my love to Mother rember me to the boys and sweetheart think of me sometime wont you it seems solong between letters, but I know you have it so hard and dear I sincerely hope it will soon be over so love kisses hugs and my best of thoughts to you and you only.

Hubbie.

EX. H. 61.

516

Ex. H. 61 is an envelope postmarked Newton, N. J., Oct. 19, 1905, 6 AM and addressed Mrs Chas. N. Hinman, Binghamton, N. Y., R. F. D. 4., and bearing business card of Hotel Newton.

Digitized by Google

Ex. H. 62.

EX. H-62

517

(Written on letterhead of Hotel Newton

Newton N. Y., Oct 18th, 190o

My dear Wife

Received your Postal cards to night and they were certainly genuine. Now dont be sillie as soon as Harvey comes will run up for will have to got to Schenectady as soon as he arrives while I would give anything to see you this is a dead town nothing doing that could or would ammuse you but in the spring you can come here with me and we can have the best there is at the present here at the hotell at an expense of Two Dollars a day Colvin the Proprietor is one of the men on the 518
Committee and there were only three and I worked him so feel that I should stay for a while anyway but my god dont want to make it four.

There are some things that are not settled yet that is depth of filter beds and drainage that I need Calvins help to do so cannot afford to go somewhere else to board till that is settled but shall as soon as am out of the woods.

So dear dont run in now anyway for as soon as H comes will run up and stay a few days or if I dont have to stay in Schenectady long you can go up with me and remain there till I come back.

Now dear please in so far as you consistently can please me in this matter for it is far in my 519
opinion best if not the pleasantest am working ten hours a day and not a minute to spare and am doing fine want you to see it that is the plant before it is finished but it will be late in the spring before we can get it done.

Well sweetheart it is bed time and will bid you good night so with kisses, hugs and love to you rembrance to my boys affection to Mother and my love my love my own and only good night good night kisses kisses good night

Hubbie.

Digitized by Google

Ex. H. 63 and Ex. H. 64.

520

EX. H. 63.

Ex. H. 63 is an envelope postmarked Newton, N. J., Oct. 21, 1905, 130 PM, and addressed Mrs. Chas. N. Hinman, Binghamton, N. Y., R. F. D. 4., and bearing business card of Hotel Newton.

EX. H. 64.

(Written on letterhead of Hotel Newton)

Newton, N. J., Oct. 20th, 1905

My dear wife

Yours of the 18th at hand and it gave great
521 pleasure to hear from you.

You say that Ray is stubborn and does not do as he had ought and I say you may say to him that I shall do by him just as he does by me if he doesnt deserving friendship and confidence and does not do in my absence as he would if I were there it is up to him for I shall do by him just as he deserves.

Am sorry Roy drinks but all boys do sooner or later and it is not a great fault for there are many greater.

And dear that you are lonesome of course is foregone conclusion but think of me in this dam town where a turtle would die in twenty four hours the novelty of his Township has worn off and am more than sick of it I assure you but the
522 time will soon go by and then we will I hope be so we can get together all the time for I hope another year we can arrange it with that in view.

It has rained here 20 hours hard and very cold to night and looks as if it would be sharp tomorrow.

Am hustling all the time expect H. the forepart

Digitized by Google

523

of the week and if he comes may run home next Saturday hope so anyway dont you.

There are no news here to tell you about but everything has been dead here for at least 10000 years and am just discerning the stench but of course have to stay here it is lovely.

Well dear you must think am thinking of you some or would not write you every night dont you think so but as a matter of fact you are all and all to me and I may be pardoned for thinking so much.

Well pet it is getting late and must be up in the morning and doing or some one will be doing me so good night remembrance to all and love kisses and usual hugs to my only girl and bestest sweetheart and xxxxxxxxx

524

Hubbie.

EX. H. 65.

Ex. H. 65 is an envelope postmarked Newton, N. J. Oct. 23, 1905, 8 AM, and addressed Mrs Chas. N. Hinman, Binghamton, N. Y., R. F. D. 4., and bearing business card of Hotel Newton.

EX. H. 66.

525

(Written on letterhead of Hotel Newton)

Newton, N. J. Oct. 21th, 1905.

My dear Wife—

It is impossible for me to come home at the present am working the gang and have no chance to get away at least till H comes.

Digitized by Google

Ex. H. 66.

526 You may say to Ray that after this season he may do as he pleases but for the present he must either do as a white man should do or pay from his salary any loss that I may suffer for his negligence. If he is inclined to and does leave he must settle with me for the amount of my loss. It is impossible for me to be held up in such a manner I have a contract envolving 30000.00 Dollars and cannot to come home on account of the Milk Wagon and if he has any manhood in him at all he had ought to take hold and try to do as a white man would.

Well dear have had to lay off to-day and have been running all day to do different things and am more than tired tonight and am going to bed
527 early.

It is cold as the devil here now and my cloths have not gotten in from Schenectady yet so am shivering like the Devil as I write.

Am so dam sick of this town a look at the County Building up on our pike would be like a glimse of heaven to a lost soul, but it is not to be and must be for the best think we will make good and plenty here but it is a tedious wait before the finish am still at the Hotell and will remain here at last untill H. comes.

Am closing some deals here that will materially effect us in the final wind up and will have it arranged so we will not be held up for rains after
528 this I hope for the smaller plant is on higher ground and can work there any time when it is not raining.

The one I am working on now is so low that water stands in the beds when it rains the least bit it looks like a long spell of good weather now and hope to push for if we can complite the beds this Fall it will make 2 or 3 Thousand difference with us in the windup so you see the object of

Digitized by Google

529

push at the present time and the imperative reason why I cant come hom now but be of good cheer for when I do come will make up for lost time so good by sweetheart for a few hours till my next letter. I wrote you one last night failed to put a stamp on and stamped it from the Post Office to day. sending my best regards to my two sons love to Mother and you usual kisses xxxxx to you with only the wail of how I miss you and how glad I would be to be with you tonight so again kisses xxxxxxx kisses xxxx hugs and love to sweetheart good bye good night goodnight.

Hubbie.

EX. H. 67. 530

Ex. H. 67 is an envelope postmarked New York. N. Y. Sta. 1, Oct. 22, 1905, 12-PM and addressed Mrs Chas. N. Hinman, Binghamton, N. Y. and bearing business card of Hotel Newton.

EX. H. 68

(Written on letterhead of Hotel Newton)

Newton, N. J. Oct. 22d, 1905

My dear Wife—

I have been loafing around all day and the most dreary of days the sun seems to have or has comitted some crime against the State and for punishments sake has kept in hiding for the last three days the clouds hand low and it looks like snow so you can imagine what my spirits are when sunshine at home with you is the only time when life is worth living but we will rush the work here and in the rushing make the time shorter for our uniting. 531

Digitized by Google

Ex. H. 68 and Ex. H. 69.

532 I wrote you a letter last night but it was so late it lays over in the mail box opposite and will accompany this letter to you so instead of your receiving it Monday there will be a pair for you to bother with Tuesday.

I have been out today looking up a stone quarry and am now freezing in the Hotell. Did not get up this morning till late so am feeling with the weather added grogy but tomorrow will find me again in the harness with no time to think of home and sweetheart till the whistle blows for six then the old longing returns but dear we must bear till the time of our liberation from Prison has passed and we are reunited to separate no more.

533 This Town is isolated to that a strange Dog on the street attracts attention so you can see what a jolly time we have here all to ourselves.

Mr Wiliams is going to New York City so will send this by him and must cut it short so good by sweetheart kisses rember to all Kisses x x

Hubbie.

EX. H. 69.

Ex. H. 69 is an envelope postmarked Newton, N. J., Oct. 24, 1905, 6 AM, and addressed Mrs Chas. N. Hinman, Binghamton, N. Y., R. F. D. 4.,
534 and bearing business card of Hotel Newton.

Digitized by Google

Ex. H. 70, Ex. H. 71 and Ex. H. 72.

535

EX. H. 70.

(Written on letterhead of Hotel Newton)

Newton, N. J., Oct. 23d.,1905

My dear Wife—

I have but a moment but am going to rember you.

I have to go out and look for men and teams so will have to make this short. Am well and working Harvey has not yet arrived.

My ground is condition the men here are not worth a dam and will have to get Dagos I guess.

Well sweetheart you must know I wrote to Ray I dont know what he will think of it but thought it best.

536

Tell them I place my faith in them and believe in them and don't believe they will fail me.

To Mother hullo Melissia.

And to my ownest own all my love confidence and sincere affection so kisses, hugs, lovings and more kisses x x x x x x x sweetheart good night.

Hubbie.

EX. H. 71.

Ex. H. 71 is an envelope postmarked Newton, N. J., Oct. 25, 1905, 6 AM and addressed Mrs Chas. N. Hinman, Binghamton, N. Y., R. F. D. 4., and bearing business card of Hotel Newton.

537

EX. H. 72.

(Written on letterhead of Hotel Newton)

Newton, N. J., Oct. 23d., 1905

My dear Wife—

Your Postal card received and was delighted to received a token from you.

Digitized by Google

Ex. H. 72, Ex. H. 73 and Ex. H. 74.

538 Have been holding wheel scraper to day all day so you see am working some could not find men so had to do it myself.

Am in fine health but very tired so am going to bed at once, it is raining here now and it seems the elements are against me but am putting up a hard fight.

Hoping this finds you in true health and spirits and taking life more easy than your wont for sweetheart dont work too hard let some of it go and take more leisure dont worry and take as much comfort as you can so give my regards to my two sons and rember me to Mother and sweetheart my own to you your kisses my love and hugs and all my best thoughts for dear my all is you
539 so good night good night my love good night.

Hubbie.

EX. H. 73.

Ex. H. 73 is an envelope postmarked Newton. N. J., Oct. 26, 1905, 6 A. M. and addressed Mrs Chas. N. Hinman, Binghamton, N. Y., R. F. D. 4.. and bearing business card of Hotel Newton.

EX. H. 74.

540 (Written on letterhead of Hotel Newton)

Newton, N. J., Oct. 25th, 1905.

My dear Wife—

Yours received and was glad to hear from you.

Now in regards to those dancing lessons just be carefull how you take them am glad for you take them under certain condition conditions and

Digitized by Google

you know without my saying it what I mean so 541
be carefull dear for you know there is only one thing I demand of of you and if you should pas that mark I will not be answerable for the consequences.

So I charge you to be carefull who you take of and who you associat with. I am no prude as you well know but as I have told you often I expect great things of you and ask you to use care and discretion in your movements as I am gone and you must not get talked about.

Well dear I cant get home Sat that is it does not look like it but will wire if can.

So good bye sweetheart my love my own remember me to my two sons love to Mother and kisses to you sweetheart. 542

Hubbie.

EX. H. 75.

Ex. H. 75 is an envelope postmarked Newton, N. J., Oct. 28, 1905, 6 A. M., and addressed Mrs Chas. N. Hinman, Binghamton, N. Y., R. F. D. 4., and bearing the business card of Hotel Newton.

EX. H. 76.

(Written on letterhead of Hotel Newton) 543

Newton, N. J., Oct. 27, 1905

My dear Wife—

I have only a minute for it is 11:30 P. M. and have been going since 5:45 A. M. so you see must make this short.

We had a carload of stuf come in to day and have had to do with that and a conference to night

Digitized by Google

544 with another Contractor and have got to go to bed or die.

So asking to be rembered to my sons love to Mother and to my sweetheart love, kisses and her usual hugs.

Hubbie.

EX. H. 77.

Ex. H. 77 is an envelope postmarked Newton, N. J., Nov. 1, 1905, 6 A. M. and addressed Mrs Chas. N. Hinman, Binghamton, N. Y., R. F. D. 4., and bearing business card of Hotel Newton.

545

EX. H. 78.

(Written on letterhead of Hotel Newton)

Newton, N. J., Oct. 31st, 1905

My dear Wife—

Yours at hand was so glad you had at last written me but your letter again makes me feel badly for dear you know am going to Rent and try to arrange so you can at least be with me most of the time and dear you might imply that I dont care for you as much as I ought or I would not

546 leave you the way I do. Now dear we stand to make or loose on this contract and am doing the best I can for all that we are separated and that it is a dam shame is a self evident fact but that the time is short that it will be so is so evident that I want you to help me dear and not make it harder that you can help for God knows it is bad enough here in this dam town of 4500 inhabitants

Digitized by Google

547

to make an African God turn to a gloating Devil.

If you only know how badly I want to see "Bing." again let alone you, you would not question my love to you for it is evident that I would not write you every night even when I dont get a letter from you for sometimes a whole week that if I were not thinking of you I would not do it. Sweetheart you cant and dont realise how dear you are to me or you would not love for you.

I am more than sorry dear that you have been ill and regret it more than I am not able to be there to take care of you but if the time ever comes when we can be together again we will make this up for we have our lives to live and by the Gods of love we will live it yet so that we can enjoy some part of it.

548

H will be here I think Thursday and if he does will be with you Saturday but if he fail will come as soon as he does but can stay but a verry short time as we must get the beds in shape for Sand and gravel this winter.

Am so tired tonight that can hardly sit up riding that Pony Sunday and pulling on those Horses and Mules have lamed me so can hardly get around and have to work evry day.

I have not slept well lately as I wanted so to see you again dear that is the reason of my restlessness for when I wak am thinking of you and it seems to me some may happen to drift us apart but cheer up will be with you at the earliest moment if only for a moment rember to my two sons love to Mother and Kisses x x x x x x to you sweetheart.

549

Hubbie.

Digitized by Google

Ex. H. 79, Ex. H. 80 and Ex. H. 81.

550

EX. H. 79.

Ex. H. 79 is an envelope postmarked Newton, N. J., Nov. 2. 1905, 6 A. M., and addressed Mrs Chas. Nelson Hinman, Binghamton, N. Y., R. F. D. 4., and bearing business card of Hotel Newton.

EX. H. 80.

(Written on letterhead of Hotel Newton)

Newton, N. J., Nov. 1st, 1905

My dear Wife

Harvey has not yet come but have written him and he will come I think have not heard from you but hope you are better am still at it and doing
551 all I can for if we can get the beds ready this fall it will mean at least $3,000 on the contract more than we can get out of it if we have to wait till spring so you see it is imperative for us to hustle.

Well sweetheart cheer up I want to get home even though it be but for a short time worse than you want to see me and will come on the earliest possible moment so dont worry pet I am coming at least soon and will make it Saturday of the Gods will only permit and have just written a rotten letter to H. and think it will produce results so keep of good cheer and will do my best to be with you soon.

Hoping you are well and sending love to Mother and trust and confidence to my two sons and to
552 my only love love, kisses, hugs and all the the most loving thoughts good night good night.

Hubbie.

EX. H. 81.

Ex. H. 81 is an envelope postmarked Newton. N. J., Nov. 3, 1905, 6 AM, and addressed Mrs Chas. Nelson Hinman, Binghamton, N. Y., R. F. D. 4., and bearing business card of Hotel Newton.

Digitized by Google

553

EX. H. 82.

Written on letterhead of Hotel Newton)

Newton, N. J., Nov. 2nd, 1905

My dear Wife—

Yours of No. 1st at hand and will try to be home Saturday but am not certain this will reach you Saturday and I most sincerely wish I could say particularly that I am coming but he may not get here in time to turn the work over to him but if he dont he will get all that is coming to him

But the work here needs all the push we can give it till the weather freezes then it will be easier to get away, but regardless of all am going 554
to get to you if it is posible but if I fail love will be with you the ensuing week anyway so if the heavens fall bear up bravely for it will be but one more week any-way dear before I see you. So pet rember this it will be no fault either of the head or heart if I fail you but conditions over which I have no controll that will prevents me seeing you once more.

Give my love to Mother rember to my two sons and my sweetest sweetheart my only love to you my ownest own all my love all my best thoughts and 1000000 xxxx Hugs xxxx hugs xxxxx

Hubbie.

555

Digitized by Google

556

EX. H. 83.

Ex. H. 83 is an envelope postmarked Newton, N. J., Nov. 20, 1905, 6 A. M. and addressed Mrs Charles Nelson Hinman, Binghamton, N. Y., R. F. D. 4., and bearing the business card of Hotel Newton.

EX. H. 84.

(Written on letterhead of Hotel Newton)

Newton, N. J., No. 5th, 1905

My dear Wife—

557 Yours at hand and believe me was more than sorry that I didn't come to you yesterday but we have so much to do here and such a little time to do it in that it seemed at the time impossible.

But you may rest assured that the time is dam short before you will see me again for I am coming to you sweetheart and in a very few days you will see me again so cheer up for this is no josh but the facts as you will find them.

It will take a few days to complete the beds and then for you and you only so you may kill the fatted calf for the wander will son cross his legs under your table and again listen to the voice of the siren from his own fireside.

I received a notice from the Water board of Bing that the water Rent was not yet paid

558 and you will have to attend to it or they will shut off the water.

Our Horses are all better so they will soon be working again in fact will have them all going but one and she will not be going for some time but at least will not loose her. Tell the man that wants to rent that I will soon take the matter up with him.

There is nothing doing here but the same old grind that is damed monotonous and assid from you I long like hell for Home and dear you think

Digitized by Google

559 I dont care but sweetheart you cannot realise how much I want to see you again for I assure you that you are not the only one that is grieved over my absence from home, for there is not a thing on the old place that I done love dear and it seems to me when I am gone that part of me is absent and when the time has elapsed and the time goes by that separates extends to the length that it has this time it has come nearer producing H homesickness than all my time in service.

But what I want to do is to have stop grieving dear and feel joy that I am coming and coming for you and you only, for it will only be a few days now when the wire will inform you of my coming.

Give my love to Mother and my two Sons and 560 say to them be of good cher for the absent will soon be present even though for a short time. So sweetheart good night and not good bye for I am coming to you to you to you and may our hapiness be perfect for dear we have many things to be gratefull for.

Kisses x x x hugs and all my love sweetheart good night that I was only coming with this letter but will soon so Kisses - Kisses good night

Hubbie.

EX. H. 85.

Ex. H. 85 is an envelope postmarked Newton, 561 N. J., Nov. 6, 1905, 6 AM, and addressed Mrs Charles Nelson Hinman, Binghamton, N. Y., R. F. D. 4, bearing the business card of Hotel Newton.

Digitized by Google

562

EX. H. 86

(Written on letterhead of Hotel Newton)

Newton, N. J. No. 5th, 1905

My dear Wife -

Long before you receive this I know you will be so disappointed that this letter will not give you joy but pain, but dear conditions here are such that it is impossible for me to leave at this time and sweetheart I want you to believe me if it had been possible for me to get away would have been home now but we had one car load of pipe to unload yesterday and two to-morrow and the machinery for our hoisting device and screen
563 besides looking after the men at the plant H is here but for a few days there is more than we can both do and if we hire a Foreman we would have to keep him in our pay all winter so you see it is up to us to hustle.

If the weather holds good am going to Newark Tuesday morning to buy three or four Teems so we can get the work along for it is impossible for us to hire decent teems here.

Have not been feeling well for a few days but am better to day have lost weight since I have been here and was never so dam homesick in my life and you can bet your life as soon as it is possible for me to get to you and I sincerely hope and in fact am going to exert evry effort to make it next Saturday but dear you dont know how I
564 have felt to day thinking thinking of you and what I would be doing if I were with you and not in this dam town, but dear I am going to fix things another year so you can be with me if possible and then they can all go to the devil for I begin to think as you do that any place is good enough where you are.

But if you were here you would think it nice as I did for about a week and then you would yell

Digitized by Google

565 like hell for Bing Their Opera House here is over the Post Office and they have had two shows since I have been here and one of those was a Magic Lantern so you see how hilarious we are here and your hubbie did not go to either.

Today has been the lonesomest since I have been here and till after I get home I suppose there will be no let up, but if the weather is good so I can keep working it will help me out so pray for God sake that it will hold good for if it does we will get in shape so I may get to you this week. I hope dear you dont take it badly for again believe me if it had been possible for me to have gotten to you Saturday should so help me God have come.

566 So cheer up sweetheart and make the best for soon we will be together again and then we can make up for absence so love to Mother say hello to my two sons and that I think of them often and want them to be good boys and to you sweetheart love, hugs, kisses forever for all my love centers in you and rember am coming soon to claim my own kisses xxxxx

Hubbie.

EX. H. 87

567 Ex. H. 87 is an envelope postmarked Newton, N. J., Nov. 14, 1905, 6 AM and addressed Mrs Charles Nelson Hinman, Binghamton, N. Y. R. F. D. 4., and bearing business card of Hotel Newton.

Digitized by Google

568

EX. H. 88.

(Written on letterhead of Hotel Newton)

Newton, N. J., No. 13th, 1905

My dear Wife -

Am having a hell of a time have been working day and night for the last six days and am all in. Harvey has been sick and have had the devils own time but he is now better and am going to take it easier for a few days till I get back on my feet.

I know you think it hard dear that I havent been home dear but it has been impossible for me to do so and I want you to believe me and sweetheart if you do it makes it so hard for me for I
569 have never deceived you yet and am doing the best I can this time if the weather turns colder as it looks as if it would to-night I can make Home all O. K. but if it warms up to-morrow then we must make the fur fly till it does tighten up.

Am feeling like hell to-night and hope to get rested so will feel better in the morning so sweetheart good night and rember will be with you at the earliest possible moment.

Give love to Mother rember me to my two sons and 100000 Kisses to my hearts idol my only sweetheart and the only one I love

Hubbie.

Havent even been to the Pst. Office for five days

570

EX. H. 89

Ex. H. 89 is an envelope postmarked Newton, N. J., Dec. 12, 1905, 6 AM and addressed Mrs Charles Nelson Hinman, Binghamton, N. Y., R. F. D. Box 116, and bearing business card of Hotel Newton.

Digitized by Google

571

EX. H. 90.

(Written on letterhead of Hotel Newton)

Newton, N. J., Oct. 11, 1905

My dear Wife -

Your letter at hand that you wrote me before I came Home and believe me am prostrated at the idea of my home being broken up and loosing your own sweet self but I suppose if it cannot be helped must stand it so if you should hear of a suicide in Jersey you may know it is I so wach the Telegraphic news.

Well I arrived safe and things are all O. K. here and am feeling quite well but things are different here that it gives me the dam blues.

572

Well dear am going to New York City tomorrow morning at 7 A. M. on Business so will be out of Newton for one day at least if I had paid attention would have gone and seen Minnie but of course it will be impossible now.

Well I have nothing to write about and so will quit.

Love to Mother my two sons Dan and Lou and to my ownest own the same old kisses love, hugs and my sincere thanks for your kindness to your poor Hubbie for dearest I never it seems to me so supremely happy for so long a time as I was the las time I was with you.

Kisses x x x hugs - -

Hubbie.

573

Digitized by Google

574

EX. H. 91.

Ex. H. 91 is an envelope postmarked Newton, N. J., Dec. 15, 1905, 6 AM, Mrs Chas. Nelson Hinman, Binghamton, N. Y., R. F. D. 4, Box 116., and bearing business card of Hotel Newton.

EX. H. 92.

(Written on letterhead of Hotel Newton)

Newton, N. J., Dec. 14th, 1905

My dear Wife -

575 I would not write you to-night but I have not written so will now Tuesday I went to New York City and Jersey City on business didn't get home till late and then had a fight with the Engineers they had stopped Harvey from working while I was gone and it took till to-day noon to get going again. So you see I have been more than busy. I have just got back from Masonic Lodge, went with Potts the head engineer and Wolff the other Contractor here it is 12:45 now so you see it is pretty late to be writing but I thought you would want to hear from me so am doing it to please honey. Well am well and working fittle.

Give my love to Mother, Dan, Lou and especially my two sons, as I have both their interests at heart and do so want them to do well.

576 And to you pet I was so dam lonesome when I first got here in fact it was hell, but the work keeps me so busy the fight so close and Harvey put me in the beds so I would have to fight it out that it pulled me out. Well sweetheart it is now 1:30 A. M. Kisses, hugs an love always and ever kisses ! ! !

Hubbie.

Digitized by Google

577

EX. H. 93.

Ex. H. 93 is an envelope postmarked Newton, N. J., Dec. 18, 1905, 1 30 PM, and addressed Mrs Chas. N. Hinman, Binghamton, N. Y., R. F. D. 4 Box 116, and bearing business card of Hotel Newton.

EX. H. 94.

(Written on letterhead of Hotel Newton)

Newton, N. J., Dec. 17th, 1905

My dear Wife -

578

I have not heard from you for some time and suppose when I do you will drop in on me so am looking for you instead.

Well this is Sunday and have been working all day. We had to shift our machinery and could not do it only when we were shut down.

We are doing quite well and things look O. K.

I have been sick again but am better now.

Harvey goes home this week and will be there for two weeks. so I will be the main squeese for that time.

There is no news here that will interest you but have been sitting here this evening listening to the fellows tell stories of the girls they have played with here in Newton and they are rotten. Well dear God knows I miss you for when I was home this time I was the happiest I ever have been with you for that length of time you have no idea dear the pleasure of myself during that time. And to come back here and stay it seems as though I was doing penance but the darkest days have silver lining to the clouds that cause them so this will pass and then the continuety of the of the conditions of my last trip home will be heaven indeed.

579

Digitized by Google

Ex. H. 94, Ex. H. 95 and Ex. H. 96.

580 So dear it will come our way soon and till that time we will do the best we can.

Give my love to Mother, Dan, Lou and our two sons and to you all my kisses and love to you for all time so love good night good night sweetheart good night.

Kisses x x x x

Hubbie.

EX. H. 95.

Ex. H. 95 is an envelope postmarked Newton, N. J., Nov. 24, 1905, 6 AM, and addressed Mrs
581 Charles Nelson Hinman, Binghamton, N. Y., R. F. D. 4, and bearing business card of Hotel Newton.

EX. H. 96

(Written on letterhead of Hotel Newton)

Newton, N. J., November 23d. 1905

My dear Wife -

Another day has gone by and am going to write you again now dear you said I would not expect me to come home if you were dieing or dying which do you mean for you must know there is a great difference.

582 Well pet have been working all day and am dog-goned if I am not. I leave the Hotell at 6.10 eat my dinner at the banks and get back to the Hotell at six so you see am hustling all the time.

I have not had a moments time to myself not even Sundays that is in the last four weeks.

Calvin the proprietor of the Hotell here has a joke on me. I was talking to a man here the other night and he was talking to Calvin after and he told Calvin that I was the smartest Italian

Digitized by Google

583

Foreman he ever met so you see I have gotten to be a Dago at last.

I think I have struck a sand bed that is a dandy and if it is as good as I think it is it will make us at least $2000.00 and all to the good for it is true we can put in the beds for 45-100 Forty five Cents a yard and we figured on Ninety Cents and the difference will be about $7000.00 so if we get half it means $3500.00 all to the good so am feeling good as far as the contract is concerned.

Well dear cheer up am coming to you soon although I hadent ought to from a financial stand point but you have pled so hard I am going to come anyway.

Well dear good night love to Mother and best wishes to our two sons. 584

And sweetheart to you as ever my whole love my whole heart and all my kisses hugs and best of thoughts to my ownest own so love good night good night kisses good night.

Hubbie.

EX. H. 97.

Ex. H. 97 is an envelope postmarked Schenectady, N. Y., Aug. 7, 1905, 7-30P, and addressed Mrs C. N. Hinman, Binghamton, N. Y., R. F. D. 4., and bearing business card of Hinman & Sproul.

585

EX. H. 98

Schenectady, Monday, 1905

Mrs C. N. Hinman,
Binghamton, N. Y.

My dear Wife -

Yours just received and am not surprised to learn of the loss by fire.

Digitized by Google

586 If you think you had better or if it will save you worry you may have the Buildings and Furniture insured.

I have no choice in relation to the matter and Company but the Agricultural will do.

You may consult Bonnell he is in the Security Building the firm name is Kneeland and Bonnell. tell Bonnie to ask Kneelands opinion dont put on more than we could get if we should have a Fire.

As far as the one that Burned is concerned let it go and be damed to it what do we care for the old thing, cheer up and dont you mind.

Remember me to all love to Mother and Kisses to you and Pearl.

Nothing to write about so good bye.

587 Hubbie.

EX. H. 99.

EX. H. 99 is an envelope postmarked Newton, N. J. Nov. 18, 1905, 6 A.M. and addressed Mrs Chas. Nelson Hinman, Binghamton, N. Y., R. F. D. 4, and bearing business card of Hotel Newton.

EX. H. 100.

588 (Written on letterhead of Hotel Newton)

Newton, N. J., No. 17, 1905

My dear Wife -

I have not heard from you in so long a time that I know you must be very angry but dear when I do come and you know what I have been up against you will not blame me.

You ought to know dear that if it were possible for me to come I would have been there long be-

Digitized by Google

589

fore this but we must get the beds here in condition for gravel and sand before cold weather or loose on our contract and you know what that means and if we have only a few days more good weather we can say weeks and I am yours.

We have had the damdest luck. I have been up two knights with a sick horse her temperture was 106 and not one in one hundred live and have got her now so if nothing else sets in will pull out all O. K. that is I have been with her day and night.

And we cant get the number of men we want and hell is to pay but a few days of good weather now and our troubles are over for a little while.

So dear for a few days just rember that I love you and I will be back to my ownest own love to 590
Mother and my two sons and kisses x x x x hugs x x x x x to my ownest own.

Hubbie.

EX. H. 101

Ex. H. 101 is an envelope postmarked Newton, N. J., Apr. 21, 1906, and addressed Mrs Charles Nelson Hinman, 14 Livingston St., Binghamton, N. Y. and bearing business card of Hotel Newton.

591

EX. H. 102

(Written on letterhead of Hotel Newton)

Newton, N. J., Apr. 20th, 1906

My dear Wife -

I did not write you last night for I was so dog goned tired went to bed and stood it out.

Well dear am here and in good health but my face and hands are red as cherries from the sun.

Digitized by Google

592 We are doing fairly well, Dan is doing good have not seen Lou and dont think she will call on me.

Saw Mrs Sproul the first night told her you wanted her to come up and she asked Harvey and he said no he was using her (wonder in what way and for what) but think if you wanted her to come, let me know when you are coming and may be H. would let her come up and back when you come.

Well sweetheart I miss your own sweet self but we must grin and bear it and you can run down when you want to after a bit.

I saw Pearl and Leda at Lordville and they were both looking fine they thought you were
593 coming with me and were much disappointed.

I asked Pearl if she was coming up this summer and she said yes in a way that left no doubt of her intentions so you may look for her.

Saw the boys and dear old Dock on a Raft from the train going down they had left Equimunk but had not reached Lordville yet. Ray waved and they yelled like mad.

Well dear I want you to know I am thinking of you and that you are in my thoughts continuously, give my love to Mother and 1000000 Kisses and hugs for my sweetest sweet but good bye rosebud for I must go to the P. O. Kisses Kisses good night. K K K K K

Hubbie.

594

EX. H. 103

Ex. H. 103 is an envelope postmarked Newton. N. J., Apr. 30, 1906, 6 A.M., Mrs Charles Nelson Hinman, 14 Livingston St., Binghamton, N. Y. and bearing business card of Hotel Newton.

Digitized by Google

595

EX. H. 104

(Written on letterhead of Hotel Newton)

Newton, N. J., Apr. 21st, 1906

My dear Wife -

Well it is Sunday Night 8:17 P. M. I rose at 5:15 A. M. worked the Teams all day and am now writing to the only one on on earth. I had to have Harvey bring my breakfast down to me on the Job received in at 9:30 made it go for Dinner reached the Hotell at 6:30 washed and got to supper at 7:30 and was to late get anything to eat and am now working for you isnt that a good second, but am not feeling well on account of my late breakfast 596
so guess it is all the better if I didn't have supper

Well how are you and are you getting along nicely. We had half our gang quit yesterday but can get along we are hancapt for Teems, but will have to get along and guess it will be all right.

Dan is doing quite well and by reports very proud of her as he thinks she compares very favorable with the ladies of Newton.

If you see Archie Warner or have McWhorter see him at once and have him come down if it were not possible for you to see him or have Harry Palmer see him for you so you could see him if we could get him we would give him a seasons work and we want him at once

You can do the best you can about it and at once and let me know what he would charge a 597
day and could wire you an answer. Am going to write Roy to come on if he wants to by this mail and have to write him and one other letter so will have to close. How did Charlie come out and is he still with you, if so remember me to him love to Mother and sweetheart to you my kisses love and hugs galore and by the way cant you see your way clear to come down for a week soon as I begin to watch the Trains for my sweetheart.

Hubbie.

Digitized by Google

598

EX. H. 105.

Ex. H. 105 is an envelope postmarked Newton, N. J., May 2, 1906, 6 A.M. and addressed Mrs Charles Nelson Hinman, Binghamton, N. Y., 14 Livingston St. and bearing business card of Hotel Newton.

EX. H. 106.

(Written on letterhead of Hotel Newton)

Newton, N. J., May 1st, 1906

599 My dear Wife -

Your most beautiful letter received and the pleasure of its receipt was only one of the things that appealed to me for I want to say to you that it was not only well written but was well spelled and the composition was good.

You write to me that my people want a lot of you, now I want you to use them well but I will be damed if I will stand for an imposition if Charlie wants to stay for a short time all well and good but you must understand first, last and all the time, his staying must not interfere with your regular routine, that is if you are getting two meals a day, then you must not change for him for I will not stand for it and if you do you must understand by so doing you displease me. You
600 have had it hard enough and my people shall not impose on you, now if you want to let him come on those grounds and those grounds only that is that he has his meals when and in no greater number than is now your custom to have them and you want him there for company all right and good but if not then he cannot come at all and I will close the House first so if you can do this and want to you may, but you shall not be tied up by it in any way, as for Orpha she must hunt like

Digitized by Google

601 hell for a place she cant stay to bother you and you have my permission to show her this and if it be necessary for me to will be glad to write her personaly.

Now in relation to your working dear I know how you feel and I fully sympathise with you but dear please dont think me stingy or mean with you or that I want to dictate or deprive you any pleasure but I be damed if I can stand for it. You may take Music lessons and I want you to also take private Dancing lessons go to all the good shows and if Maude does not come out all right will get you a Horse that you will like but work you must not Dear and please yield to me in this and if you dont think me fair dont write but buy a return Ticket and come down for a week or two 602 and will talk it over.

Give my love to Mother and to you Sweetheart all I have to love and in whom all my hopes are centered kisses hugs and all the love a man could bear woman so sweetheart good night my only love again good night.

from Hubbie

You need not take any extra trouble to see Warner but at vour leisure.

EX. H. 107.

Ex. H. 107 is an envelope postmarked Newton, 603 N. J., May 8, 1906. 6 A.M. and addressed Mrs Charles Nelson Hinman, 14 Livingston St., Binghamton, N. Y. and bearing business card of Hotel Newton.

Digitized by Google

604

EX. H. 108.

(Written on letterhead of Hotel Newton)

Newton, N. J., May 7, 1906

My dear Wife -

Yours not at hand so can not compliment you on your effort but will forgive you for I know how busy you are.

Am going to-morrow out in the Country about 12 Miles to look up a job we leave at 7 A. M. that is a man by the name of Kron and your Hubbie and will be back about dark. Things are somewhat dull here just now but will soon be booming we are getting ready to draw sand and gravel and
605 will soon be at it in full force and will be dam glad to do the same.

I was tired Sunday and dumped around all day went up to see Harvey for about 2 hours and aside from that staid here at the Hotel all Day.

Am feeling fine and not working hard at the present and am not going to kill myself I can assure you.

Saw Carrie yesterday and her and the kid want to be rembered to you and want you to come out.

Had a squabble with the Engineer to-day but came off with colors flying.

Dan has just left me and wanted me to say hello for him did not say anything but grinned to myself he certainly has nerve.

I use him cool dont know whether he notices
606 it or not. Mrs Sproul said yesterday to me that Lou said they ought to get me up there for I told such funnie stories and I told her at once that she had no reason to love me and neither did she.

I go up to see Harvey about twice a week usually but last week once and that yesterday so you see I stay pretty close to the Newton Hotel.

Well dear I thought to hear before this of your coming but it seems am to be disappointed at

Digitized by Google

607

the present so am not going to bother you any more about so please yourself and let that suffice.

Give my love to Mother rember me to all and say to them I have a warm spot in my heart for all that are my friends and that I think of all of them and to you all my love and kisses by mail as it does not seem that the near connections will be mad soon.

Again Kisses love hugs and best wishes.

Hubbie

EX. H. 109.

608

Ex. H. 109 is an envelope postmarked Newton, N. J., May 11, 1906, 6 A. M. and addressed Mrs Charles Nelson Hinman, 14 Livingston St., Binghamton, N. Y. and bearing busines card of Hotel Newton.

EX. H. 110.

Newton, N. J., May 10th, 1906

My dear Wife -

Yours at hand and am sorry to learn you have been so ill and especially that I was not there to serve you as well as a poor devil is able but I sincerely hope at this writing you are as 609 right as nails.

Tony has gotten back with another gang to-day and we will be able to get along better now.

I cannot write you much to-night as it is now 9:30 and must go to bed but I want to let you know I am thinking of you and am thinking of your coming to.

The weather is devilish snowed and rained to-day and the wind blew great guns so you see we

Digitized by Google

610 are not enjoying continual sunshine and flowers here and by next week I hope we will have pleasant weather.

Well dear must say good night to you, give love to Mother rember me to all the rest and to you as usual love kisses hugs and the sincere hope you are right as a trivit now.

love. kisses.

Hubbie.

EX. H. 111.

611 Ex. H. 111, is an envelope postmarked Newton, N. J., May 15, 1906, 6 A.M., and addressed Mrs Charles Nelson Hinman, 14 Livingston St., Binghamton, N. Y. and bearing business card of Hotel Newton.

EX. H. 112

(On letter head of Hotel Newton)

Newton, N. J., May 14'' 1906

My dear Wife.

Have not heard from you in some time and am wondering if you have forgotten your poor boy.

612 I expected to hear the pen scratching on the paper and be writing to you yesterday but had to go look for teams and lost my supper as usual Sunday and dident get back to the Hotell till 10:50 and was so dog-goned, tired went to bed without writing to you.

It is now 10:20 have been up to the barn looking after the horses and just got in and it is so un-

Digitized by Google

Ex. H. 112.

usual for me to be out that Mrs. Colvin has just accused me of being dissipated. 613

We have had the devils own weather here lately it has either been hot it was 86 yesterday or cold enough to make Ice, it froze here Ice 1/4 inch thick and the soil where it was damp 1/2 inch, and has rained nearly all day to day.

Mrs Sproul is going home the last of this week for a couple of weeks so you will be here during her absence.

Am looking for you evry day now for I expect you any time so you will not surprise me when you do come.

Dan is doing fairly well but I have not heard from Roy so conclude that he has made up his mind to stay in Equinunk and not be a Contractor. 614

Well am feeling fine and fit to the minute for anything. so you need not worry over my health. I write you this because I know you must worry for with all your work you write so many letters to me that you must miss me most dreadfully and be most crazy about my health.

So my advice to you is to bear it bravely dont worry so much and remember we may see each other again some time.

Well dear give love to Mother say hello to bert and the rest of the McWhorters o Monk to Mrs B. and best of wishes to any of friends you may meet when you come bring my book with leather cover it folds like your check or receipt book dont forget it. 615

Well by by love kisses and hugs per 10000000 x x x

Hubbie

Digitized by Google

Ex. H. 113, Ex. H. 114 and Ex. H. 115.

616

EX. H. 113.

Ex. H. 113 is an envelope postmarked Newton, N. J., Jun. 18, 1906, 6 AM and addressed Mrs. Chas. Nelson Hinman, 14 Exchange St., Bingham-ton, N. Y. and bearing business card of Hotel Newton.

EX. H. 114.

(On letter head of Hotel Newton)

Newton, N. J., June 16'' 1906

My dear Wife.

617 Yours not at hand, as usuall.

This cheap second hand Bartender is dictating this and he says that I must write you that I got home late last night did not set up so the second hand place where I board has another poor meal to the good and Mr. Calvin says that I am liable to rool in any time and look like a man that has been run through a spike threshing machine.

Well dear bought another team.

Nothing doing but am thinking of you it is now ten P. M. and they are closing so will have to quit give my love to Mother rember me to all my friends, and tell them will be home field practice.

Love kisses hugs and all my love.

Hubbie.

P. S. Mrs Hess slapped Mr Hesses face three
618 times on the front porch to day but are now love-ing again.

EX. H. 115.

Ex. H. 115 is an envelope postmarked Newton, N. J., July 16, 1906, 6 AM and addressed Mrs Charles Nelson Hinman, 14 Livingston St., Bing-hamton, N. Y. and bearing business card of Hotel Newton.

Digitized by Google

Ex. H. 116 and Ex. H. 117.

619

EX. H. 116.

(On letter head of Hotel Newton)

Newton, N. J., July 15th 1906

My dear Wife.

Your nice letter at hand. am so glad that Mother is all O. K.

We are getting along fairly and if we have no pull backs will be through in 1 1/2 months.

Harvey has gone to Ithica, N. Y. to bid on a job and if we get it it will be a nice place to go.

We have the large plant so we can finish in about two weeks and the small one we can hustle.

Dan is doing well he has not been laid up and is practically well at the present time.

620

I went down to-day and took dinner with them corn pork and cabbage with beer on the side had a good time they are doing the gyp act living in a tent down by the elevator.

I havent much to say am well and hope you are the same.

Give love to Mother rember me to Pearl and all your and my friends and kisses hugs and love to my own sweetheart.

Hubbie

EX. H. 117.

621

Ex. H. 117 is an envelope postmarked Newton, N. J., Jul. 11, 6 AM and addressed Mrs. Charles Nelson Hinman, 14 Livingston St., Binghamton, N. Y. and bearing business card of Hotel Newton.

Digitized by Google

Ex. H. 118, Ex. H. 119 and Ex. H. 120.

622

EX. H. 118

(On letter head of Hotel Newton)

Newton, N. J., July 10'' 1906

My dear Wife:

Am here all O. K. and am now going to bed.

Love to Pearl and Mother. Squeeses to and hugs kisses to you sweetheart good night and rember me to Greyce. tired.

Hubbie

EX. H. 119.

623 Ex. H. 119 is an envelope postmarked Newton, N. J., Jul. 23, 6 AM and addressed Mrs Charles Nelson Hinman, 14 Livingston St., Binghamton, N. Y. and bearing business card of Hotel Newton.

EX. H. 120

(On letter head of Hotel Newton)

and enquire for you as all do at times.

It has been so hot here for the last week that life has been a burden.

they have had a Small Pox scare here and the Town was wild, but there is no danger.

Harvey & Mrs S. went to Cranberry Lake last

624 night and have just gotten back.

I have been all in since yesterday noon but am better now but very weak. will be all O. K. tomorrow.

There are no news for me to write that would interest you so will close. Give my love to Mother.

Pearl and say hello to all the rest and to you love affection and all the feeling of my being.

Hugs kisses and love are yours for all time that is so long as I endure hoping you are well and enjoying life I remain your lonesome **Hubbie.**

again love to all.

Yours.

Digitized by Google

625

EX. H. 121.

Ex. H. 121 is an envelope postmarked Newton, N. J., Jul. 30, 6 AM and addressed Mrs Charles Nelson Hinman, Binghamton, N. Y. and bearing business card of Hotel Newton.

EX. H. 122

(On letter head of Hotel Newton)

Newton, N. J., July 29th 1906

My dear Wife. 626

Yours at hand and am more than sorry you have been ill.

Now dearie you must not figure everyone by me he has acted like he always has and must abide by the consequences.

You must know one thing it will be but a short time before he will want something more and then see how he comes out.

It is in my make up to help anyone in trouble and it is no more than I expected.

However he will pay for the barn and all the oats or be dam sorry.

The way he acts about Mother is in keeping with the rest.

Now dear is it not enough to write me only when you have the blues but is it or have you ever found it necessary to threaten. 627

You did not have to stay in Bing. but did just as you liked in the matter it was up to you and you took your choice. it would seem to me inasmuch as you preferred to stay and have so done how in the devil am I to be blamed.

You say I must and must is a nasty word one I never used to you and include that you are no fool.

Digitized by Google

Ex. H. 122, Ex. H. 123 and Ex. H. 124.

628

Now all I have got to say is when I have anything to say.
be so kind as to give my love to Pearl Blanch Leda Roy and Ray and your Parents tell them I think of them all and sincerly hope that they are all O. K.

Have been sick with acute indigestion for a week but am feeling better now and am not going to die.

Sending my best regards to all who should mention me to you and all my love and kisses to you. hoping you are having a good time.

Hubbie

629

EX. H. 123.

Ex. H. 123 is an envelope, a portion of which is not here bearing part of the post-mark "White and the letter P" and for the month "Au" and the words "Mrs Charles N. Hin," the balance of the name being absent, and just below "Mrs Charles N. Hin" part of the word "Equin" and on the back thereof the post-mark "Equinunk, Aug. 1, 1906, Received."

EX. H. 124

630

(On letter head of Orawaupum Hotel)

White Plains, N. Y., Aug. 1st 1906

My dear Wife.

Well am on my trip I spoke to you about in my last letter to you, and am dam lonesome I can tell you.

Digitized by Google

Ex. H. 124 and Ex. H. 125.

631

Am now here at the Hotell have just gotten in from up country about five mile, it is now 10,30 and am tired to death but in good health.

Harvey came up with me and went back this Afternoon expect to be back in Newton in two or three days.

We bid on a job last night and was beat out by an Italien what do you think of that our bid was $50000.00 if we had gotten it we would have made some money.

Well White Plains is a pretty place about 8000 but the country here abouts is settled by New York Millionares some of the most beautiful Residences and delightful places.

You can hardly find an old resident in the whole Country. they are all bought out by the men with money. 632

This Hotell is situate right next the R. R. so have music all night.

It is the best Hotell here and the accommodations are good so can stand it.

I sincerely hope dear you are having a good time hope all are well.

You can see am thinking of you if you dont write.

Am sending you postals from Katona, N. Y. a small place above here, hope you will like them. will send some from here but am to tired to get them tonight but will in my next.

Well dear my own Sweetheart good bye give love to all tell Pearl not to be scandilous. 633

hello to all and love kisses and hugs to you

Hubbe

EX. H. 125

Ex. H. 125 is an envelope postmarked White Plains, N. Y., Aug. 23, 1906, 6 30 AM and addressed Mrs C. N. Hinman, Equinunk, P. A., bearing business card of Orawaupum Hotel.

Digitized by Google

634

EX. H. 126

(On letter head of Orawaupum Hotel)

White Plains, N. Y., Aug. 22nd 1906

Am at White Plains as you see and thinking you might write me perhaps at Newton and if anything should happen that I would not get back tomorrow not receive it send you this.

My dear Wife.

Am on another dam hunt for something we havent got. that is a House to live in here for the next job. trid one man to day in New York City at 135 Broadway and he wanted ($75.00) Seventy-Five Dollars per Month for house & barn. what
635 do you think of that. Told him I would but my wife wont let me so dont know what we will do if we have to do that we will use tents for ourselves and man and excel places for horses.

We will soon be out of Newton and am not sorry to get at something else.

Think we have got a good thing here.

I enclose P Cards purchased in New York City to-day.

I walked into Brill Bros. where we bought our clothes just because you were with me there they wanted to know what they could do for me and I told them to show me where my wife had been, man thought me crazy you ought to have seen him stare, and when I left the store he was holding a consultation with others and they were all
636 rubbering. Jolly pun but if they had had me pulled the grin would have been on the farmer.

Well dear say hello to the boys Mother and Pa. love to Pearl, Blanch & Leda, and kisses hugs and love to you.

P. S. for you are not having the time you did in "Bing" for you not only write a different tone but oftener since you got home better write what the attraction was in B. to cause you to forget Hubbie and when you did write give him hell.

So long,

Me.

Digitized by Google

Ex. H. 127, Ex. H. 128 and Ex. H. 129.

637

EX. H. 127

Ex. H. 127 is an envelope postmarked White Plains, N. Y. Aug. 24, 1906, 3-PM and addressed Mrs C. N. Hinman, Equinunk, P. A. and bearing business card of Orawaupum Hotel.

EX. H. 128

(On letter head of Orawaupum Hotel)

White Plains, N. Y., Aug. 24'' 1906

My dear Wife.

It is now 12:40 A. M. and leave for New York 638
City at 12.55 and dont know whether will be here to-night or not.

If you write better address at Newton as usual, but dont know when I will get back.

Shipped all Teems & 8 Men to new job today and dont know whether will be here permanently or not.

Kisses love to you and rimbrence to all.

Hope you have good luck fishing.

Hubbee

EX. H. 129

Ex. H. 129 is an envelope postmarked White 639
Plains, N. Y. Aug. 24, 1906, 6 30 AM and addressed Mrs C. N. Hinman, Equinunk, P. A. and bearing the business card of Orawaupum Hotel.

Digitized by Google

Ex. H. 130, Ex. H. 131 and Ex. H. 132.

640

EX. H. 130

(On letter head of Orawaupum Hotel)

White Plains, N. Y., Aug. 23rd 1906

My dear Wife.

Thinking you might want to hear from me am again writing. You see from the above address that am still at White Plains. Just got in have been tramping all over Scarsdale Town Ship to day, and am dead tired. was sick unto death last night tramped the street till 12 at night then to my room and kept it up till 3:20 before I could lie down but am feeling better now but was allin when I left this morning.

641 Well am going back to New York City tomorrow and back to Newton tomorrow night. could not get the place I was after but am going to see about another tomorrow.

Well sweetheart good night love to all and kisses hugs and best wishes to your own sweet self.

Ever

Hubbie

EX. H. 131

Ex. H. 131 is an envelope postmarked New York, N. Y. Sta. H., Aug. 24, 1906, 8-PM and addressed Mrs C. N. Hinman, Equinunk, P. A. and bearing card in upper left hand corner Grand

642 Union Hotel, New York.

EX. H. 132

(On letter head of Grand Union Hotel)

New York, Aug. 24'' 1906

My dear Wife.

Am in the above Hotell but am going back to White Plains Tonight.

Digitized by Google

Ex. H. 132 and Ex. H. 133.

643

I was more than half tempted to skip up to Equinunk to-night and stay over Sunday but the Teems will be in to-morrow morning and must be there to direct them.

Am feeling blue as the Devil stood on the corner for a half hour debating for an hour whether to spik for Equinunk and you or go back to those dam plains but it would not be right for me to leave and so will go back.

Came in at 2.20 and have been buisy here since it is now 6.30 and am going to take the train to White Plains as soon as I finish this. I leave at the Grand Central Station and get there in about an hour and ten minutes.

How are all the folks did you have a good time and luck fishing and how large was the big fish 644
you lost.

Tell Pearl hello for me and kis her for me, rember me to Roy Ray dad and Ma, love to the girls and ask Blanch if the Baby bites any yet, and if so tell her I sad she may put him or it on the Bottle.

Well dear must close hoping I may get somewhere where I may get some of your letters after a while, sending you my love kisses and hugs as usual hoping you are enjoying yourself and having a bully time will for this time close.

Hubbie

645

EX. H. 133

Ex. H. 133 is an envelope postmarked Newton, N. J., Aug. 25, 4 PM and addressed Mrs C. N. Hinman, Equinunk, PA. and bearing the business card of Hotel Newton.

Digitized by Google

646

EX. H. 134

(On letter head of Hotel Newton)

Newton, N. J., Aug. 25'' 1906

My sweetheart,

Am back to Newton got in at 11 AM. from White Plains and New York City am going to try to get out to Margaretville Delaware Co some time tomorrow and then back to White Plains.

Dan went with the Train, and is at Marmaronack now.

So you see am on the jump am going to look over some Roads up there.

Well dear good bye for this time as I leave at
647 4.20 for Middletown then for Kingston from there to Arkville and then by Horse to the Roads. tried to figure it out to come and see you but cant the dam roads will not permit it have to go so far around dont you know and it seems to bad if I get in one end of the County and you in the other and cant see you then.

But good by with love to Pearl and the Boys hello and rembrence to all and kisses hugs and all my love to you.

Hinman.

EX. H. 135

648 Ex. H. 135 is an envelope postmarked Kingston, N. Y., Aug. 27, 630 AM '06 and addressed Mrs C. N. Hinman, Equinunk, Pa.

Digitized by Google

Ex. H. 136, Ex. H. 137 and Ex. H. 138.

649

EX. H. 136

United States Hotel,
Kingston, N. Y.

My sweetheart,

Well am here after the devils own time it is now 12:10 A.M. and am going to bed as soon as this is written.

Had the dickens of a time today had to get from Newton to Franklin Furnace connect with another Road then to Middletown connect with another Road and no Train out but a Milk to Cornwall on the Hudson, they wouldent let me ride went to the Train despather he said no, got the President of the Company on the Phone gave him a Jolly and he gave the order to the Train despatcher to let 650
me through. the Conductor looked at me talked a while and said he dident know who I was but I had a hell of a pull for not even an employe had been allowed to ride on that train in 10 years.

Will go to Albany as I cannot get to Equinunk.

love kisses and hugs

Hi - - - - - -

EX. H. 137

Ex. H. 137 is an envelope postmarked Albany, N. Y., Aug. 27, 1906, 3-PM and addressed Mrs C. N. Hinman, Equinunk, Pa. and bearing the business card of Keeler's Hotel.

651

EX. H. 138

(On letter head of Keeler's)

Albany, N. Y., Aug. 27'' 1906

Sweetheart:

Am here in Albany and just looked at the corner where we sat to Dinner that day and it makes me lonesome. got in last night 11.10 from King-

Digitized by Google

652 ston met Mr Fancher from B. sat out in front till 1 AM. got to bed at 2. and up at 7 am. may leave here to day anyway tomorrow.

I tried evry way to get to Equi - - - yesterday and the only way was 48. miles by Horse so could not make it. dam the R. R. well am all O. K. and hope you are the same. am pushed for time are bidding on about 30 miles of Road and ought to get a piece any way.

Will bid tomorrow on about 86. miles if we dont get all we want to-day.

Well sweetheart love to Pearl rember me to all with kisses love and hugs to my ownest own.

Hubbie

653

EX. H. 139

Ex. H. 139 is an envelope postmarked Albany, N. Y., Aug. 28, 1906, 2 AM and addressed Mrs C. N. Hinman, Equinunk, P. A. and bearing the business card of Keeler's Hotel.

EX. H. 140

(On letter head of Keeler's)

Albany, N. Y., Aug. 28'', 1906

654 Sweetheart,

It is 9.10 P. M. Harvey has gone looking over Roads for tomorrows bidding, was going to come to you to Night as a surprise but things came up to day that made it imperative for me to remain.

We came within $175.00 One Hundred and Seventy-Five Dollars of getting a $50000.00 Fifty Thousand Contract to day dam hard luck wasent it, thers a jona somewhere and it was the road I went over. at that and we wanted it badly. It

Digitized by Google

655

was in Delaware County near to B. and would have been O. K. but we lost and that settles it.

We will bid on about $200000.00 Two Hundred Thousand Dollars worth of work to morrow and if we make good were it.

Well dear am here in Keelers and thought you might be looking for a letter or maby want to know whether I was doing the town or thinking of my honey so you may draw your own conclusions. For there are are a lot of men here on the same business as I that are not at the present writing writing to their wives.

We will leave here for the works tomorrow, and try to get what we have on hand finished if we get nothing here.

656

We ought to feel gratefull for what we have I suppose.

Rembrence to all love to Pearl and kisses hugs and best wishes to sweetheart.

Hubbie.

EX. H. 141

Ex. H. 141 is an envelope postmarked Newton, N. J., Sept. 1, 6 AM and addressed Mrs C. N. Hinman, 114 Livingston St., Binghamton, N. Y. and bearing the business card of Hotel Newton.

657

EX. H. 142

(On letter head of Hotel Newton)

Newton, N. J., Aug. 31'', 1906

Sweetheart.

Have gotten here and am feeling O. K.

It will take us about 4 working days to finish here and may a little longer.

Digitized by Google

Ex. H. 142, Ex. H. 143 and Ex. H. 144.

658 Will have to leave here to go to Onondaga Co in the Northern part of the State Sunday and wont get back till about Tuesday night or Wednesday so you had at least not better come till I get back for I might be delayed and not get back so soon however do as you think best if you wish to visit here It would not make so much if I were not here.

Will write you again and acquaint you more definately as soon as I learn myself.

I cant write you more for it is now 11.30 have got to do a lot more work before I go to bed.

Sending you love kisses and hugs as usual I remain your ever worthless

Hubbie

659

EX. H. 143

Ex. H. 143 is an envelope postmarked Newton, N. J., Sep. 5, 6 AM and addressed Mrs C. N. Hinman, 14 Livingston St., Binghamton, N. Y. and bearing business card of Hotel Newton.

EX. H. 144.

(On letter head of Hotel Newton)

Newton, N. J., Sept. 4th, 1906

660 Sweetheart.

I wrote you Frday night as soon as I arrived here and dont see for my part why you dident get a leter before Sunday.

We are going to load the last car tomorrow and I will soon be gone. I expected to go to Syracuse Sunday or Monday but will not go now till next Sunday.

They have all gone but me and I have been doing stunts with local labour. and am so dam

Digitized by Google

661

tired tonight I could die and die easy my feet and legs ache like the tooth ache. am squirming as I write. Harvey will be in tonight on the last train and I shall make him help load the car.

This will be the last one and am not sorry at that we will store some of the stuf here and ship from here instead of taking it with us.

Well dear am sorry about Henry not liking you for I would like evryone to like you dear but it will not hurt you if he dont.

Well I have no news there is nothing didding here worked Sunday and yesterday and have got to hustle till we get away from here.

Well dear am more sorry than you that you are not with me but sometime we will be. and then well there will be something doing.

662

Tell Mrs Yager I am more than pleased to know she is making the life of the Orphan less lonesome and doing you a Christian kindness, but you must not annoy her to much or she will not always reciprocate.

Hoping you are well and enjoying yourself and that you go to Green and have a good time and that all things are for your good.

Sending love kisses hugs and best of all to you

I remain as ever

Hubbie

EX. H. 145.

663

Ex. H. 145 is an envelope postmarked Newton, N. J., Sep. 6, AM and addressed Mrs C. N. Hinman, 14 Livingston, St., Binghamton, N. Y. and bearing business card of Hotel Newton.

Digitized by Google

Ex. H. 146 and Ex. H. 147.

664

EX. H. 146.

(On letter head of Hotel Newton)

Newton, N. J., Sept. 5th, 1906

My dear wife,

Am still here and will be all this week Harvey has been held at Westchester for Dan to take a vacation and suppose he will go to Marathon where Love is. I dont know what is his reason but he has evidently made up his mind he cant hold down his job any longer without a rest.

I heard from Harvey to day by wire, and it read am detained cant come buisy Dan going on vacation.

665 Now I think there may be something more to it but of course dont know but he is a dam fool anyway for why dont he keep at it when he has a chance, but well it is his business and not ours. so we will not worry worry till worry worry comes.

Well sweetheart I hope this finds you well and having a fine time did you go to Green I hope so and had a bullie time Sending love kisses and hugs and cursing because I dident know Dan was going so you could be here I remain yours Loveingly alway

Hubbie

666

EX. H. 147.

Ex. H. 147 is an envelope postmarked Dover, N. J. Sep. 25, 7-AM 1906 and addressed Mrs C. N. Hinman, 14 Livingston St., Binghamton, N. Y. and bearing business card of Mansion House.

Digitized by Google

667

EX. H. 148.

(On letter head of Mansion House)

Dover, N. J., Sept. 24'', 1906

My Sweetheart.

Well am here for the night the dam engine broke down and here I am for the night and will go back to morrow to Newton.

It was after 8 P M when my train got in and went and got something to eat and am now doing the only pleasant thing I have done since I left Bing writing to you.

I havent anything to write about so am stuck on a long letter and you will have to excuse me for not filling several sheets. However dear to be frank I have the blues like hell and am mum as 668
a toad in sand. life is not worth the living if one cannot live it and you cannot live it if you dont live it at home or in the society of those you love. and I do most sincerely hope we may be able at no distant date to so live that we may be together and that all the time.

We have our own troubles and they are many but dear there are others that go farther and far worse, for sweetheart we are true blue to each other and by so being we are getting the best out of our lives.

Now dear dont get sour dont get old and the way to not get old is not to let yourself be worried dont get a grievence for that produces trouble and trouble brings wrinkles and wrinkles bring 669
old age and the wart of old age is a sour disposition and an idee one is getting the worst of it.
So dear this life is what we make it and to make it pleasant we must make others lives as pleasant as we can, and accomplish it by a cheerfull disposition and a kind word for all.

Now dear be your own sweet self dont let imagination or a fancied grievance make your life uncomfortable or less enjoyable.

Digitized by Google

Ex. H. 148, Ex. H. 149 and Ex. H. 150.

670 With kisses love and all my best of efforts for you and you only I remain looking for an answer to this I remain

Hubbie

EX. H. 149.

Ex. H. 149 is an envelope postmarked Newton, N. J.? Sep. 28, 6 AM and addressed Mrs C. N. Hinman, 14 Livingston St., Binghamton, N. Y. and bearing business card of Hotel Newton.

671

EX. H. 150.

(On letter head of Hotel Newton)

Newton, N. J., Sept. 27'' 1906

Sweetheart.

I have just been over to Claras that is the woman that does the laundry work for Calvin the one that is the devil and the wife of the man Dan called Billie the one Harvey mad a Boss on the new job.

She left word here that she wanted to see me about billie as I was going up there and she got a letter from Lou from Westchester saying her and Dan had a nice Boarding House and she says
672 it is a hell of a place so evidently they are both there.

The engineers were here to day to look over the Plant but they got a wire from New York and had to go back, and I expect them back to morrow and they will I hope accept the system, and if they do will go at least by Saturday.

Well dear am so dam lonesome I could almost eat a bath but I hope when I get over to the new job will forget for at least a time.

Digitized by Google

Ex. H. 150, Ex. H. 151 and Ex. H. 152.

673

Well sweetheart good night love kisses hugs and all that is best in my make up for dearest I love you more and more as you grow more as I like you when you are at your and dear try to be good to all have as much patience as you can try to modulate your voice and get controll of yourself and keep cool dont let anything worry you, and by so doing your life will be brighter and it will seem more like the living You must know that I love you just as you are dear better than all else for you are all I have sweetheart but you owe it to yourself to improve yourself all you can.

Again love good night love kisses and hugs from lonesome

Hubbie.

674

EX. H. 151.

Ex. H. 151 is an envelope postmarked Newton, N. J., Oct 3, 6 AM and addressed Mrs C. N. Hinman, 14 Livingston St., Binghamton. N. Y. and bearing business card of Hotel Newton.

EX. H. 152.

(On letter head of Hotel Newton)

Newton, N. J., Oct. 2nd 1906 675

Sweetheart,

I said to myself you would not hear from me until a communication came from you but here I am like a dam phool writing to you.

Well am still in Newton as you see by this have just gotten the Engineers here to accept the Plants and if they do will say (halileuyah) not spelled right but means feel dam good.

Well am in good health and hope to get the work over and leave in a day or two so will be with the rest.

Digitized by Google

Ex. H. 152, Ex. H. 153 and Ex. H. 154.

676 Harvey has just telephoned. to make an appointment with me over the wire at 8 P. M. and am waiting for the time to come.

Have not heard from Dan and dont know what they are doing.

Evrything in Newton the same only the best people here are trying to be very good indeed to your poor Hubbie.

Love to Mother and kisses hugs and love to you.

Hubbie

EX. H. 153.

677 Ex. H. 153 is an envelope postmarked Newton, N. J., Oct. 9, 6 AM and addressed Mrs C. N. Hinman, 14 Livingston St., Binghamton, N. Y. and bearing business card of Hotel Newton.

EX. H. 154.

(On letter head of Hotel Newton)

Newton, N. J., Oct. 8th, 1906

Sweetheart.

Yours of Saturday received and am more than sorry you had such luck, but better times may
678 come so cheer up the medacine is nasty.

Tell Jessie hello for me and also Will am glad she is so much better.

Am still here in Newton and hope to get away before I die. have about two more days work if they dont put some thing more on me and let us hope they wont.

I should have written you yesterday Sunday but Eddie Quinn was going to Franklin and insisted I go along. went and dident get back till 10.30 P. M. was cold went to bed and shivered till morn

Digitized by Google

679 ing, have got a light cold and am snuffing some and having some chills.

I had a good time the people we met were nice they used me lovely and was glad to break the monotony of this existence.

I received a letter from Love she wrote it at Dans dictation and it seems he is not satisfied but I think Harvey will do what he thinks is right however will be there soon and will know for myself.

Well sweetheart I expected you Saturday night thought you would surely come and was disapointed no name but dear sometime we will get together and then will make up for lost time.

Am working as fast as I can to get away from here but cant get any help and have to do it all myself, so it makes is necessarily slow had one man and he got drunk at noon today and dident work this afternoon. 680

Am going down to the other Plant tomorrow think I am through with the larger one, and if I am should finish in at least two Days.

Well sweetheart have got to send out three more letters tonight so will have to quit but dearie remember you are always in my thoughts and that all my love is yours and that existence would not be worth the struggle if it was not for you to hustle for.

So love be brave dont get the blues will at least soon be Home for the Winter one more month after this and perhaps not that and then a nice long time together. 681

Sending love to Mother and to be remembered to Jessie Will and your neighbors that are so kind to you.

Will try and write to your Mother to night.

So again good night love kisses hugs and my bestest best to my sweetheart that is always sweet and the only true heart to your Hubbie.

Hin

Digitized by Google

Ex. H. 155, Ex. H. 156 and Ex. H. 157.

682

EX. H. 155.

Ex. H. 155 is an envelope postmarked Newton, N. J., Oct. 10, 6 AM and addressed Mrs C. N. Hinman, 14 Livingston St., Binghamton, N. Y. and bearing busines card of Hotel Newton.

EX. H. 156.

(On letter head of Hotel Newton)

Newton, N. J., Oct. 9, 1906

Sweetheart.

Find enclosed C. K. for Balcom.

688 Well dear another day has passed and have got I guess have a fight with the Engineer.

Am going to bring the matter up before the Committee.

Well dear have felt like the devil all day had a bad headache and am not quite right yet but am feeling better.

Had to work all day and think it helped me.

If I come out all O. K. with the committee will be through tomorrow. however if you write address here. have got to write two more letters to night so will have to quit and besides have nothing to write but that I love you love you love you and you only sweetheart you are all I have so keep yourself fresh dont worry, no wrinkles. and alway fresh as a daisy.

684 Love to Mother and darling good night good night sweetheart love kisses and hugs good night good night love, love good night

Hubbie

EX. H. 157.

Ex. H. 157 is an envelope postmarked Newton, N. J., Oct. 12, 6 AM and addressed Mrs C. N. Hinman, 14 Livingston St., Binghamton, N. Y. and bearing business card of Hotel Newton.

Digitized by Google

Ex. H. 158.

685

EX. H. 158

(On letter head of Hotel Newton)
Newton, N. J., Oct. 11 1906

Sweetheart.

Am still here and dont know when I will get out any way it dosent look to me as if I would leave before Tuesday or Wednesday of next week.

Am so dam sick of hanging on here would kill a chinaman evry five minutes had not have a funk.

Well dear as usual I dont hear from you but suppose you are having your troubles or awfully buisy.

I wrote your Mother a nice long letter about Pearl just as nice as I could but dont know what she will do. I told her we would stand all expense of her board also her cloths and in fact all expenses incurred by her and put her in school and if she wanted her to she could come home during vacation period. 686

Now dear I couldent do more I am perfectly willing to do this not only for you but Pearl needs it so badly we had ought to help her if we can.

Now dearest I want you to know that I will be more pleased to do this for you than you can be yourself so no thanks please. if she is willing to let her come why get ready for a family.

Well dear I hope you are all O. K. and that I will soon hear from you. I am going before the Town Committee tomorrow and if they take my side of the controvercy then am through here if not 3 or 4 days more of work. 687

Got a letter from Harvey last night and he says they are getting along finely in fact must by what he says making good.

Am looking for time when I will again be with you sweetheart and if I dont get out of here before long will get so homesick will be tempted to flee.

Digitized by Google

Ex. H. 158, Ex. H. 159 and Ex. H. 160.

688 All it is is work in the day and sit here at night nothing doing but what I do myself and it is a stunner and wish I was out of it.

Well dear I must go to bed so good night dear good night all my love kisses and hugs rembrence to all our friends and love to mother so dearie good night love good night.

Hubbie.

EX. H. 159

Ex. H. 159 is an envelope postmarked Newton, N. J., Oct. 15, 130 PM and addressed Mrs C. N. Hinman, 14 Livingston St., Binghamton, N. Y. and
689 bearing business card of Hotel Newton.

EX. H. 160

(On letter head of Hotel Newton)

Newton, N. J., Oct. 13" 1906

My dear Wife.

Yours at hand and it gave me the greatest of pleasure to receive the same.

I dident get it in time to write you and thought you would come on Saturday as you intimated in your letter so was dissapointed and felt like the devil expecting you and then your not coming gave me the blues.

690 Now I dont know how soon I can get out of here I have a crack at the bunch tomorrow and can tell then let me know if you are coming for sure and will wire you if I am still here so you can run up if I dont get away before you come.

Have you heard from Home since I wrote my letter to your mother.

It is late and am here in the reading room and Calvin has just gone to bed and left another fellow to put out the lights so am forced to make this short.

Digitized by Google

691

Sending kisses hugs and all my love asking to be rembered to all and more kisses and kisses and hugs to you from

Hubbie.

EX. H. 161

Ex. H. 161 is an envelope postmarked Mamaroneck, Sep. 19, evidently 1907 and addressed Mrs C. N. Hinman, 35 Exchange St, Binghamton, N. Y.

EX. H. 162

Scarsdale, N. Y. Sept. 18/07 692

My dear Wife -

Will you ask Hank to find right away a Rooler man for me I will pay a good man $3.00 per day and send him on at once.

We have lots of work as soon as we finish here are going to the big job.

Tell him to make the Devils own hustle as I want one at once. if he cant find one then let me know at once I got word from Cooner. he wont come and I dont think he looked for the man he told me about if you could see him may be you could get him to look him up some of the bosses on the roads up there might know of a man Charlie Van Amburgh might and have Hank call him up at my expense and you pay him the 693 call.

Well dear got your Schenectady letter to Day and was glad to hear from you but sorry to learn you were not so well take care of yourself and try and get braced up so you can come back you may come any time when you feel well enough and want to, but I dont want you to come till you are better than you were when I left.

Now sweetheart hustle for a Rooler man as I want one badly.

Digitized by Google

Ex. H. 162, Ex. H. 163 and Ex. H. 164.

694 Give my best regards to all and pet be carefull and get well as without my saying it you know what that means to me.

So with kisses hugs love and the wish that you will be better when this reaches you, and that you will soon be with me again, good night love sweetheart kisses good night love good night.

Hubbie

EX. H. 163

Ex. H. 163 is an envelope postmarked Mamaroneck, N. Y., Sep. 21, 1907, 12 M and addressed Mrs C. N. Hinman, 35 Exchange St., Binghamton,
695 N. Y. and bearing the card in the left hand corner Company H, 1st Regiment, N. G. N. Y., 20th Sep. Co., Binghamton, N. Y.

EX. H. 164

Scarsdale, N. Y. Sept. 20" 1907

Mrs C. N. Hinman,
Binghamton, N. Y.

My dear Wife.

Yours not at hand and suppose the reason you have not written is because you have been thinking so much of me and wanting so much to see me, that you have not had the time. any way I forgive
696 you, for I know how you dislike to write letters.

Well am at the same old joint and dont know how long o lord how long. I have a barge of screenings at Port Morris and they will begin to come in about Tuesday then from then on I will be up and at it. there are three cars of stone on the road, and there are three more coming. the six will finish the stone and then the screenings finishes the job. if you get the Rooler Man I will make things hum.

Digitized by Google

Ex. H. 164.

697 I have finished the water barrel. all but one Pully and that is ten minutes work. and it works beautifully better than I had hoped. and it looks good. so you see am good for something any way.

Mr Lange had a horse lost one he was pasturing, it was gone for about two days. today about one oclock he found it mired in the sunken lake Mrs Lange tells so much about, he was all under but his back and head. they telephoned for me and I went over they dug around it and got a rope under the animal, I climbed a tree and fixed the rope fast and the team as Ray says hossed him out, I bossed the job and we got him on his feet, led him to the barn and he is all O. K.

Mrs Lange telephoned for me and said to have me hurry, but of course did not tell for what I was 698 wanted, I was going to Mamaroneck with Mrs Benedicts horse and wagon, and when I dident get back till about 5.30 they all wanted to know how I got away from here at all. they are giving me the grin, and I cant what it is all about so the laugh is on me.

And Follie is here and she says she is going to wire you as she dosent think I should do such things, and I have promised to do better if she dosent.

They use me fine and do all they can to make it pleasant but I will be so dam glad when I see the last of Scarsdale that I will get so dam drunk when I finish that the Doctor will have to use a Stomach pump to relieve me. 699

There is no news here to write you so must close, give my best wishes to all and give Hank a speed ball evry five minutes till he finds me a Rooler man.

The weather here is close and threatening but hardly any rain they have not had enough here to raise the streams. and if it dont rain more I dont know where I am going to get water to pud-

Digitized by Google

700 dle the road. but if the lord is willing and gives me rain after the screenings is on will finish in short order.

You had better write Mrs Sproul a nice letter and say I said the Boy was the nicest little fellow I ever saw and he is all right at that.

They have held the Westchester Fair this week but I was unable to go, and did not want to without you.

Well sweetheart by this time you are tired of reading so will have campasion and let you off for this time.

So good night sweetheart love kisses and lots of hugs, as ever.

Hubbie.

701

EX. H. 165

Ex. H. 165 is an envelope postmarked New Lebanon, N. Y. Dec. 21, 1907, 12 M and addressed Mrs C. N. Hinman, 15 Cedar St., Binghamton, N. Y. c/o Mrs Allen and bearing business card Hinman & Sproul.

EX. H. 166

(On letter head of Hinman & Sproul)

New Lebnanon, N. Y., 12/21 1907

702 My dear Wife:-

Yours received and was glad to hear from you. You say you have not received but one letter from me within a week, and I tell you that I have written just as soon as I received one from you. in fact have just gotten yours and am answering before going to work, so will be short.

Well dear am sorry you are having such a time with your head, and glad you have the Doctor, and hope by your next you will be O. K.

Digitized by Google

Ex. H. 166 and Ex. H. 167.

703

You must know there are no news here to write you about so except I write I love you can say nothing.

George Quest went last night for good. Carl goes Monday for good. Uncle Billie goes for a couple of weeks this A. M. Georgie Fienout goes Monday for a vacation. Herb went yesterday, so it only leaves Jack Frampton, Freddie and Walter here, and Dan.

Well pet give my best to Jessie will and and all dont get into a scrap with Orpha. as we dont want any more family jars. treat her O. K. but you can stay where you want to, you can say you were not feeling well and wanted to be where it was quiet and not so much doing.

704

Well pet for this time good by, and good night, kisses x x x x x x love and dont get it into your pretty head because you dont get a letter evry minute am not thinking of you.

So again kisses hugs and my best thoughts and give the Baby baby a kiss also, as he must or she must or both must miss me to.

by by love kisses.

Hinnie

Hubbie

Kisses

H.

EX. H. 167

705

Ex. H. 167 is an envelope postmarked Chatham, Dec. 28, 1907, 330 PM and addressed Mrs C. N. Hinman 17 Cedar St., Binghamton, N. Y., c/o Mrs Allen and bearing business card of Hinman & Sproul.

Digitized by Google

Ex. H. 168 and Ex. H. 169.

706

EX. H. 168

(On letter head of Hinman & Sproul)

On board Prarie 2/28 1907

My dear Wife:-

Yours received on leaving this A. M. am going down to Thompson's, so you may expect to hear of my having my hinder kicked.

Well dear I expect as stated in my last letter to be in Bing some where around the 1st but may not be till the 3 or 4th however will come as soon as possible.

There is not much doing here but scandal. Two little girls one 19 the other 14 or 15, have been
707 eating dried apples, and dont seem to recover as they would like.

There are two prominent men here who seem to have heart failure on account of same. sympathetic I suppose, but they have not as yet left for a healthier climate but should think from present inotication the one that gave the young one the fruit would migrate, or settle down for it a long time learning a trade.

Give love to Jess romber me to the Hinman but am not in the loaning business.

Well love hopeing to see you soon glad you are better love kisses hugs. good night

Hubbie

---

708 **EX. H. 169**

Ex. H. 169 is an envelope postmarked Albany, N. Y., Jan. 20, 1908, 10-AM and addressed Mrs C. N. Hinman, 17 Cedar St., Binghamton, N. Y., c/o W. Allen and bearing business card of Keeler's Hotel.

Digitized by Google

Ex. H. 170 and Ex. H. 171.

709

EX. H. 170

(On letter head of Keeler's)

Albany, N. Y., Jan. 20'' 1908

My dear Wife.

Am as you see safe and sound in limb at the above Hotel. and as usual thinking of you, hoping you are feeling O. K. after your late dissipations, and that you had a good nights rest.

Am feeling fair and hoping we will have a good day and success in bidding.

Harvey has not gotten here yet but will get here in a few minutes now as it is now 8.25 and he ought to get here by 9 A.M. the old place looks familiar and the corner where we took dinner 710
looks the same to me baring your sweet presence had a good run in got here 6 A. M. had a wash and at the old stand, tell Jess, I told some of her nasty stories last night and was near fired out, and she is to blame and must not tell me any more.

Well dear love kisses and many hugs. give my best to Billie and Jess. again love and x x x - - - -

Yours as ever
Lovingly
Hubbie

EX. H. 171.

Ex. H. 171 is an envelope postmarked Schenectady, N. Y. Jan. 22, 1908, 9-30A and addressed 711
Mrs C. N. Hinman, 17 Cedar St., Binghamton, N. Y. c/o Mrs Allen.

Digitized by Google

712

EX. H. 172

(On letter head of New York State National Bank Albany)

Albany, N. Y., Jan. 22nd 1908

My dear Wife,

We left last night to look over more roads and did not have time to write you.

We were going over a road this morning at 6 A.M. what do you think of that, went over two to day, we are verry close on one road on Monday bidding and might land two. stayed last night at Eagle Junction and today was up against the edge of Vermont.

713 Well dear am feeling fine am going down to the job tonight take the next train, the next bidding is not till Thursday, so will not be home till after that.

Well dear have written you all the news can think of, and as Harvey is waiting for me at Keelers, will have to make this short.

So dear be a good child dont cry or be cross, go out and be carefull. asking you to rember me to good old Jessie and will hoping you are well kisses hugs and many squeeses as ever.

Hubbie

EX. H. 173

714 Postal card, postmarked, Schenectady, N. Y. Jan. 22, 1908, 12 M

Binghamton, N. Y., Jan. 22, 1908, 11 P. M.

Addressed,

Mrs C. N. Hinman
17 Cedar St.
Binghamton
N. Y.

My dear Wife

Didnot go on the job, went there with Harvey and am in Schenectady, feeling fine, going back

Digitized by Google

715 to Albany, 1 P.M. may go to job tonight will write you later, remember to Jessie and Will. Kisses love.

Hubbie

EX. H. 174

Ex. H. 174 is an envelope postmarked Albany, N. Y., Jan. 23, 1908, 4-PM and addressed Mrs C. N. Hinman, 17 Cedar St., Binghamton, N. Y., and bearing business card of Keeler's Hotel.

EX. H. 175

(On letter head of Keeler's) 716

Albany, N. Y., Jan. 23rd 1908

My dear Wife:-

Am back as you see at Keelers, have been down with Harvey to Schenectady both nights but will probably go to the job this afternoon and be home about Sat-or Mon- may come this P.M.

We may have landed one road it is verry close, are going to bid on six to day.

Well am well and wish I was with you, but will be soon, it is now 11.15 we bid at 12 M. so it will soon be over.

Harvey has a nice boy, and notices things or seems to, Harvey will hold the bottle close to his mouth and he will wiggle and stick out his lips if he cant get it that way, he will grab it with both 717 hands, put it in his mouth, suck like a tiger.

Mrs H. Roarback is not well she lives principally on whipped eggs and milk, Pop has faild a good deal, but cheerfull, Harveys sister is with them, about 17 years old not handsome but a nice little girl and seems bright, plays quite nicely, they used me bang up, well dear give my love to Jessie and say hello to our Billie, love, kisses-hugs, and so till I see you again

Hubbie

Digitized by Google

718

EX. H. 176

Ex. H. 176 is an envelope postmarked of some place in Nebraska, the name of the place being so indistinct that it cannot be deciphered, which bears the business card of the Union Pacific Overland Railroad Co. and addressed Miss Vena Lord, Equinunk, P. A.

EX. D.

Ex. H. D. is an envelope postmarked Binghamton, N. Y., Aug. 30, 1908, 11-PM and addressed
719 Mrs. Dan Lord, Equinunk, P. A.

EX. E.

Binghamton, N. Y., Aug. 30/08

My dear Mother:-

You will undoubtedly be surprised to receive this but I want you to receive this in the same spirit it is written.

I was in hopes this would work itself out without my saying anything and sincerly hope you will not think me interfeering where I am not wanted. for I want you to know and feel that in so far as lays in my power and that is little I am
720 yours to command where that influence or help is to the welfare of you all. so again I ask you to forgive me, and will make my request.

We would like if you could see your way clear and we know how badly you want her with you and how much you would miss her, that is so far as we are qualified to gage a mother's love for her

Digitized by Google

721

child, you let Pearl come up this Term of School. we will be glad to defray all expenses and when the term is over she may come back to you.

Now the only reason I ask or could have the audasity to ask this of you is our love for Pearl and that she sadly needs the schooling and music she can get here, and I promise you she will not be allowed to run around with the fellows, as she has not been allowed to all the time she was here this summer.

Now mother think this over well for I know you want to do as well for all your children in the future as you have in the past, but dont let the mothers love be dominated to much by the wish to keep her with you for this short time for it will not be long before she will have a home of her own in all probibility; and let us generous and try and fit her so she will be an ornament for any home as this is all we can do for any of our children.

722

Again asking you to be generous and broad minded in this hoping you will not feel that I am intruding and that I mean well I am Your obedient son

C. N. Hinman

Love to all

EX. H. 177

10 A. M. July 9, 1898

My dear Friend -

723

We reached Chicago at 9:10 P. M. last night and was transferred to the Northwestern have crossed the famous Mississippi and are now in the State of Iowa, passed Cedar Rapids and are moving at the rate of about for 42 miles per hour this is a most beautifull country the roads in almost a straight line for hundreds of miles was verry ill

Digitized by Google

724 all day yesterday and last night but am all right this morning have just passed through Ames, Iowa a pretty place were having a nice journey mutch better than expected it is not so slow for there are a lot of gentlemen on this car that are full of fun we pla cards, smoke and look at the country will be in Omaha to-night and then take the Pacific through to Sanfrisco, Cal. we want to stop off at Omaha for the Great fair the rear Section is six hours behind and if the Colonel would wait it would give us five hours there but I guess nit will probably pull right through, it is about 160 miles from Council Bluffs where we cross the Missouri River and on the other side is Omaha I suppose by the time this
725 reaches you I expect you will be home what a difference while you are there in the midst of your People I am going God only knows where it seems that fate plays strange freaks with us at times but I sincerely hope it is all for the best we not passed through Omaha train end is on time stopped for 30 minutes awfull mob we have now travelled 1490 miles and have 1865 more to travel it now looks as if we would be quartered at Honolulu, hope to heaven no but the feat of fate can only need our cheating we crossed the Missouri River at Omaha it is so mudy the water is like Pudding we are now on the Union Pacific changed at Omaha which will take us as far as Ogden, Utah, which is at the head of Great Salt Lake, the
726 home of Brigham Young, thence by the Sourthern Pacific to Sanfrancisco it is now 4-10 N Y time have had a beautiful day have been playing poker and lost $15.50/100 how do you like it I think it poor judgment but it may come back to-morrow well my dear girl write and tell me all about yourself how you are getting along and adres Sanfrisco California and mail immediately.

Liut. Chas. N. Hinman, Co. H. First Reg. N. Y. V.

Digitized by Google

727 you would give to see the men work the girls where we stop a half dozen of them get around the girl and mob her blind we are now in the State of Nebraska we have just passed a cornfield at least a mile long in fact the mighty acreage here would astound you they are haying here their wheat is cut in fact there is not mutch of it raised in this part the wheat belt is further to the north we see field after field of pigs turned out to pasture the country is quite hilley here mutch different than what I though the flats are all cut up by marchy land with lots of woods with funnie little houses for the farmers passed one little Indian Vilage with their little mud and straw covered Huts where cues pigs 728

Ex. H. 178

Ex. H. 178 is an envelope postmarked Omaha & Ogden R. P. O., Tr. 4, Jul 10, 1898 and addressed Miss Vena Lord, Equinunk, P. A.

Ex. H. 179

July 9th 8:50 P. M. by eastern time and 9:50 by Central Valley Nebraska 34 miles from Omaha would not stay had to mail the last in a minute at said place so excuse pencil and hast, met a girl there that was begging for money for Bryans Flag 729 for his Regiment gave her a jolly and flew the place is not more that Forty miles from Lincoln the Capitol of the State whitch is on a branch of this road the Platt River is now on our left and follows the road for a great many miles though not in sight mutch of the time have just passed Funeral People all out saw a beautifull grove of Elms

Digitized by Google

730 that has been planted all in rows just passed a building about 16 feet front and 20 in depth with the words G A R acrost the whole front it must be the gathering place of the faithfull hop they will do as well for us when we get home for we will be old Veterans then will you be glad then or will you be married and us forgotten when you write that is if you care to make it a good long one and you may send them often if you wish tell me all about what you are doing where you are going what fun you are having another little place Devil only knows what it is how the boys are and that Fellow that is sweet on you and send your Picture if you will be so kind it is now getting dark the lights are lit cant write mutch more

731 am feeling quite well the Orders just saw in the says we are ordered to Hawai may I please say Sumit—if it proves true if I didn't would bust tell me the truth about that fellow and what he has did to you since your arrival for you see I am worried a little for think you like him a bit we are having the most beautiful groves and rows of trees all planted of about 20 years of growth should think this was all the timber there was here just stopped at North Branch got off for a minute small place people came a running about 150 of them will try and mail this at the next stop but think you will have a nice time reading them for write these while the train is in motion you will need your glasses.

732 just passed through a place called Ledge Pole. the fellows have come back to our seat to play poker and will have to stop now be a nice good girl pity for your poor friend that is a Soldier and the war will soon end and it is now 9:40 Eastern time 4:40 Mountain time want to get this of last night but could not do it we are now in the State of Colorado the night Ranches here sur-

Digitized by Google

733

prise saw at least 500 collte in one bunch this 6 M it seems a godforsaken place to live or die in the people here are so dam far apart you would wair your boots all out before could find you neibhors House the Seward has just come with our Breakfast by by

Hinman

Ex. H. 180

Ex. H. 180 is an envelope postmarked Reno, Nev., Jul 13. 98, 7 AM and addressed Miss Vena Lord, Equinunk, P. A.

734

Ex. H. 181

(Written on letterhead of Markel Hotel Company)

Wadsworth, Nevada,
Tuesday 2 P. M. July 12, 1898

My Dear Friend—

the reason you have not received your Letters regularlarly was because I have been verry ill and in fact am not well yet but mutch improved have just dined at Wadsworth. we now have about 50 miles of Snow sheds to go through and want to finish this before we reach them for will not be able to write any more before tomorrow night because we get to Oakland about 1 A. M. to night and will be hussy there for the 735
length of time we remain for we only wait for the other sections to come up the fourth Section is 14 hours behind we crossed a bridge which covered the Red Butts that at dale creek Canyon 800 feet high there is a Lake on the top of the mountains at Red Butts whitch they say are full of trout there is an Englishman here that owns a ranch by the name of Homer of 10,000 Acres a most beautifull sight through Sand

Digitized by Google

736 Creek they have a Riservi here for Irigating
pumpers witch carries water over 80 miles the
floow that carries the water is 40 feet in width at
the head for about four miles and Two feet in
depth it taps the big fork at the Laramie River
and is am mighty piece of engineering Elevation
10000 feet at head and extends to Fort Collins Colorado now if you dont like these descriptions cant help it have got behind and wont have
time to write at length of inch in about 2 miles
and of Larimer is a Branch Railroad that runs
out to the Great Soda Lakes whitch is the largest
in the world they dredge it right up out of the
like almost pure Soda saw one artesian well 1800
feet in depth spouting water presure 80 lb to the
737 square inch have just pased Wyoming—Wyoming 3-30 P. M. and the sun Shining in the car windows eastern time truly all these things are beautifull to look at for the first time the red Butes of
the Black hills: the might Mountain peaks covered with snow the deep canyons mighty rocks
towering thousands of feet above level mighty
gorges glaciers and the general wildness of the
country Stamps a Picture on ones mind never to
be forgot between Aspen and Evanston run into
a bunch of sheep whitch wer having dinner across
the track there wer about 2000 in the bunch killed
and maimed about 250 of them it was dreadful
threw some of them 15 feet high it was in a cut
and the only thing that prevented the train from
738 being wrecked was it being down grade and we
were going about 65 miles per Hour had we been
going at the usual rate of speed it would have
been all over as it was the cut for the width of
the bunch of sheep was literally filled with the
dead and wounded the Engineer after stopping
took 12 of the engine next is a place called Lookout thought it ment lookout for People werent
any here well think I have troubled you enough
for this time by the time you get this read I

Digitized by Google

739

know you will be sleepy we have been in the alkali plains for about 36 hours and will be more than grateful when we get over them.

hoping you are all well sending my regards to all I remain I hope

Yours Friend
Hinman.

Ex. H. 182

Ex. H. 182 is a piece of paper that was enclosed in the envelope, just the rubber stamp on it, Fort Columbus, N. Y. Harbor, July 5th, 1898, Officer of the Day for July 6th Lt. Hinman. By order of Col. Barber. On the back appears Lt. Hinman H.

740

Ex. H. 183

Ex. H. 183 is an envelope postmarked Wadsworth, N. Y. Jul. 12, 1898, 8 PM and addressed Miss Vena Lord, Equinunk, P. A.

Ex. H. 184

Omaha, Neb.,
3 P. M. Sunday, July 10th, 1898

My dear Friend—

741

Am crossing the first part of the Rocky Mountains on the top of the cuboos the train ran at the rate of about 15 miles per hour up the grade but when it went down you would have grinned to see us hang on for at certain places it ran at the rate of a mile a minute with a good stiff wind blowing from the front the first point of interest was the Sancho Christi Mountains is 100 miles to the west I would take my oath it was not

Digitized by Google

742 more than 10 miles to the same but the view is so clear here that it is very deceitfull an Eastern man cannot tell a thing about distances. Meducine is the highest point of the range snow all the year around passed old fort Rundal whitch has since been abanded was an old Indian frontier Post, whitch is near Cheyan this point of the Rockies is called the famous Black Hills so called becaus as soon as the sun begins to sink the side of the hills in the shadow look dark almost as night Big Meducine Hills lays of to the right the Diamond Peak a little to the right and about ninty miles from here we just passed Granite Canyon the bridge is over one Hundred feet high all through this country there are Prospect holes where the
743 miners have dug for mineral we are over 8000 feet above Sea level at this pointCharcoal lies along the line here about thirty feet in height circul in shape with an opening near the top of about three feet square just same in Badges along the road here for miles is the most beautifull formation for mud purposes it is called decomposed Granite and is shipped as far as St Louis, Missouri, they use it for tamping purposes here we arrive at Sherman Monument built in honor of Olliver and Connors. Ames and others the founders and builders of the Union Pacific Road it was here at this point where the roads met one part commenced in the east and the other from the west and the Golden Spike was driven in honor of the completion the monument
744 is about 125 feet in height square at base ground plan about 40 feet square built to a point at the top with Portrait of Ames cut in the red sand stone on the east and west sides it is a beautifull and first monument to these men of brains and action our nex stop is Wadsworth and must stop have been verry ill and could not write you for the last day or two but in my next will try and make

Digitized by Google

745

up so good by for this time hope you are well give my love to all your People and be a good boy keep your nose clean.

Wadsworth
Hinman.

EX. H. 185

Ex. H. 185 is a postal card postmarked Sanfrancisco, Jul. 13, 330 PM and addressed Miss Vena Lord, Equinunk, P. A. and on the back is written -

Arrived in Samfrancisco at 8 A. M. to-night will write soon. probably leave for Hawai on the 21 at least not later hoping all well I have the honer to 746

Remain
Your Friend
Chas. Hinman

EX. H. 186

Ex. H. 186 is an envelope postmarked Sanfrancisco, Cala., Aug. 18-8 PM '98 and addressed Mis Vena Lord, Equinunk. Pa.

EX. H. 187

Precidio, California 747
July 16, 1898

My dear Friend -

received your kind letter this morning was more than pleased to hear from you verry mutch gratified indeed to learn that you were having sutch a good time for we have only one life to live and that we all should try and make as pleasant as pos-

Digitized by Google

748 sible that you had a good time at Deposit farm your is a forgone conclusion and hoping upon your return home that you will find it just as pleasant and enjoy yourself as well is my only wish at the present think by your letter at hand that sum of my letters have miscarried but be that as it may please to rember that a Soldier has other things to do than writing home but am inclined to be lenient in my critisim but there is a difference when one has to work for a living and one who has only to look for pleasure in my opinion the one has more time to write and keep up a corrispondence than the other but will leave that to you yesterday was the first afternoon of Leisure that has been given me for some time and spent that in the
749 Park they have a verry nice Park here it was formerly Sand hills and in 20 Years they have transformed it into a verry nice place indeed we could hardly believe it possible if the evidence were not before his eyes they have nearly all kinds of animals, Birds, Swans artificial water falls Lakes Fountains and the Most magnifficent Grisley Bear whitch was raised from a Cub in the Park some of the Largest Buffalos you could imagine a grand observatory for Sightseers on the top of Stoonburg Hill was through the Park with friends familiar with the grounds and enjoyed it verry mutch they have the finest Baths here in the world they are called the Suntoo Baths the Beach is to cold for Bathing purposes so this mighty build-
750 ing by a Suntoo for bathing purposes and they are simply magnifficent there is some of large rocks a little way from the Bath and there are hundreds of Seals on and in the water about them and the Scenery at the hights is simply grand the weather here is will there is the most awfull fog that comes in from the Pacific most every day and the atmosphere is so mutch diferent from

Digitized by Google

751

what it is in the east that ie makes it uncomfortable for us here but we are more used to it here now and dont mind it so mutch there were some doubts expressed about our going to Honolulu but they are now put to rest for our orders came yesterday this is

Thursday the 18th to land all our heavy Baggage to-day and be at the Dock to-morrow to embark at 11 A. M., so you see we will have the honor to quarter the post after all Dick bought two tickets for the Orpheum yesterday and we went to the show last night it was quite good. Am not feeling well this morning but have to Drill just the same for your Soldier is not inclined to shirk his duty now Vena it may be a

752

quite long time before you hear from me again but if we meet an incoming Ship will send you tidings of the absent one and all I have to say to you is be Just the same as you always have been enjoy yourself and have a good time as I know you will be good to your Parents they are your best Friends and mean only for your own good well we are just embarking and have only a minute so good by write often adress Honolulu Honolulu for the Present Must close be a good girl as I know you will

Hinman.

EX. H. 188.

753

Ex. H. 188 is an envelope postmarked Honolulu, Aug, 29 1898, 9 AM, and addressed Miss Vena Lord, Equinunk, P. A., which has been stricken with a pen and under which has been written the words, in different handwriting, Miss Vena Lord, 234 Washington Street, Binghamton, N. Y.

Digitized by Google

754

EX. H. 189.

August. 25, 1898

On board the Aliance 400 Miles from Honolulu.

My dear Friend—

it has been some time since you have heard from me but that I am well and in good spirits goes without saying. We have had nice weather and made about 250 Miles per day the first 24 hours was forced to run out of our course but after that we inclined back toward our course and have been five days reaching it you had ought to have seen the men the first night have seen some sights in my time but nothing to compare with it the sickest lot you could imagine there are three
755 stages to sea sickness one is you are afraid you will be sick the next you think you will die the next your fear you wont some swair by the Father they will never come back untill the Ocean is trumelled but Captain Mantin and your humble servant is going to put a Cable car on the cable they are going to lay to Honolulu and ride back on that any one else will halve to pay fare the Captain that is Hitch and Dick both threw up their boots but I didnt but I had the woosey Roosy feeling to my stummick for about 48 hours after that was all right we have fair quarters on this boat and the men are well fed and looked after we will be in Honolulu Saturday forenoon if nothing happens a flying Fish flew into the port hole last
756 night and Billie Hakes is going to mount him he is a Professional at that kind of work it is getting verry warm here and will be still warmer as we proceed we are all wondering what the news are from the outside for we have been dead to the world for the last six days but are still hoping to get into Manilla but whatever our lot we are thinking of our Friends at home and hoping for their best welfare. I am so lasey I dont even try

Digitized by Google

757 to change my mind let alone doing any thing you may imagine yourself nearly seven days out and not even see a Sail nothing to do but eat, sleep and think nothing to break the monotony not even a man fell overboard and see if you would not enjoy yourself oh it is glorious how we bleed and fight for our country we take a bath on a strip of deck about three feet wide in the morning when the deck hands are washing the ship they draw salt water from the Ocean through a three inch hose and we turn that on one another full force and there is a nossel on it to you ought to hear us yell would like to turn it on you for I remember when you turned it on me a N. S. well I must say I rather like it for it is once in a life-
758 time and would not miss it for a fortune if we get in to Manilla shall try to make my pile and hope we will—30th we came in sight of land about 7 A. M. have passed Dimond head we are in the south side of Honolulu Island and about 3 1½ miles from it we saw only one sugar Plantation situated in a little Bay on the so far has all been Mountainious without a tree or shrub on any of them we are now rounding the lower point and passing between the Leper Island and the one on whitch Honolulu is situated have struck the heavy ground sweel and several of the men are sea sick again well Vena will write to you again as soon as it is possible hoping you are well and asking you to give my love to all your People
759 Mrs Sheld and G. & his wife, Lew & Mrs Lew, Mrs N and all the rest if you see them and if you wish me to bring you back a little Black Man or several if you will send Description will start on buy you any one you want so cheer up dont be discouraged for it is always darkest just before dawn Leper Island is about 30 miles from this our Island to the south west where the poor Devils are isolated well I have got to pack my trunk and

Digitized by Google

760 will have to close for his time so ar we veois till next time be of good cheer write when you can for a letter from you is always verry gratefully received no matter if they are saucy for I think you mean all right but say funnie things but will forgive you for saying those bad things to a Poor Soldier in time of War again saying good By I

I remain

Lnt. Chas. N. Hinman

Honolulu Co. H. 18t inf. N. Y. V.

EX. H. 190.

761 Ex. H. 190 is an envelope, the postmark of which is so indistinct that it cannot be made out, but it has two stamps attached on same on which the word "Hawaii" appears, and addressed Miss Vena Lord, 234 Washington St., Binghamton, N. Y.

EX. H. 191.

Honolulu, H. I.
Oct. 28, 1898

My dear Friend—

Your favor of the 12th at hand received the 26th was verry mutch surprised but more than pleas-
762 ed to receive it and more than sorry that you were so ill for judging by the length of your letter you must be under the charge of some one that knows something about medicine hoping that it is not serious and long before it was my pleasure to receive your favor that you were again enjoying the best of health for nothing makes one write badly than forcing ones self to write when one is suffering from a severe pain in the head. I assure

Digitized by Google

763 you even the thought of it would drive one frantic well am still in the Treasury Department but don't know how long I may remain here the Major is a lovely man and am pretty close to him I think and was trying to fix it to stay here indeffinently but your last favor was to say the least so quear that I have been trying to fix it with General King to take me to Manilla with him and if he does it is an unknown quanity when civilation will hear from me again, however if I do go will drop you a line to that efect please say nothing of this for it is a state secret even Dick or any of the men know nothing about it and would not want them to, well we have hopes that the Captain will even be a Major and that will
764 I hope make Dick a Captain and me a second Lieut. the Captain has earned it and I sincerely hope he will get his reward at least he has been recommended by the Colonel and that I think will go although they say there is some feeling was more than grieved to hear about the failure of Normile Bros but was inclined to think it is for an object there may be reasons why the as we look at it happened but if it afects Mrs N. shall consider it approaching a personal injury for if her beautifull home were to be broken up after all her troubles and this added to the rest what under the heavens would she do but am inclined adhere to my first opinion and that things will all come right in the end. at least give my
765 best sympathy to her in her trial at this time. well since the receipt of your last favor have been looking around to see if I could find some of the people you mention have not had verry good luck as yet but mutch encouragement that little black man you speak about will get as soon as possible in fact am searching persistently for a machine to turn him our with now and will ship as soon as he cools if I am successfull in finding the required

Digitized by Google

766 articles will postpone the trial untill I receive your specifications and then will hustle him right out for you. have expressed myself I think quite forcibly about that fellow in my last dont remember just what it was but guess it covers the point your following remark about being able to find a fellow what do you mean by making that remark to me, if you havent enough on hand buy more and send bill for same would be more than pleased to send my friends anything to please but hardly think it would be possible to satisfy the fastidious taste you have acquired lately, but am inclined to treat gracefully any suggestions from my friends and if you honor me with the selection if you will kindly enclose specifications will
767 consider it a personal favor to fill the bill to the best of my ability but owing to your change of taste it will be impossible to act in the matter without thorough instructions cannot conceive what your last remark means am not inclined to deal in metaphor myself so at riddles am entirely at sea. my health at the present writing is good. the Captains wife arrived in the China and they are like Turtle Doves well must close sending my love to all not one left out or fogotten and wishing you personally the realisation of all your desires and all the happiness possible and that the hand of him whence all love watches and guides you both day and night

by by

768 Chas. N. Hinman
Honolulu

EX. H. 192.

Ex. H. 192 is an envelope postmarked Honolulu, Nov. 9, 1898, 10 AM and addressed Miss Vena Lord, 234 Washington St., Binghamton, N. Y. and Soldiers Letter written across the corner.

Digitized by Google

769

EX. H. 193.

Progress Block Honolulu No. 5, 1898

My dear Friend—

the mail going wednesday thought perhaps you might need a few lines if you were looking for something to kill time with am trying to think of something to say that has not been said before. well I started this when the fire bell rang and you ought to have seen me my hat. first there my pants in one hand and coat in the other and trying to get into both at the same time the Fire station is on oposite corner from this and when they come out yours truly was there on time and made the run. by the way the Fire Department here is the finest I ever saw and the Chief is a great friend of mine well this is Sunday have been wandering around Honolulu all day and am tired tonight but in good health the weather here is beautifull now am still in the City guarding Vueles treasury am going out to Camp tuesday to pay the First N. Y. V. and then they will be happy, we have had the misfortune to loose some of the men of the Regiment with Typhoid Fever and other things but the present time the trouble I think is practically over so we are all feeling better at the present time Lathrop is now on his way home and we have I think 4 going home on the boat Wensday. well I most sincerely hope you are well and having a nice time in the old town of B. for if you were here you would think you were in Church it is so solm Cholly that I pinch or pin myself to find if I am living there are no popular places of amusement here and if you take a Lady to the Show it will cost you at least $6.00 before you get through so you see a man has at least to be a General if he goes with the ladies here, but there is a Place being built where they are supposed to play for popular

770

771

Digitized by Google

772 prices, but if you take a seat where an officer will have to if he goes it will be my pleasure to attend about once per Month. there has two or three Mails in since hearing from you am not surprised but when you have the time and those lonesome moments steal upon you if it is then your province please kill two birds with one stone and write to me. there is no changes here at the present nothing but same dull routine from day to day but all things come to an end and this must at least some time am willing to serve Sam as long as he thinks he needs me and am not kicking at my lot nearly the whole Camp. has been changed from where were located and our Barracks are being constructed so guess things will be all right in ashort
773 time our Hospital is going to be located in Mona Valley, a most beautifull location. Colonel Barber is now in command and we are happy. that you are well and will be kind enough to give my love to all your people and not forget Mrs N.—L. Lew and also Mr and Mrs Snow with the hope that they are feeding you well and hoping that through you when you write will give me all the news and that bad Headach will not bother you while writing and that it may be at least as long as the last will close adress as usual

Chas N. Hinman
2d Lieut. Co. H. 1st Inf.
N. Y. V.

774

EX. H. 194

Ex. H. 194 is an envelope postmarked Honolulu, Nov. 14, 1898, 10 AM and addressed Miss Vena Lord, 234 Washington St., Binghamton, N. Y. and across the corner is written Soldiers Letter.

Digitized by Google

Ex. H. 195.

EX. H. 195

Progress Block Honolulu Nov. 14, 1898
My dear Friend -

although not receiving any thing in the last lot of Mail boat that have brought me other matter will send you this to let you know am still among the living here in Honolulu if forgotten at 13 - was never in better health in my life am still in Command of the Paymasters Guard at this station there is not mutch to write you about for the absence of mail matter from you precludes you from saying mutch hoping you are enjoying yourself as you deserve to and am not worrying about the little things of life and that the Ns - are in better shap than when you wrote the last and wishing you to give to all my friends that remember the poor Soldier that is not earning the living at home the usual and a funnie joke on me thought it was going out tomorrow and it goes today so having these few minutes am devoting them to you they say I believe that no news are good news and not hearing from you am of course correspondingly happy for with the philosophical turn of mind I have acquired since my entrance into the Service of Uncle Sam, if I was Shipwrecked on a barren Island would elect myself Alderman and be happy or near it as possible for man to be in this Island of the Pacific. now in all things do as you like if it has become tiresome writing to me will freely absolve you from a disagreeable duty so if you dont care to correspond with me any more drop it if you like. Am forced against my will to send to the City that I love above any other place the tidings that must be written home but though disagreeable here it is with these gloomy thought whitch have clutched and are holding fast what little mind I have got this might better be written here them whose hope and joy furnish the material

775

776

777

Digitized by Google

778 for a whole letter. we lost a Man and Brother Friday Night Cowels by name a Hospital Nurse who has been one of the most faithfull of Nurses and beloved by not only the Company but the whole Regiment as well this makes two that we have from home and it is with more feeling than it is policy to express here or by letter that I pen these lines but the critical Stage has passed and it is my opinion that we will soon be on the rapid road to recovery that is the whole Regiment will be again in good condition hoping that you and all your friends are enjoying life with all possible yours for all time and asking you to remner to all your People will close this, for you as I now see you are tired with effort this has caused so bid-
779 ding you again good by will quit.

Hinman.

EX. H. 196

Ex. H. 196 is an envelope, the postmark of which is so indistinct that it cannot be made out, addressed Miss Vena Lord, No. 234 Washington St., Binghamton, N. Y. and bearing two Hawaiian postage stamps.

EX. H. 197

780 Oct. 22d, 1898
Island of Ohan,
Camp McKinley,
Waikiki
Honolulu

My dear Friend -

in returning from my trip around the Island with our Company must believe me more than pleased to hear from you both letters whitch you

Digitized by Google

Ex. H. 197.

781 were so kind as to spend the time in writing to a poor soldier in this land of Fevres, Mosquitos and finally Scorpions and Centipedes with these beautifull dark Farries therein where life is a Poets dream and pain a reverse of joy and comfort to the Soldiers here quartered and that you should have honored me by the presentation of the Photograph of your own self so long promised but not forthcoming was a pleasure indeed of whitch personally if I might be alowed to express an opinion is simply perfect and a good likeness as I rember you the lines of sorrow and heartbreak does not as yet show at least I could not discern them and in that also there is cause for gladness so from your picture looking the picture
782 of health and looking at the picture and realising these things commonly produce one result and that is intense pleasure that ones friends is above all else enjoying themselves and thanking you with all my heart for those favors received at your hands. they say that it is the unexpected that happens and I shall believe it from this and have been up to the Volcano of Manna Lou as you know and upon arriving home started with my Company on a practice march around the Island since my arrival at Camp have been threatened with the Fever but am now all right as a trivit plump on my legs again just heard tonight that a boat leaves to-morrow so am writing to-night this is the first but will have to write home by this boat
783 the receipt of yours there was one thing in your letter that I thought to ignore but will though perhaps may regret it say that by your saying that a Man told you all about it, and, made all those explanation you wrote about explains the whole thing and I in tendering you my best wishes for your welfare. thank you most heartily for having the confidence in a poor soldier to explain

Digitized by Google

784 the condition of your affairs so graphically and accurately in so short a sentence and having the best interest of all my friends at heart am of course mutch pleased as you would expect me to be at your good fortune or his for he must be sutch a good man am unfortunately handicapped by not having your letter before me but it is at Camp in my trunk and I am detached on daily duty and am here with a guard to protect they say several hundred thousand Dollars of Uncle Sams money in four large trunks of Iron whitch is on the ground floor in the Progress Block. so being here in Honolulu have not acess to my valuables at camp. my trip about the Island was most delightfull the whole Camp is now being changed
785 so I guess we will all be more or less benefited hope so at least we had the misfortune to loose another of our men last week by the name of Thompson a verry bright hansom fellow and it is with the deepest regret I pen these lines and a heart full to overflowing for his Father and Mother at home when the news reaches them of the demise of their gifted son he was formerly of Company E and was transferred to ours at Camp Black both Porter and him should have been discharged at Precidio, Cal. and not brought here at all the Surgeons now say so but to late the relise their mistake but if we were all home some of us would undoubtedly cross to the great unknown and I suppose we can only be thankfull that only two of us
786 has crossed the Styx. We are all of us being now being moved to the Mountains as a health precaution. well Vena if you please to give my love to Mrs. N. who believe me I hear the highest regard and am more than sorry that the brilliant mind of her Husband should be so afflicted for it must be disease and also to her whom you write me is in Collage also remember me to Mr and Mrs L. tell every one else hello even that lucky fellow

Digitized by Google

787

that you are so willing to believe for by the tone of your letter I consider him one of your People and when you explain this letter to him hope he will be satisfied that he has been at least treated fairly and with justice sending my best wishes to you and yours, I remain

Respectfully
Chas. N. Hinman
2d Lieut. Co. H. 1st Inf. N. Y. V.
Camp McKinley, Honolulu

am still here in Honolulu the expected boat didn't leave the Island so this will not go before the twenty-sixth at least if it does then if you have the time to write again whitch I hope if he does not object you will, wish to say that the arrival of mail here is very uncertain we get all our letters 788 some time but your last reached here by the same mail we know when a boat leaves here for home but in writing you cannot tell when a boat leaves Sanfrisco so if you have the time and inclination to write whitch as I said before hope you have even if you do write some verry mean ones. string them out and make them as numerous as possible my time is not all my own but will try to do justice to evry one who is Kind enough to write a poor devil if it is possible again your favor thankfully received

C. N. H.

EX. H. 197 789

Oct. 24, 1898

My dear Friend -

am still guarding the treasury of Uncle Sam and the boat has not yet gone so thought it would be pleasant to make you spend a little more time with this letter am feeling indeed well with myself to-night went up to the Hincain Hotell with

Digitized by Google

Ex. H. 197.

790 Major Purdy at his invitation to Dinner to night
and afterwards to the Band concert it was verry
good had one Hundred excuses why I should not
go but when the Major asked me could not think
of a one of them was it not funnie again thanking
you for the picture and hoping you have received
that thing of mine though when I looked at it was
impossible for me to realise how any one would
have the likes around without they owed them-
selves a grudge if it has not arrived drop Balis
Hinman a line at 175 Water St and he will send it
to you he has sent it probably to Equinuk or you
would have now received it before this. hoping
you are in a better frame of mind at this date
than when you wrote that last letter or that the
791 tempter had flown to your imaginary troubles
have ceased to bother you at least by this time and
hoping that your life is laid in pleasant places at
the present time knowing that though prompt to
suspicion you mean to be just and a true woman in
every sense of the word and that as long as you
are the shafts of treachery and falshood fall
harmless from your virgin Shield and leaves you
spotless from coming in contact with sutch put-
rid blood and foul brained loafers that you must
be asociating with to hear sutch base caluminy
as your letter indicated I expect the that under
the circumstances believeing as you do that I
have heard from you for the last time for did I
think that of a friend of mine that is the way I
792 should treat him or her so wishing for your wel-
fare only believeing that the God of wisdom to a
certain extent shapes all our ends and thinking
and believeing that it is beneath the dignity of
any true man to try to convince under the circum-
stances for when confidence is once shaken there
is no repair hoping you are well having a nice
time and congratulating you for your faith and
friendship as demonstrated by your last favor

Digitized by Google

793

will close and seal for you will probily consign this to the flames before the thing is finished and dont know as I should blame you if you did sinding my love to all my true friends and wishing them all hapiness How is the picture her says

C. N. H. U. S. A. V.

EX. H. 198

Ex. H. 198 is an envelope postmarked Binghamton, N. Y., Jan. 14, 1899, 6-30 P and addressed Miss Vena Lord, No. 234 Washington St., City.

EX. H. 199

794

1-13-1898

Miss Lord -

Your favor of the 11th at hand. was somewhat surprised to hear from you but always pleased to hear from my friends. received your note this morning and believe me am more than sorry that you are so displeased with that work of art and humbly apologise for my being the means of your receiving it.

it was perhaps an unpardonable offense but hoping you will be generous and forgiving enough at least after my next statement to forgive my impertinence evry one most wanted some souveneir from the service and no one else would have the 795
Pictures so I imposed upon you. now Miss Lord my most humble apology is yours and will act in your suggestion if you will be kind enough to direct that package to 175 Water St will mail yours to your Ad- hoping you are well and that you enjoyed the show whitch you of course did with your Friend. well it is late excuse this paper

Digitized by Google

796 and this scribble sending my best respects to friends will close.

Respectifully
Hinman

P. S. would mutch rather you sent the package by Mail to my adress than leave at Normiles will bear expense hoping this metts with your destinguished aproval and not blaming you for not wanting the old thing and again apologiseing for my gross impertinence I sincerely believe this explanation and my apology should be sufficient so good by hoping you all the good and none of the bad of this life whitch you so ritchly deserve and thanking you beforehand for your kindness in forgiving and for thinking you might accept it but
797 dont blame you for think you showed good judgment.

EX. H. 200

Ex. H. 200 is an envelope postmarked Binghamton, N. Y., Dec. 12, 1900, 1030AM, addressed Miss Vena Lord, Equinunk, Penna.

EX. H. 201

Binghamton, N. Y. Dec. 11, 1900

My dear Friend -

798 Yours of the 10th inst. at hand and was more than glad to hear from you that you enjoyed yourself in Deposit gives me great self pleasure, that you capture fishes from under the sea does not surprise me for it is clearly your pleasure and inaleinable right to gather to yourself whatever may please your fancy or serve your purpos "it is this" they simply took your hook willing to give up life to get a better look and in so doing be nearer to thee. It is my personal opinion that

Digitized by Google

799

your last experience coincides with late catch.

However have not received the fish as yet but expect to in the morning and am most deeply gratified and take great pleasure in learning by your letter that he is enroute for it conveys the impression that your old friends are not entirely forgotten.

Have been working hard lately my office work has been something devilish yesterday from 1-30 P. M. till 10:10 P. M. supper accepted Thank you for bothering about the eal and am only sorry we have not sutch fishing here.

There is no news here that I know of that will interest you it has been bitter cold here and has snowed all afternoon and still at it with the prospect of a devil of a day tomorrow and know shall 800 enjoy it tomorrow evening.

Hoping you are well and that your sister may by the help of good care so gain her health asking to be rembered to all to whom twill be acceptable thanking your and yours for the token of all your kindness will close for this time.

P. S. Please write again before the spring rains sets in.

Yours
Respectfully
C. N. Hinman
175 Water St.,
City.

801

EX. H. 202

Ex. H. 202 is an envelope postmarked Binghamton, N. Y., Dec. 21, 1900, 730 AM, addressed Miss Vena Lord, Equinunk, Penna. and bearing a card in the left hand corner as follows: Company H (20th Sep. Co) 1st Reg't. N. G. N. Y., Binghamton, N. Y.

Digitized by Google

802

EX. H. 203

(Written on stationary of Co. H. (20th Sep. Co.) 1st Reg.)

Binghamton, N. Y., Dec. 21st, 1900

My dear Friend -

Your last at hand and reason for my not writing you is that I have not been home lately but am going to day.

I was more than glad to receive word from you your fish was no fish but a whale it created more excitement on the street here than a circus parade and wish to beg of both you and yours to accept my most humble thanks for your rembrance kindness and generosity it it was so entirely unexpect-

803 ed and one of the most pleasant surprises of my life and we ate the villain limb and tumick and have his head on exhibition.

Well am writing this from Armory and am short for time hoping you are well and asking to be rembered to all will write again soon as possible wanting you to be a good kid will say write soon.

C. N. Hinman.

During the identification and introduction in evidence of the foregoing exhibits recess was taken to July 13, 1910, at 9:30 A. M. At that time the witness Asa L. Bonnell was recalled on his

804 Re-direct examination, and being examined by Mr. Hinman, continued his testimony as follows:

The Spanish-American War was in 1898. I went to Honolulu with the 20th Separate Company. Charles N. Hinman was a member of that Company and accompanied it to Honolulu. We made the trip from Binghamton to the Pacific Coast by rail. He was with the Company on that trip. Before the 20th Separate Company started across the continent for the Pacific Coast it was in Camp at Governor's Island in New York Harbor. Col. Barber was in command of the Regiment with which the 20th Separate Company was connected.

Digitized by Google

805

MAUDE MORGAN recalled for further Cross-Examination by Mr. Hinman testified as follows:

By attorney for petitioner: I do not want the record to show that she is recalled for further Cross Examination.

By Counsel for the administratrix—I ask that Mrs. Morgan take the stand in order that I may further cross-examine her.

By Counsel for the petitioner —
Objected to upon the ground that the witness was sworn on the petitioner's case and was fully cross-examined and the right to further cross-examine was not reserved, and we insist that if she be examined, she be examined as respondent's own witness.

806

By the Court —
It seems to me she ought to be examined as your witness at this time.

By counsel for the administratrix—Exception.

By counsel for the administratrix —
I desire to have Mr Morse take the stand for further cross-examination and ask the privilege of futher cross-examining him.

By counsel for the petitioner —
Petitioner objects to counsel calling this witness for further cross-examination upon the ground that he was sworn as a witness on petitioner's direct case and fully examined and cross examined, and the right for further cross-examination was not reserved. We have no objection whatever to his being examined, but insist that he should be examined by respondent as her own witness in her own case.

807

By the Court —
I do not think I should allow you to further cross-examine Mr. Hinman.

Digitized by Google

Maude Morgan for Petitioner-Cross.
808 *Vernon D. Stratton for Respondent-Direct.*

By Counsel for the administratrix — Exception.

By counsel for the administratrix —
May it be conceded on the record, by all parties, that in the year 1902 Dr. F. P. Hough, who has been sworn as a witness on behalf of the respondent in this case, was the physician at the County farm in the County of Broome and that that was his last year of service.

By counsel for the petitioner —
We will concede that, reserving the right, if we find it to be incorrect to correct it.

---

809 VERNON D. STRATTON being called as a witness for the administratrix, being duly sworn and examined by Mr. Hinman, testified as follows:
I am an attorney in the Matter of the Estate of Charles N. Hinman, deceased, for the witness Alva Morse. I represent no one else in that estate. I am the V. D. Stratton who went South and saw the witness LaRoche on one occasion. I was there only one time. I fix the date from recollection in the fore part of the month of May, 1909. At that time he made the affidavit which has been referred to and marked Ex. A. for identification. I brought the affidavit north with me when I came in May, 1909. Some time later I submitted it, or its contents, or conveyed its contents, the sub-
810 stance of its contents, to Messrs Wilber & Yetter. That was some weeks after May, 1909. Wilber & Yetter were and are the attorneys in this Charles N. Hinman Estate for the petitioner Henry A. Hinman. George A. Purdy was the man who went with me when I saw Mr. LaRoche on that occasion. He lives at Oxford now.
He was not connected in business with me nor was he related to any of the parties interested in

Digitized by Google

this estate. I introduced him to Mr. LaRoche. 811
He is a Justice of the Peace in Oxford and does some speculating and is about sixty years old. He is not related to Mr. LaRoche and never met him before this occasion. He went with me and returned with me. I first met Mr. LaRoche this month in New York City, on last Saturday July 9, 1910, at the New Grand Hotel. I accompanied him from New York to Binghamton and from the train went with him to the Crandall Hotel. I have copies of the two letters I wrote him.

Q. Are you willing to produce them?

A. I am willing to put them in evidence. I am willing to produce them.

Q. Will you let me see them please? A. Yes sir. 812

By counsel for the petitioner —

Objected to as improper, incompetent, immaterial.

By the Court—Sustained.

By counsel for the administratrix—Exception.

I do not recall the number of letters I wrote to Mr. LaRoche. I should say half a dozen and some telegrams. I sent some night messages. My recollection is I received from him three letters and I should think three telegrams. I have here in Court the letters and telegrams I received from him.

Q. Are you willing to produce those?

A. Yes. 813

Q. Will you produce them?

A. Certainly.

Q. Now if will you let me see them please?

By counsel for the petitioner—

Objected to as improper, incompetent, immaterial.

Digitized by Google

814 By the Court—Sustained.

By counsel for the administratrix — Exception.

Q. Do you refuse, Mr. Stratton, in view of the objection of the attorney for Mr. Henry A. Hinman, to produce the letters and telegrams which you received from Mr. LaRoche?

A. No, I do not refuse for personal reasons. I would like to have them put in evidence.

By counsel for the petitioner—

I will state right now that I have no objection to having put in evidence letters written by Wilber & Yetter to Mr. LaRoche and the answers of Mr. LaRoche to Wilber & Yetter, or letters from
815 Mr. Stratton to La Roche or letters from LaRoche to Stratton, or telegrams from Stratton to LaRoche and telegrams from LaRoche to Stratton.

By counsel for the administratrix—

Q. Do you now, Mr. Stratton, refuse to let me examine the letters and telegrams which you have received from Mr. LaRoche?

A. I am willing to show them.

Q. Then let me see them please.

By counsel for the petitioner—

I object to their being produced as being improper, immaterial irrelevant.

By the Court—Sustained.

816 By counsel for the administratrix—Exception.

When I met James H. LaRoche in May, 1909, he had an appointment to meet me at Meggett, Colleton County, South Carolina. When I arrived he was not there and I started for the plantation where he lived. When I got there I learned that he had started for Meggetts and I immediately returned and found him at the store where I was to meet him.

Digitized by Google

817

Q. Was he fishing that day?

By counsel for the petitioner—
Objected to as improper, irrelevant, immaterial.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. Was he engaged in the business of a base-ball fan that day?

By counsel for the petitioner—
Objected to as improper, irrelevant, immaterial.

By the Court—Sustained.

By counsel for the administratrix—Exception.

818

Q. Describe as nearly as you can how he was dressed that day when you met him.

By counsel for the petitioner—Same objection.

By the Court —Sustained.

By counsel for the administratrix—Exception.

I have known Alva Morse about ten years. He resided in Coventry when I first knew him. I do not know that I can tell you his business in Coventry. I think at the time I met him he was one of the officers of the Town. I think Constable.

Q. You as attorney for Mr. Morse have brought an action to partition the real estate, or some of the real estate of which Charles N. Hinman died seized, have you not?

819

By counsel for the petitioner—
Objected to as improper, incompetent, immaterial, the pleadings in the action are the best evidence.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Digitized by Google

820 Q. Have you brought an action in the Supreme Court in this County which is now pending, as attorney for Alva Morse, in which action Henry A. Hinman is a party, and the heirs at law of Charles N. Hinman, deceased, including this respondent, are, and which action is now pending and which is brought for the purpose of partitioning the real estate of which Charles N. Hinman, deceased, died seized?

By counsel for the petitioner—
Objected to as improper, incompetent and immaterial.

By the Court—Overruled.

821 A. Yes.
I do not remember when that action was brought. It was brought quite a number of months ago. It is my recollection that it was on the January and April calendar of this Court, that is January and April, 1910, calendars of the Supreme Court in the County of Broome. I do not remember the date when this proceeding was commenced. I do not know that the citation would refresh my recollection. My papers are all over to Mr. Yetter's office in my grip.

Q. Is it not a fact that the partition action which you have mentioned and described here was pending and at issue before this proceeding in this Court was begun?

822 By counsel for the petitioner—
Objected to as incompetent, irrelevant and immaterial.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. I show you a petition entitled Surrogate's Court, Broome County, in the Matter of the Es-

Digitized by Google

823

tate of Charles N. Hinman, deceased, purporting to be signed by Henry A. Hinman and to have been verified by him on the 9th day of March, 1910, and which seems to have been filed March 10, 1910, and ask you if by looking at that you can tell about when this present proceeding was instituted?

A. Only by hearsay. I was not present at the filing of the papers.

Q. In the partition action which you brought, and which has been described here, was and is this respondent Vena M. Hinman both individually and as administratrix of the Estate of Charles N. Hinman, deceased, a party defendant?

824

By counsel for the petitioner—

Objected to as improper, irrelevant, immaterial and the pleadings are the best evidence.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. And before this present proceeding was instituted had she appeared in that action by her attorneys and served her answer and a complaint in that action?

By counsel for the petitioner—

Objected to as irrelevant, improper and immaterial.

By the Court—Sustained.

825

By counsel for the administratrix—Exception.

Q. Did that partition action, which you say you think was on the calendar of the trial court in April, 1910, in the County of Broome, pass the term or was it stricken from the calendar on your motion?

By counsel for the petitioner—

Objected to as irrelevant, improper, incompetent, immaterial.

Digitized by Google

826 By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. Before you brought and after you brought the partition action which you have mentioned and described, as attorney for Alva Morse, did you consult with Wilber & Yetter, attorneys at law in Binghamton, N. Y., who are the attorneys for Henry A. Hinman in this proceeding?

By counsel for the petitioner—Same objection.

By the Court—Sustained.

By counsel for the administratrix—Exception.

827 Q. After the bringing of that action, and before this proceeding now pending in this Court was begun, did you consult and converse with Wilber & Yetter, attorneys at law of this City, and did they converse and consult with you with reference to bringing this proceeding in connection with other matters in reference thereto?

By counsel for the petitioner—
Objected to as irrelevant, immaterial, hearsay and privileged.

By the Court—Sustained.

By counsel for the administratrix—Exception.

828 Q. Was it arraigned, understood or agreed between you as attorney for Alva Morse, or Alva Morse on the one side, and Henry A. Hinman or Wilber & Yetter his attorneys, or both of them, before this proceeding now pending in this Court was instituted, that it should be instituted in the name of Henry A. Hinman but that the expense should be borne by both Henry A. Hinman and your client, Alva Morse?

A. I could not answer that directly.

Digitized by Google

829

Q. I will put it in this form: Was it understood or agreed that your client Mr. Morse, should bear a part of the expenses of the proceeding?

A. There has been no agreement made so far as Mr. Morse is concerned.

Q. How about that as far as you are concerned? You as attorney for Mr. Morse, whether he or his share in the estate of Charles N. Hinman, deceased, should bear part of the expense of this proceeding?

A. There has been no agreement made.

Q. Was there any such understanding?

A. No.

Q. Is there a general understanding whereby your client, Alva Morse, either by himself or through you,, is to share or bear, or his interest in the estate of Charles N. Hinman, deceased, shall bear or share in the expenses of this proceeding, or of this proceeding, by you or by Wilber & Yetter in connection with the estate of Charles N. Hinman, deceased?

830

By counsel for the petitioner—

Objected to as improper, immaterial, a privileged communication between attorney and client.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Here an adjournment was taken until July 14, 1910, at 9:30 A. M., at which time the hearing was resumed, the same appearances being made.

831

CURTIS E. HUGHSTON—being called as a witness, being duly sworn and examined by Mr. Hinman, testified as follows:

I reside at No. 38 Walnut St. in the City of Binghamton. I have lived in Binghamton about thirty-five years. My occupation is Railway mail

Digitized by Google

832 clerk. I am the husband of Sarah Hughston. I know Henry A. Hinman. I purchased the place where I now reside of Mrs. Charles N. Hinman. I first met her in September, 1909, I think. Henry A. Hinman introduced her to me. He introduced her as his sister-in-law, Mrs. Hinman. The transaction by which the title to that property was transferred by Mrs. Hinman to me was finally closed up some time in December, 1909. LaVerne Race was the lawyer who had charge of the transaction for me. I was present on that occasion when Mrs. Hinman was introduced to Mr. Race. Henry A. Hinman was the person who made that introduction. He introduced her as Mrs. Hinman.

833 Counsel for the administratrix then offered in evidence from the records in the Office of the Clerk of the County of Broome page 2 of Deed Book No. 212, upon which appears the record of a deed dated April 1, 1907, acknowledged April 6, 1907, in which the grantors are described as Charles N. Hinman and Vena Hinman, his wife.

Here an adjournment was taken until July 22, 1910, at 9:30 o'clock A. M., at which time the hearing was resumed with the same appearances.

HARVEY B. SPROUL, being called as witness for the administratrix, being duly sworn and examined by Mr Hinman, testified as follows:

834 I live at Peekskill, N. Y. My occupation is general contractor. My age is thirty. I knew Charles N. Hinman in his lifetime. I first knew him in the Spring of 1904. At that time I was employed by J. Walker, good roads contractor and was making arrangements for the road known as the Town Line Extension that goes up through the Hinman farm past the County Poor House. In April, 1905, Charles N. Hinman became a partner with me in the contracting business. The

Digitized by Google

835

firm name was Hinman & Sproul. That partnership continued until his death. In 1905 we were engaged in work at Scotia, N. Y., just across the river from Schenectady. In the latter part of 1905 and 1906 we were engaged in constructing a sewage disposal plant at Newton, N. J. Later we had a job at Scarsdale.

I first met Mrs. Charles N. Hinman in the Spring of 1904 at her house when I went to use the telephone. That was on the Hinman farm in the Town of Chenango. That same year I boarded in the house where Charles N. Hinman was living. It is my recollection I boarded there about four weeks. Charles N. Hinman and Mrs. Charles N. Hinman occupied the same room in the house there during that period. Charles N. Hinman 836
spoke of her as Mrs. Charles N Hinman while I was there and whenever he spoke of her in my presence he spoke of her as Mrs. Charles N. Hinman. While we were engaged in the work at Scotia, just across the river from Schenectady, in 1905, Charles N. Hinman boarded with my father-in-law in Schenectady. Mrs. Charles N. Hinman visited him there in the summer of 1905. She and he occupied the same room there that summer. While at Newton, N. J., Charles N. Hinman stayed at the Newton Hotel, John Colvin proprietor. In the summer of 1906 Mrs. Charles N. Hinman visited Charles N. Hinman at that hotel. My recollection is she stayed there from six to nine weeks. While there 837
he and she occupied the same room at that hotel. He spoke of her in my presence there as Mrs. Hinman. Yater at Scarsdale, N. Y., she visited him.

RESPONDENT RESTS

Digitized by Google

Motion to Strike from Record All Evidence and Testi-
838 *mony to Show Repute of Marriage Subsequent to Jan. 1, 1902.*
Harvey D. Hinman for Petitioner-Direct.

By counsel for the petitioner—

The petitioner moves to strike from the record all evidence and all testimony of the witnesses tending to show repute of marriage between this respondent and Charles N. Hinman, or their cohabitation, subsequent to January 1st, 1902, upon the ground that it is irelevant, immaterial, incompetent, and inadmissible under the pleadings.

By the Court—Motion denied.

By counsel for the petitioner—

839 Petitioner desires the record to show that in opening the case for the respondent Mr. Hinman, her counsel stated in open Court, in substance or in words, that the claim of the rspondent here is that she was married to Charles N. Hinman in Sept. 1901, by LaRoche, LaRoche to the contrary notwithstanding.

By counsel for the administratrix—

I object to the record showing what the counsel for the petitioner claims Mr. Hinman said in opening, but have no objection to the record showing what was said by Mr. Hinman when he opened the case on behalf of the respondent.

By the Court—Objection sustained.

840 By counsel for the petitioner—

I will call Mr. Hinman.

HARVEY D. HINMAN, being duly sworn and examined by Mr. Yetter, testified as follows:

I am an attorney and counselor at law. Have been for nineteen years I think. I am one of the attorneys of record for the respondent in this proceeding and conducted the case for this respondent, which commenced in this Court on July 11,

Digitized by Google

841 1910. During the time that the hearing was in progress from the 11th day of July, 1910, to July 14, 1910, the respondent sat at my side in the court during the progres of this proceeding practically all of the time. At the close of the evidence for the petitioner I addressed the Court in opening the case for the respondent.

Q. At that time was the respondent in Court?

A. I do not know but I assume that she was. It may be conceded that she was.

Q. Did you in opening the case for the respondent, in open Court, state in words or in substance that the claim of the respondent here was that she was married to Charles N. Hinman in September, 1901?

842 By the witness—Objected to as immaterial, irrelevant, incompetent, improper and not binding on the respondent.

By counsel for the petitioner—At the outset counsel stated that he had no objection to the record containing exactly what he did say.

By the Court—Objection sustained.

By counsel for the petitioner—Exception.

Q. And did you further state that you would show that the respondent was married to Charles N. Hinman in Sept. 1901, by LaRoche, LaRoche to the contrary, notwithstanding, or that in substance?

843 A. I did not.

Q. Did you state that you would show that the respondent was married in Sept. 1901, or that in substance?

A. I did not.

Q. What statement did you make relative to that matter, if any?

A. That is difficult for me to state exactly what was said at that time. I can state and have no objection to stating what my position was at that

Digitized by Google

844 time, what the position of the respondent was at that time, what it always has been and what it is now, but as to just how I worded it then, I do not know.

Q. Give us your best recollection as to how you worded it?

A. Now my recollection—and the Court will recall it—let me say first that whatever I may have said, or may have claimed, cannot be binding upon or prejudicial to the interests of this respondent here and her case does not depend and cannot depend or be decided upon what counsel said or did not say. My recollection of what I said, the substance of it, and I do not undertake to give my words because I could not do it, was that
845 this woman was married to him by a ceremonial marriage, and my recollection is that I gave the date of it.

Q. What date did you give?

A. I think I gave September, 1901, that is my recollection, but I stated to the Court—

Q. That is all I care for.

By the witness—On the opening of this case I stated to the Court in substance—

By counsel for the petitioner—
Objected to as improper, incompetent and immaterial.

By the Court—If you offer this as explanatory and as part that he drew out you may state.

846

By the witness—I do.

By the Court—Overruled.

By the witness—I stated to the Court as part of the opening that we would be unable to prove the facts in connection with the ceremonial marriage because of the fact that the only witness living, outside of LaRoche, was the respondent herself who was precluded from testifying under

Digitized by Google

Harvey D. Hinman for Petitioner-Direct.
Mrs. Jessie Allen for Petitioner-Direct.

847

Section 829, but that we would prove facts and circumstances and I gave a statement of some of the facts and circumstances and named some of the witnesses and mentioned correspondence which would establish under the decisions to the satisfaction of the Court that Charles N. Hinman and Vena M. Hinman were husband and wife and that she was his widow.

By counsel for the petitioner.—I move to strike the testimony out just given as improper, irrelevant, incompetent, immaterial.

By the Court—So far as my deciding the issue in this case upon what counsel may have said in opening the case, I will state now that I would not do it, because I do not regard the statements of counsel unless under oath, as testimony. The motion to strike out is denied.

848

Mrs. JESSIE ALLEN, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I reside at 17 Cedar Street. I have resided all my life in the City of Binghamton. My age is thirty-nine. In 1899 I resided at 16 Maiden Lane in the City of Binghamton. I think I resided there twelve years. I was acquainted with Charles N. Hinman in his life time. I had known him some time prior to 1899 several years, he had delivered milk at our house. I am acquainted with the respondent in this proceeding. I recall when I first met her. It was in the summer after the War after the 20th Separate Company, or Company H was ordered out here at the City of Binghamton.

849

By counsel—

It is conceded that the 20th Separate Company, or Company H., of which Charles N. Hinman was

Digitized by Google

850 a member, was mustered out of the service of the Spanish-American War at the City of Binghamton in February, 1899.

Witness continuing—

I first met her at my home in the City of Binghamton, No. 16 Maiden Lane. She stayed over night at my house. I cannot recall the month but it was in the summer of 1899. She and Charles N. Hinman during that summer, or early fall, occupied the same room in my house at No. 16 Maiden Lane in the City of Binghamton. They did that on more than one night, not more than two.

851 Cross examination by Mr. Hinman—

My husband's name is William C. Allen. I have been married 19 years. Was living with my husband in 1899. I first knew Charles N. Hinman when I was first married.

Q. When did you first know Mrs. Charles N. Hinman?

A. In the fall.

By the Court—I understand you to say you knew him when you were first married?

By counsel for the administratrix—

A. I did.

Q. When did you first know her?

A. After the war, when Mr. Hinman brought
852 her to my home.

Q. How old was she?

A. I do not know.

Q. What did you guess about it?

By counsel for the petitioner—

Objected to as improper, incompetent, immaterial.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Digitized by Google

Mrs. Jessie Allen for Petitioner-Cross.

853 I visited Mrs. Charles N. Hinman at the Hinman farm in the Town of Chenango several times. On those occasions I sometimes stayed over night there with Charles and Mrs. Charles N. Hinman. Charles N. Hinman's mother was there. In 1899 my husband's occupation was cigar packer. He was living at home. I moved from Maiden Lane to my present home on Cedar Street four years ago.

Q. Before you moved from Maiden Lane did Charles N. Hinman and Mrs. Hinman visit you and your husband on Maiden Lane?

A. They did.

Q. At different times?

854 By counsel for the petitioner:—I object to characterizing as Mr. & Mrs. Hinman prior to their living on Maiden Lane or at any time they lived on Maiden Lane.

By counsel for administratrix—I am using the witness' own term.

By the Court—You may bring out what she means by the remark because she has been referred to back and forth as Mrs. Hinman.

Since moving I have lived on Cedar Street with my husband. Mr. and Mrs. Charles N. Hinman visited me on Cedar Street as long as Charles N. Hinman lived. They stayed nights with me and my husband there on Maiden Lane. My husband visited the Hinman farm with me. He and I 855 stayed there nights with him: We ate our meals there at the same table with them. The mother Hinman was there at the same table with Mr. and Mrs. Hinman, my husband and myself and some of the hired help. None of the neighbors were there.

Digitized by Google

856 Q. During these years you have known Mrs. Hinman and Charles N. Hinman, have you introduced her to your different acquaintances, neighbors and friends?

By counsel for the petitioner—

Objected to as irrelevant, incompetent, improper, immaterial, no part of the cross-examination, not binding upon the petitioner in this action.

By counsel for the administratrix—Exception.

Q. Have you during these years, during all the time since you lived on Cedar Street, and before you went on Cedar Street, introduced her to your friends and neighbors, acquaintances and members of your own family, your relatives, as
857 Mrs. Charles N. Hinman?

By the Court—Sustained.

By counsel for the petitioner—Same objection.

By the Court— Sustained.

By counsel for the administratrix—Exception.

After they moved down from the farm they moved first to Livingston Street. I visited them there with my husband. I ate meals there. I know that Mother Hinman lived there with them.

Q. And you knew that they lived there as husband and wife?

By counsel for the petitioner—

Objected to as improper, irrelevant, incompe-
858 tent, immaterial and a conclusion.

By the Court— Sustained.

By counsel for the administratrix—Exception.

From Livingston Street they moved to the Moon Block in this City. I visited them there. I know that the Mother Hinman was living with them there and I know that she had died there. She was buried from their home. I was at the funeral. I knew Mrs. Hinman rode with the mourners.

Digitized by Google

859

Q. From the Moon Block where did they go to live? Do you recall?

A. No. I do not.

Q. Was it on Washington Street in this City?

A. No, I think they went out of town.

Q. You know she was away for a while down at Newton, N. J., but I am speaking of their living in town. Where next did you live?

A. I guess Washington Street.

Their next place of residence in town I think was on Washington Street. I visited them there with my husband. From Washington Street they moved to Cedar Street near me. They lived there not long. From there they moved to Walnut Street and were living there when Charles N. Hinman was killed. Mr. Hinman and Mrs. Hinman stayed with me for a time on Cedar Street.

860

Q. And did you care for her there?

By counsel for the petitioner —

Objected to as improper, immaterial, incompetent.

By the Court — Sustained.

By counsel for the administratrix — Exception.

I have never felt anything but friendly toward Mrs. Hinman.

Q. And you appear here as a friend of hers?

A. I hope so.

Q. Your husband had some trouble with her as administratrix of this estate?

861

By counsel for the petitioner —

Objected to as improper, incompetent, immaterial, any thing her husband had.

By the Court — Sustained.

By counsel for the administratrix — Exception.

Digitized by Google

862 I claim to have rendered some services for her and to have boarded Charles N. Hinman and I know that after Charles N. Hinman had died a bill was presented against the estate by my representative for some of the services alleged to have been rendered by me for Mrs. Charles N. Hinman when she was sick and for board for Mr. Hinman and Mrs. Hinman while at my house. I do not know that that bill was rejected by the administratrix. The matter of the claim against the estate of Charles N. Hinman was not a matter of discussion between my husband and myself. We might possibly have mentioned it. I know when the claim was put in. I know the bill has not been paid. I have not visited Mrs.
863 Hinman recently. Not since Mr. Hinman died. Until that time I visited her frequently. I visited her on Walnut Street and on Cedar Street, but since Charles N. Hinman's death I have not been to see her and she has not been to see me and yet I think my feelings remained the same both before and since the death of Charles N. Hinman. I know that Mrs. Charles N. Hinman continued to reside on Walnut Street from the time of Charles N. Hinman's death up to last Fall or this Spring. I know that at the present time she is living in the immediate neighborhood of my home on Main Street. I have not called on her there.

Q. When did you become interested in this
884 matter here?

By counsel for the petitioner —

Objected to, no evidence that she is interested in this matter, improper question.

By the Court — Sustained.

By counsel for the administratrix — Exception.

Last Friday was the first I told any one about this occurrence that I have given as in 1899 at

Digitized by Google

865 my home on Maiden Lane. I told Mr. Page. Before that I had talked with no one about the case, had not mentioned it. Mr. Page came to my house. He was an entire stranger to me. I never saw him before. He brought no letter of introduction. I answered his questions. That is all I did. I volunteered no information. Mr. Yetter came to my house afterwards. I never introduced Mrs. Pierce Weller to Mrs. Hinman. I did not call at her house after the death of Charles N. Hinman. She has called at my house since the death of Charles N. Hinman two or three times, on occasions after she had been down at the cemetery. In 1899 when Mrs. Hinman came to my house on Maiden Lane she was working at Dr. Daley's in this city. I knew when Charles N. 866 Hinman brought her there they were not married.

"It was in the summer of 1899 that they came there, possibly July or August. I cannot remember the day of the month or the month. They came there in the afternoon, before supper, before 6 o'clock and left a short time afterward. They were there possibly an hour. My husband was not there on that occasion. This is the first occasion that I am speaking of. The other was afterward, after September, after Mr. Hinman came back from the rifle shoot in Albany. She came in the afternoon and he came in the evening at 8 o'clock. My husband was home then, no one else was there. Mr. Hinman spent the evening there at that time. I cannot give the minutes and hours. 867 Approximately he came about eight o'clock and stayed until about ten o'clock and went away. Mrs. Hinman stayed all night there with me. She was visiting me. She was living then at Dr. Daley's. From that time on I knew her well and was intimate with her up until the time Charles N. Hinman died. My husband was home during all the evening of that second occasion when Mrs. Hinman was there with Mr. Hinman at my house

Digitized by Google

868 on Maiden Lane on that occasion. He met them both. She did not come there on that occasion on my invitation. When there I invited her to come again. On the second occasion she was there at supper with my husband and me. That afternoon and evening no one was at my house except my husband, myself, Mrs. Hinman and Charles N. Hinman. I received nothing from Charles N. Hinman in the way of financial compensation for permitting him to come there at any time. On the first occasion I was present during all their conversation and heard what was said. On the second occasion my husband and I were present so I could hear what was said during the entire evening that Charles N. Hinman was there.

869 By the Court —

Q. Mr. Hinman has just interrogated you with reference to two occasions in 1899, if I remember correctly, one in the afternoon and one in the evening. I understood you on your direct examination that while you were on Maiden Lane during the summer or fall of 1899, Charles N. Hinman and the respondent stayed at your house two nights, is that right?

A. Yes sir.

Q. So those were occasions other than the ones Mr. Hinman was interrogating you about?

A. Yes.

By counsel for the administratrix —

870 Q. Now Mrs. Allen, when Mr. Yetter was interrogating you, he asked you how many occasions Mr. and Mrs. Hinman were at your house on Maiden Lane in 1899 and you said two occasions?

By counsel for the petitioner —

Objected to as not being a true statement of the question I asked her. I asked her were there two occasions on which she stayed there over night. She said there were but two that she could recall.

Digitized by Google

871

By the Court —
That is the way I understood it.

By counsel for the administratrix —
Q. On how many occasions were Charles N. Hinman and Mrs. Hinman at your house on Maiden Lane in 1899?

By counsel for the petitioner —
I object to characterizing the respondent in 1899 as Mrs. Hinman.

By the Court —
During this proceeding the respondent has been designated at various times as Miss Lord, Mrs. Hinman and the respondent, and I ask counsel now when you have thus spoken of her you have 872
reference to one and the same person?

By counsel for the administratrix — Yes.

By counsel for the petitioner — Yes.

By counsel for the administratrix —
When I speak of Mrs. Hinman, I speak of her as Mrs. Hinman now.
Q. On how many occasions were Charles N. Hinman and Mrs. Hinman at your house on Maiden Lane in 1899?
A. She was there several times and he was there twice.
Q. How many times were they there together?
A. Twice.
Q. That is, in 1899, Charles N. Hinman and 873
this respondent, this lady who sits at Mr. Howard's right, were at your house on only two occassions?
A. Yes.
Q. But she was there at other times?
A. She was.
Q. So that the two times that Charles N. Hinman and this woman whom we now know as Mrs.

Digitized by Google

874 Charles N. Hinman, when at your house, were the two occasions you have detailed to me on your cross-examination?

A. Yes.

Re-Direct Examination by Mr. Yetter —

Q. Tell me how many times you recall that Charles N. Hinman was at your house in the summer or fall of 1899 with the respondent? A. Twice.

Q. On one occasion did he come there at your house with the respondent and stay from eight to ten?

A. He did.

Q. Is that one of the times they stayed all
875 night?

A. No.

Q. Then he was there on other occasions than the two that he stayed all night with her?

By counsel for the administratrix —

Objected to as incompetent, improper, inadmissable, a repetition, counsel has already gone over, improper in form, leading and not a question.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. Yes he was.

Q. Just state as to the other times you can re-
call that they were there together whether they
876 stayed all night or not?

A. Not over twice that I recall.

Q. That they stayed all night, you mean?

A. Yes, and twice he came just to call.

Q. Then there were four occasions when they were there together? A. Yes.

Q. You say there were two occasions when they called and did not stay all night?

A. They did.

Digitized by Google

877

Q. And then later there were two occasions when they came there together and stayed all night?

A. She was there and he came and stayed there all night.

Q. And on those two occasions they occupied the same room?

A. They did. My mother's name is Mrs. Van-Cleve and I am a sister of lawyer Van Cleve of this city. At the time the respondent and Charles N. Hinman stayed at my house over night she worked for Dr. Daley on Washington Street and Charles N. Hinman was delivering milk from his farm.

878

Re-Cross Examination by Mr. Hinman —

Q. How old did Mrs. Hinman this administratrix, appear to be in 1899 when she was at your house?

A. I could not tell.

Q. Did she appear to you to be a woman of mature years?

A. Possibly twenty or twenty-one years old.

Q. That was eleven years ago? A. Yes sir.

Q. So that if she is twenty-eight or twenty-nine now she would be seventeen or eighteen then?

By counsel for the petitioner —

Objected to as being a question on mathematics.

By the Court — Sustained.

879

By counsel for the administratrix — Exception.

Q. Do you understand, and you do I assume, how many two are?

A. I do.

Q. One and one make two do they not.

A. Yes.

Q. And they did in 1899? A. Yes, sir.

Q. I will ask you if you did not testify on your direct examination and on your cross examina-

Digitized by Google

880 tion, on your re-direct examination and on your re-cross examination, that there were only two occasions in 1899 when Charles N. Hinman and this respondent were together at your house on Maiden Lane in this City, did you so testify?

A. I did.

Q. Was it true.

A. It was the truth in the way you asked.

Q. Was it the truth that Charles N. Hinman and this respondent were at your house together only twice in 1899?

A. No.

Q. Tell me when they were there on the first occasion?

881 A. They came there together twice and were there twice afterwards.

Q. When the first time?

A. The first time he brought her.

Q. When? A. In August of 1899.

She came there with him between three and four in the afternoon? No one but myself was present when they came. They stayed there together possibly an hour with me in my parlor visiting with us three together and then they went away together.

Q. When was the next occasion that they were there together?

A. In the evening.

Q. And when was that. A. After that.

Q. What month? A. In the same month.

882 Q. August? A. In August.

They came at eight o'clock together. They were there two hours and left at ten o'clock. I am positive they came together on that occasion and arrived at eight o'clock and left about ten o'clock. My husband and myself were present during that visit. That was before the rifle shoot at Albany.

Q. When was the rifle shoot at Albany?

Digitized by Google

883

A. I could not tell you the month, but that same year.

Q. How did you know this was before the rifle shoot?

A. Because she stayed at my house after August.

Q. Did she before? A. Not all the time.

Q. They left at ten o'clock—the visit there—was it in the sitting room? A. Yes.

Q. And you and your husband were present. A. Yes.

When next were they there together in your house?

A. After the rifle shoot.

Q. What month was that?

884

A. I do not know.

Q. What time did they get there?

A. She came in the day time and he came in the evening.

Q. What time did she come.

A. I cannot say whether morning or afternoon. I have no recollection. She was there at supper. My husband was there, no one else, we three together. I think the month was September. I cannot tell what day of the month or what week. I remember nothing I talked about that day. She was there at my invitation. On that occasion Mr. Hinman came there in the evening at 8 o'clock. My husband was home. We four visited there that evening. I do not know what time Charles N. Hinman went away. She stayed all night. I 885 have no means of telling and did not know at the time what time he went away. She did not go away the next day. On that occasion she stayed with me a week. Charles N. Hinman was there to see her again.

Q. When next was he there?

A. Not more than once again.

Digitized by Google

886 Q. Then this time you have been talking about was the third time. Now we are coming to the fourth?

A. Yes.

Q. Now when did he come? A. Evening.

Q. What time? A. 8 o'clock.

Q. Was she staying there with you?

A. She was there.

Q. Did you have supper together? A. Yes.

Q. All four of you? A. No sir.

Q. Just three? A. Yes.

Q. What time did Charles N. Hinman leave on that occasion?

A. I do not know.

Q. Never have known? A. No sir.

887 Q. In any event she stayed there again all night?

A. She did.

Q. She was there making you a visit of a week?

A. She was.

Q. Do you remember anything that was talked about between you and your husband and Charles N. Hinman and this respondent during that third time he was there?

A. Yes sir.

Q. What subject do you remember being discussed?

A. Their marriage.

Q. Do you remember anything else but that?

A. No sir.

888 Q. The third time they were there was the talk about their marriage? A. Yes.

Q. On the 4th occasion you have mentioned do you remember anything talked about then? A. No sir.

Q. Was it talked then on the 3rd occasion that they were to be married? A. No.

Q. Was it so talked on the 4th occasion?

A. No.

Digitized by Google

889

On the third occasion when Charles N. Hinman and Mrs. Hinman were there my husband and I retired for the night at ten o'clock exactly. That is our usual bed-time. On the fourth occasion we retired at the same time. I heard nothing about which I could tell when Charles N. Hinman left the house on that night or on the other night and so I have never known and do not now know. There is no means by which I can fix that or tell what time he left. We have all our rooms on the same floor. On both occasions when my husband and I retired we left them in the living room.

Re-Direct Examination by Mr. Yetter —

There were two bedrooms in the house one in the front and one in the rear.

890

Q. State whether or not you saw or heard Charles N. Hinman go to a bedroom in your house that night?

A. I did not.

Q. Did you hear them in the bedroom?

A. No sir.

Q. Did you talk with the respondent next morning as to whether Charles had stayed there all night?

A. I did not.

Q. Did they occupy a bedroom in your house that night the 3rd time they were there?

A. They did.

Q. Which room was it? A. The rear room.

Q. Do you know what time they retired?

891

A. I do not.

Q. Was Charles N. Hinman peddling milk at that time?

A. He was.

Q. State how you know that they occupied that room?

A. I cannot do that.

By the Court —

You mean you do not know?

Digitized by Google

892

A. I know that he stayed all night, but I cannot tell how that I knew. I knew that they did not sit up all night.

By the Court —

If you knew you should tell. That is what he asks you for, your knowledge.

A. I will answer to the best of my ability. I cannot answer any different.

By Mr. Yetter —

Q. Now the 4th time they were there did they occupy a bedroom in your house? A. They did.

Q. Which bedroom did they occupy then?

A. The rear room.

893 Q. Now after the first two calls, when Charles and Vena called there in August, as you recall it, in 1899, did you have a talk with her, or did she make any statement to you about her marriage at that time, or about?

A. Yes, this was on the third occasion.

Q. State what she said?

By counsel for the administratrix —

Objected to as improper, incompetent, inadmissable, not proper rebuttal.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. She said they were married in Albany.

Q. She and Charles N. Hinman were married at Albany?

894 A. Yes.

Q. State whether or not she said they wanted to stay at your house all night, or Charles did, or that in substance?

A. Yes.

Q. This was after the first two visits there?

A. It was.

Q. And then that same week she stayed there all that week?

A. Yes.

Digitized by Google

895

Q. And that same week Charles came again?
A. Yes.
Q. And stayed at your house all night? A. Yes.
Q. And occupied the same room with respondent?
A. Yes.
Q. This rear room? A. Yes.
Q. You made the beds in the morning? A. No.
Q. Who made them? A. Vena.
By the Court —
When you say Vena you mean the respondent here?
A. Yes.

896

Re-Cross Examination by Mr. Hinman —
I told Mr. Page the other day that Mrs. Hinman had told me that they were married in Albany. I told him that Mrs. Hinman had told me that after the rifle shoot at Albany. I told Mr. Page, last Friday, that she told me in the Fall of 1899 that they were married in Albany. Mr. Page was the first person that I had told what this respondent had said to me about her marriage. I never had told that to any one except my husband. I told him at the time she told me. He was not present when she told me. My husband never talked the matter over with her, never at any time.
Q. On which occasion was it she told you that she had been married?

897

A. The first time Mr. Hinman stayed all night.
Q. I want to be fair. You have told me here, and have sworn to it positively, that you did not know and had no means of knowing when Charles N. Hinman left that house on any night?
A. I know I said so and I meant it.
Q. On what occasion was it of these four that you have mentioned that she told you she and Charles had been married in Albany?
A. On the third.

Digitized by Google

898 Q. Now what time during that visit did she tell you that?

A. In the morning after the third time they had been there.

Q. So you did not know it the day before?

A. No.

Q. Nor the evening before? A. I did not.

Q. Did she ever say anything to you about that further than on that one occasion?

A. No sir.

Q. Now, then, when Charles N. Hinman was there did you or your husband, or this respondent in your presence, discuss that same matter?

A. We did not.

899 Q. So the only time that was ever mentioned in your presence so far as you recall now was the time when this respondent on the third occasion that Mr. Hinman was there at your house with her that she had been married in Albany?

A. Yes sir.

I told that to my husband and after that told my mother Mrs. Hinman told that to me in the sitting room after breakfast. I cannot tell how long after.

WILLIAM ALLEN, being called in rubuttal as a witness for the petitioner, being duly sworn and examined by Mr. Yetter, testified as follows:

900 I reside at 17 Cedar Street. My occupation is cigar packer. I am the husband of the last witness sworn. I was acquainted with Charles N. Hinman in his life time, possibly twenty years. I was a member of Company H or 20th Separate Company while he was a member. I was well acquainted with him. He sold milk at my house a number of years. I am acquainted with the respondent here. I first met her in the summer just after the Spanish-American War, just after they were mustered out. It was that same summer that

Digitized by Google

I first met Vena. I met her I think at my house.

Q. How many times was she there at your house before the rifle match at Albany of that year?

A. A couple of times anyway.

Q. Was she there alone? A. She was, yes.

Charles N. Hinman called in the evening on those two occasions. He did not stay there all night on those occasions.

Q. After the rifle shoot in 1899 did Vena call at your house?

A. Yes

Q. On how many occasions shortly after that rifle shoot?

A. A couple of times anyway. She might have been more.

Q. State whether or not Charles N. Hinman came to your house on these two last occasions referred to?

A. Yes.

I do not recall what time it was when he came. It must have been evening and he was not there at that time but he was there after supper.

Q. Do you know whether or not he stayed at your house all night on those two last occasions referred to?

A. I thought he did.

By counsel for the administratrix —

Objected to as improper, leading and not proper rebuttal.

By the Court — Overruled.

By counsel for the administratrix — Exception.

He was there in the night and he was there in the morning. I think he did not work that week.

Q. Your recollection is that he was not working that week?

A. Yes sir.

Q. And that he was there at night and was there in the morning after breakfast?

A. Yes sir.

Digitized by Google

904

Q. On both of these occasions?
A. Yes sir.
Q. Was the respondent there that night also?
A. Yes sir.
Q. Did they occupy a bedroom?
A. I suppose they did. There was one there.

By counsel for the administratrix —
Objected to and move to strike it out as improper.

By the Court —
It may be stricken out.

By counsel —
Q. Do you know? A. No, I was not in there.
905 Q. Did you hear them retire? A. No sir.
Q. Did you see them when they got up in the morning?
A. I seen him when he come out of the room, yes sir.
Q. You saw him come out of the bedroom?
A. Yes sir.
Q. Was that the same room Vena occupied when she was there?
A. Yes sir.
Q. And was that the same on the second occasion that they were there? A. Yes sir.
Q. Which bedroom was this?
A. The rear bedroom on the east side of the house.
Q. Now at that time how many bedrooms did
906 you have in your house?
A. Three and used two.
Q. Was the third one furnished? A. No.
Q. Had no bed in it? A. No sir, used for a store room.
Q. Do you know where Vena was working at that time?
A. Yes.
Q. Where? A. Dr. Daley's.

Digitized by Google

907

Q. And after she left there did she return to Dr. Daley's?

A. I think she did. I am not positive about it.

Cross-Examination by Mr. Hinman —

Q. You say you first met the respondent in the Summer of 1899. Where did you meet her?

A. At my house.

Q. What time in the year?

A. In the Spring I think.

Q. What would be your best recollection as to the month it was in? A. August I believe.

Q. Is August in the Spring? A. Not sure.

Q. Is August a Spring month? A. No.

Q. Did you meet her in the Spring or August the first time?

908

A. August.

I do not remember where I was working in 1899. I don't remember what I was doing in 1899. I do not remember what time in August, 1899, I first met this respondent. I do not remember who introduced me to this respondent. I do not remember what time in the day it was. I have not the remotest recollection what time of day it was.

Q. How long did she stay there at your house that time?

A. Over night anyway.

Q. The first time? A. Yes.

Q. Did she stay more than over night?

A. The first time?

Q. I have not talked of any other time with you?

909

A. I do not remember whether she stayed all night the first time.

Q. Why did you say she did?

A. I do not know.

Q. Have you any recollection as to how long she did stay that first time?

A. Not positive, no sir.

Digitized by Google

910

Q. Have you any indefinite recollection about it?

A. No sir.

Q. Have you any recollection, definite or indefinite, certain or uncertain, as to who was there during any of the time that the respondent was at your house in 1899 on the first occasion you met her?

A. No.

Q. When did you see her next?

A. I do not remember.

It was at my house. My wife was there. I do not remember the time of day it was or that anyone else was there. The month was August, the same month that I saw her the first time. It was

911 the year after they came back from the Spanish-American War. I do not remember what year it was. I did not go to the Spanish-American War.

Q. Then why do you fix it as being after they came back from the Spanish-American War. What is there about it that enables you to say the second time you met this respondent was the year after that?

A. Because I did not meet her until after they came back from the War.

Q. How do you know that, what was the Spanish-American War to you?

A. Nothing.

Q. Then how do you fix this occasion as having any connection with the War?

912 A. Because she was there?

Q. Where? A. To my house.

Q. When? A. August.

Q. What did you, or what did she have to do with the Spanish-American War whereby you can fix the time she was at your house after the Spanish-American War? Just tell me what there was about that war that concerned you or her so that

Digitized by Google

913 you are able to fix her being at your house by that war rather than by the war of the rebellion, with which neither of you were connected? Tell me that?

A. Because I did not know her before the war.

Q. How did you come to know her then? How did the war have anything to do with it?

A. It did not have anything to do with it.

Q. Have you any recollection about it except that it was after the close of the Spanish-American War?

A. Nothing only my recollection.

Q. How many years ago was it that you first met her?

A. It was the year 1899.

914 I do not know what time the respondent left my house on the second occasion. I think she was there to supper. My wife was there. I do not remember where I was working or what I was doing. I would not say whether I was packing cigars or working in the grocery store.

Q. When did you work in the grocery store?

A. I do not remember positive.

I worked for the Dunning Grocery Company during the Spanish-American War. When they went away I was there but do not know whether I was there when they came back. The third occasion that I saw her was at my house sometime in September 1899. I do not remember what time in September. I do not remember what I was doing or what time I came home that day. I saw 915 her first when I got home. At noon or night I do not remember which. I am not positive whether I went home to my meals that day or whether I was there at noon hour or whether she was there then. I was there at supper. I would not say whether she was or not. She stayed over night anyway. Might have stayed longer. It is my recollection that she stayed all night. She might

Digitized by Google

916 have been there one or two more. She stayed all night I know that.

Q. Do you know anything else about it, that is as to the length of the time she was there? Do you know of her being there more than one night on that occasion?

A. She stayed there two nights anyway.

Q. On that occasion?

A. It was all in the one week.

Q. I am speaking of this one occasion. Did she stay more than one night on this third time when you say you saw her at your house?

A. Yes, she stayed two anyway.

Q. Is it your best recollection she stayed two nights?

917 A. Yes.

I saw Charlie Hinman there that evening or night. I do not remember when he came, whether before or after supper or early or late in the evening, or before or after I came. It was before I went to bed. I remember nothing that I said to him or to Mrs. Hinman, or she to me, or anything said by any person that night. I went to bed close to ten o'clock between nine and ten o'clock. I do not remember whether I was a member of the 20th Separate Company at that time or not. Charlie Hinman, this respondent, my wife and myself spent the evening in the sitting room in my house. I suppose we were talking. The sitting room is the one back of the parlor. The parlor

918 is the front room and the sitting room is between the bedroom and parlor. It was used for both for a dining room and sitting room. That time Charlie Hinman was a farmer. He lived up here five miles on the farm. I had been up there. His farm was a dairy farm. He sold the product of the dairy in Binghamton. He ran a milk route in 1899. Part of the time he ran the route and part of the time he had hired men who run it. Some

Digitized by Google

919

days he was off. I do not remember what days in 1899 he drove the wagon. I saw him around town and knew he was not running it that day.

Q. Was not running it what day?

A. Days that I see him, I do not remember.

Q. I am speaking of that day that you saw him?

A. What day is that?

Q. You used the expression "that day." I want to know what day you mean?

A. I say I saw him when he was not running the wagon.

Q. The days you saw him on the streets in Binghamton did you conclude he was not running the wagon A. When I saw another man on the wagon, I concluded he was not working. 920

Q. What days in August did you see any other man on the wagon?

A. I do not remember. I am not at home when they call there but see the wagon on the streets.

Q. What man did you see on Charles N. Hinman's milk wagon in August, 1899, besides Charles N. Hinman?

A. I could not give his name.

Q. Will you swear on any day in August, 1899, you saw with that wagon any other man than Charles?

A. There must have been because he was not working. I am not positive in August. I thought you meant in September.

Q. We will take September. What man did 921 you see on the wagon in September except Charles?

A. I could not remember what man.

Q. Did you see any man?

A. No. The wagon must have run.

Q. Every day? A. Yes.

Q. Where did it start from? A. His farm.

Digitized by Google

922 Q. What time did the wagon leave the farm?
A. I do not know.
Q. What time did it go back to the farm?
A. I do not know.

Here adjournment was taken until July 22nd, 1910, at two o'clock P. M., at which time the hearing was resumed. Same appearances were made.

Witness continuing:

The third occasion that I have spoken of when I saw Charlie Hinman at my house he left early in the morning, soon after five o'clock. I went to work about seven. I think at Dunnings.

923 Q. Before noon you were not able to tell where you were working in that month. How are you able to tell now that you were working for Dunning?

A. I was working there sometime after that, after they came back from the Spanish-American War.

Q. This noon was only two hours ago and you said you could not tell that you were working at Dunnings after they came back from the war. How are you able to tell now?

A. Because I was there when they went away.

Q. Before noon you said you were working there when they went away but could not tell where when they came back. What enabled you since adjournment to fix that in your mind?

924 A. I kind of refreshed my memory a little bit and thought it over.

Q. What did you refresh your memory by?

A. Nothing only thinking it over myself.

Q. Did talking it over have anything to do with it?

A. No.

Q. When did the boys get back from the war?

A. They were mustered out in 1899 were they not?

Digitized by Google

925

Q. Were they?

A. I do not know anything more about it than that if you do not know. I think it was Feb. 1899, was it not?

Q. When did they come back?

A. I do not remember. I was not with them.

Q. How long did you continue working for Dunning after they were mustered out?

A. I do not remember exactly.

Q. Then you do not know whether you worked for Dunning in September 1899, or not?

A. Pretty sure of it as far as I can recollect. Nothing special to go by.

Q. When did you next see Charles Hinman after that morning when you say he was at your house on the 3rd occasion when he and this respondent were there, when did you see him next?

926

A. The next time he stayed there to my house. That was the first time I saw him after that. I do not remember how long after it was. It might have been a day or two, it was about a day or two, it might have been the next day. I could not say positive that it was. I never thought of it since. From that day to this I had never thought of it. It had never entered my mind from that day until this. I never discussed it with any one from that day until this. Never talked it over with any one. The first time I mentioned that matter since 1899 was as I sat here in that chair to-day. I never mentioned it to a soul. I might have talked it over with my wife this week. I did. I talked it over with Mr. Page last week Friday at my house. When I said that I have not mentioned it to a living soul from 1899 until I sat in that chair here I did not mean it in that way. He asked me about it. I did talk it over with him then. He asked me if I knew. From September, 1899, down until last Friday I had not discussed it or said anything about it to

927

Digitized by Google

928 any one. It had never been a matter of discussion anywhere. I had never thought of it. I do not remember what time on this fourth occasion Mr. Hinman came to my house. I think I was there when he came. I am not quite sure about it. I must have been woking at Dunnings. I think Mrs. Hinman was there when I got home. I do not know whether they came together or separate. They were there for a while anyway both of them. She must have come there some time.

Q. She was not there in the morning but was there at night, is that a fact?

A. I cannot just recall that.

Q. Do you recall anything that occurred that day?

929 A. Not particularly, no.

I do not know what I did that day only I did my day's work wherever I was working. I do not know whether Mr. and Mrs. Hinman came there together or separately, or what time either one came, or whether before or after supper. She might have been there at supper or she might not. My recollection is that she might have been there, but it is very doubtful whether he was I have no present recollection of whether she sat down with me and my wife and ate supper with us. It is so long ago that I do not recall whether she ate supper or not. I had something else to think of besides this case. It did not interest me at all. They called upon me last Friday. I have no recollection as to what time my wife and I went to bed

930 on the evening when Mr. and Mrs. Hinman were there at my house on the 4th occasion. We usually go to bed between 9 and 10. I recall nothing that was talked there nor anything that they did. I do not remember in what room we were. One occasion when they were there was on Thursday. I say Thursday because Mr. Hinman and I went to the Armory drill that night. We went at 7:30

Digitized by Google

931 It was on the third or fourth occasion, I do not now remember. We went that night after supper. He went from the house with me. I do not remember whether he had eaten supper with me or over town. After the drill we went back home. It might have been ten o'clock, I have no present recollection. Mrs. Hinman and my wife were there in the house. I do not recall in which room they were sitting. My wife and I went to bed in the front bedroom pretty soon after I returned and left Mr. Hinman and this respondent in the dining room. On this 4th occasion I did not see Charles N. Hinman after my wife and I went to bed. I think he got up pretty early. I do not remember whether I see him that morning or not.

932 Q. Have you any present recollection of having seen him on the 4th occasion that you have described, in the morning?

A. No, I do not remember.

Q. All that you recall is that he and you and your wife and this respondent were there the evening before but you have no recollection of having seen him the next morning?

A. I do not remember.

Q. So when and where he went you have no recollection?

A. He got up pretty early same as I did.

Q. Did you see him get up the fourth time?

A. No.

Q. The fourth time you did not see him get up?

A. No, I do not remember.

933 Q. You did not see him there at the house on the 4th occasion in the morning?

A. I do not remember of it.

Q. Have no recollection of it?

A. No.

Q. So the only morning you saw him there at your house was the morning of the third occasion that he was there?

Digitized by Google

934 A. Yes.

On the morning of the 4th occasion I got up about five o'clock. My wife got my breakfast that morning. I do not remember who got up first on that morning. I did not see Mrs. Hinman that morning. She did not come out and eat breakfast with me. I did not see her there that morning before I went to work. I do not remember that she was there at noon when I go back. I have no recollection of it. I have no recollection of seeing her that day or of seeing Charlie Hinman on that day. On this third morning, on the third occasion when Hinman and this respondent were there at my house, I got up first. I saw Charles N. Hinman right away after I got up.

935 By that I mean ten or fifteen minutes. I had washed and combed my hair at the sink in the kitchen during the ten or fifteen minutes before I saw Hinman, and was dressing myself. He came out of the bedroom. I first saw him in the dining room. I don't remember how long I had been standing there. I was not standing there and waiting for anything. Charles N. Hinman put on his shoes and went out. He put on his shoes in the kitchen I believe. He walked into the kitchen, sat down and put on his shoes.

Q. Do you remember anything said between Hinman and yourself that morning?

A. Not a word.

I said to him good morning, or something like

936 that. I remember he said good morning. I do remember any other conversation only to pass the time of day, weather, or something like that. He might have said good morning or helloa, or might have said both.

Q. How old a girl did Mrs. Hinman appear to be in 1899?

A. I do not know.

Q. You remember how she looked?

A. I do not remember. I would not try to say.

Digitized by Google

937 I could not tell how she was dressed on the third occasion or how Charlie Hinman was dressed that morning. I could not tell the color of his clothes or what kind of a hat he had. I have a claim against Charles N. Hinman's estate which has not been paid. I presented a claim and verified it. My lawyer presented it to the estate. I knew what was in it. I never knew more than one Charles N. Hinman. In making out that claim for "board for wife from December 12th", I rereferred to Mrs. Hinman, Mrs. Charles N. Hinman, the administratrix. The words "care and attendance for a wife from January 3rd at$1.00 per day" referred to this Mrs. Hinman, this administratrix. The words "Wm. C. Allen" signed at the bottom
938 of the paper shown me and marked Exhibit H. 204 for identification, is in my handwriting. I signed it and swore to it. That is the bill I presented against the estate of Charles N. Hinman. It was Mrs. Charles N. Hinman who was at my house on Cedar Street and boarded there for a few days and was taken care of by my wife. I do not remember any public event or any event of public importance which occurred in 1899, except the disbanding of the 20th Separate Company. I remember no other think that I am able to speak of now that occurred there before or after the Spanish-American War. Either the year before or the year after. I remember having read of the Dewey celebration in New York. I am unable
939 to say whether this transaction there at my house was before or after the Dewey celebration.

Re-Direct Examiation by Mr. Yetter—

When Charles N. Hinman was at my house in this fall or summer of 1899, we talked of different things about Honolulu. I believe some wooden bowl that they used for eating out of over there, one particular thing. I believe he talked about some Countess over there.

Digitized by Google

940 Q. Or princess was it?

A. Or princess. I believe he had the picture. I did not see it at the time but since then I have.

Q. Kaiulani?

A. Yes. Of course there was lots of things he talked because he just been back.

Q. Is that how you fixed the date, because he talked about these things and you know it was shortly after his return?

A. Yes.

Q. And the morning you saw him come out of the bedroom you think that was the third time he had been at the house?

A. Yes.

Q. With her?

941 A. Yes, the third time.

Q. Were you at the house the first time Vena came?

A. No.

Q. And the morning afterwards she was down there?

A. Yes.

Q. Now when you saw them come out of the bedroom that morning you have testified to, did you speak of it to your wife?

By counsel for the administratrix—

Object to the form of it on the ground that he has not testified that he saw it, and improper and incompetent.

942 By the Court—Overruled.

By counsel for the administratrix—Exception

A. Yes.

Re-Cross Examination by Mr. Hinman—

I do not remember when I again saw Charles N. Hinman at my house after the fourth occasion I have spoken of. I do not remember that I ever saw him there again. I have no recollection of

Digitized by Google

943

it. I only recall having seen him there four times. I have seen him at my house on Maiden Lane a great many times with milk. The only times I would see him there with milk would be on Sunday morning. The other mornings he would come after I had gone to work. On Sundays he would come sometimes before I got up and sometimes after. I got up early, about seven o'clock.

Q. On how many occasions did you know of Charles N. Hinman visiting your house in 1899?

A. I could not tell.

Q. Do you recall now of having seen him there on any other than these four occasions?

A. No, I do not remember it.

Q. On how many occasions do you recall this administratrix, Mrs. Hinman, being there at your house on Maiden Lane before or during 1899?

944

A. Three. The first time I did not see her.

Q. Did you see Charles N. Hinman the first time?

A. No.

Q. So you never saw Mrs. Charles N. Hinman there at your house in 1899 but three times?

A. Three times.

Q. How many times did you see this administratrix at your house on Maiden Lane in 1900?

A. I do not remember.

Q. Do you remember having seen her there at all?

A. I do not remember.

Q. How many times did you see her there in 1901?

945

A. I do not remember.

Q. Do you remember having seen her there at all in 1901?

A. She might have been there.

Q. Do you recall? A. I do not.

Q. Do you recall having seen her there in 1902?

A. I could not recall any special time.

Q. Do you? A. No I do not.

Digitized by Google

946 Q. So to-day you have no recollection of having seen her there in 1902?

A. I know she was there several times.

She was there several times, every year while we lived there. Not particularly with Mr. Hinman. That was after they moved on the farm. She had a horse and drove down. I do not remember when she went to live on the Hinman farm. There came a time when I knew she went to live on the Hinman farm. I knew from that time she drove one of Charles N. Hinman's horses to town. She called at my house. I visited at their house. I visited them in the fifth ward, on Lewis Street when they lived together in the
947 Moon Block and on Washington Street when they lived together. I think I did not visit them on Walnut Street before Charlie died. I think the only time I was there was after Charlie was killed and before the funeral. I went with my wife one evening after he was killed. I am not positive whether I saw Mrs. Hinman that night or not. I saw her mother there. Mrs. Hinman's mother.

MRS. JESSIE ALLEN, being recalled in the petitioner's behalf and being examined further by Mr. Yetter, testified as follows:

Q. The first night that Charles Hinman and Vena stayed at the house, did your husband speak
948 to you about seeing Charles come out of the door?

By counsel for the administratrix—

Objected to as improper, incompetent, improper in form, and assumes facts not proven by this witness, also leading.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. He did.

Digitized by Google

949

Q. Did Vena eat breakfast with you and your husband that morning?

A. Not with my husband but with me.

Q. Did you have any converstaion with her at that time?

A. I did.

Q. State what was said?

A. I asked her if she was married.

Q. First let me ask this: State whether or not you told her that your husband had told you that he saw Charles come out of her bedroom door. Did you tell Vena that?

A. No.

Q. State what you said. What did you say to Vena and she to you?

950

By counsel for the administratrix—

Objected to what she said to Vena, hearsay and incompetent.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. I said to her, why Vena, are you married, and she said yes, we were married in Albany.

Q. That was after your husband had made this statement to you?

A. Yes sir.

951

HATTIE M. SHEARER, being called in rebuttal as a witness for the petitioner, being duly sworn and examined by Mr. Yetter, testified as follows:

This summer I am residing on Prospect Ave. in this City. I formerly resided in the Town of Dickinson. I own a farm there. It is nearly two miles south of the Hinman farm. During the past 30 years I have lived there about twenty-five years. I was acquainted with Melissa Hinman, who was the mother of Charles Hinman.

Digitized by Google

952 The Hinman family, while I lived on the farm, consisted of Baylis, Ida, Charles and Henry Hinman. I called at her home quite often but she did not call at my home very often.

Q. Do you know the respondent here?

A. I do not particularly. I have met her perhaps three or four times.

Q. Do you recall when she went up to the Hinman farm first?

A. I do not think I could, not to tell the year when she went up there to stay.

Q. As near as you can say eight or nine years ago?

A. I do not know as I could tell you the year.

953 I recall when Mr. Moses was at the County Farm and that I had a talk with Charles N. Hinman. I could not tell the dates at any of those times because I have not given it a passing thought. It was before Bayless died. I should say it was three years before but I would not say positive as I could not remember the years. I do not think it was the last year Mr. Moses was on the County Farm. I think he was there a year after that. It was longer ago than the second last year he was there because Mr. Malloy died after that. It was just before Mr. Malloy died. He was a nurse at the Hospital at the County Farm.

Q. What was that talk with Charles N. Hinman?

954 By counsel for the administratrix—

Objected to as incompetent, improper and not proper rebuttal, and it is not part of the res gestae and that it is hearsay and no proper foundation has been laid.

By the Court—When was this?

By counsel for the petitioner—I will have to fix the date later.

Digitized by Google

955

By the Court—Objection sustained.

By counsel for the petitioner—
I will have to fix the date by another witness.

By the Court—
You state at this time that you will fix the date of this conversation by another witness.

By counsel for the petitioner—Yes.

By the Court—Then I will overrule the objection.

By counsel for the administratrix—
Exception, and the further objection that it is too remote in time and too indefinite in time.

956

By the Court— Overruled.

By counsel for the administratrix—Exception.

By Mr. Yetter—
A. Now, Mrs. Shearer, you are to give the conversation which you had with Charles N. Hinman?
A. At what time?
Q. The talk you fix as about the time Mr. Moses was at the County Farm?
A. He called at my house as he was returning from peddling his milk, and I was sitting out in the yard, and he came up and asked me if it was true that Mr. Moses had told that he was married and that he had seen it in the paper, his marriage in the paper, and I said it was, and he asked me who told me that, if Mr. Moses, and I says no, 957
Mr. Moses told the nurse at the County Farm. He said, it is not so. Well, I said, he said that he saw that marriage in the paper. He said a man by the name of Hinman his marriage was in the paper, and he says it was not me. Then I said, you say you are not married, and he says I am not, and he says, can't a man have a housekeeper unless he marries her? He said, when I

Digitized by Google

958 am married you will all know it. I will marry a lady that I am not ashamed of and I will have it published in all the papers in the town. That is just as near as I can remember the conversation.

I was well acquainted with Melissa Hinman. I remember that I had a talk with her a year or two before Bayless died. I cannot remember exactly the time. I do not think it was the summer before he died. I know she was at my home at the farm. Melissa Hinman is dead. I could not tell you the years of anything that I may state particularly that occurred. I know as a matter of fact she is dead. As I said before I could not tell whether my conversation with her occurred a year
959 or two years before Bayless died.

Q. Just state what that conversation was that you had with Melissa Hinman?

By counsel for the administratrix—

Objected to as improper, incompetent, inadmissible, immaterial, irrelevant, no sufficient foundation laid, too remote in time, hearsay and that it it not part of the res gestae.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. It is more forceful than elegant, but if I have got to say I will say it.

Q. Just state it as it was?

By counsel for the administratrix—Same objec-
960 tion.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. She was talking about Miss Lord. I asked her if they were married. She says, no, and they never will be, Charlie has promised me that he never would marry her, and I said I do not know how you are going to get rid of her, and he says I have a scheme working now, mother, and if it

Digitized by Google

961

works all right, I will show you, and she says, can't you tell me now,and he said he could not, then she said—I cannot remember exactly what I asked her then—Why, I said, Miss Lord does not ill-treat you, or some such question as that, and she says, Mrs. Shearer, you could rake hell over with a fine tooth comb and you could not find her equal. She is the biggest devil in hell or on earth, and there is nothing but what she would do if she undertook it.

Q. Anything else that occurs to you Mrs. Shearer?

A. She said she was very unhappy.

Q. That is Melissa was?

A. Yes sir.

962

I was at the Hinman residence the night that Bayless Hinman died. Melissa Hinman during the time I have spoken of was living on the Hinman farm at the town of Chenango.

Q. And Vena was living there at that time and had been for some time.

A. Yes.

I was at the Hinman house on the night that Bayless Hinman died, Nov. 27, 1902. I was there after he died. He died in the morning and I was there in the evening. His remains were in the Hinman residence at that time. Mr. and Mrs. Isaac Cooley, Mrs. Heim and Henry Hinman were there.

Q. Was Charlie there A. Yes.

Q. And Vena Lord? A. Yes sir. 968

My husband was there with me. He is now dead.

Q. State whether or not you heard Charles Hinman introduce Vena Lord to anybody that night and what he said?

A. He introduced her to my husband.

By counsel for the administratrix—

Objected to on the same ground as stated in the last objection.

Digitized by Google

964

By the Court—Overruled.

By counsel for the administratrix—Exception. Also objected to as not proper rebuttal.

By the Court— Overruled.

By counsel for the administratrix—Exception.

He introduced her to my husband as Miss Lord. She just acknowledged the introduction by saying good evening. My grandaughter, Hattie Heim was in the room at that time and sat right beside me. I had a talk with Bayless Hinman about three months before he died. Bayless Hinman resided at the Hinman farm there at the time he died and had for a great many years. Charles
965 Hinman resided there for a great many years up to that time.

Q. And Vena Lord had resided there for some time, a year or two at least before he died, had she?

A. I cannot tell when Miss Lord went there. She was there I know when he died.

Q. Now Bayless Hinman was a brother of Charles N. Hinman was he not?

A. I suppose so.

Q. Just state, Mrs. Shearer, what the conversation was that you had with Bayless Hinman about two or three months before he died?

By counsel for the administratrix—

Objected to upon each and all the grounds stat-
966 ed to similiar question put to witness with reference to that conversation with the mother Melissa Hinman?

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. We sent for him to come down and doctor a cow very early in the morning and he came in and he says, Hat, I guess you will have to get my breakfast. He says I did not ask her to get breakfast for me.

Digitized by Google

967

Q. Go on and tell what was said?

A. He said he would not ask that hellion or devil to get his breakfast—I do not remember which one of the two—because, he says, she puts on the table just what she has a mind to for myself and mother, but, he says, I do not care so much for myself what I get to eat, but it makes me feel very bad to see my mother sit at the table with what is put on for her to eat, and I got his breakfast for him.

Q. Did he say anything further in that conversation that you recall about whether Charlie was married or not?

A. He said he did not think Charlie was married or never would be.

968

By counsel for the administratrix—

Same objection on each and all the grounds as stated to similiar evidence.

By the Court—Overruled.

By counsel for the administratrix—

Exception. And I move to strike out the answer.

By the Court—Motion denied.

By counsel for the administratrix—Exception.

Witness continuing—

He said he thought he had got his equal now. Charlie had had pretty good luck, but now he thought he had a sticking plaster that he could not get rid of very easily.

969

Q. Do you recall that you went to the Moon Block when Melissa Hinman resided there with Charles and saw Miss Lord there?

A. I never was there.

Q. Mrs. Shearer, do you know what the reputation was of Charles N. Hinman and Vena Lord, from the speech of people in the community in which they lived, as to whether they were married or not?

Digitized by Google

970 By counsel for the administratrix—
Objected to as incompetent, improper, inadmissible, immaterial, irrelevant, not sufficient foundation laid, witness not shown to be competent, not part of the res gestae, and hearsay.

By the Court—I think you should fix some time.

By counsel for the petitioner—
Down to the time of the death of Bayless Hinman.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. Yes.

971 Q. What was that reputation?

By counsel for the administratrix—
Objected to upon each and all the grounds stated in the last objection.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. That they were not married.

Cross Examination by Mr. Hinman.—

We moved off the farm five years ago. I went with my son to Pearne Street on the north side in the City of Binghamton. Since that time I boarded at different places. I have been with my sister most of the time for the last year here in
972 the City on Prospect ave. During the last five years I have lived in the City of Binghamton most of the time. We moved to the farm nineteen or twenty years ago and we were there all the time until we moved away five years ago. My family consisted of one son, myself, my husband and our hired help. I am sixty-seven years old. I know John Moses who lived at the County Farm

Digitized by Google

973

and I knew a man by the name of Malloy who was employed there. I do not know when Mr. Malloy died. In any event during his last years I had a talk with Charles N. Hinman about something he said he heard that Uncle John Moses said about his being married. How long it was before Mr. Malloy died that I had the conversation with Charles N. Hinman I could not tell, unless I would take a day and think. I could not even fix the year when it was. I do not think it was over two years before Mr. Malloy died, if it was that. It might have been two years. This talk was in the yard at my house. He came along with his milk rig. I was sitting in the yard. I do not know as I could tell about what time he was accustomed to leave the farm mornings with milk 974
when he, himself drove, but I think he left between five and six o'clock. I hardly think it was between four and five o'clock.

Q. Now in this talk Charlie said he understood that Mr. Moses had told you or reported that he was married?

A. He said that he heard that Mr. Moses had told me that Charlie was married.

Q. And you told him that that was not a fact? That Mr. Malloy had told you that Mr. Moses had told him that Mr. Hinman was married, and Charlie told you that was not the fact?

A. He did.

Q. And that was the substance of that conversation? 975

A. He said that he was not.

Q. Now there was a time when Melissa came to your house, you say that was sometime before Bayless Hinman's death. Have you any means of telling how long it was before Bayless Hinman died?

A. It was not over two years.

Q. It might have been two and it might have been less?

Digitized by Google

976 A. No. I think it was a year before he died.

Q. Have you any means of fixing definitely just how long it was before Bayless Hinman died that you had the talk at your home with Melissa Hinman that you have spoken of here?

A. As I said before, if I had time to think I could tell it more definitely.

Q. Sitting here now is there anyway you can fix it more definitely, any more than about two years before he died? Have you any means of fixing it more definitely than that? Did you write down anything?

A. I did not.

Q. Was there anything that happened about that same day, as you remember it now so you
977 are able to tell just when it was?

A. I could not tell you any different than I have told you. I could not remember the year unless I had time.

Q. So it may have been a year or two before Bayless Hinman died?

A. Yes, I think it was two years before Bayless died.

That talk was on the farm. Mrs. Hinman came in the morning on the Castle Creek stage and stayed with me and went back at supper time.

Q. Was Melissa Hinman an intimate friend of yours and acquaintance?

A. I always thought a great deal of her.

Q. You knew her for a great many years?

978 A. Thirty-four or thirty-five years.

Q. Your relations were very friendly and intimate?

A. They were.

Q. And this language she used on that occasion was that characteristic of her?

A. I never heard her say it before.

Q. How old a woman was Melissa Hinman at that time?

A. I could not tell you.

Digitized by Google

979

Q. How old did she appear to be?

A. Her health was good.

Q. That is not answering my question. How old did she appear to be?

A. She appeared as if she was about fifty.

I think she was older. She appeared to be very young, because she was a well, healthy woman. I concluded she was more than 50.

She was a woman who smoked, smoked a pipe as long as I knew her. I know when Charles N. Hinman left the Hinman farm. I do not know where he went to live. I know he came to Binghamton and that Melissa Hinman came to Binghamton to live with him at one time. She lived and died with them in the Moon Block I think.

980

I was not at her funeral. I did not see her in her last illness. I do not think I saw her after she left the farm. I knew Bayless Hinman's wife. Years ago she used to live with him there on the Hinman farm. She went away from the farm and Bayless continued to live there. During the last years of Bayless' life there was no wife with him and the women folks up there was Melissa, the mother of Charles, and this administratrix, and the hired help.

I think Bayless Hinman continued to live at the Hinman farm until he died. That was his home. He continued to live there up to the time of his death only when he was away doctoring stock in the neighborhood anywhere he was called.

981

I was not at the Hinman farm on a visit during the last year of Bayless Hinman's life. I was not at the farm visiting after Miss Lord came there. I had occasion to go past the farm after she went up there a great many times but did not stop to go in the house.

Q. Did you know that he (Bayless Hinman) and this administratrix did not get along well together?

Digitized by Google

982 By counsel for the petitioner—

Objected to as irrelevant, improper, incompetent, immaterial, calling for a conclusion.

By the Court—Sustained.

By counsel for the adminsitratrix—Exception.

Mr. and Mrs. Cooley lived on the farm adjoining the Hinman farm. At the time when Charles N. Hinman introduced the respondent to my husband I did not hear him introduce her to anybody else. My talk with Bayless Hinman was about three months before he died. This talk was the last time he was at my house. It was the last time I ever saw him to have a talk with him. He came
983 in and asked me if I would get his breakfast. He said, Hat, I guess I will have to ask you to get my breakfast because I would not ask that hellion. If I had she would have got what she wanted to and I was pretty hungry this morning. He said Mother and I fare pretty slim but I do not care so much about myself as I do my mother and then said he thought Charlie had got a sticking plaster now that would stand by him, he could not get rid of her so easily, but he says he can if anybody can. That is all I remember.

Q. What else?

A. Well, I could not remember the rest of it.

Q. That is all you remember he said about that?

A. That is. There were other things that he
984 said.

Q. I am asking you now if that is all you remember of the language that he used there on that occasion in reference to that subject?

A. No. He said he came in one morning and his mother was at the table eating and all she had for breakfast was some tea or coffee—I cannot say which— and some cold johnny-cake and he says, I made it hot for a while, and Vena said she got her what she had in the house.

Digitized by Google

985

Q. Anything else you remember on that occasion that Bayless said?

A. Yes. He said he went down cellar or looked around and found out that the family had had a good breakfast. He said I told Charlie when he came home just what mother had for breakfast. He says, I do not care what I have to eat but mother must have good victuals and enough of them, and he said Charlie was pretty mad and spoke his piece, or something to that effect.

Q. Have you told all that you remember of the talk?

A. That is all that I remember.

Q. Now in all the time you have known the Hinman family up there, have you known of any of the children doing anything for the mother except Charles N. Hinman?

986

A. In what way do you mean, supporting?

Q. Yes.

A. I do not know much of anything about it only what she told me.

I knew of Melissa Hinman going to live with Henry Hinman and his wife Orptha when they were at Coventry. She did not tell me how long she had been up there, but it was more than a visit because she told me that she went there to stay with Henry and his family.

Q. What were the relations between Charles N. Hinman and your daughter?

A. Nothing but school children and school mates.

987

Q. Did you ever have any trouble with Charles N. Hinman?

A. I did not, never.

Q. After your daughter married her first husband, where did she live?

By counsel for the petitioner—

Objected to as improper, incompetent, immaterial, irrelevant, no part of the cross-examination.

Digitized by Google

By the Court—Sustained.

988

By counsel for the administratrix—Exception.

Q. Did your daughter obtain a divorce from her first husband or he from her?

By counsel for the petitioner—
Objected to as irrelevant, improper, incompetent, immaterial.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. Did you learn that your daughter was up at the Hinman farm at one time while the administratrix was living there and the administratrix
989 threw your daughter out of the house and told her to keep away from there?

A. I did not, never heard it.

Q. How long has it been since your daughter lived with her first husband?

By counsel for the petitioner—
Objected to as improper, incompetent, immatrial.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. You say your daughter has been married only twice?

A. She has been married three times.

Q. How many husbands has she living now?

990

By counsel for the petitioner—
Objected to as improper, incompetent, immaterial.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Digitized by Google

Q. Was it not a fact that you knew that Charles Hinman before his marriage to this administratrix was a good deal in the company of your daughter? 991

A. I do not know that she was any more than any school-mate or young people in the neighborhood. She was there at the home a great deal.

Q. Even after they had stopped going to school?

A. She was there at the home a great deal.

Q. At the Hinman home?

A. Yes.

Q. He was there at your house some?

A. Yes just as other young people came in.

Q. Both before and after school days were over? 992

A. Yes, sir.

Re-Direct by Mr. Yetter:

She was a friend of Ida Hinman, sister of Charles the whole family.

By counsel for the administratrix—

I move to strike out the evidence of this witness as to conversation with Charles N. Hinman she has detailed here upon the ground that it is incompetent, improper, no foundation laid, no part of the res gestae, hearsay, and it is not proper rebuttal, too indefinite and remote in time.

By the Court—Motion denied.

By counsel for the administratrix—Exception. 993

By counsel for the administratrix—

I make a like motion as to the conversation this witness has detailed with Melissa Hinman at the witness' home on each and all of those grounds.

By the Court—Motion denied.

By counsel for the administratrix—Exception.

Digitized by Google

994

By counsel for the administratrix—

I make the same motion as to conversation that this witness has given with Bayless Hinman at the witness' home on the farm, on each and all of the grounds stated in the motion as to the conversation with Charles N. Hinman.

By the Court—I deny the motion.

By counsel for the administratrix—Exception.

ABBIE THOMAS, being called in rebuttal as a witness for the petitioner, being duly sworn and examined by Mr. Yetter, testified as follows:

995 I reside in the Town of Chenango. Have for forty-eight years. My home is about one mile above the Hinman farm. It is the next residence north. I was well acquainted with the members of the Hinman family. Bayless, Charles, Henry and Melissa. Charles N. Hinman used to run a milk route to the City of Binghamton. I used to sell my milk to him.

Q. And down until the time he left the farm in 1905 or 1906?

A. Yes, more or less.

I never heard Charles N. Hinman address this respondent here by name.

Q. During the years after Miss Lord came there, say 1900 down to the time Charles left the
996 farm in 1903, 1904 or 1905, there at the farm how did he address her?

By counsel for the administratrix—

Objected to as incompetent, improper, inadmissible, no foundation laid, too remote in time, no part of the res gestae and not proper rebuttal.

By the Court—Overruled.

By counsel for the administratrix—Exception.

Digitized by Google

997

A. He called her the kid.
Q. What else have you heard him call her?
A. Nothing else.
Q. You knew that she came there to live on the Hinman farm about the fall of 1899?
A. Yes sir.
Q. And she resided there until Charles left the farm?
A. Yes sir.
Q. When they came to Binghamton?
A. Yes sir.
Q. Do you know what their reputation was, judging from the speech of the people in the community there as to whether they were married or not?

998

A. No.
Q. You do not know?
A. Yes I do.
Q. State whether their reputation was they were married or not?

By counsel for the administratrix—
Objected to as incompetent, improper, inadmissible, no sufficient foundation laid, improper in form, no part of the res gestae and too remote and indefinite as to time.

By the Court—Sustained unless time is fixed
Q. During the period from 1900 down to 1903, during the years 1900, 1901, 1902 and 1903?
By counsel for the administratrix—
Same objection.

999

By the Court—Overruled.
By counsel for the administratrix—Exception.
A. That they was not married.
Q. Did you have a conversation with Melissa Hinman in which she made any statement relative to whether or not Charles was married?
A. She always said she was not married.
By the Court—The answer may be stricken out.

Digitized by Google

1000 Q. Did you have such a conversation?
A. Yes.
Q. State what was said?
By counsel for the administratrix—
Objected to, the time and place not fixed.
By the Court—Sustained.
Q. When were those conversations you had?
A. Not more than a year or so before they moved to Town.
Q. That was what year?
A. I should think they moved to town in 1900, but I won't be sure.
Q. Who do you mean moved to town?
A. Charlie Hinman. No, they moved to town about five years ago.
1001 Q. You think it was about a year before they moved to town?
A. Yes.
Q. Was she visiting you at that time?
A. Yes.
Q. How long did she stay there on that visit?
A. Ten days.
Q. State what she said relative to whether or not Charles was married, during that visit?

By counsel for the administratrix —
Same objection on the same grounds.

By the Court — Overruled.

By counsel for the administratrix — Exception.

1002 A. She said she thought it was awful to think they was living that way, very bad to think they was living that way.
Q. What else?
A. I told her it was their business not mine.
Q. What else did she say? A. That was all. In that conversation she stated to me in substance or in words that they were not married.

Digitized by Google

1003

Cross-Examination by Mr. Hinman—

My home is about a mile further north than the Hinman farm. I have lived there many years. I should say Melissa Hinman was seventy when she died. I did not visit her at her home on the Hinman farm. I visited there when her daughter Ida was living. She has been dead about twenty-five years. During the last twenty-five years I did not visit at the farm. Melissa Hinman was at my house on the farm and stayed over a week I think.

Q. Have you any means of fixing the year that that was?

A. I do not know — She used to come up there often. I should say about a year — four years before they moved to town. I think they moved 1004
to town about five years ago. I have no way of fixing dates but simply give my best recollection.

Q. All you know then about the time that this administratrix, who is now known as Mrs. Charles N. Hinman, went up to the farm was from hearsay. that is, you did not go down to the farm to see her there?

A. No sir.

I should say it was in 1900 that she came there. It may have been 1901. It may have been 1900 or 1901 and from that time on she lived there at the Hinman farm until Charles Hinman moved away. The occasion when I heard him speak of her as the "kid" was when I was at the Hinman house to get milk checks. He called to her and called 1005
her the kid. I should think he was over forty at that time. This administratrix was then a good deal younger than he was. She appeared to be a young girl then. He spoke of her in that way about every time I was there. I have given all that I remember what Melissa Hinman said in reference to the way in which they were living.

Digitized by Google

1006 I made no memorandum at the time and am giving just my recollection. At this time I do not intend to give the exact words but the substance of it as I remember it.

Re-Direct Examination by Mr. Yetter —

Q. Did you say that Melissa came up there to visit you about a year before they left the farm or four years?

A. Four years.

HATTIE HEIM, being called in rebuttal as a witness for the petitioner, being duly sworn and
1007 examined by Mr. Yetter, testified as follows:

I reside in the city of Binghamton. My husband is a merchant tailor. I have lived here ever since I was two years old. I am a granddaughter of Mrs. Shearer. I was acquainted with Charles Hinman, Bayless Hinman, Mary, Bayless Hinman's wife.

Q. Were you acquainted with Miss Lord?

A. Not particularly, no.

Q. Were you up at the Hinman residence in the Town of Chenango at different times?

A. A great many, just as much like home as my own could be until after Mary left, Mamma did not like to have me go so often because there was so much talk.

Q. Do you remember when Bayless died?

1008 A. I could not say just when he died.

Q. Did you have a talk with Melissa Hinman the summer before Bayless died?

A. Yes.

Q. Where were you?

A. It was at Charlie Hinman's house up in Mrs. Hinman's room, in the south room on the Hinman farm, in the south room east of the parlor.

Digitized by Google

1009

Q. State what was said to you on that occasion?

By counsel for the administratrix —
Objected to upon the ground that it is incompetent, improper, inadmissible, improper in form, no sufficient foundation laid, too remote and indefinite as to time, not part of the res gestae and not part of the rebuttal.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. I do not know as I could say exactly word for word. Grandma Hinman felt quite badly. Her spirits, that is, you know, she was sort of depressed. I asked her what was the matter and 1010
she said, why, I have been feeling very badly, Charlie and Vena have been having a lot of trouble, and I said, that is too bad, what is the matter? She says, Charlie is trying to get rid of her and he cannot, and that Vena came home intoxicated and she and Charlie had an awful scrap. That is just the way she said it. She meant a quarrel of course. I says, why that is too bad, grandma, did you have to hear it all and she says, I heard some but went in my room so I could not hear it all, and she said Charlie ordered her out and she said "I will be back, Charlie Hinman, you do not get rid of me so easily." I says, grandma, I came to-day to see you and she refused to let
me in and as I was going past the lot Charlie 1011
called me. It was probably between three and four o'clock. He called me and said, hello Hattie, and I says hello, and he said did you see mother, or ma, I do not remember which.

By counsel for the administratrix —
Object to same as to last question.

Digitized by Google

1012 Q. Go on and state what Charlie said to you?

By counsel for the administratrix —
Same objection on the same grounds.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. I told Melissa why I happened to be there. She asked me why I had not been to see her.

She said she was very unhappy and she said she wished the land Mary had never left, that was Bayless Hinman's wife. I was up at the Hinman farm the night after Bayless died. His remains were in the house. I went with Mr. and Mrs. Shearer, my grandfather and grandmother. I
1013 saw Charlie Hinman there that evening and Miss Lord. I heard Charlie Hinman introduce Miss Lord to my grandfather, Mr. Shearer. As nearly as I can remember it he said this is Miss Lord. I do not remember her saying anything, merely nodding.

Cross Examination by Mr. Hinman —

From a little girl I called Mrs. Melissa Hinman grandma. Henry Hinman I do not know so as to say how do you do on the street. When I was small I did. I was in New York for three winters previous to my marriage, winters of 1904, 1903 and 1902 living there with my mother and father. My mother's name was Eva T. Wessel. Before my marriage my name was Hattie Wilson. We
1014 was living with my mother's second husband as I supposed when I was living in New York. He had no business there at that time, nor did my mother. I hink it was in 1902, the summer before Bayless died that I visited Mrs. Hinman up at the farm.

Q. Do you mean 1901 or 1902?

Digitized by Google

A. 1902. The summer before Bayless Hinman died in the Fall. 1015

Q. Where did you live the summer of 1902?

A. I cannot say where my home was.

Q. Where were your mother and father during the summer of 1902?

A. I do not remember where they were.

Q. Cannot remember the City you lived in that year?

A. I never lived in any other except this one as home.

Q. Did you live in this one the summer of 1902?

A. Around here.

Q. Where did you live in the summer of 1902?

A. I cannot say.

Q. What were you doing in the summer of 1902? 1016

A. Eating breakfast, dinner and supper and going to bed at night and having a good time if possible.

Q. Tell me where you spent the summer of 1902 and what you did besides eat your breakfast, dinner and supper and go to bed and have a good time?

A. I probably played croquet, rode my wheel and went in swimming.

Q. I want you to tell me what you remember you did?

A. I did.

Q. Where did you play croquet in the summer of 1902 and with whom? 1017

A. I played croquet at grandma's at the farm.

Q. Grandma Hinman?

A. I mean my grandmother Shearer.

Q. Whom did you play croquet with at your grandmother's?

A. I had lots of company. How can I remember.

Digitized by Google

1018

Q. If you cannot remember then say so?

A. I cannot remember every one I played croquet with.

Q. Can you name one?

A. Mr. Bokes might. The night watchman at the County Farm.

I do not remember what his first name was. He was older than I. He used to come up evenings and play with us. I cannot say who was keeper at the County Farm in 1902. I am quite sure Mr. Bokes was night watchman at the County farm in the summer of 1902. I am quite sure. Yes, I will say positively. It was in the summer that Mr. Bokes was night watchman, in the summer of 1902 that I went up and had a talk with Melissa Hin-

1019 man.

Q. So if Mr. Bokes was not at the County, Farm after the summer of 1901 as night watchman, then the talk you had with Melissa Hinman must have occurred in the summer of 1901 and not the summer of 1902, because the talk you had with Melissa Hinman which you detailed here was the same summer that Mr. Vokes was night-watchman at the County Farm, I am right about it am I?

A. Yes sir.

I went up to see Grandma Hinman that day in the afternoon. I went on my wheel.

Q. Whom did you see up at the Hinman farm that day?

A. Some one came out that I did not know,

1020 probably someone working there, she had the appearance, and I could not swear whether it was Miss Lord back of the door or not, I presume it was her, and this woman said who did you come to see.

Q. Did you understand what the question was?

A. Whom did I see.

Q. Whom did you see at the Hinman farm that day?

Digitized by Google

A. This woman that I did not know and grandma Hinman. 1021

That is all at the house. I stayed there probably an hour and a half. I could not state the exact time. It was not more than two hours and I think not more than one.

Q. What did you go up to the farm that day for?

A. To see old Mrs. Hinman.

Q. How old was she?

A. I could not tell you.

Q. Did you call her old Mrs. Hinman?

A. Mrs. Hinman or grandma. I called her grandma.

Q. What was the distinction between old Mrs. Hinman and young Mrs. Hinman at that time? 1022

A. I never knew there was a young Mrs. Hinman.

Q. Why did you say old Mrs. Hinman?

A. Because the woman at the door asked me and I said I never knew there was a young Mrs. Hinman except Mary.

Q. The woman asked you whether old or young Mrs. Hinman?

A. Yes and I said old Mrs. Hinman.

That day I saw Melissa Hinman in her room in her house.

Q. Tell us now just the talk that she had there with you and you with her that day about this administratrix, tell it as it occurred?

A. I cannot say it word for word. I went in and she did not feel good, and she says Hattie we are having so much trouble or something to that effect. I says that is too bad, what is the trouble. She says, Charlie is having so much trouble with Vena, that Vena came home intoxicated and Charlie told her she would have to get out and they had a terrible scrap, and that Vena 1023

Digitized by Google

1024 said she would not go and if she did she would come back, it was not the last of it and he could not get rid of her and she said she did come back and brought her trunk with her. She says I suppose she is here to stay.

Q. Then you took it she had been away?

A. She said she went when Charlie ordered her to.

Q. How long did she stay?

A. She did not stay.

Q. Came right back?

A. In a day or so. I did not see Vena that day. She said she was there. I do not know how long Vena was away. Grandma didn't say where she went.

1025 Q. She didn't say when she came home intoxicated?

A. Just at the time she went away it was.

Q. She came back with her trunk and a jag at the same time?

A. After Charlie sent her away.

Q. After she brought back her trunk she came back a second time intoxicated?

A. No, she came home intoxicated and that is what made the scrap.

Q. Then grandma Hinman said to you Vena came home intoxicated?

A. She said she came home drunk.

Q. The word intoxicated you used was your own word and the word grandma used was drunk?

1026 A. Yes.

Q. Grandma Hinman didn't use the word intoxicated?

A. I said I gave the substance.

Q. Why did you give another word if you were repeating the substance of it.

A. Because you asked just what she said.

Q. What did you say?

Digitized by Google

1027

A. I said the substance of it was that Vena came home intoxicated.

Q. Give the words as near as you can?

A. I cannot right straight through. I remember she used the word scrap.

Q. What other word?

A. Drunk.

Q. Do you remember any other phrases and words she used that Day?

A. No, I could not say that I do.

Q. The two words that impressed themselves indelibly upon your memory and to linger with all these years were drunk and scrap?

A. Yes.

Because she drew her face so when she said it.

1028

Q. And that is what made you recall those words?

A. Yes.

Q. Did she draw her face on any other words?

A. No.

Q. The drawing of her face on those two words impressed your memory?

A. Naturally.

Q. Naturally or unnaturally, did it?

A. Yes.

I am now twenty-seven years old. Since that day I have ben at the Hinman farm. I was there at the time of the death of Bayless and at his funeral. Save those occasions I do not recall that I have been at the Hinman farm since the day when I had this talk with Melissa Hinman. In addition 1029 to remembering the introduction by Charles Hinman of this administratrix that evening I remember grandma Hinman saying to my grandmother and myself that if Bayless had been home things had been right and Mary had never left the farm that he would still be alive. I lived in Binghamton in 1906, 1907 and 1908 and yet did

Digitized by Google

1030 not call on Melissa Hinman in any of those years. I knew she was living in Binghamton and did not call on her. Why I did not I do not know. She did not call on me.

Q. Did you know who she lived with in Binghamton?

A. Just from what I heard.

Q. With Charles Hinman and Mrs. Hinman?

A. Yes.

Charlie told me they were living in the Moon Block one Sunday in front of the Central Cigar Store. I cannot say that I was shocked by the language Grandma Hinman used that day. I was impressed by those two words. I guess I have
1031 heard them in my life before. At that time when I had this talk I think I had not been at Grandma Hinman's since Mary left. I cannot tell how long that was, one or two winters before. Before Mary left I had been there a great deal. I was a friend of Mary's. I had called there to see the whole family. My visits ceased at the farm after Mary went because mama considered it was not proper for me, there was so much talk. That was the only reason.

Re-direct by Mr. Yetter—

I was married 5 years ago this coming summer.

Here an adjournment was taken to July 23, 1910, at 9:30 A. M.

1032 July 23, 1910, 9:30 A. M. the hearing was resumed with the same appearances.

JENNETTE PALMER, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

Digitized by Google

1033

Q. Where do you reside?
A. Between Whitney Point and Castle Creek.
Q. In the County of Broome? A. Yes sir.
Q. How long have you resided there? A. Four years.
Q. Prior to that where did you reside?
A. We lived in Nimmonsburg.

Nimmonsburg is a short distance north of the City of Binghamton, about two miles south of the Hinman farm. We resided there a year, then we moved down just below the County Farm. There we resided a year. The County Farm is located just south of the Hinman residence. I was acquainted with the members of the Hinman family. 1034
Have known them ever since I knew anybody. My age is sixty-three. I was well acquainted with Melissa Hinman. She was at my house a good deal one time and another. I used to go to her home frequently. I remember when she died. It was after Christmas. I cannot remember just the date or whether just before or after, nor the year I cannot remember that. She visited me a short time prior to her death. She was at my house in haying time and stayed until the last of September. That was the year she died. I had a talk with her at that time relative to the relations of Charles N. Hinman, her son, and Vena Lord.

Q. State what that conversation was? 1035

By counsel for the administratrix—

Objected to as incompetent, improper, inadmissible, hearsay, immaterial, no proper foundation laid, not part of the res gestae.

By the Court—Overruled.

By counsel for the administratrix—

Exception. And not in the presence of Charles

Digitized by Google

1036 N. Hinman or this respondent and not binding upon either.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. She says to me, Net, it is so funny that Charlie lives in the way he does. I do not see why they do not go and get married and live like other people.

I recall nothing else at that time.

Q. Later, or at any time while she was there, did she say anything further about their relations?

A. She spoke about it when she came up there. She came up there and began to cry and I asked

1037 her what was the matter.

By counsel for the administratrix—

Objected to on the same grounds as stated in the last objection.

By the Court—Sustained.

By counsel for the petitioner—Exception.

Q. Did she make any other statement to you of their relations, the relations of Charles and Vena?

A. No, that is just what she said at that time on that subject.

I recall when Bayless Hinman died in November, 1902. I was present at the funeral and was at the house prior to the funeral. At that time I was living at Nimmonsburg. I was at the house

1038 about a week or so before Bayless died.

Q. State whether or not you heard Melissa Hinman introduce this respondent, Miss Lord, to anybody at that time?

A. I did.

Digitized by Google

1039

Q. State what she said?

By counsel for the administratrix—

Objected to upon each and all the grounds stated in the two prior objections.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. As she came in she introduced her but I do not remember the lady's name. She was an oldish lady and not there but a little while, and Miss Lord came out of another room and she turned around and said, this is Miss Lord. That was Melissa Hinman that said that.

Q. And Miss Lord was present there?

1040

A. Yes.

Q. What did they say if anything when Mrs. Hinman introduced her as Miss Lord?

A. She passed the time of day with her and went on.

Q. About six weeks or something like that before Bayless died did you have a conversation with him at Nimmonsburg?

A. I did.

Q. State what that conversation was?

By counsel for the administratrix—

Objected to as incompetent, improper, inadmissible, immaterial, hearsay, no proper foundation laid, no part of the res gestae.

By the Court—Overruled.

By counsel for the administratrix—Exception.

1041

A. He came in there and said to me, of course about Miss Lord, he says to me, Net, that is the worst woman on this earth and I do not know whether Charlie will marry her or not. That is what he said.

Q. That was about six weeks before he died?

Digitized by Google

1042

A. Just about six weeks.

Cross-Examination by Mr. Hinman—

My husband's name is Reuben Palmer. I do not know anything about what he is doing now. My husband and I do not live together.

Q. Whereabouts is the house you live in?

A. Upon Page Brook.

Q. Between Whitney's Point and Castle Creek?

A. No, it is not now. It is on Page Brook.

Q. On your direct examination were you not asked where you lived and did you not say between Whitney's Point and Castle Creek?

A. I said at that time.

Q. What time did you refer to?

1043 A. Two years ago we lived there and moved from there when her aunt was at our house.

Q. So now you do not live between Whitney's Point and Castle Creek?

A. No.

Q. And if you so stated on your direct examination it is not correct?

A. I did not state that.

Q. Are you certain that you did not testify on your direct examination that you now live between Whitney's Point and Castle Creek.

A. Yes sir.

Q. Are you certain of that as you are of everything else you have testified to here?

A. I am certain of everything I said.

1044 Q. Are you as certain of that as you are of everything else you have testified to here this morning?

A. I am certain of it.

I moved to Page Brook last Spring.

Q. What do you mean, Spring of 1910?

A. I mean last Spring.

Digitized by Google

Q. Do you mean the Spring of 1910?
A. Why certainly. 1045
Q. Where did you move from there?
A. Just a little ways from there.

I moved there from what they call Johnsontown. That is about a mile and a half from Page Brook. I lived at Johnstown about a year. I moved there a year ago last Fall, that is in the Fall of 1908. I moved from Johnsontown to Hyde Street, between Whitney Point and Castle Creek. I lived there going on four years. I moved on to Hyde Street in the Fall. I moved to Hyde Street from just about Chenango Forks, about a mile and a half north of Chenango Forks. I lived about 1½ miles north of Chenango Forks about a year.

Q. What year did you move there? 1046
A. It must have been 1907 I think.
Q. Are you certain it was 1907 when you moved there?
A. Year before we moved on Hyde Street.
Q. What year was it that you moved on that place 1½ miles north of Chenango Forks?
A. 1907 I think when we went there.
Q. And lived there a year? A. Yes sir.

I do not know as I can tell exactly how far it is from Binghamton to Chenango Forks. I have always lived in Broome County. Chenango Forks is in Broome County. When I moved to this place a mile and a half from Chenango Forks I came from Nimmonsburg. I lived at Nimmonsburg about two years. I am certain about that.

Q. So if on your direct examination you testified you lived there a year you were wrong about that? 1047
A. I said we lived there two years. We lived in one house a year.
Q. If on your direct examination you testified you lived at Nimmonsburg a year you were in error about it were you?

Digitized by Google

1048

A. I did not testify that way.

Q. Are you as certain about that as anything else you testified to this morning?

A. I be.

At Nimmonsburg we lived in Charlie Johnson's house, rented of Charlie Johnson.

Q. Where is Charlie Johnson now?

A. There I suppose. I say Charlie Johnson. It is Charlie Lewis. He lives there on the Johnson homestead.

We lived in his house one year.

Q. Where else did you live there?

A. Down below the County Farm. The County House is this side of Nimmonsburg south of it and we lived right there. The premises joined on
1049 this side, on the side nearer the City of Binghamton than the County House. We lived nearer the City of Binghamton than the County House.

The year must have been 1906 when we lived in the Lewis house at Nimmonsburg. We moved there off from the hill, Mr. Howard's hill. I am certain about that. We moved off there about 1905 I think. On Howard's hill we lived on Darwin Howard's farm five years. I think we moved on Howard's hill five years before we moved to Nimmonsburg, it was five years before that time.

I have not thought and had those things in my mind and do not remember just the date exactly nor the year.

Q. Give us the year when you moved into Dar-
1050 win Howard's place on Howard Hill, and take whatever time is necessary for you to think only give it right if you can.

A. I think 5 years before we moved to Nimmonsburg.

Q. Not what you think. What year was it?

That would be, it seems to me, 1901. I won't say for sure. It is my best recollection that it was

Digitized by Google

1051

1901. I lived there five years. Before I moved on that farm I was living at Castle Creek. From Darwin Howard's place we moved to Nimmonsburg and lived there a year. From there we moved just below the County Farm and lived there a year. It was the year 1907, I think. I rented of Mr. Lander living here in town and lived there a year and he sold it. I lived there a year and moved from there up above Chenango Forks. I lived there a year, just a year and from there moved on Hyde Street. I do not know as I can not remember exactly what year Bayless Hinman died, because at that time I did not think anything about it. I was living then just below Mr. Hinman's farm about two miles to Nimmonsburg.
1052
He died the year I lived at Nimmonsburg I am very certain of it. When Melissa Hinman visited me I was living on Hyde Street, between Whitney Point and Castle Creek. The lady that was on the farm brought her there. They had rented the farm. I do not remember the lady's name. I was never acquainted with her. I saw her that day and was introduced to her by Mrs. Hinman. I do not remember her name. She did not bring her up there and stay to dinner. She just brought her and went right back. Nobody came after the old lady. I mean Mr. Palmer and myself. We took her home, back down to the farm. She was staying there on the Hinman farm for a little while after it was rented. I do not suppose it was her home. We took her back where she came
1053
from. When we took her back I did not go in. We drove up and she went in and we went home. I did not see a man, woman or child on the farm, around there on the farm or about the house. It was the last of September. I fix that because I remember how long she was with me. She came in haying time, I can not remember just what

Digitized by Google

1054 time it was. She came and stayed until the last of September.

Q. You say you know she stayed until that time because you know how long she was with you. How long was she with you?

A. I cannot give that. I cannot tell what time in haying time she came. She came in haying time and stayed until the last of September. That was the last I saw of her before she died.

Q. What year was that?

A. I do not know as I can remember the year exactly.

Q. But you remember the month?

A. Yes.

Q. But not the year?

1055 A. I cannot remember that.

Q. You did think of September?

A. I remember when she went home. If you had company you would.

I cannot tell what other time Melissa Hinman visited my house. She was there a good many times. Three times while I lived on Hyde Street. I do not know as I can remember not thinking anything about it at the time. I remember her coming that time because I know she soon died after that.

Q. How long after that did she die?

A. Either after Christmas or between Christmas and New Years.

Q. Of the same year?

A. Yes sir. I met them down to Glen Castle

1056 when they brought her body there. I was then living on Hyde Street.

Q. Do you remember anything else Melissa Hinman said up there except what you told this morning?

A. I do not know as I can remember any particular thing. Yes I remember one thing.

Digitized by Google

1057

Q. What was that?

A. She said you might scrape hell with a fine tooth comb and you could not scrape up a worse woman than she was living with.

Q. Did that just come to you? A. No sir.

Q. You remembered that all these years?

A. Yes and always shall.

Q. On your direct examination when counsel asked you if that was all you remembered you said it was. Did you remember it then?

A. I remembered it.

Q. Why didn't you in response to his question say so and tell it?

A. I did tell it.

Q. Did you tell that on your direct examination? 1058

A. I did not.

Q. When counsel on the other side asked you if that was all you remembered of the conversation that you had told, did you say that it was all you remembered?

A. No.

Q. Are you as certain about that as of anything?

By counsel for the petitioner—Objected to.

By the witness—A. Yes sir.

By counsel for the petitioner— I move to strike it out.

By the Court— The answer may be stricken 1059 out.

By counsel for the administratrix—Exception.

Q. Do you remember anything else she said up there on that visit except what you have told?

A. No sir, not anything to repeat.

Q. Do you remember anything not to repeat?

Digitized by Google

A. I suppose we all do.

1060 Q. Do you know Mrs. Shearer?

A. Not acquainted with her, not well acquainted.

Q. Were you here in Court yesterday?

A. No.

Q. Did you hear what she testified to yesterday?

A. No sir.

Q. Bayless Hinman saw you sometime somewhere?

A. Yes at Nimmonsburg. I cannot just remember the years. He came to Charlie Lewis' to doctor a sick horse and then came over to my house. He came over, I suppose, because he was

1061 acquainted with me and wanted to. He came there and sat down and we talked and visited. My daughter Rose was there when I had the talk with Bayless, she is now dead. Bayless Hinman, it seems to me died in the Fall. I cannot tell exactly now. I was living at that time about two miles below Mr. Hinman's at Nimmonsburg. i was at the Bayless Hinman house a week before he died, and was there again the day he died also at the funeral.

On the ocassion when I was at the Hinman farm the week before Bayless died I stayed to dinner.

Q. Who did you see at the Hinman farm that day?

A. Only the people that belonged there and the hired help. I cannot remember the hired help

1062 at all.

Q. Name the members of the family who were there?

A. Miss Lord, Mrs. Hinman, Charlie and I remember no one else. They had hired help. I did not see Bayless there that day.

The hired help came in to dinner and ate at

Digitized by Google

the table. I was not introduced to them. They came down after me the day Bayless died. I think one of the hired men came, I cannot tell his name. The day of the funeral Mr. Palmer and myself hitched up and went up and then we went up in the cab with the rest. We drove from Nimmonsburg, where we lived. I did not know as I repeated this talk that Melissa Hinman had with me upon Hyde Street until they came up the other day and I saw them and they asked me, and I says if I tell you anything I will tell you the truth and nothing but the truth. When I say they I mean Charlie Hinman and Mr. Wilber. Charlie is Henry Hinman's son. I have known Henry Hinman from his childhood but never knew him very well. The last time I saw Melissa Hinman was the year before she died, which was at my own house. The last time I visited Melissa Hinman at her home upon the farm was just before Bayless died about a week or two. That was the last time I ever called on her. That was when this introduction occurred that I have spoken about. My Aunt herself, Mrs. Hinman, made that introduction. Mrs. Hinman was my Aunt. I am related to the Hinman family. I cannot remember the name of the lady that was introduced by my aunt. She was a stranger to me. She was there a little while, a few minutes. I do not know as I can describe the woman. She was an oldish lady and had a veil on. She came into the room and my Aunt introduced her and Miss Lord came in the room and she turned around and said this is Miss Lord and Miss Lord went out of the room. I do not know whether she told Miss Lord who the other lady was. She named her, I suppose, of course. 1063 1064 1065

Q. Did you hear her name?

A. If I did I have forgotten the name.

Digitized by Google

1066 When that stranger came in she was introduced to me and I to her. I cannot remember her name and do not know where she lived. I did not ask any questions about it and heard nothing about it. I do not think I visited with her. I do not think she sat down. I think she came in and was introduced to Miss Lord and myself and went right out. Nothing else was said while she was there except the introduction. All that I saw was a stranger coming in there who did not sit down, was introduced to me and Miss Lord and went out. That is all that occurred.

Re-direct by Mr. Yeter:

Q. Now, Mrs. Palmer, you spoke of Nimmons-
1067 burg, is that a little country village a few miles north of the City of Binghamton?

A. Yes, it is.

Q. Nimmonsburg is a little village is it not between Binghamton and the Hinman Residence?

A. Yes. It is not much village about it. There is a little grocery store and that is about all.

Q. And speaking of places in that vinicity you speak of being in Nimmonsburg?

By counsel for the administratrix—

Objected to as incompetent, improper and leading.

By the Court—Sustained.

By counsel for the petitioner—Exception.

1068 Q. When you speak of Nimmonsburg do you refer to the locality surrounding the grocery store which you have referred to?

By counsel for the administratrix—

Objected to as incompetent, improper and leading.

By the Court—Overruled.

Digitized by Google

1069

By counsel for the administratrix—Exception.

A. Yes sir.

Q. Now the day that you heard Melissa Hinman, your aunt, introduce a lady to Miss Lord, did you say the lady remained there a time and talked with Melissa and went out?

By counsel for the administratrix—

Objected to as improper, incompetent, leading and the record is the best evidence of what she testified to.

By the Court—Overruled.

By counsel for the administratrix—Exception.

1070

A. She did not stay . She came in and spoke to my aunt and talked with her I do not think over five minutes, and she introduced me and Miss Lord and then she went out.

ELLA JOHNSON, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Stratton, testified as follows:

I live at 94 Prospect Street, Binghamton. I have lived there about three years. Prior to living in Binghamton, I resided in Nimmonsburg, about 1 1/2 miles from the Hinman farm. I have known the Hinman family a great many years. I was personally acquainted with all the members of the Hinman family. I have known Melissa Hinman, the mother of Charles Hinman, a number of years. I could not tell how many, but they came in the place when the children were small and it was my home place and from the time the Hinman family moved on what is called the Hinman farm I have lived in the same

1071

Digitized by Google

neighborhood with them from the time and down
1072 to the time when Bayless Hinman died and met different members of the family frequently.

Q. Did you have a conversation with Melissa Hinman at the Hinman farm house after the death of Bayless Hinman and before Mrs. Hinman moved into the City of Binghamton?

A. No conversation, no sir.

Q. Were you there at one time at the house during that time?

A. I called at the house.

Q. Referring to the time between the time when Bayless Hinman died and Melissa Hinman moved away from the Hinman farm, at one time when you heard Mrs. Melissa Hinman speak of
1073 Miss Lord, state how she spoke of her?

By counsel for the administratrix—

Objected to as incompetent, improper, inadmissible, immaterial, hearsay, no proper foundation laid, no part of the res gestae, too indefinite as to time.

By the Court—

She may answer, but I suggest that you may have to strike it out if I do not deem it proper.

By counsel for the administratrix—Exception.

A. She spoke of her casually as Miss Lord.

By counsel for the administratrix—

I move to strike it out as a conclusion, and upon
1074 each and all the grounds stated in the objection and the question.

By the Court—It may be stricken out. She may state what she said.

By counsel for the petitioner—

Q. Give her language, just detail what there was of it?

Digitized by Google

A. There was nothing of it that I remember at all, only Mrs. Hinman was ill in bed and talking about her son caring for her, her son Charles N. Hinman, and she spoke of her as Miss Lord, but I could not detail one particle of conversation, and that was all. I remember that occurred, the circumstances. 1075

I am sure this was after Bayless Hinman died. I cannot remember how long after his death it was.

Cross Examination by Mr. Hinman—

When I was there in the bedroom talking with Mrs. Hinman Mrs. Isaac Cooley and the son Charles was there, no one else. Charles went in and out. I do not know whether he was in or out when this one remark was made. Mrs. Cooley was there with me while I was there when that remark was made. She was present in the bedroom all the time I was there. 1076

JOHN HUGABOOM, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I reside at Glen Castle, in the town of Chenango, about one mile from the Hinman residence. I have resided there about thirteen years.

Q. Were you well acquainted with the different members of the Hinman family while you were living there? 1077

A. Not so very well acquainted. I knew them.

Q. You knew them all? A. I knew the men folks.

Q. Did you know this respondent, Vena Lord, lived there for a number of years commencing about 1899 or 1900?

A. I knew of the woman being there, yes.

Digitized by Google

1078 Q. Do you know, Mr. Hugaboom, what the reputation, judging from the speech of the people was as to the relations between Charles N. Hinman and Vena Lord, as to whether they were married or not?

By counsel for the administratrix—

Objected to as incompetent, improper, immaterial no proper foundation laid, not part of the res gestae and hearsay and too remote.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. I do.

Q. State what the reputation was?

1079 By counsel for the administratrix—Same objection.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. As a general rule amongst neighbors the talk was that they were not married. That is all I know.

Cross-Examination By Mr. Hinman.—

My store is about a mile from the Hinman farm. I run the grocery store there. I moved to Glen Castle about 17 years ago. I have lived where I am now 13 years. Before that I rented a property that belonged to Ike Page about one-half mile
1080 above. The first 3 or 4 years I lived in that locality I lived 1 1/2 miles above the Hinman farm. In going to Binghamton from the Hinman farm they would not pass my place.

Q. Did you or your family ever visit at the Hinmans?

A. No sir.

Q. And none of the Hinmans visited you or yours?

Digitized by Google

A. No.

Q. No social relations between you and your family? 1081

A. No.

Q. Or any members of your family?

A. No sir, not that I know of.

Q. I take it from what you said that you never visited at the Hinman house?

A. No sir.

I never visited at the Hinman house. I have been in the kitchen but I do not know that I ever went any further than that. The only members of the Hinman family that I know are the men folks. I do not know anything whereby I can fix the date when this respondent, Mrs. Charles N. Hinman first came to live at the Hinman farm. I 1082 know that when she came there, whenever she did come, she came there as a stranger in that community. She was not born or brought up there. So far as I know she came and lived at the Hinman farm as long as Charlie Hinman lived there and when he went away she went away. I know nothing about when they came to Binghamton to live. I had no business relations with them after they came here and no social relations.

Q. Now you have spoken of the reputation of the parties among the neighbors. Do you refer to the early period when this respondent first came to live at the Hinman farm?

A. I do not think probably when she first came there for I presume they did not know anything 1083 to have anything to talk about.

Q. What period of time do you refer to?

A. The last five or six years at the farm.

Q. How many years was she at the farm?

A. I could not tell you anything about it.

Q. What do you mean by the last five or six years?

Digitized by Google

1084

A. That they lived up there. I do not know anything about them after they came away from there.

Q. What neighbors up there did you hear talk about it? I am speaking of before this case came up, before Charlie died?

A. As a general rule most of them.

Q. Who were they, the names that you now recall?

A. George Winfield, Charles Everts, Will Ransom, a man by the name of Maybie, that runs the blacksmith shop.

Q. Who else?

A. I do not know as I can think of all of them.

Q. Where was the blacksmith shop?

1085 A. In what they call Nimmonsburg.

This Mr. Ransom lives now about some 80 or 100 rods from me. I do not know particularly of any other than those three. Winfield lived at Charles Everts at that time. I think he worked for Charles Hinman. I could not tell when he worked for him. I could not tell you where I had my talk with Mr. Winfield, probably in the store. As near as I can give it my talk with Ransom was at the store. I presume it was for I do not go to the neighbors to do it.

Q. Do you remember what was said or did you just have a general conversation?

A. That was all.

Q. As to just what was said or how it was

1086 said you do not know?

A. No.

Q. Or how it came up or what particular time it referred to you do not know?

A. No.

Q. Or what year?

A. No.

Q. As to any of the talks of these neighbors you have spoken of?

A. No, I do not

Digitized by Google

1087

DAVID SMITH, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I live in the Town of Chenango,probably 2 1/2 miles southwest from the Hinman homestead. I have lived in that vicinity always. My age is fifty-three. I was well acquainted with the Hinman family and had been ever since they moved down there from Coventry, which was 30 or 40 years ago. I was acquainted with Bayless Hinman, with Charles and with Ida. I visited at the house. Melissa and other members of the Hinman family visited at my house. I recall one occasion when Melissa called at my house and I had a conversation with her relative to re-

1088

lations of Charles Hinman and Vena Lord. That was about four years ago, about 1906. It took place at my home out on the porch.

Q. You may state, Mr. Smith, what that conversation was?

By counsel for the administratrix—

Objected to as incompetent, improper, inadmissible, immaterial, hearsay, no proper foundation has been laid and not part of the res gestae.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. Why I do not know as I could just state word for word.

1089

Q. Give the substance of it in your own way if you cannot state it word for word?

A. Her and I was sitting out on the porch and she made some remark about Vena and Charles, and I said I had never had much use for her, and she looked up at me and says, Why? And I says, the way she used Bayless, and she says to me, do you think her and Charles was ever married

Digitized by Google

1090 and I says no, do you, and she says, not much, or something to that effect.

Q. Now you remember, do you, Mr. Smith, about when Vena came there to the Hinman place to live, about 1900 or so?

A. Not exactly, along about then I should think.

Q. And do you know when Charles left the farm?

A. I could not tell the date.

Q. About 1905 or 1906? A. Something like that.

Q. During that period between 1900 and 1906 did you know the reputation from the speech of people in the community of the Hinman residence

1091 as to the reputation of Charles Hinman and Vena Lord as to whether they were married or not?

A. Yes.

Q. What do you say that reputation was?

By counsel for the administratrix—

Objected to upon each and all the grounds stated in the last objection made.

By the Court—Overruled.

By counsel for the administratrix—Exception.

Q. State what it was as to whether they were married or not?

A. They were not.

Q. Did you ever have any conversation with Bayless Hinman relative to their relation?

1092 A. Yes.

Q. When was that as near as you can remember?

A. A year or so before he died.

Q. State what was said as near as you can?

A. Well he rather gave me the idea that he was misused pretty bad up there.

Digitized by Google

1093

Q. Anything else that you can recall?

A. Nothing in particular only along to that same effect.

Cross-Examination by Mr. Hinman—

I knew Bayless Hinman well all these years. I knew his wife Mary well. I would describe Bayless Hinman as a pretty good hearted fellow, quite a fleshy fellow. A man who drank. A man from whom his wife got a divorce.

Q. A man who died at the house of a woman that his wife Mary had charged him with having had adulterous intercourse while living with his wife, and for whose relations with this woman Mary obtained a divorce from her husband?

A. I heard so.

1094

By counsel for the petitioner—

I move to strike it out as hearsay.

By the Court—The answer may be stricken out.

By counsel for the administratrix—Exception.

Q. Did you know a woman named Newman with whom Mary Hinman, Bayless' wife, charged him in the action for divorce with having had adulterous intercourse.

A. No sir, nothing only what I heard.

By counsel for the petitioner—

I move to strike it out as hearsay.

By the Court—What is your answer?

1095

A. That is the general impression I guess up around there.

By counsel for the petitioner—

I move to strike it out.

By the Court—The answer may be stricken out.

Q. What is the name of this Newman where Bayless Hinman you understood died?

Digitized by Google

A. Charles Newman.

1096 I am not able to fix the exact time when I had the talk with Bayless a year or two before he died. I cannot tell as to whether it might be a little more than two years or a little less. That talk was at my house and I met him on the road.

Q. I mean this particular talk?

A. I had no particular talk.

Q. I am referring to the one you spoke of to day, what Bayless said?

A. He told me several times.

Q. You were asked by counsel to give a conversation you had with Bayless in which you said Bayless led you to believe or indicated he was abused up there?

1097 A. The one I had reference to I met him in the road. I could not tell when the last time was I visited the Hinman farm. It was quite a while ago. Probably ten years ago. That was before this administratrix went there to live. After she was there I never visited at that farm.

Q. Have you ever met this administratrix?

A. Yes.

Q. To speak with her

A. Not to amount to anything.

Q. That is you had seen her, that is what you mean by meeting her?

A. Yes.

I knew at some time she went there to the Hinman farm to live and she continued to live there until Charles N. Hinman left the farm. I know

1098 that Charlie Hinman went into the contracting business about 1905, in partnership with a man by the name of Sproul and Charlie went away from the farm. I think that the administratrix and Melissa Hinman stayed there on the farm and ran the farm that year. The Hinman farm was on an R. F. D. Route. That route is R. F. D. No.4.

Digitized by Google

I get my mail on the same route. I did not know 1099
that this administratrix was going under the name of Mrs. Hinman. I knew nothing about it. I knew nothing about the relations which these two persons bore to each other at the farm or after they moved from the farm. I did know that Melissa Hinman came to Binghamton to live with them. Personally I knew nothing of her treatment of Bayless and I have no personal knowledge whether the stories I had heard of her treatment of Bayless were true. I did not discuss with Melissa that day what her treatment of Bayless had been, but simply assumed it. Bayless was a friend of mine, and I did not like anything unfriendly to him. In this conversation I had with
Melissa Hinman I think she asked me first whether 1100
I thought they were married and I told her I did not believe they were, and I asked her if she thought they was married, and she says not much. Some of the rest of them came out and she did not say any more about it. I am not undertaking to give any exact language. I am giving the substance of what was said there at that time. Melissa Hinman was living at that time on the farm. This occurred in the Spring. She was up there and stayed 4 or 5 days that time. I could not say what Henry Hinman was doing in 1900 and 1901. During the period of 1898 to 1901 I think he was on the farm near Greene. I know one time he had a saloon on Water Street in this City. I could not tell when that was, it was a good
while ago, quite a few years ago. Whether 1101
Charles N. Hinman and this respondent here were ever married or not I do not know, I could not tell you.

Q. The only one you ever talked with about it was Melissa Hinman that you remember?

A. I have talked with Bayless about it.

Digitized by Google

1102

It was before that talk with Melissa that I had made up my mind that they were not married. From 1900 down to the time Charlie Hinman left the farm I saw him quite frequently, usually several times a week. I knew at that time that this administratrix was living up there at the farm. After he moved away from the farm and moved to Binghamton I saw him once in a while. I knew he was engaged in the good roads construction here in the County. I never took the pains to inquire from him whether or not he was married to the respondent. As to what the facts were about it I never talked with him about it at all.

Q. So far as you have any personal knowledge about it, you are unable to state whether Charles

1103

N. Hinman and this respondent were or were not married by a ceremonial mariage?

A. No I do not know anything about it.

Q. Who else besides Melissa Hinman do you now recall having had talks with reference to Charles N. Hinman being married?

A. Why the different neighbors around there.

By counsel for the administratrix—
I move to strike it out as not responsive.

By the Court—The answer may be stricken out.

Q. Just the names if you remember them now?

I recall having heard Mr. Isaac Cooley's people talking about it, with reference to Charles N. Hinman being married. Also Mr. Maybie. I do

1104

not know that I can recall any more.

Q. In your talk with Mr. Maybie did he indicate or pretend that he had been at the Hinman house or knew anything personally in reference to the relations between these two persons?

A. No.

Q. And the same between Mr. and Mrs. Cooley?

A. No.

Digitized by Google

1105

Q. They did not pretend to know anything about it personally?

A. No.

Q. You said you thought you had talked with other neighbors at different times. Did any of those neighbors say they knew anything personally about it, as to whether they were married or not as you now recall?

A. No.

GEORGE THOMAS, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

1106

I reside at Chenango Bridge. Have resided there seventy-two years. I should say my residence is a mile north from the Hinman residence in the Town of Chenango. I was well acquainted with the members of the Hinman family. I know Charles, Bayless, Melissa, Ida and knew them ever since they lived there. In coming to Binghamton I sometimes passed the Hinman homestead.

Q. Do you know, Mr. Thomas, what the reputation of Charles N. Hinman and Vena Hinman was as to whether they were maried or not during the time they lived there at the Hinman farm from 1900 to 1905, basing your testimony upon the speech of people there in the community in which they lived?

1107

A. Yes.

Q. State what that reputation was?

By counsel for the administratrix—

Objected to upon the grounds that it is incompetent, improper, inadmissible, immaterial, witness not shown competent to express his view

Digitized by Google

1108 thereon, that it is too remote in time and indefinite, and no proper foundation has been laid, no part of the res gestae, hearsay and not proper rebuttal.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. That they were not married.

Q. You knew she was living there? A. Yes.

Cross-Examination by Mr. Hinman

Q. Did you ever have any social relations with the Hinman family, and by social relations I mean relations whereby you visited their home and their family visited your home?

1109 A. I did years ago.

Q. How long ago was that?

A. That was previous to the divorce of Bayless Hinman.

Q. That was while his wife Mary was living there at the farm

A. Yes.

Q. Can you tell me about what year Bayless and his wife became divorced?

A. I do not think so.

Q. 12 or 15 years?

A. I should not think it was so long.

Q. Have you any recollection?

A. Not that I could swear to.

Q. After that, that is after the trouble com-

1110 menced between Mary Hinman and Bayless, you did not visit there at that farm and they did not visit you any more?

A. It was more between Bayless and myself. I cannot tell about when the divorce occurred. I do not think it was so long ago as 12 or 15 years. I have no recollection that I could swear to.

Q. After that, that is after the trouble commenced between Mary Hinman and Bayless, you

Digitized by Google

did not visit there at that farm and they did not visit you any more? 1111

A. It was between Bayless and myself.

I never met the administratrix. I knew her by sight. I never visited the Hinman farm after she went there to live and never made her acquaintance up to this time. She never visited at my house and Charlie never visited at my house after she went there to live. So far as I can recall my wife never visited the Hinman farm after this administratrix went there to live. I cannot tell the year when I first learned that this respondent went up to the farm to live. It was soon after Bayless and his wife parted. Just how long it was I could not tell. I heard she came there to the farm as a stranger in that locality and I 1112 knew she continued to live there until Charlie moved away.

Q. You say it was talked there that they were not married. Are you able to fix the time when you heard that talk, that is the year?

A. It was the talk of the neighborhood up to the time after she claimed to be married.

Q. Did you ever talk with her to know when she claimed to be married.

A. No.

Q. So all you knew about her claim to being married was what you heard?

A. Yes.

Q. Whether that was correct or not you do not know? 1113

A. No.

I should think she had been there two or three years before I heard the talk about her being married. It might not have been so long. In any event I heard she was there and claimed to be married to Charles N. Hinman. I never heard her called Mrs. Hinman. I do not think I have

Digitized by Google

heard her called Mrs. Hinman since he died. I
1114 have heard it here in Court.

Q. Never before?

A. I never heard one of my neighbors call her Mrs. Hinman.

Q. The question is, had you ever heard her referred to by any one, until in Court here, as Mrs. Hinman?

A. I had not.

All that I now recall having talked with about whether Mr. and Mrs. Hinman were married were James Maxwell, Abbie Thomas, Jerell Hall and Cooley Bunnell. I talked with James Maxwell about it soon after this respondent came up on the Hinman farm to live. I talked with Abbie Thom-
1115 as about it a number of times but could not specify any time.

Re-direct examination by counsel for petitioner.

Q. You talked with other people about this you think but do not recall them?

By counsel for the administratrix —
Objected to as already gone over and on the grounds heretofore stated.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. Yes.

Q. And the parties you have named, have you
1116 talked with them on more than one occasion?

By counsel for the administratrix —
Objected to as leading.

By the Court — Overruled.
By counsel for the administratrix — Exception.

A. Yes.

Digitized by Google

1117

COOLEY BUNNELL, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I reside near Chenango Bridge, about a mile and a half north from the Hinman homestead. I have known Bayless, Charles, Henry, Ida and Melissa since I was thirteen years old. I am now fifty-one. At one time I worked on the Hinman farm. I think I went there when I was twenty and stayed there nine years. I remember this administratrix coming there on the Hinman farm to live but I could not give any date. I think it was shortly after Mary left. Charles and this administratrix left the farm there about 1905 or 1906. I met this respondent and was introduced to her by Charles

1118

N. Hinman nine years ago this fall, in 1901. It was about August, 1901, there at the house. He introduced her to me as Miss Lord. She simply bowed, that is all I remember. I saw her there on different occasions between 1901 and 1905 or 1906. I knew she was there.

Q. Do you know, Mr. Bunnell, what the reputation was, judging from the speech of people in the community in which they lived, of Charles N. Hinman and Vena Hinman, as to whether they were married or not?

A. Yes.

Q. State what that reputation was?

By counsel for the administratrix —

1119

Objected to as incompetent, improper, inadmissible, immaterial, no proper foundation laid, not proper res gestae and hearsay, too remote in time, indefinite and not proper rebuttal.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. They were not married.

Digitized by Google

1120 Q. Did you ever have any conversation with Bayless upon the subject as to whether they were married or not?

A. If I did I could not repeat it and do it right.

Cross-examination by Mr. Hinman —

I never worked on the Hinman farm after the respondent went there. My services there on the farm were prior to that time. After Mary went away from the farm and I met this respondent in August, 1901, as long as Charlie remained on the farm the women folks there on the farm, so far as I knew, were Melissa Hinman and this respondent.

Q. Do you remember the first year Charlie went away on the good roads construction?

1121 A. I remember hearing about it.

Q. You knew the year he was away and Melissa and this respondent stayed on the farm?

A. I suppose so. I do not know anything to the contrary.

Q. You were there at the farm A. No.

After I met the respondent while Charlie lived there I was there a good many times talking with Charlie but not in the house. I was not in the house at the time when I met this respondent in August, 1901. It was out on the stoop. I knew Charlie Hinman quite well. Up to 1905 when he went away and from the time I met the respondent I saw him quite frequently at the farm. Bayless is the only Hinman I ever talked with in refe-

1122 rence to the marriage of these people. I never had any particular talk with Charles myself about it.

Q. You have testified as to what the reputation was there. What period do you refer to when you speak of that, when you had the talk with those people?

A. All times they lived there together.

Digitized by Google

1123

Q. Who did you talk with that you now recall about it?

A. Gerald Hall for one, George Thomas, Isaac Cooley and his wife. I presume there was a good many. That is all I think of now. I recall having had more than one talk with the Cooley family about that subject. I distinctly recall three anyway. I never talked with Mrs. Hinman, the respondent, in reference to it. I never talked with Melissa Hinman about it. I never talked with any of Mrs. Hinman's acquaintances with reference to that subject, so far as I now recall.

Re-direct examination by Mr. Yetter —

1124

Q. Do you know that she had any acquaintances or friends in that vicinity, Miss Vena?

A. No sir.

NELLIE MURPHY, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I reside about two miles from the Hinman farm on the Wilson Hill road. I have lived there for the last eight or nine years. Prior to that I lived at David Smith's about three years, which is about one half mile from where I now live. I knew Charles N. Hinman, Bayless Hinman and Henry Hinman but am not very well acquainted with them. I have been married 13 years and we have resided on the farm where we now live I think 1125
very near 10 years. I think we went there to live 10 years ago last Spring. I knew this respondent by sight. For a number of years between 1900 and 1905 she was staying at the Hinman farm,

.Q Do you know Mrs. Murphy what the reputation was of Charles N. Hinman and Vena Lord, judging from the general speech of people in that

Digitized by Google

1126 community in which they lived, as to whether their relations were matrimonial or not?

A. Yes.

Q. Please state to the Court, Mrs. Murphy, what what reputation was?

By counsel for the administratrix —

Objected to as improper, incompetent, inadmissible, immaterial, witness not shown competent, her evidence showing she is incompetent to express her views on that subject, too remote in time, no proper foundation laid, hearsay, no part of the res gestae.

By the Court — Overruled.

1127 By counsel for the administratrix — Exception.

And objected to on the further ground that she is not acquainted with the parties and not in position to speak.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. That they were not married.

Cross-Examination by Mr. Hinman —

I have met this respondent. She came to my house to buy butter. I cannot tell when—2 or 3 years after we moved there. There was a little child with her I think. Before that I had seen her pass on the road, that is when I would be going to town or coming home. I have met her
1128 on the road lots of times. It seems to me I have talked with her on occasions other than that one time when she came up to my house for butter. I think down to her house.

Q. Where do you mean?

A. Down where she was staying at Hinman's.

When I speak of her house I mean the Hinman Farm in the Town of Chenango. I think it was in

Digitized by Google

the Winter when I saw her there but I have no recollection when it was. 1129

Q. Do you remember what your errand was?

A. Yes, I was in the American Soap Club. She wanted some soap.

She ordered some. I have not kept any record of the order. I don't remember what year it was.

Q. In response to Mr. Yetter's question you said you knew that this respondent for a number of years between 1900 and 1905 was staying at the Hinman farm. Do you know when she went up to the Hinman farm?

A. No I do not know when she went there.

I do not know whether 1900 or 1901. It was shortly after she got the butter that I had a talk with people in my neighborhood with reference 1130 to whether she and Mr. Hinman were married. I do not remember what year it was. Mrs. Gray for one talked with me. She runs the Postoffice at Glen Castle. I also talked with Mary Collins, a neighbor next door to us. I have no present recollection of having talked with anybody else. I cannot tell when I talked with them. It was after I went to the Hinman farm to get Mrs. Hinman's order for soap. I did not visit the Hinman farm after that time. I did not know Bayless Hinman. I had a speaking acquaintance with Bayless. He visited at our house in case any of the stock were sick or anything like that. I did not know Charlie Hinman very well. At that time I did not know Henry. I never made any 1131 social visits to the Hinman farm. Mrs. Gray was not a visitor at the Hinman farm. I do not know that Mrs. Collins was. I never talked with Melissa Hinman or Charlie Hinman as to whether they were married or not.

Q. And you never talked with anybody who lived there at the house, or upon the farm, or pretended to know anything about it?

Digitized by Google

Nellie Murphy for Petitioner, Cross
George Gaffney for Petitioner, Direct

1132

By counsel for the petitioner —
Objected to as improper "pretended to know."

By the Court — Sustained.

By counsel for the administratrix — Exception.

Q. Did any person who you have talked with about that subject say that they had any personal knowledge on that subject.

A. Why no. When I went to the farm to get the order for soap it was this respondent who gave me the order. Whatever business I transacted there at the farm that day with reference to the purchase of soap was transacted by me with this
1133 lady at your right, the respondent in this case.

Here recess was taken until July 26, 1910, at two o'clock P. M., at which time further adjournment was taken until July 27, 1910, 9:30 A. M., at which time the hearing was resumed with the same appearances.

GEORGE GAFFNEY being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I reside on the Broome County Farm, which is two miles south of the Hinman farm. My occupation is engineer. I have been there seventeen
1134 years continuously since 1893. I remember John Moses who was keeper of the farm. He was there eight years. He left there I think in 1904, the first of March, 1904. He had been keeper prior to that time for eight years. I knew of an assistant there by the name of Malloy, J. S. Malloy. He came there January 21, 1893, and was there continuously until he died, which was in May, 1904.

Digitized by Google

1135

Cross-Examination by Mr. Hinman —

At one time there was a night watchman there who called himself Owen D. Vokes. I cannot tell when he left. The records will show.

CHARLES HOWLAND being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I reside at Newark Valley. Have lived there since last October. I formerly ran the Castle Creek stage for eight years commencing with July 1, 1897. The first three years the route was from Binghamton to Castle Creek and back and 1136
thereafter from Binghamton to Castle Creek and to Whitney Point and back. I made that trip every day except Sunday. I was acquainted with Mary Hinman, the wife of Bayless Hinman, with Charles Hinman, Bayless Hinman and Melissa Hinman.

Q. Were you acquainted with Miss Vena Lord?

A. Yes sir.

Q. Do you recall about the time that you first observed this Vena Lord at the Hinman farm?

A. Yes sir, I remember the first time I ever saw her. I could not give the date.

It was shortly after the time Mary left there, perhaps six months.

Q. Has Vena Lord ridden with you from the 1137
farm to the City here on different occasions?

A. Yes sir.

Q. During this period that you have described?

A. Yes sir.

Q. How did you address her

By counsel for the administratrix —

Objected to as incompetent, improper, immaterial, irrelevant.

By the Court — Overruled.

Digitized by Google

By counsel for the administratrix — Exception.

1138 A. I addressed her as Miss Vena Lord, or Miss Lord.

By counsel for the petitioner —

Q. Did she respond? A. Yes.

Q. You continued to address her that way and she continued to respond to your address so made during all the time you drove stage?

By counsel for the administratrix —

Objected to as improper, incompetent, inadmissible and leading, let him state.

By counsel for the petitioner —

Q. State whether or not that is the fact?

1139 By counsel for the administratrix —

Objected to as leading.

By counsel for the petitioner —

Q. State for how long a period you continued to address her in the manner stated and she responded to your address?

By counsel for the administratrix —

Same objection on the same grounds.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. I think I did all the time.

Q. That is your recollection? A. Yes sir.

Q. Now did you carry any mail?

1140 A. I think I did carry mail but not all the time.

Q. Do you ever recall having carried any mail there from 1900 to 1905 addressed to Miss Vena Lord?

A. I think I carried packages. I could not say positively that I did mail.

Q. But you have carried packages?

Digitized by Google

1141

A. Yes sir.
Q. Where from?
A. From the dry goods stores. I think I had them from Sissons.
Q. How did you come to get those packages there?
A. They would send word for me to call and get them.
Q. Who, Miss Lord?
A. No at the store, Sisson's store.
Q. For what period of time did you deliver such packages to Miss Lord so addressed?
A. I think occasionally all of the time between the time I commenced in 1897 to 1905.
Q. That is between 1899 when she first came there?

1142

By counsel for the administratrix —
He said 1897, that is his answer.

By counsel for the petitioner —
Q. Do you mean between 1900 and the time you stated?

By counsel for the administratrix —
Objected to upon the ground that the answer of the witness as to the period of time he carried the packages is not capable of explanation and an attempt to explain is improper, incompetent, inadmissible and immaterial.

By the Court — Overruled.

1143

By counsel for the administratrix — Exception.

A. Yes sir, I did.
During this period say from 1900 down to 1905 I carried passengers, residents of the neighborhood of the Hinman farm to Binghamton and back. I heard the relations of Vena Lord and Charles Hinman discussed between 1900 and 1905.

Digitized by Google

1144 Q. Do you know Mr. Howland, what the reputation was of Charles N. Hinman and Vena Lord, as to their relations judging from the speech of people in the vicinity of the Hinman farm as to whether their relations were matrimonial or not

A. Yes.

Q. What was that reputation?

By counsel for the administratrix —

Objected to as incompetent, improper, inadmissible, immaterial, witness not shown to be competent to testify on that subject, that there has been no proper foundation laid too remote and indefinite in time and not part of the res gestae hearsay, and witness not pretending to know anything about it personally but says he
1145 heard it spoken of, not being shown to have any knowledge on the subject.

By the Court — Fix the time.

By counsel for the petitioner —

I fix the time between 1900 and 1905.

By the Court — With the time fixed between 1900 and 1905 the objection is overruled

By counsel for the administratrix — Exception.

By counsel for the petitioner —

Q. State whether the talk was they were married or not married?

A. They were not as any people knew.

Q. That was the reputation?

1146 A. That was the reputation.

Q. From the speech of the people in that vicinity.

A. That was the reputation.

Cross-Examination by Mr. Hinman —

When driving the Castle Creek stage I lived at Castle Creek during that entire period. Castle

Digitized by Google

Creek is 10 miles from the City of Binghamton and five miles from the Hinman farm. I do not 1147
recall just how long it was after Mary Hinman left the Hinman farm before I saw this respondent there at that farm. The matter of fixing that date has not been called to my attention until recently. I am testifying simply from recollection. I have nothing definite in my mind concerning that period of time. I could tell the year. It was 1899. I am willing to testify that I saw this respondent at the Hinman farm in the Town of Chenango in the year 1899. I am as certain about that as I am of anything else that I testified to here. I could not tell what time of the year it was. I could not swear what year it was when Mary Hinman left the farm. I do not know 1148
when she left the farm.

Q. Do you know anything about the time when this respondent went to the Hinman farm to live continuously? You say the first time you saw her, you have described or fixed, but do you know when she went there to live continuously?

A. I do not know the exact time, no sir.

Q. The Castle Creek road entered the river road just between — or rather below the Hinman house.

A. Right at the house on the corner.

I had nothing to do with the Hinman house except as I had passengers or packages for the house. I was not interested in fixing the time when this respondent went to the farm to live. 1149
All I know is that the first time I recall seeing her there was sometime after Mary Hinman left. Whether on the first occasion I saw her there she was visiting or not I do not know. I simply saw her there. I have no recollection of the next time I saw her there and no means of fixing it exactly. I could not fix the time. I carried and

Digitized by Google

1150 distributed mail along the road between here and the Hinman farm from 1897 to 1900. From that time on they put on the R. F. D. Route No. 4, which started from Binghamton I did not carry or distribute mail along the route between here and the Hinman farm. Since 1900 the mail to the Hinman farm was carried by the R. F. D. Route No. 4, except some that people wished me to carry. The Hinman farm was not one of those to which I carried mail.

Q. You say that you carried packages to the people in the neighborhood and that you think you remember of carrying packages up to the Hinman farm. I will ask you if you know this lady who sits over here with the black hat and
1151 white dress?

A. I do not recognize her.

Q. Do you know the lady next to her? (Pearl Lord).

A. No.

Q. Ever see her before?

A. Do not recollect that I have.

Q. You do not know who she is now?

A. No, sir.

Q. Do you recall whether or not she rode with you in the stage any recollection of it?

A. No sir.

Q. Do you know a woman by the name of Blanche Lord?

A. I know a Miss Lord, a sister of hers.

1152 Q. That is a sister of this respondent?

A. Yes.

She was up there at the farm. I know that she was there quite a good deal during the time I was driving the stage and while Charlie lived there at the farm. I think she rode back and forth with me some of the time. I knew her home was away somewhere. As to what her first name was I have forgotten.

Digitized by Google

Q. Was there another Lord girl that rode with you sometimes back and forth to the farm? 1153

A. I do not recollect anyone.

I did not know the fact to be that a girl by the name of Blanche Lord lived at the Hinman farm for a whole year. I do not know but that might be so. I have a recollection of getting packages which I took to the Hinman farm from other sources than Sissons. I got them from Guilfoyle's Drug store.

Q. To whom were those addressed?

A. Addressed to Lena Lord — Vena Lord.

Q. Which was it? A. Vena Lord.

Q. Always addressed to Vena Lord from Guilfoyle's Drug store.

A. Yes. 1154

I could not remember what other places I got packages so addressed. I have no recollection of any other except those two. From Sissons I got them every year from 1899 to 1905. I do not say that I got them there but I had packages that I occasionally took up to the farm.

Q. During what years did you take from Sisson Bros. & Weldon's store on Court St. City of Binghamton, packages addressed to Vena Lord at the Hinman farm? Now be certain about your answer.

A. I could not swear.

I cannot tell for certain what year or years I took those packages from Sisson Bros. & Welden, a dry goods store located on Court street, City of Binghamton. I have a recollection that sometime 1155 while driving stage between the year 1899 and 1905 I did take a package or packages from Sisson Bros. & Weldon's Store to Miss Lord, but when it was I cannot tell. I am not able to fix the year definitely when I took packages from Guilfoyle's store.

Digitized by Google

1156 Q. You say that you always addressed the respondent as Miss Vena Lord whenever you spoke to her. You do not mean that?

A. I think I did.

She rode back and forth with me on the stage. I could not tell how many times she rode back and forth, nor the dates. I have talked with her at times other than when she was riding back and forth on the stage. I could not tell on how many occasions. I have known her to come down to the road and she would give me orders and I would execute the orders and take things back to the farm whatever it was. I simply took the packages. I never made payment of the bill. Orders which I bought and executed were not paid. They
1157 would be charged. I do not remember the name of any clerk in Sisson's or Guilfoyle's to whom I gave those orders for goods or packages which I afterwards carried to the Hinman farm. So far as I recall, when I took packages to the Hinman farm for which I did not first get orders from the farm I got word from here that they were to go to the farm and took them up. That was the way usually.

Q. And where did you take orders to from the Hinman farm that you now recall?

A. Where they told me to.

Q. What places do you recall?

A. I do not recall about taking the orders.

Q. So far as you now recall you never received
1158 any orders from the Hinman farm to get packages in Binghamton?

A. Yes, I think I have.

Q. From whom? A. Miss Lord.

Q. To whom did you give those orders?

A. I do not recollect?

Q. What was the order?

A. That I do not recall.

Digitized by Google

Q. Do you recollect the time it was, that is 1159
the particular year or years?

A. I think I did every year.

Q. Where did you fill an order that you received from her and what was one order that you received from her?

A. I do not recollect the orders. Perhaps I could look on my book. I may have set them down.

Q. Do you remember a place you want to fill an order except Sisson's or Guilfoyle's Drug store?

A. No sir.

Q. You spoke of a book in which you kept a record of those things. Where is the book?

A. At my home. 1160

At Newark Valley. That book does not cover the entire period that I drove stage. Everything was not set down. It was an order book. I kept several from 1899 to 1905. I think I have five or six of them. Perhaps I have not all of the books I kept during that period. I think I could find some but not all. I never visited at the Hinman farm only I drove in there once or twice with the stage. There were no social relations between the Hinman's and me or my family. All I saw of the Hinmans was as I would drive by the farm each day. I could not swear who were the passengers who rode with me and who I heard speak of the relations of Charlie Hinman and this respondent. 1161

Q. Where did you first hear the name of Vena as appliel to this woman, or to any woman for that matter?

A. I guess the first I ever heard it was Ernest Hugaboom, who worked for me.

Q. Driving stage? A. Yes.

I first heard Ernest Hugaboom use the name

Digitized by Google

"Vena" in 1899. It was when he came back from
1162 visiting Kittie King. I recall having heard it again from other people, except Hugaboom, from people on the stage.

I have no recollection now of the name of any person except Hugaboom who spoke the name of Vena to me. This little Lord girl that used to ride with you back and forth when did you first hear her given name?

A. I could not tell.

Q. Do you know it? A. No.

Q. How did you address her in speaking to her on the stage?

A. I do not remember as I ever addressed her.

I might have visited with her as she would ride
1163 back and forth but I do not recall it.

Q. Do you recollect talking with Mrs. Hinman here, this administratrix, as she rode back and forth?

A. Yes.

I do not remember talking with Blanche Lord. I do not remember having heard Blanche Lord's first name.

Q. When did you first hear this respondent called Mrs. Hinman?

A. I do not recollect hearing her called that.

I know of a milliner by the name of Sawyer in the City of Binghamton. I may have taken packages from there to the farm. I don't recollect taking any packages from there addressed to Mrs. Charles Hinman. I won't swear that I did
1164 not. While driving stage I knew a jeweler by the name of Judson S. Newing. I may have carried packages from his store to the Hinman farm but I could not swear that I did.

Q. Did you carry a package from his store to the Hinman farm addressed to Mrs. Charles N. Hinman, Chenango Bridge?

Digitized by Google

1165

A. Not to my recollection.
Q. Will you swear you did not?
A. I do not recollect of it.
I won't swear that I did not. I will not swear that I never carried to the Hinman farm a package so addressed to this respondent.

By the Court —
Q. How old a man are you?
A. 51 years last September.

JOHN H. WARNER, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows. 1166

I have resided at Nimmonsburg, in the Town of Chenango for thirty-six or thirty-seven years. Nimmonsburg is a little settlement about one mile south from the Hinman farm and on the same road. I was acquainted with the Hinman family. I know Mary Hinman, the wife of Bayless. I remember about the time when she left there but could not fix the date. I do not remember when Vena Lord first went up to the Hinman farm. I cannot tell about when it was. I cannot tell how long she remained there but it was more than a year. I never was on the place while she was there. I see her go up, drive by, or ride up on the stage.

Q. Now during the time that you knew she was up there on the farm, did you know what the reputation was as to the relations of Charles N. Hinman and Vena Lord, judging from the speech of people in the community there as to whether they were married or not? 1167

A. I have heard it spoken of in the neighborhood.

Q. What was that reputation as to whether they were married or not?

Digitized by Google

1168 By counsel for the administratrix —
Objected to upon the same grounds as stated to similar questions when put to the last witness, and on the further ground that it does not appear that he was an acquaintance of the parties or knew about their relations.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. Why I have heard say that they were not married.

Q. That was the reputation that they had?

A. I have heard it talked of in the neighborhood.

1169 Cross-Examination by Mr. Hinman —
I will be sixty-four years old on the 23rd day of next January.

Q. I take it, and I will ask you if I am correct, that you did not visit socially with the Hinmans or they there at your house?

A. No not for a number of years. I used to work some there when the boys were home.

Q. How long ago was that?

A. 15 or 18 years ago. My brother, policeman Warner and me built a house there for the boys, but I have not worked at the Hinman farm since 1898, 1899 or 1900. I was not on the farm during the time the administratrix was there at least. I might have been across to the barn or something.

1170 At least I was not there during the time that the administratrix was there. I have had no business or social relations with the Hinmans during the past ten years and I know nothing personally about the matter in question.

Q. These neighbors you say you have heard speak of the subject did they say they had any personal knowledge concerning it?

A. I never heard any of them say so.

Digitized by Google

JEAN WILSON, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows: 1171

I reside on what is now called upper Front Street formerly was called Nimmonsburg about two miles from the Hinman residence. I have resided there five years this fall. Prior to that I was in New York City. I went to New York in February, 1902, and I was there until the Fall of 1905. Prior to going to New York in February 1902, I lived on the Hinman farm, where I was working. I went there in June, 1901, and continued to work there until February, 1902. When I went to work on the Hinman farm in June, 1901, Bayless and his mother, Charles, Miss Lord, James Maxwell and myself resided there. I won't say 1172 positive, but I think Harry Palmer worked there. Miss Lord was there when I went there. I do not know when she first went there. I was there continuously between June 1, 1901, and February 1, 1902. I was there every night. As a usual thing I took my meals at the house. My occupation was driving the milk wagon. It was customary for the family and the hired help to sit at the table together at meal times.

Q. During this time did you hear different members of the family address this respondent here, call her by name?

A. Yes.

Q. Tell how you heard them speak to her?

By counsel for the administratrix — 1173

Objected to as incompetent, improper, immaterial, irrelevant, too remote in time, no proper foundation laid, and hearsay.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. Do you mean each one of the family or as a whole?

Digitized by Google

1174 Q. Either way? How did Charles address her while you were there?

A. Charles addressed her as a usual thing as Vena or the "kid."

Q. How did Melissa address her

A. As Vena.

Q. How did Bayless address her?

A. I won't say positive whether I ever heard Bayless address her or not.

Q. How did you? A. Vena.

Q. How did Mr. Maxwell address her?

A. Vena.

Q. State whether or not during the time you were there you ever heard any member of the Hinman family address her as Mrs. Hinman?

1175 By counsel for the administratrix —

Objected to as incompetent, improper, inadmissible, and a negative, no foundation laid.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. I did not.

Q. When strangers were around have you ever heard her spoken of there in her presence?

By counsel for the administratrix —

Objected to as incompetent, improper, leading.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. I don't think so. I won't say positive.

1176 Q. Did you ever hear any member of the Hinman family, while you were there, address her as Charles' wife?

By counsel for the administratrix —

Objected to on the same ground.

By the Court — Overruled.

By counsel for the administratrix — Exception.

Digitized by Google

A. I did not. 1177

Mr. Maxwell, Miss Lord, Charles, Bayless, Melissa and myself all slept there in the house. Miss Lord occupied two different rooms while I was there. First it was the large room from the parlor.

Q. Did she occupy that room alone?

A. Why I never saw enyone else in there.

Q. Do you know whether she occupied it alone or not, from other sources of information?

By counsel for the administratrix —

Objected to as improper and incompetent.

By the Court: He may answer if he knows of his own knowledge.

A. Not of my own knowledge. 1178

By counsel for the petitioner —

Q. Have you seen Charles Hinman's clothes in that room?

By counsel for the administratrix —

Objected to as incompetent, improper, immaterial, irrelevant.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. Yes.

Q. What else have you seen about that room?

A. Why I have seen that the room had the appearance of two sleeping in it.

By counsel for the administratrix —

Objected to and move to strike it out.

By the Court: The answer may be stricken out. 1179

Q. State whether or not you have seen two nightgowns in the room in the morning?

A. I could not state that positively.

Q. What is your recollection?

A. I have seen one.

Q. What is your recollection?

Digitized by Google

1180 A. My recollection is that I never knew Mr. Hinman wore one.

While there I have seen Charles and Vena start up stairs together. When they went up I would hear one door close. I have not seen Charles and Vena come out of that room in the morning because I went before they were up. Charles would say "come on Kid, time to go to bed," or something to that effect and then they would go up stairs together. I recall that Charles was absent from the farm on August 10, 1901. I do not know positively where he went, but as near as I can remember he went to Albany.

Q. Was Vena Lord away at that time?

A. No sir.

1181 Q. To your knowledge was Vena Lord and Charles N. Hinman away from the Hinman farm, during the time you were there, any night?

A. Not to my knowledge, not together.

During the time Charles was in Albany I took Miss Lord to a church festival at Chenango Bridge. We drove up together and drove back.

Q. State whether or not while you were there between June 1st, 1901, and Feb. 1, 1902, you ever heard of any wedding occuring in the Hinman residence?

By counsel for the administratrix —

Objected to as improper, incompetent, immaterial, irrelevant

1182 By the Court — Overruled.

By counsel for the administratrix — Exception.

A. I never heard of any.

Cross-Examination by Mr. Hinman —

During the most of the time I drove the milk route from the farm to the City and peddled milk.

Digitized by Google

The dairy there consists of from twenty to thirty cows. The farm was five miles from the City. I would start from the farm with the milk and deliver here at residences in Binghamton and then return to the farm with the team. I calculated to leave in the neighborhood of four o'clock from the farm. I did not assist in the milkings mornings. I would feed my team and have a lunch before I started. My lunch was generally put on the table over night for me. I would usually go up and feed my team about 3:30. The team would have an opportunity to eat their grain and I to eat my lunch before starting. I usually left the farm before the rest were up. I had no particular time for going to bed. It was anywhere from 7 o'clock to 10 o'clock. I did not at the time make any particular note of the fact as to whether Charles was absent from the farm one night while this respondent was away. I have a note of it now. I was not interested in that particular fact at that time. To-day I am testifying from my best recollection. 1183 1184

JOANNA SULLIVAN, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I am married and my husband's name is Frank Sullivan. I was acquainted with Charles N. Hinman in his life time, for about ten or twelve years before his death. He delivered milk at my house for nine or ten years. He ceased to deliver milk there the year before he went on the good roads. I think he delivered milk part of the time he was on the good roads. That was 1905. I had a conversation with Charles N. Hinman the last year he brought milk to my house relative to his being married. 1185

Digitized by Google

1186 By counsel for the administratrix —
Objected to as improper, incompetent, inadmissible.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. I heard that Charles N. Hinman was married and I asked him about it and he said he was not.

By counsel for the administratrix —
Objected to and move to strike it out as incompetent, improper, no sufficient foundation laid, no part of the res gestae and hearsay.

1187 By the Court — Motion denied.

By counsel for the administratrix — Exception.

I do not remember that I said anything further to him. I think that is about all the conversation. That was in 1904 or 1905, I am not sure which.

Cross-Examination by Mr. Hinman —
At the time Charles N. Hinman died at his house there on Walnut Street, in the City of Binghamton, and before his funeral, I went there to the house with my husband. It was the night before the funeral. I saw there Mr. Sproul, the man who had been in partnership with Mr. Hinman. Different people had told me that Charles Hinman was married. I cannot remember their names.
1188 It was between 1904 and 1905. I do not remember the first time I saw this administratrix. I know Miss Pearl Lord. I do not remember where I first met her. I never met her on the Hinman farm. We were there one year, 1906. By we I mean my husband and family. We were camping there on the Hinman farm and I went up to the Hinman farm house for water. I do not re-

Digitized by Google

member the first time I ever saw this administra- 1189
trix. I remember meeting her in front of Marcellus' cigar store on Court Street. Her sister was with her then. Charles Hinman and my little boy also were present. That was about four years ago, I met this administratrix then. That was the first time I ever met her. Charles N. Hinman introduced her to me.

Q. Did he introduce her as his wife?

A. He said Mrs. Hinman.

Q. And he called you by name?

A. Yes.

By the Court —

Q. Was that about 1906?

A. Yes.

1190

LENA SOUTHEE, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I was acquainted with Charles N. Hinman about 20 years before he died. Perhaps longer. He delivered milk at my house. He stopped delivering milk when he went in the good roads business about 1904 or 1905. After that we continued buying milk from him just the same, somebody else delivering it. In the last year Charlie Hinman delivered milk, or about that time, I had a conversation relative to whether he was married or not.

Q. State what that conversation was?

By counsel for the administratrix — 1191

Objected to on the same ground as we stated in the objection to a similar question put by counsel to the last witness, Mrs. Sullivan.

By the Court — Overruled.

By counsel for the administratrix — Exception.

Digitized by Google

1192 A. I heard he was married. My husband came home one day and said he was married and I asked him and he said no, he was not married.

JERELL HALL being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I have resided at Chenango Bridge about twenty-eight years. My place of residence is about one mile from the Hinman farm. In going from my home to the City of Binghamton I sometimes went by the road passing the Hinman farm and sometimes down Port Dickinson way. I was acquainted with the Hinman family. Have
1193 known them 34 or 35 years. I was acquainted with Bayless, Charles, Melissa, Ida and Henry. Melissa's husband died before I came around there. I think his name was Charles. I was acquainted with Mary Hinman, Bayless' wife. I recall about when she left but could not tell what year it occurred. I should think it was about ten years ago. I recall when Bayless died.

Q. Was that on Thanksgiving Day 1902?

A. It don't seem as though it was as long ago as that. Perhaps it was.

Q. Do you recall when Vena Lord went to the Hinman farm to live?

A. Yes sir.

Q. About when was it?

1194 A. Well I could not tell exactly the year, somewhere about 1899 or 1900 probably.

Q. You had seen her there at different times?

A. I had seen her there yes.

Q. Now during the period from 1900 to 1905 had you heard the relations of Charles N. Hinman and Vena Lord discussed by people in that vicinity?

Digitized by Google

A. Yes sir. 1195

Q. Do you know Mr. Hall what the reputation was as to their relations judging from the speech of people in the community in which they resided as to whether they were married on not?

A. Yes.

Q. What was that reputation during that period?

By counsel for the administratrix—

Objected to as incompetent, improper, inadmissible, immaterial, the witness not shown competent to testify on that subject, and on the further ground that it is too remote in time and too indefinite, no proper foundation laid, no part of the res gestae, hearsay, and that neither the witness, 1196
nor those whom he says, whom he heard discuss the matter, pretend to be or claim to be in position to know personally what such relations were.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. That they were not married.

Cross-Examination by Mr. Hinman—

I did not know the age of Melissa Hinman when she died. There were no social relations between my family and the Hinman family during the last ten or twelve years. There used to be before Ida Hinman died, but since Ida died there have been no social relations to amount to anything between my family and the Hinman family.

Q. Did you know it to be the fact that his 1197
business he had was almost wholly transacted in the City of Binghamton?

A. His milk business was in Binghamton.

Q. Practically all of his business, buying and selling whatever he did, was done here so far as you know?

Digitized by Google

A. Yes.

1188 Q. Did you know he was a member of the 20th Separate Company?

A. No sir.

Q. Did you know that his social relations, that his intimate personal friends were young men about his age living in the City of Binghamton. Did you know about this?

A No. I did not know it.

Q. Nimmonsburg has been spoken of here. I wish you would describe that village. Is there anything there except one store?

A. There is a blacksmith shop.

The blacksmith shop is off on the side road. Now there is only one store there. I guess its size

1199 is 10 x 12. Nimmonsburg is not really a village, but a few houses clustered there called Nimmonsburg and sometime Goosetown.

Q. About how many houses are there in Nimmonsburg?

A. I cannot tell how far it goes.

The houses there are largely farm houses. At Chenango Bridge there are two stores, one church, a railroad station and seven or eight houses. There is no incorporated village there. The place where a man could buy general merchandise nearest to the Hinman farm was the City of Binghamton. The Hinmans used to come up to Chenango Bridge and buy a good deal of feed. It was a good deal shorter haul than from the City of Bing-

1200 hamton. Besides the feed business most of the business transacted from the farm was transacted in the City of Binghamton. The persons with whom I talked did not state that they had any personal knowledge of the relations between these people. I have talked with Isaac Cooley. I cannot fix the date when. I talked with him several times. I cannot fix the year. I have talked with

Digitized by Google

Abby Thomas, but I could not fix the date, not 1201
even the year. She did not indicate whether she was friendly or unfriendly with the Hinmans. I talked with George Thomas several times. I could not fix the year, except that I have talked this year. I have talked with Fred Harding. He lives at Chenango Bridge. I cannot tell you when. I guess it was within the last year. I cannot remember any others. I have seen this administratrix I have never met her. I know that she came to the Hinman farm a stranger in that locality. She is not one of our local girls.

HARVEY BUNT, being called as a witness for 1202
the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I reside at Sanitaria Springs. I was acquainted with the Hinmans that lived in the Town of Chenango just north of the City of Binghamton. I knew them all, Charles, Bayless and Melissa.

Q. Were you at the Hinman farm in 1901 or 1902?

A. Yes.

Q. What year was it?

A. 1901.

It was 1901, in the latter part of October or forepart of November. My wife went with me. Her name is Lillian. We drove there. When we first got there we saw James Maxwell. My wife got out at the house and Maxwell and I went to the barn and put the horses up. Maxwell and I then 1203
returned to the house, my wife and I stayed there to dinner. I cannot say all that was there when I got in the house. Bayless was there. I remember Charles was there. I think Melissa was there.

Q. And on that occasion was Miss Lord there?

A. Yes.

Digitized by Google

1204 On that occasion I was introduced to her by James Maxwell.

Q. State what was said?

By counsel for the administratrix —

Objected to as incompetent, improper, immaterial, irrelevant and hearsay.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. I do not remember as to that.

Q. When he introduced you what did he say?

A. He introduced me to Miss Lord.

This lady sitting here. She responded to it saying how do you do, or something like that. I
1205 cannot say that Charlie was present at that time.

Cross-Examination by Mr. Hinman —

I made no record of the month when I was there at the Hinman farm and have no means of fixing definitely just when it was. It was in the fall of 1901, but as to what month, day or week I am not able to state. James Maxwell was the hired man on the farm and had been employed there some time before that. I had known Maxwell fifteen or sixteen years before that. The introduction that was made I suppose was a casual part of my visit. I do not remember of ever talking about the introduction that was made that day. My attention was first called to the matter when Mr. Wilber came up and subpoenaed me. He is one of
1206 the attorneys for the petitioner here. I had not known him before. That was last week Thursday. I think that was last week Thursday. As I now recall, I have not thought of, discussed or mentioned this introduction in the Fall of 1901 to any one until Mr. Wilber was there at my house the other day. The whole thing had passed from my mind.

Digitized by Google

Re-Direct Examination by Mr. Yetter —

That day we took some hickory nuts back with us so that, I should say, it was after the hickory nut season that we were there. They got them up stairs. 1207

Re-Cross Examination by Mr. Hinman —

When Mr. Wilber came up there and subpoenaed me he brought up the question of the introduction first. He called my attention to the fact that an introduction was made that Fall and I then recalled it. I do not know when those hickory nuts had been gathered. We took home a small bag.

By the Court —

Q. Were they hickory nuts grown that year or were they old hickory nuts? 1208

A. Grown that year.

Re-Cross Examination by Mr. Hinman —

I was not interested as to whether they were grown that year or the year before at that time. They were gathering hickory nuts that day. We met them that day when we were going home. On that day we met Lett Eaton and Henry Patterson and wife right near the Hinman house. We talked with them. They had hickory nuts with them there in a bag. We talked with them as to where they got them. I do not remember anything about the season of 1901. There is a difference in seasons as to when nuts mature some seasons earlier than others. 1209

Q. So that the only thing you recall as to the time of the year was that it was in the Fall and these people had been gathering hickory nuts?

A. Yes it was quite late, because he had stabled the cows.

Digitized by Google

1210 LILLIAN BUNT, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I am the wife of the last witness sworn and reside at Sanataria Springs. I recall the occasion when my husband and I visited the Hinman farm. We would not call it a visit. We drove in there and took dinner. It was in 1901. I could not say what month, late Fall, November or October, sometime along there. On that occasion I saw there Charles Hinman, Miss Lord, Bayless Hinman and the hired man, James Maxwell.

Q. And Melissa?

A. No she was not there as I recollect.

Q. On that day were you introduced to Miss
1211 Lord?

A. Yes.

Q. By whom? A. Mr. Hinman.

Q. Charles? A. Yes.

Q. What did he say?

A. He introduced her as Miss Lord, same as anyone.

Cross-Examination by Mr. Hinman:

Q. Do you remember the fact that you and your husband went down to the Hinman farm one day in the Fall and took dinner there?

A. Yes.

Q. I take it from the answer you made you are not positive as to the year or month but know that it was in the Fall of the year, is that correct?

1212 A. Yes.

Q. You recollect an occasion when you were at the Hinman farm and introduced by Charles N. Hinman to this lady at my right, the administratrix, he introducing her as Miss Lord?

A. Yes.

Q. But as to what particular year or month you cannot be positive?

Digitized by Google

A. As near as I can recollect I would say 1901.
Q. But it is possible you may be mistaken as to the year? 1213
A. I should say 1901 if I say anything.
I did not make any record of it. I have never thought of it until my attention was called to it in the last few days. It was nothing that concerned me whatever. I hardly think it possible that I may be mistaken as to the year. I have nothing by means to which to fix the date. Mr. Hinman went away that afternoon to get signers for the Good Roads, or something of that sort. I talked with no one about that occurrance until within the past few days. Mr. Wilber called us up on the telephone and said he wanted to talk with my husband. He came up to our house the 1214
next day and called our attention to this occasion at the Hinman farm years before. Until Mr. Wilber talked with us on the telephone I had not thought about this occasion.

Re-Direct Examination by Mr. Yetter —
Q. Would it refresh your recollection any by fixing the time that Bayless Hinman died. Bayless died the next Fall after you were there?

By counsel for the administratrix —
Objected to as leading.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. I should say he did. 1215
Q. Your recollection is that Bayless died the next Fall after you were there?
A. I should think so.

By the Court —
Q. Was Bayless Hinman living at the time you were there?

Digitized by Google

1216 A. Yes he was there that day.
We have lived where we now reside 24 years.

Re-Cross Examination by Mr. Hinman —
I should say the farm where we lived was located 10 miles from the Hinman farm. I did not attend Bayless Hinman's funeral. When he died I heard of it right along. When I heard of his death I did not give my thought as to the question when it was I was at the Hinman farm for I was there many times. I should think that Bayless died the next year after we were there. I am giving my best recollection and nothing more.

1217 HARVEY BUNT recalled in behalf of the petitioner and examined by Mr. Yetter testified as follows:
I recall that Bayless Hinman died the Fall after I was there.

Re-Cross Examination by Mr. Hinman —
That is the last time I ever recall seeing Bayless. I am not able to state positively how long it was between that occasion and the time of Bayless Hinman's death. He died the forepart of the Winter after that. I never went up but what I stopped to see Bayless. It is my recollection that Bayless died sometime the Winter following the time I was there. I am quite sure about that. I am certain that he died the following Winter after
1218 I was there. I should say it was the middle of the winter. By that I mean January or February. I am clear about that.

Re-Direct Examination by Mr. Yetter —
Q. You were there, you say, in the Fall you think of 1901?
A. Yes sir.
Q. Is it your recollection that Bayless died the next Fall after you were there?

Digitized by Google

By counsel for the administratrix — 1219
Objected to as improper, leading, the witness has testified that he is positive that he died the following Winter and in the month of February or March.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. Yes.
Q. And that helps you to fix the date when you were there as 1901?
A. Yes.

Re-Cross Examination by Mr. Hinman —
I have no desire to be anything but fair in this case. I am not interested on either side. 1220
Q. You told me that you were sure, did you not, that Bayless died in the Winter following the time you were there and you were quite positive he died in February or March?
A. It was along in cold weather.
Q. Didn't you say it was in the Winter and you were quite certain February or March?
A. It was pretty cold.
Q. Do you distinguish between Fall and Winter?
A. Yes.
Q. Did you tell me in response to my question you were certain he died in February or March?
A. Yes sir.
Q. And did you know when you were answering the question you were answering it that way? 1221
A. Why I understood that I answered the question that he died in the middle of the Winter sometime.
Q. Do you call November the middle of the Winter?
A. No.

Digitized by Google

1222 Q. Do you consider November as one of the Winter months?

A. Yes.

Q. You are certain that Bayless Hinman died in the Winter?

A. Yes.

Q. And by means of that you fix the time you were there?

A. Yes.

Q. So if he did not die in the Winter you would not be as certain of the other dates you have given? That is, if you are mistaken as to the time when he died you may possibly be mistaken as to the exact time of the year that you and your wife were at the farm?

1223 A. I do not think so.

Q. You have testified now on re-direct examination that the way you fix the time, and the only way you have of fixing the time when you were at the farm was by the date or time of Bayless Hinman's death. Now if you are mistaken as to the time of Bayless' death may you be mistaken as to the exact time you were at the farm?

By counsel for the petitioner —

Objected to, witness has not so answered, and also the subject has been covered repeatedly in cross examination.

By the Court — Sustained.

By counsel for the administratrix — Exception.

1224 Q. You have testified on re-direct examination that one of the ways by which you fix the occasion when you were at the Hinman farm with your wife, and when you were introduced to this respondent by Mr. Maxwell, was by means of the time when Bayless Hinman died? If you are mistaken as to the time of the death of Bayless

Digitized by Google

Hinman may you be mistaken as to the exact time you were up there at that farm on that occasion? 1225

A. I might be.

Re-Direct Examination by Mr. Yetter —

I have given my best recollection.

THOMAS M. PARKER, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I reside at Chenango Bridge. Have lived there at different times. The last time have been there about eight years. I was acquainted with the Hinmans, went to school with them. The last time I took up my residence at Chenango Bridge was in the Fall of 1902. I think that is the Fall Bayless Hinman died. I went to the funeral anyway. The next Spring I was down at the Hinman Farm. I saw Charlie and Miss Lord. I think that was all at that time. I saw Miss Lord in the kitchen. I do not think any one went with me. I rapped on the door and was admitted. Charlie was not in then but came in later. He introduced me to Miss Lord. He introduced her as Miss Lord. She responded. That was in the Spring of 1903. It was towards the time to plant potatoes. I went to get seed potatoes. I have lived in that vicinity a great many years. I knew the respondent was living at the Hinman farm. I have heard different neighbors in that vicinity discuss the relations of Vena Lord and Mr. Hinman. 1226 1227

Q. Do you know what their reputation was in the community from the speech of people in the community as to whether they were married or not?

By counsel for the administratrix —

Digitized by Google

1228 Same objection on each and all the grounds in the objection made when the question was put to the witness Jerrell Hall.

By the Court — Overruled.
By counsel for the administratrix — Exception.

Q. What was it as to whether they were married or not?
A. I never heard anybody claim they were.
Q. The reputation was they were not married?
A. Yes.

Cross-Examination by Mr. Hinman —
Q. You moved up to the farm in the Fall of 1902?
A. Yes.
1229 When was the first time that you ever saw Miss Lord?
A. I think it was the time I went there.
Q. The Fall of 1902?
A. At the time of Bayless' funeral.
Q. That is you were at the farm house at the time of Bayless Hinman's funeral in the Fall of 1902?
A. Yes.
Q. You were there at the funeral?
A. Yes.
Q. And you saw and met this administratrix there at that time?
A. I saw her at that time.
Q. Did you also see there at that time Miss
1230 Blanche Lord?
A. Not to my knowledge.
Q. Do you know that she was there? A. No.
Q. Do you know she was not?
A. No I do not know anything about it.
I do not remember seeing this administratrix again until I went after the potatoes. I do not remember anything that ever occurred in the

Digitized by Google

house after that time. I remember being introduced two separate times by Charles but how long apart it was I do not know. The time when I got the seed potatoes was the first time. I could not fix the time of my being at the house again. I don't remember why I was there. The introduction is all I remember. I think I was at the house three times after Bayless died. I could not tell when the third time was, there is nothing to fix it in my mind. At that time I was a married man but my wife is dead now. There were no social relations whatever between my family and the Hinman family and never had been. 1231

Q. From the time that introduction was made had you told anyone of it until this case came up?

A. Yes, the neighbors have talked about it some. 1232

I told Abbie Thomas about that introduction soon after the Spring of 1903. I told Fred Thomas at the same time. I told Mrs. Schofield along about that time, I cannot remember when. I told her and those other two about the two introductions. I talked with Mrs. Charles Johnson about it about the same time. I do not know that I recall any others now. I did not make it a business to go around the neighborhood telling about receiving the two introductions. This present summer I talked with Cooley Bunnell about it. From that time on I do not recall having talked with anybody about it. In speaking of this reputation that I have mentioned among the neighbors I knew nothing personally about the relations of these two people. None of the neighbors with whom I talked, or whom I heard talk about it stated or pretended that they had any personal knowledge about it. I am friendly with Henry Hinman and have been a good many years. I have not interested myself in this case. I do not 1233

Digitized by Google

1234 know anything about their marriage and do not pretend to. It is my recollection that at the funeral of Bayless Hinman this administratrix sat in the same room with the relatives during the funeral.

Here recess was taken until July 17, 1910, at 2:15 P. M., at which time hearing was resumed, same appearances being made.

JENNIE EVERETT, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I reside at Glen Castle about a mile from the Hinman farm. I have resided in that vicinity for
1235 twenty-two years, during which time I have been acquainted with the members of the Hinman family. Once in a while I was down at the Hinman farm. Once in a while I worked there.

Q. What did you do?

A. Vena Lord had rheumatism and I went there and worked by the day.

Q. Was Mrs. Hinman there all the time you were there, Melissa?

A. Yes sir.

Q. Do you remember when Miss Lord came there?

A. I do not know as I could tell just the year. Yes, I remember when she came there but do not know as I could tell just the year.

1236 Q. Was she there 4 or 5 or 6 years?

A. I think she was more than that, I should think that anyway.

I was well acquainted with Melissa Hinman. In 1906 the year they built the Castle Creek road she visited me. At that time I had a conversation with her as to whether Charles and Vena Lord were ever married.

Digitized by Google

Q. What did she say?

1237

By counsel for the administratrix —
Objected to as incompetent, improper, inadmissible, hearsay, no proper foundation laid, no part of the res gestae and incompetent.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. She said they was not married nor never was.

Q. Now you have heard the subject discussed, have you, during the time that Miss Lord was there, say from 1900 to 1905, by the people in that vicinity, as to whether they were married or not?

A. Yes sir.

1238

Q. Do you know what the reputation was as to the relations of Charles N. Hinman and Vena Lord during the period that I have mentioned, judging from the speech of people in that community, as to whether they were married or not?

A. No.

Q. Do you know what the reputation was as to whether they were married or not?

A. Why yes. They was not married.

By counsel for the administratrix —
I move to strike out "They was not married."

By the Court — That may be stricken out.

By counsel for the petitioner —

1239

Q. What was that reputation?

By counsel for the administratrix —
Objected to as incompetent, improper, inadmissible, immaterial, hearsay, no proper foundation has been laid for the evidence, no part of the res gestae, not proper rebuttal, witness not shown competent to speak on that subject, and neither

Digitized by Google

1240 she nor the persons whom she has heard discuss it are shown to have been in position to speak with any personal knowledge as to the relations between these parties.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. Not married.

Cross-Examination by Mr. Hinman —

I am fifty years old. My husband's name is Charles Everitt. I have been married to him 25 years. He is not the first man I married. My first husband's name was Fortner. I was married to him in 1881. He is not dead. I don't know as
1241 I can tell you when I ceased living with Mr. Fortnor. I got a divorce from him at Montrose. I lived at New Milford at that time. I could not tell when.

Q. You do not know do you how long this administratrix lived there at the Hinman farm?

A. I washed for her a good while, five or six years.

I should say she lived there at the farm about six years. I did the family washing there on the Hinman farm. I did it for her and that was for a period of some five or six years.

Melissa Hinman visited me where I am now living at the time they were building the Castle Creek road. That was about 4 years ago. It was in the Fall when she was there.

1242 Q. Did you know that in that year of 1906, this administratrix, the woman you washed for up there, was visiting Charles N. Hinman in New York?

A. Yes. I heard Melissa say so.

While she was in New York Melissa Hinman was staying at Mr. Potter's house. The Potters

Digitized by Google

lived in a house on Castle Creek road between my 1243
house and the Hinman farm. It was a small house owned by Charles Hinman. I did not know where Charlie Hinman was living at that time. It was somewhere in Binghamton. I have visited the administratrix's house in Binghamton. I cannot tell you the street it was, somewhere on the south side and she came back over town with me. I think she told me where she lived and how to get to her house from the central part of the city. I did washing for this administratrix during the time she lived up there on the farm and after Charlie went to work on the Good Roads. I did it for a good while. I knew that Charlie Hinman left the farm and was away in contracting work sometime before the administratrix left 1244
the farm and that she stayed with Melissa Hinman sometime after Charlie went away.

Q. You knew at that time she was going by the name of Mrs. Hinman?

A. No I always called her Vena.

Q. But when you spoke here on the direct examination the first thing that was asked you said Mrs. Hinman and then said Vena?

A. I never called her Mrs. Hinman.

Q. Did you know that Charlie Hinman was calling her Mrs. Hinman?

A. No.

Q. Did you know she was being called Mrs. Hinman by anyone?

A. No I did not.

Q. All you ever heard her being called was 1245
Vena?

A. Yes.

Q. That was all by anyone, is that a fact?

A. Yes.

Q. You say you talked with some neighbors at some time. Do you remember when you talked with anyone about it?

Digitized by Google

1246 A. No I do not just remember when I did talk with them.

Q. That is you could not fix the year you talked with anybody about it?

A. No.

Q. But do you remember having talked or having heard talked that subject, that is the reputation of these people?

A. That was a general rumor.

Q. The question is whether you can now remember the name of any one you heard talk about it so you can name them now?

A. Mr. Mowrey's folks, Mr. and Mrs. Mowrey, Miss Grey, Mary Winfield and just my neighbors.

1247 Q. Name the people you remember?

A. Miss Grey, Mary Winfield and Charlie Winfield.

Q. Do you recall anybody else?

A. Gene Page and Charlie Prentice.

Q. Do you remember anybody else now?

A. Is not that enough?

Q. Will you just answer the question? Do you remember anybody else now?

A. No.

Q. When did you talk with Eugene Page about it?

A. I do not know as I have heard Gene say anything about it this year.

Q. I am asking you to tell me when you talked with Gene Page about that subject?

1248 A. I cannot remember.

Q. Where were you?

A. In their sitting room.

Q. Was it before or after Charlie Hinman died?

A. It was before.

Q. What year?

Digitized by Google

A. I cannot remember the year. 1249

Q. Did Eugene Page tell you anything about it himself or was he simply in the room?

A. Just simply talking.

Q. Did Eugene Page say anything?

A. He said he did not believe they were married.

He said that to me. His wife was present at the time, nobody else. Eugene Page lives at Glen Castle. Albert Mowrey lives this side of Glen Castle between Glen Castle and the Hinman farm. I do not remember whether Albert Mowrey was at our house when I heard him talking about it, or whether he was down there, it is so long ago. I think Albert Mowrey and his wife was present. She is living now. We were all talking there. 1250

Q. Do you remember what Mr. Mowrey said?

A. No sir.

Q. Do you remember what Mrs. Mowrey said?

A. No. She said she did not believe they were married.

Q. Now so far as you recall Mr. Mowrey did not say anything about it?

A. He said he did not believe they were married.

Q A moment ago did you say you did not remember anything he said?

A. I told you that he said he did not believe they were married.

Q. When I first asked you what Mr. Mowrey said did you say that you did not know as he said anything about it? Did you so answer? 1251

A. He was talking and he was saying as much as the rest.

Answer stricken out and question asked by stenographer.

A. No I did not say so.

I do not know which one of the Mowreys spoke first when they said "I do not believe they were

Digitized by Google

married." After one made the remark the other
1252 said I do not believe they were married. Mary Grey keeps a store at Castle Creek. I could not tell you when I talked with her about it. When I visited this administratrix on the south side of the Susquehanna River in the City of Binghamton, Melissa Hinman was living there. I saw her there. When I did the washing up there at the farm for the administratrix Charlie Hinman paid for it always. I always got the money from him. The bill would run and he would pay it. That was during all the time I did the washing there. I washed for the entire family. When I went over on the south side of the Susquehanna River to visit this administratrix I went to get some money
1253 they owed me for washing. I did not get the money that day, but I did get when I saw Charlie. It is not the fact that this administratrix came over town with me that day and that she went to the City National Bank and got the money on a check and paid me. I did not give her a receipt for my pay. I never gave anybody a receipt. When Charlie Hinman paid me I saw him in the reading room on Washington street. I do not know what building. I saw him there at six o'clock and he came out and paid me $9.50. I cannot tell you what date that was or what month or what year. I do not think it was the same year that Melissa Hinman visited me up at my place. I will not swear to it for I do not know. It was before Melissa visited me.

1254 Q. That is you were here before?

A. No I think she was up there before.

Melissa Hinman was at my house before I was here on the south side. Melissa stayed at our house on that occasion two days and two nights. Mr. Potter's boy brought her with a horse and wagon and I think my husband took her back.

Digitized by Google

JAMES F. MAXWELL, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows: 1255

I have resided in the City of Binghamton about three years and ten months. Prior to living in Binghamton I lived in Kattellville. I owned a farm there, and prior to my going to the farm in Kattellville I resided on the Hinman farm in the Town of Chenango. I resided at the Hinman farm beginning in 1899, I think, and worked there, I think, until the Spring of 1903.

Q. When you went there who constituted the Hinman family?

A. Mrs. Charles Hinman.

Q. That is Melissa? 1256

A. Yes and Bayless Hinman and his wife.

Q. What was Bayless' wife's name?

A. Mary.

Q. Do you recall when Mary left there?

A. 1899, I think.

Q. That Fall of that year?

A. Yes in the Fall.

Q. Are you acquainted with Vena Lord?

A. Yes sir.

Q. When did you first meet her?

A. Why it was the Summer before Mrs. Mary Hinman went away. I think it was in 1899.

Q. That summer? A. Yes sir.

Q. Was she stopping at the farm at that time?

A. No sir.

Q. Was she there frequently? A. Yes. 1257

Q. How would she come up to the farm on these occasions along in the summer of 1899?

A. Came up on a wheel.

Q. On a bicycle? A. Yes.

Q. In the day time or evening?

A. In the afternoon usually.

Digitized by Google

1258 Q. And when would she go back?
A. Along in the evening.
Q. Who went back with her if anybody?
A. Charlie Hinman.
Q. Now did that continue during the summer and fall of 1899
A. Yes sir.
Q. Subsequent to that state whether or not you have seen her come up with Charles in the afternoon on the milk wagon?

By counsel for the administratrix—
Objected to as leading.

By the Court—Overruled.

1259 By counsel for the administratrix—Exception.

A. Later than that she used to come up on the milk wagon, in cold weather.
Q. Did she stay all night?

By counsel for the administratrix—Objected to as leading.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. Sometimes.
Q. When is the first that you recall that she stopped there over night?
A. I cannot remember.
Q. About when?
1260 A. In the winter.
Q. Winter of 1899 and 1900?

By counsel for the administratrix—Objected to as leading.

By the Court—It is leading. Do not lead. He may answer.

A. I think it was.

Digitized by Google

Q. Do you know where she slept at that time when she first stayed there over night? 1261

A. No.

Q. Do yon know where she slept any of the time up there when she first stayed over night?

A. Yes sir.

Q. Where? A. On the couch.

Q. Where was this couch located?

A. In the sitting room.

Q. You have seen her sleeping there have you?

A. Yes sir.

Q. Was she sleeping alone?

A. No sir.

Q. Who was with her? A. Charlie.

Q. Charlie Hinman? A. Yes sir.

Q. State on how many occasions you saw Charles N. Hinman and Vena Lord sleeping on the couch in the sitting room in 1899 and 1900? 1262

A. I cannot remember.

Q. About how many? A. I do not know.

Q. More than one?

By counsel for the administratrix—

Objected to upon the ground that it assumes the summer of 1899 and 1900 and witness has not so testified, improper, incompetent.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. More than once but I cannot remember how many times.

Q. State whether or not it was several times? 1263

By counsel for the administratrix—Objected to as leading.

By the Court—He may state how many times.

A. I cannot remember as to how many times.

Q. Will you state whether or not it was several times?

Digitized by Google

1264 A. It was more than one. That means several. I cannot remember as to how many times.

By the Court—What year was this?

A. It was along in the winter after she first came up there. She come up in the Summer and along in the Winter. I should say it was the Winter of 1900, commencing in 1899 and along in the latter part of 1899 and 1900.

By counsel for the petitioner—

Q. Now at that time did she remain there day times?

A. No sir.

Q. Do you know where she was working at that time if any place?

1265 A. Dr. Daley's in the City.

Q. Worked for Dr. Daley in the City of Binghamton?

A. Yes sir.

Q. Now after she ceased working for Dr. Daley did she come up there and stay day times as well as nights?

By counsel for the administratrix—Objected to as leading.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. She was up there some. I do not know when she quit working for Dr. Daley.

1266 Q. I say after she stopped working there did she come up there and stay day and night?

A. She came up there afterwards and stayed day and night. I do not remember whether just after she quit working for Dr. Daley or not.

Q. Do you know when she commenced staying there days as well nights?

A. No.

Digitized by Google

Q. Well how long after, say the Spring of 1900? 1267

A. I could not tell you how long it was.

Q. Can you give me any idea?

A. No. Quite a while afterwards, I could not tell. It is something I did not pay much attention to.

Q. Was it the year 1900?

A. Sometime during that year.

Q. Do you know what room she occupied when she commenced staying there all the time?

A. What was termed as Mrs. Hinman's spare room, at the time.

Q. When you speak of Mrs. Hinman you refer to Melissa Hinman?

A. Yes sir. 1268

So far as I know she occupied that room alone. I could not say how long it was. I do not know how long it was. I do not think it was a year. I do not know that it was six months. It was a while. I cannot tell to a month. It was not a year I do not believe. I know it was not. After that she roomed with Charlie Hinman I guess.

Q. What year was that, would you say 1900?

By counsel for the administratrix—Objected to as leading.

By the Court—Overruled.

A. I do not know. It might have been the last part of 1900. I could not say for certain.

Q. Is that your recollection that it was the latter part of 1900? 1269

By counsel for the administratrix—Objected to as leading.

By the Court —Overruled.

A. I do not remember as to when this took place because I did not pay much attention to it.

Digitized by Google

1270 Q. Was it the latter part of 1900 that they were sleeping together in what you call Charles N. Hinman's room?

By counsel for the administratrix—

Objected to as leading, improper method of examination, the witness having already testified two or three times that he cannot tell when it was.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. It was along there about that time but I would not say to a month, I might have it wrong.

Q. Now from that time on did Charles N. Hin-
1271 man and Vena Lord occupy the same room while you were there?

A. No sir.

Q. What time was there that they did not?

A. When Pearl came up there.

Q. When Pearl Lord came there? A. Yes sir.

Then Vena Lord slept with Pearl and Charles slept alone in the large room. She was up there two or three times and Charles slept in Mrs. Hinman's spare room. I recall when Bayless Hinman died. It was November 27, 1902. That was Thanksgiving day. I was there at the farm every night. I cannot remember whether I was there at the farm every evening during the months of September and October, 1901. I do not recall
1272 whether I was away any of the time. I went out to parties and dances part of the time and might not have been there. I do not recall any time when I was away during the months of September or October, 1901.

Q. Now during the time that you were there, or during the time that Miss Lord was there from

Digitized by Google

1899 down to the time you left in 1903, how was she addressed by members of the Hinman family? 1273

By counsel for the administratrix—
Objected to as incompetent, improper, immaterial, irrelevant, inadmissible, no foundation laid, no part of the res gestae and not proper rebuttal.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. Why Charles called her the "Kid" and the rest of the family called her Vena, and I called her Vena and Lord.

Q. Did you on any occasion during this period I have mentioned, from 1899 to the Spring of 1903 ever hear Charles, Melissa, Bayless, or anybody, address her as Mrs. Hinman? 1274

By counsel for the administratrix—
Objected to as incompetent, improper, conclusion.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. I did not.

Q. Did you during that period ever hear any of the members of the family or anybody else address her as Charles' wife or refer to her in that way?

By counsel for the administratrix— 1275
Objected to as incompetent, improper, calls for a conclusion, leading.

By the Court —Overruled.

By counsel for the administratrix—Exception.

A. I do not think I ever did.

Digitized by Google

1276 Q. Did you ever have any conversation with Vena as to her relations with Charles?

A. No sir.

Q. What is that? A. No sir.

Q. Did she ever make any statement to you about the way she was living there?

A. Yes sir.

Q. What did she say?

A. She said she knew she was doing wrong.

Q. What else did she say?

A. I used to talk to her about the matter and tell her she ought to cut it out and make him marry her or else get away from there.

Q. What did she say?

A. She said she knew she had. I had several
1277 conversations. I do not remember what she said every time.

Q. Do you recall anything else she said about that?

A. I cannot remember.

Q. Do you recall an occasion when she referred to the way she was living there with Charles, not being married to him, and that if she wanted to lead that kind of a life she could go down to New York and live with somebody?

By counsel for the administratrix—

Objected to as improper, incompetent and leading.

By the court—Overruled.

1278 By counsel for the administratrix—Exception.

A. Yes sir.

Q. State what was said on that occasion?

A. She said if she wanted to lead that kind of a life she could go down to New York and get $20. a week and not lift her finger.

I recall an occasion when I was there when

Digitized by Google

Harvey Bunt and Lillian Bunt called at the Hinman place. It was before Bayless died. I could not tell how long. It was before Bayless died. It was sometime in the Fall before Bayless died. 1279

Q. State whether or not the Fall before Bayless died?

By counsel for the administratrix—
Objected to as leading, incompetent and improper in form.

By the Court —Overruled.

By counsel for the administratrix—Exception.

A. Before Bayless died, I cannot tell just when.

Q. Do you know whether it was the preceding Fall? 1280

By counsel for the administratrix—
Objected to as improper, incompetent and leading.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. I think it was a year, but I might be mistaken.

Q. That is your recollection is it?

A. It don't seem any longer that that, but I might be mistaken.

Q. Do you recall who introduced Mr. Bunt to Miss Lord on that occasion?

A. I introduced Mr. Bunt one time but I do not remember anything about his wife. 1281

Q. Was that the occasion when they were there that Fall?

A. Yes, they were there together.

Q. How did you introduce her to him?

By counsel for the administratrix—
Objected to as incompetent, improper, hearsay.

Digitized by Google

1282 By the Court—Overruled.

By counsel for the administratrix—Exception.

A. As Miss Lord.

Q. Do you know whether or not any of the neighbors around there called on Miss Lord while she was there, made social calls?

A. I cannot remember of any while I was there. There did not many call.

Q. Did anybody call? A. Yes sir.

Q. Who? A. Mrs. Barnes.

Q. Who was she, what was her first name?

A. Lib Barnes.

Q. Where did she live?

A. In Mr. Hinman's house for a while.

1283 Q. Is she living now or dead?

A. I do not know.

Q. Who else called if anybody?

A. I cannot remember . There might have somebody called but I cannot remember anybody.

Q. Do you know whether Charles took her out and visited the friends and neighbors in that vicinity during the period you were there for social calls?

A. No I do not.

Q. You do not know that he did?

A. I do not remember as he did, no.

Q. Now while you were there did you ever hear Melissa Hinman make any statement as to whether Charles and Vena were married or not?

1284 A. Yes.

Q. What have you heard her say upon that subject?

By counsel for the administratrix—

Objected to upon the same grounds at stated in objection to similiar questions with other witnesses.

Digitized by Google

By the Court—Overruled. 1285

By counsel for the administratrix—Exception.

A. She always said they was not.

Q. Did you ever hear Bayless Hinman make any statements down to the time of his death relative to the matter?

A. Yes.

Q. What did he say?

By counsel for the administratrix—

Same objection as to similiar questions put to other witnesses.

By the Court —Overruled.

By counsel for the administratrix—Exception. 1286

A. That they was not.

Q. During the time that you were there from 1900 to the Spring of 1903 have you seen letters come addressed to Vena Lord?

A. Yes.

By counsel for the administratrix—

Objected to and move to strike it out on the ground that it is incompetent, improper, inadmissible; that they have laid no foundation for secondary evidence of the contents or addresses of envelopes or letters.

By the Court—

Objection sustained and the answer may be stricken out.

By counsel for the petitioner— 1287

I ask counsel to produce the letters called for by the notice to produce heretofore served upon them.

By counsel for the administratrix—

We have not been notified in any proper or legal

Digitized by Google

1288 manner to produce any letters similiar to the ones this witness has been interrogated concerning.

Paper marked Ex. 1 for identification.

By counsel for the petitioner—

Is it conceded that Ex. 1 for identification was served upon you July 25 1910?

By counsel for the administratrix—Yes it is so conceded.

By counsel for the petitioner—

We ask to have that incorporated into the record.

By counsel for the administratrix—

Objected to upon the ground that it is no part
1289 of the record.

By the Court—It may be incorporated in the record.

By counsel for the administratrix—Exception.

Ex. 1 for identification, being the notice to produce referred to was as follows:

SURROGATE'S COURT—BROOME COUNTY

In the Matter of the Estate
of
CHARLES N. HINMAN, *Deceased.*

1290 PLEASE TAKE NOTICE, that you are hereby required to produce on the hearing in the above entitled matter appointed for the 26th day of July at 2 o'clock P. M. the following described documents: All letters and envelopes in which they were enclosed and post cards or postal cards received through the mails by Vena M. Lord, otherwise known as Vena M. Hinman, which were received by her from any person or persons be-

Digitized by Google

tween the 1st day of November, 1899 and the 31st day of December, 1904. 1291

In default of their production secondary evidence of their contents will be offered.

Dated July 25, 1910.

WILBER & YETTER,
attorneys for petitioner,
1007 Kilmer Building,
Binghamton, N. Y.

To Hinman, Howard & Kattell,
Attorneys for the Respondent."

By counsel for petitioner—

We ask to have it entered on the record that no letters were produced pursuant to Ex. 1 for identification. 1292

By counsel for the administratrix—

We object to it on the ground that the statement should not appear on the record; that there is no necessity for our producing anything.

By the Court—Overruled.

By counsel for the administratrix—Exception.

By counsel for the petitioner—

Q. Do you know of Vena M. Lord receiving through the mail letters addressed to her as Vena M. Lord during the period from 1900 to 1903?

By counsel for the administartrix—

Objected to upon the ground that it is incompetent, improper, no sufficient foundation has been laid for the introduction of secondary evidence of the contents or address of of any envelopes or letter, and immaterial, irrelevant, too remote in time and indefinite. 1293

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. Yes, sir.

Digitized by Google

1294 Q. Did you during the period I have mentioned observe any letters that came through the mail that were received by Miss Lord at the farm there addressed in any other way than Vena M. Lord?

By counsel for the administratrix—
Objected to upon the same ground and upon the further ground that it is an attempt to prove a negative.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. I never did when I was there.

Q. Do you remember an occasion when Charles N. Hinman was away in the Fall of 1901 when
1295 Mr. Wilson worked there, Eugene Wilson in August, 1901?

A. I could not give the dates.

Q. About what time?

A. I do not know whether it was or not. It was some time.

Q. Do you remember an occasion when Wilson accompanied Vena to a festival at the Bridge?

A. He took her some place. I do not know where.

Q. Did you have a talk with her before going there?

A. I presume so.

Q. Did Vena ask you on one occasion to go with her to a church festival at Chenango Bridge?

1296 A. Quite a while ago she wanted me to go some place up there but I cannot remember what was going on.

Cross-Examination by Mr. Hinman —

I am thirty-eight years old. I worked at the Hinman farm fourteen years and have been away seven years last Spring. I have a farm at Kattell-

Digitized by Google

ville consisting of 112 acres. I bought it on September 10, 1902. I now live at 116 Susquehanna Street. I am now working for Geo. E. Hall & Co. doing all kinds of outside work, driving team, drive the ice wagon. I am unmarried. I board with Mr. and Mrs. Arnet and have for four years. In 1899-1900 the stage driver brought my mail, the one who drove from Binghamton to Castle Creek. He left it there at the house in a box beside the road. My work on the Hinman farm was farm work. It was almost entirely out of doors. The stage driver delivered mail there in 1899 and 1900 about four o'clock in the afternoon. In 1901 there was a new delivery started. During the time when the R. F. D. was running I got it through the R. F. D. in the same box. I do not know that the box was locked. I would not swear whether it was or was not. It is a fact that the people in the house tended to taking in the mail. It was a fact that the women folks got the mail. I do not think the box was locked and the key there in the house, still it may have been some of the time, might have been all of the time. I was not interested in this woman's mail.

1297

1298

Q. Who else got mail there while you worked there?

A. I supposed the hired girl.

Q. What hired girl got mail there?

A. The hired girl did not get mail there. I do not think they had one at the time.

Q. At any time you worked there?

1299

A. The hired girl got her mail there when the stage driver brought it up.

Q. What hired girl was that

A. One by the name of Wright and another one I cannot call her by name now, she lived up near Castle Creek.

Q. They got their mail from the mail man or from the box?

Digitized by Google

1300 A. From the box.

Q. How was it addressed? A. I do not know.

Q. How was Melissa Hinman's mail addressed that she got while you were there?

A. Melissa Hinman, I suppose.

Q. Not what you suppose. How was it addressed the years you were there?

A. Mrs. Melissa Hinman.

Q. Always? A. Yes.

I never saw it addressed any other way. I saw letters addressed to her. I could not tell where they were postmarked. Bayless Hinman once in a while got mail there. He did not get much mail. I cannot recall any. Presume he did. He got some mail ,of course. That was addressed to Mr.
1301 Bayless Hinman whatever I seen. It might have been B. Hinman. I have seen it both ways while I was there. I cannot tell what papers they took while I was there I do not remember to whom they were addressed. Charlie Hinman got mail while I was there that was addressed C. N. Hinman, or Charles N. Hinman. I have recollection that I first saw this administratrix in the summer of 1899. I cannot tell what month. She appeared to be somewhere between 18 and 19 years of age. I cannot remember how old Charlie Hinman was at that time. He appeared to be some years older than the administratrix. I do not know how many. The first time I saw the administratrix come up there was Sunday. I cannot tell whether
1302 I met her the first time or not. It was along in the summer sometime. I cannot remember the month. I fixed the year by the fact that it was the same Fall that Mary Hinman applied for a divorce. Vena Lord's coming to the farm had nothing that I know of to do with Mary Hinman getting a divorce. Vena Lord came up that summer and Mrs. Hinman got a divorce in the Fall. It was in 1899 she got a divorce.

Digitized by Google

Q. When did you ascertain it was in 1899 she got her divorce? 1303

A. She might not have got it in 1899. That is when she applied for it.

Q. When did you learn that she got her divorce in 1899?

A. That is when she left the farm and I think she got it then. I may be mistaken.

I might have been mistaken in the year she got her divorce. She applied for a divorce and may not have gotten it until 1900. The Hinman house stands on the southeast side of the highway. The rooms in front are the dining room and parlor. The dining room opens right out on to the road. In entering the house from the highway you pass into either the dining room or the kitchen. 1304

Cross-examination suspended.

CATHERINE KING, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I reside at Hydeville north of Castle Creek. I was at one time employed on the Hinman farm. It was in 1900 and 1901.

Q. When did you go there in 1900?

A. In the Spring of the year.

Q. When did you leave in 1901?

A. In the Spring.

Q. Were you acquainted with Miss Lord while you were there? 1305

A. Yes.

Q. Was she living there at that time?

A. Yes.

Q. Do you remember what month it was in the Spring of 1900 that you went there?

A. March.

Digitized by Google

1306 Q. Do you know where Miss Lord slept at that time? In what room?
A. Right at the head of the stairs.
Q. Did she sleep alone?
A. No sir, I do not think she did.
Q. Who slept with her?
A. I think Mr. Charles Hinman.
Q. All while you were there? A. Yes sir.
Q. When you first met her were you introduced to her?
A. Yes sir.
Q. Who introduced her?
A. Charles Hinman.
Q. How did he introduce her?
A. As Miss Lord.
1307 Q. Did you hear Charles introduce her to anybody else?
A. Yes.
Q. To whom? A. Dr. Taylor at Castle Creek.
Q. When was that.
A. I think the first year I was there.
Q. How did he introduce her?
A. Called her Miss Lord.
Q. After you knew that Charles Hinman and Vena Lord were sleeping together, did you ever have a conversation with her as to whether she was married or not?
A. I asked her once if she was married.
Q. What did she say?
A. She said I should have to ask Charlie.

1308 Cross-Examination by Mr. Hinman —
It was Mr. Yetter who saw me about coming down here as a witness. I do not know as I am to get any compensation for coming here. I have been promised an automobile ride. I have ridden before just a little ways. This is the only long ride I ever had. Before Mr. Yetter came up I talked with no one but my husband about this

Digitized by Google

evidence I gave to-day. I talked with him every 1309
day most lately. From 1901 to 1907 I talked with nobody about it. I first talked about it with my husband when this case came up. It was about the time Mr. Yetter was up there. I do not know how he learned of me. From 1900 down to within the past few days I have not talked this with anybody and not mentioned it to any one. Had not thought anything about it.

Q. And the first thing you knew, three men were at your house in an automobile, one of whom was Mr. Yetter?

A. Yes.

Q. You were promised an automobile ride if you would come down here?

A. Yes. 1310

Dr. Taylor is dead. He was the family physician at the Hinman farm. I remember once when this administratrix was sick. He attended her. That was while I worked there. I went there in March, 1900 and left sometime in the Spring of 1901. I was married in 1903. In 1901 I worked down to Mr. Cutlers and then went to Calvin Gaylord's at Hydeville. That is between Chenango Bridge and Castle Creek. When I left the Hinman farm I went to John Cutler's to work. I worked there five weeks. From John Cutler's I went to Calvin Gaylord's and stayed there until January 1, 1903.

Q. I want you to tell me how long you worked at Gaylord's?

A. I do not remember. 1311

Q. Not quite a year?

A. No sir, not quite a year.

Q. How much did it lack?

A. I could not tell that.

Q. Did you go from John Cutler's to Gaylord's and then work to Gaylord's until the next January?

Digitized by Google

A. Yes.

1312 Q. Was the only places you worked at Cutler's and Gaylord's after you left the Hinman farm?

A. Yes. I left Gaylord's and married.

Q. The first Winter you went to Gaylord's you left and were married?

A. Yes.

Q. Did you go directly from the Hinman farm to Cutler's?

A. No, I went to my sister's.

She lived just above Hinman's on the road towards Castle Creek. I stayed there about a week before I went to John Cutler's and then went directly from my sister's to John Cutlers, where I stayed five weesk. Then I went up to my sister's

1313 and stayed about a week and then went to Gaylord's and stayed until sometime in January and then left there and was married. That is certain. There can be no doubt about those things. I was married to my husband in 1903. That I am certain of. While I lived at the Hinman farm working there Charlie Hinman and this administratrix here occupied the same room.

Q. And did that openly, Melissa Hinman and all the family knew it just as you did? Q. That is during that period of time, they slept there in the room openly. That is I do not mean the door was open, I mean it was known to the people in the house and known to you.

A. Yes sir.

1314 It was not a great while after I was introduced that they were sleeping together. I think it was the Fall of 1901. That is my best recollection.

Re-Direct Examination by Mr. Yetter —

They were sleeping together most of the time when I was there. It is fifteen miles from Binghamton to where I live. I was paid $1.70. That is 8¢ a mile and 50¢ a day.

Digitized by Google

Q. I asked you to come down here as a wit- 1315
ness?

A. Yes.

Q. What did you say?

By counsel for the administratrix —

Objected to as incompetent, improper, inadmissible, immaterial, irrelevant.

By the Court —

I will permit you to show that this woman has a small baby, etc.

I have a small baby three months old and another child two years old that is in bad health. I was desirous of getting back as soon as possible.

Q. Did you ever hear Melissa Hinman make 1316
any statement as to whether Vena and Charles were married?

A. No sir but just once when I asked her.

Q. What did she say?

By counsel for the administratrix —

Objected to as improper, incompetent, inadmissible, no foundation laid, no part of the res gestae, too remote in time and indefinite and hearsay.

By the Court — Overruled.

By counsel for the administratrix — Exception.

A. She says I do not know.

Cross-Examination of James Maxwell continued by Mr. Hinman —

In entering the Hinman house at the front from 1317
the highway you enter into the dining room. I cannot remember how many times I saw this administratrix there at the Hinman house in the first summer that I saw her there. I saw her there more than once. I could not say now how many or about how many. I could not tell how many times I saw her there that Fall or that Winter.

Digitized by Google

1318 The next Spring I think she was there all the time. I do not know what month she came there. I ain't sure when she came, what month. She came there in 1900, I think. My recollection is that it was 1900 but I can not be positive of that absolutely. She came there at sometime to stay and stayed there as long as I stayed. She was there after I left. After I left the Hinman farm in the Spring of 1903 I went back again to work in the summer of the same year and stayed a few days. From that time on I was at the Hinman farm. I have no present recollection of being there after 1903. Prior to the time when this administratrix came there to stay continuously I know that she had stayed there all night. How
1319 many times I cannot remember. I do not know about how many times.It was along in the last part of 1899 or in the early part of 1900 in the Winter.

Q. What do you fix that by.

A. Not the Winter, no, she stayed in the summer.

I am positive of the fact that I first saw the administratrix there at the farm in 1899.

Q. Did you testify a little while ago that you could not be absolutely certain? Did you so testify within 10 minutes that you could not be absolutely certain about it?

A. I am certain.

Mr. Hinman: I move to strike it out as not res-
1320 ponsive.

Court: The answer may be stricken out.

Mr. Hinman:

Q. As you sat there in the chair only a few minutes ago, did I ask you if you could swear positively certain that it was in 1899 that you first

Digitized by Google

saw the administratrix here and did you say in answer you could not be absolutely certain, but that it was your best recollection? 1321

A. Yes sir.

Q. Now is your recollection any better this minute than it was 15 minutes ago about that?

A. Yes sir.

Q. What has made your recollection better now with reference to that than it was 15 minutes ago

A. Because I thought that way.

Q. That is the only difference?

A. Yes.

Q. When had you thought over this question as to when she first went to the Hinman farm and you saw her there? 1322

A. About a week.

Q. And you have been thinking about it for a week?

A. Yes.

Q. And yet you thought more about it as you sat there in the chair during the past 15 minutes, and your recollection is better now than it was 15 minutes ago?

A. Yes.

Q. Who saw you about a week ago and suggested that you think it over?

A. Harry Yetter.

Mr. Hinman and Mr. Thomas B. Kattell have also talked with me about this case. Mr. Yetter first saw me some months ago. He saw me about this case. I cannot remember that he talked with me then as to when I first saw the administratrix upon the farm. I cannot remember that anything was said to me by him as to when I first saw her there. I first saw him in his office. He sent for me. I cannot remember by whom he sent word. Henry Hinman got the word to me. He spoke 1323

Digitized by Google

1324 about it several times. I cannot remember when the first time was, or where. No one else was present. I do not know how many times I have talked with Henry Hinman about this case. I have been in Yetter's office three times. Some months ago, I cannot remember, a week ago to-day, a few months ago, a while ago. I have been in his office to-day. About five months ago I made the statement that he took down in writing in his office . I cannot remember who was present when that was done. Mr. Hinman asked me to go on that occasion. I did not read over the statement. I first told Mr. Yetter about the Bunt matter about a week ago. It was on the 19th of July, 1910. I do not think that was in the
1325 written statement that I made five months ago. I went to Yetter's office a week ago because he sent for me by Henry Hinman. I made no changes then in the statement that I had made five months before.

Q. Was your recollection any better a week ago than it was 5 months ago with reference to this case?

A. Yes.

Q. It had become considerably refreshed during the five months had it?

A. Yes.

Q. That is you remember more?

A. Yes.

Q. A week ago at Yetter's office than five
1326 months before?

A. Yes.

Q. And you remember more to-day than you did a week ago about this case?

A. Yes.

Q. And you remember more at this moment than you did 15 minutes ago?

A. Yes.

Digitized by Google

Q. Your recollection is one that improves with time? 1327

A. Yes.

This couch that I speak of was in the sitting room. That was located on the north-east side of the Hinman home. That is the room facing the main road going from Binghamton to Chenango Forks. I am certain of that now. The parlor is on the south side, on the side towards Binghamton. We call the dining room the sitting room. It is all one. We used to call them by different names. This couch was in the dining room. We ate our meals in the kitchen. This couch was not at that time in the room used as a dining room.

Q. Is the east side of that house towards the river? 1328

A. No sir.

Q. Is not the easterly side of that house towards the Chenango River?

A. No.

Q. You are certain about that are you?

A. Yes.

What is the side of the house toward the river by the points of the compass?

A. It is the southwest side.

Q. And is the sitting room in which the couch was in the northeasterly side?

A. Yes.

Q. Northeasterly corner? A. Yes.

Q. Is that the one that faces the road?

A. Yes. 1329

Q. That is the northeasterly corner?

A. Yes.

Q. Where is the northwest corner of that house?

A. The northwest corner is on the side towards Binghamton. The northwest corner is not just toward Binghamton.

Digitized by Google

1330 Q. Where was the northwest corner of that house and where was it at the time you speak of?

A. It is a hard question to answer. It is towards Swan's I should call it.

Q. I do not care anything about Swan's.

A. It is on this side of the house towards Binghamton.

Q. Is the north side of the house on the side towards Binghamton?

A. No.

Q. Where is the northwest corner of that house?

A. The north side is towards Castle Creek, the road leading to Castle Creek, and the west corner is towards the bridge, the bridge going across Castle Creek, the bridge that crosses Castle Creek on the road leading to Binghamton.

1331 Q. Tell me where the northwest corner of the house is?

A. It is on the lower corner.

Q. Which corner of the house is the northwest corner?

A. It is the corner the parlor is on.

Q. Take the parlor and the northwest corner, you are certain about that?

A. Yes.

Q. Now, then, let us start from Binghamton and travel northerly on the highway that runs past the Hinman house. The house stands on the right hand side.

1332 A. Yes.

Q. The first room in the corner as you approach the house is the northwest corner?

A. Yes.

Q. Where is the northeast corner?

A. It is on the corner where the sitting room or dining room is, the northeast corner.

Digitized by Google

Q. Where is the southwest and southeast corners? 1333

A. One is towards Chenango Bridge and the other is Port Crane.

Q. Which is which?

A. The corner towards Chenango Bridge and the Chenango River I call the southeast corner, and this one towards Binghamton is the southwest corner of the house.

Q. Does the rear of that house stand nearly parallel with the river?

A. In the same way.

Q. And you are still of the opinion that the room you speak of is in the northeast corner of the house?

A. Yes. 1334

Q. Where did the couch stand in the room, on which side of the room with the points of the compass?

A. It stood on the side towards the river.

Q. Give me the point of the compass now?

A. On the south side of the room.

The kitchen is directly in the rear of the sitting room of that house. There is one door from the dining room and sitting room, as I use both terms here, that enters into the kitchen. There are no other doors into that sitting room from the rear. There was an entrance into a bed room on that same side. There was no other doorway there except an outside door out to the road. There was no doorway out of the sitting room except the one in front. As you came in 1335
from the kitchen that couch stood on the right of the doorway into the kitchen and the entrance to the bed room was on the left. There were two bed rooms on the first floor of the house during all the time I worked there. Bayless Hinman occupied the one that opened out of this

Digitized by Google

1336 sitting room during all the time I was there up to the time of his death and Melissa Hinman ocupied the other. The entrance to the other was from the parlor. This couch was a narrow couch, just a litle couch. I cannot describe it any nearer than that. There was a back to it, it was a narrow couch. I do not think that it stood there all the time I worked there. I cannot tell what period of time it stood there. It was a good many years ago. I do not know where they got it when it was put there. I do not know where it went. It was there when I left. It was the first Winter that the administratrix was there that I saw her sleeping on the couch. It was not the first Winter that she came there to live continously.

1337 She was working down to Doc Daley's. She said she was working at Dr. Daley's. It was the summer of 1899. I do not know that she worked at Dr. Daley's any time after the summer of 1899.

Q. You never heard her say anything about working at Dr. Daley's excepting the Summer of 1899?

A. That is that Winter she first came up there. That is all I heard her say about it. That is all I knew about it. It was in the Winter when I first saw her sleeping on the couch in the sitting room on the Hinman farm. She told me in the summer time she was working at Dr. Daley's. It was the Winter after she came up in the summer. I cannot remember how many

1338 times I say her sleeping on the couch. I do not remember when I first told Mr. Yetter about it.

Q. On how many occasions did you see her sleeping on the couch there in the Hinman house during that period of time, during that Winter?

A. I do not remember.

Q. How many times do you remember having seen her sleep on the couch?

Digitized by Google

A. I do not remember.
Q. Do you remember anything about it? 1339
A. Yes sir.
Q. What do you remember about it as to the number?
A. I cannot remember the number of times.
Q. I am asking if you remember anything about the number of times?
A. I could not tell how many times it was.
Q. Can you tell anything about it approximately
A. I know she slept there. That is all I know about it.
Q. I am asking you what your recollection is as to the number of times you saw the administratrix sleeping on that couch in the Winter of 1340
1899?
A. I cannot tell about the number of times.
Q. Can you tell anything about the number of times?
A. I cannot.
Q. Who else have you ever seen sleeping on that couch?
A. I cannot remember.

I do not know who was sleeping in the house that first night that I saw her sleeping on the couch. I do not know who was there. I do not know anything about who was there. I slept up stairs that night in the east room. That was along the road leading to the barn from the house on the east side of the house, that is the side towards Chenango Bridge. It was in the rear 1341
of the house, that is the room I always slept in when I was well. I was well that night. Nobody slept with me that night. I do not know what time I went to bed. I cannot tell about what time I went to bed. I do not know what I had been doing that day. I do not know where I had been

Digitized by Google

1342 that evening. I cannot remember a thing I did that evening. I did not get up that night. I got up in the morning about five o'clock. The stairway that went to the rooms up stairs to the house was off from the kitchen. There was only one stairway in the house and that went up out of the kitchen. That evening before I went to bed I went into the sitting room or dining room. It was not right after supper. I do not know who ate supper with me that night at the Hinman farm. I do not remember what I did after supper that night. I have no definite recollection of anything I did after supper that night. I do not remember any place where I went after supper that night. I am not related to Charlie Hinman.

1343 This girl then was a young girl and a stranger in that locality at that time. I was twenty-eight years old. My thirty-eighth birthday was on the 27th day of May, 1910. There were six sleeping rooms upstairs. I do not remember who slept up stairs besides myself. I cannot remember who was working there at the time. I cannot remember any man or woman at that particular time. I do not remember when I first told about seeing this respondent sleeping on the couch. The first I remember of having told it is to Mr. Yetter about five months ago. That is the first I can think of at the present time. I do not know when was the second time I saw her sleeping on the couch. I cannot remember what month it was.

1344 It was either in 1899 or 1900, which one I cannot remember. I do not know what I had been doing that day on the farm or who was there at the farm that day or that night. I do not know what time I went to bed that night. I slept in the same place. I do not know what I did after supper. I cannot remember who ate supper with me at the house that night. I cannot remember that

Digitized by Google

I told any one there at the house about it. I did not get up that night after I went to bed. The next morning I got up at five o'clock. Charlie was up when I got up. He was out getting his milk ready. In those days he usually left for town with his milk between four and five o'clock. The morning following the first night when I first saw the administratrix sleeping on the couch, Charlie was up when I got up getting his milk ready. I cannot remember where he was when I first saw him. He was on the couch with this respondent that first night when I went to bed. They had both gone to bed on the couch. I cannot remember where Charlie Hinman was this second night when I went to bed. 1345

Q. The third night you saw this respondent sleping on the couch in the siting room in the Hinman house what had you been doing that day? 1346

A. I do not know.

I do not know who was at the farm that day, who was in the house that night, who ate supper with me, what time I went to bed or what I did after supper. I slept up stairs that night. I believe no one was up when I went to bed. Every one had gone to bed that third night. I do not remember who was up the second night. I do not remember seeing anyone. The first night I guess they had all gone to bed. I did not see anyone. I remember about it. On the first night, the second night and the third night that I have testified that this respondent slept on the couch that Winter, all that were in the house when I was there had gone to bed. I do not remember that I was the last one on each night. On the first night I went into the sitting room because it was cold and I went in there to take off my shoes. The fire was there. There was no fire in the kitchen where we ate at that time. 1347

Q. So the first night the only fire in the house was in the sitting room?

Digitized by Google

1348 A. If it was late hours.

Q. Was it a late hour that first night when you saw her sleeping on the couch when you went to bed?

A. I cannot remember.

Q. Then what do you say as to whether or not there was a fire in the sitting room only that night when you went to bed?

A. That was the only one there was a fire in.

It was my custom to go into the sitting room and take off my shoes. I left them in the sitting room rather than in the kitchen, or rather than in my room up stairs and went up stairs in my stocking feet.

Q. You preferred to take off your shoes in a
1349 warm room and walk through the cold kitchen, up the cold stairs, through the cold hall into your cold room rather than wear your shoes?

A. I did not walk through the kitchen.

Q. Didn't you go into the kitchen to get into the stairway?

A. Yes.

Q. Did the stairway open into your room?

A. Into a hall.

Q. Then in that winter without any fire in the kitchen you preferred to go to the sitting room and take your shoes off and leave them there and walk in your stocking feet through the cold kitchen, up the cold stairway, through the cold hallway and into your cold room, rather than wear
1350 your shoes up into your room?

A. That was my custom.

That is why I went into that room that night. I had no other reason. I cannot remember that there was a light in that room when I went in.

Q. Did you take any with you when you went in?

A. I never did.

Digitized by Google

I do not remember that I ever did. I sat in 1351
the chair right beside the stove when I took off my shoes. The stove was on the side of the house towards Binghamton. It was a little distance from this couch. This woman knew that I was the hired man there. I do not remember how many times I had seen her there at the farm before this time. I cannot tell about how many. I will swear it was more than two or three or four. I do not know how many. At this time they burned wood in the kitchen stove and coal in the sitting room. On the second time I saw her in bed on the couch I went into that room when I got home. I do not know where I had been. I do not know where I had come from. I had been away somewhere I do not know where, 1352
with whom or for what purpose I had gone away, who went with me or who came back with me. When I came back I entered the kitchen. I do not know what time it was. I went through the kitchen into the sitting room. Nobody was up that I know of. There was no light in the kitchen. I do not remember that there was a light in the sitting room. I have no recollection about it. I took off my shoes in the sitting room.

Q. The first night what did you say to anyone?

A. I do not remember.

Q. Anyone say anything to you?

A. I do not remember.

Q. The second night that you took off your shoes in the sitting room what did you do besides that? 1353

A. I do not remember.

Q. Talk to anyone? A. I do not remember.

Q. This respondent was on the couch that second time?

A. Yes right there.

Q. Who was in bed with her on the couch at that time?

Digitized by Google

A. Charlie.

1354 Q. Did you testify a few minutes ago that you did not know where he was when you went to bed that second time?

A. I do not know.

Q. But do you recall now that he was there the second time, this second occasion, do you?

A. If she was there he was there.

Q. This second occasion do you remember that he was there?

A. I think he was.

Q. Are you positive about it?

A. Yes.

Q. Is your recollection better on that subject now than it was fifteen minutes ago?

1355 A. He was there.

Q. Is your recollection better now on the subject than it was fifteen minutes ago?

A. Yes, he was there.

By counsel for the administratrix—I move to strike it out.

By the Court—The answer may be stricken out.

Q. Is your recollection on that subject better now than it was fifteen minutes ago?

By the Court—Answer yes or no if you can.

A. I think he was there.

By counsel for the administratrix—I move to strike it out.

By the Court—It may be stricken out.

1356 A. He was there.

By counsel for the administratrix—I move to strike it out.

By the Court—It may be stricken out.

A. When I seen him Mr. Hinman was on the couch with her.

Digitized by Google

By counsel for the administratrix—I move to strike it out. 1357

By the Court—The answer may be stricken out.

(Question read by stenographer)

A. Yes.

Q. Are you here simply to swear that he was on the couch with her without regard to anything else?

A. No sir.

I do not know what I had been doing on the third occasion when I saw this respondent in bed in the Hinman house in the Winter. I do not remember who was up when I went to bed, with whom I ate supper that night, what I did after supper that night, or where Charles Hinman was after supper. 1358

Q. What was the weather the fourth time you saw him on the couch?

A. I do not remember.

Q. What time was it when you saw him on the 5th occasion on the couch when this respondent was sleeping on the couch?

A. I do not remember as to the time it was.

Q. What year was it?

A. 1899 and 1900, that Winter.

Q. The sixth time, when was that?

A. I cannot remember as to the times.

Q. What month was it

A. I do not remember.

Q. What year was it?

A. It was between 1899 and 1900.

Q. And the seventh time, what year? 1359

A. Right along the same time.

Q. And the eighth time was what year?

A. I cannot remember what year it was, either 1899 or 1900.

Q. And the ninth time, what year was that?

A. Quite a number of times. I do not know how many.

Digitized by Google

1360 Q. I am speaking now of the ninth time, when was it, the same year, 1899 or 1900?

A. I cannot remember those times. I kept no track of them, did not keep any diary and cannot remember.

Q. Take the ninth time, what year was that?

A. I cannot tell you as to the ninth time.

Q. Can't tell what year the ninth time was?

A. Any times I seen her there was those dates, but I cannot tell how many times.

Q. Each occasion you saw her there had you been away?

A. Yes.

Q. That is if she happened to come up to the farm that evening when you happened to be away

1361 you came home in the evening and took off your shoes on every occasion?

A. No.

Q. Was there any occasion when you saw her and Charles Hinman in bed on this couch except when you had been away?

A. No sir.

Q. Was it your custom to go away every evening up there?

A. No.

Q. Where did you go when you were away from there evenings?

A. I do not know.

Q. Do you know one evening where you had been?

A. I cannot remember.

1362 Q. Can't you name a place? A. No.

Q. Every occasion you saw them there was an occasion when you went in the sitting room to take off your shoes?

A. Yes.

Q. Every occasion that you saw them there?

A. Not every occasion.

Digitized by Google

Q. Which occasion was it you saw them when you had not taken off your shoes in the sitting room? 1363

A. If they overslept in the morning I saw them when I got up.

Q. Did they oversleep there on the couch when you got up?

A. One morning I seen them on the couch.

Q. What occasion was that?

A. Why I cannot remember.

Q. When was this one occasion when you got up in the morning and Charlie and the respondent had overslept?

A. I cannot remember the time.

Q. The year?

A. During the year of 1899 and 1900 sometime. 1364

Q. What month? A. I do not know.

Q. Who was there at that time?

A. I cannot remember.

Q. Who was first up in the morning

A. I was that morning.

Q. Who went with the milk that morning?

A. Hinman.

Q. What time did you get up that morning?

A. 5 o'clock sometime I guess.

Q. What did you go into that room for?

A. Went in to put on my shoes and they were there and I came out.

Q. Did you put on your shoes?

A. No, brought them out in the kitchen.

Q. For fear you would awaken somebody? 1365

A. So they could get up.

Q. That is you went out of the room so they could get up?

A. Yes sir.

Q. Was there a light in the room that morning when you went in to get your shoes?

A. No sir.

Digitized by Google

Q. Did you take a light with you?

1366 A. I do not remember.

Q. Have you any recollection of it?

A. No.

Q. Did you have a light when you got up that morning?

A. I presume so.

Q. Not what you presume. Did you have a light that morning?

A. I can't remember as to that morning.

Q. Can't remember anything about it?

A. No, usually did have.

Q. Whom did you see around that morning?

A. No one.

Q. Take that particular morning, was the res-

1367 pondent undressed?

A. I do not know.

Q. Was Charlie undressed?

A. I do not know.

Q. Take these other occasions when you have spoken of their being in bed and sleeping on the couch there in the sitting room, was the respondent undressed?

A. I do not know.

Q. And was Charlie Hinman undressed?

A. I do not think so.

Q. Now this morning when they had overslept so you awakened them as you went in after your shoes, had you seen them the evening before when you took off your shoes in the room there?

A. I do not remember.

1368 Q. Do you remember that you had gone into the room the night before and left your shoes?

A. Yes.

Q. Do you remember whether they were in the room or not?

A. I do not remember.

Q. Was anybody in the house so far as you know?

Digitized by Google

A. I cannot remember.

1369

Q. In any event when you went in the next morning this respondent and Hinman were there on the couch in the sitting room, on the couch asleep?

A. I do not know whether asleep or not.

Q. They were both on the couch? A. Yes.

Q. How these different occasions, you say you do not know of having told anybody about the first occasion. Did you talk with anybody about having seen Charles and this respondent on the couch in the year 1899 or 1900 until you told Mr. Yetter about five weeks ago?

A. I cannot remember any time.

Q. You say you talked with Thomas B. Kattell about this case?

1370

A. Yes.

Q. He asked you what you knew about this case the other day. Did you tell him anything about these occasions of finding Charlie Hinman and this respondent in bed on the couch?

A. No.

Q. Didn't mention it to him? A. No.

Q. Why not?

A. I did not happen to think of it.

Q. That was the only reason you can give now?

A. I did not talk with him but a few minutes.

Q. Is that the only reason you can give now?

A. Yes sir.

Q. He asked you what you knew about this case didn't he?

1371

A. No.

Q. Didn't he ask you anything about what you knew about this case or that in substance

A. Yes.

When Mr. Yetter asked me about five months ago about this case I told him about this instance. I think I did, and I told him about five months

Digitized by Google

1372 ago. I did not tell him about each of those occasions.

Q. How many of them did you tell him then?

A. Not any.

I cannot remember the date I first told Mr. Yetter about this occasion. It was about five months ago. I did not tell him about any number of occasions, told him I saw them more than once. Just told him I saw them. He never asked me how many times, just told him. I told him nothing about the morning. I never had told about that morning until now. I had remembered about the morning.

Q. Why didn't you tell Mr. Yetter about the
1373 morning?

A. I was not interested enough about it.

Q. Why were you more interested telling about the evening than the morning?

A. I just told him I saw them there.

He did not inquire when, whether day or night, morning or evening. I simply told him five months ago that I had seen them lying on the couch. I did not tell him whether day or night, morning, noon or evening, week day or Sunday but that I had seen them lying on the couch. I cannot remember when it was that Bayless told me that they were not married. I do not know what year. I cannot remember where, who was present when he told me, or how many times he told me
1374 that. I could not say about how many times. I remember his telling me more than once.

Q. How many times did he tell you that?

A. I do not know.

Q. He kept telling it to you over and over again?

A. Every time we talked about it.

Q. Were you satisfied the first time he told you that they were not married?

A. Yes.

Digitized by Google

Q. And yet you asked him again about it? 1375
A. No I did not ask him.
Q. Did he volunteer it to you? A. Yes.
Q. Over and over again? A. Yes.
Q. At different times? A. Yes.

I do not remember who was present. I do not remember who was present on one occasion when he told me that, or where I was on any such occasion. I say I have heard Melissa say they were not married. I do not know how many times she said that, or when, or where, or who was present. I never talked about it. I cannot remember any particular time or place or circumstances when Melissa Hinman told me they were not married. I remember this young lady who sits here with the black hat and white waist 1376 on. I first saw her on the Hinman farm in the Town of Chenango. Her name is Pearl. I cannot remember when I first saw her there. I cannot remember anything about it. She was there.

Q. Why can you remember the year you saw the administratrix at the farm and cannot remembe the year you saw Pearl Lord there?

A. Because she came up after Bayless' wife left.

Q. Who did? A. Miss Vena Lord.

Q. And did Miss Pearl Lord come up before or after Bayless' wife left.

A. After.

Q. Then why can't you tell the year Pearl came as well as the year Vena first came. 1377

A. Because I cannot.

Q. Can you give me any idea of what year it was when you first saw Pearl Lord at that farm?

A. No.

I do not remember an occasion when Charles Hinman was absent from the farm at Camp and

Digitized by Google

this administratrix came to the farm and to stay
1378 with his mother while he was away. I remember Charlie Hinman was a member of the 20th Separate Company. I remember his going in Camp somewhere with the 20th Separate Company. I do not know that he went every year. I cannot remember that he went in the year 1900 or 1901. I do not know whether he did or not. I do not remember that he left his mother on the farm and that Vena Lord went and stayed with her during Charles' absence in Camp with the 20th Separate Company. I will not swear he did not.

Q. Was not that the first occasion you ever saw this administratrix there on the Hinman
1379 farm to stay any length of time?

A. I do not remember as to that?

Q. Will you swear it was not?

A. No I won't. I do not know.

Q. Now Miss Pearl Lord, did she come there at the farm and stay any?

A. Yes.

Q. When did she come there and stay?

A. I cannot remember as to that.

Q. When was the first year you remember her coming there to stay any?

A. I cannot remember.

I do not know how many years it was while I was there that she came there to stay for a considerable length of time.

Q. Every year Miss Pearl Lord came there to
1380 stay was Miss Vena Lord there

A. I do not remember.

When Pearl was there she slept in the little room on the side of the house towards Binghamton. It was on the southwest corner. It was not in the corner room. I said on the southwest side. It is really on the side towards Binghamton. A

Digitized by Google

large bedroom is between that and the road. Charlie slept in that. On the occasions when Pearl had the little bedroom Charles had the room in front of that and next to the road. The room on the front adjoining his was vacant. There was a third room in the front of the house. Charlie slept in that room when I first came to the farm. While I was there Charlie slept in it part of the time and part of the time nobody slept there. I could not describe the bed in this little room where Pearl slept when she visited the Hinman farm while I was working there. I do not know whether it was a double or a single bed. I presume it was a single bed. 1881

Q. Do you say that while Pearl was there occupying that room while you worked there, that this administratrix slept in that bed with her? 1882

A. Yes.

Q. Every night?

A. I would not say every night.

Q. How many nights do you say she slept there?

A. I could not give the number of times.

Q. Give me one that you knew?

A. I could not state.

Q. Did you see her in bed with Pearl Lord at any time you was there?

A. Yes I have.

Q. Morning, noon or night?

A. I cannot tell as to what time.

Q. Both of them in bed? A. Yes.

Q. In the night? 1883

A. I do not know what time it was. It was probably in the night. I would not say.

Q. Who was with you? A. No one.

Q. Anyone sick at that time?

A. I cannot remember as there was.

Q. Did you see this administratrix in bed with

Digitized by Google

Pearl Lord in that litle bedroom at the Hinman
1384 house on more than one occasion?

A. I do not remember.

Q. By that do you mean you do not remember any other occasion?

A. I cannot remember the number of times.

Q. Did you see them more than once?

A. I do not know.

Q. Describe where the bed stood and what was in that room when Pearl Lord was there?

A. There was not very much in it.

Q. What was in it?

A. I do not know. I cannot remember.

Q. Can you remember anything that was in it?

A. Some things in there but I cannot remember
1385 what at present.

Q. How long did Pearl stay at the farm the first time you saw her there?

A. I do not remember.

Q. Was she there more than once that first year that you saw her there?

A. I cannot remember. I think she was there twice, but I may be mistaken.

Q. Did she stay weeks or months?

A. I cannot remember.

Q. The second year she was there that you saw her, how long did she stay?

A. I do not know.

Q. Weeks or months? A. I do not know.

Q. The third year that she was there, how long did she stay, weeks or months?

1386 A. I cannot remember how many times I saw her there.

Q. Do you know Blanche Lord? A. No.

Q. Never saw her?

A. Yes, when I was going past the farm they said that was Blanche Lord, that is all I knew about it.

Digitized by Google

Q. When was that?
A. The year 1904, when they built the good roads, I would not say for certain. 1387
Q. Did you ever see Dan Lord. A. Yes.
Q. That was a brother of this administratrix?
A. So she said.
Q. Where did you see him? A. At the farm.
Q. Had you seen Roy and Ray her twin brothers?
A. Yes.
Q. Seen them there at the farm? A. Yes.
Q. Were they small boys?
A. Not very large.
Q. How old were they when you first saw them?
A. I could not tell. 1388
Q. When did you first see them there?
A. The year they built the good roads.
Q. Which roads?
A. The road, the first piece that was built on upper Front street, what is termed Hinman's Corners as you turned to go to Chenango Bridge.
Q. That went up on the road past the Hinman farm?
A. Yes.
Q. What year was that built in?
A. It was 1904 I think, I might be mistaken.
Q. Now did these boys work there on the Hinman farm?
A. Yes.
Q. During all the time you worked there, what neighbors houses do you know of Bayless Hinman taking his wife, Mary Hinman, to visit? 1389

By counsel for the petitioner—
Objected to as irrelevant, improper, incompetent, immaterial.

By the Court—Sustained.

Digitized by Google

1390 By counsel for the administratrix—Exception.

Q. What houses there, what neighbor's houses, do you know of Charles Hinman visiting socially while you worked at the Hinman farm?

A. I do not remember.

Q. Do you remember his visiting any people up there socially while you worked there?

A. No. Not unless someone was dead or something.

Q. Going to a funeral?

A. Yes, or on business sometimes.

Q. He did not go to the neighbors unless he had business?

1391 A. No, he was not much of a hand to visit around.

Q. Charlie Hinman's friends were young men about his age residing in Binghamton?

A. Yes.

Q. His acquaintances and intimate friends were here?

A. Yes.

Q. And he did most of his business while you worked on the farm in Binghamton.

A. Yes.

Q. Practically all of it was it?

A. Yes.

Q. And while you were working on the farm and Charlie was running that milk route, did he have a place on Water street where he got his

1392 mail?

A. He used to get some mail.

Q. Practically all? A. I do not know.

Q. Did you ever know while you worked there during the last five or six years of his getting any mail except at the office on Water Street?

A. I do not remember.

Q. Do you mean by that that you do not remember his getting any anywhere else?

Digitized by Google

A. No I do not remember whether he got any. I think he got some both places. When I peddled I used to stop there and see if there was any for him. 1393

Q. In any event you knew he had a post-office address on Water Street?

A. Yes.

Q. And that is where you stopped every morning when you delivered milk to get his mail?

A. Not every morning but sometimes.

Q. Have you any present recollection of Charlie Hinman having received any mail during the last four years you worked at the farm up at the mail box there?

A. I cannot remember.

Q. You knew Charles N. Hinman was receiving a good deal of mail as an officer of the Company addressed as Lieut. Charles N. Hinman? 1394

A. He got some.

Q. That was always addressed to him at Water Street so far as you knew?

A. All that I ever seen was.

Q. You say you called this administratrix the Lord?

A. Yes I used to call her Miss Lord and Vena Lord and I called her the Lord a good deal.

Q. On what occasion would you call her Lord, the Lord, Miss Lord and Vena?

A. Any time I happened to want to speak to her.

Q. Why call her one thing one time and another another? 1395

A. Because it was all right.

Q. Is it not a fact that after you came to know her there you always called her Vena?

A. No.

Q. Did you ever call her Vena?

A. I have.

Digitized by Google

1396 Q. Part of the time Vena and then you became more formal and called her Miss Lord?

A. Yes, called her Lord.

Q. You would say Lord do this and Lord do that?

A. Yes in these terms.

Q. And Lord is this so and Lord is that so, is that it?

A. Yes.

Q. You would not prefix it with Miss?

A. No.

Q. It was not oh Lord but sometimes the Lord?

A. Yes I presume I have sometimes.

Q. When you spoke to her?

1397 A. Yes.

Q. When you addrssed her?

A. Yes.

Q. Now you say she told you she was doing wrong?

A. Yes sir.

Q. And that if she wanted to lead that kind of a life she could go to New York City and get $20. a week if she wanted to?

A. Yes.

Q. You never knew of her going to New York?

A. No.

Q. She told you if she wanted to lead that kind of a life she could do it?

A. Yes sir.

1398 Q. Where was it when she told you that?

A. I do not remember.

Q. Who was present?

A. There was not anybody.

Q. Except the hired man and this young woman?

A. No, no hired man.

Q. You were not running the farm? A. No.

Q. What was your occupation up there?

Digitized by Google

A. I was the hired man. 1399
Q. She was talking over her matters with you?
A. Yes.
Q. When was it?
A. I cannot remember.
Q. Did she say that to you more than once?
A. I do not remember whether she did or not.
Q. Who did you first tell about that conversation?
A. I cannot remember.
Q. What year was it that you had that talk with her?
A. I cannot remember what year it was.
Q. Anything about it?
A. No.
Q. Who did you first tell about it? 1400
A. I cannot remember who.
Q. Who was the first that you remember of telling about it?
A. I cannot remember.
Q. Did you ever tell about it until today on the stand here?
A. Yes I must have.
Q. Who did you tell?
A. I do not know.
Q. Did you tell Mr Kattell when he asked you the other day?
A. I cannot remember.
Q. Don't you know you did not tell him anything of the kind?
A. No I do not. 1401
Q. Will you swear you did?
A. I do not remember about the matter.
Q. Don't you remember you did not tell anything of the kind?
A. I do not remember who I did tell.
Q. How long ago was it you talked with Mr. Kattell?

Digitized by Google

1402 A. It was a week ago last Sunday. He was down to the house and I stopped and talked with him in front of Whitney's store and I talked with him some night since that.

Q. And you cannot remember what you told him?

A. I cannot remember word for word, no.

Q. And you cannot remember whether you told him anything about that?

A. I do not remember in front of Whitney's.

Q. Or at your house?

A. I do not remember.

Q. You can remember what Miss Lord said to you away back there 8 or 9 years ago?

A. Yes.

1403 Q. Word for word? A. Yes.

Q. Is your recollection any better regarding events occurring 9 years ago than regarding what took place a week or 10 days ago?

A. I was telling her as a friend.

Q. I am asking you if your recollection of recents events is any stronger than of events which occurred 7, 8 or 9 years ago?

A. No sir.

Q. You say that you were talking to her as a friend of hers?

A. Yes sir.

Q. And were you talking with Harry Yetter 5 weeks ago or two weeks to-day in his office as her friend?

A. I had nothing against her.

1404 Q. Answer the question?

A. Nothing against the woman.

Q. Were you telling Mr. Yetter that because you were her friend, and did you think you were doing it because of friendship for her?

A. I told him I was at that time.

Q. You told him when you talked with him 5 months ago that you were her friend?

Digitized by Google

A. That I talked to her as a friend. 1405

Q. Did you tell Mr. Yetter 5 months ago that you were Miss Lord's friend?

A. Yes, I told him I was friendly as far as I was concerned?

Q. You knew Mr. Kattell was a partner of mine a week ago last Sunday?

A. Yes.

Q. You knew our firm were attorneys for her in this proceeding?

A. Yes.

Q. And yet you did not tell Tom Kattell, so far as you recall, anything about Charles N. Hinman sleeping on the couch with the administratrix and that she had said to you she was doing wrong and if she wanted to lead that kind of a 1406 life she could go to New York and get $20. a week?

A. He did not ask me.

Q. Did you tell him?

A. I do not know as I did.

Q. Did you tell Mr. Kattell anything about having talked with her as a friend at anytime?

A. I do not think I did.

Q. Why didn't you tell him that?

A. He did not ask me about it.

Q. Why didn't you tell him as long as you and he were talking about this case?

By counsel for the petitioner—

Objected to, not cross examination, the witness is made respondent's own witness and he should 1407 be permitted to tell the conversation he had with Mr. Kattell.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. Why have you taken such an interest in this case

Digitized by Google

By counsel for the petitioner—

1408 Objected to, no evidence he has taken an interest in this case.

By the Court—Sustained.

Q. What have you done in this case?

A. Not anything.

Q. Did you tell Mr. Yetter about Bunt?

A. Yes sir.

Q. Did he ask you about Bunt?

A. He asked me who I introduced to her and I told him Mr. Bunt.

Q. Do you remember the year you introduced her to Bunt?

A. The Fall of 1901 I think.

1409 Q. Was Mrs. Bunt present when you introduced Bunt to her?

A. I do not think so.

Q. Whereabouts was Bunt and this administratrix when you made the introduction?

A. Kitchen of the Hinman house.

Q. How do you fix the year?

A. About a year before Bayless died. He died the fall of 1902.

Q. What was there with reference to that introduction that connects itself with Bayless Hinman's death?

A. Nothing.

Q. Why do you say about a year before he died?

A. Because it seems to me it was.

1410 Q. May it have been two years before Bayless Hinman died?

A. No.

Q. Is it possible?

A. No I do not think so.

Q. Is it possible you are mistaken about that?

A. I do not think so.

Digitized by Google

I last spoke to this administratrix the summer they built the Good roads in 1904 I guess. 1411

Q. You were discharged by Charles N. Hinman were you not?

A. No sir.

Q. You know the administratrix was the cause of your leaving the farm?

A. No sir.

Q. You remember an occasion Pearl Lord was there, the year you left the farm, and when she and the administratrix and Charles N. Hinman saw you in Melissa Hinman's room?

A. No sir.

Q. Will you swear that did not occur?

A. Yes.

Q. Did you tell Mr. Kattell or inquire of him whether or not you could be interrogated concerning anything outside of this case? 1412

By counsel for the petitioner—Objected to as improper.

By the Court—Overruled.

A. Yes sir.

Q. Did you at that time know that this administratrix knew something concerning your transactions at the farm you did not want to tell?

A. No sir.

Q. Did you ever do anything at that farm in connection with your work that you were ashamed of?

A. No sir. 1413

Q. Never did a thing?

A. No sir.

Q. Was Miss Pearl Lord at the Hinman farm in the summer of 1903?

A. I do not remember.

Q. The last year that you worked there?

A. I do not remember.

Digitized by Google

1414

Q. Will you swear she was not?

A. No sir.

Q. Will you swear she did not see you in Melissa Hinman's room there in 1903, summer of 1903?

By counsel for the petitioner—

Objected to as improper, immaterial, irrelevant, already gone over.

A. No.

Here an adjournment was taken until July 28, 1910, at 9:30 o'clock A. M., at which time the hearing was resumed, same appearances being

1415 made.

Cross-Examination of James Maxwell continued by Mr. Hinman—

Q. Is your memory and recollection any better this morning than yesterday?

By counsel for the petitioner—Objected to as improper.

By the Court—Sustained.

By counsel for the administratrix—Exception.

I am not able to fix the first year I saw Pearl Lord at the Hinman farm. I cannot just remember what year it was.

Q. Who first suggested to you the year 1899

1416 or 1900.

A. About what.

Q. Anything? A. No such thing mentioned.

Q. By anyone?

A. No sir.

Q. What thing do you remember of having happened in 1899?

Digitized by Google

By counsel for the petitioner—
Objected to, already covered on cross examination. 1417

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. What event can you fix as having occurred in 1900?

By counsel for the petitioner—Same objection.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. What event can you recollect having occurred in 1901? 1418

By counsel for the petitioner—Same objection.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. What event can you fix as having occurred in the year 1902?

By counsel for the petitioner—Same objection.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. Did you testify yesterday that you first saw Vena Lord there at the Hinman farm the summer after Mary left?

A. No sir. 1419

Q. You did not so testify yesterday?

A. No.

Q. When did you first see her there?

A. The summer before Mary Hinman went away from the farm.

Q. Is that what you testified to yesterday?

A. I think so yes sir.

Digitized by Google

1420

Q. Are you sure? A. Yes sir.
Q. The summer before? A. Yes.
Q. What time in the year did Mary Hinman leave the farm?
A. Sometime in the Fall.
Q. What year? A. In the year of 1899.
Q. So then you saw Vena Hinman there in the summer of the year of 1898?
A. No.
Q. 1899? A. 1899, that summer.
Q. Did you on the stand yesterday tell all that you remembered about this case?
A. No not all that I remembered.
Q. You did not tell yesterday all that you
1421 remembered about it?
A. No.
Q. Do you remember more this morning about it than you did yesterday?
A. No.
Q. Now when you talked with Mr. Yetter 5 months ago did you tell him all you knew about the case?

By counsel for the petitioner—Objected to, already gone over.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. Is there anything which you testified to
1422 yesterday on your direct or cross examination which you desire to change this morning?
A. No sir.
Q. Stand by it all? A. Yes sir.
Q. And you think you made no mistake in your testimony yesterday?
A. I do not think so.
Q. Quite sure about that? A. Yes sir.

Digitized by Google

Re-Direct examination by Mr. Yetter— 1423

Q. Counsel asked you on cross-examination about conversations you had with Mr. Kattell. Just tell what those conversations were?

By counsel for the administratrix—

Objected to on the ground that counsel did not ask for the conversation with Mr. Kattell, assuming facts not proven, incompetent and improper.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. I stopped Mr. Kattell on the street and asked him if I was obliged to tell any matters ask-me regarding my own personal matters?

Q. Prior to that conversation did you have a 1424
conversation with Mr. Kattell when he came to see you?

A. Yes.

Q. State what that was?

By counsel for the administratrix—

Same objection, incompetent, improper, incompetent, declaration in the witness' own favor, and immaterial, irrelevant, no foundation laid.

By the Court—Sustained.

Q. How many conversations did you have with Mr. Kattell?

A. Two.

Q. When was the first one?

A. Two weeks ago last Sunday. 1425

Q. Where.

A. He came up to the ice house on South Street where I was working.

Q. Was it in that conversation that you had the talk with him to which you have referred with reference to becoming a witness in this case?

A. Yes.

Digitized by Google

1426 Q. State what that conversation was?

By counsel for the administratrix—
Objected to as incompetent, improper, immaterial, hearsay declaration in the witness' own behalf, calling for a conversation concerning which he was not interrogated on cross examination, the only question as to that interview being, did you tell Mr. Kattell the circumstances in connection with sleeping on the couch, and he said he did not, and asked why, and he said he did not think of it.

By the Court—Sustained.

By counsel for the petitioner—Exception.

1427 Q. Did Mr. Kattell in this conversation that you have referred to say in substance that he wanted to talk to you about the Hinman case?

By counsel for the administratrix—
Objected to on the same ground as stated in the objection to the last question.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. Yes.
Q. What did you say in reply?

By counsel for the administratrix—
Same objection on the same ground.

By the Court—Overruled.

1428

By counsel for the administratrix—Exception.

A. I told him I had a friendly feeling towards him but I could not help him a bit, that he was in it for what there was in it and I did not blame him a bit for doing it, but they were never married and he knew about the matter as well as I

Digitized by Google

did, and I could not help him a bit and I was very 1429
sorry.

Q. Now on those occasions that you have testified to when Vena Lord stayed there at the house and slept on the couch with Charles N. Hinman over night, do you know how she returned to the City?

By counsel for the administratrix—

Objected to as incompetent, improper, going over a matter that has already been threshed out on direct and cross examination, improper in form. immaterial and irrelevant.

By the Court—Overruled.

By counsel for the administratrix—Exception. 1430

A. She came down with Mr. Hinman.

Q. How? A. On the milk wagon.

When he started away with his milk, it might have varied a little, usually about 4 to 5:30 o'clock.

Q. You were asked by counsel whether when you left there in the Spring of 1903 you were discharged?

A. No sir.

After I left there in the spring I went back to work. Charles N. Hinman asked me to come back. I went back and peddled milk a little in the forepart of the summer and brought my machine down and helped them in haying. I do not remember how long I helped them in haying until they got through. It was several days. 1431

Re-cross examination by Mr. Hinman—

Q. When was this you went back to work?

A. In the summer of 1903.

Q. You did not stay there long did you?

A. Until they were through haying.

Digitized by Google

1432 Q. You did not stay but a few days?
A. Just a short time, while doing the haying.
Q. And you never went back after 1903?
A. No sir.
Q. I asked you yesterday if you were not discharged in 1903?
A. I said I was not.
Q. Yesterday I asked if you were discharged in 1903 didn't I?
A. Yes.
Q. After you got through in 1903 did you ever go back to that farm to work?
A. No.
Q. Ever go back there visiting?
A. I do not think so.

1433 Q. Did you ever speak to Charlie Hinman on the streets after that time?
A. Yes.
Q. Where?
A. Every place I saw him.
I told Mr. Kattell I did not blame him a bit, he was getting paid by this woman, but I says I cannot help you any. When I spoke to Mr. Kattell I said he was in it or getting paid for it something to that effect. I did not know that he was getting paid. I did not suppose he was doing it for nothing. I did not know anything about it. in 1901, 1902, 1903 and 1900 Thomas Kattell was living in the City of Binghamton. I never saw him at the Hinman house.

1434 Q. So far as you know he had never been there?
A. I never saw him there. Yet my declaration to him was that he knew as much about this case as I.
Q. You are certain about that?
A. That I told him so, yes sir.
When Vena was there at the house on these oc-

Digitized by Google

casions to which I testified she went down on the milk wagon with Charlie Hinman. 1435

Q. Each morning? A. Yes sir.

Q. You got up you said about 5 o'clock?

A. Somewhere about there yes.

Q. Charlie Hinman usually left the farm with his milk wagon about four o'clock, along about that, is that true?

A. He did.

Q. That is true?

A. Yes, intended to leave about 4 o'clock.

Q. Usually got up and fed his team about 3:30?

A. Along about that.

Q. Yet every morning on these occasions you testified to yesterday, eight or more, Vena left with him on the milk wagon in the morning? 1436

A. I did not testify nine or more.

Q. You testified yesterday 8 or more?

A. I did not.

Q. How many were there?

A. Several occasions.

I cannot tell as to how many but on every one of them she went down on the wagon with him.

Q. How do you know? A. I saw her.

Q. Every morning? A. Yes.

Q. Where were you when you saw her?

A. Around there some place.

Q. Where were you.

A. Around the place somewhere.

Q. Whereabouts? A. I cannot tell.

Q. Name one place where you were one morning? 1437

A. I cannot remember.

Q. Whether in the house, up-stairs, down-stairs or in the cellar?

A. Around there some place.

Q. Where?

By counsel for the petitioner—Objected to, already covered.

Digitized by Google

1438

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. How did you happen to get up every morning when she was there in time to see them go?

A. I got up about such a time.

Q. You testified the usual time Charles left with the milk wagon was about 4 o'clock?

A. Anywhere from 4 to 5:30.

Q. Have you testified here this morning that his usual time for leaving with the milk wagon was about 4 o'clock?

A. That was his intentions.

Q. Have you testified that was the usual time
1439 for him to leave?

A. Yes.

Q. Was it true when you testified to it?

A. That was the time he was supposed to leave.

Q. Was it his usual time leaving? A. Yes.

Q. Did you so testify? A. Yes.

Q. Was it true? A. Yes sir.

Q. Have you testified that your usual time for getting up was about 5?

A. Yes.

Q. Was that true? A. Yes.

Q. Then on these mornings she was there and leaving with him on the milk wagon were you up at 4 to see them go?

A. I was not up at 4. I was at 5.

1440 Q. On those mornings who was up first?

A. Somtimes he and somtimes I.

Q. Which time were you up first and which times he?

A. I cannot remember

Q. Do you remember any of them?

By counsel for the petitioner—

Objected to, already covered on cross examination.

Digitized by Google

By the Court—Sustained.

1441

By counsel for the administratrix—Exception.

Q. Why didn't you mention this yesterday that you saw her go away with him the next morning?

A. You did not ask me.

Q. Were you asked yesterday to tell anything that happened the next morning, on cross examination, anything you remembered happening?

By counsel for the petitioner—

Objected to, the record is the best evidence of what he was asked.

By the Court—Sustained.

By counsel for the administratrix—Exception.

1442

Q. Didn't you testify yesterday that you could not remember anything that happened the next morning?

By counsel for the petitioner—Objected to, already covered.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. Who suggested to you giving this testimony this morning that Vena left on the milk wagon with him the next morning?

A. No one.

Q. Had you mentioned it to anybody?

A. No sir.

1443

Q. Had you mentioned it to anybody at any time until you told it in the chair there?

A. No sir.

Q. Never to a soul?

A. No sir.

Q. From that day to this?

A. Might have but I do not remember it.

Digitized by Google

1444

Q. So when Mr. Yetter asked you the question so far as you know he did not know anything about that?

A. He did not ask me that.

Q. Didn't he ask you how she went away the next morning?

By counsel for the petitioner—
Objected to, record is the best evidence.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. Did you ever see her, that is Vena, go away with Charles Hinman on the milk wagon any
1445 morning from there before 5 o'clock?

By counsel for the petitioner—Objected to, already been covered.

By the Court—Overruled.

A. No sir.

Q. Was that the same summer when she stated to you that she was working at Dr. Daley's?

A. Yes sir.

Q. What time would the milk wagon usually reach the city of Binghamton? How long would it take to drive from the Hinman farm here?

A. According to how late it was.

Q. Did it take any longer to drive here when late than early?

1446 A. Did not take as long.

Q. How long did it take usually to drive from the Hinman farm to the city of Binghamton with the milk wagon?

A. About ½ or ¾ of an hour.

Q. Did you ever drive that milk wagon and double team from the Hinman farm to where they commenced peddling milk in 30 minutes?

Digitized by Google

A. I have driven it in 30 minutes. 1447
Q. Farm team?
A. A team I peddled milk with.
Q. What kind of a team?
A. Small pair of ponies usually.
Q. What kind of a wagon?
A. What is termed as a low-down wagon.
Q. A milk wagon with enclosed body?
A. Yes.
Q. And milk cans in it?
A. Yes.
Q. You drove down in half an hour from the farm to what point?
A. To Prospect Street.
Q. About five miles? A. Yes sir.
Q. Was that the usual driving time? 1448
A. No sir.
Q. This was a team that you would leave unhitched when you delivered milk at the houses?
A. Yes.

T. E. DORMAN, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows.

I reside in Buffalo. Have resided there two years this Fall. Before going to Buffalo I resided in Binghamton four years. Before going to Binghamton, I resided at Glen Castle, about a mile from the Hinman farm. I was acquainted with Charles N. Hinman, Henry Hinman, Melissa, 1449
Mary, Bayless' wife. I met Vena Lord at one time. It was when I was passing the house and Charles was out in the front yard doing some work on the lawn and he called me in to see a sick lamb. I hitched my horse and went in and while we were going in I says to Charles, you miss your brother Bayless at this time. He says, yes

Digitized by Google

1450 we do in a way. Then we went on into the house, in the kitchen. The lamb was in the kitchen and Miss Lord, as she was introduced to me, was there with the lamb at that time. Charles Hinman introduced me. He said, Miss Lord make you acquainted with Mr. Dorman and she responded. That was in the summer of 1903. I fix the date by Bayless having died just previously and the following Fall I moved to Binghamton. I lived at Glen Castle all my life before I moved to Binghamton. Miss Lord went there some time before this, a long time before this. While I lived there at Glen Castle, say for the years I knew Vena Lord was at the Hinman farm, I had heard the subject of her relations with Charles N. Hinman discussed

1451 by people in that vicinity.

Q. And do you know what the reputation was, as to whether Charles Hinman and Vena Lord were married, judging from the speech of the people in that vicinity during the time you knew she was there, as you have stated, down to 1903?

A. Yes.

Q. What was that reputation?

By counsel for the administratrix—

Objected to as incompetent, improper, inadmissible, immaterial, not the proper method of proving the issue here, no sufficient foundation laid, no part of the res gestae, hearsay, witness not shown to have personal knowledge of the relations between these parties, nor is it shown that the

1452 persons whom he heard talk had personal knowledge.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. That they were not married.

Digitized by Google

Cross-Examination by Mr. Hinman— 1453

My business is a salesman for D. Boezing of Buffalo. He is in the dairy and egg business. I have been with him two years. His place of business is 154 Michigan Street. I live at No. 203 West Utica Street. I am a married man and have three children. When I lived in Binghamton, I lived on Chapin Street, 134. I lived there four years renting of George N. Cobb. While here in Binghamton I was a butter and egg salesman for Corbin, for over two years. The rest of the time I worked for E. Y. Andrus in a grocery store and meat market on Vestal Avenue. I do not know how many salesmen this man has. I say that Charles N. Hinman called me in to see a sick lamb as I was passing. I am not a veterinary surgeon. 1454 I was a butcher. I had treated and doctored sick stock for people other than myself. I treated a cow for Eugene Page. I had never doctored sick lambs. I was alone at that time, going home from Binghamton, where I had been with a load of meat. It was in the afternoon during the summer. I heard him speak to Miss Lord several times. He called her Vena and said he would not lose the lamb for $100. and spoke about getting a veterinary surgeon. I stopped a few days afterwards and he said the lamb died of hydrophobia, and he says, how fortunate you and Vena did not get near the lamb. I had the lamb's mouth open.

Q. Was he handling the lamb?

A. He put his hand on the lamb while I was 1455 there.

Q. How large was the lamb?

A. A pretty large lamb.

Q. Give us its weight?

A. I should think would weigh about 200.

Q. What did you see about the condition of the lamb?

Digitized by Google

A. I see that it was sick and would not eat.
1456 Q. Anything else you observed about it?
A. No sir.
Q. Was it lying on the kitchen floor?
A. No sir, the lamb was standing up.
Q. In the kitchen? A. Yes.
Q. At the Hinman farm house? A. Yes.
Q. Weighing about 200
A. Yes it was a pet lamb they told me they had brought up.
Q. Was this later than July?
A. I could not say what time it was, during the Summer of 1903.
Q. What would be your recollection whether it was July or August?
1457 A. I could not tell.
Q. Have you any recollection about it?
A. Nothing more than that.
Q. You have butchered stock and peddled meat for some time?
A. Yes.
Q. And you are a fair judge of the weight of animals?
A. I think I am.
Q. All you saw about this lamb was that it was standing and would not eat.
A. Yes, evidently was sick.
Q. What did you see about it indicating sickness except that it would not eat?
A. It was trembling all over.
Q. What else did you observe about the lamb
1458 except it was standing up, would not eat and was trembling?
A. That was all.
Q. What was there for it to eat? A. Milk.
Q. Where was the milk. A. On the floor.
Q. In front of the lamb?

Digitized by Google

A. They offered it to him several times while I was there. 1459

Q. What do you mean by several?

A. 4 or 5 times while I was there.

Q. How long was you there?

A. Perhaps 20 minutes or half an hour.

Q. Who else did you see at the house?

A. Only the ones I have mentioned.

Q. Not another soul?

A. No sir.

Q. Inside or out?

A. No sir.

Q. You spoke about going into Bayless' house and then changed it into the Hinman house, why did you speak of Bayless' house?

A. It had always been Bayless' home. 1460

Q. Why did you call it Bayless' home?

A. The Hinman home.

Q. You started to say Bayless' home and then you changed it?

A. It was his until he was driven out.

Q. He was driven out, was he?

A. That was the talk.

Q. After he was driven out it was not his home. Why do you call it Bayless' home when you started about this lamb business?

A. That is the way we always spoke of it, as Bayless Hinman's home and Charles' home.

Q. You say you knew Bayless was dead?

A. Yes.

Q. And you knew that he had been driven out?

A. Yes that was the talk. 1461

Q. And you said to Charlie, you must miss him, and he was dead?

A. Yes sir.

Q. Do you think they missed him any more dead than after he was driven out?

A. I mentioned it on this special occasion.

Q. When did they come after you?

Digitized by Google

1462

By counsel for the petitioner—
Objected to. It does not appear anybody came after him.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. When were you subpoenaed?

By counsel for the petitioner—
Objected to, no evidence he was subpoenaed.

By the Court—Sustained.

By counsel for the administratrix—Exception.

1468 Q. Have you been subpoenaed as a witness here?

A. I was asked to come here.

Q. Do you know what a subpoena is?

A. No, I never was subpoenaed in a suit in my life.

Q. Have you been served with a paper directed to you in which you were directed to be in this court this morning or any other morning?

A. Yes sir.

Q. When was that served on you?

A. Tuesday.

Q. Where were you when it was served?

A. Buffalo.

Q. Have you that paper with you

A. I do not know whether I have or not. I

1464 have not.

Q. Where is it?

A. Home.

Q. Why did you leave it there?

A. I simply came away without it, that is all.

Q. Why didn't you bring it with you?

A. I had not much time to prepare in.

Q. Is that the reason you left it?

Digitized by Google

A. I left lots of other things I might have brought with me. 1465

Q. Tell me why you left that piece of paper?

A. That is the only reason I know.

Q. Who served that paper on you?

A. It was at the house when I got home.

Q. Then it was not served on you?

A. It was at the house when I came from work.

Q. Then it was not handed to you personally by anyone?

A. It was handed to me by my wife.

Q. How did it get to the house.

A. I do not know.

Q. Did she hand you anything when she handed you that paper.

A. What have you reference to? 1466

Q. I have reference to whether she handed you anything at the time she handed you the paper except the paper?

A. No sir.

Q. Has anybody handed you anything except the paper in connection with this case?

A. No sir.

Q. Tell me what was on that paper?

A. It requested me to be here yesterday and I could not get here yesterday.

Q. Did you read the paper? A. Yes.

Q. Tell me how it read?

A. It stated to be here yesterday.

Q. Who was it signed by?

A. Wilber & Yetter.

Q. Any other name signed to it? 1467

A. No sir.

Q. Type written or written with a pen?

A. Typewritten.

Q. On a letterhead?

A. Yes sir.

Q. Whose letterhead was it?

Digitized by Google

1468 A. Wilber & Yetter's.
Q. Directed to you?
A. Yes sir.
Q. Mr. T. E. Dorman?
A. Yes sir.
Q. What did it say?
A. It told me to be here anytime Wednesday.
Q. Just give me the language of the paper as near as you can?
A. That is all it said, be here Wednesday at anytime.
Q. Did your wife hand you the envelope in which it came?
A. Yes.
1469 Q. So it was a letter from them to you?
A. Yes.
Q. Did you know them before that?
A. No never met either of them, had heard of them.
Q. And do you call that a subpoena?

By counsel for the petitioner—
Objected to, what he calls it.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Q. Is that the only paper you have received in connection with this case?
A. I received a telegram.
1470 Q. Who was that from?
A. Wilber & Yetter.
Q. When did you receive it?
A. Sometime last night, yesterday afternoon.
Q. There in Buffalo? A. Yes.
Q. Have you received anything from anyone except the letter and telegram?
A. No sir.
Q. Had you written to Wilber & Yetter anything?

Digitized by Google

A. No sir. 1471

Q. Had anyone seen you about this case until you got in Binghamton?

A. No sir. I reached Binghamton this morning, 4:20. When I reached the city went to a restaurant up here, Haight & Smith's on Court Street. Went right from the train there. I then went to my sister's, 27 Parsons street. Her name is Griffin. From there I came back over town, stopped in a barber shop on Exchange street and from there to Wilber & Yetter's office. No one went to their office with me, nor met me at the train or restaurant. My sister and brother-in-law met me at my sister's. I had Wilber & Yetter's address in my mind, it was 1007 Press Building, Binghamton, N. Y. 1472

Q. Do you know Henry Hinman? A. I do.

Q. Who had you seen about this case before you got the letter from Wilber & Yetter requesting you to be in Binghamton yesterday?

A. I had seen no one.

Q. Whom had you heard from.

A. Wilber & Yetter.

Q. When did you hear from them?

A. Perhaps a week ago.

Q. What did you hear? In what way did you hear?

A. You want me to state just how I heard and why I heard from them?

Q. You heard the question didn' you?

A. I had a request by letter to come here. 1473

Q. When was that?

A. Last week I think. I got the letter too late to come at the time they asked me to come so I did not come at that time.

Q. That is, you received a letter from them asking you to come here last week?

A. Yes.

Digitized by Google

Q. And you did not come at that time?

1474 A. Not until this morning.

Q. You have now told of two letters you received from Wilber & Yetter and a telegram?

A. Yes.

Q. Not long ago you said all you received was two papers, a letter and a telegram, now you say three. Did you receive three?

A. I received three papers.

Q. Have you received any communications from anyone except the three letters you speak of, or two letters and a telegram from Wilber & Yetter?

A. No sir.

Q. Nor from anyone?

1475 A. No sir.

Q. Had you received a communication of any kind, verbal or written, about this case?

A. No sir.

Q. So from the day you saw the sick lamb on the Hinman farm in 1903, down until this morning, you have not discussed the case with anyone?

A. With my wife, yes.

Q. I asked you if you had talked with anyone since and you said no?

A. I said I had talked with my wife about it and talked with no one else until I talked with Mr. Yetter this morning.

Q. You talked with your wife when you got home from the Hinman farm that day?

A. Yes.

1476 Q. From the time you talked with your wife in 1903, until you talked with Mr. Yetter, you had not talked with anyone about this matter?

A. No one except my wife. I have talked with her about it since.

Q. When?

A. At the time I read it in the Binghamton Press, this suit.

Digitized by Google

Q. When did you read it in the Binghamton 1477
Press.

A. I read the first of it, I could not tell just when it was.

Q. About when was it?

A. I could not state. I picked up the paper in a store in Buffalo.

Q. When?

A. I could not answer just when. I should think it was all of two weeks ago.

Q. Your recollection would be about two weeks ago?

A. That or more.

Q. Three weeks?

A. I could not state exactly. It was all of two 1478
weeks.

Q. What do you mean, when the trial of this particular case commenced in this Court, when the taking of evidence before Judge Parsons in this action in this Court?

A. Yes.

Q. So that from the time you talked with your wife in 1903, the same day you were there at the Hinman farm and saw the sick lamb, down until the evidence in this case was being taken in this Court, you had not talked with anyone about that?

A. No sir, not to my recollection.

Q. And then the only one you had spoken to about it was your wife until you spoke to Mr. Yetter about it in his office this morning in Bing- 1479
hamton?

A. Yes.

I have been to the Hinman house many times. I could not recall just the times. My wife and I never visited there. The occasions of my going to the Hinman house were matters of business or my stopping to talk. I did not make social visits at the house, only with the boys out doors. I never went in the house to make a visit.

Digitized by Google

1480 Q. Was this the only time you were ever in the Hinman house?

A. No sir, been in there many times.

Q. How long was it since you had been in the Hinman house up to the time you went to see the sick lamb?

A. I could not state.

Q. Can you state approximately?

A. Had not been a year anyhow.

Q. Who did you see when you went there before?

A. Charles only. I went there to see Charles on personal business. I was at the Hinman kitchen. He was washing milk cans. I was there about five minutes. I went there to see him about some
1481 cows, to sell him some cows. He was in the kitchen about half a minute and went out washing cans during the time. I could not say when prior to that I was last at the house.

Q. Had you been there within a year in the Hinman house?

A. I could not say.

Q. Had you been there in two years, in the house

A. I could not state that I had been in the house.

I worked there a good many times off and on. I do not think I worked there in 1899. I did not work there in 1900, 1901 or 1902. I could not say that I was at the Hinman house in 1898 nor in it in 1899, 1900, 1901 or 1902. I was there in 1903
1482 once that I know. The only occasion that I am able now to testify to having been in the Hinman house between January 1, 1898, to the present time is this one occasion when I went to see the sick lamb in 1903. I made no minute of what occurred at the time. It was impressed on my mind enough without any minute.

Digitized by Google

Q. That is about the only occasion that was impresed on your mind during the three years, 1902, 1903 & 1904? 1483

A. That is the only one I recall now.

Q. You say you heard people speaking about the relations of these persons?

A. Yes sir.

Q. Who were they?

A. I do not care to state who they were. It was common talk with them all.

Mr. Hinman: I move to strike it out as not responsive.

Court: It may be stricken out.

Mr. Hinman:

Q. Who were they? 1484

A. John Hugaboom for one, James Maxwell for another, Harry Paramalee for another.

Q. Go right on, name others if you remember any?

A. James Winfield.

Q. Any others?

A. That is all I recall just now.

Q. Where did you have your talk with Hugaboom?

A. Personally I never had a talk with him. I overheard the conversation at the store.

Q. Who was he talking with?

A. All of us in general.

Q. Who was there when he was talking?

A. I have named them. He was talking with James Maxwell and Harry Paramalee in my presence. 1485

Q. That is, Hugaboom was speaking with Maxwell and Paramalee the two being with you or sitting there together in the store?

A. Yes sir.

Q. When was it?

Digitized by Google

1486

A. I could not state just when.
Q. About when?
A. I could not say.
Q. What year was it?
A. I could not say, we were all talking.
Q. Did you talk with Hugaboom personally?
A. No.
Q. With Maxwell?
A. No.
Q. Did you talk with Paramalee?
A. No sir. I spoke in general, not speaking to any one of them, and they all did the same.
Q. Did Hugaboom make this statement, or did you make the statement or did Maxwell make
1487 the statement or Paramalee or did you all make the statement?
A. We all made the statement to that same effect.
Q. Who made that statement first?
A. Hugaboom. I do not remember just how it came up.

The occasion when I heard James Winfield talk about it wat at his home at West Chenango, about two miles from Glen Castle. I could not state what year it was.

Q. Who was present at that time?
A. Balis, I and James Winfield were riding to town together.
Q. Then it was not at his house?
1488 A. Not at that particular time.
Q. Where were you when that particular talk was?
A. Several times I talked with James Winfield about it.
Q. You spoke of an occasion you heard him talk at his house. You say now that it was Balis Hinman, yourself and himself when driving to town?

Digitized by Google

A. We got in the wagon at James Winfield's house and drove to town. 1489

Q. That was you and Balis Hinman?

A. And James Winfield.

Q. What year was it?

A. I could not say.

I was up there on business. I was there buying a piece of property and James Winfield was helping me. I bought it at auction in front of the Court house. It was sold under a mortgage here. I got the deed from Charles Howland. He bid in the place for me. He took the deed in his own name and then deeded it to my brother. I sold it to him. The deed never came to me. The contract went to me and the property was deeded to my brother. This talk I had was on my way 1490 down here to bid in the property. I cannot remember who owned the place at the time it was sold under a mortgage foreclosure. It was bid off by Charles Howland, who now lives in the Town of Maine. The farm was located at Glen Castle; consisted of 40 acres, and was known as the old Siver farm. I had lived on it two years under a contract with Charles Howland. A. D. Wales was the attorney who sold it. This talk I had with Winfield and Balis Hinman, which I have mentioned, was the day of the sale. It was during the time I went to live on the place under the contract. I do not know as it was just the day of sale, but it was during that time. I have testified that that talk ocurred on the day I came down to the sale and to the best of my knowledge 1491 it is true. My brother's name is Darwin Dorman and he lives at Glen Castle. There is no doubt but what I had a talk with Winfield.

Q. Is there any doubt about that talk you had with Winfield about these people being un-

Digitized by Google

1492 married on that day when you, he and Balis Hinman were on your way or getting into the wagon to come to Binghamton to attend the mortgage foreclosure sale?

A. I do not know as the farm was sold that day but we came down to see about it.

By Attorney for Administratrix—I move to strike the answer out.

By the Court—It may be stricken out.

By Attorney for Petitioner—Exception.

Q. Is there any doubt, as you think it over, of the fact of the correctness of your statement that
1493 the talk which you had with James Winfield, which you said you had about whether those two people, Charles N. Hinman and this administratrix, were married, was had on the day when you, Balis Hinman and he came to Binghamton to attend the sale on mortgage foreclosure?

By attorney for petitioner—Objected to as improper, already covered on cross examination.

By the Court—Overruled.

By attorney for petitioner—Exception.

A. I know he was coming down to see about the sale of the place but do not know whether the sale was made on that day or not.

1494 By counsel for administratrix—I move to strike the answer out.

By the Court—The answer may be stricken out.
By counsel for petitioner—Exception.
A. There is no date in my mind about that.
Q. Are you any relative of the Hinmans?
A. I am not.
Q. Is your wife any relative of theirs?

Digitized by Google

A. No.

Q. These men you named, Hugaboom, Winfield, Maxwell and Hinman were they intimate friends of yours?

A. No sir.

The place which I bought on foreclosure sale the sale was postponed several times. They could not agree on the sale of it and it was postponed. I was down at this sale several times. A minister owned it and his heirs could not agree on a sale and it was postponed and I came down several times with reference to this sale. I am 36 years of age.

FRANK JEWELL, being called as a witness for the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I reside about one-half mile south of Chenango Bridge in the Town of Fenton, on the east side of the Chenango River. I am a brother-in-law of Henry Hinman. We married sisters. I was acquainted with Charles Hinman, with Balis Hinman, with Henry and with Melissa. I have known the Hinmans thirty years. I have met this respondent. The first time was in 1902. It was the latter part of February, or 1st of March, 1902. She was at the residence of Mr. Charles Hinman in the Town of Chenango. I was introduced to her in the room they used as a sitting-room in the Hinman residence. Mr. Charles Hinman introduced me. He introduced her as Miss Lord. He says: "Mr. Jewell, Miss Lord." She acknowledged the introduction.

Cross-Examination by Mr. Hinman—

The business that took me to the Hinman farm was to sell a typewriter. I made no record of the

Digitized by Google

1498 time. I was not working for any Company. I owned a typewriter and I wanted to sell it. I did not dispose of it. I went over alone. The way I fixed the time as being in February or March is I wanted to raise some money and I wanted to sell the typewriter as I had no particular use for it. I did not make a sale to Charles Hinman and I borrowed the money on a personal note I gave. The note was dated March 8th, 1902. The note was given to Fred Amsbry. It has been paid. I have it with me here. I saw old Mrs. Hinman, Melissa, Miss Lord and Charles Hinman over at the Hinman house. I do not know where Bayless was. I did not see any of the hired help. I do not remember of being at the Hinman farm in
1499 a long while before that. I do not remember when I went there after that I heard Charles Hinman wanted to buy a typewriter and I took it over there to sell it to him. This administratrix and Orpha, Henry Hinman's wife, visited at my house when Charlie Hinman had moved from the farm and lived here in Binghamton. I think it was the time when Miss Lord was living at Henry Hinman's on Exchange St. I knew that she and Charlie were living at Henry's on Exchange Street for a time. It was during that period that they were at my house. Inez Clark, Henry Hinman's daughter, was with them. I met Miss Lord and Inez Clark at the car and took them up to my house. I have forgotten how Orpha got up there. At that time this administratrix was known
1500 as Mrs. Hinman.

By the Court—When was it she was known as Mrs. Hinman?

A. The time she and Charles was living at Henry Hinman's on Exchange Street.

I do not recollect any time when I first heard her called Mrs. Hinman. I cannot fix the date.

Digitized by Google

MARY WILSON, being called as a witness for 1501
the petitioner in rebuttal, being duly sworn and examined by Mr. Yetter, testified as follows:

I reside at Lestershire. I was at one time the wife of Bayless Hinman. I left the Hinman farm in the Fall of 1899, in the latter part of October. I had lived there for some years prior to that time. Before I left there I had seen the respondent, Vena Lord, at the Hinman farm. She would usually come up in the afternoon and go back in the evening, sometimes before dark and sometimes after dark. She came on a wheel generally, always I guess, and went back that way.

Q. Were you acquainted with Lois K. Johnson?
A. Some.
Q. Was she acquainted with the Hinmans? 1502
A. Yes.
Q. Where did she live?
A. At Nimmonsburg.
Q. She visited at the Hinmans?
A. Yes before I was there.

By counsel for the petitioner—

We offer in evidence record of a deed given by Charles N. Hinman to John W. Osterhout dated April 1, 1904, and recorded in the County Clerk's Office of Broome County on the 7th day of April, 1904, at 8:30 o'clock A. M., in Book of Deeds No. 196 at page 89.

By the Court—For what purpose is that offered?

1503

By counsel for the petitioner—

It is signed by Charles N. Hinman alone in 1904, a warranty deed.

By counsel for the administratrix—

Objected to as incompetent, improper, inadmissible, irrelevant, not proof of any affirmative fact in this case but an attempt to prove a negative,

Digitized by Google

1504 and not binding upon the respondent and hearsay.

By the Court—Overruled. It may be received.

By counsel for the administratrix—Exception.

By counsel for the petitioner—

We also offer in evidence the record of a mortgage given by Charles N. Hinman to Lois K. Johnson, dated April 11th, 1903, and recorded in the County Clerk's office of Broome County, Apr. 11th, 1903, at 11:30 o'clock A. M., in Book of Mortgages No. 123 at page 319.

By counsel for the administratrix—

Objected to on each and all the grounds stated
1505 in objection made to the reception of the deed just offered in evidence.

By counsel for the petitioner—

Which is signed by C. N. Hinman, and is acknowledged by Charles N. Hinman before Lewis Seymour, Notary Public.

By the Court—Objection overruled and it may be received.

By counsel for the administratrix—Exception.

This mortgage is signed by Charles N. Hinman, alone.

By counsel for the petitioner—

We also offer in evidence record of a mortgage
1506 given by Charles N. Hinman to Lois K. Johnson, dated April 11th, 1903, and acknowledged Aug. 29th, 1903 before L. Seymour, Notary Public, and recorded in the County Clerk's Office of Broome County, Sept. 3rd, 1903, at 11:15 A. M., in Book of Mortgages No. 123 at page 571, which mortgage is signed Charles N. Hinman only.

Digitized by Google

By counsel for the administratrix—
Same objection on all the grounds stated in the objection made to reception of deed and mortgage. 1507

By the Court—Overruled. It may be received.

By counsel for the administratrix—Exception.

MINNIE CADMUS, recalled as a witness for the petitioner in rebuttal, and examined by Mr. Yetter, testified as follows:

My father and mother are living at Equinunk, in the State of Pennsylvania.

Q. What is your mother's health?
A. Very poor. 1508
Q. Such that it is impossible for her to be here?

By counsel for the administratrix—
Objected to as improper, incompetent, calling for a conclusion.

By the Court—Sustained.

By counsel for the petitioner—Exception.

Q. Describe her condition?
A. She is not able to sit up all the time.
Q. Are any of the children home or is your father the only one there with her?
A. Papa is the only one there with her.

PETITIONER RESTS.

At this time the hearing was adjourned until July 29, 1910, at 9:30 o'clock A. M., at which time the hearing was resumed with the same appearances. 1509

Digitized by Google

1510 W. P. GUILFOYLE, being called as a witness for the administratrix, in sur-rebuttal, being duly sworn and examined by Mr. Hinman, testified as follows:

I reside at No. 1 Dickinson Street in the City of Binghamton. My occupation is druggist. My store it at No. 72 Court Street in the O'Neil Building at the corner of State and Court Streets. I have been in busines at that place over twenty years. I know the respondent in this case. I have known her fifteen years I should say. She has bought goods at different times at my store. I think she has bought goods there with direction to send them to the Hinman farm in the Town of
1511 Chtnango. To the best of my recollection she did not have anything sent there to Mrs Lord. I have known that for many years she has been there on the Hinman farm. I do not know the particular time when she went up there to live.

Q. How far back can you state that she was living at the Hinman farm?

A. I have to think of some other circumstances. I should say about 8 years, but I may be a couple of years out of the way. It may be six years.

Q. Under what name have you known her since she has been living at the Hinman farm, that is to your knowledge that she has been living there?

By counsel for the petitioner—

1512 Objected to as improper, incompetent, irrelevant, immaterial, no part of the sur-rebuttal.

By the Court—Sustained.

By counsel for the administratrix—Exception.

Cross-Examination by Mr. Yetter—

During the time that I ran this store on Court Street I have had many clerks. I know what is

Digitized by Google

going on in the store by other people. Of course I do not know that no package was ever taken from my store and delivered to Vena Lord. 1513

JOHN MOSES, being called as a witness for the administratrix in sur-rebuttal, being duly sworn and examined by Mr. Hinman, testified as follows:

At one time I was keeper at the County Farm. I had a man employed there under me by the name of Vokes, Owen Vokes. His occupation was night watchman. He left the farm and ceased to be night watchman in 1902. I left the County Farm in 1904.

1514

JOHN W. OSTERHOUT, being called as a witness for the administratrix in sur-rebuttal, being duly sworn and examined by Mr. Hinman, testified as follows:

I live at Glen Castle. I bought the place where I live from Charles N. Hinman. I think in the year 1901. I bought it on contract.

Q. I call your attention to a deed from Charles N. Hinman to John W. Osterhout, dated April 1st, 1904, recorded in Broome County Clerk's office in Book 196 of Deeds at page 89, purporting to convey all that tract or parcel of land, situate in the town of Chenango, County of Broome and State of New York, and known as part of lot No. 124 in Boston Purchase in said town of Chenango, commencing in the center of the highway known as the Castle Creek road at a point in the said road in line of the center of said Creek thence northerly in the center of said highway to the northwest corner of the lot hereby conveyed; thence running westerly 8 rods to a stake and 1515

Digitized by Google

1516 stone; thence southerly in a straight line to the center of the Creek; thence westerly along center of Creek to point of beginning, and ask if those are the premises you bought of Charles N. Hinman?

By counsel for the petitioner—

Objected to on the ground that the description of the land mentioned in the paper referred to by counsel should not form a part of the question, and that the instrument itself is the best evidence as to what it contains.

By the Court—Sustained.

By counsel for the administratrix—Exception.

1517 Q. I show you H 212 for identification and ask you if that is the deed you got from Charles N. Hinman?

A. That is the deed.

Q. At the time that deed was given did you give Charles N. Hinman a bond and mortgage to secure part of the purchase price?

A. I think I did.

Q. Later did you have a talk with Charles N. Hinman about the deed?

A. Yes.

Q. Did you pay off the bond and mortgage afterwards?

A. After that.

Q. After the deed was given?

1518 A. Yes sir.

Q. You may state what Charlie Hinman said to you in reference to this deed, if anything?

Q. About when was that talk you had with Charlie Hinman about this deed?

A. I should think about 8 months after the deed was given.

Q. Where was that talk?

A. Hayes' lunch room.

Digitized by Google

Q. State what was said there at that time by Charles Hinman to you with reference to this deed? 1519

Q. When this deed Ex. H. 212 for identification was delivered to you and recorded who had signed the deed?

By counsel for the petitioner—
Objected to, the deed is the best evidence and the record of it.

By the Court—Sustained.

By Counsel for the administratrix—Exception.

Q. After this deed had been delivered to you by Charles N. Hinman, and after it had been recorded, and after this talk with Charles N. Hinman, did you take this deed to anybody and have it signed? 1520

A. Yes.

Q. To whom did you take it and who signed it?

By counsel for the petitioner—
Objected to, the deed itself is the best evidence.

By the Court—Sustained.

By counsel for the administratrix—

I now offer the deed in evidence. This is the proposition: We offer to prove that this witness bought the farm of Charles N. Hinman and took a deed ot it, paying part of the purchase price and giving back a bond and mortgage. He paid the bond and mortgage and Charles N. Hinman said to him, now Osterhout, you had better get my wife to sign that deed because it is not good without her signature, and he then took it to this respondent and she signed it and her signature is there on the deed. 1521

Digitized by Google

1522 By the Court—You are offering the deed in evidence.

By counsel for the administratrix—Yes sir.

By counsel for the petitioner—
Objected to on the ground that it is irrelevant, improper, incompetent, immaterial, that it appears from the instrument itself that it was not acknowledged and that it is a self-serving declaration on the part of the respondent in this proceeding.

By counsel for the administratrix—
Let me ask another question before you rule.
Q. Did you see Mrs. Charles N. Hinman sign that deed?
1523 A. I did.

By counsel for the administratrix—
Now we offer this deed in evidence.

By counsel for the petitioner—Same objection.

By the Court—Mr. Hinman have you shown that is her signature?

By counsel for the administratrix—Yes he said he saw her sign it.

By the Court—Show that that particular signature is hers.

By counsel for the administratrix—
Q. I show you H-212 for identification, and
1524 right under the name Charles N. Hinman the signature, Mrs. C. N. Hinman, did you see her write that?
A. I did, yes sir.

By the Court—It is offered for the purpose of showing that she executed the instrument. The objection is overruled and it may be received in evidence.

Digitized by Google

Q. How did you come to take this paper H-212 to Mrs. C. N. Hinman, how did you come to have her sign it? 1525

By counsel for the petitioner—
Objected to as irrelevant, improper, incompetent, immaterial, and it does not appear that he took it to her, and leading.

By the Court—Sustained.
By counsel for the administratrix—Exception.

Q. State what was said to you if anything by Charles N. Hinman, and when and where, with reference to having anyone else besides himself, or anyone else sign the deed Ex. H-212?

A. I met Mr. Hinman in Hayes lunch room and 1526
he says to me "Osty" you better bring your deed down and have my wife sign it as the deed is not good without my wife's signature.

Q. Then what did you do?

A. I brought the deed. Then Bonnell and Mrs. Hinman met me there and signed it.

Q. This Ex. H-212?

A. Yes that deed right there.

Q. Can you fix the time that was?

A. I think the Fall of 1904, I cannot swear positively, in 1904 sometime.

Cross-Examination by Mr. Yetter—
I do not think I told you and Mr. U. C. Lyons and others that I thought it was a couple of years after the deed was given to me by Charles N. 1527
Hinman on April 1, 1904, that the signature "Mrs. C. N. Hinman" was put on that paper. I fix the time from memory. My memory is not any better now than it was two weeks ago when talking with people about this transaction.

Q. Who have you talked with about this matter recently, this week?

Digitized by Google

A. Several.

1528 Q. Talk with any persons here?

A. Yes sir.

Q. Who?

A. I have not had very much talk.

Q. With whom have you talked?

A. I do not know the gentlemen's names.

Q. Are they here in the Court room?

A. Some of them.

Q. Just tell who they are, point them out?

A. Senator Hinman for one, Bonnell for another, that is all.

Q. When did you have this talk with Senator Hinman and Bonnell?

A. Yesterday afternoon with Bonnell.

1529 Q. When did you have the talk with Senator Hinman about it?

A. 9 o'clock.

Q. Mr. Bonnell is counsel for the respondent in this proceeding you have referred to?

A. Yes.

Q. And he is the man to whose office you went when the signature of "Mrs. Charles N. Hinman" was put on that paper?

A. Yes.

Q. You would not swear positively that it was not two years after April 1st, 1904, would you?

A. I would not swear positive.

Q. When you said 8 months you may have been mistaken about it?

1530 A. I misunderstood it. I said 8 months but I would not swear positive.

Q. And you have not anything by which you can fix it?

A. No.

Q. You know U. C. Lyons, an attorney in this city?

Digitized by Google

A. Yes.

1531 Q. You had a talk with him and myself relative to this matter a week ago, didn't you? Don't you recall that you said you could not tell what time it was but you thought it was about two years after he gave you the deed?

A. I know I said after, but how long I said I could not say.

Q. You may have said it was two years after, is not that so?

A. Yes.

MARIE QUIGLEY, being called as a witness for the administratrix in sur-rebuttal, being duly sworn and examined by Mr. Howard, testified as 1532 follows:

I am employed by Sisson Bros. & Weldon Co., and have been employed there about seven years. I have known Mrs. Hinman, who sits at my right, during that time. She has traded at the store where I am employed ever since I have been there.

Q. By what name have you known her?

By counsel for the petitioner—

Objected to as improper, irrelevant, immaterial no part of the sur-rebuttal.

By the Court—Sustained.

By counsel for the administratrix—Exception.

By the Court—

1533 If she addressed her during that time, to which she made any response, I will permit you to show how she did address her.

By counsel for the administratrix—

Q. You may state how you addressed her?

A. Always "Mrs Hinman" I never knew her by any other name.

Digitized by Google

1534 MRS MAUDE LOWE, being called as a witness for the administratrix in sur-rebuttal, being duly sworn and examined by Mr. Howard, testified as follows:

I am employed by Sisson Bros. & Weldon Co. and have been employed there fourteen years. I know Mrs. Hinman, who sits at my right, the respondent in this case. I have known her for years. I could not state any length of time. I became acquainted with her in a business way at the store. I addressed her at the store as Mrs. Charles N. Hinman. I never addressed her by any other name than Mrs. Hinman.

1535 By counsel for the administratrix—

We offer in evidence Ex. H-204 for identification, the Allen claim.

The same is received in evidence.

EX. H. 204.

The Estate of Charles N. Hinman, Deceased,
In Account with William C. Allen, Dr.

To board for wife from Dec. 12, 1907 to Feby. 11, 1908, 9 weeks @ $4.00	$ 36.00
To Board for self from Jan. 4th, 1908 to Feby. 11, 1908, 5½ weeks @ $5.00	27.50
To care and attendance for wife from Dec. 27, 1907 to Feby. 3, 1908, @ 1.00 per day	38.00
	101.50

1536

BROOME COUNTY—ss.

Wm. C. Allen, being duly sworn, deposes and says he is the claimant and owner of the foregoing claim against the estate of Charles N. Hin-

Digitized by Google

man, deceased; that said claim, amounting to $101.50, is justly due and owing to deponent, that no payments have been made thereon, and there are no offsets against the same, to the knowledge of deponent, except as therein stated and specified. 1537

Sworn before me this 29th
day of March, 1909.
Wm. F. Van Cleve,
Notary Public.

JOHN W. OSTERHOUT, re-called, and further cross-examined by Mr. Yetter, testified as follows:

Q. Did you state that the signature of Mrs. Charles N. Hinman was put on that paper offered in evidence after the mortgage was satisfied? 1538

By counsel for the administratrix—Objected to on the ground he did not so testify, the record is the best evidence of what he testified to.

By the Court—Overruled.

By counsel for the administratrix—Exception.

A. Yes.

Q. How long after you do not know?

By the Court—He answered he did not know.

By counsel for the administratrix—

I offer in evidence a mortgage executed by Henry A. Hinman and wife to Seth W. Gallup, recorded in Broome County Clerk's Office Jan. 3rd, 1899. in Book 111, page 90, to secure the payment of $700. 1539

By counsel for the petitioner—

Objected to as irrelevant, improper, incompetent, immaterial, inadmissible.

By the Court—For what purpose is it offered?

Digitized by Google

1540

By counsel for the administratrix—

Offered for the purpose of showing the indebtedness of Henry A. Hinman to the estate of Charlie N. Hinman.

By counesl for the petitioner—

And the further objection that it is no part of the sur-rebuttal.

By the Court—Sustained.

By counsel for the administratrix—Exception.

By counsel for the administratrix—

I offer in evidence a judgment roll entitled, Supreme Court, Broome County, in an action in

1541 which Flavilla A. Wood and another, as executors of the last will and testament of Abner J. Welton, deceased, are plaintiffs, and Clara B. Jones and others were defendants, filed in Broome County Clerk's office March 30, 1901.

By counsel for the petitioner—

Objected to as irelevant, improper, incompetent, immaterial inadmissible, no part of the sur-rebuttal in this case.

By counsel for the administratrix—

Showing the sale of land in the town of Chenango at foreclosure sale to Charles Howland of a 40 acre farm in the town of Chenango.

By the Court—For what purpose is it offered?

1542

By counsel for the administratrix—

You will remember that we had our friend here yesterday from Buffalo, Mr. Dorman, who testified to the reputation these people had as being man and wife, and he testified that among the persons he talked with was James Winfield.

By the Court—Offered for the purpose of fixing the date of sale?

Digitized by Google

By counsel for the administratrix— 1543

And thereby fixing the date when Dorman had his talk with the witness James Winfield with regard to the reputation of these people as to being married, and also to show that A. D. Wales was not the attorney for the plaintiff in the action.

By counsel for the petitioner—

And the further objection that this is not identified as to the sale referred to by the witness.

By the Court—

Did the witness say anything as to who were the parties or simply that it was the Siver property?

By counsel for the administratrix— 1544

The Siver farm, and as being sold to Charles Howland in the town of Chenango.

By the Court—

Objection overruled, and it may be received for that purpose.

Received and marked H-213.

By counsel for the administratrix—

I also offer in evidence a judgment roll in that same foreclosure action filed in Broome Co. Clerk's Office Feb. 11th, 1901, for the same purpose, and for the purpose of showing who the attorney of record was from the beginning of the action.

Received and marked Ex. H.-214.

1545

By counsel for the administratrix—

I also offer in evidence an order of the Supreme Court, granted at a Special Term, March 30, 1901, in the same foreclosure action, confirming the referee's report of sale, filed in the Broome County Clerk's Office March 30th, 1901.

Received and marked Ex. H.-215.

Digitized by Google

1546 JOHN A. BROWN, being called as a witness for the administratrix in sur-rebuttal, being duly sworn and examined by Mr. Hinman, testified as follows:

I am Clerk of the County of Broome. The Town of Chenango is in the County of Broome. I have made a search of the records in the office of the Clerk of the County of Broome for the purpose of ascertaining what referee's deeds have been recorded there of real property situate in the town of Chenango in Broome County to Charles Howland from 1890 to date. I find only one such deed recorded. That is the deed recorded in Book 170 of Deeds at page 433.

By counsel for the administratrix—

1547 I offer in evidence the record of a deed recorded in Broome County Clerk's Office in Liber 170 of Deeds, at page 433, from Albert Hotchkiss, referee, to Charles S. Howland, dated March 27th, 1901, acknowledged March 27th, 1901, and recorded March 29th, 1901.

By the Court—

Offered for the purpose of fixing the date?

By counsel for the administratrix—Yes.

By the Court—It may be received.

Witness continuing—

I made an examination of the records in the Broome County Clerk's Office for the purpose

1548 of ascertaining to whom and when that property was deeded by Charles Howland if at all, that is the property mentioned in the deed just offered in evidence. The record of conveyance appears in Book 217 at page 229.

By counsel for the administratrix—

I offer in evidence the record of a deed from Charles S. Howland and wife to Demenica Della-

Digitized by Google

panta, dated April 16th, 1908, acknowledged April 16th, 1908, and recorded April 21, 1908, in Liber 217 of Deeds at page 229. 1549

By the Court—For what purpose is that offered?

By counsel for the administratrix—

For the purpose of contradicting the witness Dorman, who testified that the property bought by Charles Howland at the foreclosure sale in the City of Binghamton was sold by Charles Howland to himself, the witness, by contract, and that he, the witness Dorman, then assigned the contract to his brother D. Dorman, and that the deed by Howland was given directly to Darwin Dorman his brother. Offered for the purpose of contradicting that witness and showing that the deed was not given. 1550

By the Court—It may be received.

By counsel for the petitioner—

We offer in evidence the record of a mortgage in the Broome County Clerk's office in Liber 119 of Mortgages at page 262, being a mortgage given by John W. Osterhout and Edna Osterhout, his wife, to Charles N. Hinman, dated April 1, 1904, recorded April 7, 1904, at 8:30 o'clock A. M., as well as the record of satisfaction on the margin thereof, showing the certificate of satisfaction of said mortgage, recorded May 2, 1906, in Book of Discharge of Mortgages No. 32 at page 179. Also satisfaction of a mortgage Charles N. Hinman to John W. Osterhout dated April 13, 1906, in Book No. 32 Discharge of Mortgages at page 179. 1551

By the Court—They may be received.

The above mortgage is the mortgage hereinbefore referred to and which was given upon the property described in Ex. H. 212 and the satisfaction above referred to was a satisfaction of said mortgage.

Digitized by Google

1552 Witness continuing—

In making this search in my office, covering the period since 1890 for conveyance to Charles Howland I included a search for all judicial conveyances made to him in the town of Chenango during that period and found but the one.

It is conceded by counsel for both parties that Isaac Cooley and Mrs. Isaac Cooley, of the town of Chenango, whose premises adjoin the Hinman farm in that farm, have been in this Court during this proceeding under subpoena by and for the petitioner in this proceeding, and were not called as witnesses, and during this proceeding both Mr. and Mrs. Isaac Cooley were interviewed
1553 by Harvey D. Hinman, one of the attorneys for the respondent here, and by the respondent herself, prior to the closing of the respondent's case, and were not called by the respondent.

RESPONDENT RESTS.

EVIDENCE CLOSED.

ORDER SETTLING CASE

The foregoing case and exceptions contains all the evidence given and proceedings had upon the trial of this matter, and it appearing to me that a proper presentation of this proceding for review so requires, I hereby direct the evidence and ex-
1554 hibits to be stated in full so far as is done in the foregoing, and the same is hereby settled and signed by me and ordered filed in the Office of the Surrogate of Broome County.

Dated, June 2, 1911.

ROBERT S. PARSONS,
Surrogate of Broome County.

Digitized by Google

1555

APPELLANT'S REQUESTS FOR FINDINGS AT THE SETTLEMENT OF THE CASE.

SURROGATES COURT: BROOME COUNTY

In the Matter of the Application of HENRY A. HINMAN, for the removal of VENA M. HINMAN, from office as administratrix of the estate of CHARLES N. HINMAN, deceased.

1556

VENA M. HINMAN, the administratrix, whose letters are sought to be revoked, hereby submits the following proposed findings of fact which she deems established by the evidence herein and proposed conclusions of law which she desires and requests to be made.
Dated May 25, 1911

HINMAN, HOWARD & KATTELL,
Attorneys for Vena M. Hinman,
Security Mutual Life Bldg.,
Binghamton, N. Y.

1557

Digitized by Google

1558

At a Surrogate's Court, held at The City of Binghamton, New York, on the—— day of May, 1911.

PRESENT:

HON. ROBERT S. PARSONS,
SURROGATE

SURROGATE'S COURT: BROOME COUNTY

In the Matter of the Application of HENRY A. HINMAN, for the removal of VENA M. HINMAN,
1559 from the office as administratrix of the estate of CHARLES N. HINMAN, deceased.

The issues of fact raised herein, by the answer of Vena M. Hinman, the person whose letters are sought to be revoked, having been tried by the Surrogate and a decision having been made by said Surrogate and a case having been proposed and served by said Vena M. Hinman and said case being brought before the Surrogate at this time for settlement, and the said Vena M. Hinman having submitted the following proposed findings of fact and conclusions of law which she desires and requests to be made herein, I pass upon said
1560 requests and decide and find as hereinafter indicated.

Findings of Fact.

1. In the year of 1899, the decedent, Charles N. Hinman, was an unmarried man, residing upon a farm located about five miles north of the City of Binghamton, N. Y., in the Town of Chenango,

Digitized by Google

County of Broome and State of New York.
Find as Requested
July 5, 1911
R. S. P.
S. 1561

2. At that time, the family residing on said farm and of which said decedent was a member, consisted of the decedent, his mother, Melissa Hinman, his brother, Balis Hinman and Mary Hinman, the wife of Balis Hinman.
Find as Req.
July 5, 1911.
R. S. P.
S.

3. In the latter part of October in that year, the said Mary Hinman, the wife of Balis Hinman, left the said farm, and shortly afterwards procured a divorce from her said husband. She never thereafter resided upon said farm and never thereafter was a member of said family. 1562
Find as Req.
July 5, 1911.
R. S. P.
S.

4. During the year of 1899, the name of the person to whom letters of administration have been issued upon the estate of said decedent, being the same person whose letters are sought to be revoked in this proceeding, was Vena M. Lord. For the sake of convenience said person in the following requests is designated as the administratrix. 1563
Find as Req.
July 5, 1911.
R. S. P.
S.

Digitized by Google

1564

5. At that time the administratrix was of the age of about eighteen years and was unmarried.

Find as Req.
July 5, 1911.
R. S. P.
S.

6. During the said year of 1899, upon different occasions, the said administratrix was a transitory visitor at the said farm.

Find as Req.
July 5, 1911.
R. S. P.
S.

1565

7. During said year, the administratrix did not at any time reside at said farm, and during said year, none of her visits to said farm exceeded one day's duration, or thereabouts.

Find as Req.
July 5, 1911.
R. S. P.
S.

8. At some time in the year 1900, the said administratrix went to said farm to live, and, from that time on, stayed and resided at said farm until in or about the year 1906. During all of said time, she and the decedent, Charles N. Hinman, as well as the decedent's mother, Melissa Hinman, resided in the same house, but after the year 1904, the said decedent, Charles N. Hinman, was absent from said house and said farm during considerable portions of the time, although he still maintained his legal residence there. The said Balis Hinman, the brother of said decedent, continued to occupy and reside at the same house

1566

Digitized by Google

until his death which occured in the month of November, 1902. 1567

Find as Req.
July 5, 1911.
R. S. P.
S.

9. The administratrix slept in and occupied alone a room in said house for a period at the beginning of her said residence there.

Refused
July 5, 1911.
R. S. P.
S.

10. Later and at least as early as the year 1901, the administratrix changed her room and from that time on, occupied and slept in a room in said house, together with the decedent, Charles N. Hinman. 1568

Find as Req.
July 5, 1911.
R. S. P.
S.

11. Neither said change nor the said intercourse between the administratrix and the said Decedent was clandestine nor in any way concealed from the other people in the house, including a number of servants who were employed there and on the farm, but such intercourse was open and known to all of said people.

Refused 1569
July 5, 1911.
R. S. P.
S.

12. Prior to the time when the administratrix went to live at said farm, there had been an intimate acquaintance and written correspondence

Digitized by Google

1570 between the administratrix and the said decedent, Charles N. Hinman, extending back at least as far as the middle or early part of the year 1898.

Find as Req.
July 5, 1911.
R. S. P.
S.

13. In said written correspondence the decedent directed the envelopes in which his letters to the administratrix were inclosed, to "Miss Vena Lord." In the letters, at the opening, thereof, he addressed her as "My dear friend."

Find as Req.
July 5, 1911.
1571 R. S. P.
S.

14. The letters written by the said decedent in said written correspondence which extended from July 9, 1898, down to December 21, 1900, were respectful and decent.

Find as Req.
July 5, 1911.
R. S. P.
S.

15. At different times during the year 1900, the decedent had spoken concerning the administratrix with Judson S. Newing, a merchant engaged in the jewelry business in Binghamton, N. Y., who was a mutual acquaintance of both the
1572 decedent and the administratrix, and in such conversation had asked said Newing what kind of a wife the administratrix would make.

Find as Req.
July 5, 1911.
R. S. P.
S.

Digitized by Google

Findings of Appellant's Requests

16. After such conversation, the decedent on December 24th, 1900, bought from said Newing, a lady's opal ring. At the time of the purchase of said ring, the following conversation occured between said decedent and said Newing. The decedent said, "I suppose you know where it is going." Mr. Newing replied, "I do not know, but I surmise." The decedent then said, "Keep it under your hat." 1573

Find as Req.
July 5, 1911.
R. S. P.
S.

17. Shortly after said last mentioned conversation the administratrix was wearing the ring so purchased. It continued in her possession until the time of the trial and upon the trial was produced by her and identified by said Judson S. Newing. 1574

Find as Req.
July 5, 1911.
R. S. P.
S.

18. After the purchase of the said opal ring, by the decedent, the decedent again bought a ring from said Judson S. Newing. The ring so purchased was a plain gold band ring.

Find as Req.
July 5, 1911.
R. S. P. 1575
S.

19. At the time of the purchase of said last mentioned ring, the decedent told said Newing "That was to tie the knot with."

Find as Req.
July 5, 1911.
R. S. P.
S.

Digitized by Google

1576 20. Soon after said last mentioned conversation, the administratrix was wearing said plain gold band ring.

Find as Req.
July 5, 1911.
R. S. P.
S.

21. On one occasion, the decedent went to said Newing's store with the administratrix and told said Newing that the administratrix "was no longer his girl, but his wife", and said "Let her have whatever she wants and put it on my bill and I will settle."

Find as Req.
July 5, 1911.
1577 R. S. P.
S.

22. Said last mentioned conversation occurred after the purchase by decedent from said Newing of the plain gold band ring, above mentioned.

Find as Req.
July 5, 1911.
R. S. P.
S.

23. From time to time, the administratrix purchased from said Newing different articles and had them charged to the decedent, Charles N. Hinman. Said Charles N. Hinman paid for all articles so purchased by the administratrix.

Find as Req.
1578 July 5, 1911.
R. S. P.
S.

24. On other occasions the decedent in conversations with said Judson S. Newing, referred to the administratrix as "my wife" and from the

Digitized by Google

1579

time when said Newing was first told by the decedent that the administratrix was the decedent's wife, whenever the decedent, Charles N. Hinman, spoke of the administratrix to said Newing, he spoke of her as Mrs. Charles N. Hinman or as his wife.

Find as Req.
July 5, 1911.
R. S. P.
S.

25. The conversations between said Judson S. Newing and Charles N. Hinman occurred as testified to by said Newing and the circumstances regarding the administratrix and the decedent, Charles N. Hinman, were as testified to by said Newing. 1580

Refused
July 5, 1911.
R. S. P.
S

26. During the winter of 1901 and 1902, the administratrix was ill with inflammatory rheumatism.

Find as Req.
July 5, 1911.
R. S. P.
S

27. On the occasion of said illness of the administratrix, Dr. Frank P. Hough of the City of Binghamton, was called by the decedent, Charles N. Hinman, to treat the administratrix in said illness, professionally. 1581

Find as Req.
July 5, 1911.
R. S. P.
S.

Digitized by Google

1582

28. Said Hough was then an acquaintance of the administratrix and had known her from her childhood, having become acquainted with her at Equinunk, Pa., where her parents resided.

Find as Req.
July 5, 1911.
R. S. P.
S.

29. The said illness of the administratrix continued for a considerable time, during which she was treated and visited professionally at the residence of said decedent, by said Dr. Frank P. Hough. The decedent, Charles N. Hinman, paid
1583 said Hough for his said professional attendance upon the administratrix.

Find as Req.
July 5. 1911.
R. S. P.
S.

30. The decedent in his conversation with said Hough, requesting him to attend the administratrix, referred to the administratrix as his wife.

Find as Req.
July 5, 1911.
R. S. P.
S.

31. At other times after the said illness of the administratrix, said Hough treated the adminis-
1584 tratrix at the home of the decedent, Charles N. Hinman, at different places where said Decedent resided in the City of Binghamton, after removing from the said farm in the Town of Chenango.

Find as Req.
July 5, 1911.
R. S. P.
S.

Digitized by Google

Findings of Appellant's Requests

1585

32. One of the occasions when said Hough so treated the administratrix, was her giving birth to a child, which occurred in or about the year 1907.

Find as Req.
July 5, 1911.
R. S. P.
S.

33. The birth of said child was reported to the registrar of Vital Statistics of the City of Binghamton, as a child born of Vena and Charles N. Hinman.

Find as Req.
July 5, 1911.
R. S. P.
S.

1586

34. On different occasions said Hough heard the decedent speak of the administratrix as his wife, and the decedent in said Hough's presence introduced the administratrix as his wife to neighbors.

Find as Req.
July 5, 1911.
R. S. P.
S.

35. In the fall of 1901, the decedent, Charles N. Hinman, introduced the administratrix as his wife to Charles T. Gage, an old acquaintance of the decedent.

1587

Refused
July 5, 1911.
R. S. P.
S.

36. At the time of such introduction said Charles T. Gage was a tenant of real premises belonging to the said decedent and situated in the

Digitized by Google

1588 City of Binghamton, N. Y. Later in conversation with said Gage, said decedent told said Gage that he proposed giving said premises to the administratrix, and referred to her as his wife; and on one ocassion said decedent went with the administratrix to said Gage and told said Gage that he should pay the rent to the administratrix. From that time on, said Gage paid the rent to the administratrix and took from her receipts therefor. Those receipts were signed by her, prior to the death of the said Charles N. Hinman, some in the name, "Mrs Charles N. Hinman" and some in the name "Mrs C. N. Hinman."

Find as Req.

1589 July 5, 1911.

R. S. P.

S.

37. In April, 1902, the said decedent in conversation with Harry P. Worthing said he was buying a present for his wife. On that occasion, the decedent bought a diamond ring which, together with the package in which it was purchased, was produced by the administratrix upon the trial of this matter. Said conversation occurred at St. Louis, Missouri, where the decedent and said Worthing had gone with a military company of the New York State National Guard, of which said Worthing was a captain and the decedent, first-lieutenant.

1590 Find as Req.

July 5, 1911.

R. S. P.

S.

38. In the fall of 1902, the decedent, Charles N. Hinman, introduced the administratrix as his wife to said Harry P. Worthing at the State

Digitized by Google

Armory in the City of Binghamton. 1591

Find as Req.

July 5, 1911.

R. S. P.

S.

39. Said Harry P. Worthing was an old acquaintance and intimate friend of the decedent.

Find as Req.

July 5, 1911.

R. S. P.

S.

40. Said Harry P. Worthing was elected sheriff of Broome County in the year 1902 and took said office on January 1, 1903. Soon after taking said office and in the year of 1903, the decedent, 1592 together with the administratrix, called upon said Worthing and his wife at the Sheriff's residence in the City of Binghamton and presented the administratrix as his wife to both said Worthing and to his wife.

Find as Req.

July 5, 1911.

R. S. P.

S.

41. In the year 1906 or 1907, the decedent in conversation with said Worthing said that he "expected a little baby down at our house", and, in the same conversation, said that he "had something to live for now, more than ever", and talked about making his will, saying that he proposed 1593 leaving his property to his wife and baby, except a little to "young Charlie" a nephew of the decedent.

Find as Req.

July 5, 1911.

R. S. P.

S.

Digitized by Google

Findings of Appellant's Requests

1594 42. From the time of the said introduction of the administratrix to said Worthing in the year 1902, everyone, except the decedent, who mentioned the administratrix in said Worthing's hearing, called her Mrs. Hinman. The decedent called her "Vena" or "The Kid."

Find as Req.
July 5, 1911.
R. S. P.
S.

43. The decedent was considerably older than the administratrix.

Find as Req.
July 5, 1911.
R. S. P.
1595 S.

44. Said Harry P. Worthing was appointed by the Surrogate as one of the appraisers of the estate of the said decedent, Charles N. Hinman.

Find as Req.
July 5, 1911.
R. S. P.
S.

45. In the fall of 1901, the decedent, Charles N. Hinman, and also his mother, Melissa Hinman, introduced the administratrix to Nelson P. Brink [illegible] City of Binghamton and in such introduction, each of them designated her as Mrs. Hinman, the decedent's wife.

1596 Refused
July 5, 1911.
R. S. P.
S.

46. Soon after the death of Balis Hinman, the decedent, Charles N. Hinman, introduced the ad-

Digitized by Google

ministratrix to Charles W. Yeomans, and in such introduction, designated her as the decedent's wife, Mrs. Hinman. 1597

Find as Req.
July 5, 1911.
R. S. P.
S.

47. Said last mentioned introduction occurred at the said farm in the Town of Chenango wherein decedent and the administratrix resided, as hereinbefore stated, and at the time of said introduction said Charles W. Yeomans was present at said farm for the purpose of appraising the personal property belonging to the estate of said Balis Hinman, deceased, said Charles W. Yeomans having been appointed appraiser of said estate by the Surrogate of Broome County. 1598

Find as Req.
July 5, 1911.
R. S. P.
S.

48. In the year 1904 when the company of the New York State National Guard of which the decedent was a member, was encamped on the fair grounds in the City of Binghamton, the decedent introduced the administratrix as his wife, in the presence of said Charles W. Yeomans, to several officers of the battalion with which said company was then encamped.

Find as Req. 1599
July 5, 1911.
R. S. P.
S.

49. On May 28, 1902, at the house where the decedent and the administratrix resided on the said farm in the Town of Chenango, the adminis-

Digitized by Google

1600 tratrix was introduced as the decedent's wife by Melissa Hinman, the mother of said decedent, to Etta Furman.

Refused
July 5, 1911.
R. S. P.
S.

50. At some time prior to April, 1905, the decedent, together with the administratrix, called at the law office of Harmon J. Kneeland, in the City of Binghamton, N. Y., and upon that occasion said decedent introduced the administratrix to said Harmon J. Kneland as his wife, Mrs. Hinman.

Find as Req.
1601 July 5, 1911.
R. S. P.
S.

51. In the year 1904, Harvey B. Sproul boarded for a time in the house on the said farm in the Town of Chenango wherein said decedent resided. During that period, the decedent and the administratrix occupied the same room in that house.

Find as Req.
July 5, 1911.
R. S. P.
S.

52. During that period, the decedent spoke of the administratrix in the presence of said Sproul
1602 as Mrs. Charles N. Hinman, and whenever he spoke of her in said Sproul's presence, he spoke of her as Mrs. Charles N. Hinman.

Find as Req.
July 5, 1911.
R. S. P.
S.

Digitized by Google

1603

53. In the month of April, 1905, the decedent became a partner with said Sproul and engaged in the business of contracting under the firm name of Hinman & Sproul. Said partnership continued until the death of said Charles N. Hinman.

Find as Req.
July 5, 1911.
R. S. P.
S.

54. After the commencement of said partnership and during the years of 1905, 1906 and 1907, the decedent was absent from the said farm in the Town of Chenango during considerable portions of said years, and during his said periods of absence from said farm, was engaged in the transaction of said co-partnership business. 1604

Find as Req.
July 5, 1911.
R. S. P.
S.

55. In the year 1905, said co-partnership firm was engaged in a work at Scotia, near Schenectady, New York, and while the decedent was away from his said home, attending to said work, he boarded in Schenectady, N. Y., with the father-in-law of said Harvey B. Sproul.

Find as Req.
July 5, 1911.
R. S. P. 1605
S.

56. While the decedent was engaged in said work, the administratrix visited him at his said boarding place in Schenectady in the summer of 1905 and during such visit, the administratrix

Digitized by Google

1606 and the decedent occupied the same room.

Find as Req.
July 5, 1911.
R. S. P.
S.

57. In the year 1906, the decedent was engaged in work at Newton, New Jersey, where he boarded at the Newton Hotel. In the summer of that year, the administratrix visited the decedent at said Hotel in Newton, N. J., and remained with him there from six to nine weeks.

Find as Req.
July 5, 1911.
1607 R. S. P.
S.

58. During the said last mentioned visit, the decedent and the administratrix occupied the same room at said Hotel.

Find as Req.
July 5, 1911.
R. S. P.
S.

59. During said last mentioned visit, the decedent spoke of the administratrix as Mrs. Hinman, in the presence of said Harvey B. Sproul.

Find as Req.
July 5, 1911.
R. S. P.
1608 S.

60. In the year 1907, the administratrix visited the decedent at Scarsdale, N. Y., where the decedent was then working.

Find as Req.
July 5, 1911.
R. S. P.
S.

Digitized by Google

Findings of Appellant's Requests

1609

61. On or about April 1, 1904, the decedent made a Deed of Land to John W. Osterhout. Said Osterhout made a bond and mortgage to said decedent to secure a part of the purchase price of the land so deeded.

Find as Req.
July 5, 1911.
R. S. P.
S.

62. The administratrix did not sign or execute said Deed.

Find as Req.
July 5, 1911.
R. S. P.
S.

1610

63. In or about the fall of 1904, or later, the decedent had a conversation with said Osterhout in which the decedent told said Osterhout that he had better bring his said deed down and have the decedent's wife sign it as the deed was not good without the decedent's wife's signature.

Find as Req.
July 5, 1911.
R. S. P.
S.

64. After said conversation said Osterhout took said deed to the administratrix and procured her signature thereto. She signed it "Mrs C. N. Hinman."

1611

Find as Req.
July 5, 1911.
R. S. P.
S.

65. On August 29, 1905, Dr. Charles R. Seymour of Binghamton, N. Y., a member of the said military company of which the decedent was an

Digitized by Google

1612 officer, was called, in the middle of the night, to the decedent's residence in the Town of Chenango, to attend the decedent's mother, Melissa Hinman, who was ill. On that occasion the administratrix was introduced to said Seymour by the decedent as his wife, in the presence of the decedent's mother.

Find as Req.
July 5, 1911.
R. S. P.
S.

66. The administratrix cared for the decedent's mother during said illness of the latter.

1613 Find as Req.
July 5, 1911.
R. S. P.
S.

67. Said Seymour at different times attended the administratrix professionally. His services for such attendance were charged to Charles N. Hinman, the decedent, and paid for by him.

Find as Req.
July 5, 1911.
R. S. P.
S.

68. Said Charles R. Seymour was an intimate friend and acquaintance of the decedent.

Find as Req.
1614 July 5, 1911.
R. S. P.
S.

69. On or about April 6, 1907, the decedent and the administratrix executed a deed of real estate situated in Broome County, in which deed, as grantors, they are described as "Charles N. Hinman and Vena Hinman, his wife." Said deed

Digitized by Google

was recorded in the office of the Clerk of the County of Broome in Book of Deeds No. 212 on page 2. 1615

Find as Req.
July 5, 1911.
R. S. P.
S.

70. In the year of 1904, a battalion of which the said Military Company of which decedent was an officer, was a part, was encamped on the fair grounds in the City of Binghamton.

Find as Req.
July 5, 1911.
R. S. P.
S. 1616

71. During said encampment, different groups of people were invited to attend evening parade and take dinner with the officers of the battalion. On the last evening of such encampment, those so invited were the wives and lady friends of the officers. On said occasion the administratrix was present with the decedent, Charles N. Hinman and was introduced by him as his wife to Colonel Charles H. Hitchcock, who was in command of said battalion and to other officers who were then present.

Find as Req.
July 5, 1911.
R. S. P.
S. 1617

72. The last mentioned introductions of the administratrix by the decedent, were testified to upon the trial by Charles R. Seymour, Charles H. Hitchcock, Charles W. Yeomans and Edward E.

Digitized by Google

Powell, each of whom was present.

1618 Find as Req.
July 5, 1911.
R. S. P.
S.

73. **On an occasion in 1904, 1905 or 1906** the administratrix and the decedent were present in the State Armory in the City of Binghamton, at a dance held there by the said military company.
Find as Req.
July 5, 1911.
R. S. P.
S.

74. **On said last** mentioned occasion, the de-
1619 cedent introduced the administratrix as his wife to Dr. D. M. Hooks, who is a coroner of Broome County.
Find as Req.
July 5, 1911.
R. S. P.
S.

75. Even while the decedent resided in the Town of Chenango, the greater of number of his friends and intimate acquaintances resided in the City of Binghamton and the greater part of the decedent's business was transacted in said City of Binghamton.
Refused
July 5, 1911.
1620 R. S. P.
S.

76. For a long time prior to the death of said decedent, the administratrix was known to many of the decedent's said acquaintances and so far as was shown upon the trial was without exception, reputed among the decedent's said friends

Digitized by Google

and acquaintances to be the decedent's wife. 1621

Refused
July 5, 1911.
R. S. P.
S.

77. There is no evidence tending to show that the decedent was ever married to any woman other than the administratrix.

Find as Req.
July 5, 1911.
R. S. P.
S.

78. During a number of years prior to the death of the decedent, the administratrix traded at different stores in the City of Binghamton, N. Y., including Sisson Bros.-Welden Company, Judson S. Newing and William P. Guilfoyle, where she was addressed as Mrs. Hinman. 1622

Find as Req.
July 5, 1911.
R. S. P.
S.

79. In the said City of Binghamton, the administratrix for a long time prior to the death of the decedent, was addressed and known as Mrs. Hinman among the acquaintances of the decedent and was reputed to be his wife.

Refused
July 5, 1911. 1623
R. S. P.
S.

80. No evidence was produced which showed or tended to show in any way, that after the Fall of the year 1901, the administratrix was known or addressed, in the City of Binghamton, otherwise than as Mrs. Hinman or that in said City during

Digitized by Google

1624 said time, her reputed relation with the decedent was otherwise than matrimonial.

Refused
July 5, 1911.
R. S. P.
S.

81. After the decedent engaged in the contracting business and began to be absent from his residence in the Town of Chenango and City of Binghamton, and beginning on May 15, 1905, and extending down to January 23, 1908, the decedent wrote and mailed many communications to the administratrix, the most of which were inclosed
1625 in sealed envelopes, but some of which were on postal cards.

Find as Req.
July 5, 1911.
R. S. P.
S.

82. Ninety of such written communications were produced by the administratrix and received in evidence upon the trial. Every one of said communications was addressed in the mail in one of the following names, viz:—"Mrs C. N. Hinman," "Mrs Charles N. Hinman," "Mrs Chas. N. Hinman," "Mrs. Chas. Nelson Hinman" or "Mrs Charles Nelson Hinman."

Find as Req.
1626 July 5, 1911.
R. S. P.
S.

83. All of said communications written prior to the year 1906, of which there were fifty-two, were with three exceptions, directed and mailed to "Binghamton, N. Y., R. F. D. 4" which was the Rural Free Delivery address of said farm in

Digitized by Google

1627

the Town of Chenango, upon which the decedent resided prior to the year 1906.

Find as Req.
July 5, 1911.
R. S. P.
S.

84. Many of the envelopes so mailed, were envelopes bearing the printed business card of Hinman & Sproul.

Find as Req.
July 5, 1911.
R. S. P.
S.

1628

85. Each of the said communications made during the year 1906, of which there were thirty, was directed and mailed to one of the following addresses:—14 Livingston st., Binghamton, N. Y.; 14 Exchange st., Binghamton, N. Y. or Equinunk, Pa.

Find as Req.
July 5, 1911.
R. S. P.
S.

86. Four of the said communications were in 1907, one of which was addressed and mailed to 35 Exchange st.; Binghamton, N. Y.; one to 15 Cedar st., Binghamton, N. Y., c/o Mrs Allen; and the others to 17 Cedar st., Binghamton, N. Y. c/o Mrs Allen.

1629

Find as Req.
July 5, 1911.
R. S. P.
S.

87. Of said communications, four were in January, 1908, all of which were directed and mailed to 17 Cedar st., Binghamton, N. Y., one of them in

Digitized by Google

1630 care of W. Allen and another in care of Mrs Allen.

Find as Req.
July 5, 1911.
R. S. P.
S.

88. Each of the said ninety communications, including two postal cards, but excepting nine letters, was signed by the decedent—"Hubbie". Of the nine letters excepted, one (H. 124) is signed "Hubbe" and another (H. 128) "Hubbee."

Find as Req.
July 5, 1911.
R. S. P.
S.

1681

89. At the beginning of seventy of said ninety communications, the administratrix was addressed by the decedent as "My dear wife" and in one of them as "My dear wifie".

Find as Req.
July 5, 1911.
R. S. P.
S.

90. In fifty-four of said letters, the decedent referred to his mother or sent some greeting or message to her.

Find as Req.
July 5, 1911.
R. S. P.
1632 S.

91. In one of the letters directed to the administratrix at Equinunk, Pa., where her parents resided, the decedent referred to them as "mother and pa" and in another as "dad and ma."

Find as Req.
July 5, 1911.
R. S. P.
S.

Digitized by Google

1633

92. In many of the said letters which were put in evidence the decedent wrote in reference to his business affairs and in some of them gave directions to the administratrix regarding the business of the decedent to be attended to by her in his absence.

Find as Req.
July 5, 1911.
R. S. P.
S.

93. From the said letters, it appears that the administratrix was managing the decedent's house and giving attention to his business in connection with his farm and other matters, in his absence. 1634

Find as Req.
July 5, 1911.
R. S. P.
S.

94. The said letters show conclusively that from the time when the decedent went into the contracting business in the year 1905 and to the time of his death, the administratrix performed for the decedent, the duties and services, in caring for his house and property and person, which a wife would ordinarily perform for a husband in the circumstances of the decedent.

Refused
July 5, 1911. 1635
R. S. P.
S.

95. In said letters are references to the administratrix as a member of the decedent's family.

Find as Req.
July 5, 1911.
R. S. P.
S.

Digitized by Google

1636

96. In said letters the decedent wrote many expressions of affection for the administratrix and exacted the duty and conduct on her part, becoming a wife, and he recognized and treated such duty as extending not only to himself but to his mother and to the family of his brother, Henry A. Hinman, the contestant in this matter.

Find as Req.
July 5, 1911
R. S. P.
S.

97. In said letters, the decedent expressed sentiments and mentioned conduct on his part, toward the administratrix which, in view of the facts and circumstances proved upon the trial, are incompatible with any construction of their relation save that such relation was matrimonial.

1637

Refused
July 5, 1911
R. S. P.
S.

98. In the said letters, written by the decedent in the year 1905 and subsequently, there are many expressions showing that the decedent entertained for the administratrix, a passionate attachment as well as sincere regard, and said letters clearly indicate that it was the decedent's intention that a relation between himself and the administratrix apparently matrimonial should be permanent.

1638

Refused
July 5, 1911
R. S. P.
S.

99. The letters written by the decedent and dated in and prior to the year 1900, are inconsistent with an inference that the relations be-

Digitized by Google

1639

tween the administratrix and the decedent were either matrimonial or illicit.

Refused
July 5, 1911
R. S. P.
S.

100. The letters written by the decedent subsequent to the year 1900, clearly indicate a change in the relation between the administratrix and the decedent after the writing of the letters dated in and prior to the year 1900.

Find as Req.
July 5, 1911
R. S. P.
S.

1640

101. Said letters bearing dates, subsequent to the year 1900, clearly establish that the relation between the decedent and the administratrix had become either matrimonial or illicit.

Refused
July 5, 1911
R. S. P.
S.

102. There is nothing in said last mentioned letters from which the inference could be drawn that such relation was illicit, but there is sufficient to support the inference that the decedent regarded the administratrix as his wife.

1641

Find as Req.
July 5, 1911
R. S. P.
S.

103. In or about the year 1906, the decedent, after having engaged in the contracting business, changed his place of residence from the said farm in the Town of Chenango to the City of Bingham-

Digitized by Google

1642 ton. After such change, he occupied, along with his mother and the administratrix, a house at number 14 Livingston street in said City of Binghamton. From there, he moved to the Moon Block on Lewis street and his mother and the administratrix moved and lived with him in said Block.

Find as Req.
July 5, 1911
R. S. P.
S.

104. Early in the year 1907, the decedent's mother died while she was residing with the decedent and the administratrix in said Moon Block.

1643 Find as Req.
July 5, 1911
R. S. P.
S.

105. Alvah E. Morse, who was a half-brother of the decedent and a son of the decedent's mother, attended the funeral of his said mother at the decedent's said home in the Moon Block and knew at that time that the administratrix was then living with the decedent and that she was going by the name of Mrs. Hinman.

Find as Req.
July 5, 1911
R. S. P.
S.

1644 106. At the funeral of Balis Hinman, the decedent's brother, in 1902, the administratrix sat in the room with Balis Hinman's relatives.

Find as Req.
July 5, 1911
R. S. P.
S.

107. After living at said Moon Block, the de-

Digitized by Google

1645

cedent and the administratrix moved to the Doubleday Block on Washington street in said City of Binghamton, and lived together and kept house there for a short period.

Find as Req.
July 5, 1911
R. S. P.
S.

108. While living in said Doubleday Block, in or about the year 1907, a child was born to the administratrix and the decedent. Said child was still-born.

Find as Req.
July 5, 1911
R. S. P.
S.

1646

109. After living in said Doubleday Block, the decedent and the administratrix rented and lived in a house on Cedar street in the City of Binghamton, for a short time and from there, moved to a house on Walnut street where they lived together and kept house until the month of September, 1908, when the decedent died.

Find as Req.
July 5, 1911
R. S. P.
S.

110. The decedent's death was violent. It was caused by an accident which rendered him immediately unconscious and he never, afterwards, gained consciousness. 1647

Find as Req.
July 5, 1911
R. S. P.
S.

Digitized by Google

1648 111. In addition to the above mentioned places of residence of the decedent and the administratrix, in the City of Binghamton, N. Y., they lived also for a short time on Exchange street in said City with Henry A. Hinman, a brother of the decedent and the petitioner in this case, and for a few weeks, the administratrix boarded with William Allen and Jessie Allen, his wife, on Cedar street.

Find as Req.
July 5, 1911
R. S. P.
S.

1649 112. After the death of the decedent, Henry A. Hinman, a brother of the decedent and petitioner in this matter, introduced the administratrix as Mrs. Hinman, his sister-in-law.

Find as Req.
July 5, 1911
R. S. P.
S.

113. Said last mentioned introduction occurred after the petitioner had knowledge of all the matters stated in the petition in this matter.

Find as Req.
July 5, 1911
R. S. P.
S.

1650 114. After the death of the decedent, Alvah E. Morse, a half-brother of the decedent, introduced the administratrix to his daughter, Maud Morgan, as his daughter's aunt, and at the time of such introduction, both said Alvah E. Morse and his daughter had knowledge of all facts and circumstances stated in the petition in this matter.

Find as Req.
July 5, 1911
R. S. P.
S.

Digitized by Google

1651

115. William Allen, who was called as a witness for the petitioner and with whom the administratrix boarded in or about the year 1907, presented a claim against the decedent's estate for the care of the administratrix, while she was boarding at his house in said year, as a claim for care of the wife of the decedent.

Find as Req.
July 5, 1911
R. S. P.
S.

116. In the year 1906, the decedent introduced the administratrix as his wife, to Johanna Sullivan, who was called as a witness by the petitioner.

1652

Find as Req.
July 5, 1911
R. S. P.
S.

117. The wife of the witness, Alvah E. Morse, who is a half-brother of the petitioner and whose counsel appeared upon the trial and assisted the petitioner's attorneys in the trial, was not called as a witness, although she talked with the administratrix in the year 1901, regarding whether the administratrix was married or not.

Find as Req.
July 5, 1911
R. S. P.
S.

1653

Digitized by Google

Findings of Appellant's Requests

1654 118. The petitioner omitted to call either Isaac Cooley or his wife as witnesses upon the trial.

Find as Req.
July 5, 1911
R. S. P.
S.

119. The said Isaac Cooley was one of the nearest neighbors of the decedent and the administratrix while the latter resided on the farm in the Town of Chenango and said Isaac Cooley is the only neighbor of the decedent, while he resided on said farm, who appears to have been socially intimate with the decedent.

1655 Refused
July 5, 1911
R. S. P.
S.

120. The decedent and the administratrix in or about the year 1901, visited the parents of the latter at their home at Equinunk, Pa.

Find as Req.
July 5, 1911
R. S. P.
S.

121. On said visit, the decedent and the administratrix occupied a room together and the administratrix introduced the decedent as her husband.

1656 Find as Req.
July 5, 1911
R. S. P.
S.

122. The decedent was on good terms with the parents and the brothers and sisters of the administratrix and took an interest in the well-

Digitized by Google

1657

fare of her younger brothers and sisters.

Find as Req.
July 5, 1911
R. S. P.
S.

123. While the decedent and the administratrix were residing on the farm in the Town of Chenango, brothers and sisters of the administratrix made repeated visits at said farm and made long visits there.

Find as Req.
July 5, 1911
R. S. P.
S.

1658

124. Among the brothers and sisters of the administratrix were two twin brothers, who in the year of 1905 were only seventeen years of age and who resided at said farm for considerable periods of time. There was also, a younger sister, named Pearl, who visited at the farm as early at least, as 1903 and who made long and frequent visits at said farm.

Find as Req.
July 5, 1911
R. S. P.
S.

125. On or about August 30, 1908, the decedent wrote and mailed to the mother of the administratrix at Equinunk, Pa., a letter in which he addressed the mother of the administratrix as "My dear mother" and in which he asked that Pearl, the said sister of the administratrix, might be permitted to come to the decedent and the administratrix at Binghamton, for the purpose of being sent to school and given music lessons there.

1659

Digitized by Google

1660 and in said letter the decedent promised to defray the expenses of such schooling.

Find as Req.
July 5, 1911
R. S. P.
S.

126. The mother of the administratrix complied with said request and the said sister of the administratrix came to Binghamton, and at the time of the death of the decedent in September, 1908, was residing there with the decedent and the administratrix.

Find as Req.
1661 July 5, 1911
R. S. P.
S.

127. Prior to the death of the decedent, the administratrix was known to the petitioner and to his family as Mrs. Hinman, and was recognized and treated by them as the wife of the decedent.

Find as Req.
July 5, 1911
R. S. P.
S.

128. Such recognition of the administratrix by the petitioner and by members of his family, continued until after the death of decedent and many months after the discovery by the peti-
1662 tioner of all the facts and circumstances stated in the petition in this matter.

Find as Req.
July 5, 1911
R. S. P.
S.

Digitized by Google

1663

129. The decedent's brother, Balis Hinman, was not friendly to the administratrix.

Find as Req.
July 5, 1911
R. S. P.
S.

130. The attitude of Melissa Hinman, the mother of the decedent, toward the administratrix at times was not friendly.

Find as Req.
July 5, 1911
R. S. P.
S.

1664

131. There is no evidence that the gossip in the Town of Chenango to the effect that the decedent and the administratrix were not married, continued after they moved away from the farm to the City of Binghamton and took up their residence there together.

Refused
July 5, 1911
R. S. P.
S.

Conclusions of Law.

1665

1. Mere gossip in the neighborhood where the administratrix resided, by persons who were not acquainted with the administratrix, and were not socially intimate with the decedent and his family, is not legal or competent evidence in support of the issues in this matter.

Find as Req.
July 5, 1911
R. S. P.
S.

Digitized by Google

1666

2. Where a man and woman are cohabiting and living in the apparent relation of husband and wife, the presumption that their intercourse is matrimonial, arising from such circumstance, is not rebutted by proof of a different reputation from the speech of people residing in the neighborhood where they reside but who have no knowledge of the true character of their relation and who are not socially intimate with either one of the parties and not even acquainted with one of them.

Find as Req.
July 5, 1911
R. S. P.

1667 S.

3. Where facts are proved, showing that a man and woman have cohabited, have mutually recognized their relation as that of husband and wife and have so lived as to procure from others a recognition of that relation between them, and where the facts proved are sufficient to raise a presumption that their relation was that of husband and wife, evidence of a different or divided reputation of the parties is not competent or sufficient to rebut the said presumption, unless it proves or tends to prove that such reputation continued down to the time to which the presumption refers.

Find as Req.

1668 July 5, 1911
R. S. P.
S.

4. In this matter the facts proved were sufficient to raise a presumption that the decedent and the administratrix were husband and wife at the time of the death of the decedent and at all

Digitized by Google

1669

times after they took up their residence in Binghamton in 1906;

Refused
July 5, 1911
R. S. P.
S.

5. The facts proved on the trial in this matter are such that the conclusion of law above stated and numbered 3 applies in the decision herein.

Refused
July 5, 1911
R. S. P.
S.

1670

6. If facts are shown, sufficient to raise a presumption that the decedent and the administratrix were married at the time of the death of the decedent in the year 1908, evidence that, in a locality where they formerly resided, they bore a different reputation during a period ending at or about the beginning of the year 1906, is not competent or sufficient to rebut said presmuption.

Find as Req.
July 5, 1911
R. S. P.
S.

1671

7. No evidence of a reputation from the speech of people that the decedent and the administratrix were unmarried persons, is competent or sufficient to rebut the presumption, if any such presumption there be, that they were married at the time of the death of the decedent, unless such evidence proves, or tends to prove a reputation that continued down to the time of the death of

Digitized by Google

1672 the decedent and existed at the place where he resided at the time of his death.

Find as Req.
July 5, 1911
R. S. P.
S.

8. There is no evidence that, from the speech of people, or otherwise, either the decedent or the administratrix was reputed in the City of Binghamton, to be unmarried, at the time of the death of the former, or at any time after they began to reside in said City in 1906.

Refused
1673 July 5, 1911
R. S. P.
S.

9. The only legitimate inference from all the evidence is that when the decedent and the administratrix moved to Binghamton and took up their residence there together, the gossip in the Town of Chenango to the effect that they were unmarried, ceased.

Refused
July 5, 1911
R. S. P.
S.

10. Marriage may be established by proving the cohabitation of the parties, their reputed re-
1674 lation as married people, a mutual acknowledgment, by each of the parties, of the matrimonial relation, the reception of either party in the family of the other, and from other circumstances, from which a marriage may be inferred.

Find as Req.
July 5, 1911
R. S. P.
S.

Digitized by Google

1675

11. The circumstances proved at the trial, including letters of the decedent, produced by the administratrix, the declarations of the decedent made to third persons, the conduct and manner of living of the decedent and the administratrix from in or about the year 1901 down until the time of the death of the decedent in 1908, the birth to them of a child in 1907 and the recognition of the administratrix by the relatives of the decedent, as well as the recognition of the decedent by the relatives of the administratrix, are sufficient in law, to raise, and in this matter have raised the presumption that the decedent and the administratrix were married.

1676

Refused
July 5, 1911
R. S. P.
S.

12. The petitioner is in no better position to controvert the claim of the administratrix that she was married to the decedent, than the decedent would have occupied in an action or proceeding brought against him by the administratrix at the time immediately prior to his death and putting in issue the question whether they were married or not.

Find as Req.
July 5, 1911
R. S. P.
S.

1677

13. The declarations of the decedent that the administratrix was his wife, made in her presence and his written communications to her in which he addressed her as his wife, cannot be contradicted, nor can their weight as evidence be overcome or lessened in any way, by proof or mere gossip, upon the part of acquaintances, who had

Digitized by Google

1678 no knowledge of the true character of the relation of the administratrix and the decedent, to the effect that the decedent and the administratrix were not married.

Find as Req.
July 5, 1911
R. S. P.
S.

14. Proof of declarations made by the administratrix which were not made in any legal proceeding or on any occasion when the administratrix was under legal duty to speak the truth, cannot be made to supply the place of a bill of
1679 particulars in this proceeding, and do not in any way limit the issues.

Find as Req.
July 5, 1911
R. S. P.
S.

15. In the absence of any claim in the pleading of the administratrix in this proceeding, that she was married to the decedent within the State of New York, and in the absence of any limitation of the issues by means of a bill of particulars, and in the absence of proof that there was no marriage between the decedent and the administratrix without the State of New York, Section 19 of Chapter 339 of the Laws of 1901, cannot be
1680 given any application whatever, to the decision in this matter.

Find as Req.
July 5, 1911
R. S. P.
S.

16. Section 19 of Chapter 339 of the Laws of 1901 did not even while it was in effect, and does not now require proof of the solemnization of a

Digitized by Google

1681

marriage in the manner required by said Chapter, in order to establish the marriage, but while said section was in effect, a marraige to which it applied might have been, and may now be established by circumstantial evidence.

Find as Req.
July 5, 1911
R. S. P.
S.

17. After the repeal of Section 19 of Chapter 339 of the Laws of 1901, that Section had no application whatever to any claimed marriage, unless the marriage relation to which such claim is applied, terminated prior to the repeal of said Section.

1682

Find as Req.
July 5, 1911
R. S. P.
S.

18. The relation between the decedent and the administratrix and claimed by the latter to have been matrimonial extended beyond the time while Section 19 of Chapter 339 of the Laws of 1901 was in force and, after the repeal of said Section, continued until the death of the decedent in September, 1908.

Find as Req.
July 5, 1911
R. S. P.

1683

S.

19. In this proceeding, it is encumbent upon the petitioner to show affirmatively, that the representation made by the administratrix that she was the widow of the decedent, was false.

Find as Req.
July 5, 1911
R. S. P.
S.

Digitized by Google

1684

20. The petitioner has failed to show by a fair preponderance of proof that the administratrix is not the widow of the decedent or that she obtained the grant of her letters by a false suggestion of a material fact.

Refused
July 5, 1911
R. S. P.
S.

21. The evidence is sufficient to establish and does sufficiently establish that in or about the year 1901, the decedent and the administratrix made and consummated a valid marriage con-
1685 tract.

Refused
July 5, 1911
R. S. P.
S.

22. The evidence is sufficient to establish and does establish that prior to January 1, 1902, the decedent and the administratrix made and consummated a valid marriage contract.

Refused
July 5, 1911
R. S. P.
S.

23. The evidence is sufficient to establish and does establish that the decedent and the adminis-
1686 tratrix were married at the time of the death of the former.

Refused
July 5, 1911
R. S. P.
S.

24. The evidence is sufficient to establish and

Digitized by Google

1687

does establish that the administratrix is the lawful widow of the decedent.

Refused
July 5, 1911
R. S. P.
S.

25. The evidence is sufficient to establish and does establish that the statement made by the administratrix in her petition for letters of administration on the estate of the decedent to the effect that she was the widow of the decedent was true.

Refused
July 5, 1911
R. S. P.
S.

1688

26. The evidence is sufficient to establish and does establish that in procuring the grant of letters of administration on the estate of the decedent the administratrix made no false suggestion of any material fact.

Refused
July 5, 1911
R. S. P.
S.

27. The evidence established that for years prior to the decedent's death the decedent enjoyed the services and society of the administratrix and all the benefits incident to the matrimonial relation with her, and that by his manner of life and by express and oft-repeated declarations to her, he recognized her as his wife and their relation was matrimonial.

1689

Refused
July 5, 1911
R. S. P.
S.

Digitized by Google

Exceptions to Surrogate's Findings of Appellant's Requests

1690

28. The decedent having recognized the relation between him and the administratrix as matrimonial, having declared it to the administratrix, having continued openly for years and down to the time of his death a relation with her apparently connubial and respectable and having taken all the benefits incident to said relation, the decedent was and his next of kin are, estopped to deny that the relation between the decedent and the administratrix was that of husband and wife.

Refused
July 5, 1911
1691 R. S. P.
S

APPELLANT'S EXCEPTIONS TO THE SURROGATE'S REFUSALS TO FIND AS REQUESTED

SURROGATES COURT: BROOME COUNTY

In the Matter of the Application of HENRY A. HINMAN for the removal of VENA M. HINMAN from office as Administratrix of the Estate
1692 of
CHARLES N. HINMAN,
Deceased.

Vena M. Hinman, a party to the above entitled matter who has appealed from the decree made herein and filed on or about October 12, 1910, having submitted proposed Findings of Fact and Conclusions of Law to the Surrogate at the time of the settlement of the case in said matter, and

Digitized by Google

Exceptions to Surrogate's Findings of Appellant's Requests

1693

having requested the Surrogate to make findings thereon, and the said Surrogate having passed upon said requests and having refused to find as requested, said appellant, Vena M. Hinman, hereby excepts—

1. To the Surrogate's refusal to find as submitted the Finding of Fact numbered 9;

2. To the Surrogate's refusal to find as submitted the Finding of Fact numbered 11;

3. To the Surrogate's refusal to find as submitted the Finding of Fact numbered 25;

1694

4. To the Surrogate's refusal to find as submitted the Finding of Fact numbered 35;

5. To the Surrogate's refusal to find as submitted the Finding of Fact numbered 45;

6. To the Surrogate's refusal to find as submitted the Finding of Fact numbered 49;

7. To the Surrogate's refusal to find as submitted the Finding of Fact numbered 75;

8. To the Surrogate's refusal to find as submitted the finding of Fact numbered 76;

9. To the Surrogate's refusal to find as submitted the finding of Fact numbered 79;

1695

10. To the Surrogate's refusal to find as submitted the finding of Fact numbered 80;

11. To the Surrogate's refusal to find as submitted the Finding of Fact numbered 94;

12. To the Surrogate's refusal to find as submitted the Finding of Fact numbered 97;

13. To the Surrogate's refusal to find as submitted the Finding of Fact numbered 98;

Digitized by Google

Exceptions to Surrogate's Findings of Appellant's Requests

1696

14. To the Surrogate's refusal to find as submitted the Finding of Fact numbered 99;

15. To the Surrogate's refusal to find as submitted the Finding of Fact numbered 101;

16. To the Surrogate's refusal to find as submitted the Finding of Fact numbered 119;

17. To the Surrogate's refusal to find as submitted the Finding of Fact numbered 131;

18. To the Surogate's refusal to find as submitted the Conclusion of Law numbered 4;

1697

19. To the Surrogate's refusal to find as submitted the Conclusion of Law numbered 5;

20. To the Surrogate's refusal to find as submitted the Conclusion of Law numbered 8;

21 To the Surrogate's refusal to find as submitted the Conclusion of Law numbered 9;

22. To the Surrogate's refusal to find as submitted the Conclusion of Law numbered 11;

23. To the Surrogate's refusal to find as submitted the Conclusion of Law numbered 20;

24. To the Surrogate's refusal to find as submitted the Conclusion of Law numbered 21;

1698

25. To the Surrogate's refusal to find as submitted the Conclusion of Law numbered 22;

26. To the Surrogate's refusal to find as submitted the Conclusion of Law numbered 23;

27. To the Surrogate's refusal to find as submitted the Conclusion of Law numbered 24;

28. To the Surrogate's refusal to find as submitted the Conclusion of Law numbered 25;

Digitized by Google

29. To the Surrogate's refusal to find as submitted the Conclusion of Law numbered 26;

30. To the Surrogate's refusal to find as submitted the Conclusion of Law numbered 27; and

31. To the Surrogate's refusal to find as submitted the Conclusion of Law numbered 28.

Dated, July 12, 1911.

HINMAN, HOWARD & KATTELL,
Attorneys for Vena M. Hinman, Appellant,
Security Mutual Life Bldg.,
Binghamton, N. Y.

To

HON. ROBERT S. PARSONS,
Surrogate; and
WILBER & YETTER, ESQS.,
Attorneys for Petitioner and Respondent.

STIPULATION WAIVING CERTIFICATION

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby STIPULATED that the foregoing are true copies of the notice of appeal herein, of the decree and the intermediate orders from which the appeal is taken, and of all of the papers upon which said decree and said orders were founded; also of the case and exceptions herein and of the appellant's requests to find, together with the Surrogate's rulings thereon and of the appellant's exceptions to the Surrogate's refusals to find as requested, all of which papers are now on file in the office of the Surrogate of the County of Broome.

ALSO STIPULATED that said copies are correct transcripts of the original papers respective-

Digitized by Google

1702 ly and of the whole of such originals, and certification thereof by the Surrogate or his Clerk, is hereby waived.

Dated, July 26, 1911.

HINMAN, HOWARD & KATTELL,
Attorneys for Vena M. Hinman,
Appellant.

WILBER & YETTER,
Attorneys for Henry A. Hinman,
Respondent.

OPINION REGARDING REQUESTS TO FIND.

1703 SURROGATE'S COURT: BROOME COUNTY

In the matter of the Application of HENRY A. HINMAN for the Removal of VENA M. HINMAN from the office of Administratrix of the Estate of CHARLES N. HINMAN, Deceased.

The following appearances were made in the proceeding:

1704 Wilber & Yetter Esqrs. for the petitioner with Page & Hays Esqrs. and V. D. & H. D. Stratton Esqrs. as counsel.

Hinman, Howard & Kattell, Esqrs. for Vena M. Hinman with A. L. Bonnell Esq. as counsel.

Parsons, Surrogate.

On the 14th day of October, 1908, letters of administration on the estate of Charles N. Hinman, deceased, were issued to one Vena M. Hinman

Digitized by Google

upon her verified petition, reciting among other things that she was the widow of the said Charles N. Hinman. 1705

This proceeding was brought to remove the said Vena M. Hinman as administratrix of the said estate upon the ground that the letters of administration thus issued to her were obtained by a false suggestion of a material fact, and that such a false suggestion consisted of the sworn statement in her said petition for such letters that "Your petitioner is the widow of Charles N. Hinman, late of the city of Binghamton, in said county of Broome, now deceased."

The said Vena M. Hinman made a verified answer to the said petition and the issue thus raised has been tried. 60 witnesses were sworn in the said proceeding and in addition thereto more than 225 documents were received in evidence. Eight or nine days were given up to the taking of testimony, which when written out covered over 900 typewritten pages not including the said documents. After the evidence had been written out the counsel for the respective parties were given such time as they desired in which to prepare briefs and submit the case, which was done by oral argument. 1706

After most careful consideration of all the evidence in the proceeding, I reach a decision which was expressed in the findings of fact and conclusion of law which I made and filed on September 13th, 1910. Some of the findings of fact are as follows: 1707

"7th. That the aforesaid Vena M. Hinman is not the widow of the said Charles N. Hinman, deceased."

"8th. That the said Charles N. Hinman, deceased, and the aforesaid Vena M. Hinman were

Digitized by Google

1708 never married, and the relation of husband and wife never existed between them."

"9th. That the grant of Letters of Administration on the estate of the said Charles N. Hinman, deceased, to the aforesaid Vena M. Hinman, was obtained by her by a false suggestion of a marterial fact."

"10. That the false suggestion of a material fact, mentioned in the 9th finding of fact herein, is found and contained in the verified petition of the aforesaid Vena M. Hinman upon which she obtained the Letters of Administration upon the estate of the said Charles N. Hinman, deceased, on
1709 October 14th, 1908, and the said false suggestion of a material fact is expressed in the said petition in the following terms, to wit: 'Your petitioner is the widow of Charles N. Hinman, late of the city of Binghamton, in said county of Broome, now deceased.' "

The conclusion of law is as follows: "That the Letters of Administration heretofore issued on the estate of Charles N. Hinman, deceased, to the aforesaid Vena M. Hinman on the 14th day of October, 1908, should be revoked."

On October 19th, 1910, the said Vena M. Hinman filed exceptions to the 7th, 8th, 9th & 10th findings of fact and to the conclusion of law here-
1710 inbefore mentioned.

The attorneys for the said Vena M. Hinman presented no requests to the Surrogate at the time of the submission of the said matter, but on June 2nd., 1911, almost nine months after the Surrogate's said decision, the attorneys for the said Vena M. Hinman presented to the Surrogate requests for 131 separate findings of fact and requests for 28 conclusions of law.

Digitized by Google

1711

§2545 of the Code of Civil Procedure, among other things, provides that "Upon such a trial, (referring to a trial before the Surrogate), the Surrogate must file in his office his decision in writing which must state separately the facts found and the conclusions of law." It further provides that "Either party may upon the settlement of a case request a finding upon any question of fact or a ruling upon any question of law; and an exception may be taken to such a finding or ruling or to a refusal to find or rule accordingly."

As has already been pointed out, in this case the Surrogate did make and file his decision in writing, stating separately the facts found and his conclusion of law.

1712

That provision of the section heretofore quoted, which permits a party upon the settlement of a case to request a finding upon any question of fact, or a ruling upon any question of law, has reference to such questions of fact and such questions of law as constitute the issue or are pertinent thereto. The court is not called upon to make findings upon isolated pieces of evidence or upon abstract propositions of law.

The real issue in this case was squarely passed upon by the Surrogate, as will appear from an examination of the petition, the answer, and the findings which the Surrogate made in the first instance.

1713

The court should not be called upon to make findings as to what each or any particular witness may have sworn to, or as to what particular expression was contained in any one or more of the numerous documents received in evidence.

As was said by McAdam, J., in Schnugg vs N. Y. Elevated Railroad Co., et. al., 56 St. Reporter, 251, at page 252: "Proposed findings should never be made more numerous intricate or

Digitized by Google

1714 complicated, than the exigencies of the case and nature of the controversy require. They ought to simplify and aid review by the Appellate Court rather than obscure and complicate it by repetitions, immaterial matter, and the like, which serve no useful purpose."

The purpose of the provision contained in §2545 of the Code of Civil Procedure which permits either party on the settlement of a case to request a finding upon any question of fact, or a ruling upon any question of law, was to assimilate the practice of appeals from a Surrogate's decree in the prescribed cases to that which regulates appeals from a judgment rendered by a court or a
1715 referee in an action in the Supreme Court.

The opinion of Judge Freedman, in the case of Bates vs. Bates, 57 N. Y. St. Reporter, 725, is quite applicable to the matter now under consideration; therefore I quote from it somewhat at length. In that case the real question was as to whether the plaintiff and defendant were husband and wife. In the matter which I now have under consideration the real question is—is Vena M. Hinman the widow of Charles N. Hinman?

In the case of Bates vs. Bates, above referred to the Court, at page 732, says: "Although the whole case turns upon a single question—viz., marriage or no marriage—plaintiff's attorneys have submitted requests for 283 separate findings of fact
1716 and 6 requests for conclusions of law. The labor of passing upon these requests, with due care, and recording my ruling in each instance, and attesting the same with my initials, will consume several day's time. Most of the requests are for findings upon isolated pieces of evidence. This practice has been repeatedly condemned by the courts, and especially by the General Term of this Court in Livingston vs. Manhattan Railway Co., 42 St.

Digitized by Google

1717

Reporter, 4, and in Schnugg vs. N. Y. Elevated Railroad Co., 56 St. Reporter, 251, and by the Court of Appeals in Steubing vs. N. Y. Elevated Railroad Co., 138 N. Y., 658. Such detailed findings are wholly unnecessary for the proper protection of the rights of the client. It is only the necessary, general or ultimate facts constituting the foundation of the decision which must be found, and a refusal to find a minor act which, if found, does not, while standing by itself, call for a change or modification of the general or ultimate facts already found, or for a change or modification of some conclusion of law based upon such general and ultimate facts, is wholly immaterial and does not constitute error. No trial judge should, therefore, be asked to waste valuable time in passing upon unnecessary requests. The practice of doing so has lately, however, assumed such alarming proportions and become such a great abuse, that the Legislature should take cognizance of it and provide a remedy. If this is not done the present judicial courts available for trying equity cases will shortly become wholly inadequate for a dispatch of this class of cases, and the delay in having a cause reached, which already is great must necessarilly become greater and greater."

1718

In the case at bar the issue was clearly defined, and was fully disposed of by the findings made by the Surrogate in the first instance; therefore the multitudinous requests for findings presented to the Surrogate by the attorneys for the said Vena M. Hinman could serve no good purpose and were unnecessary for the protection of her rights.

1719

Findings may be so numerous and so cleverly drawn as to oftentimes befog the issue. Findings which have a tendancy to ensnare the trial judge and to defeat the ends of justice by introducing

Digitized by Google

1720

mistakes, confusion and uncertainty into the record, should not be countenanced.

Schnugg vs. N. Y. Elevated Railroad Co., 56 N. Y. St. Reporter, 251.

Inasmuch as my attention has not been called to any expression, with reference to such findings, by an Appellate Court in this department, I have again gone over the evidence in this proceeding and have passed upon each and every one of the requests to find.

Dated July 8th, 1911.

ROBERT S. PARSONS,
Surrogate.

1721

AFFIDAVIT REGARDING GIVING OF OPINION IN THE COURT BELOW.

SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

In the Matter of the Application of HENRY A. HINMAN for the removal of VENA M. HINMAN from office as administratrix of the estate of CHARLES N. HINMAN, deceased.

1722

State of New York }
County of Broome } ss.

ARCHIBALD HOWARD being duly sworn, says that he is one of the attorneys for Vena M. Hinman, the appellant in the above entitled matter; that upon the decision of said matter, no

opinion was written by the Surrogate, but that said Surrogate, at the time of filing his decision, notified deponent to be present in Court; that deponent attended at the time specified in said notice; that the attorneys for the respondent were also present; that the Surrogate at that time stated orally that he had decided to revoke the letters issued to the administratrix; that he had been unable to find when the decedent and the administratrix were married, how they were married or where they were married, or that they were, in fact, married. 1723

Deponent further says that the said appellant, pursuant to Section 2545 of the Code of Civil Procedure, submitted to the Surrogate at the time of the settlement of the case herein, requests to make findings upon questions of fact and law; that said Surrogate passed upon said requests and in so doing, gave an opinion in writing, a copy of which is contained in the foregoing printed record. 1724

Deponent further says that at the time when the issues in the above entitled matter were submitted to the Surrogate for his decision, deponent asked said Surrogate if he desired to have requests to find submitted, and said Surrogate informed deponent that he did not desire such requests, but that at the time when said Surrogate announced his decision as hereinbefore stated, deponent then requested said Surrogate that the appellant's attorneys be permitted to submit requests to find; that at said time said Surrogate stated to deponent that such requests could be submitted at the time of the settlement of the case. 1725

Deponent further says that so far as he has any knowledge or information, no opinion has been

Digitized by Google

given herein by the Court below, except as herein-
1726 before stated.

ARCHIBALD HOWARD.

Subscribed and sworn to before
me this 14th day of July, 1911.
FRANK L. WOOSTER,
Notary Public.

1727

1728

Digitized by Google

ORDER OF REVERSAL

1729

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department of said State at the Appellate Division Court Room in the City of Albany commencing on the 14th day of November, 1911.

PRESENT:

HON. WALTER LLOYD SMITH,
Presiding Justice.

1730

HON. JOHN M. KELLOGG,
HON. ALBERT H. SEWELL,
HON. JAMES W. HOUGHTON,
HON. JAMES A. BETTS,

Associate Justices.

SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

1731

In the Matter of the Application of HENRY A. HINMAN, for the removal of Vesta M. Hinman from Office as administratrix of the estate of CHARLES N. HINMAN, *Deceased.*

An application for the revocation of letters of administration upon the estate of the above named

Digitized by Google

1782 Charles N. Hinman, deceased, issued to the above named Vena M. Hinman, by the Surrogate of Broome County on or about the 14th day of October, 1908, having been made by Henry A. Hinman, above named, to said Surrogate, upon the ground that the grant of said letters of administration was obtained by an alleged false suggestion of a material fact, to wit: that said Vena M. Hinman was the widow of said Charles N. Hinman, and a decree having been made by said Surrogate upon said application, on or about the 12th day of October, 1910, whereby it was adjudged and decreed:

1783 First. That said Charles N. Hinman, deceased, and the said Vena M. Hinman were never married, and the relation of husband and wife never existed between them;

Second. That said Vena M. Hinman is not the widow of said Charles N. Hinman, deceased;

Third. That said letters of administration on the estate of said Charles N. Hinman, deceased, issued to said Vena M. Hinman on the 14th day of October, 1908, be and were revoked;

1784 Fourth. That said Henry A. Hinman recover of said Vena M. Hinman the sum of $241.52, for his costs and disbursements in the proceeding upon said application; and

Said Vena M. Hinman having appealed upon questions of law and upon the facts to the Appellate Division of the Supreme Court in and for the Third Judicial Department, from said Decree and

Digitized by Google

upon said appeal having brought up for review two intermediate orders entered in said proceeding, viz: 1735

1. The order made on April 25, 1910, denying the motion made by said appellant upon her special appearance in said proceeding on said date, to set aside the citation issued from said Surrogate's Court, and directing said Appellant to show cause before said Court on April 25, 1910, why an order should not be made revoking the letters of administration issued to her upon the estate of the above named decedent, as well as to set aside the service of said citation, which order was entered on the 19th day of October, 1910; and

1736

2. The order made in said proceeding on the 25th day of April, 1910, denying the motion made by said appellant upon her general appearances in said proceeding to dismiss the petition in said matter and to vacate and set aside the citation issued thereon and to discontinue said proceeding, which order was duly entered on the 19th day of October, 1910;

And said appeal having been brought on for argument at a term of this Court commencing on the 12th day of September, 1911, and said appeal having been heard at said term;

1737

And after due deliberation, said Appellate Division, on said appeal having found and decided:

1. That said Charles N. Hinman, deceased, and the said Vena M. Hinman were married and that the relation of husband and wife existed between them at the time of the death of said Charles N. Hinman;

Digitized by Google

1738 2. That said Vena M. Hinman was the widow of said Charles N. Hinman, deceased; and

3. That the grant to said Vena M. Hinman of said letters of administration upon the estate of said decedent, issued to her by said Surrogate on the 14th day of October, 1908, was not obtained by any false suggestion of a material fact;

Now, on reading the printed record on said appeal, heretofore filed herein with the Clerk of this Court and after hearing Harvey D. Hinman, Esq., of Counsel for the said Vena M. Hinman, appellant, and Harry A. Yetter, Esq., of counsel for the said Henry A. Hinman, respondent, and due deliber-
1739 tion having been had, it is, on motion of Hinman, Howard & Kattell, attorneys for said Vena M. Hinman, appellant,

ORDERED that said decree and orders be and hereby are reversed upon the law and the facts with costs, and said application to remove said administratrix denied, with costs, all concurring except Smith, P. J., who dissents.

JOSEPH H. HOLLANDS, Clerk.

(Seal)

A copy
JOSEPH H. HOLLANDS, Clerk.

1740

Digitized by Google

DECREE ON ORDER OF REVERSAL

1741

At a Surrogate's Court held in and for the County of Broome at the Court House in the City of Binghamton, N. Y., on the 27th day of January, 1912.

PRESENT:

Hon. Robert S. Parsons, Surrogate.

SURROGATE'S COURT—BROOME COUNTY.

In the Matter of the Application of

HENRY A. HINMAN, for the removal of Vena M. Hinman from Office as administratrix of the estate of CHARLES N. HINMAN, *Deceased.*

1742

A petition having been presented to the said Surrogate by Henry A. Hinman upon an application for a decree that the letters of administration issued to the above named Vena M. Hinman upon the estate of the above named Charles N. Hinman, deceased, be revoked upon the ground that the grant of such letters was obtained by said Vena M. Hinman by the false suggestion of a material fact, and upon said petition a citation directed to the said Vena M. Hinman having issued requiring her to appear before said Surrogate on the 25th day of April, 1910, to show cause why a decree should not be made revoking said letters of administration,

1748

Digitized by Google

1744 and said citation having been returned with proof of service thereof, and thereupon said Vena M. Hinman having appeared specially upon said application and having moved to set aside said citation, and the service thereof, and said motion having been denied and an order denying the same having been entered in said Surrogate's office on October 19, 1910, and said Vena M. Hinman having thereupon appeared generally and moved to dismiss said petition and to vacate and set aside the said citation issued thereon and to discontinue the proceedings thereon, and said last mentioned motion having been denied and an order denying the same having been entered in said Sur-
1745 rogate's Office on the 19th day of October, 1910, and thereupon said Vena M. Hinman having filed an answer to said petition, and the surrogate having tried the issues and having decided the same and made a decree revoking said letters of administration, which decree was filed and entered in said Surrogate's Office on the 12th day of October, 1910, and the said Vena M. Hinman having appealed upon questions of law and upon the facts to the Appellate Division of the Supreme Court in and for the Third Judicial Department from said decree, and in her notice of appeal having stated that she intended to bring up for review on said appeal the intermediate orders hereinbefore mentioned and
1746 described, and said appeal having been duly heard and decided and an order made thereon whereby it was ordered that said decree and orders be and were reversed upon the law and facts with costs, and the said application to remove said administratrix denied with costs, and whereby it was found and decided:

1. That said Charles N. Hinman, deceased, and

Digitized by Google

the said Vena M. Hinman were married and that the relation of husband and wife existed between them at the time of the death of said Charles N. Hinman; 1747

2. That said Vena M. Hinman was the widow of said Charles N. Hinman, deceased; and

3. That the grant to said Vena M. Hinman of said letters of administration upon the estate of said decedent, issued to her by said Surrogate on the 14th day of October, 1908, was not obtained by any false suggestion of a material fact;

And said order having been duly filed and entered with the Clerk of said Appellate Division on the 10th day of January, 1912, and a certified copy thereof annexed to the papers transmitted from the Court below upon which said appeal was heard having been transmitted to and filed with the Surrogate of said County of Broome on the 15th day of January, 1912, and the costs of the said Vena M. Hinman having been duly taxed and allowed at the sum of eight hundred seven dollars and eighty-eight cents ($807.88). 1748

Now, on motion of Hinman, Howard & Kattell, attorneys for said Vena M. Hinman,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED— 1749

1. That said Charles N. Hinman, deceased, and the said Vena M. Hinman were married and that the relation of husband and wife existed between them at the time of the death of said Charles N. Hinman;

Digitized by Google

1750 2. That the said Vena M. Hinman was the widow of said Charles N. Hinman, deceased;

3. That the grant to said Vena M. Hinman of said letters of administration upon the estate of said decedent, issued to her by said Surrogate on the 14th day of October, 1908, was not obtained by any false suggestion of a material fact;

4. That the said decree made herein by said Surrogate revoking said letters and entered on the 12th day of October, 1910, as well as the said intermediate orders entered in said Surrogate's Office on the 19th day of October, 1910, be and hereby are
1751 reversed upon the law and the facts;

5. That the said application of said Henry A. Hinman to revoke the said letters of administration issued to said Vena M. Hinman by said Surrogate upon the estate of said decedent on the 14th day of October, 1908, be and the same hereby is denied, and that said petition and the proceedings thereupon be and the same hereby are dismissed upon the merits;

6. That the said Vena M. Hinman recover of the said Henry A. Hinman the said sum of eight hundred seven dollars and eighty-eight cents
1752 ($807.88), which sum is hereby allowed to her for her costs and disbursements in this proceeding.

ROBERT S. PARSONS,

Surrogate.

Digitized by Google

OPINION FOR REVERSAL 1753

SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

In the Matter of the Application of

HENRY A. HINMAN, for the removal of Vena M. Hinman from Office as administratrix of the estate of CHARLES N. HINMAN, *Deceased.* 1754

Argued September Term, 1911.
Decided November Term, 1911.

BEFORE

SMITH, *Presiding Justice*,

KELLOGG, SEWELL, HOUGHTON, BETTS,

Associate Justices.

Appeal by Vena M. Hinman from a decree of the Surrogate of Broome County, entered upon the 12th day of October, 1910, vacating the order appointing her Administratrix of the estate of Charles N. Hinman, deceased. 1755

APPEARANCES:

Hinman, Howard & Kattell (Harvey D. Hinman of Counsel) for Appellant.

Wilber & Yetter (Harry A. Yetter of Counsel) for respondent.

KELLOGG, J.

Digitized by Google

1756 "The presumption of marriage, from a cohabitation, apparently matrimonial, is one of the strongest presumptions known to the law. * * * The presumption of law is not lightly to be repelled. It is not to be broken in upon, or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive, * * * by disproving every reasonable possibility." (Hynes vs. McDermott, 91 N. Y., 451, 459).

The evidence shows conclusively that the parties lived together as husband and wife for many years in the actual belief that they were married, and
1757 were so recognized by their friends and neighbors. It is practically conceded that a marriage at common-law is shown, but we are asked to find that it took place between January 1st, 1902, and January 1st, 1908, when it is claimed that a common-law marriage in this State was not permissible. It is sought to reverse the presumption and to assume that the marriage took place at a time, place and manner which makes it illegal.

The presumption of marriage does not assume that it took place at any particular place, manner or time; it means that a legal marriage existed.

1758 The husband is dead, the wife is an incompetent witness to prove the time, place or manner of marriage. If he were living and she were a competent witness they might be able to prove that the marriage took place in all respects according to the laws of this State, but they are necessarily silent. The marriage does not fail for that reason. The provisions of the Domestic Relations Law relating

Digitized by Google

to marriage is not a rule of evidence and does not annul the ordinary presumption of law applicable thereto. Section 19 of that law did not attempt to visit the ban of invalidity on any contract of marriage except upon one claimed to have been contracted otherwise than as mentioned in the statute. That statute is a restraint upon the natural common-law right of parties to make a contract of marriage and must have a reasonable construction, but is not to be extended beyond its fair terms. It has no reference to and does not destroy the ordinary presumption of marriage. While that law was in force in all its terms it was still permissible, when the facts required, to presume a legal marriage, although none was actually proved, which conformed to the statutory requirements. Several considerations invite the application of the presumption to this case. 1759 1760

It is uncontradicted that in the fall of 1901 the parties visited the appellant's mother, father and sister at Equinunk, Pa. He was introduced as her husband and occupied a room with her. Other evidence shows their acts and their claim to be married prior to January, 1902. They were in fact living in the house with his mother. The introduction of evidence tending to throw a doubt on their relations at that time does not meet the case in view of their lives and conduct and the practical concession that a common-law marriage took place at some time. The relation of the parties from that time down to the death of the husband, aided by the presumption, is alone sufficient to determine this case in her favor. There are other facts upon which the presumption comfortable rests and which assure her position. They were 1761

Digitized by Google

1762 out of the State at different times in Pennsylvania and New Jersey, and we cannot assume that the statutory law of those states is the same as for a time existed in this State. It is provided by Sec. 7 of Chapter 742 of the Laws of 1907, which chapter is alleged to make common-law marriages invalid, that that chapter shall not affect marriages among the people called Friends or Quakers, nor marriages among people of any other denomination having as such any particular way of solemnizing marriages, but such marriages must be solemnized in the manner theretofore practiced in their respective societies or denominations, and that marriages so solemnized shall be as valid as if this Article
1768 had not been passed. If the marriage took place in this State after January 1st, 1902, we cannot assume that it did not take place in the manner provided for in this Section.

Irrespective of the question whether from January 1st, 1902, to the death of the husband on September 17th, 1908, common-law marriage might take place in this State, the evidence shows that the parties were right in believing that they were married, and the finding that there was no marriage is in conflict with the law and the evidence in the case.

1764 Counsel have ably argued the question whether a common-law marriage since the statute of 1907 is permissible in this State. The Surrogate evidently believed it was not. The matter of so public interest, and although not necessary to a decision of the case, it may not be unwise to give it consideration. Sections 10 to 18 of Article 2 of the former Domestic Relations Law, Chapter 272 Laws

Digitized by Google

of 1896, recognized marriages as civil contract de- 1765
pending for its validity upon the consent of parties capable in law of making it, and permitted such consent to be shown by common-law evidence. It did, however, provide for a manner of solemnizing marriages in order to have them authenticated and recorded pursuant to that statute. Chapter 339 of the Laws of 1901 amended that Article. From Section 10 of the former law it omitted the words "For the purpose of being registered and authenticated as prescribed in this Article," leaving that Section to read that a marriage must be solemnized in one of the ways stated in its four subdivisions, and incorporated into Section 10 of the law a provision that a lawful marriage contracted in the manner 1766
and pursuant to the regulations of a religious society to which either party belongs is as valid as if the Article has not been amended, and it added to the Law Section 19 which declared that no marriage claimed to have been contracted after January 1st, 1902, within this State otherwise than in that Article provided, should be valid for any purpose whatever, provided that no such marriage shall be deemed invalid by want of authority to the person solemnizing the same under Section 11, if consummated with the full belief on the part of either of the contracting parties that they were lawfully joined in marriage, or on account of any mistake in the date, place of marriage or resi- 1767
dence of either of the contracting parties. It must be conceded that during the lifetime of Section 19 a marriage claimed to have been solemnized in the State in other than the statutory way and not pursuant to the regulations of a religious society to which the parties belonged was invalid. The necessity of Section 19 to require ceremonial marriages

Digitized by Google

1768 is apparent from the general rule that a statutory provision directing how marriage shall be performed is construed by the courts as merely directory and does not affect the validity of a marriage otherwise contracted unless there is a provision of the law asserting such invalidity. (Meister vs. Moore, 96 U. S., 76).

Chapter 742 of the Laws of 1907 again amended the Domestic Relations Law by striking from Section 10 the provision excepting from the provisions of the Article marriages according to the regulations of a religious society to which the parties belong, and incorporated into Section 7 a similar and
1769 broader exception, and expressly repealed Section 19 added by the Laws of 1901. Having thus stricken from the law every provision which declared other marriages invalid, the intention evidently was to recognize the validity of other marriages according to the well known rule mentioned in Meister vs. Moore, supra. Aside from that rule the legislative intention is clear from the Act itself. Section 19 had a saving clause by which a marriage was recognized as legal if the parties were mistaken about the official character of the person solemnizing it, ignoring mistakes in names, dates and places in the record. It cannot be that the Legislature meant to repeal this saving clause and
1770 make such excepted cases illegal. I think the repeal shows the changed public policy of the State and that the Legislature became satisfied that the provision making marriages void unless performed in a particular manner was against the public good and public morals and that the repeal was intended to and did make common-law marriages valid in this State.

Digitized by Google

We have not overlooked the fact that sub-division 4 of Section 11 of the Laws of 1901, which related to a written contract of marriage and required it to be acknowledged in the same manner as is required of a conveyance of real estate to be recorded, was by the Act of 1907 renumbered as Section 6 and amended. The amendment added a proviso that the acknowledgment "must, in order to be valid" be before a Judge. It also required that the contract be recorded within six months with the County Clerk instead of being filed with the town or city clerk. 1771

If the Legislature intended by the general clause of Section 11, as is claimed, to make all marriages void which were not solemnized in the manner mentioned in one of its four sub-divisions, then it was clearly unnecessary to insert the words quoted in sub-division 4, which provision in that sub-division can have no effect upon the other sub-division. If the amendment of sub-division 4 was deemed necessary in order to make a written contract not according to its terms void, then it clearly was the legislative understanding that the other sub-divisions of the Section did not carry invalidity with them. The words quoted only relate to the acknowledgment of the paper and do not relate to a failure to have it recorded as required by the next sentence of the amendment. The Section, as amended, until we get to the proviso, permits the acknowledgment to be taken before any officer qualified to take an acknowledgment of conveyances for record. Instead of re-writing that sentence the Legislature added the proviso, which was undoubtedly intended to mean that notwithstanding the general language immediately preceding 1772 1773

1774 that the contract was not in compliance with the statute unless acknowledged before a Judge.

The order should be reversed upon the law and the facts, with costs, and the motion to remove the appellant as administratrix, denied with costs.

1775

1776

Digitized by Google

AFFIDAVIT OF NO OPINION

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK.

In the Matter of the Application of HENRY A. HINMAN for the Removal of VENA M. HINMAN from Office as Administratrix of the Estate

of

CHARLES N. HINMAN,

Deceased.

STATE OF NEW YORK,
COUNTY OF BROOME,
CITY OF BINGHAMTON. } *ss.*

HARRY A. YETTER, being duly sworn, deposes and says that he resides in the City of Binghamton, and is one of the attorneys for the appellant in the above entitled proceeding; that an Opinion for Reversal, by Mr. Justice KELLOGG, was rendered herein; that no other Opinion was rendered herein, as deponent is informed and verily believes.

HARRY A. YETTER.

Subscribed and sworn to before me
this 6th day of April, 1912.

MAURICE E. PAGE,
Notary Public.

Digitized by Google

1780 **NOTICE OF APPEAL TO COURT OF APPEALS**

SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

In the Matter of the Application of HENRY A. HINMAN,

Appellant,

For the Removal of

VENA M. HINMAN, Respondent,

1781 from office as administratrix of the estate of CHARLES N. HINMAN,

Deceased.

TAKE NOTICE that Henry A. Hinman, a party to the above entitled proceeding, hereby appeals upon questions of law and upon the facts to the Court of Appeals from the Order of the Appellate Division of the Supreme Court for the Third Department entered herein in the office of the Surrogate of Broome County on or about the 15th day of January, 1912, and also from the Judgment entered thereon in the above entitled proceeding in the Office of the Surrogate of the County of Broome on the 27th day of January, 1912, and the said Henry

1782 A. Hinman appeals from each and every part of said Order and Judgment as well as from the whole of each, and that said appellant intends to bring up for review upon said appeal the Order of the Appellate Division dated on or about January the 11th, 1912, and entered in the Broome County Surrogate's Office on or about the .... day of March, 1912, denying the application of the appellant

Digitized by Google

herein permission to file Requests to Find and to pass upon the same, and the above named Henry A. Hinman, appellant, hereby stipulates and agrees that if the said order of the Appellate Division be affirmed, Judgment absolute shall be rendered against him in favor of the above named Vena M. Hinman, respondent. 1783

Dated March 14, 1912.

WILBER & YETTER,

Attorneys for Henry A. Hinman,

Appellant,

1784

1007 Kilmer Bldg.,

Binghamton, N. Y.

To Hon. Robert S. Parsons,

Surrogate of the County of Broome.

And to Vena M. Hinman, Respondent.

And to Hinman, Howard & Kattell,

Attorneys for Vena M. Hinman, Respondent.

1785

Digitized by Google

1786 **ORDER DENYING APPLICATION FOR PERMISSION TO FILE REQUESTS**

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department of said State at the Appellate Division Court Room in the City of Albany commencing on the 2nd day of January, 1912.

PRESENT:

1787 HON. WALTER LLOYD SMITH,

Presiding Justice.

HON. JOHN M. KELLOGG,

HON. JAMES W. HOUGHTON,

HON. JAMES A. BETTS,

Associate Justices.

SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

In the Matter of the Application of

1788 HENRY A. HINMAN, for the removal of Vena M. Hinman from Office as administratrix of the estate of CHARLES N. HINMAN, *Deceased.*

An application for permission to file Requests to Find having been made in behalf of Henry A. Hin-

Digitized by Google

man, Petitioner Respondent, in the above entitled proceeding on the 9th day of January, 1912, upon which date counsel for all parties appeared in this Court for settlement of Order herein. 1789

NOW, after hearing V. D. Stratton, Esq., in favor of said application, and Archibald Howard, Esq., in opposition thereto, and after due consideration,

IT IS ORDERED, That the application of the respondent upon appeal for permission to file requests to find, be and the same hereby is denied.

JOSEPH H. HOLLANDS, Clerk. 1790

(Seal)

A Copy

JOSEPH H. HOLLANDS, Clerk.

STIPULATION WAIVING CERTIFICATION

IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

In the Matter of the Application of HENRY A. HINMAN for the Removal of VENA M. HINMAN from office as Administratrix of the Estate of CHARLES N. HINMAN, *Deceased.* 1791

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby STIPULATED and agreed

Digitized by Google

1792 by and between the undersigned, being the attorneys for all the parties to this proceeding, that the foregoing are true copies of the Notice of Appeal to the Court of Appeals, of the Decree and Orders appealed from, of the Opinion for Reversal rendered by the Appellate Division, and of all records and papers used before the Appellate Division of the Supreme Court, Third Department, upon which said Orders and Decree appealed from were rendered, now on file in the Office of the Surrogate of the County of Broome, and of the whole thereof, and certification thereof by the Surrogate or his Clerk is hereby waived.

1793 IT IS FURTHER STIPULATED that these copies may be filed with the Clerk of the Court of Appeals as the RETURN herein.

Dated April 11, 1912.

WILBER & YETTER,

Attorneys for Henry A. Hinman,

Appellant.

HINMAN, HOWARD & KATTELL,

Attorneys for Vena M. Hinman,

1794 Respondent.

Digitized by Google

IN THE
Court of Appeals

STATE OF NEW YORK

APPEAL FROM APPELLATE DIVISION, THIRD DEPARTMENT

In the Matter
of
The application of Henry A. Hinman, Appellant, for the removal of Vena M. Hinman, Respondent, from the office as administratrix of the estate of Charles N. Hinman, deceased.

BRIEF FOR PETITIONER-APPELLANT.

Henry A. Hinman, one of the next of kin of the above named Charles N. Hinman, deceased, appeals to this court from an order of the Appellate Division, Third Department, granted on November 14, 1911 (Fol. 1729), which order and decree reversed (Fol. 1739) a decree of the Surrogate's Court of the County of Broome, granted on the 12th day of October, 1910 (Fol. 92), which decree revoked Letters of Administration theretofore issued on the estate of the said Charles N. Hinman, deceased, to the person called Vena M. Hinman, the respondent on this appeal, which Letters were

Digitized by Google

issued to her on October 14, 1908 (Fol. 1902,) on the ground that the grant of such Letters was obtained by the said Vena M. Hinman by a false suggestion of a material fact, to wit: that she was the widow of said Charles N. Hinman, deceased (Fols. 99-100); and the controversy involved here and in the courts below related wholly and entirely to the one issue as to whether this respondent was at the time of the death of the decedent his lawful widow and had been lawfully married to him during his lifetime.

STATEMENT OF FACTS.

Charles N. Hinman, the decedent, died on September 17, 1908, a resident of the County of Broome (Fol. 25), leaving him surviving Albert J. Griswold, a half-brother, Alva E. Morse, a half-brother, and Henry A. Hinman, the appellant herein, an own brother, all children of the same mother, whose maiden name was Melissa Foote (Fol. 125).

On or about October 14, 1908, the respondent, who called herself Vena M. Hinman, made and filed with the Surrogate's Court of the County of Broome her petition alleging that she was "the widow of Charles N. Hinman, late of the City of Binghamton, in said County of Broome, now deceased" (Fol. 25), and on such petition Letters of Administration were duly issued to her without notice to the next of kin of the decedent (Fols. 13-14). On or about March 10, 1910, the appellant Henry A. Hinman presented to said Surrogate's Court his petition alleging, among other things, the granting of Letters to the respondent and that

Digitized by Google

such Letters were obtained by her "by the false "suggestion or statement by her in said petition "that she was the widow of said Charles N. Hin- "man, deceased" (Fol. 14), and that the *respond- ent based her claim "to being the widow of said "Charles N. Hinman upon an alleged marriage "ceremony with him which she claims was per- "formed by the Rev. James Henry LaRoche, a "minister of the gospel, at the Hinman farm, in "the Town of Chenango, N. Y., Broome County, "on the 24th day of September, 1900. That said "Vena M. Lord also claims that the said James "Henry LaRoche issued to her a certificate of "such marriage and that the notice of such mar- "riage was published in one of the Binghamton "papers directly after said 24th of September, "1900,"* and the petitioner in such petition prayed for the revocation of such Letters and for the issue of Letters of Administration to himself (Fols. 21-23). A citation was issued upon this petition and after some preliminary skirmishing the respondent filed her answer thereto in which she alleged in the third and fourth paragraphs thereof, *"She denies that she bases her claim to "being the widow of said Charles N. Hinman upon "the alleged marriage ceremony mentioned and "described in the complaint and alleges that she "bases her claim to being the widow of said "Charles N. Hinman upon a valid marriage with "him.*

"4. She denies the allegation contained in said "petition that she and the said Charles N. Hin- "man were not married by James Henry LaRoche "in said petition mentioned and described. and "she denies the allegation in said petition con-

Digitized by Google

"tained that no certificate of her marriage with "said Charles N. Hinman was ever issued to her "by said James Henry LaRoche" (Fol. 77).

This denial logically amounts to an affirmative allegation on her part, under oath, that she was married to the decedent by Mr. LaRoche; her double negatives must constitute an affirmative allegation to that effect. Upon filing this answer the appellant's attorneys, in open court, moved that the answer be made more definite and certain by specifying:

> "First, whether the alleged marriage be- "tween her and Charles N. Hinman was cere- "monial or non-ceremonial.
>
> "Second: Or that, if the marriage was a "ceremonial marriage, that she be required to "specify and state when, where and by whom "performed and the witnesses present, if any, "at said marriage. If the marriage was a "non-ceremonial marriage, that an order be "made by the Surrogate, requiring the admin- "istratrix to state when the contract of mar- "riage was had, whether it was in writing or "verbal, and where made and, if the marriage "was a non-ceremonial marriage and was "made after January 1, 1902, that she state "where the contract was filed" (Fols. 116-117).

Upon the issues thus made by the pleadings, which were in writing, the parties proceeded to the trial, which resulted in a determination and decision by the Surrogate's Court that there had never been any marriage between the respondent

Digitized by Google

and the decedent and that therefore she was not his lawful widow, not entitled to administer his estate, and decreeing a revocation of the Letters theretofore issued to her (Fols. 92-105). This determination was reversed by the Appellate Division of the Third Department, the presiding Judge Smith dissenting (Fols. 17-39), and the order or decree of the Appellate Division contained affirmative findings that the respondent was legally married to the decedent, and the relation of husband and wife existed between them at the time of the decedent's death and that she was his widow (Fols. 1737-1738). The prevailing opinion of the Appellate Division is found beginning at page 585 and the questions presented on this appeal involve a construction of the Domestic Relations Law relating to marriage and also the sufficiency of evidence constituting an oral marriage contract known as a "common law marriage." For the purpose of a logical arrangement of the points hereinafter discussed, the relations of the decedent and respondent and the evidences of their alleged marriage can best be divided chronologically into three periods, as the law of the State in reference to marriages was evidently not the same during such three specific periods.

First: We think it must be conceded that there was no marriage between these parties previous to December 21, 1900, for on that date the decedent wrote a letter to the respondent in which he addressed her as "My dear Friend" (Fol. 802), and the first period involved is from that day until January 1, 1902, when the Domestic Relations Law was amended in reference to the necessary

Digitized by Google

steps to be taken to constitute a valid marriage under the statute.

Second: The second period of time involved is from January 1, 1902, to January 1, 1908, when the Domestic Relations Law was again amended in reference to marriage contracts.

Third: The third and final period of time is involved from January 1, 1908, to September 17, 1908, the date of the death of Charles N. Hinman.

POINT ONE.

THERE IS NOT TO BE FOUND IN THIS RECORD EVEN A SCINTILLA OF EVIDENCE TO ESTABLISH THE FACT THAT THERE WAS EVER A CEREMONIAL MARRIAGE BETWEEN CHARLES N. HINMAN, THE DECEDENT, AND THE RESPONDENT AT ANY TIME OR AT ANY PLACE AND SUCH MARRIAGE IS THE ONLY CLAIM AND THE ONLY THEORY UPON WHICH THE RESPONDENT PRESENTED HER PROOF AND TRIED HER CASE IN THE TRIAL COURT.

(a) *The pleadings in the case indicates a denial by appellant and an affirmation by respondent of a ceremonial marriage and none other.*

The appellant alleged in his petition, which is the basis of the pleadings in the case, that the respondent and Hinman were not married by a cere-

Digitized by Google

monial marriage by the Rev. LaRoche on September 24, 1900, and further allege that no certificate of such a marriage had ever been issued by such minister (Fol. 17). These allegations were put in issue and denied by the respondent (Fol. 77).

(b) It is absolutely and conclusively undisputed, as a matter of fact, that the respondent never claimed any marriage contract except a contract based upon an alleged marriage ceremony between her and the decedent performed by the Rev. LaRoche, in September 1900 or 1901.

Mr. Morse testified that on April 29, 1909, he and his daughter Maud Morgan were at the house of the respondent (Fol. 120), and that he had the following conversation with her at such time and place:

> "I asked her what Hank meant—that is my "half-brother Henry Hinman—when he said "in regard to nobody being married. She "said that he claimed he was not married. I "asked her if she was and she said she was "and I asked her when she was married and "she said upon the farm the 24th of Septem-"ber, 1900, by Elder LaRoche. There was "no witnesses only the parties concerned. It "was printed in the Binghamton paper" (Fol. 122).

Mrs. Morgan testified to the same statements and admissions and said that her father, Mr. Morse,

> "Asked her where Mr. LaRoche was and

Digitized by Google

"she said he was not here, that he had all "gone to pieces and had lost his mind. She "said she was married at the farm and that "she had her marriage certificate and she "would show it when she was obliged to. "She said they did not record marriages at "the time she was married, that was before "they put marriages on record, but that it "was published in one paper in Binghamton. "She said there were no witnesses present "but just the parties concerned" (Fol. 158).

"She said in relation to Dr. LaRoche being "acquainted with Mr. Hinman, she said he "was a brother Mason and they were great "friends" (Fol. 159).

Minnie Cadmus, a sister of the respondent, attempts to say that this conversation did not take place, at least in her hearing (Fol. 357), but the evidence on this proposition is that this witness was not present during all of the conversation and she herself admits that she did not hear all that was said, that she was getting dinner and the respondent and Mr. Morse and Mrs. Morgan were in the dining room and in the parlor (Fol. 363), and that when they were in the parlor she could not see the other parties (Fol. 367). She says further:

"I did not hear particularly what they were "talking about at the time. I do not remem- "ber. They may have said some things I "did not hear" (Fol. 368).

It is the contention of this appellant, therefore, that the evidence of Mrs. Cadmus does not deny

Digitized by Google

or qualify or modify the statements of Mr. Morse and Mrs. Morgan, but the significant point about this item of evidence is the *absolute failure of the respondent, the one most interested in the issue, to deny or attempt to deny under oath that this transaction occurred.* The respondent herself was not called as a witness in her own behalf. There were no legal barriers in the way to a square denial of this testimony, if it was untrue, and when she was called as a witness by this appellant, the petitioner in the proceeding before the Surrogate, she did not then take advantage of a situation created by her adversary to deny or attempt to deny the most significant admissions she had made to Mr. Morse and Mrs. Morgan. Her entire evidence in the case is found at Folio 230 and consists of seven lines of the printed record. The respondent on the trial in the court below was represented by very learned and able counsel who must have known the legal presumption which was created by this failure to deny, and he should not now be heard in any attempt to claim that the testimony of Mr. Morse and Mrs. Morgan was inadvertent, false or misleading. The rule that where a party has opportunity to deny pertinent, material and important testimony and fails so to do, an exceedingly strong and violent presumption arises that such failure is equivalent to a solemn admission of the truth of the testimony, and that such party can not thereafter be heard in contradiction thereof.

> "When a party has made a prima facie "case against another and that other has "possession and control of evidence and pe- "culiar means of repelling the proof or ex-

Digitized by Google

"plaining it, we ought to accept the fact as "satisfactorily established."

McGuire vs. Hartford Ins. Co., 7 A. D., 575; affirmed 158 N. Y., 680;
Kirby vs. Tallmadge, 160 U. S., 379;
Marden vs. Dorthy, 12 A. D., 188; 160 N. Y., 39;
Buffalo Loan Co., vs. Medina Gas Company, 12 A. D., 208; affirmed 162 N. Y., 67;
McConnell vs. Mackin, 22 A. D., page 539;
McNevin vs. Solvay Process Co., 32 A. D., page 616;
Cushman vs. DeMallie, 46 A. D., page 381.

The respondent herself on the trial and on the only occasion where she apparently opened her mouth, testified that she, herself, exhibited to the Rev. Harry S. Longley, the successor of Mr. LaRoche, and pastor of the Episcopal Church in the City of Binghamton, N. Y., a paper purporting to be a certificate of marriage and that "Senator Hinman" (her leading counsel) "has that paper" (Fol. 230). Hence, it must be taken as a fact in this case that the respondent was about the City of Binghamton exhibiting either an honest and valid certificate of her marriage, or a "fake" certificate, and that, evidently, she was taking it to the Rev. Longley for the very purpose of having someone familiar with the handwriting of his predecessor, Mr. LaRoche, identify it for the purpose of establishing it upon the trial of this action.

Digitized by Google

Again, the door was open to this respondent to make a full explanation about such certificates; if it had been lost, as afterwards claimed by her counsel, she could have told the date of it, by whom it was signed, and have described its contents. The appellant put in her power all the means and the way for a full and absolute explanation concerning this certificate and her silence in this respect is tantamount to an admission that at that time she was making no other claim than the claim of a ceremonial marriage performed by some religious functionary.

(c). The record is quite suggestive as to this alleged marriage certificate. After the respondent had testified that she had delivered it to Senator Hinman, the Senator was asked by counsel upon the other side to produce it, he then said,

> "Mr. Howard says it is in the safe at the "office and he will go over and get it" (Fol. 230).

It appears that thereupon Mr. Howard left the court room and after ten or fifteen minutes' absence reported that he could not find the paper, and that Mr. Howard and Mr. Hinman thereupon left the court room and were gone some fifteen or twenty minutes and when they returned Mr. Hinman stated that he could not find the paper "but would find it later and produce it" (Fol. 231). He further says:

> "The paper referred to by the witness was "in my possession the last or middle of last "week and I assume it is there now. Last

Digitized by Google

"week I took up the preparation of this case "and that paper with some other papers "which refer to the heirs of Melissa Hinman, "I put them one side in a long envelope and "with other letters and I am unable to find "them at this time but expect to be able to "produce them later" (Fol. 233).

This paper was not thereafter produced and no further explanation in regard to the same was made by respondent or by any one of her numerous counsel.

(d). The formal statement of respondent's counsel when opening the case shows without dispute or equivocation that at such such time he and the respondent relied wholly and entirely upon proof of a ceremonial marriage and upon nothing else. After the episode about the alleged marriage certificate and the denial by the Surrogate of a motion to dismiss the proceeding it appears that Mr. Hinman opened the case for the respondent (Fol. 236). His opening does not appear in the record and was evidently not taken by the stenographer, and this appellant had to rely upon the sworn testimony of Senator Hinman as to what he did actually say on opening his case. To show that he was called as a witness by the appellant and at Folio 842 these questions were submitted to him and he made answers thereto as appears in the record:

"Q. And did you further state that you "would show that the respondent was mar- "ried to Charles N. Hinman in Sept., 1901, by

Digitized by Google

"LaRoche, LaRoche to the contrary notwith-
"standing, or that in substance?

"A. I did not.

"Q. Did you state that you would show
"that the respondent was married in Sept.,
"1901, or that in substance?

"A. I did not" (Fol. 843).

But on reflection the witness thought better of such statements and swore "My recollection of what I said, the substance of it, and I do not undertake to give my words because I could not do it, was that this woman was married to him by a ceremonial marriage and my recollection is that I gave the date of it."

"Q. What date did you give?

"A. I think I gave September, 1901; that
"is my recollection but I stated to the court"
(Fol. 845).

This was the end of his direct examination but he evidently desired to make some further explanation on his cross-examination and he further said:

"I stated to the court as part of the open-
"ing that we would be unable to prove the
"facts in connection with the ceremonial mar-
"riage because of the fact that the only wit-
"ness living *outside of LaRoche* was the re-

Digitized by Google

"spondent herself, who was precluded from "testifying under Section 829" (Fol. 846).

Applying the rule that where inconsistent clauses or statements are found in a contract or a will, the last one is controlling, it must be apparent that the counsel for the respondent, in opening the case, with the marriage certificate of this appellant nestling snugly in his safe and fresh from the confidential interviews and communications he had had with his client, stated most solemnly and earnestly that the marriage of these parties was not left to the uncertainties of repute, but rested securely upon a ceremonial marriage, written evidence of which was in the possession of the respondent and her counsel, which was never produced and of which no explanation was ever attempted.

(e). Other evidence adduced by the respondent indicated, if anything, a formal engagement between her and the decedent, followed by the formal marriage ceremony.

The witness Newing, strongly relied upon by the respondent in this proceeding, testified that sometime in 1900 the decedent asked his advice as to "What kind of a wife she would make" (Fol. 262); this was scarcely necessary, as the undisputed record shows that he had been living with her for some time in the capacity of a husband and, presumably, ought to have known. However, he further says that in that year the decedent bought what the witness evidently understood was to be an engagement ring and which he afterwards saw upon the hand of the respondent

Digitized by Google

(Fol. 262). Later he says that Mr. Hinman bought another "plain gold band ring, he told me that was to tie the knot with. Soon after that I saw Mrs. Hinman wearing the ring" (Fol. 263).

> "I say he spoke before that he was going to "marry Miss Lord and then he came in with "her one day and said she was no longer his "girl but his wife, 'Let her have whatever she "wants and put it on my bill and I will set-"tle' " (Fol. 264).

We have thus quoted from the case as made out by the respondent herself. In it there can be no claim of a common law marriage, so-called. Either there was an actual marriage performed by Mr. LaRoche or some other clergyman in 1900 or 1901, at which a proper certificate was given, or the whole claim reeked with perjury, was founded upon a tissue of falsehoods and was a fraud which neither the respondent nor her attorneys had the courage to perpetrate and fully consummate upon the court below. In view of the fact that Mr. LaRoche testified most unequivocally,

> "I did not at any other time or at any "place perform a marriage ceremony for "Charles N. Hinman" (Fol. 179),

and that Mr. LaRoche, for a long time, was ill and physically and possibly mentally incapacitated (Fol. 182), that he left his family and was gone for a long time in a distant State (Fol. 183), that he had given up his church and duties as a minister (Fol. 185) as early as 1903 (Fol. 185),

Digitized by Google

and in view of the further fact, undisputed in this record, that the respondent understood "That he "was not here, that he had all gone to pieces and "had lost his mind" (Fol. 158), we urge as a matter of fair and reasonable argument, and have a right to urge, *that the respondent, thoroughly knowing that she had never been married to the decedent, evidently thought it entirely safe to produce a false certificate, apparently signed by Mr. LaRoche, to make claims that she had actually been married by him, with the belief and expectation on her part that LaRoche, the only living witness to the alleged false and fictitious marriage ceremony, so far as known, would not and could not be produced to refute or puncture her claims.* In the court below counsel for the respondent, outside of the record, has thus described the Rev. Mr. LaRoche:

> "With his hair snow white, his teeth rot-
> "ting, in his jaws and his bloated face and
> "sodden appearance indicating the bum, with
> "the whole tenor of his evidence,"

but we submit that, even for the purpose of the argument, admitting this description to be true (which, as a matter of fact, was grossly and indecently false), the testimony of this witness should have been and was believed by the Surrogate in preference to the contrary statements of counsel for the respondent, and in their failure to produce, account for or explain the written certificate of marriage, which must have been either true or false, in their possession at the very time of the trial.

Digitized by Google

POINT TWO

THE EVIDENCE IS INSUFFICIENT, AS A MATTER OF LAW, TO ESTABLISH AN ORAL CONTRACT OF MARRIAGE OR A COMMON LAW MARRIAGE BETWEEN THE RESPONDENT AND CHARLES N. HINMAN PREVIOUS TO JANUARY 1, 1902.

The evidence upon a question of common law marriage during this period of time is exceedingly meagre and obscure and is insufficient to raise the presumption of matrimony between the parties. It is confined to the testimony of three witnesses. Nelson P. Brink, in his direct examination, claims that he first met the respondent in the fall of 1901 and she was introduced to him by the decedent and by the decedent's mother as the wife of the decedent (Fol. 276), and he fixes the date from the fact that he claims that at that time he bought a telephone right of way over Mr. Hinman's property, paid Hinman and took a receipt therefor (Fols. 282-283), although he says he has not seen the receipt in a year. On the trial of the case the appellant was not able to show the date when this witness purchased such rights of way and paid therefor, but he asks leave on the submission of the appeal herein to present to this court the original checks given by Brink to Hinman for such rights of way, which checks are dated August 11, 1902, and December 23, 1903. This witness was absolutely mistaken as to the date, as he might well have been and the Trial Court so found (Fol. 1595).

Charles T. Gage, another witness for respond-

Digitized by Google

ent, thinks that he was introduced by the decedent to her in the fall of 1901 and that in such introduction the decedent spoke of the respondent as his wife (Fol. 372), but on his cross-examination he says:

> "It might have been November, 1902" (Fol. 374).

And a careful examination of the entire testimony of this witness indicates that he had no positive or even satisfactory knowledge of the date of the alleged transaction and the Surrogate so found and held. (Fol. 1587).

Minnie Cadmus, a sister of the respondent, testified that about the last of September or first of October, 1901, she first met the decedent at her father's home in Equinunk, that he and the respondent came there together and,

> "He was introduced to me by my sister "Vena as my brother-in-law. They remained "at my father's and mother's house that night "and occupied the same room there. Mr. "Hinman left the next morning. My sister "did not go with him. She stayed home for a "while" (Fol. 347).

But this witness says on cross-examination.

> "I might have been mistaken a good many "times and that might have been 1902. I am "not positive about it" (Fol. 361).

And she further says:

> "Nothing that I heard was said between

Digitized by Google

"them or by her to them with reference to her "marriage to Charles N. Hinman. I heard "all the talk there from the dinner time on" Fol. 357).

If the respondent and decedent were married at such time, clearly this was their first trip to her father and mother's home. All that the witness can say is that the respondent was introduced as the wife of the decedent, strangely, there was no talk as to the details of their marriage, when or where it took place or any other such conversation as would naturally have taken place on such an occasion, and the unreliability of this testimony is further emphasized by the fact that the father and mother of the respondent, who were present upon that occasion and who only lived sixty or seventy miles from the City of Binghamton (Fol. 362) and who were both living at the time of the trial (Fol. 1507), *were not called to substantiate or corroborate this most important item of testimony.* While it appeared from this sister that her mother's health was poor (Fol. 1508), there is absolutely no pretense of an excuse for the non-production of the father. The legal rule hereinbefore referred to in Point I as to the failure of the respondent to produce witnesses within her reach, presumably friendly to her, who would not only be interested in her financial rights, but in the establishment and perpetuation of her good name, is strongly significant of the falsity of her claim.

The evidence of the witness Newing is not at all corroborative of the fact of a common law marriage or of an oral contract of marriage (Fols.

Digitized by Google

262-271), but, as hereinbefore stated, it is only significant of a ceremonial or formal marriage. Thus, the case of the respondent upon the proposition of a common law marriage rests upon an alleged introduction to one Brink, in the light of the checks now produced occurring in 1902 or 1903, the evidence of one Gage, who admitted that the transaction as to the introduction might, and quite probably was, in 1902, the evidence of a sister of the respondent as to this strange and unnatural introduction of her newly made brother-in-law to her and her father and mother under circumstances above stated, and upon this testimony and upon this only, the respondent claims she has established a solemn contract of marriage. It might be pertinent to inquire in this connection where are the friends and relative of these parties, the members of the family in which they lived, their neighbors and their associates during the year 1900 and 1901. Why did not the respondent produce the testimony of such friends and relatives and neighbors during that period of time? Absence of all other testimony creates at least a suspicion or a probability that there must have been something in the relations between the respondent and the decedent which would preclude any finding of lawful matrimony.

On the other hand, the appellant conclusively showed that at least during the years 1900, 1901, 2 and 3, the relations of the respondent and the decedent were meretricious and not matrimonial.

In 1899 Charles N. Hinman was about thirty-six years of age and resided on a farm, which he owned, in the Town of Chenango, about five miles from the City of Binghamton. He was engaged

Digitized by Google

in the business of producing milk and distributing it in the City of Binghamton, which business he continued until about 1905, when he left the farm and engaged in good roads construction, in which business he was engaged when he died.

The Hinman family in 1899 consisted of Charles N. Hinman, Melissa Hinman, his mother, a lady then about sixty years of age (Fol. 1003), Balis Hinman, a brother who was several years older than Charles, Mary Hinman, the wife of Balis, and James Maxwell, a hired man on the farm. The members of the household including the hired help changed from year to year, but these persons were there in the summer of 1899.

In October, 1899, Mary Hinman, who had commenced an action for divorce against her husband Balis, left the farm and did not return there. Balis died in November, 1902, but lived on the farm until his death. James Maxwell went on the farm in the Spring of 1899 and remained there until the Spring of 1903. (Fol. 1255.)

Prior to May, 1898, Charles N. Hinman had become acquainted with Vena Lord as appears from letters addressed to her by him while he was on his way to and staying at Hawaii with a military Company enlisted in the Spanish-American War. (Exhibits H-177 to H-199, Fols. 723-797.)

In 1899 Vena Lord was 17 years of age (Fol. 359), and was employed as a domestic at No. 231 Washington Street, in the City of Binghamton, at the residence of Dr. Daly. (Fols. 359, 865, 1906 1907, and 1265.) In July or August, 1899, Charles

Digitized by Google

took Vena to call at the home of Mr. and Mrs. Allen at No. 16 Maiden Lane, Binghamton, with whom Charles was well acquainted. (Fols. 848-849, 866.) Later Vena called there in the afternoon and Charles called on her there in the evening (Fols. 866-867), on another occasion Vena stayed with Mrs. Allen for a week, in September, 1899 (Fol. 885), and on this occasion Charles came there and they slept together at that place on two different nights. (Fols. 850, 869, 887 and 890.) During this same summer and fall Vena was in the habit of riding on her bicycle from Binghamton up to the Hinman Farm to see Charles and he would ride back with her, both on their bicycles. (Fols. 1501, 1257-1258.)

After Mary Hinman left the farm, in the latter part of October, 1899, Vena was in the habit of coming up to the farm on the milk wagon with Charles after he had finished delivering, and they would sleep on the couch together in the sitting-room (Fol. 1261) and then she would return in the early morning with Charles on the milk wagon; at this time she was still working for Dr. Daly (Fol. 1436.) Later, becoming more bold, she left Dr. Daly's and went up on the farm and made her home there except when she was absent on visits, etc. (Fols. 1267-1268.)

We have outlined this preliminary sketch of their conduct and surroundings before entering into a detail of the testimony which so clearly shows that the relations between these parties were meretricious and which precludes any possibility of an inference that a contract of marriage was entered into between them prior to January 1st, 1902.

Digitized by Google

Jessie Allen testified that she was well acquainted with Charles N. Hinman for a long time prior to 1899 (Fols. 848-849); that Charles and Vena occupied a bedroom in her house on Maiden Lane on two different nights in the summer of 1899 (Fol. 850); Vena Lord was then working at Dr. Daly's (Fol. 865), and Charles first brought her to the house in July or August, 1899 (Fol. 866); she was again there in September, 1899, on which occasion she came to the house in the afternoon and Charles called in the evening and they visited there together when Charles left at about ten P. M. (Fol. 867); these two occasions were other than the occasions when they stayed there all night (Fol. 869); twice they came there just to call and twice they stayed there all night (Fols. 875-877); in September Vena visited at the Allen home for a week and Charles came there and stayed with her in the bedroom all night (Fols. 884-885); he came there again during that same week and they occupied the same bedroom again (Fol. 895); on the first night that they slept together Mrs. Allen said to Vena the next morning, "Why, Vena, are you married?" and she said, "Yes, we were married in Albany." (Fols. 893 and 950.)

William Allen testified that after the rifle shoot at Albany in the summer of 1899 Charles and Vena occupied the same bedroom at their house on two different nights (Fols. 901-902); at this time Vena was working at Dr. Daly's (Fol. 906); on the first occasion that they were at the Allen home, when he saw them, they were there for supper (Fol. 913); he not being at home on the first occasion when Charles brought her there (Fols. 940-941); in September, 1899, she, with

Digitized by Google

Charles, occupied a bedroom in their house on two different nights in one week (Fol. 916); one of these nights was Thursday because he and Charles went to the Armory to drill, which always takes place on Thursday night (Fol. 930); he first saw Charles come out of the bedroom, which was on the occasion of their third time when Charles had been there and the first time that he had stayed all night (Fols. 934-940); after Charles had left he spoke to his wife about having seen Charles come out of Vena's bedroom (Fol. 942); and it was on account of this statement that Mrs. Allen was prompted to ask Vena whether she was married. (Fols. 948-950.) The evidence discloses that Charles and Vena and the Allens visited together until about ten o'clock, when the Allens retired and then Charles and Vena some time thereafter went into Vena's bedroom where they stayed until morning (Fol. 889.) The same clandestine manner and method was used by Charles and Vena later when Vena first went up on the farm and slept on the couch with Charles.

Hattie Shearer testified that she lived about two miles south of the Hinman Farm for about 25 years and knew the Hinman family well and visited there (Fol. 915); that just before Mr. Malloy, a keeper at the County Farm, died (Fol. 953) —which date was subsequently fixed at 1904 (Fol. 378)—she had a conversation with Charles N. Hinman; it seems that Mr. Moses, who was the keeper at the County Farm, had told a nurse there that he had seen a notice in the paper that Charles N. Hinman was married and the nurse had told Mrs. Shearer; evidently Charles had heard about it and so stated to the witness (Fol. 956); Charles

Digitized by Google

then stated to witness that a notice of a marriage of a man by the name of Hinman was in the paper, but that he was not the man, and he then stated to the witness, "Can't a man have a housekeeper "unless he marries her?"; he also stated that when he got married everybody would know it; that he would marry a lady that he was not ashamed of and would have it published in all the papers in the Town. (Fols. 957-958.) A year or two before Balis died which was in November, 1902, witness also had a conversation with Melissa Hinman in which Melissa stated to her that Charles was not married to Miss Lord and that he had promised her that he never would marry her (Fols. 959-960); that Charles had told his mother that he had a scheme working by which he hoped to get rid of Vena, but that he wouldn't tell his mother what his scheme was (Fol. 960); at that time Mary was living on the farm and Vena was living there and had been for some time (Fol. 1962); on the evening of November 27th, 1902, the day that Balis Hinman died, witness was at the Hinman residence and Mr. and Mrs. Isaac Cooley, Mrs. Heim, Henry Hinman, Charles Hinman and Vena Lord were there (Fol. 962); Mr. Shearer, the husband of the witness, was also there and Charles introduced Mr. Shearer to Vena as Miss Lord, which introduction she acknowledged (Fol. 963-964); about two or three months before Balis Hinman died witness had a talk with him in which Balis stated that he did not think Charles was married nor ever would be (Fols. 966-967); that Charles had got his equal now, that he had had pretty good luck, but that he had a sticking plaster that he couldn't get rid of very easily (Fol. 969); she also stated that among the people in that com-

Digitized by Google

munity they were reputed to be not married. (Fol. 970.)

Abbie Thomas testified that she had lived about one mile north of the Hinman Farm for 48 years and knew all the members of the Hinman family very well, and had sold her milk to Charles up to the time he left the farm in 1905 or 1906 (Fol. 995); that their reputation was, in that community, that they were not married (Fol. 999); she talked with Melissa in 1904 or 1905, on an occasion when Melissa was visiting her for about ten days, and she said that it was awful the way Charles and Vena were living there not married (Fol. 1002); she later fixed this conversation at about four years before they left the farm, or about 1902. (Fol. 1006.)

Hattie Heim testified that she was well acquainted with Charles Hinman and had known him for a great many years and had lived with her grandmother Mrs. Shearer near the Hinman Farm for many years and that she frequently visited Melissa Hinman (Fol. 1007); in the summer of 1902 before Balis died in November of that year, Melissa Hinman told witness that Charles was trying to get rid of Vena who had come home one night drunk and that Charles had put her out but Vena said she would be back (Fol. 1010); she was at the Hinman Farm the night that Balis died and on that occasion heard Charles introduce Vena to Mr. Shearer, her grandfather, as Miss Lord.

Jennette Palmer testified that she was well acquainted with the members of the Hinman family and that she and Melissa visited each other and

Digitized by Google

that on a visit to her by Melissa, the year before she died, Melissa said, "It's funny that they don't "get married," referring to Charles and Vena (Fol. 1036); about a week before Balis died she had been at the Hinman residence and on that occasion heard Melissa Hinman introduce Vena as Miss Lord which introduction Vena acknowledged (Fol. 1040); about six weeks before he died Balis told witness that he didn't know whether Charles was married to Vena or not, but that she was the worst woman on earth (Fols. 1040-1041); on one occasion Melissa told witness "That you might "scrape hell with a fine tooth comb and could not "scrape up a worse woman than Vena." (Fol. 1057.) This witness resided a couple of miles south of the Hinman Farm (Fol. 1033.)

Ella Johnson testified that she resided at Nimmonsburg, which is a couple of miles south of the Hinman Farm, for a great many years prior to 1907 and was well acquainted with all the members of the Hinman family (Fol. 1070-1072); that on one occasion she was visiting at the Hinman Farm after the death of Balis Hinman in November, 1902, and in her presence and in the presence of Mrs. Isaac Cooley who was also calling there at the time, Melissa spoke of Vena as Miss Lord. (Fol. 1075.)

John Hugaboon testified that he knew the Hinman family and knew of Vena living there with Charles (Fol. 1077) and that their reputation among the neighbors was that they were not married (Fol. 1079); that he had been engaged in the store business for 13 years about a mile from the Hinman Farm; that the reputation referred to

Digitized by Google

was during the last five or six years they were at the farm (Fol. 1083); he then specifies the names of four neighbors whom he had heard discuss the matter, all of whom believed that Charles and Vena were not married. (Fols. 1084-1085.)

David Smith testified that he had been well acquainted with all the members of the Hinman family for thirty or forty years and that he had always lived about a mile and a half from the Hinman Farm; that the Hinmans visited at his house and he and his family visited at their home (Fol. 1087); that in 1906 Melissa told him that Charles and Vena were not married (Fol. 1088-1090); that the reputation among the neighbors was that they were not married (Fol. 1091); that he knew that Vena was there on the farm from 1900 down to the time Charles left (Fol. 1102); he then gave the names of neighbors who had stated that they believed Charles and Vena were not married. (Fol. 1103.)

George Thomas testified that he had lived for a great many years about a mile north of the Hinman Farm and that he knew the Hinman family very well (Fol. 1106); that he knew Vena was living there with Charles and that the reputation was that they were not married; that he never heard her called Mrs. Hinman and that he never heard any of the neighbors refer to her as Mrs. Hinman (Fols. 1113-1114); that he had talked with James Maxwell, Abbie Thomas, Jerell Hall and Cooley Bunnell and others, all of whom stated that they did not believe they were married. (Fols. 1114-1115.)

Digitized by Google

Cooley Bunnell testified that he was fifty-one years old and had known all the members of the Hinman family since he was thirteen years old; that Vena had come there to the farm to live shortly after Mary had left and that she and Charles lived there to about 1905 (Fol. 1117); that in August, 1901, Charles introduced him to Vena as Miss Lord (Fol. 1118); that he saw Vena there upon the farm between 1901 and 1906 and the reputation was that they were not married (Fol. 1119); this reputation continued all the time they lived there (Fol, 1122); he then specifies the names of several neighbors who also believed that they were not married (Fol. 1123).

Nellie Murphy testified that she lived about two miles from the Hinman Farm for eight or nine years and that prior to that she had lived with David Smith, the witness above referred to, for three years; that she knew Vena by sight and knew that she was at the farm between 1900 and 1905 (Fol. 1125); that the reputation among the neighbors was that Charles and Vena were not married; that she had met Vena at her home and had talked on other occasions with her (Fols. 1127-1128); she also gave the names of two different ladies who were neighbors, who were also of the opinion that Charles and Vena were not married. (Fol. 1130.)

Charles Howland testified that he was acquainted with the members of the Hinman family and with Miss Lord (Fol. 1136); that he met Vena shortly after Mary Hinman left the farm (Fol. 1136); that Vena had ridden with him to the City, while he was driving the stage, on different oc-

Digitized by Google

easions and that he always addressed her as Miss Lord (Fol. 1139); that he had carried packages from 1900 to 1905 from stores in Binghamton addressed to Miss Vena Lord, which packages he had delivered to Vena (Fol. 1140-1141); that he had carried the neighbors of the Hinmans, the residents of that neighborhood, on his stage between 1900 and 1905, had heard the reputation of Charles and Vena discussed (Fol. 1143), and the reputation was that they were not married. (Fol. 1145.)

John Warner testified that he had resided in Nimmonsburg, about a mile south of the Hinman Farm, for thirty-seven years; that he was well acquainted with the Hinman family; that he knew Vena was upon the farm with Charles (Fols. 1166-1167), and the reputation was that Charles and Vena were not married. (Fol. 1168.)

Jean Wilson testified that he went to work at the Hinman Farm in June, 1901, and worked there continually until February, 1902, and that Vena was there when he went there (Fol. 1171); that the members of the family and the hired help all sat at the table together; that he never heard anybody, while he was there, address her as Mrs. Hinman (Fol. 1175), nor as Charles' wife (Fol. 1176); that during this whole period he was at the house every night (Fol. 1172), and never heard of any wedding occurring up there between June the 1st, 1901, and February the 1st, 1902 (Fol. 1182); and that Charles and Vena were not away together while he was there. (Fol. 1181.)

Johanna Sullivan, who resides at the City of

Digitized by Google

Binghamton, testified that she had known Charles Hinman ten or twelve years before his death and that in 1905 she had a conversation with him, while he was at their house delivering milk, in which he stated that he was not married. (Fol. 1186.)

Lena Southee testified that she was acquainted with Charles Hinman about twenty years before he died, and that the last year he delivered milk to her house, in 1904, or 1905, Charles told her that he was not married. (Fol. 1192.)

Jerell Hall testified that he had lived at Chenango Bridge the past twenty-eight years about a mile from the Hinman Farm and that he had known all the Hinmans for thirty-four or thirty-five years (Fol. 1192); that Vena went there to live in 1899 or 1900 and that he had seen her there at various times between 1900 and 1905 (Fol. 1194); that he had heard the relations of Charles and Vena discussed and the reputation in that community was that they were not married (Fols. 1194-1196), and he then named several people in that vicinity who had stated to him that they believed Charles and Vena were not married. (Fols. 1200-1201.)

Harvey Bunt, who was an acquaintance and friend of the Hinman family, testified that he and his wife made a visit at the Hinman Farm in November, 1901, and that at that time James Maxwell, the hired man, introduced him to Vena as Miss Lord, which introduction she acknowledged. (Fol. 1204.)

Lillian Bunt testified that she and her husband

Digitized by Google

visited at the Hinman Farm in November, 1901, and that Charles Hinman introduced her to Vena as Miss Lord. (Fol. 1211.)

Thomas Parker testified that he had gone to school with the Hinman children and knew all of them well (Fol. 1226); that the last time he moved to Chenango Bridge was in the Fall of 1902; that in the Spring of 1903 he was down at the Hinman Farm and was at that time introduced to Vena as Miss Lord by Charles N. Hinman (Fol. 1226); that he knew Vena was living there with Charles and had heard the relations of Charles and Vena discussed (Fol. 1226); that he never heard anybody state that they were married and the reputation was that they were not (Fol. 1228); and that Charles again introduced him to Vena as Miss Lord after the Spring of 1903. (Fol. 1231.)

Jennie Evert testified that she had resided at Glen Castle about a mile from the Hinman Farm for twenty-two years and once in a while worked there (Fol. 1235); that she knew when Vena came there, although she could not remember just the year, but that she had been there five or six years (Fol. 1235); that in 1906 Melissa Hinman visited her and told her that Charles and Vena were not married (Fol. 1237); that the reputation in the community there was that they weren't married (Fols. 1238-1240); that she washed for Vena for five or six years while she lived at the Hinman Farm (Fol. 1241); that all the while Vena was on the farm she never heard her called Mrs. Hinman and that she did not go by that name (Fols. 1244-1245); and she then names five different persons whom she had heard state that they did not be-

Digitized by Google

lieve Charles and Vena were married. (Fol. 1247.)

James Maxwell testified that he worked and resided on the Hinman Farm from 1899 to 1903 (Fol. 1255); that when Vena first came up to the farm she would ride up on a bicycle, in the summer of 1899, and would go back in the evening with Charles Hinman (Fol. 1257-1258); that later she used to come up with Charles on the milk wagon and sometimes stayed there all night (Fol. 1259); that in the winter of 1899 and 1900 he saw Charles and Vena sleeping on the couch in the sitting room several times (Fol. 1261); that at this time Vena was not staying there during the day but was working at Dr. Daly's in Binghamton (Fol. 1264-1265); that she would go back to Binghamton on the milk wagon with Charles (Fol. 1435), between four and five o'clock in the morning (Fol. 1345); that some time during the year 1900 she came up and stayed permanently and that they were sleeping in Charles N. Hinman's room in the latter part of 1900 (Fol. 1270); that when Pearl Lord, the sister of Vena, came up on the farm Vena did not sleep with Charles (Fol. 1271); that all the members of the family, as well as himself, always addressed her as Vena and Lord (Fol. 1273), and that he never heard anybody refer to her as Mrs. Hinman (Fol. 1274-1275); that at one time Vena told him that she was doing wrong in living with Charles in that way and if she wanted to live that kind of a life she could go down to New York and get $20 a week and not lift her finger (Fol. 1276-1278); that Mr. and Mrs. Bunt called at the Hinman Farm the year before Balis died (Fol. 1280); and that

Digitized by Google

he introduced Mr. Bunt to Vena as Miss Lord (Fol. 1282); that Melissa Hinman always said that Charles and Vena were not married (Fol. 1284), and so did Balis Hinman (Fol. 1285-1286); that from 1900 to 1903 he had seen letters come to the house addressed to Vena Lord (Fol. 1293) and that he never saw any letters or packages addressed to her in any other way. (Fol. 1294.)

Catherine King testified that she went to the Hinman Farm to work in March, 1900 (Fol. 1305), and at that time Charles and Vena were sleeping together (Fol. 1306); that when she went there Charles introduced her to Vena as Miss Lord (Fol. 1306) and she heard Charles introduce her to Dr. Taylor, who was calling at the house, as Miss Lord.

T. E. Dorman testified that he was well acquainted with all the members of the Hinman family and that he formerly lived at Glen Castle, about a mile from the Hinman Farm (Fol. 1448); that in the summer of 1903, the summer after Balis Hinman died (Fol. 1450), he was introduced to Vena as Miss Lord, to which introduction Vena responded (Fol. 1450); that he knew she was living there at the farm for many years; that he had heard her relations with Charles discussed by people who lived in that vicinity and the reputation was that they were not married (Fol. 1451-1452); and he then names several persons living in that vicinity, whom he had heard discuss the matter.

Frank Jewell testified that he had known the Hinmans for thirty years; that in February or

Digitized by Google

March, 1902, which date he fixed by a note made at that time, he was introduced by Charles N. Hinman to Vena as Miss Lord; that Vena acknowledged the introduction (Fol. 1496-1497).

Mary Wilson testified that she left the farm, when she commenced her action for divorce against Balis Hinman, the latter part of October, 1899, and that before that she had seen Vena Lord there at the farm and that Vena used to come up on her bicycle and go back to Binghamton that way (Fol. 1501); that Lois K. Johnson knew the Hinmans and was well acquainted with them.

In addition to the testimony of these thirty witnesses, who were the neighbors of the Hinman family from 1899 to 1905, and the intimate associates, and neighbors of the Hinman family for many years, unanimously testifying to facts which overwhelmingly showed that the relations of Charles and Vena were not matrimonial but meretricious, we call the Court's attention to some additional facts and circumstances which add color to the picture already painted.

1. While the appellant showed by the numerous letters in evidence that she was a person who preserved her correspondence, the question arises, *Why did she not produce some letters written to her between 1900 and 1905 either by Charles N. Hinman or by her father, mother, sisters, brothers and friends? There is no reason except that such letters, as testified to by Maxwell, always were addressed to her as Vena M. Lord.*

2. In April, 1903, we find Charles N. Hinman

Digitized by Google

giving two mortgages to Lois K. Johnson, who was a friend and near neighbor of the Hinmans (Fol. 1501-1502), which were signed by him alone (Fols. 1504-1506). These records testify that at that time neither Charles, himself, nor Mrs. Johnson thought Vena was the wife of Mr. Hinman.

3. In April, 1904, Charles gave a Deed to John W. Osterhout, who at that time had lived three years only about a mile from the Hinman family (Fol. 1514), and in which deed Vena did not join (Fol. 1502). As to the signing of this deed by Vena in 1906 we will explain later.

4. *If there were a marriage between these parties in 1900 or 1901, why should it have been kept a secret from all the members of the family, from the hired help, and from all the friends and neighbors for so many years?* As was stated by the Court in Cunningham v Burdell, 4 Bradf. Sur.. 455: "Marriage is a highly honorable state, and is never kept a secret without very strong and controlling reasons." This record is absolutely barren of any reason or excuse for such conduct.

5. While the evidence shows that Vena has three brothers, all of whom are living; a sister, who sat in the Court Room by her side throughout the trial, and her father and mother, all of whom were to a certain extent familiar with the relations existing between Vena and Charles, why were none of these persons produced by her? We can invoke the rule laid down in the McGuire and Wennerstrom cases, supra, to the effect that every inference warranted by the evidence must be invoked against her, and that the presumption is

Digitized by Google

that the testimony, if produced, would be unfavorable.

6. Why should the appellant sit throughout the trial and hear witness after witness testify to her illicit relations with Charles, commencing in 1899, to introductions to her as Miss Lord by Charles and others from 1900 to 1904, *to her confession that she was living the life of a mistress to Charles, of receiving letters and packages all the while she was at the farm addressed to her as Miss Lord and not as Mrs. Hinman, to her false statement that she was married at Albany in 1899, and not attempt to explain or deny such testimony? Sec. 829 of the Code of Civil Procedure did not bar her from giving her version of these transactions and occurrences. Here again, we invoke the rule laid down in the cases last above referred to.*

The counsel for the respondent has attempted to build up a marriage between her and the decedent wholly upon the framework made out of presumption, and the learned court below has evidently made a presumption the corner stone for this opinion. The learned justice who wrote the opinion in the court below commences such opinion,

> "The presumption of marriage from a co-
> "habitation apparently matrimonial is one of
> "the strongest presumptions known to the
> "law. * * * The presumption of law is
> "not lightly to be repelled. It is not to be
> "broken in upon or shaken by a mere balance
> "of probability. The evidence for the pur-

Digitized by Google

"pose of repelling it must be strong, distinct, "satisfactory and conclusive." (Fol. 1756).

At Folio 1757 he states,

"It is practically conceded that a marriage "at common law is shown but we are asked "to find that it took place between January "1, 1902, and January 1, 1908, when it is "claimed that a common law marriage in this "State was not permissible."

The record does not show any such concession, and the learned court erred in this particular case by relying upon a presumption of marriage, because the evidence hereinbefore referred to and not disputed by the respondent *shows that the relations between her and the decedent in the beginning were illicit and meretricious and the decisions are all flatfooted that such cohabitation does not raise a presumption of matrimony.* The rule is clearly stated in Foster vs. Hawley, 8 Hun, 71,

"The presumption of law is that a cohabi- "tation which was illicit in its origin con- "tinues to be of that character throughout its "duration unless the contrary be proved. "* * * The concubinage which existed for "so long a period can not be transferred into "matrimony by evidence which falls short of "establishing the fact of an actual contract "of marriage."

See also Bates vs. Bates, 7 Misc., 547;
Matter of Schmidt, 42 Misc., 465;
O'Gara vs. Isenlohr, 38 N. Y., 296;

Digitized by Google

Gall vs. Gall, 114 N. Y., 109;
Badger vs. Badger, 88 N. Y., 547;
Brinkley vs. Brinkley, 50 N. Y., 185;
Matter of Brush, 25 A. D., 610;
Dietrich vs. Dietrich, 128 A. D., 564,

wherein the Court said:

> "This presumption" (presumption arising from illicit relations) "can only be destroyed "by clear and convincing proof of a subse- "quent marriage."

POINT THREE

THERE WAS NO MARRIAGE SOLEMNIZED BETWEEN THESE PARTIES AFTER JANUARY 1ST, 1902, IN ACCORDANCE WITH THE REQUIREMENTS OF THE MARRIAGE LAW OF THIS STATE IN EFFECT AT THAT TIME, AND ANY ATTEMPT TO CONTRACT MARRAIGE NOT IN ACCORD WITH THE PROVISIONS OF THE STATUTE TO JAN. 1, 1908, WAS VOID AND INEFFECTIVE.

The Marriage Law of this State was amended in 1901 and went into effect in 1902 and provided as follows:

> "Sec. 11. HOW A MARRIAGE MUST "BE SOLEMNIZED.
>
> A marriage must be solemnized by either:

Digitized by Google

1. A Clergyman or minister of any religion, or the leader of the Society for Ethical Culture in the City of New York;

2. A mayor, recorder, alderman, police justice or police magistrate of a city;

3. A justice or judge of a court of record, or of a municipal court, a justice of the peace; or

4. A written contract of marriage signed by both parties, and at least two witnesses who shall subscribe the same, stating the place of residence of each of the parties and witnesses and the date and place of marriage, and acknowledged by the parties and witnesses in the manner required for the acknowledgment of a conveyance of real estate to entitle the same to be recorded. Such contract shall be filed within six months after its execution in the office of the clerk of the town or city in which the marriage was solemnized. The word "clergyman," when used in the following sections of this article, includes any person referred to in the first subdivision of this section; the word "magistrate," when so used, includes any person referred to in the second or third subdivision."

Sec. 12, Art. 2, Chap. 272, of the Laws of 1896, remained unchanged by that amendment and read as follows:

"MARRIAGE, HOW SOLEMNIZED.—
"No particular form or ceremony is required "when a marriage is solemnized as herein "provided, by a clergyman or magistrate,

Digitized by Google

"but the parties must solemnly declare in the "presence of the clergyman or magistrate "and the attending witness or witnesses that "they take each other as husband and wife. "In every case, at least one witness besides "the clergyman or magistrate must be pres- "ent at the ceremony."

Sec. 19 of Chap. 339 of the Laws of 1901, which went into effect January the first, 1902, provided, among other things, as follows:

"Sec. 19.—No marriage claimed to have "been contracted on or after first day of "January, Nineteen Hundred and two, within "this State, otherwise than under this article "provided, shall be valid for any purpose "whatever."

The object of the statute was to abolish so-called common-law marriages. This is very plain from a reading of the statute itself, and under Sec. 10 of the Domestic Relations Law is the following note:

"Reference—Subdivision 4 of Sec. 11, re- "quiring a written contract of marriage in "the absence of a ceremony either before a "minister or magistrate, in effect abolishes "common-law marriages. This change was "brought about by L. 1901, Chap. 339, taking "effect Jan. 1, 1902. Common-law mar- "riages contracted prior to that date are "valid."

The comparison of certain provisions of Chap.

Digitized by Google

272 of the Laws of 1896 with Chap. 339 of the Laws of 1901 demonstrate the purpose of the legislature to abolish common-law marriage.

Sec. 11 of the Laws of 1896 provides as follows:

> "Who MAY SOLEMNIZE MARRIAGE. "—For the purpose of being *registered and* "*authenticated* as prescribed by this article, "must be solemnized by either, etc."

Sec. 11 of the Laws of 1901 provides as follows:

> "HOW A MARRIAGE MUST BE "SOLEMNIZED.—A marriage must be "solemnized by either, etc."

That is, the earlier statute provided that a marriage MIGHT be solemnized in a certain manner in order that a record thereof might be made, while in the later statute a marriage, in order to be valid, *must* be solemnized as therein provided.

The purpose of the legislature is further evidenced by the provision of Sec. 19 of the Laws of 1901, above referred to, which expressly nullifies marriages unless performed as required by the statute.

Although Sec. 19 was repealed by the Laws of 1907, which went into effect Jan. 1, 1908, this was the law of this State from January 1st, 1902, to January 1st, 1908. The repeal of Section 19 and the effect of such repeal in connection with the amendment to Section 11 is discussed under Point Fourth.

Digitized by Google

There should not be any misunderstanding of the principles of Law applicable to the facts in this case. Counsel for the Respondent upon the trial assumed, and in their Brief, assume, that a marriage, since January 1st, 1902, where there was no formal solemnization, could be established by the same evidence and in the same manner as marriage could be established prior to the amendment of the Marriage Laws as above stated. It is our understanding that this is not so. Our interpretation of the amendment of 1901 is that under it the Respondent and Charles N. Hinman could make no contract between themselves, aside from the ceremonial marriage specified by the statute, except in writing, signed by both of them, and witnessed by at least two persons, and acknowledged. *And while such a marriage may, of course be established by circumstantial evidence, as any other fact may be so established, nevertheless the evidence must be such as convinces the Court, not that the parties verbally agreed to live together as husband and wife, but that they were married in accordance with the statutory requirements.* That is, the evidence must point to the fact, and the fact alone, that at some time and place, there was a marriage between the parties, in some of the ways prescribed by the statute, and not a common-law marriage. If a marriage performed by some minister or official, the circumstantial evidence should point him out that the Court could ascertain if he were one of the persons authorized to perform the marriage ceremony, or if by a written contract there should some evidence be given that such contract was made.

Digitized by Google

A merely cursory reading of the decisions, without any reference to the statute, shows that the presumption of marriage was indulged by the Courts largely because of the facility with which the contract could be made.

In Clayton v. Wardell, 4 N. Y., 230, which has always been considered a leading case upon the question, the Court said:

> "It is not pretended that there is any "proof of the solemnization of such marriage, "nor is such proof necessary; a valid mar- "riage may exist without any formal solem- "nization. By the ancient common law of "England, marriage, being regarded as a sac- "rament, must, to be valid, have been cele- "brated in facie ecclesiæ. But, since the "Reformation, it has been regarded as a civil "contract. And, like all other contracts, all "that is necessary for its validity is the de- "liberate consent of competent parties on "entering in a present agreement to take each "other for husband and wife. The policy of "such a rule may, perhaps, be questionable. "The facility with which the contract may "be made, where the rule exists, contrasts "most singularly with its indissolubility "when made."

In Brinkley v. Brinkley, 50 N. Y., 185, at page 197, the Court says:

> "We shall not relax any rule or require- "ment which has been set up for a validity "of a marriage. The law is well settled that

Digitized by Google

"a man and woman, without the presence of "a witness, without the intervention of min- "ister or magistrate, by words of present "contract between them, may take upon "themselves the relation of husband and wife "and be bound to themselves and to society "as such. . . . We are aware, however, "that the wise caution of the Courts has set "hedges about this rule. To presume from "the fact of co-habitation that there has been "an actual marriage, it must be matrimonial "and be so begun and not illicit."

In Caujolle vs. Ferrie, 23 N. Y., 90, at page 106, the Court says:

"But it is strenuously insisted that the "non-production of the act of marriage be- "tween the respondent's parents, or other "direct or positive proof of a solemnization "of marriage between them, are sufficient to "overthrow the presumption which the law "makes of the prima facie legitimacy of the "respondent. The principles of the common "law regulating marriage in this State are "few and simple. To render it legal and "valid, no ceremony, no solemnization by "minister, priest or magistrate are required. "Consent of the parties is the only requisite, "and the marriage contract is complete when "there is a full, free and mutual consent by "the parties capable of contracting, even "when such consent is not followed by co- "habitation."

All of the cases cited by appellant in her brief

Digitized by Google

in the Court below are based upon the fact that there were no statutory requirements to be complied with in order that a marriage might be valid. But since the Marriage Law was amended in 1901, these decisions, which are based upon the fact that there were no statutory requirements to be complied with, are inapplicable since there now are certain statutory provisions to be complied with in order that a marriage may be valid. In Hynes, et al., v. McDermott, et al., 91 N. Y., 451, at page 457, the Court said:

> "He said he did not believe in the marriage "ceremony or the mumblings of priests, he "thereupon, in the presence of witnesses, took "a ring from his pocket and gave it to her, "saying that if she would wear the ring and "be true to him he would consider her his "wife as much as if they had been married "in church. She accepted the ring on these "conditions, and he remained there that night "and from that time until his death openly "lived and co-habitated with her. . . . "The British Marriage Act prescribes that "marriages shall be publicly celebrated, and "expressly annuls all marriages not solem- "nized in church or under a license before a "magistrate. Nor is there any evidence of "a subsequent marriage in England in ac- "cordance with the local Law. There seems "to be no ground for such a presumption in "view of the fact above stated, and of the "further fact which was found, that by the "British statute, all marriages in England "are required to be registered and that no

Digitized by Google

"registry between these parties could be "found.

"If the issue of marriage depended upon "the evidence that there was a marriage ac- "cording to the forms of the English Law, "the plaintiffs could not recover."

It will be observed that in this case the issue was as to the legitimacy of children, where a stronger presumption is indulged by the Courts than in a case where the principals are concerned. It should also be noted that the British Marriage Act is not any stronger than the Marriage Laws of this State since January 1st, 1902.

In St. Devereux v. Much Dew Church, 1 Wm. Blackstone's Reports, 366, referred to by respondent in her Brief, the point in issue is clearly explained. The statement of fact in that case is as follows:

"Susannah Meridith was removed by an "order from Much Dew Church to St. Dev- "ereux. St. Devereux appealed to the Ses- "sion, who states specially that Susannah's "maiden settlement is in St. Devereux; that "the settlement of John Meridith, her pre- "tended husband, is in the parish of Llan- "garron; that it was proved by the oath of "James Bowen that he and one Wm. Jones "were present 7th Feb., 1758, when John "Meridith and the said Susannah were mar- "ried at the parish church of St. Devereux "by the minister thereof by banns; and that "the entry in the registry states thus. '1758

Digitized by Google

"February 7; John Meridith and Susannah "Jenkins were married by bans;' but that "neither the minister, the parties, or the wit- "nesses signed the said entry, nor was any "other entry made. The Sessions were "therefore of opinion that such marriage "was not legally proved and confirmed the "order of approval.

"Lord Mansfield, writing the opinion, said:

"In a suit in the Ecclesiastical Court for "Jactitation of Marriage, perhaps it may be "necessary to prove that all the solemnities "of the marriage act have been punctually "and regularly complied with; but, God for- "bid, that in other cases (the legitimacy of "children and like) the usual presumptive "proofs of marriage should be taken away "by the statute. It was confessed in Parlia- "ment, at the time when the act was made, "and universally agreed by all whose opin- "ions were worth having, that it would not "become necessary to prove the publication "of banns, etc. Besides, here the publica- "tion of banns is actually proved by the entry "in the register and the parol evidence of "Bowen."

In Pettit v. Pettit, 105 App. Div., 321, which was decided by the Third Department in 1905, the Court, Justice Houghton, writing the opinion, passed upon the very question at issue here.

This action was brought to obtain a decree annulling a marriage on the ground that it was in

Digitized by Google

valid because defendant had a wife living at the time. In October, 1902, the wife of the defendant procured against him in this State an interlocutory judgment of divorce. Shortly after its entry, and nearly three months before final judgment was entered thereon, the plaintiff and defendant went to the State of Vermont, where a marriage ceremony was performed. They immediately returned to this State, and lived together as husband and wife until July, 1904. Justice Houghton said:

> "The plaintiff's complaint herein was not "dismissed upon the ground that the Court "exercised discretion in refusing to order the "relief asked, but upon the ground that the "plaintiff had contracted a new marriage "with the defendant by living with him as his "wife after the entry of final judgment. We "cannot concur in this view. The marriage "was a nullity. It was not subject of ratifi- "cation as such. . . . There was no new "ceremony after the entry of final judg- "ment or any new contract. Indeed, the "plaintiff and defendant could make no con- "tract between themselves, aside from a cere- "monial marriage, except in writing, signed "by both of them, and witnessed by at least "two persons, and acknowledged, for Chapter "339, page 933, of the Laws of 1901, was then "effective, and so-called parol common-law "marriages had been done away with."

In Chinham v. Preston, 1 Wm. Blackstone's Reports, page 192, from the statement it appeared that Edward Young since the late act (26 G. 2 c.

Digitized by Google

33) was married to Rebecca when he was under age and without banns or license. Wherefore, it was argued that she could not be removed as his lawful wife, the marriage being void. On the other hand, it was contended that the marriage was not void, but only voidable, quoad the settlement of the parties.

Lord Mansfield, C. J., writing for the Court, said:

> "There is this distinction between things "void and voidable: when a Law makes a "thing void for the benefit of the parties con- "cerned, they may waive that advantage if "they please. But the marriage act is avow- "edly made AGAINST both the contracting "parties (Foster J., added, 'and against the "innocent children, too'), and therefore they "shall not waive the disabilities of it at their "own option: the marriage is void and null "to all intents and purposes, even though the "parties should afterwards agree to it, wher- "ever the fact appears directly contrary to "the statute."

Although the statute expressly states, and the Courts have held, that unless a marriage is performed in accordance with the requirements of the statute it shall be absolutely null and void, nevertheless, respondent's counsel take the position in their brief that marriage may be established since the amendment to the Marriage Law, by exactly the same evidence that would establish a marriage prior to the amendment. That is, they assert that the amendment of 1901 to the Marriage Law has absolutely no force or effect whatever, although its express purpose was to

Digitized by Google

abolish so-called common-law marriages. Our position is that the statute means what it says and that the Courts mean what they say, namely, that the marriage to be valid in the State of New York after January the 1st, 1902, must have been performed in accordance with the terms of the statute. The State of New York had the right to specify the requirements which a man and woman should comply with in order to have a valid marriage in the interest of purity, decency, for the sake of the innocent offspring, and for the purpose of passing the title to property. As was stated by the Court of Appeals in Clayton v. Wardell, 4 N. Y., 230, page 232, in discussing the law of this State which permitted a presumption of marriage based upon a mere verbal agreement, etc., that "the policy of such a rule may, perhaps, be questionable." On account of the hardships, the scandals, and the disgraces arising from the situation as it existed the legislature of this State was prompted, backed by an enlightened public sentiment, to abolish parol marriages, which policy has been followed, and is being followed, by a great many of her sister states.

If our contention is the correct one, namely, that a marriage to be valid must be performed in accordance with the statutory requirements, then certainly this respondent was never married to Charles N. Hinman after Jan. 1, 1902.

If the marriage were performed in accordance with sub-division 1, 2 or 3, of Sec. 11 of Domestic Relations Law, there must have been present, as eye witnesses, the celebrant and at least one witness (Sec. 12, Domestic Relations Law).

Digitized by Google

Can this Court believe or assume that if such a marriage were actually performed that neither the minister, magistrate nor required witness can be produced, nor their absence explained?

Again, if the marriage were thus performed, the law required that the groom or celebrant should, within thirty days thereafter, make a public record thereof.

> Public Health Law (L. 1893 ch. 661, as amended by L. 1894, ch. 679, by L. 1897, ch. 138, by L. 1904, ch. 392).

Can this Court presume that neither the groom nor the celebrant performed this legal duty? On the contrary, the legal presumption is that every person obeys the law and performs his legal duty.

If the marriage were performed pursuant to subdivision 4 of Sec. 11 above, then there must have been a written agreement signed by both parties and at least two witnesses, all of whom must have acknowledged the execution thereof, and within six months thereafter the contract must have been recorded in the office of the Clerk of the City or Town in which the marriage occurrred.

Can this Court presume that if such marriage were performed neither the contract itself, nor any of the eye witnesses, nor the record thereof can be produced, nor their absence be explained?

And yet if these requirements were not complied with, then any marriage otherwise con-

Digitized by Google

tracted was utterly invalid under Sec. 19 of the Domestic Relations Law. We are dealing with recent and not remote events.

In O'Gara v. Eisenlohr, 38 N. Y., 296, at page 299, the Court says:

> "The actual marriage of the respondent "with Donnery was unlawful and void, and the "issue of that marriage was born while Rose, "the first wife, was actually proved to be liv- "ing, and this child cannot be legitimate upon "any legal presumption. But it is claimed "that upon the facts above stated we are to "presume that Rose Donnery died before her "husband and that after her death the re- "spondent and Donnery were married and "that upon these two presumptions, without "any proof of the facts being so, it is claimed "that it is established that the respondent "was the lawful wife of Patrick Donnery."

> "Presumptions of this kind require to be "made with caution, and no one can look "through the adjudged cases on this subject "without being convinced that the legitimate "limits of presumption have too frequently "been overlooked. There are many cases in "the books which cannot be considered as "law, and which are condemned by the best "commentators. . . . It must be con- "fessed that decisions of this kind, requiring "courts and jurors to presume facts to be "true which are probably, if not obviously, "false, are pernicious and ought not to be "followed. The presuming of absurdities in

Digitized by Google

"order to meet the exigencies of a particular "case must ever be fraught with mischief. ". . . Presumptions of fact are but infer- "ences drawn from other facts and circum- "stances in the case, and should be made "upon the common principles of induction."

In Brinkley v. Brinkley, 50 N. Y., at page 197, the Court says:

"The learned counsel for the defendant, "with a commendable earnestness, urged "upon the Court not to sanction, by their "judgment in favor of the plaintiff, the no- "tion which he perhaps correctly averred "was too prevalent: That in the State of "New York as no form or ceremony, nor "civil or religious rite was essential to the "validity of a marriage, so any cohabitation "of man and woman, no matter how or with "what motive begun, might, by the false as- "sumption of a marital relation sometime "continued, by the false acknowledgment and "recognition of each other as husband and "wife for a space kept up, and by an ill- "founded general reputation, grow into the "real valid and lawful state of matrimony, "with all its reciprocal rights, liabilities, "duties and obligations."

"We shall not relax any rule or require- "ment which has been set up for a validity "of a marriage."

The Court then discusses the law of this State which then permitted parol contracts of marriage,

Digitized by Google

and holds that the marriage was valid in this case solely because of that rule. Can there be any question as to what the decision of the Court would have been if the Law of 1901 were then in force? Its decisions would certainly have been that since there *was* a "form" and a ceremony, and "civil" or "religious rites" essential to the "validity of a marriage," that any marriage which did not conform to the requirements of that statute was null and void.

And to indulge the wild presumption asked for by the respondent here, that a marriage was performed after January the 1st, 1902, in the absence of any evidence to support it, the Court is further required so to do *against the express declaration of the respondent made in 1909, that she was then relying upon a ceremonial marriage contracted in September, 1900.*

We understand that the learned Court below also were of the opinion that there could have been no legal marriage between these parties between Jan. 1, 1902, and Jan. 1, 1908, unless contracted in one of the ways pointed out by the statute. (Fol. 1767.)

Digitized by Google

POINT FOUR

THE AMENDMENTS TO THE DOMESTIC RELATIONS LAWS BY SEC. 6 OF CHAP. 742 OF THE LAWS OF 1907, BY WHICH SECTION 19 OF THESE LAWS WAS ABOLISHED, DID NOT HELP THE RESPONDENT.

Respondent's counsel in their Brief argue that when Sec. 19 of the Domestic Relations Law providing, in substance, that no marriage shall be valid unless contracted in the manner provided by the terms of the statute was repealed, the legislature expressed an intention to put the marriage laws of this State upon the same basis in which they were prior to the amendment by Chap. 339 of the Laws of 1901, and that the so-called common-law marriage again came into legal existence. They say in their Brief in the Court below: "Since December 31, 1907, the statutes of this State have regulated the method or manner in which marriage contracts are to be made, but since that date there has been no statute which declares a marriage contracted in any other way invalid for any purpose." They invoke the rule laid down in Mathewson v. Phoenix Iron Foundry, 20 Fed. Rep., 281, which is based upon the decision of the U. S. Supreme Court in Meister v. Moore, 96 U. S., 76, in which, perhaps, the rule is the most strongly and clearly stated as follows:

> "No doubt a statute may take away a com-
> "mon-law right; but there is always a pre-
> "sumption that the legislature has no such

Digitized by Google

"intention unless it be plainly expressed. A "statute may declare that no marriages "shall be valid unless they are solemnized "in a prescribed manner; but such enactment "is a very different thing from a law requir- "ing all marriages to be entered into in the "presence of a magistrate or a clergyman, "or that it be preceded by a license, or publi- "cation of banns or be attested by witnesses. "Such formal provisions may be construed "as merely directory instead of being treated "as destructive of a common-law right to "form the marriage relation by words of "present assent."

We believe we can convince this Court beyond every slightest doubt that, in the light of these decisions, our marriage laws cannot be construed as contended by counsel for the respondent.

We must all agree that the thing to be ascertained is the object of the legislature in framing a statute. The questions which first arise in construing a statute are these: What is the apparent purpose of the legislature? What end does it seek to accomplish? The rules of construction, as adopted in this State, are very clearly expressed in the following cases, to wit:

People v. Onondaga Co. Savings Bank, 147 N. Y., at page 167.
President, etc., v. Kaldenberg, 165 N. Y., at page 7.

In the first case Justice Peckham, speaking for the whole Court, said:

Digitized by Google

> "The cardinal rule in the interpretation of "the statutes is to arrive at and give effect "to the intention of the legislative body which "enacted them. This intention is primarily "to be deduced from the language used in the "statute itself, and it has been said that "where such language is clear and unambig- "uous there is no room for construction and "that effect must be given to its plain and "obvious meaning."

In the other case, Justice Werner, speaking for the whole Court, said:

> "In construing statutes the proper course "is to set out and find the true intent of the "legislature, and to take that sense which "harmonizes best with the context and pro- "motes in the fullest manner the apparent "policy and objects of the legislature."

We shall now examine the legislation upon the subject of marriage in this State and also the statutory provisions construed by the Courts in the two cases first cited under this Point.

In the First Edition of the Revised Statutes, Chap. VIII, Part 2, Title 1, Article 1, Adopted in 1829, the law is as follows:

> "Sec. 1. Marriage, so far as its validity in "law is concerned, shall continue in this State "a civil contract, to which the consent of the "parties, capable under law of contracting, "shall be essential."

Digitized by Google

"Sec. 8. For the purposes of being regis-
"tered and authenticated according to the
"provisions of this Title, marriages shall be
"solemnized only by the following persons:

"1. Ministers of the Gospel and Priests of
"other denominations.

"2. Mayors, Recorders and Aldermen of
"Cities; and

"3. Judges of County Courts, and Justices
"of the Peace."

"Sec. 19. The provisions of this Article,
"relative to the solemnization and proof of
"marriages, shall not apply to the people
"called Quakers nor to Jews whose mar-
"riages may respectively continue to be
"solemnized in the manner and agreeably to
"the requirements of their respective so-
"cieties."

Secs. 1 and 8 were not changed in the Second Edition of the Revised Statutes adopted in 1836; to Sec. 19, however, was added the following:

"Nor shall the provisions of this article be
"construed to require the parties to any mar-
"riage, or any minister or magistrate to
"solemnize the same except in the manner
"herein prescribed; but all lawful marriages
"contracted in the manner heretofore in use
"in this State shall be as valid as if this
"Article had not been passed."

Digitized by Google

All these sections remained unchanged in the Third, Fourth, Fifth, Sixth, Seventh and Eighth Editions of the Revised Statutes and down to 1896, when the Ninth Edition was passed, except in the Seventh Edition, in 1881 there is attached to Sec. 8:

> "4. Justices and Judges of Courts of "Record."

And in the Eighth Edition, Subdivision 1, of Sec. 8, is made to read as follows:

> "1. Ministers of the Gospel or of legally "incorporated religious congregations, the "leader for the Society of Ethical Culture in "the City of New York, and priests of every "denomination."

The provisions of Sec. 19 as to Jews is omitted in this Eighth Edition.

In the revision of 1896, Ninth Edition, the Marriage Law was redrafted, but the provisions above set forth were all embodied therein and remained practically unchanged, as appears from the following:

> "Sec. 11. WHO MAY SOLEMNIZE MAR-"RIAGES.—For the purpose of being regis-"tered and authenticated as prescribed by "this article a Marriage must be solemnized "by either:
>
> "1. A clergyman or minister of any re-"ligion or the leader of the Society for Eth-"ical Culture in the City of New York.

Digitized by Google

"2. A mayor, recorder, alderman, police "justice, or police magistrate of a City; or a "Justice or Judge of a Court of Record, or of "a municipal Court, a Justice of the Peace, "or a Justice of the District Court in Cities "of New York and Brooklyn."

Sec. 19 is omitted, but to old Sec. 1, which is here Sec. 10, the provision of the old Sec. 8 is added, so that this Section then read as follows:

"Sec. 10. Marriage, so far as its validity "in law is concerned, continues to be a civil "contract, to which the consent of the parties, "capable in law of making a contract, is es- "sential. *This Article does not require any "marriage to be solemnized in the manner "herein specified and a lawful marriage con- "tracted in the manner heretofore in use in "this State,* or in the manner and pursuant to "the regulations of a religious society to "which either party belongs is as valid as if "this Article had not been enacted."

There was no material change in our marriage laws after 1896 until the amendments of 1901 were passed.

NOW, IF ONE THING IS CLEARLY DISCLOSED BY OUR MARRIAGE LAWS COVERING THIS LONG PERIOD IT IS THAT THE LEGISLATURE HAD A FIXED AND DETERMINED PURPOSE NOT TO INTERFERE WITH THE OLD PAROL CONTRACT FORM OF MARRIAGE. This purpose is further evinced by the Revisors' Notes to the First Edition. Under Sec. 8 is the following:

Digitized by Google

'Sec. 8 as reported; not enacted. Sec. 8. "Marriages hereafter to be contracted within "this State shall not be established, or held to "be proved, unless there be sufficient evidence,

"1. Of the actual solemnization, in the "manner prescribed in this Article, of the "ceremony of the marriage between the par-"ties; or

"2. Of the known co-habitation of the par-"ties as man and wife, avowing themselves as "such."

During this period and under such loose regulations and requirements an intolerable situation had arisen. The heirs of men who were supposed to be bachelors or widowers by all their relatives, friends and neighbors during lifetime were confronted after the deaths of such ones by mistresses and harlots in the guise of widows, and in some cases with their natural offspring, claiming, and in many cases acquiring, their whole estates. The evidence of a man's debauch, or of a liaison during life took on, in the machinations of prostitutes and unscrupulous lawyers, the evidences of matrimony after his death. A premium was put on harlotry, fraud and perjury. Morality and decency were trampled under foot by the very worst elements of society. The most important contract known to civilized society was made and unmade by the unscrupulous at will. Divorces arising from such unions were multiplied. The very foundations of society were being undermined. It was this state of affairs, culminating in the Crouse case at Syracuse, the facts of which are known

Digitized by Google

to this Court, which prompted the legislature, at the instance of outraged public sentiment, and in answer to the appeal of the Courts of this State to remedy the situation by statute.

We ask the Court to observe the marked and striking character of the changes made in the statutes in answer to these demands.

Chap. 339 of the Laws of 1901, which went into effect January 1, 1902, so far as the same is material to this discussion, provided as follows:

Sec. 10, which was Sec. 1, in the First Edition of the Revised Statutes, and Sec. 10 of the Laws of 1896, was amended to read as follows:

> "Sec. 10. MARRIAGE A CIVIL CON-
> "TRACT; EFFECT OF THIS ARTICLE.
> "—Marriage, so far as its validity in law is
> 'concerned, continues to be a civil contract to
> "which the consent of parties capable in law
> "of making a contract is essential. A lawful
> "marriage contracted in the manner and pur-
> "suant to the regulations of a religious so-
> "ciety to which either party belongs is as
> "valid as if this Article had not been en-
> "acted."

We ask the Court to observe that the provision declaring lawful "marriages contracted in "the manner heretofore in use in this State," which was in old Sec. 10 is omitted in this Section. This alone shows what the intention of the legislature was relative to the old parol contract marriage.

Digitized by Google

"Sec. 11. How a Marriage MUST be "solemnized,—A Marriage must be solem- "nized by either:

"1. A clergyman, etc.

"2. A mayor, etc.

"3. A Justice, etc.

"4. A Written contract of marriage signed "by both parties, and at least two witnesses "who shall subscribe the same, stating the "place of residence of each of the parties and "witnesses and the date and place of mar- "riage, and acknowledged by the parties and "witnesses in the manner required for the ac- "knowledgment of a conveyance of real estate "to entitle the same to be recorded. Such "contract shall be filed within six months "after its execution in the office of the Clerk "of the Town or City in which the marriage "was solemnized. The word clergyman when "used in the following Section of this Article "includes any person referred to in the first "subdivision of this Section; the word mag- "istrate, when so used, includes any persons "referred to in second or third subdivision."

It will be observed that instead of the language of Sec. 11 of 1896, "WHO MAY SOLEMNIZE MARRIAGE.—For the purpose of being registered and authenticated as prescribed by this Article, etc.," we have this mandatory language: "HOW A MARRIAGE MUST BE SOLEMNIZED.—A marriage must be solemnized by either, etc."

Digitized by Google

It will also be noticed that the words, "For the purpose of being registered and authenticated, etc.," are omitted.

When we consider that the legislature in enacting the former merely directory statutes relative to marriage, nevertheless, inserted therein provisions specifically legalizing the old parol contract form, can there be any question but that it intended to and actually did, under all the rules of construction, by the use of the word "must" in the later statute and by omitting the saving clause legalizing the old parol contract marriage, forbid the old parol contract marriage? And if any further assurance that this was the intent of the legislature is necessary is not the fact that a METHOD OF CONTRACT, as distinguished from the CEREMONIAL FORM, was provided for? This was the first time in the history of this State that the legislature prescribed a contract form of marriage, as distinguished from the ceremonial form, and it must conclusively establish that inasmuch as the statute directed the form of such contract, that it intended, and actually did, invalidate any other contract of marriage. Can there be any question but that this statute must be considered mandatory if it is to be interpreted in that "sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature"?

When the legislature used the words "HOW A MARRIAGE MUST BE SOLEMNIZED.—A marriage MUST be solemnized by either:" instead of the word, "WHO MAY SOLEMNIZE MAR-

Digitized by Google

RIAGE, etc.," what did it mean unless to declare that marriages otherwise performed were invalid? For what purpose "*must*" a marriage be so performed, if not for that? Why was the language changed unless the purpose was to invalidate marriages otherwise made between the parties? To give effect to the intent of the legislature this language must be taken into consideration, and that, too, in the light of the changes made in the former language, and of the objects and purposes of the legislature sought to be accomplished.

But counsel for the respondent state that this statute cannot be so construed in accordance with the rules of interpretation laid down in the cases Meister v. Moore and Mathewson v. Phoenix Iron Foundry, supra. We are purposely disregarding Sec. 19 of the Domestic Relations Law, as passed in 1901, which expressly invalidates marriage unless performed exactly in the manner prescribed by the statute, and are insisting that independent of that Section the statutes of this State are mandatory, and that any marriage not performed in accordance with their requirements is invalid.

In arriving at the force and meaning of the decisions in the cases last above mentioned the statutes under discussion there should be considered.

The statute construed in Meister v. Moore provided, in substance, as follows: "Sec. 6. That marriages may be solemnized by any Justice of the Peace in the County in which he is chosen and by ministers of the Gospel. Sec. 8. That no particular form of ceremony is necessary. Sec. 14. That no marriage shall be void for want of jurisdiction

Digitized by Google

or authority in the minister or justice; and Sec. 15. That Quakers and Menomists are exempted from the provisions of the statute.

It will be observed that the statute here was merely directory in form and the Court held that this being so it could not be construed to have been the intent of the legislature to invalidate marriages good under the common-law. We do not believe that the Court would have put any such construction upon our statute. And we are certainly sure that the Courts of this State should not put such a construction upon it knowing the objects and purposes it was intended to accomplish. In our State the contract right of marriage, as distinguished from the ceremonial form, was preserved, but the legislature took upon itself to declare, as it had a right to do, what kind of a contract it must be in order to be valid.

In the Mathewson case the statutory provisions were substantially as follows: By Sec. 7 any minister or elder domiciled in the State or any Justice of the Supreme Court may join persons in marriage. Sec. 9 prohibits any minister, elder or magistrate from joining in marriage any persons unless they shall sign and deliver to said minister, elder, or magistrate a certificate setting forth their names, age, color, occupation, etc. By Sec. 11 a penalty is imposed upon the minister, elder or magistrate who shall join persons in marriage without first receiving such certificate. By Sec. 14 the solemnization of marriage is required to be in the presence of two witnesses, at least, besides the minister, elder, or magistrate officiating. Sec. 15 permits Quakers, Friends and Jews to marry

Digitized by Google

according to their forms and ceremonies. Sec. 16 requires the parties to any marriage, before celebration, to deliver to the Town Clerk the certificate mentioned in Sec. 9 under penalty of fine or imprisonment. Sec. 13 provides that, "whoever shall be married without duly proceeding as by this chapter is required shall be fined not exceeding $50."

The Court, in pursuing this purely directory statute, said:

> "We think a careful reading of the whole "statute impresses the mind with the convic- "tion that while the legislature intended to "subject to imprisonment the parties, as well "as those officiating, who might fail to ob- "serve the statutory provisions but was not "the intention to make marriages void by "reason of non-compliance and thus subject "parties to all the serious consequences which "would flow from such a result."

If this Court had been interpreting our statute in the light of the change of the legislation on the subject from the old permissive language to the mandatory "must," and a contract method of marriage had been specified in the statute, and the purpose of the legislature to overcome the evils and demoralization of the old parol contract form of marriage was apparent, we cannot doubt but that it would have held that no valid marriage could be made except in conformity with the requirements thereof. See Re McLaughlin, 4 Wash., 570.

Digitized by Google

But counsel argue that by repealing Sec. 19 of the Domestic Relations Law the legislature intended to again permit the old parol contract form of marriage. If, however, we are correct in our views above set forth the repeal of Sec. 19 did not accomplish such a result. If marriages not contracted in accordance with the statutory requirements of the Law of 1901 were invalid, without resorting to the provisions of Sec. 19, then that Section must be construed as having been inserted for the purpose of showing the legislative intent and that its repeal would not be considered as working the result claimed, since the intent of the legislature is apparent from the other provisions of the statute independent of Sec. 19.

But even if this Court should differ with our interpretation of the statute, as amended in 1901, and should hold that the statute, independent of that Section, was directory only, and that consequently marriages good at common-law are in the absence of Sec. 19, good in this State to-day, nevertheless the respondent cannot succeed here upon that theory.

This brings us to a consideration of the objects and purposes of the legislature in enacting Sec. 19, in 1901, and repealing it in 1907 to take effect January 1, 1908.

It will be admitted on all sides that the definite and unalterable purposes of the legislature in enacting the amendments of 1901 was to abolish the so-called common-law marriage. The mandatory language used in specifying how the marriage must be solemnized, the insertion of the provision

Digitized by Google

permitting a contract form, but regulating the kind of contract and the adoption of Sec. 19 clearly and conclusively shows this. The counsel for the respondent base their sole claim to a change in the intent of the legislature upon the repeal of Sec. 19, that is, they admit thereby that there is nothing in or out of the statute excepting this to show that there was any change in the intent of the legislature as it was expressed by the amendments made in 1901. Counsel state on page 115 that there is no legitimate evidence in or out of the Act of an intent to qualify and restrict the operation of the repeal of Sec. 19. In this they are mistaken, as a reading of Sec. 11, of the Domestic Relations Law in effect January 1, 1902, and of Sec. 11, of the same Law in effect January 1, 1908, conclusively shows.

Sub-division 4 of Sec. 11 of the Domestic Relations Law as adopted in 1901, and which went into effect January 1, 1902, reads as follows:

> "A written contract of marriage signed by "both parties, and at least two witnesses who "shall subscribe the same stating the place of "residence of each of the parties and wit- "nesses and the date and place of marriage "and acknowledged by the parties and wit- "nesses in the manner required for the ac- "knowledgment of a conveyance of real estate "to entitle the same to be recorded. Such "contract shall be filed within six months "after its execution in the office of the Clerk "of the Town or City in which the marriage "was solemnized. The word clergyman, "when used in the following Sections of this

Digitized by Google

"article includes any person referred to in "the first sub-division of this Section; the "word magistrate when so used includes any "person referred to in the second or third "sub-division."

Sec. 11 of the same Law, as amended in 1907, when Sec. 19 was repealed, reads as follows:

"A written contract of marriage signed by "both parties and at least two witnesses who "shall subscribe the same, stating the place of "residence of each of the parties and wit- "nesse and the date and place of marriage, "and acknowledged by the parties and wit- "nesses in the manner required for the ac- "knowledgment of a conveyance of real "estate to entitle the same to be recorded, "PROVIDED. HOWEVER, THAT ALL "SUCH CONTRACTS OF MARRIAGE "MUST, IN ORDER TO BE VALID, BE "ACKNOWLEDGED BEFORE A JUDGE "OF A COURT OF RECORD. Such con- "tract shall be recorded within six months "after its execution in the office of the Clerk "of the County in which the marriage was "solemnized. The word clergyman, when "used in the following Sections of this Article "includes each person referred to in the first "subdivision of this Section. The word mag- "istrate, when so used, includes any person "referred to in the second or third sub- "division."

Here is a plain and expressed qualification and limitation placed upon the repeal of Sec. 19. The

Digitized by Google

addition of the words, "provided, however, that all such contracts of marriage, must, in order to be valid be acknowledged before a Judge of a Court of Record," clearly was for the purpose of invalidating every contract of marriage which was not acknowledged before a Judge of a Court of Record.

The intention of the legislature is very plain and the very object sought is effectively accomplished, namely, the abolition of a parol contract of marriage.

When the amendments of 1901, Chap. 339, were passed the legislature, as we have stated, was determined to abolish the parol contract form of marriage. And after drafting Sec. 11, describing the method and manner in which marriages MUST be celebrated and providing for the contract marriage, as distinguished from the ceremonial form, and prescribing the manner in which the contract should be made, nevertheless, in addition thereto it enacted Sec. 19 which invalidated every marriage unless performed in every essential in accordance with the provisions of said Sec. 11. The only saving clause in the statute was that contained in Sec. 19 to the effect that a marriage should not be deemed invalid on account of the want of authority in the celebrant if either of the parties believed they were lawfully married, nor if there was any mistake in the date or place of marriage or in the residence of either of the parties if the marriage was solemnized under sub-division 4 of said Sec. 11. If, in any other respect, there was not a strict compliance with every requirement of the statute, the marriage was not "valid

Digitized by Google

for any purpose whatever." This was a harsh and unreasonable rule. The purposes of the legislature could be accomplished in another manner. For instance, with Sec. 19 in force, parties might strictly comply with every requirement of sub-division 4 of Sec. 11, excepting that relative to the filing of the contract, yet the marriage would be absolutely void. It also opened the door to fraud to be perpetrated upon one of the parties by the other.

Inasmuch as the iniquity to be reached was the contract marriage, there being no trouble arising from the ceremonial marriages, the legislature hit at the heart of the matter and inserted the provision that all contracts of marriage, in order to be recognized as valid, must be acknowledged before a Judge of a Court of Record.

The purpose of the legislature is so manifest and its object is so effectively accomplished that it would seem that there could be no possible room for doubt. The statement of respondent's counsel that there was no qualification or restriction upon the repeal of Sec. 19, and no evidence in the act of an intent to restrict or qualify it, is so at variance with the fact that it must be they failed to read sub-division 4 of Sec. 11, as amended by the laws of 1907, Chap. 742. And all of their argument, based upon the assumption that there is no provision in the Domestic Relations Law declaring invalid marriages not performed in accordance with the requirements thereof, is so without point of merit that we are convinced that either the provision escaped their attention or they expected it might escape ours.

Digitized by Google

Any argument based upon the theory that the legislature provided for a contract of marriage which must be in writing, must be signed by both parties, must be signed by two witnesses and must specify the date and place of marriage, and the place of residence of each of the parties and witnesses, and must then be acknowledged by both the parties and witnesses as required by a conveyance of real property to entitle it to be recorded, and yet intended to permit the use of the old parol contract marriage is so contrary to reason as to be utterly absurd. It will be observed that after specifying all these requirements, including that of acknowledging, there is then inserted the provision, "provided, however, that ALL SUCH con-"tracts of marriage must, in order to be valid, "be acknowledged before a Judge of a Court "of Record." It does not state that only this particular contract described in the statute must be so acknowledged, but that ALL SUCH contracts, that is, all contracts similar or like unto it, in other words, all contracts of marriage, as distinguished from the ceremonial form, must be so acknowledged. Which is to say that the old parol contract marriage is as effectively barred by the amendment of 1907, which took effect January 1, 1908, as it was by the amendment of 1901, which took effect January 1, 1902.

But even assuming that the repeal of Sec. 19 had the effect claimed by appellant's counsel, and that the insertion of the words in sub-division 4 of Sec. 11 in 1907 did not have the effect claimed by us, nevertheless, this Court would be unwarranted, it seems to us, in presuming that a contract of marriage was made between these parties between

Digitized by Google

January 1, 1908, and September 17, 1908, the date of decedent's death, for the reasons set forth in the next Point.

POINT FIVE

AS A MATTER OF FACT THE RELATIONS OF APPELLANT AND DECEDENT WERE ILLICIT FROM 1899 TO THE AMENDMENT OF 1901 AND FOR A LONG TIME THERE-
Hinman Brief 601C Office cor p 755 R C M 31 6
AFTER; AND THEIR RELATIONS WERE ILLICIT AS A MATTER OF FACT AND UNDER STATUTORY LAW FROM JAN. 1, 1902, TO JAN. 1, 1908. AND ANY PRESUMPTION THAT A PAROL CONTRACT MARRIAGE WAS ENTERED INTO BETWEEN THESE PARTIES BETWEEN JAN. 1, 1908, AND SEPT. 17, 1908, ASSUMING THAT THERE WAS NO STATUTORY BAR THERETO IS NOT ONLY UNWWARRANTED BY THE EVIDENCE IN THIS CASE, BUT IS CONTRARY TO THE EVIDENCE AND THE DECISIONS OF THE COURTS APPLICABLE THERETO.

As appears from the evidence herein, to which the Court's attention has been called under Point Second, the respondent and decedent had illicit intercourse at the Allen home in the summer of 1899; that in that fall and in the spring of 1900 they were caught several times at the Hinman Farm in the act of having illicit intercourse; and inasmuch as the respondent was hanging around the farm and at other places with the decedent the presumption is that their meetings were for that purpose. The

Digitized by Google

claim of respondent's counsel that their relations while on the farm prior to 1905 were matrimonial, based upon a few introductions during this period to persons residing, not where the parties lived, but five miles distant in the City of Binghamton and who had no knowledge of the origin of their relation, or of the nature of their relations and cared nothing about them, and under circumstances where the requirements of decent society compelled such conduct, is so utterly contrary to the weight of evidence as to deserve no consideration whatever.

> "The opinion of a few immediate neighbors "who made up the social circle will outweigh "the negative testimony of a thousand citizens "who know nothing and care nothing about "the matter."
>
> Cyclopedia of Law and Procedure, Vol. 26, page 877.
> Conley's Estate, 6 Pa. Dist., 119.

But when we come to the testimony of the mother, brother, employees at the farm who lived in the same house with them, who ate at the same table and slept under the same roof with them for a number of years, and to the testimony of friends and neighbors who observed these people from day to day and who knew the truth about the matter, then we get what Justice Finch in Badger v. Badger, 88 N. Y., at page 552, describes "As the "shadow cast by their daily lives. It is for that "reason that such general repute is permitted to "be proven. It sums up a multitude of trivial "details. It compacts into the brief phrase of a

Digitized by Google

"verdict the teachings of many incidents and con-
"duct of years. It is the average intelligence
"drawing its conclusion."

That there was no marriage, nor any desire for one, is further shown by the fact that this relation was only asserted by them as a cloak for their illicit relations when they were called to account or were liable to be, by their friends.

Again, the respondent and decedent are presumed to have known the law. They knew that after 1901 no amount of co-habitation, no amount of recognizing each other as married, no number of letters could make them husband and wife. They knew that after the law was amended in 1901, they might with impunity live as they did during the years 1906-1907, and that such relations could not constitute a marriage, and that either was free to leave the other at will and sever their relations at any time without the intervention of a Court. They are presumed to have known these things as a matter of law, and that they did know them as a matter of fact is shown by letter of the decedent dated October 25, 1905, (exhibit H. 74) in which decedent says: (Fol. 540.)

> *"Now in regards to those dancing lessons*
> *"just be carefull how you take them am glad*
> *"you take them under certain conditions and*
> *"you know without my saying it what I mean*
> *"so be careful dear for you know there is one*
> *"thing that I demand of you and if you should*
> *"pass that mark I will not be answerable for*
> *"the consequences. So I charge you to be*
> *"careful who you take of and who you asso-*

Digitized by Google

"*ciate with*," and then adding, "*I am no* "*prude as you well know*, etc."

And still again, the fact that this respondent stated in April, 1909, afted decedent's death, when all their relations were spread in retrospect, when the record of their lives had been made up and was closed, that she based her claim to a marriage upon a ceremony performed by LaRoche in September, 1900, which we showed to be false, is conclusive evidence that there was never any marriage between them.

> "When a marriage is set up as having been "performed at a particular time or place or "by a particular form or ceremony and the "evidence fails to support the assertion, the "party asserting the marriage will not be al- "lowed to rely on co-habitation and reputa- "tion to establish it."
>
> Cyclopedia of Law and Procedure, Vol. 26, page 877.

> "A marriage solemnized at a particular time "and place was set up and relied on, and it "was not competent to show *by repute* that "there had been a marriage prior to 1900."
>
> Bowman v. Little, 101 Md., at page 295.

> "But it must be borne in mind that the "appellee, who was seeking to prove her legiti- "macy, did not set up a marriage of her par- "ents at a particular place by a particular "form of ceremony. Had she done this and "failed she would not have been at liberty to

Digitized by Google

"rely on *general repute* to establish the legiti-
"mate marriage."

Jackson v. Jackson, 82 Md. at page 28.

"The three instructions given by the Court
"sua sponte were characterized by a common
"error. They submit to the jury as a ques-
"tion to be considered, whether there was not
"a marriage at a different time and place, and
"contracted in a different manner from that
"alleged by the putative wife, Elizabeth Tay-
"lor. Her testimony was clear and positive.
"It was wholly inconsistent with such a prop-
"osition. If there was none as alleged by her
"clearly there was none at any time."

Blackburn v. Crawford, 70 U. S., at page 194.

The respondent not only stated to Mr. Morse and Mrs. Morgan in April, 1909, when her marriage was directly challenged, that she based her claim to marriage upon an alleged ceremony performed by Mr. LaRoche, but she took the same position again in her answer herein verified April 25th, 1910.

The petition herein alleges (Fol. 17), "that as
"your petitioner is informed and believes the said
"Vena M. Lord and said Charles N. Hinman were
"not married by the said James Henry LaRoche
"on September 24th, 1900, at the Hinman resi-
"dence in the town of Chenango, Broome County,
"New York, or at any other time or place."

The answer of the appellant to this allegation of the petition is as follows:

Digitized by Google

"She denies the allegation contained in said pe-
"tition that she and the said Charles N. Hinman
"were not married by James Henry LaRoche in
"said petition mentioned and described."

That is, she, by these double negatives affirms that she was married by Mr. LaRoche.

Again, counsel for the respondent upon trial asserted that her claim was that she was married by La Roche in September, 1901, (Fols. 840-848) and this statement was made in the presence of the respondent, without any protest or denial from her.

In the face of a record like this how can respondent's counsel ask this Court to presume not in the interest of innocent offspring, for there is none, but in the interest of the guilty party herself, that these parties were married somewhere,—they don't say where,—somehow,—they don't say how,—and by someone,—they don't say by whom.

By a motion to make more certain and definite her answer before proceeding to trial, throughout the trial, and upon the argument we again and again attempted to get the respondent to take some position as to when, where, how, and by whom she was married, having established that her claims that she was married in Albany in 1899, and at the Hinman Farm in 1900 or 1901 by LaRoche were absolutely and utterly false, but always in vain.

When the Respondent sets up a false ceremonial marriage and we prove its falsity, her counsel say, let the Court presume a common-law marriage; when respondent falsely sets up a marriage in New

Digitized by Google

York, and we prove it false, her counsel say, let the Court presume a marriage in New Jersey; when her counsel by the wildest stretch of their vivid imagination assert a common-law marriage in 1908 and we show the thing prohibited by statute, they say, let the Court somewhere, somehow, at some time, spell out a marriage, we are not particular as to the details.

May we with propriety suggest to the Court that, in the interest of morality and decent living, it is important to all the people of this State that the judgment herein should be reversed? Would it not be dangerous to follow the will-o'-the-wisp set up by respondent's counsel here which can be but dimly seen through the fog?

As was said in O'Gara v. Eisenlohr, 38 N. Y., at page 296:

> "The presuming of absurdities in order to "meet the exigencies of a particular case must "ever be fraught with mischief. Presump- "tions of fact are but inferences drawn from "other facts and circumstances in the case, "and should be made upon the common prin- "ciples of induction."

The statement of the Court of Appeals in Brinkley v. Brinkley, 50 N. Y., at page 197 is peculiarly applicable here:

> "The learned counsel for the defendant, "with a commendable earnestness urged upon "the Court not to sanction, by their judgment "in favor of the plaintiff, the notion which

Digitized by Google

> "he perhaps correctly averred was too prev-
> "alent: that in the State of New York as no
> "form nor ceremony, nor civil or religious
> "rite was essential to the validity of a mar-
> "riage so any co-habitation of man and wo-
> "man no matter how or with what motive be-
> "gun, might, by the false assumption of the
> "marital relation some time continue, by the
> "false acknowledgment of each other as hus-
> "band and wife for a space kept up, and by
> "ill-founded general reputation grow into the
> "real valid and lawful state of matrimony
> "with all its reciprocal rights, duties and obli-
> "gations."

The Court then adds these words:

> "We shall not relax any rule or requirement
> "which has been set up for the validity of a
> "marriage."

This is the situation here. These parties came together originally simply to indulge their passions. As time went on they became more bold and brazen in their relations. They quarreled and made up. Charles drove her from the house, then took her back again. He had schemes in mind whereby, he expressed to his mother, he intended to get rid of her forever. Up at the farm where the members of the family and employees and the neighbors knew the commencement of their relations, saw the shadows cast by their daily lives, they made no pretense of marriage. These people by their statement that Charles and Vena were not married, summed up a multitude of trivial details, compacted into the brief phrase of a ver-

Digitized by Google

diet the teachings of many incidents and conduct of years. These parties did not attempt to throw the mantle of respectability about their relations there because they knew it would do no good. But when Charles met his friends in Binghamton, who he had reason to believe knew that Vena was living with him on his farm, then in self-defense and to prevent himself from becoming a social outcast, he took shelter behind the cloak of matrimony. This must have been the arrangement between them while they lived at the farm, because after their visit at Mr. Worthing's in 1902, when Charles introduced Mr. Worthing and his wife to Vena as his wife, upon their return to the farm they were on the same footing again, namely, that she was Miss Lord. They drifted into the situation in which we found them at Charles' death and they both knew they had never been married and that each was at liberty to quit the other at any time. It is very likely that some time after 1902, perhaps in 1905, Charles knew as a matter of fact, that the Marriage Laws had been amended so as to invalidate the old common-law marirage, and was emboldened because of the secure situation in which he then was. The evidence is that up to 1904 all letters to Vena came addressed to Miss Vena Lord. She did not dispute this testimony upon the trial and it must be taken as conclusive upon the question. She did not produce any letters that were written to her by Charles or by her father, mother, sisters, brothers or friends between 1900 and 1905. When they moved to the City of Binghamton in 1905 or 1906 it was again, as a matter of self defense that they passed off each other as husband and wife. There was nothing else left for them to do if they wished to live

Digitized by Google

in a decent community or associate with decent society.

In view of the law applicable to this case the letters produced by Respondent and which are in evidence here, in which he calls her his wife, are as inadequate to establish a statutory marriage as they would be to establish a statutory adoption of Vena's two brothers, Ray and Roy, whom Charles repeatedly referred to as his sons. This statement of their relations is the only statement that harmonizes with all the evidence in the case.

To summarize. A presumption of the common law marriage prior to Jan. 1, 1902, because of the relations of the parties subsequent to that date, does not arise because:

(1) The evidence is wholly insufficient to show common law marriage before that date, and the presumption was that the illicit relations continued to such date.

(2) Respondent did not claim on the trial a common-law marriage, but a formal one, and should be held to her claim.

(3) The law should not be juggled so as to create by a mere presumption, a condition which did not in fact exist and such is not its purpose. See matter of Smith 74 Misc. 11.

Digitized by Google

POINT SIX

A FINDING BY THE TRIAL COURT THAT RESPONDENT WAS MARRIED IN NEW JERSEY IN 1906, AT WHICH PLACE SHE VISITED THE DECEDENT FOR A FEW WEEKS, WOULD HAVE BEEN CONTRARY TO THE EVIDENCE AND THE LAW.

In their Brief in the Court below respondent's counsel state that the Trial Court should "have gone to the extent of finding that a marriage contract was entered into" there. That the Court would have been required to "have gone" some in order to make such a finding is certainly true.

The case of Hynes v. McDermott, 91 N. Y., 451, is not an authority for the proposition. In the first place, the issue in that case was presented not alone by the putative widow but by the offspring of the union, who were asserting their legitimacy. And the Courts of this State have gone much further in presuming marriage in such cases than in cases where the issue is presented by one of the guilty parties.

In the second place, that very issue was presented to the jury and found for the plaintiffs. At page 458, the Court says:

> "The jury, in addition to their general "verdict, made a special finding that the par- "ties, while in France, entered into an agree- "ment in presenti to take each other as hus- "band and wife."

Digitized by Google

In the third place, the Court states at page 464,

> "We are not called upon to say whether the "finding of the jury of a marriage is satis- "factory to us."

As was said by the General Term, First Department, in Fagan v. Fagan, 32 St. Rep., 994, at page 997 in discussing this case:

> "Furthermore, it is worthy of note that "the Court of Appeals there thought proper "to state in so many words, that they were "not called upon to say whether the finding "of a marriage by the jury was satisfactory "to them or not."

Again, how could the trial Court "have gone to the extent" of finding a marriage in New Jersey in 1906 in view of the undisputed evidence in the case that in April, 1909, respondent stated to Mr. Morse and Mrs. Morgan, when her marriage was directly challenged that she based her claim to marriage upon an alleged ceremony performed by LaRoche in September, 1900, and also in view of her allegations in her verified answer in April, 1910, that she based her claim to marriage upon an alleged ceremony by Mr. LaRoche?

Upon this point we again call the Court's attention to the following cases which are discussed under Point Fifth:

Barnum v. Barnum, 42 Md., at page 297,

Bowman v. Little, 101 Md., at page 295,

Digitized by Google

Jackson v. Jackson, 82 Md., at page 28.
Cyc., Vol. 26, at page 877,
Blackburn v. Crawford, 70 U. S., at page 194.

POINT SEVEN

ASSUMING THAT THE BURDEN OF PROOF IN THIS PROCEEDING WAS ON THE PETITIONER, SUCH BURDEN WAS FULLY MET AND SUSTAINED THROUGHOUT THE TRIAL.

At the outset, we call the Court's attention to the case of Re Gerlach's Estate, 29 Misc. Rep., 90, s. c. 60 N. Y. Supp., 574.

That proceeding was very similar to the one at bar. It was brought by the brothers of the decedent to remove his putative widow, who had taken out letters of administration, upon the ground that she was not his widow. It was claimed that she could not be his widow since a decree of divorce made against her by her former husband prohibited her from remarrying in this State. She set up in her answer a marriage in Pennsylvania. Upon the trial the petitioner put in evidence the Decree of Divorce and showed that her former husband had not married again, and rested. The attorneys for the widow also rested. The Court then says at page 575:

"The Referee, in an elaborate opinion

Digitized by Google

"holds that the petitoners have made a "prima facie case sufficient to put the re- "spondent upon her proof, and that, in the "absence of such proof, the ground alleged "for her removal must be regarded as estab- "lished; and that upon the case submitted "the petitioners had shown themselves en- "titled to the relief prayed for. In this con- "clusion I concur, and deem the case of "Stanley v. Stanley, 4 Dem. Sur. 416, suf- "ficient authority. In that case two persons "each asserted herself to be the widow of the "intestate. One of them procured the issu- "ance to herself of letters of administration. "Thereafter the other applied for the revoca- "tion of said letters. It was held in the pro- "ceeding of revocation that both occupied the "same position before the Court with refer- "ence to the method of establishing their re- "spective claims to the status of widowhood "as if application had been made simultan- "eously for letters. Surrogate Rollins in "the course of that opinion, wrote as fol- "lows:

"The fact that the respondent was more "diligent than the petitioner in applying for "letters of administration, that letters had "been granted pursuant to her application, "manifestly does not put upon the petitioner "any burden that she would not have been "called upon to bear if both parties to this "proceeding had simultaneously appeared "before me as rival claimants for letters."

But we are not required to rely upon the rule

Digitized by Google

above laid down, and which is so well fortified by the opinion of the referee therein referred to.

Our petition alleged that the administratrix based her claim to being the widow of the decedent upon an alleged ceremony performed by LaRoche on September 24th, 1900, at the farm, and further that she was not so married by LaRoche at that time and place, and also that she was not married by LaRoche, "at any other time or "place." In her answer the administratrix "Denies that she bases her claim to being the "widow of said Charles N. Hinman upon the al-"leged marriage ceremony mentioned and de-"scribed in the complaint," and then also, "Denies the allegation contained in said petition "that she and the said Charles N. Hinman were "not married by James Henry LaRoche in said "petition mentioned and described." That is, she denied that she based her claim to marriage upon the alleged ceremony on September the 24th, 1900, by LaRoche, but did aver that she based such claim to a ceremonial marriage which was performed by LaRoche at some other time or place, which put in issue the allegation of the petition that she was not married by LaRoche "at "any other time or place."

That was the issue upon which we went to trial. And we established that she was not married to the decedent by Mr. LaRoche on September 24th, 1900, at the farm, "*or at any other time "or place.*" If this was not meeting and sustaining the burden of proof we do not know the meaning of that expression. If we did not make out a prima facie case for the petitioner, what in the name of reason and common sense would? How

Digitized by Google

did the administratrix seek to meet the case as it stood against her, upon the issue raised by her pleading? By establishing that her statement to Mr. Morse and Mrs. Morgan was true? Not at all. By establishing that she was married by Mr. LaRoche at some other time or place? Not at all. Not a scintilla of evidence did she produce to show that she was married by LaRoche, but on the contrary, attempted to establish a marriage *by repute* at some other time, at some other place, and by some other form. And even now nobody knows when, where, how or by whom.

Under the authorities last cited in Point Sixth the administratrix should have been limited to the production of evidence substantiating the claim presented by her in her statement to Mr. Morse and Mrs. Morgan, and raised by her in her answer herein, namely, to her marriage by LaRoche in 1900, at the farm, or at some other time and place.

Instead of doing this, however, the Trial Court threw down the bars and permitted the administratrix to change her position, to disregard her statement and her pleading and to establish, if possible, a marriage upon co-habitation, repute, etc. And counsel for respondent now claim that we should not have been permitted to introduce any evidence in rebuttal to meet this new situation. Could anything be more absurd or silly than this?

And because the Surrogate permitted the petitioner, not as a matter of discretion, but as an absolute right, to meet this testimony, counsel

Digitized by Google

stated at page 126, of their brief below, that this action of the Court "fairly illustrates the at-"mosphere which surrounded the trial in this "proceeding and the spirit with which the hear-"ings were conducted on the part of the Surro-"gate." And again at page 118 referring to this same ruling of the Surrogate, as well as to others, uses this language:

> "We desire to call the Court's attention to "some of such rulings, for the purpose not "only of showing all the errors committed "thereby, but to show the general atmosphere "that surrounded the case and to show the "peculiar mental condition and attitude of "the Surrogate with respect to the matter at "issue."

These thinly veiled insinuations against the integrity of the Trial Court, characteristic of others worming their way through the pages of respondent's brief, all of them indicative of malice and personal animosity and wholly unwarranted by the rulings made, are it seems to us, deserving of attention at the hands of this Court. We shall not pursue the matter any further but do submit it to the consideration of this Court.

The record of this case can not be examined by any impartial person but that he will be convinced of the absolute fairness of the Trial Court throughout this long trial.

Digitized by Google

POINT EIGHT

THERE WERE NO ERRORS COMMITTED BY THE SURROGATE ON THE TRIAL. EVIDENCE OF THE DECLARATIONS OF THE DECEDENT AND EVIDENCE OF THE REPUTATION OF THE CO-HABITATION OF THE PARTIES WAS PROPER.

Badger v. Badger, 88 N. Y., 546.
Stackhouse v. Shoughenburg 22 A. D. 312, Code Civil Procedure Sec. 2545.

POINT NINTH

THIS COURT HAS JURISDICTION TO HEAR AND DETERMINE THIS APPEAL AND IS NOT CONCLUDED BY THE FORM OF THE ORDER IN THE COURT BELOW.

Matter of Totten, 179 N. Y. 112.
Hirsh v. Jones, 191 N. Y, 195.

POINT TEN

THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED AND THAT OF THE SURROGATE'S AFFIRMED WITH COSTS.

All of which is respectfully submitted.

WILBER & YETTER,
Attorneys for Respondent,
1007 Kilmer Bldg.,
Binghamton, N. Y.

Digitized by Google

IN THE

Court of Appe

In the Matter

of

The Application of Henry A. Hinman for the removal of Vena M. Hinman from office as Administratrix of the Estate of Charles N. Hinman, deceased.

Henry A. Hinman, Petitioner and Appellant.

Vena M. Hinman, Administratrix, and respondent.

Bri
Res

STATEMENT OF FACTS

This is an appeal from a final order the Appellate Division of the third de in a special proceeding for the revocatic ters of administration instituted under 2685 of the Code of Civil Procedure b Surrogate of Broome County and taken Surrogate's Court to the Appellate Di an appeal upon questions of law and facts under Section 2576 of the Code Procedure.

On September 17th, 1908, Charles N.

Digitized by Google

a resident of the City of Binghamton, died intestate, at his home on Walnut Street. (Fols. 11 and 25). His death was violent being caused by an injury which rendered him immediately unconscious, in which condition he remained until he died. (Fol. 294). After his death, this respondent, Vena M. Hinman, with whom he was, and for years before, had been, living and cohabiting as his wife, presented to the Surrogate's Court of Broome County, her petition, containing the allegation that she was the widow of said Charles N. Hinman, the decedent, and praying for the issuance to her of letters of administration on his estate. (Fols. 13 and 24 to 31). Upon such petition, the Surrogate of Broome County, on October 14, 1908, issued letters of administration upon the estate of Charles N. Hinman to her (Fols. 13 and 14), and she thereupon qualified as such administratrix and entered upon the discharge of her duties, and continued to act as such administratrix until after the making of the decree in the Surrogate's Court in this matter, which was entered October 12, 1910.

The decedent left him surviving, an own brother, Henry A. Hinman, who was also a resident of the same city in which the decedent resided at the time of his death; a half-brother, Alvah E. Morse, who resided at Smithville, Chenango County, New York; and a half-brother, Albert Griswold, who resides in Aztec, New Mexico. The evidence shows that the deceased and these two half-brothers had never maintained familiar relations, (Fols. 125 to 128), and that toward the brother, Henry A. Hinman, the decedent did not have any too kindly feelings and

Digitized by Google

did not intend that he should have any of his property. (Fol. 253).

On March 10, 1910, the brother, Henry A. Hinman, proceeding under Article sixth of Title III of Chapter XVIII of the Code of Civil Procedure, presented to the Surrogate's Court of Broome County, his petition, praying for the revocation of the letters of administration theretofore issued by that Court to this respondent, alleging as the sole grounds therefor, that the respondent had procured the issuance of letters to her by the misrepresentation of a material fact, namely, the statement in her petition, that she was the widow of Charles N. Hinman, deceased. It will be noted in this connection, that the presentation of this petition, and the institution of this proceeding had been delayed for nearly a year and a half after the letters of administration had been issued to this respondent and for nearly a year after the members of the Hinman family had full knowledge of all the facts that they claimed to know or intended to produce on the trial of this proceeding. (See affidavit of La Roche, verified May 10, 1909, Fols. 36 to 38, which is the affidavit upon which the proceeding is based, also Finding No. 128, Fol. 1662).

The matter came on for trial before the Surrogate of Broome County in July, 1910. The sole question at issue was whether Charles N. Hinman, the decedent, and Vena M. Hinman, the respondent, were husband and wife or not. For reasons stated at Fols. 846 and 847, no direct and positive proof of their marriage was available, but much circumstantial evidence was introduced

Digitized by Google

to show the existence of the matrimonial relation between them. A large mass of testimony was taken and on September 13, 1910, the Surrogate rendered his decision (Fols. 82 to 91), directing the entry of a decree revoking the letters of administration issued to this respondent.

An appeal was taken from that decree to the Appellate Division upon questions of law and upon the facts. Upon that appeal findings were made by the Surrogate under the provisions of Section 2545 of the Code of Civil Procedure (Fols. 1555 to 1690) and further findings were made by the Appellate Division (Fols. 1737 and 1738). In the latter Court an order was made by a divided Court reversing the Surrogate's decree and denying the application for the revocation of the letters of administration, (Fols. 1729-1740). A decree having been entered on that order in the Court below (Fols. 1741-1752) this appeal was taken therefrom as well as from the order. (Fols. 1780 to 1784).

The Surrogate wrote an opinion with reference to a question of practice arising upon the submission in the respondent's behalf of requests to find (Fols. 1703 to 1720) but gave no opinion regarding his decision on the merits. The Appellate Division gave an opinion which appears in the record at folios 1753 to 1754.

The respondent's maiden name was Vena Lord. Her people lived at or near Equinunk, Pa. When a young girl she came to the City of Binghamton to work, and for a time was employed in the home of Mr. Normile, and later in

Digitized by Google

the home of Dr. Daley (Fols. 346, 358, 359). While so employed at Binghamton, she made the acquaintance of the decedent, Charles N. Hinman, who owned and lived on a large farm in the Town of Chenango, in the County of Broome, some five miles north of the City of Binghamton. There resided on the Hinman farm with the decedent, at the time, his mother, Melissa Hinman, his brother, Balis Hinman, and Mary Hinman, the wife of Balis Hinman. Sometime in or about the year 1899, Mary Hinman instituted proceedings for a divorce, against her husband, Balis Hinman, and left the Hinman farm in the fall of 1899. (Fol. 1501 and 1560 to 1562). Sometime after that, and in or about the year 1900, the respondent, then unmarried, went to the Hinman farm to live, and from that time on, as long as Charles N. Hinman occupied the farm, which was until sometime early in 1906, she continued to live there at the farm with Charles N. Hinman, and his mother, Melissa Hinman, and with Balis Hinman, until he died in November 1902, (Findings 4 to 8, Fols. 1562 to 1567), and there were also on the farm different hired men. (Fol. 1171). The Hinman family was not a family that was socially inclined and apparently had but little company or intercourse with the neighbors, at least after the time when Mary Hinman left the farm. (Fols. 1389 to 1391, 1111, 1196). The evidence shows that the friends and acquaintances and business associates of Charles N. Hinman resided in the City of Binghamton, and it was there that he peddled milk from the farm and had his business transactions, and where he later went to reside. (Fols. 1391, 1197-1198).

Sometime early in 1905, Charles N. Hinman

Digitized by Google

became interested in good roads construction and entered into a partnership with Harvey B. Sproul, under the firm name of Hinman and Sproul, to engage in the contracting business. He continued in that firm and in that business up to the time of his death in September, 1908. (Fols. 834, 835, 1603). During the year 1905, and afterwards, Charles N. Hinman was away from the farm, engaged in his contracting business. (Fols. 835, 1603, 1604). During the year 1905, the respondent remained on the farm with the mother and looked after the farm and home affairs. (Exhibits F. to H. 100, Fols. 378 to 590). Early in 1906, Charles N. Hinman, the respondent and Mrs. Melissa Hinman left the farm and moved to Livingston street in the City of Binghamton, where they resided for some time. (Fols. 265, 266 and 1641-1642). From there, they moved to the Moon Block in the City of Binghamton and continued to live there until Melissa Hinman, the mother, died in January, 1907. (Fol. 1642). From the Moon Block Mr. Hinman and the respondent moved to Washington street in the City of Binghamton and resided there for a time and from there, removed to Cedar street where they remained and lived together for a short period of time and from there, they moved to Walnut street in the City of Binghamton, where they were living at the time of Mr. Hinman's death. (Findings 107 and 109, Fols. 1644 to 1646).

In 1898, Charles N. Hinman was a member of the 20th Separate Company of New York State Volunteers, which was a company organized and having its headquarters at the City of Bingham-

Digitized by Google

ton. During the progress of the Spanish War, in 1898, that company was stationed at Governors Island, New York City, and was later ordered and went to Honolulu, where it remained for some time. (Fol. 804).

The undisputed evidence shows, and the Surrogate found as a fact, that during that period Charles N. Hinman was corresponding with the respondent, who was then Vena M. Lord, and that neither of them were, or had been married. (Findings 1, 4, 5 and 12, Fols. 1560, 1562, to 1564 and 1569 to 1570). The letters written during that period by the decedent to the appellent appear in the case as Exhibits H. 177 to H. 197. (Fols. 723 to 793). Later, and after the decedent's return, the evidence showed that he wrote at least three letters to the respondent, one of which was addressed to her at Dr. Daley's residence on Washington street in the City of Binghamton, (Exhibits H. 198 and 199, Fols. 793 to 797), and the other two at the home of her parents in Equinunk, Pa. (Exhibits H. 200 to H. 203, Fols. 797 to 803). These letters written while Mr. Hinman was in the U. S. Military service and after his return, were written in the period between July 9, 1898, to December 21, 1900. These letters are all written and directed to Miss Vena Lord. In them he addressed her always as "My dear friend" and he signed them all with his name. The letters are all respectful and are such letters as a decent man might write to a decent girl. (Findings 13 and 14, Fols. 1570-1571). They show on their face, an increasing interest and regard for the respondent on the part of the writer.

Digitized by Google

The evidence established and the Court found as a fact that sometime prior to December 24, 1900, the decedent had talks with his particular friend, Judson S. Newing, a jeweler in the City of Binghamton, and who had known Vena M. Lord for many years, regarding the kind of wife she would make, and Mr. Newing testified that the decedent told him that he proposed to marry her, (Fol. 263), and that on December 24, 1900, Mr. Hinman, the decedent, purchased from Mr. Newing an opal ring, saying to him at the time—"I suppose you know where this is going," to which Mr. Newing replied—"I don't know but I surmise" and that Hinman then said—"Keep it under your hat." Shortly thereafter, Mr. Newing say this ring on the hand of the respondent, and it was produced by her on the trial of this proceeding. (Newing's testimony Fols. 261 to 263 and 269 and Findings of Fact 15 to 17 at Fols. 1571 to 1574).

The undisputed evidence established and the Court found as facts that some time later, the exact time not being fixed but it being within two years and probably within one, the decedent bought of said Newing a plain gold band ring, saying to Newing at the time that it was to "tie the knot with" and that shortly thereatfer, Newing saw the ring on the finger of the respondent and that she had it exchanged at his store for another similar ring. (Fols. 263, 267 and 269 and Findings 18 to 22 at Fols. 1574 to 1577). The undisputed evidence showed and the Court found as facts that soon after the decedent purchased the gold band ring, the decedent came to Newing's store with the respondent and said to him that

Digitized by Google

she was no longer his girl, but his wife, and to let her have whatever goods she wanted from the store and charge the same to decedent, and thereafter Newing did sell her goods and charged same to decedent, who paid the bills and that from that time on, the decedent always spoke of and referred to her as his wife. (Fols. 263 and 264 and Findings of Fact 21 to 24 at Fols. 1576 to 1579).

The undisputed evidence established and the Court found as facts that in the latter part of September or the first part of October, 1901, the respondent and the decedent visited at the home of the parents of the respondent at Equinunk, Pa., and that the respondent then and there introduced the decedent to her father, mother, brothers and sisters, as her husband; that they stayed there together that night, occupying the same room; that the respondent stayed there for some days thereafter while the decedent was absent and during her visit there, was again visited by the decedent who again remained at the home with the respondent over night, they occupying the same room again. (Fols. 347, 348 and 349 and Findings of Fact 120 and 121 at Fol. 1655).

The undisputed evidence also established and the Court found as facts that the respondent had twin brothers named Ray and Roy; that after this visit by the decedent and the respondent, in the fall of 1901, to the home in Equinunk, Pa., these two boys went to live on the Hinman farm and that from that time on, they took part in the carrying on of the work of the farm and were

Digitized by Google

addressed or spoken of by the decedent as his sons, (Fol. 356); and that the respondent had a younger sister, Pearl, who made long visits at the decedent's at different times. (Fols. 360 and 361 and see Findings of Fact Nos. 122, 123 and 124, Fols. 1656 to 1658).

The undisputed evidence established and the Court found as facts that late in 1901 or early in 1902, Dr. F. P. Hough of the City of Binghamton, who had known the respondent from her childhood and who had known her people, was called to the Hinman farm by Charles N. Hinman, to attend his wife, (Fol. 238), who was ill with inflammatory rheumatism; that he went to the farm and was taken into the room of the respondent who was ill and that he treated her for inflammatory rheumatism, visiting her for a considerable period of time, in the presence of the decedent's mother, Melissa Hinman, charging the services therefor to Charles N. Hinman, who paid the bill. (Fol. 237 to 239, 245 and 247 and Findings of Fact 26 to 30, Fols. 1580 to 1583); that from 1901 on, the decedent always spoke of the respondent, to the Doctor, as his wife (Fol. 242 and Finding of Fact 34 at Fol. 1586); that on different occasions after the decedent and the respondent moved from the Hinman farm in the Town of Chenango to the City of Binghamton, the Doctor treated her professionally, at their residence, one occasion being the birth of a child in 1907, which birth was reported to the Registrar of Vital Statistics in the City of Binghamton, as a child born to Vena and Charles N. Hinman, and that on all occasions when the decedent referred to the respondent, he spoke of her as

Digitized by Google

his wife. (Fols. 242 to 245 and Findings of Fact 31 to 34 at Fols. 1583 to 1586).

The undisputed evidence established, and the Court found as a fact, that Charles F. Gage rented his store on Chenango street in the City of Binghamton, of the decedent; that the decedent introduced the respondent to Gage as his wife and told Gage to pay the rent of the store to her; that he did thereafter make payments of rent to her, taking her receipts therefor, which were signed either "Mrs. Charles N. Hinman" or "Mrs. C. N. Hinman." (Fols. 371, 372 and 373 and Finding of Fact 36 at Fols. 1587 and 1588). Mr. Gage testified and it was undisputed, (although the Court refused to find it as a fact) that his introduction to the decedent by Charles N. Hinman occurred, he thought, in the Fall of 1901, but that it might have been in 1902. (Fols. 371 to 374).

The evidence of Nelson P. Brink, which was undisputed, established that in the Fall of 1901, he was at the Hinman farm in the Town of Chenango, and that Melissa Hinman, the mother of the decedent, introduced the respondent to him in the kitchen, as "Charley's wife, Mrs. Hinman" (Fol. 275 and 276); that later and late in 1901 or early in 1902, he was again at the farmhouse at a time when the respondent was ill with inflammatory rheumatism and that he was again introduced to her by the decedent, as his wife, the decedent not knowing that the witness had been previously introduced. (Fol. 276). The Court refused to find this fact (Finding No. 45, Fol. 1595) but it will be observed that Mr.

Digitized by Google

Brink's testimony is corroborated by that of Dr. Hough, already referred to. Furthermore, there is nothing in the case which casts the slightest suspicion on the character or reliability of this witness or which, in any way tends to discredit his testimony.

The undisputed evidence established and the Court found as facts, that H. P. Worthing, an old acquaintance and intimate friend of the decedent, and who was the commanding officer of the 20th Separate Company at one time, and who in 1902 was elected Sheriff of Broome County, (Fols. 250 and 254 and Findings of Fact, Nos. 39 and 40, Fols. 1591 and 1592) was in St. Louis, Mo., with the decedent in April, 1902, and while walking down one of the streets there, Mr. Worthing said "I am going in and buy a present for my wife" and the decedent said—"I will go in and buy one for my wife"; that thereupon they went into a jeweler's store and that the decedent bought a diamond ring, which was produced on the trial in this proceeding by the respondent and identified by the witness, (Fols. 250, 251 and Finding No. 37 at Fol. 1589); that Mr. Worthing first met the respondent in October, 1902, at the Armory in the City of Binghamton; that on that occasion, the decedent introduced the respondent to him as his wife, (Fol. 254); that in March or April,1903, while Mr. Worthing, as Sheriff, was residing at the jail in the City of Binghamton, with his wife, the decedent came to the jail with the respondent, to call on the witness and his wife and that at that time the decedent introduced the respondent to the wife of the Sheriff as his wife, Mrs. Hinman, (Fols. 252 and 255,

Digitized by Google

Finding No. 40, Fol. 1592); that at the time when the decedent and the respondent were living on Washington street in the City of Binghamton, (which by the testimony of Dr. Hough was shown to be in 1907 and see Finding No. 108, Fol. 1645), the decedent talked with Mr. Worthing about his expecting "A little baby down at our house;" and that the decedent said that he had something more to live for; that he had made up his mind to make a will and to leave his property to his wife and baby and a little to young Charlie (a nephew and a son of the petitioner, Henry A. Hinman), but that he would not leave Hank (the petitioner here), a cent, because he had tailed him up for years and he had cost him thousands of dollars and he would not get a cent of what he had (Fol. 253 and Finding No. 41, Fol. 1593), and that from the time when the respondent was introduced to him by Charles N. Hinman as his wife, at the Armory in 1902, he heard her called "Vena" and Hinman called her the "Kid" and everyone else called her "Mrs. Hinman" (Fol. 258).

Mrs. Etta Furman, a woman living in the Town of Chenango, testified, and her evidence was undisputed, that in May of 1902, she was at the Hinman farm for the purpose of borrowing some money from the decedent and that on that occasion, Melissa Hinman, the mother of the decedent, introduced the respondent to the witness as "Charlie's wife" and that shortly after the introduction, the respondent went up stairs and while she was gone, Melissa Hinman asked the witness how she liked Charlie's wife (Fols. 328, 329, 331 and 334). The Court refused to find

Digitized by Google

this as a fact (Finding No. 49, Fol. 1599). While the witness was a little uncertain at first as to whether this occurrence was in 1902 or 1903, she testified that it was at the time when she borrowed some money of the decedent and gave him a mortgage. A search of the records in the Clerk's Office disclosed that she was correct, and a production of these records enabled her to fix the date as being on May 28, 1902. (Fol. 334 and 335). The testimony of this witness was straightforward, and there was nothing in her apearance, her testimony or in the case which cast the slightest doubt on her truthfulness or on the correctness of her testimony. Furthermore, it was corroborated by the records in the Clerk's Office made at that time and by the other circumstances disclosed in the case.

The undisputed evidence established that from as early a period of time as seven years before the trial, which would be as early at least, as July 1903, the respondent traded at the Dry goods store of Sisson Bros. & Weldon Company, one of the largest dry goods stores in the City of Binghamton, and at the drug store of W. P. Guilfoyle in the City of Binghamton where she was known by the name of Mrs. Hinman. (See evidence of Marie Quigley, Fols. 1532 and 1533, evidence of Mrs. Maude Lowe, Fol. 1534 and testimony of W. P. Guilfoyle, Fols. 1510 to 1513 also Finding No. 78, Fol. 1622).

The undisputed evidence showed and the Court found as a fact, that sometime prior to April, 1905, the decedent introduced the respondent as his wife, to H. J. Kneeland, a member of the

Digitized by Google

Broome County Bar, in practice for many years and a man of high standing. Mr. Kneeland was not positive as to the date, but his best recollection was that it occurred probably in 1902 or 1903. (Fols. 340 and 341 and Finding No. 50, Fol. 1600).

The undisputed evidence established and the Court found as a fact, that soon after the death of Balis Hinman, which occurred in November, 1902, (Fol. 128), Charles W. Yeomans, a lawyer and assistant corporation counsel of the City of Binghamton (Fol. 312), was at the Hinman farm in the Town of Chenango as an appraiser, to appraise the estate of Balis Hinman, deceased, and that while there, the decedent introduced the respondent to him as his wife and that she and the decedent were living there on the farm at that time. (Fols. 315 and 314 and Findings No. 46 and 47, Fols. 1596 and 1597); that later and in 1904, at an encampment of the 20th Separate Company, on the fair grounds in the City of Binghamton, the decedent introduced her as his wife, in the presence of Mr. Yeomans, to several officers of the battalion, present at the time. (Fols. 314 and 319, Finding No. 48, Fol. 1598).

The undisputed evidence established and the Court found as facts, that at an encampment of the 20th Separate Company on the exposition grounds in the City of Binghamton in 1904, at a banquet given to the officers of the battalion, and at which the officers were given permission to invite and have with them, their wives and lady friends, the decedent, an officer of the company, was present with the respondent, and on that

Digitized by Google

occasion introduced her as his wife to Colonel Hitchcock, and that in the presence of Colonel Hitchcock, he introduced her as his wife to other officers present. (Fols. 303 to 305 and Findings Nos. 70, 71 and 72, Fols. 1615 to 1618).

Edward E. Powell, a business man of the City of Binghamton, and a member of the 20th Separate Company in 1904, and who was then assistant quartermaster with the rank of first lieutenant, testified to the same facts as did Colonel Hitchcock, (Fols. 308 and 309 and Findings No. 70, 71 and 72, Fols. 1615 to 1618).

The undisputed evidence showed and the Court found as a fact, that sometime in the years 1904, 1905 or 1906, the witness being unable to give the exact year, at a dance at the armory in the City of Binghamton, the decedent introduced the respondent, as his wife, to Dr. Don M. Hooks, a coroner of Broome County, such introduction being made at the request of the witness, who testified that he went to the decedent and requested the privilege of an introduction to decedent's wife. (Fols. 326 and 327 and Findings Nos. 73 and 74, Fol. 1618).

The undisputed evidence established and the Court found as facts, that in the Spring of 1904, Harvey B. Sproul, a good roads contractor and builder, while engaged in the construction of a state road through the Hinman farm in the Town of Chenango, boarded with the decedent on the farm; that he first met the respondent at that time; that she and the decedent occupied the same room in the house during that period; that

Digitized by Google

whenever the decedent spoke of her he spoke of her as "Mrs. Charles N. Hinman." (Fols. 835 and 836); that in April, 1905, the decedent entered into partnership with Mr. Sproul in the contracting business, the firm name being Hinman & Sproul, which partnership continued up until the time of the decedent's death, (Fols. 834 and 835); that in 1905, the firm was engaged in work at Scotia near Schenectady, the decedent boarding with the witness's father-in-law in Schenectady; that the respondent visited the decedent at that time and place, they occupying the same room there; that in 1906, the firm was engaged in work at Newton, N. J., the decedent staying at the Newton Hotel and that in the summer of 1906, the respondent visited the decedent at that Hotel; that she remained there from six to nine weeks and that while there, she occupied the same room with the decedent and that the decedent spoke of her there as "Mrs. Hinman"; also that the respondent visited the decedent later at Scarsdale, N. Y., in 1907. (Fols. 836 and 837 and see Findings Nos. 51 to 60, Fols. 1601 to 1608).

The undisputed evidence showed and the Court found as facts that on August 29, 1905, Dr. Charles R. Seymour, a physician of the City of Binghamton, was called to the Hinman farm to attend the decedent's mother, Melissa Hinman; that on that occasion, the decedent introduced the respondent as his wife to Dr. Seymour in the presence of the decedent's mother, the latter being in bed; that he attended the mother a considerable period, during which time the respondent was caring for her; that on that occasion the decedent introduced the Doctor to the mother;

Digitized by Google

that the witness attended the respondent professionally at different times thereafter, charging the services to the decedent who paid the bills and that prior to that time and in 1904, he heard the decedent introduce the respondent to others as his wife. (Fols. 290, 291 and 292 and Findings Nos. 65, 66, 67 and 68, Fols. 1611 to 1613 inclusive).

The undisputed evidence established and the Court found as a fact, that on April 1st, 1904, the decedent executed a deed of real estate in the County of Broome, to one John W. Osterhout, the respondent not joining in the conveyance; that in the latter part of 1904, or later, the decedent had a talk with Mr. Osterhout and told him that he had better bring his deed down and have his (the decedent's) wife sign it, as it was not good without her signature and thereupon, Osterhout took it to the decedent's residence and presented it to the respondent who signed her name therto, writing it "Mrs. C. N. Hinman." (Fols. 1514 to 1527 and Findings Nos. 61, 62, 63 and 64, Fols 1609 to 1611 inclusive).

The undisputed evidence established that one Fred G. Jones, a real estate agent in the City of Binghamton, rented and lived in rooms in the Moon Block in that City, located at the corner of Lewis and Chenango streets; that while living there with his wife and in 1906 or 1907, he rented apartments in the same block to the decedent; that the decedent with the respondent and with his mother, Melissa Hinman occupied those rooms for a period of time; that there were only two bed rooms in the suite of rooms rented by the

Digitized by Google

decedent, (Fol. 296 and 297); that the mother, Melissa Hinman, died while living in the Moon Block with the decedent and the respondent (Fol. 298); that sometime thereafter, the witness rented an apartment in a block owned by him on Cedar street in said City to the decedent and that after the decedent and the respondent moved there, he had a talk with the decedent which he thought was in the Spring of 1907, in which conversation, the decedent stated to the witness that they were not satisfied with the rooms; that he wanted something better for his wife; that the decedent said "His wife had got dissatisfied with them" (the rooms) "and they had not unpacked their goods entirely and he also stated that if his moving out would do me" (the witness) "any damage, that he would make it good to me; that he had rather rent better rooms and have his wife satisfied than to live in cheaper rooms" and "that his wife's comfort and happiness meant more to them than the money. * * * He said that his wife had been sick and was not well and he did not want to argue the question at all. * * * Regarding the nature of his wife's illness, he said she had lost a child." (Fols. 297 to 302 inclusive).

The undisputed evidence established and the Court found as a fact, that in April 1907, the decedent and the respondent gave a deed of real estate in which the grantors are described as Charles N. Hinman and Vena Hinman, his wife. This deed was duly executed and acknowledged and thereupon duly recorded in Broome County Clerk's Office in Book of Deeds No. 212 at page 2. (Fol. 833 and Finding No. 69 at Fol. 1614.

Digitized by Google

Mrs. Leah Weller, whose name at the time was Leah King, and who later married the City Editor of the Evening Herald, a newspaper published in the City of Binghamton, testified that the respondent was introduced as Mrs. Hinman, to her by the petitioner's witness, Mrs. Jessie Allen, at Mrs. Allen's home in the City of Binghamton, (Fol. 343). The record shows that this was in 1908 (Fol. 343). (In this, the record is in error or else the witness was, because a little later on, the witness testified that this was before the respondent's baby was born on Washington street, and it is undisputed that that event occurred in 1907); that from the time when she was introduced to the respondent by Mrs. Allen, she visited the respondent and the decedent at their home on Washington street, on Cedar street, and on Walnut street where they were living at the time of decedent's death; that she stayed at the home of the decedent different nights, at different places and on each of these occasions the decedent and the respondent occupied the same room. (Fols. 343 to 345).

H. Pierce Weller, the City Editor of the Binghamton Evening Herald, and the husband of the last mentioned witness, testified that he visited at the decedent's house with Miss King, who later became his wife; that he heard the decedent speak of the respondent as his wife and that he addressed her as Mrs. Hinman and sometimes as "my wife"; that he addressed her in no other way except that he sometimes called her "kid." (Fol. 368 and 369).

The undisputed evidence established, and the

Digitized by Google

Court found as a fact that on August 30, 1908, the decedent wrote to the respondent's mother, Mrs. Dan Lord, at Equinunk, Pa., addressing the letter "My dear mother" and asking that she permit her daughter Pearl, a sister of the administratrix, a young girl, to come to the home of the decedent in the City of Binghamton and go to school, the decedent offering to pay all expenses connected therewith. The following is a copy of the letter:—

"Binghamton, N. Y., Aug. 30, '08.

"My dear Mother:—

"You will undoubtedly be surprised to re-
"ceive this but I want you to receive this in
"the same spirit it is written.

"I was in hopes this would work itself
"out without my saying anything and sin-
"cerely hope you will not think me inter-
"fering where I am not wanted. for I want
"you to know and feel that in so far as Lays
"in my power and that is little I am yours
"to command where that influence or help
"is to the welfare of you all, so again I ask
"you to forgive me, and will make my re-
"quest.

"We would like if you could see your way
"clear and we know how badly you want
"her with you and how much you would miss
"her, that is so far as we are qualified to
"gage a mother's love for her child, you let
"Pearl come up this Term of School. We

Digitized by Google

"will be glad to defray all expenses and "when the term is over she may come back "to you.

"Now the only reason I ask or could have "the audacity to ask this of you is our love "for Pearl and that she sadly needs the "schooling and Music she can get here, and "I promise you she will not be allowed to "run around with the fellows, as she has not "been allowed to all the time she was here "this summer.

"Now mother think this over well for I "know you want to do as well for all your "children in the future as you have in the "past, but dont let the mothers love be "dominated to much by the wish to keep her "with you for this short time for it will not "be long before she will have a home of her "own in all probability; and let us generous "and try and fit her so she will be an orna- "ment for any home as this is all we can do "for any of our children.

"Again asking you to be generous and "broad-minded in this hoping you will not "feel that I am intruding and that I mean "well I am our obedient son

"C. N. Himnan

"Love to all."

(Exhibit E., Fols. 719 to 722 and see Finding of Fact No. 125, Fol. 1659). The undisputed evidence established and the Court found that the

Digitized by Google

mother complied with the decedent's request and that the sister come to Binghamton to reside with the decedent and the respondent at their home on Walnut street and continued there up until the time when the decedent was killed. (Fol. 349, Finding 126, Fol. 1660.)

The evidence conclusively established and the Court found as facts that from sometime early in 1905 until sometime early in 1908, the decedent was absent much of the time from his home, engaged in the contracting work of the firm of Hinman & Sproul, (Finding No. 54, Fol. 1604); that during 1905, while the decedent was absent, the respondent remained on the decedent's farm in the Town of Chenango, supervising the farm and farm work and taking care of the decedent's mother, who resided there, (Finding No. 93, Fol. 1633); that the Hinman farm was located on and received its mail by means of a Rural Free Delivery route, which was numbered 4, and which started from the Binghamton postoffice; that during the period of the decedent's absence from home, in the contracting work, in the years 1905, 1906 and 1907, the decedent wrote the respondent ninety letters, every one of which was addressed in the mail by the decedent, in his handwriting, in one of the following ways:—"Mrs. C. N. Hinman," "Mrs. Charles N. Hinman," "Mrs. Chas. N. Hinman," "Mrs. Chas. Nelson Hinman," or "Mrs. Charles Nelson Hinman" (see exhibits F to H 175, Fols. 378 to 717 and Finding of Fact No. 82, Fol. 1625); that in seventy of these communications he addressed the respondent in the beginning of the letter as "My dear wife" and in one of them as "My dear wifie," (Finding No. 89, Fol.

Digitized by Google

1631); that in eighty-one of them he signed himself at the end as "Hubbie" and in another as "Hubbe" and in another as "Hubbee" (Finding No. 88, Fol. 1630); that of the communications, fifty-two in number, so written by the decedent to the respondent in 1905, while she was living on the farm in the Town of Chenango, forty-nine of them were directed to the respondent under one of those names above mentioned at Binghamton, N. Y., R. F. D. 4, and many of the envelopes so directed, bore the printed business card of Hinman & Sproul (Findings Nos. 83 and 84, Fols. 1626 and 1627); that in fifty-four of these communications to the respondent the decedent referred to his mother or sent some message or greeting to her (Finding No. 90, Fol. 1631); that in one of the letters, written evidently at a time when the respondent was temporarily visiting her parents at Equinunk, Pa., and addressed to her at that place, the decedent referred to her father and mother as "Mother and pa" (Exhibit H, 126, Fol. 636), and in another addressed to the respondent at the same place referred to the respondent's parents as "Dad and ma" (Exhibit H. 132, Fol. 644); that in many of such letters the decedent wrote in reference to his business affairs, giving directions to the respondent regarding his business.

A reading of these letters conclusively demonstrates that the respondent performed for the decedent, the duties and services in caring for his house, his property, his person, his business and members of his family which a wife would ordinarily perform for a husband in the circumstances of the decedent; that she was considered

Digitized by Google

by the decedent as a member of his family; that he exacted from her the duty and conduct on her part becoming a wife, and recognized and treated such duty as extending not only to himself but to his mother and to the various members of his family and to his relations; that he owed her corresponding duties and obligations on his part and that he was shaping his conduct accordingly and that notwithstanding the gossiping of busy-bodies who were in no position to know and who did not claim to know anything about it, he for one, knew that the respondent was his wife and that he was her husband.

The evidence conclusively established and the Court found as a fact that after a period more than a year subsequent to the death of the decedent, his brother, Henry A. Hinman, the petitioner here, with full knowledge of all the facts alleged in the petition and on which this proceeding is based, was introducing the respondent to different persons as his sister-in-law, Mrs. Hinman (Fols. 337, 338 and 832 and Findings Nos. 112 and 113, Fol. 1649).

Alvah E. Morse, a half-brother of the decedent, and who was called as a witness by the petitioner and who, during the hearing, was represented by counsel associated with the petitioner's attorneys, sworn for the purpose of establishing a statement alleged to have been made by the respondent in April of 1909, that she had been married to the decedent in September, 1900, by the petitioner's witness, La Roche, testified that on one occasion he introduced the respondent as "Mrs. Charles N. Hinman, that is all I knew her as," to his daugh-

Digitized by Google

ter, and that he called her "her Aunt" (Fols. 137 and 138). Although the daughter, Maud Morgan, also called as a witness by the petitioner, to establish the same fact as was sought to be established by the testimony of her father, Alvah E. Morse, denied that the administratrix was ever introduced on that occasion as her Aunt. The Court found as a fact that such introduction was made in that manner, thereby showing how little credence he gave to the testimony of Mrs. Morgan. (See Finding No. 114, Fol. 1650.)

Jessie Allen, a witness called by the petitioner, testified:—"I visited Mrs. Charles N. Hinman at "the Hinman farm in the Town of Chenango, sev-"eral times. On those occasions I sometimes "stayed there over night with Charles and Mrs. "Charles N. Hinman. Charles N. Hinman's "mother was there" (Fol. 853), and that "My "husband visited the Hinman farm with me. He "and I stayed there nights with him. We ate our "meals there at the same table with them. The "mother Hinman was there at the same table "with Mr. and Mrs. Hinman, my husband and my-"self and some of the hired help" (Fol. 855). She also testified that with her husband she visited and ate with the decedent and the respondent at their home on Livingston street in the City of Binghamton and that Mother Hinman lived there with them (Fol. 857); that they moved from Livingston street to the Moon Block and that she visited them there, and that Mother Hinman was living with them there and died there; that the mother was buried from their home; that the witness was at the funeral and knew that "Mrs. Hinman rode with the mourners" (Fol. 858); that

Digitized by Google

the decedent and the respondent stayed with the witness and her husband for sometime at their home on Cedar street (Fol. 860); that the witness rendered services for Mrs. Hinman and boarded Mr. and Mrs. Charles N. Hinman, and knew that a bill therefor was presented by her husband to the estate of the deceased, Charles N. Hinman. (Fol. 862 and see bill for such services and board, Ex. H. 204, Fols. 1535 to 1537.)

William Allen, another witness called by the petitioner, and the husband of the witness last mentioned, testified that he verified his claim against the estate of Charles N. Hinman, deceased, for care and board of the respondent as the wife of Charles N. Hinman (Fol. 937). He testified that in making out that claim for "Board for wife from December 12th," he "Referred to Mrs. Charles N. Hinman," and that it was Mrs. Charles N. Hinman who was at his house on Cedar street and boarded there for a few days and was taken care of my his wife. (Fol. 938.) He also testified that the respondent visited at his house and that he visited the Hinmans at their house on the farm, in the 5th ward (Livingston street) on Lewis street, when they lived in the Moon block and on Washington street where they lived together. (Fol. 946.)

This witness, William Allen, also testified that Mrs. Hinman's mother (who resided at Equinunk, Pa.,) was at the home of the respondent and the decedent the night after he was killed and before the funeral. (Fol. 947.)

At least as early as 1902, the respondent must

Digitized by Google

have been known in the neighborhood as Mrs. Hinman, for Hattie Heim, another witness called by the petitioner, testified that early in that year, when she inquired at the Hinman farmhouse for Mrs. Hinman she was asked by the servant who came to the door whether she desired to see "Old Mrs. Hinman" or "young Mrs. Hinman," and that she replied that she wished to see "old Mrs. Hinman." (Fols. 1021 to 1022.)

George Thomas, another witness sworn on behalf of the petitioner, testified that he had heard that the respondent claimed to be a married woman, and that she made this claim shortly after she went to the Hinman farm to live. (Fols. 1112 and 1113.)

Nellie Murphy, another witness called on behalf of the petitioner, testified that she had talked with the respondent "down at *her house*," and that when she spoke of "*her*" house, she meant the Hinman farm in the Town of Chenango. (Fols. 1127 and 1132); that the respondent while living on the Hinman farm, came to the witness's farmhouse to buy butter for the Hinman farm (Fol. 1127 and 1128); also that whatever business the witness transacted at the Hinman farm, she transacted with the respondent. (Fol. 1132.)

Jean Wilson, another witness sworn for the petitioner, testified that he worked on the Hinman farm for the decedent from June, 1901, to February, 1902; that when he first went to work there, the respondent slept in a bedroom out of the parlor, in which he never saw anyone else while she occupied it (Fol. 1177), but that during the latter

Digitized by Google

part of his service there, when it came bed time, the decedent would say to the respondent:—"Come on, Kid, time to go to bed," or something to that effect, and then they would go upstairs together. (Fol. 1180.)

Joanna Sullivan, a resident in the City of Binghamton, to whom the decedent sold milk while he was running a milk route from the farm in 1904 or 1905, and who was called as a witness by the petitioner, testified that, having heard in 1904 or 1905 that the decedent was married, she asked him about it and that while he denied it then, later, and probably in 1906, she, with her little boy, met the decedent with the respondent and the respondent's sister, in the City of Binghamton, and that the decedent then introduced the respondent as his wife to her (Fol. 1189).

Frank Jewell, a brother-in-law of the petitioner, and called by him as a witness, testified that he knew that the decedent and the respondent were living at Henry's (the petitioner) on Exchange street for a time; that during that period, the petitioner's wife, Orpha, and the respondent visited at the witness's house; and that at that time the respondent was known as Mrs. Hinman (Fol. 1499).

Digitized by Google

POINTS

I

THE APPELLANT TOOK NO EXCEPTION EITHER TO ANY MATERIAL RULING UPON THE TRIAL OR TO ANY OF THE FINDINGS; HENCE THE ONLY QUESTION PRESENTED BY THE RECORD FOR THIS COURT TO REVIEW IS WHETHER THE FINDINGS OF FACT SUSTAIN THE DECREE OR NOT.

This matter was before the Appellate Division on an appeal taken *upon the facts* as well as upon questions of law (Fol. 5). And so that court sat not only as a court of review over the proceedings of the Surrogate, but as a trial court to determine the matter upon the facts, independently of the determination made by the Surrogate.

Sections 2586 and 2587, Code of Civil Procedure.
Matter of Farmers' Loan and Trust Company, 47 App. Div. 448.
Matter of Totten, 179 N. Y. 112.
Hirsch vs. New England Navigation Company, 200 N. Y. 263 on 265.
Matter of Rice, 81 App. Div. 223 on 228.
Matter of Rogers, 10 App. Div. 593.

In the exercise of its functions as a trial court the Appellate Division made findings of fact which appear at Folios 1737 to 1739, and when the order was remitted back to the Surrogate, he, too, made and stated similar findings in the final decree

Digitized by Google

(Fols. 1749 to 1751). No exception was taken by the appellant to any of these findings nor to any finding made by the Surrogate. Such an exception is necessary to make the sufficiency of the evidence to support the finding a question of law. Without it the finding must remain unquestioned in this court.

West vs. Van Tuyl, 119 N. Y. 620.
Donovan vs. Clary, 138 N. Y. 631 on 632.
Turner vs. Weston, 133 N. Y. 650.
Travis vs. Travis, 122 N. Y. 449 on 453-454.
Daniels vs. Smith, 130 N. Y. 696.
Volkommer vs. Cody, 177 N. Y. 124.
Hopkins vs. Clark, 158 N. Y. 209.
Cooper vs. N. Y., O. & W. Ry. Co., 180 N. Y. 12 on 15.
Alden vs. Supreme Tent of the Knights of the Maccabees, 178 N. Y. 535 on 542.

II

THE FINDINGS OF FACT AMPLY SUSTAIN THE ORDER AND DECREE APPEALED FROM.

The only ground on which the petitioner sought relief in this proceeding was that the respondent obtained her letters by means of the alleged false representation that she was the widow of the decedent (Fols. 13 to 20). The findings of fact are positive and explicit that the respondent and the decedent were married, that the relation of husband and wife existed between them at the time of

Digitized by Google

the decedent's death, that the respondent was the widow of the decedent and that the grant of the respondent's letters of administration were not obtained by any false suggestion of a material fact (Fols. 1737 to 1739, also Fols. 1749 and 1750). No argument is needed to demonstrate the sufficiency of these findings to support the order and decree appealed from. As we have shown in the preceding point the findings are not open to question, no exception to any of them having been taken. These considerations alone should be sufficient to dispose of this appeal.

III

IN ORDER TO ESTABLISH THE EXISTENCE OF A VALID MARRIAGE, DIRECT OR POSITIVE EVIDENCE OF THE MAKING OF THE CONTRACT IS NOT REQUIRED. IT MAY BE PROVED BY THE ACTS OF THE PARTIES, BY THEIR APPARENT RELATIONS TO EACH OTHER, OR BY PROOF OF OTHER FACTS AND CIRCUMSTANCES WHICH SATISFY THE COURT THAT SUCH RELATION EXISTS.

This is the theory on which this case was presented to the Surrogate on the part of the petitioner, and he recognized this as being the law of the case, although his decision was against the respondent, for in his tenth conclusion of law he found, at the request of the petitioner, at Fol. 1674, as follows:

"10. Marriage may be established by prov-

Digitized by Google

"ing the cohabitation of the parties, their re-
"puted relation as married people, a mutual
"acknowledgment, by each of the parties, of
"the matrimonial relation, the reception of
"either party in the family of the other, and
"from other circumstances, from which a mar-
"riage may be inferred."

This conclusion of the Surrogate as to the law of the case, which was adopted and followed by the Appellate Division, is supported by the decisions in this state.

"A present agreement between competent par-
"ties to take each other for husband and wife, con-
"stitutes a valid marriage, even if not in the pres-
"ence of witnesses. * * * Such a marriage
"may be proved by showing actual cohabitation as
"husband and wife, acknowledgment, declarations,
"conduct, repute, reception among neighbors and
"relations, and the like."

Gall vs. Gall, et al., 114 N. Y., 109 at 118.

"It is stated that there was not proof of any
"subsequent marriage *in fact*, and that no solem-
"nization of marriage was shown to have taken
"place. But proof of an actual marriage was not
"necessary. Such strict proof is only required in
"prosecutions for bigamy, and in actions for crim-
"inal conversation. * * * * A marriage may
"be proved in other cases from cohabitation, repu-
"tation, acknowledgment of the parties, reception
"in the family, and other circumstances from
"which a marriage may be inferred. * * * No
"formal solemnization of marriage was requisite.
"A contract of marriage made *per verba de*

Digitized by Google

"*presenti*, amounts to an actual marriage, and is "as valid as if made in *facie ecclesiae*."

Fenton vs. Reed, 4 Johnson, 52 on 53-54.

"These circumstances, cohabitation, family life, "declarations of the parties, repute of marriage, "while they do not constitute marriage, evi- "dence it, because they are the circumstances "which usually attend and characterize that re- "lation."

Hynes et al. v. McDermott et al., 91 N. Y., 451 at page 456.

"The rule has been frequently recognized in this "State, that proof of matrimonial cohabitation, "declarations of the parties and reputation that "they are man and wife, is sufficient upon which "to found a presumption of marriage."

Betsinger vs. Chapman et al., 88 N. Y., 487 at 499.

"It is undoubtedly true that cohabitation and "repute merely, do not constitute a marriage. "There must be an agreement or contract to be "husband and wife; mere living together as such "is not sufficient; the agreement to be such is an "absolute and vital prerequisite to constitute a "valid marriage. But murder can be proved by "circumstantial evidence, and there does not seem "to be any reason why a valid marriage may not "be established by the same class of proof. Men "are convicted and executed without having eye "witnesses of their crime. Circumstances which

Digitized by Google

"inevitably lead to the conclusion of the commis-
"sion of the crime are sufficient in a capital case;
"and in civil cases a preponderance of evidence
"which tends to establish the proposition is all
"that is required. So where the issue is of mar-
"riage, although the contract itself may not be
"established by direct evidence, yet it may be
"established by circumstances. It may, from the
"actions of the parties, their visible relations to
"each other and their representations to others, be
"inferred that at some previous time, they had
"entered into a contract of marriage and that is
"all the dignity of the proof of cohabitation and
"repute. It is circumstantial evidence tending to
"establish a previously existing fact and such
"proof may be as satisfactory and often more
"satisfactory than the much more limited direct
"evidence which it is ordinarily possible to pro-
"duce."

Matter of Hamilton, 76 Hun, 200 at 207.

Up to January 1st, 1902, when Section 19 was, by Chapter 339 of the Laws of 1901, added to the Domestic Relations Law, Article 2 of Chapter 272 of the Laws of 1896, *the statute expressly permitted marriage contracts to be entered into in the same manner as theretofore.* (See Section 10 of Article 2 of Chapter 272 of Laws of 1896.) While by this amendment to the Domestic Relations Law, made by Chapter 339 of the Laws of 1901, and which amendment was in effect only from January 1st, 1902, to and including December 31st, 1907, it was provided that a marriage claimed to have been contracted *within this state on or after January 1st, 1902,* should not be valid for any purpose un-

Digitized by Google

less contracted in the manner provided for in that Article, that amendment did not in any wise change the method of proving, or the kind of proof required, or permitted, to establish such a contract either before or after or while such statute was in effect. It is true that Section 16 of the Domestic Relations Law, as amended by Chapter 339 of the Laws of 1901, provides a method for proving a marriage contract, but such method is not made exclusive and there is nothing in the statute which, even by implication, can be construed as evidencing an intent upon the part of the legislature to in any wise *change* the then existing method or manner of proving the existence of the marriage relation.

In the case of St. Debereaux against Much Dew Church, reported in 1 William Blackstone's Reports 366, it appeared that by statute 26, Geo. 2, Chapter 33, marriage without publication of bans or license was absolutely null and void. The action was to remove Susanah Meredith from the defendant church. The decision of the case turned upon the question of her marriage to John Meredith. The proof of the marriage consisted of an entry in the parish register, which entry was not signed by the minister, the parties or the witnesses, nor was any other entry made as required by the statute, in order to constitute a valid marriage. On the trial, the sessions were of the opinion that such a marriage was not lawful and approved and confirmed the order of removal. On appeal, Lord Mansfield, writing for the Court, said:—

"In a suit in the Ecclesiastical Court for jactita-

Digitized by Google

"tion of marriage, perhaps it may be necessary to "prove, that all the solemnities of the marriage "act had been punctually and regularly complied "with; but God forbid, that in other cases (the "legitimacy of children and the like), the usual "presumptive proofs of marriage should be taken "away by this statute. It was canvassed in "parliament at the time when the act was made, "and universally agreed, by all whose opinions "were worth having, that it would not become "necessary to prove the publication of bans, etc."

This decision of Lord Mansfield, notwithstanding the provisions of such a statute, making null and void a marriage contract unless made in the manner prescribed by statute, that proof of such marriage contract could be made in the usual way, was approved by our Court of Appeals in the case of Caujolle vs. Ferrie, 23 N. Y., at 104.

IV

WHERE A MAN AND WOMAN, COMPETENT TO MARRY EACH OTHER, COHABIT FOR A LONG TIME, AND UNTIL THE DEATH OF ONE OF THEM, LIVE IN THE APPARENT RELATION OF HUSBAND AND WIFE, THE LAW PRESUMES THAT THEIR INTERCOURSE WAS MATRIMONIAL; AND THAT PRESUMPTION IS ONE OF THE STRONGEST KNOWN TO THE LAW.

"The presumption of marriage from cohabita- "tion, apparently matrimonial, is one of the

Digitized by Google

"strongest presumptions known to the law. This "is especially true in a case involving legitimacy. "The law presumes morality, and not immorality; "marriage, and not concubinage; legitimacy and "not bastardy. Where there is enough to create "a foundation for the presumption of marriage, "it can be repelled only by the most cogent and "satisfactory evidence. In Morris v. Davies (5 "Cl. & Fin. 163), Lord Lyndhurst, speaking of this "presumption, says: 'The presumption of law "'is not lightly to be repelled. It is not to be "'broken in upon, or shaken by a mere balance of "'probability. The evidence for the purpose of "'repelling it must be strong, distinct, satisfac-"' tory and conclusive.' In Piers v. Piers (2 H. "L. Cas. 331) Lord Campbell said that the pre-"sumption could be negatived only '*By disproving* "'*every reasonable possibility.*'"

Hynes et al. v. McDermott et al., 91 N. Y. 458.

"The common law also *presumes* marriage; that "is it presumes every man legitimate until the "contrary be shown, as it presumes every man in-"nocent and that every man obeys the mandates "of the law, and performs his social and official "duties, until the contrary be shown. Suspicions, "or conjectures, or rumors, will not do to rebut "this presumption, however strong the suspicions, "specious the conjectures, or loud and general the "rumors may be."

Caujolle v. Ferrie, 26 Barb. 177 at 185. Affd. and language approved 23 N. Y., 90 at 108.

Digitized by Google

"The inference that there was a lawful contract "of marriage between plaintiff's parents is justi- "fied and presumed from the evidence of open "cohabitation as man and wife in her father's "house, and her introduction to friends and neigh- "bors under Cramsey's name and as his wife * * * "and we think the finding that the contract of "marriage was not proved is against the weight "of the evidence."

Cramsey v. Sterling, 111 A. D., 568 at 576.
Affd. 188 N. Y., 602.

"The existence of such a presumption is in "consonance with every correct sense of propriety "and justice. Any other rule would be fraught "with danger and produce immeasurable uncer- "tainty. Property rights would be rendered "doubtful, and the fair fame of their ancestors "might be destroyed by the cupidity of remote "heirs and next of kin. There might be "others who would be willing to dishonor "their ancestors and bastardize their rela- "tives to increase their patrimony. In the ab- "sence of this presumption, the protection of pro- "perty and character would require proof of the "marriage and legitimacy of ancestors, however "remote and in cases where it could not be ob- "tained. To hold that this safeguard of the law "does not exist would serve no good or proper "purpose, and would overrule a beneficent princi- "ple of the law as it is now understood. We have "no hesitation in adhering to the principle that "the law presumes legitimacy and not illegiti- "macy; morality and not immorality; social in-

Digitized by Google

"tegrity and not social dishonor and in declaring "such to be the law of this state."

Matter of Matthews, 153 N. Y., 443 at 448.

V

THE PROOF AND EVEN THE FINDINGS OF FACT MADE BY THE SURROGATE IN THIS CASE, MEET ALL THE REQUIREMENTS OF THE RULE OF LAW STATED IN THE FOREGOING POINTS III AND IV, AND CONCLUSIVELY ESTABLISH THAT THE MARRIAGE RELATION EXISTED BETWEEN THE RESPONDENT AND DECEDENT AT THE TIME OF THE DEATH OF THE LATTER.

The evidence established and the surrogate found that the decedent and the Respondent were competent to marry (Finding No. 1, Fol. 1560, Finding No. 5, Fol. 1564, Finding No. 77, Fol. 1621); that the respondent was a girl seventeen years of age in 1898 (Fol. 358); that she was a daughter of Mr. and Mrs. Dan Lord, who resided at Equinunk, Pa., and who had a daughter named Pearl, much younger than the respondent, a daughter eight years older than the respondent, who married Mr. Cadmus, and a pair of twin boys named Ray and Roy, who became twenty-two years of age in February 1910 (Fol. 356); that from as early as 1898 down to as late at 1905, the decedent owned and occupied a large farm in the Town of Chenango, Broome County, N. Y., some five miles

Digitized by Google

north of the City of Binghamton; that living with him on the farm were his mother, Melissa Hinman, a woman over seventy years of age, his brother, Balis Hinman, up to the time of his death in November 1902 (Finding No. 8, Fol. 1566) and Mary Hinman, the wife of Balis Hinman, until she left the farm at the time when she commenced a divorce proceeding against her husband, Balis Hinman (Finding Nos. 2 and 3, Fols. 1561 and 1562); that the decedent was a man considerably older than the respondent (Finding No. 43, Fol. 1594); that the respondent came to Binghamton as early as 1898, and for a time worked in the family of a Mr. Normile, and for a time in the family of Dr. Daley (Fol. 358); that at least as early as that period, the decedent and the respondent became intimately acquainted with each other (Finding No. 12, Fols. 1569-1570); that in 1898, in the Spanish-American war, the decedent was an officer in the 20th Separate Company of New York State Volunteers and with that company enlisted and took part in the war, being stationed for a time at Governor's Island in New York harbor and later at Honolulu (Fol. 804); that during the period of time when the decedent was stationed at Governor's Island and while the company was on its way to, and while at, and while returning from Honolulu, the decedent wrote to the respondent, both at the City of Binghamton and at Equinunk, Pa., at least twelve letters, which communications were addressed to Miss Vena Lord and in each one of which he addressed her as "My Dear Friend," and to each of which communications, the decedent signed his name, all of which letters were respectful and decent (See Exhibits H. 177 to H. 197, and findings Nos. 12 to 14, Fols. 1569-1571); that be-

Digitized by Google

tween the time when the decedent returned from the Spanish-American war and January 1st, 1901, the decedent wrote at least three more communications to the respondent, one of them bearing date January 13, 1898 (the date 1898 evidently being a mistake because it was enclosed in an envelope which was postmarked January 14, 1899 (See Exhibit H. 198, Fol. 793), another dated December 11, 1900, and another dated December 21, 1900; each of these three letters was written by the decedent in reply to a letter received by him from the respondent and was directed to "Miss Vena Lord"; that in one of them he addressed the respondent as "Miss Lord" and in the other two as "My Dear Friend" and to each of them he signed his name; that those letters were also respectful and decent (See Letters Exhibits H. 198 to H. 203, Fols. 793 to 803); that before the respondent went to the Hinman farm to live in 1900, she occasionally visited at the farm for a few hours at a time (Finding No. 7, Fol. 1565); that at some time during 1900, the respondent went to the Hinman farm in the Town of Chenango to live (Finding No. 8, Fol. 1565) and continued to reside there as long as the decedent resided there, which was until some time in 1906, and left with him when he left and resided with him at each of his subsequent places of residence until the time of his death, the decedent's mother living with them at their various homes until she died in 1907 (See Finding No. 8, Fols. 1565 to 1567, Findings Nos. 103 to 111, Fols. 1641 to 1648); that on December 24, 1900, the decedent after having talked with Mr. Newing, an intimate acquaintance and a friend of long standing of both the decedent and the respondent, regarding the kind of wife the respondent would

Digitized by Google

make, and after having stated to Mr. Newing that he proposed to marry her, purchased a lady's opal ring from Mr. Newing, saying at the time "I suppose you know where this is going," to which Newing replied he did not know but surmised, the decedent then saying "Keep it under your hat"; that Mr. Newing saw that ring on the respondent's finger within a short time thereafter and that she produced it upon the trial (Fols. 262, 263, Findings Nos. 15, 16, 17, Fols. 1572 to 1574); that later, and within a year or two, the exact date being unfixed, the decedent purchased of Mr. Newing a plain gold band ring, stating at the time that it was to "tie the knot with" and that later the respondent was wearing said ring and the decedent, with the respondent present, told Mr. Newing that the respondent was no longer "his girl but his wife" and said to him "Let her have whatever she wants and put it on my bill and I will settle" (Findings Nos. 18 to 22, Fols. 1574 to 1577); that late in September or the first of October 1901 (Fol. 346), the decedent with the respondent visited the home of the parents of the respondent at Equinunk, Pa., on which occasion the respondent introduced the decedent to her father, mother, brothers and sisters as her husband; that the decedent and the respondent remained there all night, occupying the same room and that ever thereafter the decedent remained on good terms with the parents of the respondent and her brothers and sisters and took an interest in the welfare of her younger brothers and sisters (Findings Nos. 120 to 122, Fols. 1655 to 1657), addressing the mother of the respondent as "Mother" (See Ex. E, Fol. 719 and Finding No. 125, Fol. 1659), and referring to the parents of the respondent as "Dad and Ma" and

Digitized by Google

"Mother and Pa" (Finding No. 91, Fol. 1632); that from that time on, the respondent's brothers and sisters, some of them little children, visited, and for considerable periods of time lived with the decedent and the respondent at their home on the farm and at their other homes (Finding No. 124, Fol. 1658 and No. 126, Fol. 1660); that from that time on, at his own home, in the presence of members of his family, at formal social gatherings, at the homes of his friends and acquaintances, and in business and public places the decedent introduced the respondent as his wife, to his most intimate friends, business associates and acquaintances and their wives. (See Evidence of Ex-Sheriff Worthing, Dr. F. P. Hough, Nelson P. Brink, Harvey B. Sproul, Dr. Charles R. Seymour, H. J. Kneeland, Charles H. Hitchcock, Charles W. Yeomans, Charles T. Gage, Etta Furman and Joanna Sullivan (Findings Nos. 34, Fol. 1586; Nos. 37 to 40, Fols. 1589 to 1592; No. 46, Fol. 1596; No. 48, Fol. 1598; No. 50, Fol. 1600; No. 52, Fol. 1602; No. 59, Fol. 1607; No. 65, Fol. 1612; No. 71, Fol. 1616; No. 74, Fol. 1619); that from 1901 down to the time of his death, the decedent cohabited with the respondent (Findings No. 10, Fol. 1568; No. 51, Fol. 1601; Nos. 56 to 60, Fols. 1605 to 1608; Nos. 81 and 82, Fols. 1624 and 1625; Nos. 88 and 89, Fols. 1630 to 1631; Nos. 95 and 96, Fols. 1635 and 1636), and the respondent during that time and since his death was recognized and treated and known by the members of the decedent's own family and relatives as the decedent's wife and was introduced and addressed (Findings 121, 127 and 128, Fols. 1655, 1661 and 1662); that in 1907, while the decedent and the respondent were residing on Washington street in

Digitized by Google

the City of Binghamton, a baby was born to them, and its birth certified by the attending physician to the registrar of vital statistics as a child born to "Vena and Charles N. Hinman" (Findings Nos. 31 to 33, Fols. 1584-1585); that just prior to the birth of this child, the decedent, in conversation with his friend, Ex-Sheriff Worthing, the commanding officer of the Military company of which the decedent was an officer, informed Mr. Worthing of his expectation and told him that he proposed making a will, leaving his property to his wife and baby but that his brother Henry, this petitioner, would not get a cent of his property (Finding No. 41, Fol. 1593 and see evidence of Mr. Worthing, Fol. 253); that in 1907, the respondent joined with the decedent in a deed of real estate to be recorded in Broome County Clerk's Office, in which the grantors are described as husband and wife, which deed was duly recorded (Finding No. 69, Fol. 1614); that after giving a deed of real estate in 1904, without the respondent's signature thereto, the decedent told the grantee named in the deed to procure the signature of his wife, as the deed was not good without it, which was done during his lifetime (Findings Nos. 61 to 64, Fols. 1609 to 1611); that in 1906, the decedent was engaged in contracting work of the firm of Hinman and Sproul, of which he was a member, at Newton, N. J., and was boarding there at the Newton Hotel, where the respondent visited and remained with him from six to nine weeks, occupying the same room with him, and where she was known as Mrs. Hinman (Finding Nos. 57, 58 and 59, Fols. 1606 and 1607); that from the spring of 1905 down to early in 1908, the decedent was engaged in his said contracting business, and during much of the time was

Digitized by Google

absent from his home (Finding No. 81, Fol. 1624); that while absent during that period, the decedent wrote and mailed to the respondent many letters and postal cards, ninety of which letters were produced by the respondent on the trial, each one of which were addressed in the mail in one of the following names, viz: "Mrs. C. N. Hinman," "Mrs. Charles N. Hinman," "Mrs. Chas. N. Hinman," "Mrs. Chas. Nelson Hinman," or "Mrs. Charles Nelson Hinman," fifty-two of which communications were written in 1905 and were with three exceptions directed and mailed to "Binghamton, N. Y., R. F. D. 4." which was the Rural Free Delivery address of the Hinman farm in the Town of Chenango at that time, many of which communications were inclosed in envelopes bearing the printed business card of Hinman and Sproul (See Findings Nos. 81, 82, 83 and 84, Fols. 1624 to 1627); that thirty of such communications were written and mailed in 1906 and four in 1907 and four in January, 1908:—The thirty written and mailed in 1906 having been addressed to 14 Livingston street, Binghamton, N. Y.; 14 Exchange street, Binghamton, N. Y., and Equinunk, Pa.; the four written and mailed in 1907 to 35 Exchange street, Binghamton, N. Y., 15 Cedar street, Binghamton, N. Y., care Mrs. Allen, and to 17 Cedar street, Binghamton, N. Y., care Mrs. Allen, and the four written and mailed in January, 1908, to 14 Cedar street, Binghamton, N. Y., one in care of Mrs. Allen and the others in care of W. Allen (Findings Nos. 85, 86, 87, Fols. 1628 to 1630); that at the beginning of seventy of said ninety communications the decedent addressed the respondent as "My dear wife" and in one of them as "My dear wifie," and that

Digitized by Google

excepting nine letters in each of said ninety communications, including two postal cards, the decendent signed himself at the end thereof "Hubbie," and in one of the nine excepted letters, he signed himself as "Hubbe" and in another as "Hubbee" (Findings Nos. 88 and 89, Fols. 1630 and 1631) and in fifty-four of such letters, the decedent referred to his mother and sent some greeting or message to her, through the respondent (Finding No. 90, Fol. 1631); that in these letters the decedent wrote in reference to his business affairs, giving directions to the respondent regarding his business to be attended to by her; and that from the letters, it appears that she, the respondent, was managing the decedent's house and farm and giving attention to his business in connection with his farm and other matters, and that in them the decedent referred to the respondent as a member of his family (Findings Nos. 92, 93, and 95, Fols. 1633, 1635); that in such letters the decedent indicated strong affection and respect for the respondent and exacted from her the duty and conduct becoming a wife, and recognized and treated such duty on her part, as extending not only to himself but to his mother and to the members of his family (Finding No. 96, Fol. 1636); that the letters written by the decedent subsequent to the year 1900, clearly indicate that a change in the relation between the decedent and the respondent had taken place since the writing of the letters by the decedent to the respondent in the years 1898, 1899, and 1900, already referred to; that there is nothing in the letters which indicate that the change in the relationship was illicit but on the contrary there is sufficient to support the inference that the decedent regarded the res-

Digitized by Google

pondent as his wife (Findings Nos. 100, 102, Fol. 1639 and 1640 and see envelopes and letters Ex. H. 1 to H. 175, Fols. 383 to 717).

The following are some of the expressions contained in such letters written by the decedent to the respondent:

In a letter dated May 20, 1905, the decedent wrote:—

> "I have not (now don't shout) taken a chew "of tobacco since I left home or a single drink "stronger than tea. Now don't get excited "but your Hubbie is honestly trying to do as "you would like to have him. . . .
>
> "Well dear it is now 11-15 so good night "*give my love to mother through her daugh-* "*ter* and remember me to Dan and Ray "George and Pat. and all my love to you and "1000000 of kisses and hugs to your own "sweet self. Pretty good for a fellow who "always writes business letters don't you "think. but not half good enough for my "own dear wife. Well dear again good "night."
>
> Ex. H. 8, Fol. 401 and 402.

In a letter dated May 21, 1905, appears the following:—

> "This is Sunday and sitting here all alone "waiting for the people to come home from "Church am thinking of my own little wife so "far away. * * *

Digitized by Google

"Sproul says I am more like a Groom than "an old married man and is inclined to give "me the laugh but stick to my text but it may "be I may have to skip some day "(evidently "meaning skipping writing daily letters)" "but if I do twill be by force of circum- "stances."

Ex. H. 10, Fols. 404 and 407.

"Well dear, give my love to *our* mother and "remember me to Roy and Don."

Ex. H. 10, Fol. 410.

"We are not going to make a large stake "out of this job, but with your fine financeer- "ing at home am OK anyway. * * *

"I hope your better dear I would have you "come up here now and stay a week but don't "see how they could get along without you "business seems to go better when I am gone "than when you are."

Ex. H. 16, Fol. 426.

Under date of May 29, the decedent wrote:—

"Mrs. C. N. Hinman,

"Binghamton,

"N. Y.

Digitized by Google

"My dear wife.

"It is 9:45 but thought I would not go to "bed without writing you. I have had a hard "day of it and am very tired in fact when I "arrived home was too tired almost to eat "supper, but am somewhat better now.

"Well, dear, I haven't much to say only am "thinking of you and want you to know of it. "I want you to be the good girl you can be " and try your best to so conduct yourself as "to be always at your best for you are my "only rock of safety and if you fail to please "me it makes it so much harder for me to so "live that you will not be ashamed to call me "husband. Now dear don't worry if things "dont go right dont fret for that will wear you "out and I want you to look just as sweet as "you do now for at least a century. You have "no idea how much I love and appreciate you "dear and I can see now that I should have "told you so oftener than I did but you know "sweet I am not much of a hand to say all I "think, but I am going to make a clean breast "of it dear if anything should happen to you "God only knows what I should do we have "had our differences but you have no idea "how trivial they seem to me now.

"So you see it has done a hard old sinner "good to be away not with the Company but "so situated that he has time and things lei- "sure that gives him food for reflection. * * *

"Well dear give my love to mother regards

Digitized by Google

"to Ray and Dan tell all the rest what you "please.

"But for yourself dear I cannot express "what I would like to say to you but dear you "are all in all to me."

Ex. H. 18, Fols. 428 to 430.

Under date of June 6, 1905, the decedent wrote:—

"Mrs. C. N. Hinman,

"Binghamton,

"N. Y.

"My dear wife.

"Yours of Sunday at hand and was more "than sorry you are feeling so badly. Now "dear I have only been gone three weeks and "believe me I really think it is the best thing "that could happen to both for dont you "think we are both a little imperfect, but I do "hope it will be a lesson to both of us to bear "with each other more try to give way a little "both of us and struggle to make every min-"ute count for happiness and home. "So "dear congratulate yourself that this has "happened for it will lead to happiness for "both. there were times when we were drift-"ing away from each other because we did not "appreciate our opportunity for happiness. "The moral is our life is what we make it."

Ex. H. 30, Fols. 452 and 453.

Digitized by Google

Under date of June 16, 1905, appears this:—

"Have been thinking of you more than us-
"ual I suppose because it has been so recent
"since I left you and we had so good a time
"and everything was so delightfull in fact
"cannot remember when home seemed so
"much like home as it did this time with
"you."

Ex. H. 36-Fol. 464.

Under date of June 22nd, 1905, appears:—

"Am glad Ray is coming to help you out
"you ask if I want you to come and I say
"there is nothing I so much desire it will
"please me more and make me happier than
"anything on earth for dear while I do not
"tell you all the time you know the reason
"for my continuous hustle is for you that you
"may sometime have what you ought to have
"you so well deserve."

Ex. H. 40, Fol. 472.

Under date of June 25th, the decedent wrote:—

"My dear Wife

"That I was more than surprised when I
"reached Loarbacks and found you gone and
"my God dear you dont know how I feel, for
"you to go was inevitable that I expected and
"was prepared for but to have you go and I
"not there to say goodbye sweetheart I can

Digitized by Google

"hardly see the lines, however dear will say
"no more about it for the page is now wet
"with tears.

"Harvey (Sproul) "broke his glasses and
"had to come up and have them fixed so told
"him to see you but he wrote instead he
"thought it was all right so dont blame him
"but sweetheart it will never occur again."

Ex. H. 42, Fols. 475 and 476.

Under date of Sunday, 1905 (envelope postmarked Aug. 7, 1905) this language appears:—

"And to you be even dont worry keep cool
"dont fret for that only hurts you and can
"do no good. be kind to mother dont let any-
"thing she may do raise your anger so you
"will be cross with her for she is old and you
"ought to have better judgment than her."

Ex. H. 44, Fol. 480.

Under date of Oct. 6th, 1905:—

"The main issue, however, with us was our
"honor to a certain extent was pledged in
"case at issue, that is had we been beaten in
"the final decision it would have looked as if
"we had deliberately tried to beat a woman
"out of her first rights and for all times it
"would have been thrown up to us if not
"openly then behind our backs.

"But by this decision rendered by the Court

Digitized by Google

"of equity, makes it final, and says to all men
"and women that our cause was just, and that
"we were the agressed and not the agressor.
"That we were simply resisting persecution
"and fighting for that principle held most
"dear to all by every man in any civilized
"country that is justice with honor and by
"this decision rendered by the highest Court
"in the State leaves our honor untarnished
"and our rights secure. * * *

"It will help me do for you what it will
"give me the greatest joy of all for believe
"me dear you come before all and it is all for
"you, and therein lies my greatest joy, for I
"can now hand to my ownest own my name
"untarnished and reputation secure.

"And another pleasure is that it was your
"hand that forwarded the glad tidings."

Ex. H. 50, Fols. 493 to 495.

Under date of Oct. 17, 190—, the decedent wrote:—

"Am sorry you are having trouble with
"Mother I know she is somewhat of a task
"for you dear but do the best you can for be-
"lieve me I appreciate it all but there are
"things we all feel and dear I know she tries
"you to the limit but she is my mother and
"that is all I can say to you for I appreciate
"the conditions as they exist and believe me
"wish most sincerely I could make them dif-
"ferent * * *

Digitized by Google

"I would give a goodeal to be with you to-
"night sweetheart but its impossible so have
"to make the best of it and dear you must
"know it is true or I would not write you
"every night when I am so tired if it was not
"true. but will be with you as soon as possi-
"ble."

Ex. H. 58, Fols. 510 to 512.

In a letter under date of October 16, 1905, the decedent used this language:—

"Give my love to Mother rember me to the
"boys and sweetheart think of me sometime
"wont you it seems solong between letters,
"but I know you *have it hard* and dear I sin-
"cerely hope it will soon be over so love kisses
"hugs and my best of thoughts to you and you
"only."

Ex. H. 60, Fol. 515.

"Newton, N. J., May 1st, 1906.

"My dear wife—

"Your most beautiful letter received and
"the pleasure of its receipt was only one of
"the things that appealed to me for I want
"to say to you that it was not only well writ-
"ten but was well spelled and the composi-
"tion was good.

"You write to me that my people want a
"lot of you, now I want you to use them well

Digitized by Google

"but I will be damned if I will stand for an "imposition if Charlie" (His nephew and son of the petitioner here and the one to whom the decedent stated to Ex-Sheriff Worthing in 1907 that he would leave a little of his property) (Fol. 253) "wants to stay for a "short time all well and good but you must "understand first, last and all the time, his "staying must not interefer with your regu- "lar routine, that is if you are getting two "meals a day, then you must not change for "him for I will not stand for it and if you do "you must understand by so doing you dis- "please me. You have had it hard enough and "my people shall not impose on you, now if "you want to let him come on those grounds "and those grounds only, that is that he has "his meals when and in no greater number "than is now your custom to have them and "you want him there for company all right "and good but if not then he cannot come at "all and I will close the house first so if you "can do this and want to you may, but you "shall not be tied up by it in any way, as for "Orpha she must hunt like hell for a place "she cant stay to bother you and you have my "permission to show her this and if it be "necessary for me to will be glad to write "her personaly.

"Now in relation to your working dear I "know how you feel and I fully sympathise "with you but dear please dont think me "stingy or mean with you or that I want to "dictate or deprive you any pleasure but I "be damed if I can stand for it. You May

Digitized by Google

"take Music Lessons and I want you to also
"take private Dancing lessons go to all the
"good shows and if Maude does not come out
"all right will get you a horse that you will
"like but work you must not Dear and please
"yield to me in this and if you dont think me
"fair dont write but buy a return ticket and
"come down for a week or two and will talk
"it over.

"Give my love to Mother and to you Sweet-
"heart all I have to love and in whom all my
"hopes are centered kisses hugs and all the
"love a man could bear woman so sweetheart
"good night my only love again good night.

"from Hubbie

"You need not take any extra trouble to see
"Warner but at your leisure."

Ex. H. 106, Fols. 599, 600, 601, 602.

In a letter written by the decedent to the respondent and addressed to her as "Mrs. C. N. Hinman at the home of her parents at Equinunk, Pa.," (See Exhibit H., 125, fol. 633) on August 22, 1906, the decedent wrote:—

"Well dear say hello to the boys, mother
"and pa love to Pearl, Blanch and Leda"
(sisters of the appellant) "and kisses hugs
"and love to you."

Ex. H. 126, Fol. 636.

Digitized by Google

In a letter written by the decedent from the Grand Union Hotel in New York to the respondent on August 24, 1906, and directed to her as Mrs. C. N. Hinman at the home of her parents in Equinunk, Pa., the decedent wrote:—

> "I was more than half tempted to skip to "Equinunk tonight and stay over Sunday but "the teams will be in tomorrow morning and "must be there to direct them * * * "How are all the folks did you have a good "time and luck fishing and how large was the "big fish you lost.
>
> "Tell Pearl hello for me and kiss her for "me, remember me to Roy Ray dad and Ma, "love to the girls."

Ex. H. 132, Fol. 643 and 644.

Under date of Aug. 28, 1906, the decedent wrote to the respondent addressing the envelope "Mrs. C. N. Hinman, Equinunk, P. A.":—

> "Well dear am here in Keelers and thought "you might be looking for a letter or maby "want to know whether I was doing the town "or thinking of my honey so you may draw "your own conclusions. For there are a lot "of men here on the same business as I" (bidding on good roads construction) "that are not at present writing to their wives."

Ex. H. 140, Fol. 655.

Under date of Sept. 24, 1906, the decedent

Digitized by Google

wrote the respondent from Dover, N. J., addressing the envelope "Mrs. C. N. Hinman, 14 Livingston st. Binghamton, N. Y.":—

"I haven't anything to write about so am
"stuck on a long letter and you will have to
"excuse me for not filling several sheets.
"However dear to be frank I have the blues
"like hell and am mum as a toad in sand.
"life is not worth the living if one cannot live
"it and you cannot live it if you don't live
"it at home or in the society of those you
"love. and I do most sincerely hope we may
"be able at no distant date to so live that we
"may be together and that all the time.

"We have our own troubles and they are
"many but dear there are others that go far-
"ther and far worse, for sweetheart we are
"true blue to each other and by so being we
"are getting the best out of our lives.

"Now dear don't get sour don't get old
"and the way to not get old is not to let your-
"self be worried don't get a grievence for
"that produces trouble and trouble brings
"wrinkles and wrinkles bring old age and
"the wart of old age is a sour disposition
"and an idee one is getting the worst of it.

"So dear this life is what we make it and
"to make it pleasant we must make others
"lives as pleasant as we can, and accomplish
"it by cheerful disposition and a kind word
"for all.

"Now dear be your own sweet self don't

Digitized by Google

"let imagination or a fancied grievance make
"your life uncomfortable or less enjoyable.

"With kisses love and all my best of efforts
"for you and you only I remain looking for
"an answer to this I remain

Hubbie."

Ex. H. 148, Fols. 667 to 670.

In another letter dated February 28, 1907, he writes:—

"Give love to Jess rember me to the Hin-
"man but am not in the loaning business."

Ex. H. 168, Fol. 707.

The following quotations are taken from letters written by the decedent to the respondent prior to 1901: From Honolulu on October 28, 1898, and in closing that letter to the respondent, the decedent said:—

"Well must close sending my love to all
"not one left out or forgotten and wishing
"you personally the realisation of all your
"desires and all the happiness possible and
"that the hand of Him whence all love
"watches and guides you both day and
"night."

Ex. H. 191, Fol. 767.

On October 22, 1898, in writing to the respondent acknowledging receipt of her photograph, he wrote:—

Digitized by Google

"That you should have honored me by the "presentation of the Photograph of your own "self so long promised but not forthcoming "was a pleasure indeed of which personally "if I might be allowed to express an opinion "is simply perfect and a good likeness as I "rember you the lines of sorrow and heart-"break does not as yet show at least I could "not discern them and in that also there is "cause for gladness so from your picture "looking the picture of health and looking at "the picture and realising these things com-"monly produce one result and that is in-"tense pleasure that ones friends is above all "else enjoying themselves and thanking you "with all my heart for those favors received "at your hands. They say that it is the un-"expected that happens and I shall believe "it from this."

Ex. H. 197, Fol. 781, 782.

In this connection permit us to call the Court's attention particularly to the letter Exhibit H. 201, written December 11, 1900, to the respondent at her parent's home in Equinunk, Pa., and Exhibit H. 203, written to the respondent at the same place as late as December 21, 1900.

The above quotations except two are taken at random from a few of the many letters written to the respondent by the decedent between the Spring of 1905 and January, 1908, the period during which the decedent was away from home in connection with his contracting business. They are a fair sample of the substance, the spirit and the sentiment throughout the whole correspondence.

Digitized by Google

These letters, written by the decedent at a time when, and under circumstances which, made it of no object for him to dissimulate or to speak other than the truth, show more plainly and more conclusively than any other evidence in the world could show, the true relationship of these parties, and that such relationship was matrimonial. They show the existence and the recognition of the "home" in which the decedent was the husband and master and the respondent the wife and helpmeet; the "home" in which little family jars were sometimes present but in which true affection found its constant abiding place; the "home" in which the respondent not only presided as "wife" and in the absence of the husband directed the affairs of the home and the farm, but in which the husband claimed the duty on the part of the wife to recognize his "people" as her "people," which duty she fully met and performed in the care of the old mother and in all other regards.

These letters are not letters of a boy or of an impulsive young man, but were written by a man nearly forty years of age. They are not such letters as any man would write to a mistress. They are not the letters that any man would write to any woman other than his wife. They are written under circumstances which gave no occasion to the writer, or to anyone, to make it necessary, or of any object, for the writer to keep up appearances or to make the relationship between the parties appear other than it actually was. These letters are not "Hearsay" nor are they opinions of witnesses and their contents are not the talk of old women or he gossips. They are the honest

Digitized by Google

expression of a man who knew better than any one else in the world, whereof he was writing. Reading them compels the conclusion that they honestly and accurately set forth the true and abiding sentiment of the writer toward the respondent, that their relationship was honest and virtuous and was to continue throughout life; that the wife was all in all to the husband; that he was living and laboring for her, her happiness and her welfare and that she and the home and the folks at home were ever present in his thoughts. Not only this, but further, they show that this relationship was fully understood, appreciated and recognized by the other members of the decedent's family.

Search throughout all the books in this state and of every other state in this country and of every English speaking country of the world, and no reported case will be found in which the existence of such facts as were established and as the Court found to exist in this case, were not held to be sufficient to justify and require a judgment that the parties were married. On the other hand, the books are full of cases where evidence, and facts ten times less conclusive than the facts proved and found in this case, have been held to support and require the decision that the marriage relation had been established and did exist.

Tummalty v. Tummalty, 3 Brad. 369.
Christy v. Clarke, 45 Barb. 529.
Cramsey v. Sterling, 110 App. Div., 568 on 576 (Aff. 188 N. Y. 602).
Tracey v. Frey, 95 App. Div., 579.
Gall v. Gall, 114 N. Y., 109.

Digitized by Google

Badger v. Badger, 88 N. Y. 546.
People v. Bartholf, 24 Hun 272.

In colonial times in England, it was the law, and the law in that respect has not been changed, that even during his lifetime, a man could not repudiate the obligations toward a woman evidenced by conduct similar to that of the decedent as proved in this case. In a case where a man, apparently very influential, had attempted to rid himself of a wife who had not better evidence of her marriage than the respondent in this case produced, and where the husband positively denied the marriage, on appeal to the deligates, after four days' hearing, their Lordships were of the opinion:—

> "That this was not to be considered merely "as circumstantial evidence of a marriage "but that it was (in all its branches) the most "solemn and deliberate acknowledgment and "avowal on (the man's) part, of the truth of "the marriage that could be devised and that "he should not now be admitted (especially "on such light and flimsy evidence) to con- "trovert or impeach it. And therefore they "unanimously pronounced for establishing "the marriage and reversed the two former "sentences with costs."

A petition for review was afterward rejected by the Lord Chancellor after many days hearing.

Hervey vs. Hervey, 2 William Blackstone's Reports, 877.

In Rose vs. Clark, 8 Paige's Ch. 574, it appears

Digitized by Google

that the woman who was claiming to be the widow of the decedent, at the time of her marriage to the latter, had a husband living, who, however, died before the death of the husband whose widow she claimed to be in that case. The prominent circumstances which the Court mentioned in order to sustain the conclusion that the marriage relation existed between the widow and the decedent, were cohabitation until the death of the decedent, fair character of both during the cohabitation, recognition by the decedent of the widow as his wife, joining with her in a deed of lands wherein she was described as his wife, recognition as the wife of the decedent by his children and recognition of her as the widow of the decedent after his death in the proceedings to procure administration of the decedent's estate. After enumerating those circumstances, the Chancellor in his opinion said (page 582):

> "After all that had transpired previous to "the death of the intestate, *I think he would "have been precluded from denying that she "was his wife* in January 1838."

In matter of Wells, 123 A. D. 79 at 84, the Court, commenting upon similar circumstances said:

> "It is hardly conceivable that in the case at "bar Arthur Wells, if living, would be heard "to deny that the appellant was his lawful "wife."

Each of the two last mentioned cases is an authority for holding that the decedent's next of

Digitized by Google

kin cannot question the marriage relation which the decedent himself would have been precluded from denying.

The same rule is stated by the Court of Appeals in the case of Betsinger vs. Chapman, 88 N. Y., 487 at 499.

In the case last mentioned, the Court enumerated the circumstances by which the existence of the marriage was established. Such enumeration appears on page 498 of the report mentioned. From an examination of the circumstances as they are stated, it is apparent that the evidence in this case is much stronger than that on which the Court there upheld the verdict of the jury.

The law as laid down in each of the cases last referred to, was recognized even by the Surrogate as the law of this case. (See 12th conclusion of law, Fol. 1676).

A reading of the opinions in a long line of cases decided in the Court of Appeals, in this State, including the following:—

Caujolle vs. Ferrie, 23 N. Y., 90.
Badger vs. Badger, 88 N. Y., 546.
Hynes vs. McDermott, 91 N. Y., 451.
Gaul vs. Gaul, 114 N. Y., at 109.
Matter of Matthews, 153 N. Y., 443,

should carry the conviction that such circumstances as declarations made by the decedent to third persons that the respondent was his wife, his cohabtiation with her as his wife for more

Digitized by Google

than seven years, the birth to them of a child, the recognition of the respondent as the decedent's wife by his relatives, as well as the recognition of him as the respondent's husband by her relatives, not only raise the presumption in this case that the respondent and the decedent were married, but raise a presumption that was conclusive, strengthened as it was by the additional circumstances of the decedent's joining with the respondent as his wife in the deed of real estate, his communications to her during his absence, addressing her as his wife, her receiving many letters through the mail in a country district, addressed to her as Mrs. Charles N. Hinman, her attention to household duties in the decedent's family and to his business affairs in his absence, her purchasing goods at stores upon his credit and his payment of the bills so incurred. Indeed, we fail to see how even the production of a marriage certificate, signed by the broken down clergyman, whom the petitioner called as a witness to disprove the declaration alleged to have been made by the respondent, or even a complete record of the marriage made by him, could have been of greater probative value to establish a marriage than the circumstances testified to by Mr. Newing. After describing similar circumstances, the Court in Tracy vs. Frey, 95 App. Div. 579, at 595 said:—

> "There can be no doubt but that if this "statement be true the declarations made by "Evans to the household that night in the "presence of Hannah Maria, followed by ac- "tual cohabitation, *furnished evidence of a "marriage contract as conclusive as evidence*

Digitized by Google

> *"of a ceremonial marriage could have done.*
> *"The relation between these parties based*
> *"thereon would not be illicit, but begin in*
> *"lawful wedlock."*

Concurring in the same decision, Justice Van Brunt, after enumerating similar circumstances, wrote on page 598:—

> "By this uncontradicted evidence, *it was*
> *"established beyond question* that Evans and
> "Hannah Maria Van Deventer had entered
> "into a contract of marriage, and that their
> "intercourse had been in fulfillment of that
> "contract and was matrimonial in charac-
> "ter."

In any community there could be no hesitancy among decent people in recognizing a marriage relation which was evidenced by a young man, unmarried, purchasing from an intimate acquaintance, a wedding ring with the declaration that it was intended to "tie the knot with" and later, presenting to the merchant from whom the ring was bought, a young woman also acquainted with the merchant, wearing the ring so purchased, with a declaration on the part of the man that she was no longer his girl but his wife and that she was authorized to trade on his credit with the merchant.

It is true that witnesses called by the petitioner related such scandalous gossip regarding the relations between the decedent and the respondent at the commencement of their intimacy. The credibility of the most damaging of such testimony

Digitized by Google

was sharply attacked. It is perhaps sufficient to state that no findings of the particulars narrated in such testimony were made.

But whether the witnesses who gave such testimony were entitled to credit or not, is of little consequence. If they are to be believed they have succeeded in reviving an old scandal to the detriment of the respondent's reputation, but they have not succeeded in disproving her marriage with the decedent nor in aiding the petitioner. If they told the truth, they have revived also, an unworthy memory of the decedent and unnecessarily exhibited an incident that befouls his character. To have done this, adds as little to the petitioner's advantage in the case as it adds to his credit.

However, the respondent's intercourse with the decedent may have commenced, whether in a way that was honorable or reprehensible, there is no question but that from the year 1901 and until the decedent's death, it not only assumed and retained a character having the outward marks of a matrimonial bond, but developed into a relation, in which their affections and sentiments had become inseparably fused and welded together into a mutual intent and purpose to make their ostensible relation of husband and wife real and permanent. It is well settled by authority that the fact, that the intimacy of a man and woman began in intercourse that was illicit, does not preclude the drawing of the inference that they later became husband and wife, from circumstances which indicate that the character of their relations was changed, and from their later acts and declara-

Digitized by Google

tions and other circumstances which would indicate the existence of a matrimonial connection.

Gall vs. Gall, 114 N. Y., 109.
Jackson vs. Claw, 18 John, 346.
Rose vs. Clarke, 8 Paige Ch., 574.
Badger vs. Badger, 88 N. Y., 546.
Hynes vs. McDermott, 91 N. Y., 451.
Matter of Spink, 62 Misc., 158.

The decedent's letters and the testimony regarding his cohabitation and manner of living with the respondent, carry irresistible conviction, regardless of whatever may have been the commencement of the decedent's intercourse with the respondent, that from the year 1901, down until the time of his death in 1908, it was the intercourse of a husband with his wife. Even if it be true that early in the life of this respondent there were occurrences that cannot be recalled without shame, words are inadequate to express the meanness that would go back into her girlhood to recall those occurrences, reflecting as they do upon the character of the decedent as well as upon her purity, in order to get merely the one-third part of what would be her portion of the estate, if her relation with the decedent were what it seemed and what for years, the petitioner and his family recognized it to be. The meanness that, for a pecuniary advantage, would thus exploit a brother's vice and depravity appears more offensive when the length of time during which the appellant and the decedent cohabitated, and the character of that cohabitation are considered. Even if the production of that testimony could be purified of its sordidness, it would be of no value, be-

Digitized by Google

cause the question in this case was not at all as to what relations between these parties were in 1899, 1900 or 1901 or at any other remote period, but what they were on September 17, 1908, the date of the decedent's death, and whether, on that day, she, the appellant, was his wife or not. Under the decisions cited, the evidence compels an affirmative answer to that question, whatever their relations may have been at the times to which this testimony referred.

Some of the witnesses testified to declarations by the decedent to the effect that he was unmarried. Regarding this testimony it is to be observed that none of such alleged declarations were that the decedent was not married to the respondent, but merely that he was not married. Such general declarations were not only worthless but incompetent.

Van Tuyl vs. Van Tuyl, 57 Barb. 235 on 241.

Witnesses testified also to an alleged reputation of the decedent and the appellant from the speech of people of being unmarried. Such testimony, however, referred to times prior to 1906, and to the town of Chenango, while the decedent died in 1908, and for two years prior to his death resided in the City of Binghamton. The issue in this case was not what the relationship of these parties was in 1900, 1901, 1902, 1903, 1904, or 1905, nor what the "speech of people" during that period was, but the question was and is, what was their relationship on September 17, 1908. The "people" who were in a position to know the

Digitized by Google

reputation of these parties at that time and during the entire period from 1901 to 1906, were in the City of Binghamton, because it was there where the decedent and the respondent did their trading, it was there where they maintained their business and social relationships and it was there where they lived from early in 1906 down to the time of the death of the decedent. "Speech of people" concerning the true relationship of these parties in any other place or at any other period, was wholly immaterial and worthless, and yet not a soul is produced to testify, or pretend, or claim, that ever, after 1901, in the City of Binghamton, the reputation of these parties "by the speech of people" was other than that of man and wife, or that anywhere, by anyone, after early in 1906, these parties had any other reputation than that of husband and wife. What is the worth of testimony of witnesses who are simply repeating idle "gossip" and unsupported "rumors" that a meretricious relationship existed between the decedent and this respondent (leaving out of consideration the question regarding the reliability of the witnesses) when confronted with the testimony of the decedent himself, made to his intimate friends and business associates and declared by him over and over again, in such a way that there could be no mistaking that it was his understanding that he was the husband of the respondent and that she was his wife? In this connection, the remarks of Surrogate Thomas in the matter of Kelley, which was a case involving the right of administration, are quite in point, and dispose of this evidence. Judge Thomas said:—

"As to the vital question of fact, the legiti-

Digitized by Google

"macy of the children of Ann Coffey, none of "the witnesses testify in their personal "knowledge, and the entire bulk of their testi- "mony is based upon hearsay. It would "seem that the neighborhood gossip of the "vicinity in which Ann Coffey lived, or some "of it, imputed the paternity of her two older "children to one Matthew Parker, a wealthy "man and a gentleman farmer, who never "was married to her, and that there was a "difference of opinion among the acquaint- "ances of Ann Coffey as to whether she was "married to Cunningham, who was the father "of the intestate. So far as this hearsay "evidence is shown to consist of the declara- "tions of members of the family of Ann Cof- "fey likely to know the facts and having fam- "ily reasons for reporting them truly, such "declarations are competent. *So far as they "consist of a recital of the idle chatter of "strangers they must be disregarded.*"

Matter of Kelley, 46 Misc. 541 at 543.

The views of the Surrogate of Broome County in this case, agree with those entertained by Surrogate Thomas on this branch of the case. In this case, the Surrogate found as conclusions of law, the following:—

"1.—Mere gossip in the neighborhood "where the administratrix resided, by per- "sons who were not acquainted with the ad- "ministratrix, and were not socially intimate "with the decedent and his family, is not "legal or competent evidence in support of "the issues in this matter."

Digitized by Google

"2.—Where a man and woman are cohabi-
"tating and living in the apparent relation of
"husband and wife, the presumption that
"their intercourse is matrimonial, arising
"from such circumstance, is not rebutted by
"proof of a different reputation from the
"speech of people residing in the neighbor-
"hood where they reside but who have no
"knowledge of the true character of their
"relation and who are not socially intimate
"with either one of the parties and not even
"acquainted with one of them."

"3.—Where facts are proved, showing that
"a man and woman have cohabitated, have
"mutually recognized their relation as that
"of husband and wife and have so lived as
"to procure from others a recognition of
"that relation between them, and where the
"facts proved are sufficient to raise a pre-
"sumption that their relation was that of
"husband and wife, evidence of a different
"or divided reputation of the parties is not
"competent or sufficient to rebut the said pre-
"sumption unless it proves or tends to prove
"that such reputation continued down to the
"time to which the presumption refers."

"6.—If facts are shown, sufficient to raise
"a presumption that the decedent and the
"administratrix were married at the time of
"the death of the decedent in the year 1908,
"evidence that, in a locality where they
"formerly resided, they bore a different repu-
"tation during a period ending at or about

Digitized by Google

"the beginning of the year 1906, is not com-
"petent or sufficient to rebut said presump-
"tion."

"7.—No evidence of a reputation from the
"speech of people that the decedent and the
"administratrix were unmarried persons, is
"competent or sufficient to rebut the pre-
"sumption, if any such presumption there be,
"that they were married at the time of the
"death of the decedent, unless such evidence
"proves, or tends to prove a reputation that
"continued down to the time of the death of
"the decedent and existed at the place where
"he resided at the time of his death."

(Respondent's Requests for Conclusions of Law, Nos. 1, 2, 3, 6, and 7, Fols. 1665 to 1667 and 1671).

If the Court will turn to the record at folios 1560 et seq., and read the particulars which the Surrogate, at the request of the appellant's counsel, found as facts in this case, reading them in the order here stated, viz:—Requests to find numbered 1, 77, 5, 43, 2, 4, 12, 13, 14, 6, 7, 8, 15, 17, 18, 19, 20, 21, 22, 23, 24, 120, 121, 122, 123, 124, 26, 27, 28, 29, 30, 31, 32, 33, 108, 34, 36, 78, 37, 38, 39, 40, 41, 42, 44, 106, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 70, 71, 72, 73, 74, 65, 66, 67, 68, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95, 96, 100, 102, 103, 116, 69, 104, 105, 107, 109, 111, 115, 125, 126, 110, 127, 128, 112, 113, and 114, it will see not only how absolutely was the decision reached by the Surrogate unsupported by the facts as they were

Digitized by Google

proved and as he found them to exist, but that his conclusions and decision are absolutely contrary to such facts, and must have been made with the mistaken conclusion of law that direct testimony or documentary evidence of a ceremonial marriage was necessary. Under the law as stated in the long line of cases already cited, a statement of the facts as found in this case by the Surrogate, precludes any conclusion except the one that these parties were husband and wife on September 17, 1908, and that the respondent is the lawful widow of the decedent.

Fenton vs. Reed, 4 John, 52.
Canjolle vs. Ferrie, 23 N. Y., 90.
Betsinger vs. Chapman, 88 N. Y., 487.
Rose vs. Clarke, 8 Page Ch., 574.
Badger vs. Badger, 88 N. Y., 546.
Hynes vs. McDermott, 91 N. Y., 451.
Gall vs. Gall, 114 N. Y., 109.
Matter of Matthews, 153 N. Y., 443.
Cramsey vs. Sterling, 111 A. D., 568, affd. 188 N. Y., 602.
Tummalty vs. Tummalty, 3 Brad. 369.
Christy vs. Clarke, 45 Barb. 529.
People vs. Bartholf, 24 Hun 272.
Matter of Wells, 123 A. D., 79.
Tracy vs. Frey, 95 A. D. 597.

That Courts will, if possible, refuse to advance an heir's claim to a decedent's estate, by branding as meretricious, a relation maintained with a person of opposite sex, and which might, by any possibility, be held to have been virtuous, is well illustrated in Matter of Burtis, 107 A. D., 51, a case where the aspersion of the woman's character

Digitized by Google

seems not unmerited. There the evidence from which the Court revolted was almost conclusive in support of the Surrogate's decision; yet, in that case, the Court reversed the Surrogate's decree, that the claimant might have a trial of the issue before a jury saying: "We hesitate to con-"clude that the evidence in this case clearly indi-"cates that the decedent was a criminal, guilty "of the crime of rape, that the proponent was a "whore and that her mother was a procuress."

Matter of Burtis, 107, A. D., 51 on 57-60.

VI

SECTION 19 OF THE DOMESTIC RELATIONS LAW, ADDED BY CHAPTER 339 OF THE LAWS OF 1901, WHICH WAS IN EFFECT ONLY FROM JANUARY 1, 1902, TO DECEMBER 31, 1907, DOES NOT CONTROL THE DECISION OF THIS CASE, BECAUSE THE QUESTION AT ISSUE IS "DID THE MARRIAGE RELATION EXIST BETWEEN THE RESPONDENT AND THE AND THE DECEDENT AT THE TIME OF THE DEATH OF THE LATTER, ON SEPTEMBER 17, 1908," NOT "WAS A MARRIAGE BETWEEN THEM CONTRACTED WITHIN THE STATE OF NEW YORK WHILE SAID STATUTE WAS IN EFFECT."

Although this section, while it was in force, made void certain marriage contracts unless the contract was made in the manner prescribed by

Digitized by Google

the statute, this law by its very terms, excepts from its operation *marriages contracted prior to January 1, 1902, as well as those contracted outside this State* and the law expressly provided (section 10 as amended by section 1 of Chapter 339 of the Laws of 1901), that "a lawful mar-"riage contracted in the manner and pursuant to "the regulations of a religious society to which "either party belongs, is as valid as if this article "had not been enacted."

On the trial and on the argument before the Surrogate, the petitioner built up his case on an alleged declaration made by the respondent in April, 1909, to the half-brother Morse and his daughter Maud Morgan, that she was married to the decedent in 1900 at the Hinman farm in the Town of Chenango, by La Roche, and finished it by producing La Roche to testify that he had not married the respondent at that time and place or at any other time.

He could not thus dispose of the issue, because it was broader than the statute. Having failed in his attempt to limit the issue by compelling a bill of particulars to be given (Fols. 116 to 118) it became necessary for him to show, not only, that no marriage was contracted by the decedent with the respondent within the State of New York, between the day when the law went into effect, and the day when its repeal took effect, *but that no marriage between them was ever anywhere, contracted.*

There is nothing in the pleadings which limited the question as to when, where or how the mar-

Digitized by Google

riage contract between the decedent and the respondent was entered into; and so, even if the statute be held to prescribe a rule of evidence as to how a marriage, within its operation must be proved, its application is still too limited to cover the whole issue in this case, so as to prevent the application of the rule of the common law that marriage may be proved by showing cohabitation of the parties and other circumstances. There is no allegation or proof in the case, showing, or tending to show, that the marriage contract evidenced by the respondent's cohabitation, for years, with the decedent, was not made or entered into prior to January 1st, 1902, or that it was not "lawfully contracted in the manner and pursuant "to the regulations of a religious society" to which either of the parties belonged, or that it was not entered into somewhere outside of the State of New York.

After the petitioner had called the half-brother Morse and his daughter, Maud Morgan, and the ex-dominie, La Roche, and had rested his case, and after the respondent had put in her evidence, including the letters which showed the true relations between the parties, the petitioner then, on rebuttal, and over the objection and exception made by the appellant, that it was not proper rebuttal, undertook to break the legal effect of the respondent's evidence by saying that the relationship between these parties was illicit in the beginning and that this statute, Chapter 339 of the Laws of 1901, in effect only between January 1st, 1902, and December 31st, 1907, precluded the establishment of any marriage otherwise than by direct proof of the contracting of the marriage in

Digitized by Google

the manner prescribed in that statute, and, as we understand it, the petitioner's position still is, and must be, that this statute is applicable as a rule of evidence, to this case and establishes a different rule than that of the common law as to the manner in which this marriage relationship must have been created if it is to be held valid, and the method and manner of proving or establishing such relationship: In other words, that because of the existence of this statute during that limited period, the decisions of the Courts of this state, already cited in this brief, and similar cases in this and other jurisdictions, do not apply.

That such statute did not change the kind or quantity of proof required to establish the marriage relation see the case of St. Debereaux vs. Much Dew Church, 1 Wm. Black., 336.

If the rule contended for by the counsel for the petitioner here, were in force and were the law, it would be unreasonable. It would make the establishment of the marriage relation dependent upon the performance of his duty, under the law, by the minister or magistrate who performs the ceremony; and, if he fails in this, or if the records are destroyed and if then his memory, or that of the witnesses, fails, or if they are deceased, or cannot be produced, it becomes impossible to establish the marriage. Add to this the possibility that the person officiating at the marriage might falsify his report or his testimony (as he may have done in this case) and that witnesses, if living, might do the same, and the harshness and unreasonableness of such a rule become apparent. In case of the death of one of the parties, the sur-

Digitized by Google

viving husband or wife under the rule contended for, and under Section 829 of the code, in such a case would be absolutely helpless to prove the relationship, if it were required to be proved by the production of the evidence specified in the statute.

Furthermore, if it were necessary in this case in order to protect and preserve the good name and fame of the respondent as well as of the decedent and that of his family, the Court should go, as Courts heretofore have gone, to the extent of finding that *a marriage contract was entered into between these parties in the State of New Jersey in the Summer of 1906, when the respondent visited the decedent at the Hotel at Newton, N. J., and remained there with him from six to nine weeks, using his name and passing as his wife.* (Finding Nos. 57-58-59, Fols. 1606-1607).

Hynes vs. McDermott, 91 N. Y., 451.

This provision of Section 19 of the Domestic Relations Law, as amended by Section 6 of Chapter 339 of the Laws of 1901, which made invalid any marriage not contracted in accordance with the provisions of the Domestic Relations Law, was taken out of the statute in 1907 by Section 6 of Chapter 742 of the Laws of 1907. Since December 31st, 1907, the statutes of the State have regulated the method or manner in which marriage contracts are to be made, but *since that date there has been no statute which declares a marriage contracted in any other way invalid, for any purpose.* In the absence of such a statute, any marriage regularly made according to the com-

Digitized by Google

mon law, without observing the statutory regulations, is a valid marriage.

Mathewson vs. Phoenix Iron Foundry, 20 Fed. Rep., 281.
Hutchens vs. Kimmel, 31 Mich., 126.
Meister vs. Moore, 96 U. S., 76.
Ferrie vs. Public Administrator, 3 Brad., 151.
Caujolle vs. Ferrie, 26 Barb., 177.
Durand vs. Durand, 2 Sweeney, 315.
Kahn vs. Kahn, 60 Misc., 344, also 62 Misc., 550.

We desire to call the attention of the Court particularly to the opinion of Judge Colt, in the case of Mathewson vs. Phoenix Iron Foundry, 20 Fed. 281, as above cited, and the cases therein cited.

Digitized by Google

VII

EVEN IF IT BE HELD THAT THIS STATUTE, SECTION 19 OF THE DOMESTIC RELATIONS LAW, AS ADDED BY CHAPTER 339 OF THE LAWS OF 1901, COULD APPLY IN THIS CASE, AND THAT THE MARRIAGE CONTRACT OR RELATION OF THE RESPONDENT AND THE DECEDENT WAS ENTERED INTO IN THIS STATE DURING THE PERIOD WHEN SUCH STATUTE WAS IN EFFECT, AND THAT SUCH CONTRACT OR RELATION WAS NOT ENTERED INTO IN ACCORDANCE WITH THE REQUIREMENTS OF THAT STATUTE, IT IS IMMATERIAL, BECAUSE THE MARRIAGE OF THE PARTIES MUST BE PRESUMED FROM THEIR RELATIONS, WHICH, CONCEDEDLY, EXISTED LONG AFTER THE REPEAL OF STATUTE, AND CONTINUED TO THE TIME OF THE DECEDENT'S DEATH.

Even if the Courts below had gone to the extent, in this case, of finding that the relationship between these parties was illicit in its inception, that their living together as husband and wife, began subsequently to January 1st, 1902, and that their reputation throughout the community where they lived, from that time to the time when they left the farm, by the common speech of everyone familiar with their affairs, was that they were not married; and if it had been found that no marriage contract between the parties was ever entered into in the form or manner prescribed by Section 19 of the Domestic Relations Law, as

Digitized by Google

added by Chapter 339 of the Laws of 1901, nevertheless, under the undisputed evidence in this case and under the facts as found, *the judgment must still have been in favor of the respondent and in support of the proposition that at the time of the death of the decedent the respondent was his wife and that she is now his widow.* This is so, because it stands absolutely uncontradicted and unchallenged in this case, that, if the relations of these parties were illicit in the beginning, from as early as 1905 on, the decedent recognized the respondent as his wife, lived with her in that relationship, held her out to the world in that capacity, and treated her in all things as occupying that relation to him. His letters and their lives, from that time on, showed the existence of a matrimonial relation, and there is nothing in the record which tends to show that such relationship was questioned by anyone anywhere, even by the gossips of Chenango.

During 1908 in the absence of such a provision as was contained in Section 19 of the Domestic Relations Law between January 1st, 1902, and December 31st, 1907, the manner of life of these parties, under the common law and under all the decisions, raised the conclusive presumption that they were husband and wife.

Mathewson vs. Phoenix Iron Foundry, 20 Fed., 281.
Hutchens vs. Kimmel, 31 Mich., 126.
Meister vs. Moore, 96 U. S., 76.
Ferrie vs. Public administrator, 3 Brad., 151.
Caujolle vs. Ferrie, 26 Barb., 177.

Digitized by Google

Durand vs. Durand, 2 Sweeney, 315.
Kahn vs. Kahn, 60 Misc., 334, also 62 Misc., 550.

"The next objection is to the charge of the "judge, that the repeal of the act prohibiting "the circulation of bank bills of a denomination "less than five dollars, repealed also the conse- "quences of the act, as to contracts entered into "while it was in force. This principle applies "only to those acts of the legislature which are "measures of public policy merely, not to those "which are intended primarily to establish or af- "fect the rights of parties as to each other. The "legislature deeming it wise as a measure of pub- "lic policy, to restrain the circulation of notes of "denominations less than $5, made the act unlaw- "ful, and prohibited it, under the consequence, "among others, of refusing enforcement of any "contract based on such consideration. That law "had its day, and was repealed when a change in "the wants of society or new light as to its real "interests arose. By that repeal the law is de- "cided to be unwise for the present at least, and "the contracts made under it, whose considera- "tion was always morally good as between the "parties, are now without the legal impediment "of being contrary to legally established public "policy (contraband of law), and are valid."

Central Bank vs. Empire Stone Dressing Co., 26 Barb., 23 at 36.

"The repeal of a statute indicates a change "of policy on the part of the State upon "the particular subject, and it would be incon-

Digitized by Google

"sistent to enforce the provisions of an act after "the State had declared it to be unwise."

Sturgis vs. Spofford, 45 N. Y., 446 at 452.

So in this case, when the legislature of this State, in 1907, repealed Section 19 of the Domestic Relations Law, which had been added by Chapter 339 of the Laws of 1901, and which declared invalid all contracts of marriage not made in accordance with the provisions of the Domestic Relations Law, it thereby declared that the public policy of the State was against such a statute, and in repealing that statute, it repealed all penalties and disabilities imposed thereby. So that by the repeal of that statute in 1907, the common law rule, as it had theretofore existed in this state, was made applicable to all contracts of marriage which had been entered into within the period while such statute was in force.

"Lord Ch. J. Tindal laid down the rule applic- "able to such a case. He said: 'I take the effect "of a repealing statute to be, to obliterate it (the "statutue repealed) as completely from the "records of the parliament, as if it had never "passed, and that it must be considered as a law "that never existed, except for the purpose of "those actions or suits which were commenced, "prosecuted and concluded whilst it was an exist- "ing law.'"

Butler vs. Palmer, I Hill, 324 at 332.
Re-affirmed in Washburn vs. Franklin, 35 Barb., 599.

"If the repeal of a statute is by express and

Digitized by Google

"positive terms and there is no legitimate evi-
"dence in or out of the act of an intent to qualify
"and restrict the operation, that is, no limitation
"or qualification, express or implied," (and there
was none in the repeal of Section 19) "the only
"question is as to the effect of the repeal, and the
"rule is that for all purposes the law repealed is as
"if it had never existed."

Smith vs. People, 47 N. Y., 330 at 338.

In the Appellate Division the attorneys for the appellant met the argument founded on these cases to the effect that since the repeal of Section 19 of the Domestic Relations Law, there has been no statute which declares a marriage contracted in any other way than that specified in the Statute, invalid, and that the repeal of Section 19 of the Domestic Relations Law being without limitation or qualification, express or implied, left the situation exactly as though that section had never existed, by contending that the Legislature, in 1907, in repealing Section 19 of the Domestic Relations Law did not intend to change the Statute as it then existed, but to leave it exactly the same. This contention was based upon the claim that the insertion by the Legislature, in 1907, in subdivision 4 of Section 11 of the Domestic Relations Law, of the words "Provided, however, all such "contracts of marriage must, in order to be valid, "be acknowledged before a Judge of a Court of "Record," was, to use their own words, "a plain "and express qualification and limitation placed "upon the repeal of Section 19." The addition of the words "Provided, however, that all such "contracts of marriage must, in order to be valid,

Digitized by Google

"be acknowledged before a Judge of a Court of "Record," clearly was for the purpose of invalidating every "contract of marriage which was "not acknowledged before a Judge of a Court of "Record."

The insertion of the word "must" in Subdivision 4 of Section 11, in 1907, by the Legislature, is of no materiality in considering the effect of the repeal of Section 19 and is not indicative of any intent upon the part of the Legislature to limit or qualify the repeal of that section, because before that change Section 11 of the Domestic Relations Law, as enacted by Chapter 339 of the Laws of 1901 contained the word so as to make it applicable to the whole Section, and it then provided:

"Section 11. How a marriage *must* be solem- "nized. A marriage *must* be solemnized by "either:

"1. A clergyman, etc.;

"2. A mayor, etc.;

"3. A justice or Judge, etc.;

"4. A written contract * * * signed by "* * * at least three witnesses who *shall*, "etc., * * * such contracts *shall* be "filed * * *."

Therefore the insertion in Subdivision 4 of Section 11 of the Domestic Relations Law, by the Legislature, in 1907, of the provision requiring

Digitized by Google

written contracts of marriage to be acknowledged "before a Judge of a Court of Record," does not make Section 11 any more mandatory or the penalty for a failure to comply with its provision any greater than theretofore. Moreover, the addition of the words to Subdivision 4 of Section 11 of the Domestic Relations Law, by the Legislature in 1907, relate only to written contracts of marriage and do not relate to or effect marriage contracts entered into in any other manner, nor do they relate to the necessity of the solemnization of marriage.

If the word "must" is to be given the effect contended for by the attorneys for the appellant, then it is the word "must," found in the title and in the first line of Section 11 which is to be considered and not the word "must," inserted in Subdivision 4, in 1907. This word was in the law and qualified the whole section before the repeal of Section 19.

Hence there is no significance in the word being inserted in only one of the subdivisions of Section 11 coincidently with the repeal of Section 19. It is plain that by the repeal of the latter sections the Legislature intended to put an end to the pronouncement of invalidity against marriages irregularly solemnized or contracted.

This precise point, attempted to be made by the attorneys for the appellant had been up and passed upon by the Courts in this State and decided adversely to their contention. In Kahn vs. Kahn, 60 Misc., 334, the marriage alleged, was entered into in the form of a written contract under

Digitized by Google

subdivision 4 of Section 11 of the Domestic Relations Law. The date of the marriage was August 19, 1907. The last day for filing the contract was February 19, 1908, and it was undisputed that the contract was not filed. There the defendant's contention was that Section 19 of the Domestic Relations Law as added by Chapter 339 of the Laws of 1901, operated to make every marriage not evidence or solemnized in accordance with the statute, absolutely void and not voidable merely, and that therefore, the failure to file the contract required a finding that there was no legal marriage and that therefore a motion for alimony and counsel fees should be denied. In holding to the contrary in that case, Judge Bischoff said:—

> "There would seem to be merit in this con-
> "tention if Section 19 * * * had re-
> "mained in force, since the words used to ex-
> "press the absolute invalidity of any mar-
> "riage not in accordance with the provisions
> "of the statute are unmistakable in their im-
> "port, but by Chapter 742 of the Laws of
> "1907, Section 19 was repealed, the repeal to
> "take effect on the 1st day of January, 1908.
> "Therefore, prior to the expiration of the
> "period during which the plaintiff could have
> "filed the contract of marriage in compliance
> "with the statute, the provision which made
> "the contract void if not filed was no longer
> "a part of the law of this State, and at the
> "expiration of the six months' period, on
> "February 19, 1908, the omission of filing
> "created a situation in which the marriage
> "was possibly voidable because of non-com-
> "pliance with a condition imposed by law, but

Digitized by Google

"was not void. See Meister v. Moore, 96
"U. S., 76."

That is, notwithstanding the fact that Section 11 of the Domestic Relations Law (which, by the way, was then Section 6 of Chapter 742 of the Laws of 1907), provided and still provides: "That mar-"riage *must* be solemnized by * * * 4. A "written contract of marriage signed by both "parties and at least two witnesses who shall sub-"scribe the same," and that "such contract *shall* "be recorded within six months after its execu-"tion, etc." Judge Bischoff held that a failure to comply with these mandatory provisions of the Domestic Relations Law, did not make the contract void but possibly voidable.

In the Court below counsel for the respondent grew hysterical about the terrible conditions in which the Legislature found society in 1901, because of the absence from the statute of a provision making void contracts of marriage entered into without the formalities prescribed by law, and claimed that in order to preserve society from utter annihilation, "At the instance of outraged "public sentiment and in answer to the appeal of "Courts of this State," the Legislature was "prompted" to enact Section 19 of the Domestic Relations Law. The fact is that the Legislature after the passage of Section 19, discovered what other States have come to learn, namely that concubinage is of no benefit to society nor is public policy served by permitting a man to hold a woman out as his wife, live with her as such for years, have and enjoy all benefits and privileges which flow from the marriage relation, and then,

Digitized by Google

after his death, allowing unscrupulous heirs and next of kin to reap advantage by setting up the man's failure to comply with some technical requirement of some statute and thus deprive the woman of the rights which otherwise would be hers.

These considerations induced the Legislature in 1907, to repeal Section 19, and they are more than sufficient to reinstate the rule by the common law.

VIII

IRRESPECTIVE OF THE QUESTION AS TO WHETHER OR NOT THE RESPONDENT IS IN FACT THE WIDOW OF THE DECEDENT, THE PETITIONER AT THE TIME OF FILING HIS PETITION, WAS ESTOPPED TO INSTITUTE THIS PROCEEDING.

This proceeding is not one to test the right of the respondent to dower or to share in the distribution of the estate of the decedent, but is one instituted for the sole purpose of procuring administration on such estate and thus to deprive her of the compensation which would come to her from such administration.

The respondent's letters of administration were issued to her on this estate, by the Surrogate of Broome County on October 14, 1908 (Fol. 13). The respondent immediately entered upon the discharge of her duties as such and continued to actively administer the estate and to collect the as-

Digitized by Google

sets of and to settle the partnership affairs of the firm of Hinman & Sproul (Fols. 14 and 320 to 323).. The petitioner and his attorneys are residents of the City of Binghamton, where the respondent resided and where the estate was being administered and must have known, at all times, that she was proceeding with the administration of the estate. During the entire course of the administration the petitioner, and his attorneys, had knowledge of the fact that the administratrix had been appointed and was assuming to act and was acting as such administratrix and had general knowledge of the different matters connected with such administration. As early at least as May 10, 1909 (Fol. 38), the petitioner and his attorneys had knowledge of all the facts which they undertook to establish, on the trial of this proceeding, as the reason for the revocation of the respondent's letters of administration. With these facts and with this knowledge, the petitioner and his attorneys remained perfectly silent and made no move, and gave no indications of an intention to move, for revocation of such letters. During that entire period they permitted this respondent to proceed with the administration of the estate upon the assumption by her that she had the right to do so and that she should receive the usual compensation therefor. They permitted her to spend her time, her money and her efforts in the collection of the assets of the estate, for the benefit of this petitioner and the other next of kin of the decedent. It was not until the administration of the estate was practically complete and after the administratrix had succeeded in making a settlement of the claim of the estate against the surviving partner of the firm of Hinman & Sproul, on

Digitized by Google

account of that partnership (Fols. 321 to 323), that the petitioner first made any move to prevent the respondent from completing the administration of the estate and obtaining the commissions which she had earned in the settlement of the estate. There is nothing in the case which impugns the good faith of the respondent or her belief of the fact that she was the widow of the decedent, and as such, entitled to administer his estate. Under the facts, even as found by the Surrogate, and under the decisions, any lawyer, had he been consulted with reference to it, would have advised the respondent that she did occupy just that relation. Furthermore, the petitioner himself, by his acts, showed that he entertained the same opinion, for he was introducing the respondent as late as September, 1909, as Mrs. Hinman, his sister-in-law (See Testimony of Sarah Hughston, Fol. 337, Bertha L. Hughston, Fols. 338 and 339 and Curtis E. Hughston, Fol. 832, and finding 112, Fol. 1649). The petitioner by his acts, necessarily led the respondent to believe that there was no question raised and could be none, as to her relationship or as to her right to administer on the estate of the decedent.

To such a situation the old equitable maxim applies, that, he who remains silent when good conscience requires him to speak will not be permitted to speak when good conscience demands that he should remain silent.

Bank of Monongahela vs. Weston 172 N. Y., 259 on 266-267.

This proceeding is part of a settled and deter-

Digitized by Google

mined purpose upon the part of the decedent's heirs at law and next of kin to make use of the respondent's services, while such services might be of benefit to them, and to dismiss her without compensation when she had accomplished all that they might hope to gain from her efforts, her familiarity with the business and affairs of the decedent and the friendly relations which it appears existed between Harvey B. Sproul, the surviving member of the firm of Hinman & Sproul, and the respondent.

Courts will not lend their aid to the furtherance of such a purpose.

Crawford vs. Crawford 6 A. D. 50.
Trustees vs. Smith, 118 N. Y. 634 on 641.
Haviland vs. Willets, 141 N. Y. 35 on 52.
Williams vs. Whitteil, 69 A. D. 340.

IX

A MARRIAGE ESTABLISHED BY CIRCUMSTANTIAL EVIDENCE HAS ALL THE DIGNITY, AND SUCH A CONNECTION HAS ALL THE VIRTUE THAT SOCIETY RECOGNIZES IN MATRIMONIAL RELATIONS INCURRED WITH ALL CEREMONY AND LEGAL FORMALITY.

The term "common law wife" is not to be attached to the respondent because, in the absence of direct evidence showing her participation in a marriage ceremony with the decedent, she has resorted to proof of circumstances to establish her

Digitized by Google

marriage with him. The term "common law wife" is not one known to the law. As ordinarily used, it has been defined (Matter of Brush, 25 A. D. 608 at 613) as "A synonym for a woman who, "having lived in a state of concubinage with a man "during the time when she might have been openly "declared to be his wife, if she were such, only "seeks to assume that relation openly after his "death, and when she is impelled to it by the loss "of the support which he has given to her, and by "a desire to obtain that support by sharing in the "proceeds of his property."

Such is not the status of the respondent in this case. She was not a whore and no one so regarded her. She lived with the decedent, she worked with him and for him, she cared for his aged mother, she took his name and was known by it, she was recognized by his relatives, she presented him, as her husband in the home of her parents, and he was received there, she bore him a child, she was introduced by him as his wife, among his associates and acquaintances, she was prostrated by the accident that killed him (Fol. 295), at his death, it was she that was left in possession of his property, a possession voluntarily given her by him, and after his death her tears evidenced a decent and tender respect for his memory. (Fol 169.) A marriage established by these circumstances is as legally and truly, marriage, as that solemnized by church ceremony and legal forms.

"There can be no doubt but that if this state- "ment be true, the declarations made by Evans to "the household that night in the presence of Han-

Digitized by Google

"nah Maria, followed by actual cohabitation, *"furnished evidence of a marriage contract as "conclusive as evidence of a ceremonial marriage "could have done. The relation between these "parties based thereon would not be illicit, but "begin in lawful wedlock."*

Tracy vs. Frey, 95 A. D., 579 at 595.

X

THE APPELLANT'S APPLICATION FOR PERMISSION TO MAKE REQUESTS TO FIND WAS PROPERLY DENIED.

This matter was submitted to the Appellate Division at the term commencing on September 12, 1911 (Fol. 1736). It was decided at the term commencing on November 14, 1911 (Fol. 1729). The order came up for settlement on Jan. 9, 1912 (Fol. 1789). The appellant then asked permission to make requests to find which was denied (Fols. 1786 to 1790). In the notice of appeal from the final order the appellant has brought up the order denying this application for review (Fol. 1782).

As we have shown in Point I the Appellate Division superseded the Surrogate's Court as a trial court and in exercising that jurisdiction made findings of fact. Doubtless the appellant might have required findings to be made had he made his request seasonably. The only provision of the law which gave him that right is Section 1023 of the Code of Civil Procedure. But the appellant failed to make his requests. He came before the

Digitized by Google

Court after the decision and asked permission then to make such requests, but the court denied the application evidently believing that the delay between the September term, when the matter was submitted, and the January term, following the decision, was too long. The appellant has no cause for complaint regarding this ruling because he was not making the request within his rights. When the decision was rendered his right to file requests was at an end. He could not insist upon findings being made at his request after the decision.

§1023 Code of Civil Procedure.

XI

THE DECREE AND ORDERS APPEALED FROM SHOULD BE AFFIRMED.

Respectfully submitted,

HINMAN, HOWARD & KATTELL,

Attorneys for Respondent,

Security Mutual Bldg.,

Binghamton, N. Y.

Digitized by Google

41

Court of Appeals

OF THE STATE OF NEW YORK.

IN THE MATTER

OF

376

The Final Accounting of BAYARD L. PECK, as Assignee
Girard N. Whitney, under a General Assignment for t
Benefit of Creditors,

Responde

JOHN F. McINTYRE,

Claimant-Appella

CASE ON APPEAL.

THOMAS F. GILROY, JR.,
Attorney for John F. McIntyr
Claimant-Appellant,
No. 42 Broadway,
New York City

DANIEL BURKE,
Attorney for Bayard L. Peck, a
Assignee, and others, Respon
ents,
No. 44 Pine Street,
New York City

152
Appeal by
120

from order o

New York:
Stillman Appellate Printing Co.
1912.

no accounti
a general assignee. Appeal
p for review an interlocutory d

Digitized by Google

Digitized by Google

INDEX.

	PAGE
Statement Under Rule 41	1
Notice of Appeal	3
Order to Show Cause	6
Petition	8
Citation	16
Order of Reference	17
Referee's General Report	18
Referee's Special Report—Claims of John F. McIntyre	40
Proof of Claim, Against Girard N. Whitney	41
Assignment of Girard N. Whitney	43
Proof of Claim Against Whitney & Kitchen, filed April 25, 1908	47
Rejection of Claim Against Whitney & Kitchen, filed April 25, 1908	48
Summons—John F. McIntyre vs. Girard N. Whitney *et al.*	49
Complaint	50
Stipulation Amending Complaint	55
Answer of Defendant Whitney	57
Answer of Defendant Geraghty	61
Answer of Defendant Peck	64
Report of Hon. Charles F. Brown, Referee	68
Judgment—Supreme Court	75
Judgment on Remittitur of Appellate Division, McIntyre vs. Whitney	78
Judgment on Remittitur of Court of Appeals	82
Proof of Claim Against Whitney & Kitchen, filed March 24th, 1911	87
Statements of Facts on Submission of Controversy	90
Order of Appellate Division on Submission	52

Digitized by Google

PAGE
Opinion, Referee's General 97
Opinion of Referee—Claims of John F. McIntyre 108
Proposed Conclusions of Law of Claimant McIntyre 116
Exceptions to Referee's Report 117
Final Decree 120
Statement on Appeal from Interlocutory Judgment 129
Interlocutory Judgment on Remittitur on Submission of Controversy 130
Opinion of Appellate Division, per Dowling, J., on Submission of Controversy 134
Memorandum of Concurrence by Miller, J 142
Opinion of Ingraham, P. J. 143
Stipulation Waiving Certification 151
Order Filing Record 151

EXHIBITS.

Liquidation Agreement of Whitney & Kitchen Creditors 38

INDEX TO PAPERS ADDED ON APPEAL TO COURT OF APPEALS.

Notice of Appeal to Court of Appeals 152
Order of Appellate Division 155
Judgment on Remittitur of Appellate Division 156
Memorandum of Affirmance by Appellate Division 159
Affidavit of No Opinion 160
Stipulation Waiving Certification 161

Digitized by Google

1

Supreme Court.

APPELLATE DIVISION—FIRST DEPARTMENT.

In the Matter

of

The Final Accounting of BAYARD L. PECK, as Assignee of Girard N. Whitney under a General Assignment for the Benefit of Creditors,

Respondent,

JOHN F. MCINTYRE,

Appellant.

2

Statement Under Rule 41.

3

This proceeding was commenced by the petition of Bayard L. Peck, verified July 8th, 1911, and a citation issued thereon to show cause why a settlement of the accounts of the assignee should not be had, returnable September 5th, 1911, and duly served on all parties in interest. The only parties who appeared on said accounting were as follows:

Bayard L. Peck, Assignee, by Daniel Burke, Esq.

Edward J. McKeever, by Bernard J. York.

William R. Willis, by John R. Halsey.

Digitized by Google

4 Statement Under Rule 41.

Dudley S. and Herbert S. Harde, by George W. Phillips, Jr.

Jonas Monheimer, by James Cowden Meyers.

Charles F. Pope, by Charles A. Runk.

John F. McIntyre, by Thomas F. Gilroy, Jr.

Gray Casement, W. Hunt Hall and E. Dudley Barlow, by E. Dudley Barlow.

Arthur B. Waring, by C. S. Pinkney.

United States Fidelity and Guaranty Co., by Leonidas Dennis.

Girard N. Whitney, Joseph Bogner and Annie R. Spratley, by Ivins, Mason, Wolff & Hoguet.

5 Gideon E. Fountain, by Richard J. Lewis.

E. C. Manning, by T. A. Leary.

James V. Geraghty, in person.

The only one who appeals from the decree herein is John F. McIntyre.

There has been no change of parties since the commencement of the proceedings, except that James V. Geraghty appears on this appeal by Roger Sherman, Esq., and also that all the above-named parties have stipulated that all notices, papers on appeal, briefs, etc., may be served on and that the stipulation waiving certification of the printed record may be made by Daniel Burke, Esq.,

6 on behalf of all the respondents herein.

Digitized by Google

Notice of Appeal.

SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Final Acounting of BAYARD L. PECK, as Assignee of Girard N. Whitney, under a General Assignment for the Benefit of Creditors,

Sirs:

Please take notice that John F. McIntyre, one of the claimants herein, hereby appeals to the Appellate Division of the Supreme Court, First Department, from so much of the final decree entered herein on the 28th day of February, 1912, in the office of the Clerk of the County of New York, confirming the report of William F. McCombs, Esq., Referee, filed in the office of the Clerk of the County of New York, on the 9th day of February, 1912, as disallows the claims of said John F. McIntyre against the separate estate of Girard N. Whitney as individual claims against said estate in addition to allowing the said claims as co-partnership claims against said estate, and from so much of said final decree as discharges the Assignee and his surety from liability upon distribution of the said estate, as set forth in said final decree, and from so much of said final decree as directs a distribution of any part of said separate estate exceeding one-third,

Digitized by Google

10 Notice of Appeal.

among the copartnership creditors of Whitney & Kitchen before the payment of said claimant's claims in full, with interest to the date of payment; and appellant will bring up for review on such appeal so much of an interlocutory judgment on remittitur entered upon an order of the Appellate Division of the Supreme Court of the State of New York for the First Department, made in proceedings commenced under Section 26 of the Debtors and Creditors Law and submitted to said Court on a submission of controversy under Section 1279 of the Code of Civil Proceedure, entitled "In the
11 matter of the assignment of Girard N. Whitney to Bayard L. Peck," which order was entered and filed in the office of the Clerk of said Appellate Division on the 18th day of September, 1911, and which interlocutory judgment on remittitur was entered in the office of the Clerk of the County of New York on the 4th day of October, 1911, as directs that the claims filed by John F. McIntyre with the Assignee of Girard N. Whitney and dated March 21st, 1911, against said several estates be disallowed by the Assignee as individual liabilities of the said Girard N. Whitney and that the claims should not be allowed as claims against said individual estate except to the extent that claims
12 against the copartnership of Whitney & Kitchen are allowable under the terms of the individual assignments or otherwise.

Dated, New York, March 7th, 1912.

Yours, etc.,

THOMAS F. GILROY, JR.,
Attorney for Appellant,
John F. McIntyre,
No. 42 Broadway,
New York City.

Digitized by Google

Notice of Appeal. 13

To DANIEL BURKE, Esq.,
Attorney for Bayard L. Peck, as Assignee.

IVINS, MASON, WOLFF & HOGUET, Esqrs.,
Attorneys for Girard N. Whitney and
Joseph Bogner and Annie R. Spratley.

BERNARD J. YORK, Esq.,
Attorney for Edward J. McKeever.

JOHN R. HALSEY, Esq.,
Attorney for William R. Willis.

GEORGE W. PHILLIPS, JR., Esq.,
Attorney for Dudley S. and
Herbert S. Harde. 14

CHARLES A. RUNK, Esq.,
Attorney for Charles F. Pope.

JAMES COWDEN MEYERS, Esq.,
Attorney for Jonas Monheimer.

E. DUDLEY BARLOW, Esq.,
In person and attorney for
Gray Casement and W. Hunt Hall.

C. S. PINKNEY, Esq.,
Attorney for Arthur B. Waring.

LEONIDAS DENNIS, Esq.,
Attorney for U. S. Fidelity & Guaranty Co. 15

RICHARD J. LEWIS, Esq.,
Attorney for Gideon E. Fountain.

T. A. LEARY, Esq.,
Attorney for E. C. Manning.

JAMES V. GERAGHTY, Esq.,
In Person.

WILLIAM J. SCHNEIDER, Esq.,
County Clerk of New York County.

Digitized by Google

16 **Order to Show Cause.**

At a Special Term, Part II, of the Supreme Court, held at the County Court House, in and for the County of New York, on the 11th day of July, 1911.

Present—Hon. EDWARD J. GAVEGAN, Justice.

In the Matter

of

17 The Final Accounting of BAYARD L. PECK, as Assignee of Girard N. Whitney, under a General Assignment for the Benefit of Creditors.

On reading and filing the annexed petition of Bayard L. Peck, the above named assignee of Girard N. Whitney, verified on the 8th day of July, 1911,

18 Now, on motion of Daniel Burke, attorney for the said petitioner, it is

Ordered that a citation issue herein to all parties interested in the estate assigned by the said Girard N. Whitney to the said Bayard L. Peck by general assignment, dated the 25th day of January, 1908, and recorded on the 25th day of January, 1908, in the office of the Clerk of the County of New York, to appear in this Court, at Special Term, Part I thereof, to be held in the County Court House, in the Borough of Manhattan, City and

Digitized by Google

County of New York, on a day therein to be specified, and show cause why a final settlement of the account of the said Bayard L. Peck, as such Assignee, should not be had; and if no cause be shown, then to attend the final settlement of such account. And it is

Further ordered that said citation be served on such creditors who have presented their claims by depositing a copy of the same, at least thirty (30) days prior to the return day thereof, in the General Post Office, in the Borough of Manhattan, City of New York, duly enclosed and directed to each of the said creditors, at their last known post office address, with the postage thereon prepaid, and by publishing the said citation once a week for at least six (6) successive weeks prior to the return day of the said citation in The New York Law Journal and in the New York American, two newspapers published in the City and County of New York.

Enter,

E. J. G.,
J. S. C.

Digitized by Google

22 **Petition.**

SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Final Accounting of BAYARD L. PECK, as Assignee of Girard N. Whitney, under a General Assignment for the Benefit of Creditors.

23

To the Supreme Court of the State of New York:

The petition of the above named assignee respectfully shows:

First. That on the 25th day of January, 1908, Girard N. Whitney, residing in the Borough of Manhattan, City, County and State of New York, at No. 116 Riverside Drive, executed in due form a general assignment to your petitioner for the benefit of creditors and that the petitioner duly accepted the said assignment and trust.

24

Second. That said assignment was recorded in the office of the Clerk of the County of New York on the day of its execution and petitioner duly qualified as such assignee and entered upon the execution of his trust.

Third. That the inventory and schedules, as required by law, were made and filed by your petitioner on the 26th day of March, 1908, in the office

Digitized by Google

of the Clerk of the County of New York, and thereafter petitioner gave a bond as such assignee in due form and in the sum and approved as required by law, and executed by The United States Fidelity & Guaranty Co.

Fourth. That upon the prayer of this petitioner an order was made by the Honorable James A. O'Gorman, one of the Justices of this Court, on the 30th day of March, 1908, authorizing the petitioner to advertise for creditors to present their claims to him against said assignor on or before a day to be therein specified. That said notice was published as provided by said order and that a copy thereof was duly mailed to each creditor whose name appears on the books of the assignor, postage prepaid, at least thirty (30) days before the day specified in said advertisement or notice as appears by the affidavit of said mailing, hereto annexed.

Fifth. That the time within which claims were to be presented to petitioner, as specified in said notice, expired on the 22d day of June, 1908, and that all the creditors mentioned in the annexed affidavit of Clarence H. Fay, verified the 3d day of May, 1911, have presented their claims against the assignor to your petitioner.

Sixth. That the names and addresses of the creditors who have presented claims are as follows:

Percy H. Williams, M. D., #222 West 72d Street, New York City,

Matthew I. Fox, Broadway and 25th Street, New York City,

Dann & Peckner, 50 Broadway, New York City,

Reed & Barton, 5th Avenue and 32d Street, New York City,

Weingarten & Pearl, 34 West 35th Street, New York City,

Digitized by Google

28 Petition.

Phillip Blass, 22 Beaver Street, New York City,

Annie R. Spratley, 117 Lincoln Avenue, Montclair, N. J.,

New York Stock Exchange, Broad Street, New York City,

New York Quotation Company, Welles Bldg., New York City,

John F. McIntyre, 25 Broad Street, New York City,

D. S. & H. S. Harde, 25 Broad Street, New York City,

Jonas H. Mouheimer, 108 West 86th Street, New
29 York City.

That the names of claimants against the assigned estate of Whitney & Kitchen, a co-partnership of which the assignor was a member, are as follows:

W. W. Erwin, 56 Broad Street, New York City.

Mrs. Lena Beck, 124 Hobart Avenue, Bayonne, N. J.,

Vernon Weston, 104 West 37th Street, New York City,

Thomas E. Murray, 783 St. Marks Avenue, Brooklyn, New York,

L. C. Neidermeyer, 458 West 33rd Street, New York City,

30 George Mercer, Jr., 60 Wall Street, New York City,

John F. Carroll, 3 East 63rd Street, New York City,

John F. McIntyre, 25 Broad Street, New York City,

Cyrus O. Baker, 120 Liberty Street, New York City,

Mrs. M. Geraghty, 26 West 96th Street, New York City,

Miss Anna F. Jones, 28 St. James Avenue, Boston, Mass.,

Digitized by Google

Petition. 31

Edward J. McKeever, 105 Sixth Avenue, Brooklyn, New York,

Gray Casement, Painesville, Ohio,

Mrs. Septima M. Collis, 50 West 45th Street, New York City,

Edward W. Steinicke, 129 Vernon Avenue, Long Island City,

Ferris Faulkner, 320 Fifth Avenue, New York City,

Willard S. Crossman, 15 West 4th Street, New York City,

Mrs. H. Brightman, 3 East 63rd Street, New York City, 32

R. M. Coleman, 166 Brooklyn Avenue, Brooklyn, New York,

G. E. Fountain, 34 East 64th Street, New York City,

H. M. Kirkby, 31 East 71st Street, New York City,

Joseph Haas, 555 West 48th Street, New York City,

A. H. Laidlaw, 57 Duane Street, New York City,

Miss Ellen C. Manning, 304 East 20th Street, New York City,

James H. Mayhew, Fort Schuyler, Westchester County, New York,

Mrs. Florence Mead Brightman, 50 Broadway, 33
New York City,

Arthur B. Waring, 201 West 55th Street, New York City,

E. B. Corey, 271 Broadway, New York City,

Charles B. Halsey, 1048 Fifth Avenue, New York City,

I. Morgan Lewis, 173 West 81st Street, New York City,

John J. Gilroy, 1 Hudson Street, New York City,

Miss Annie R. Whitney, 171 West 71st Street, New York City,

Digitized by Google

34 Petition.

Miss Minnie Griffen, 216 West 79th Street, New York City,

Mrs. E. A. Whitney, 116 Riverside Drive, New York City,

Henry C. Spratley, c/o Matheson Co., 1619 Broadway, New York City,

A. Bowser, Regina, Sask., Canada,

Max L. Meyers, 1 Hudson Street, New York City,

Mrs. H. Ethel Bowman, 117 Lincoln Street, Montclair, New Jersey,

Joseph Bogner, 443 West 47th Street, New York City,

35 A. O. Whitney, 216 West 79th Street, New York City,

Archibald Douglas, 280 Broadway, New York City,

E. Dudley Barlow, 290 Broadway, New York City,

Mrs. Louise Whitney Landeau, 31 Boulevard Berthier, Paris, France,

Mrs. June M. Craine, 7 Mount Morris Park West, New York City,

W. Hunt Hall, 129 East 54th Street, New York City,

John Mitchell, Jr., 170 West Broadway, New York City,

36 Charles W. Baker, 408 New Jersey Railroad Avenue, Newark, New Jersey,

Mrs. F. G. Maher, Cedar Avenue, Far Rockaway, Long Island,

Charles F. Pope, 61 East 65th Street, New York City,

S. H. Voorhees, 826 Arlington Avenue, Plainfield, New Jersey,

W. R. Willis, Corner Broad & Maple Avenues, Morsemere, N. J., Ridgefield P. O.

Digitized by Google

Petition. 87

Dr. J. D. Jones, 240 Genesee Street, Utica, New York,

Redmond & Company, 33 Pine Street, New York City,

Annie R. Spratley, 500 West 111th St., New York City,

Daniel G. Tenney, 15 West 4th Street, New York City,

E. B. Smith & Company, 27 Pine Street,

C. I. Hudson & Company, 36 Wall Street, New York City,

C. M. Schott, Jr., & Co., 25 Broad Street, New York City, 88

Arthur Lipper & Co., 20 Broad Street, New York City,

Jewett Bros., 49 Broadway, New York City,

E. R. Chapman & Company, 18 Wall Street, New York City,

C. A. Buttrick & Company, 18 Wall Street, New York City,

Gwynne Bros., 40 Broad Street, New York City,

New York Financial Bureau, 44 Broadway, New York City,

Postal Telegraph Cable Co., 20 Broad Street, New York City,

Gerry & Murray, 75 Broad Street, New York,

Financial Calendar Co., 25 West Broadway, New 89 York City,

Yost Writing Machine Co., 343 Broadway, New York City,

New York News Bureau, 40 Stone Street, New York City,

C. Mont Benton Company, 526 West 28th Street, New York City,

Dow, Jones & Company, 44 Broad Street, New York City,

Digitized by Google

40 Petition.

New York Stock Exchange, 16 Broad Street, New York City,

Economy Clean Towel Supply Co., 50 Park Place, New York City,

Roger W. Babson, Inc., Wellesley Hills Station, Boston, Massachusetts,

Godfrey S. Mahn, 6 Wall Street, New York City.

That since the completion of the publication of said notice to present claims, the following persons and corporations, having the following addresses, have notified the assignee of the assignment to them of an interest in one or more claims against said
41 estate of Whitney & Kitchen:

Assets Realization Co., 25 Broad Street, New York City,

Levy, S. L., 133 Bank Avenue, Philadelphia, Pennsylvania,

Prankard, W. S., 34 Thomas Street, New York City.

And your petitioner therefore prays that a citation may issue out of, and under the seal of, this Court, to all persons interested in said estate, requiring them to appear in court on some day to be specified therein, and to show cause why a settlement of the account of the assignee, your petitioner,
42 should not be had, and, if no cause be shown, to attend the settlement of said account. That no previous application has been made for the relief demanded herein.

Dated New York,

BAYARD L. PECK,
Assignee of Girard N. Whitney.

Digitized by Google

Petition.

43

State of New York, }
County of New York, } ss.:

Bayard L. Peck, being duly sworn, deposes and says: That he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

BAYARD L. PECK.

Sworn to before me this 8th day of July, 1911.

CHARLES H. BURNETT,
Commissioner of Deeds,
City of New York.

44

45

Digitized by Google

46 **Citation.**

The People of the State of New York to all persons interested in the estate of Girard N. Whitney, assigned to Bayard L. Peck, for the benefit of creditors, send greeting:

You and each of you are hereby cited and required personally to be and appear at Special Term, Part I, of the Supreme Court, to be held in the County Court House, in the Borough of Manhattan, City and County of New York, on the 5th day of September, 1911, at 10.30 o'clock a. m., there and then to show cause why a final settlement of the ac-
47 counts of Bayard L. Peck, as assignee of above named Girard N. Whitney, insolvent debtor, should not be had, and if no cause be shown, then to attend the final settlement of the assignee's accounts.

In testimony whereof, I have hereunto caused the seal of the said Supreme Court, New York County, to be hereto affixed. Witness, Hon. Edward J. Gavegan, Judge of the said Supreme Court, this 12th day of July, 1911.

WM. F. SCHNEIDER,
(Seal) Clerk.

DANIEL BURKE,
Attorney for Assignee,
48 44 Pine Street,
Borough of Manhattan,
New York City.

Digitized by Google

Order of Reference.

49

NEW YORK SUPREME COURT.

COUNTY OF NEW YORK—SPECIAL TERM, PART I.

Matter of

BAYARD L. PECK,

(Assignee).

50

Present—Hon. EDWARD J. GAVEGAN, Justice.

The following papers used on this motion

Submitted this day.

	Papers numbered
Citation and Affidavits annexed	1
Answering objections	2

Upon the foregoing papers, William F. McCombs, Esq., appointed referee to take and state the assignee's account and to take proof and report as to the persons entitled to share in the assigned estate, their respective priorities and proportions.

51

Dated, Sept. 6/11.

E. J. G.,
J. S. C.

Digitized by Google

52 **Referee's General Report.**

SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Final Accounting of BAYARD L. PECK, as Assignee of Girard
53 N. Whitney, under a General Assignment for the Benefit of Creditors.

To the Supreme Court, New York County:

I, William F. McCombs, the Referee appointed herein by order of this Court dated September 6, 1911, to take and state the accounts of the above named Assignee and to take proofs and report as to the persons entitled to share in the assigned estate, their respective priorities and proportions, do re-
54 spectfully report, that having taken and subscribed the oath required of a Referee by Section 1016 of the Code of Civil Procedure, I proceeded to take proofs and from the evidence before me, which is hereto annexed and forms a part of this report, I do find as follows:

First. That prior to the 25th day of January, 1908, the above named Girard N. Whitney was engaged in business in the City of New York as a co-partner with James V. Geraghty and both doing business under the firm name and style of Whitney & Kitchen, and that the said Girard N. Whitney

Digitized by Google

55

then resided at No. 116 Riverside Drive, Borough of Manhattan, City of New York.

Second. That on the last mentioned date the said Whitney executed and acknowledged an instrument in writing assigning all his property to the above named Bayard L. Peck in trust for the benefit of creditors of the said co-partnership of Whitney & Kitchen and of himself individually; that no preferences were created in or by said assignment other than the provision for payment to creditors of the firm of Whitney & Kitchen.

Third. That the said Assignee joined in the execution and acknowledgment of said assignment and accepted the said trust; that said assignment was acknowledged by the said Girard N. Whitney and Bayard L. Peck, as assignor and assignee respectively on the 25th day of January, 1908, and was recorded in the office of the Clerk of the County of New York on the 25th day of January, 1908.

56

Fourth. That the assignor failed to file the inventory and schedules of the assigned estate, and that said inventory and schedules were prepared by Bayard L. Peck, the assignee herein, and were by him duly verified on the 25th day of March, 1908, and filed in the office of the Clerk of the County of New York on the said 25th day of March, 1908, showing liabilities of the assignor to be twenty thousand seven hundred and nineteen dollars and eighty-four cents ($20,719.84), with one hundred six thousand six hundred and thirty dollars ($106,630) nominal and actual assets.

57

Fifth. That on the 24th day of February, 1908, the said assignee presented to the Honorable M. Warley Platzek, one of the Justices of this Court, his bond with The United States Fidelity & Guaranty Company, having an office at No. 66 Liberty

Digitized by Google

58 Referee's General Report.

Street, in the Borough of Manhattan, City of New York, as Surety, in the sum of one hundred thousand dollars ($100,000), which bond was on the said last mentioned day, approved by the said last mentioned judge, and was filed on said day in the office of the Clerk of this Court.

Sixth. That the said Assignee having applied to this Court, upon petition verified by him on the 30th day of March, 1908, for an order to advertise for creditors to present their claims, with the vouchers thereof, duly verified, an order was thereupon made on the said 30th day of March, 1908, the Honorable
59 James A. O'Gorman presiding, authorizing such advertisement to be made in The New York Law Journal and the New York Times, two newspapers published in the City and County of New York, once in each week for six (6) successive weeks.

Seventh. That the said advertisement was published as directed in each of said papers, commencing on the 9th day of April, 1908, in the New York Times, and on the 11th day of April, 1908, in the New York Law Journal, and the following is a copy of such advertisement:

"Pursuant to an order of the Supreme
60 Court, signed by his Honor Justice James A. O'Gorman, one of the Judges of said court, and entered in the office of the County Clerk of the County of New York on the 30th day of March, 1908, notice is hereby given to all persons having claims against Girard N. Whitney, residing at No. 116 Riverside Drive, Borough of Manhattan, City and State of New York, and against Whitney & Kitchen, a co-partnership composed of Girard N. Whitney and James V. Geraghty, lately doing business at No. 1 Nassau Street, in the same city, to present the same,

Digitized by Google

 61

with the vouchers thereof, duly verified, to the subscriber, Bayard L. Peck, who has been duly appointed assignee of the said Girard N. Whitney for the benefit of the creditors of the said Girard N. Whitney and of the said copartnership of Whitney & Kitchen, at his office, No. 26 Liberty Street, Borough of Manhattan, City and State of New York, on or before the 22nd day of June, 1908.

Dated, New York, April 2, 1908.

BAYARD L. PECK,
Assignee of Girard N. Whitney. 62

BURKE & FAY,
Attoneys for Assignee,
No. 44 Pine Street, Borough of Manhattan,
New York City."

That proof of such publication, consisting of the affidavits of Joseph F. MacDonald and John J. Cosgrove, principal clerks of the publishers of the New York Law Journal and the New York Times, respectively, verified on the 21st and 23rd days of May, 1908, were duly filed in the office of the Clerk of this Court on the 11th day of July, 1911.

Eighth. That a copy of such advertisement, enclosed in a sealed envelope, on which was endorsed a direction that if the same was not delivered in ten (10) days, it should be returned to Bayard L. Peck as Assignee, and with the proper postage prepaid thereon, was more than thirty days before the day specified therein, deposited in the post office in the City of New York and directed to each of the creditors whose names appeared on the books of the said assignor, and that none of the said notices has been returned by the Post-master. 63

Ninth. That the following parties have presented claims against the assigned estate, duly verified, to the Assignee:

Digitized by Google

Claims Against Co-partnership of Whitney & Kitchen.

Name	Amount
Roger W. Babson, Inc.,	$ 15.00
Lena Beck,	306.07
E. Dudley Barlow,	522.00
Julie Brightman,	353.99
H. Ethel Bowman,	35.99
Joseph Bogner,	5165.85
Florence Mead Brightman,	252.31
C. A. Buttrick & Company,	26.20
Charles W. Baker,	7024.00
65 Cyrus O. Baker,	13798.90
Cyrus O. Baker,	7271.43
C. Mont Benton Company,	14.50
Septima M. Collis,	19824.96
Edward B. Corey,	43.18
Gray Casement,	6540.39
R. M. Coleman,	1580.33
E. R. Chapman & Company,	44.00
John F. Carroll,	394.35
Willard S. Crossman,	545.02
Jane M. Craine,	.44
Archibald Douglas,	3.91
Dow, Jones & Company,	15.00
66 Warren W. Erwin,	18497.99
Ferris Faulkner,	667.47
Financial Calendar Company,	25.00
Gideon E. Fountain,	13156.00
John J. Gilroy,	1964.88
Minnie Griffen,	512.31
Gwynne Bros.,	29.87
Gerry & Murray,	8.80
W. Hunt Hall,	1296.81
Joseph Haas,	258.41
Charles B. Halsey,	1501.16
C. I. Hudson & Company,	5.00

Digitized by Google

Jewett Brothers,	367.80
Anna Fry Jones,	845.00
Dr. J. D. Jones,	55.90
Louise Whitney Landeau,	5543.36
I. Morgan Lewis,	438.40
A. H. Laidlaw,	1138.21
Arthur Lipper & Company,	7.50
Thomas E. Murray,	965.25
John Mitchell, Jr.,	117.33
Frances G. Maher,	70.50
Max L. Meyers,	145.56
Edward J. McKeever,	4138.62
James H. Mayhew,	1000.00
Ellen C. Manning,	1178.96
George Mercer, Jr.,	10249.18
Godfrey S. Mahu,	4.00
John F. McIntyre,	36356.53
John F. McIntyre,	249.29
John F. McIntyre,	1817.82
New York Financial Bulletin,	5.00
Louis C. Niedermeyer,	174.23
New York News Bureau,	30.00
Charles F. Pope,	2438.40
Postal Telegraph-Cable Company,	3.25
Postal Telegraph-Cable Company,	3.55
Redmond & Company,	175.00
Annie R. Spratley,	1054.90
Henry C. Spratley,	89.03
C. M. Schott, Jr., & Company,	534.82
Edward B. Smith & Company,	5.00
Edward W. Steinicke,	1232.12
Daniel G. Tenney,	10.24
S. H. Voorhees,	32093.69
Arthur B. Waring,	18415.65
Vernon Weston,	207.10
Albert O. Whitney,	6126.24
William R. Willis,	12956.63
Annie R. Whitney,	667.06

Digitized by Google

70 Referee's General Report.

Emily A. Whitney,	2997.30
Yost Writing Machine Company,	.50

Claims Against Girard N. Whitney.

Philip Blass,	14.00
Daun & Peckner,	6.50
Matthew I. Fox,	355.50
D. S. & H. S. Harde,	10750.00
Jonas H. Monheimer,	1500.00
Reed & Barton,	89.25
Annie R. Spratley,	20000.00
Weingarten & Pearl,	107.50
Percy H. Williams, M. D.,	55.00
71 John F. McIntyre,	36356.33
John F. McIntyre,	249.29
John F. McIntyre,	1817.82

Among the copartnership claims mentioned above the following were assigned:

Septima M. Collis to Solomon L. Levy, March 10th, 1911,

Warren W. Erwin, to Assets Realization Co., March 9, 1909,

Ferris Faulkner to Assets Realization Co., Oct. 9, 1908,

Charles B. Halsey to Assets Realization Co., Aug.
72 6, 1908,

H. C. Spratley to Assets Realization Co., Aug. 11, 1908,

Annie R. Spratley to Assets Realization Co., July 7, 1908,

Annie R. Whitney to Assets Realization Co., July 7, 1908,

Emily A. Whitney to Assets Realization Co., July 7, 1908,

Arthur B. Waring, to the extent of Twelve thousand four hundred dollars ($12,400) to W. S.

Digitized by Google

73

Prankard, February 8th, 1908, and by W. S. Prankard to Assets Realization Company, July 18th, 1908.

The assignors and more than eighty-five per cent. (85%) in amount of the creditors of the said firm of Whitney & Kitchen executed an agreement liquidating and fixing the claims of said creditors and eliminating the possibility of preferences among the creditors signing the agreement. A copy of the said agreement is hereto annexed and marked Exhibit A. The assignee also signed an agreement annexed to Exhibit A and reading as follows:

74

"I hereby agree that, in case the foregoing agreement shall be executed on or before June 15th, 1908, by eighty five per cent. (85%) in amount of the creditors as they appear in Schedule A annexed to said agreement, I shall waive all commissions and compensation direct or indirect in excess of two and one half per cent. (2½%) on the whole sum which has come or shall come into my hands as assignee of the estate of Whitney & Kitchen and of the individuals comprising said firm."

The list of creditors who signed said agreement is as follows:

75

S. J. Lemon,	D. Ethel Bowman,
James V. Geraghty,	Gideon E. Fountain,
Girard N. Whitney,	A. O. Whitney,
Joseph Bogner,	Louise Whitney Landeau,
Joseph Haas,	
Lena Beck,	Minnie Griffen,
Vernon Weston,	C. O. Baker,
H. C. Spratey,	C. O. Baker, Special,
John Mitchell, Jr.,	C. W. Baker,
E. J. McKeever,	Septima M. Collis,
Max L. Meyers,	Anna F. Jones,

Digitized by Google

76 Referee's General Report.

John J. Giroy,	E. W. Steinicke,
L. F. Coleman,	Gray Casement,
Forence M. Brightman,	E. Dudley Barlow,
L. C. Niedermeyer,	W. Hunt Hall,
George Mercer,	Charles B. Halsey,
A. H. Laidaw,	Ellen C. Manning,
Annie R. Whitney,	Arthur B. Waring,
E. A. Whitney,	John F. Carroll,
Annie R. Spratley,	Willard S. Crossman,
W. R. Willis,	J. D. Jones,
S. H. Voorhees,	James H. Mayhew,
Charles F. Pape,	I. Morgan Lewis.

77 Tenth. That on the 11th day of July, 1911, the said assignee presented to this Court an account of his proceedings as Assignee, verified by his oath thereto, made on the 8th day of July, 1911, stating his account as follows:

	Dr.	
Amount, as per inventory,	$106,630.00	
Increase, as shown by Schedule A,	8,970.63	
Property not included in inventory, as shown by Schedule B,	240.00	
		$115,840.63

78

	Cr.	
Amount of assets included in schedules not realized, as per Schedule C,	50.00	
Amount of Schedule D,	9,723.86	
Amount paid to creditors, as shown by Schedule E,	47,777.61	
		$57,551.47
Leaving a balance of		$58,289.16

Digitized by Google

 79

Eleventh. That upon petition of the said Assignee, verified by him on the 8th day of July, 1911, this Court, by order made by the Honorable Edward J. Gavegan, one of the Justices thereof, directed a citation to issue to all persons interested, requiring them to appear in court on a day to be therein specified, and to show cause why a settlement of the account of proceedings of the said Assignee should not be had; and if no cause be shown, to attend the settlement of such account, and such order further directed that said citation be served on each credior who had filed his claim by depositing a copy of the same at least thirty (30) days 80
before the return day thereof in the post office at the place where the Assignee resided, duly enclosed and directed to each of said creditors, at his last known post office address, with the postage prepaid, and by publishing said citation once every week for at least six (6) weeks prior to the return day in the New York Law Journal and the New York American, newspapers published in the City and County of New York.

Twelfth. That such citation was thereupon issued out of and under the seal of this Court, returnable on the 5th day of September, 1911. That the said citation was duly served by personal service upon 81
the following:

United States Fidelity & Guaranty Company, the surety upon the bond of the Assignee herein, on the 17th day of July, 1911, James V. Geraghty on the 18th day of July, 1911, and Girard N. Whitney on the 19th day of July, 1911, as appears by the affidavits of Charles H. Burnett.

That said citation was duly published in the New York Law Journal and the New York American, papers published in the City and County of New

Digitized by Google

82 Referee's General Report.

York, once a week for six (6) weeks, beginning on the 14th day of July, 1911, and ending on the 1st day of September, 1911, as appears by the affidavits of John J. Cosgrove and Louis C. Zimmer. That a copy of the said citation was also duly mailed to all the creditors who had presented claims or whose names appeared upon the books of the assignor, at their last known place of address. That said notices were enclosed in sealed, postpaid envelopes, on which was plainly typewritten a direction to return said envelope, if not delivered, to the Assignee within ten (10) days, and that none of them was so
83 returned.

Thirteenth. That by order made by the Honorable Edward J. Gavegan, on the 6th day of September, 1911, this Court referred the said account to me to take and state the same and to settle the accounts of said Bayard L. Peck as Assignee and to take proof and report as to the persons entitled to share in the assigned estate, their respective priorities and proportions.

Fourteenth. That the following objections to the said account have been filed:

An objection filed by Annie R. Spratley on ac-
84 count of the payment of forty-seven thousand seven hundred seventy-seven dollars and sixty-one cents ($47,777.61) out of the estate as dividends on the claims of the creditors of the firm of Whitney & Kitchen. A copy of this objection is hereto annexed, together with my opinion as to the method of distribution of this estate.

An objection filed by John F. McIntyre on account of the payment of forty-seven thousand seven hundred seventy-seven dollars and sixty-one cents ($47,777.61) out of the estate as dividends on the

Digitized by Google

86

claims of the creditors of the firm of Whitney & Kitchen. A copy of this objection is annexed hereto.

An objection to the allowance of the claim of Dudley S. and Herbert S. Harde by Bayard L. Peck as Assignee, the said Assignee having rejected the same, and my findings of fact and conclusions of law thereon are annexed hereto.

The claim of Dudley S. and Herbert S. Harde was rejected by the Assignee, and an objection to its allowance was also taken by Thomas F. Gilroy, Jr., as attorney for John J. Gilroy. The Assignee likewise rejected the claim of Jonas H. Monheimer; and Thomas F. Gilroy, Jr., as attorney for John F. McIntyre, likewise objected to the allowance of this claim. I took testimony of all parties as to both of these claims, and my findings of fact and conclusions of law in regard thereto are annexed hereto, together with my opinion with reference to each of said claims.

86

The claims of John F. McIntyre, as an individual creditor against this estate were rejected by the assignee and my findings of fact and conclusions of law on these claims are hereto annexed, together with my opinion as to the manner in which this claimant should share in this estate.

87

Fifteenth. That in accordance with Rule III of the Special Rules in First Judicial Department of the New York Supreme Court, regulating the Special Terms of the Supreme Court in and for the County of New York and establishing the calendar practice therein, a notice of hearing before me as Referee, at my office, No. 96 Broadway, New York City, on the 10th day of November, 1911, at three o'clock in the afternoon, and a notice to present claims, duly verified, to me as said Referee, at my office, No. 96 Broadway, on or before the said last

Digitized by Google

88 Referee's General Report.

named day, was duly served upon all the creditors who had appeared herein upon the return of the citation and upon all creditors whose names appeared upon the books of the assignor, being all the creditors of the assignor herein, more than twenty (20) days prior to the day set in said notices, by depositing a true copy of each of said notices in the Wall Street Branch of the General Post Office, which notices were contained in securely closed, duly post-paid wrappers; that each of the envelopes containing said notices had typewritten on the outside the following:

89 "If not called for, return within ten (10) days to Daniel Burke, 44 Pine Street, New York City."

That none of said notices has been returned, except one addressed to A. Bowser, Regina, Sask., Canada, who had no claim against the estate.

Sixteenth. No claims were filed with me in response to the notice to present claims to me as Referee, referred to in Paragraph Fifteenth of this report.

Seventeenth. That the following named persons appeared before me on said reference in person:

90 James V. Geraghty, E. Dudley Barlow, Girard N. Whitney.

And the following by counsel:

Edward J. McKeever by Bernard J. York,
William R. Willis by John R. Halsey,
Dudley S. and Herbert S. Hardt by George W. Phillips, Jr.,
Charles F. Pope by Charles F. Runk,
Jonas Monheimer by James Cowden Myers,
John F. McIntyre by Thomas F. Gilroy, Jr.,

Digitized by Google

Gray Casement by E. Dudley Barlow,
W. Hunt Hall by E. Dudley Barlow,
Arthur Waring by C. S. Pinkney,
United States Fidelity & Guaranty Company by Leonidas Dennis,
Girard N. Whitney by Ivins, Mason, Wolff & Hoguet,
Joseph Bogner by Ivins, Mason, Wolff & Hoguet.
Bayard L. Peck by Daniel Burke,
Gideon E. Fountain by Richard J. Lewis,
E. C. Kenney Manning by T. A. Leary,
Annie R. Spratley by Ivins, Mason, Wolff & Hoguet. 92

Eighteenth. That the said assignee, immediately after the execution, approval and filing of his bond, entered upon his duties as such assignee; that he reduced to possession the assigned estate, consisting of real estate and the property rights in a seat on the New York Stock Exchange, as shown in Schedule A of his account herein and the personal property shown in Schedules B and C of his account herein.

Nineteenth. That the said assignee realized on the sale of property and the collection of rents included in the schedules a total sum of one hundred fifteen thousand seven hundred ninety dollars and sixty-three cents ($115,790.63); that he paid out and expended the sum of ninety-seven hundred twenty-three dollars and eighty-six cents ($9,723.86), including eighteen hundred forty-nine dollars and sixty-seven cents ($1,849.67) for taxes on real estate and two thousand dollars ($2,000) on account of his commissions; that the vouchers for all the items of which expenses I have examined and found correct, and with which amounts, no objection having been made thereto, he should be credited as having 93

Digitized by Google

94 been made upon proper, reasonable and necessary expenses in the administration of the assigned estate; that he has faithfully performed the duties of his trust herein, and that his accounts should be stated, and I hereby do state them as follows:

	Dr.	
Amount, as per inventory	$106,630.00	
Increase, as shown by Schedule A,	8,970.63	
Property not included in inventory, as shown by Schedule B,	240.00	
95		$115,840.63
	Cr.	
Amount of assets included in schedules not realized, as per Schedule C,	50.00	
Amount of Schedule D,	9,723.86	
		9,773.86
Leaving a balance of		$106,066.77
96 Deduct the amounts paid out by the Assignee since the filing of his original account for publishing the citation to creditors, postage and other expenses, as follows:		55.65
Leaving a balance of		$106,011.12

Digitized by Google

97

in the hands of the assignee subject to distribution, after the deducting therefrom of the costs and expenses and allowances of this accounting and the unpaid commissions of the assignee, among those hereinafter mentioned as entitled thereto, in accordance with the direction of the deed of assignment herein.

Twentieth. That the commissions of the assignee herein amount to two and one-half per cent. (2½%) upon the total moneys, viz: one hundred fifteen thousand seven hundred ninety dollars and sixty-two cents ($115,790.62), received by him as assignee, namely $2,894.77, of which sum $2,000 has already been paid, leaving unpaid the sum of eight hundred ninety-four dollars and seventy-seven cents ($894.77) plus two and one-half per cent. (2½%) of the additional interest accrued and to accrue on the bank deposits of the assignee.

98

Twenty-first. Inasmuch as the individual creditors of Girard N. Whitney will be paid in full herein, pursuant to the terms of the assignment, interest is allowed on all individual claims, filed herein, and allowed as valid claims against the estate of Girard N. Whitney.

Twenty-second. Pursuant to the terms of the assignment herein and of the statute with reference to preferences in general assignments, the co-partnership creditors of Whitney & Kitchen, as indicated in my opinion, filed herewith, are entitled to a preference in this estate to the extent of one-third of the assets left after deducting the costs and expenses of the execution of the trust.

99

Twenty-third. The assignee has already paid to the co-partnership creditors of Whitney & Kitchen the sum of $47,777.61, which is more than one-third

Digitized by Google

100 of this estate, after deducting the costs and expenses of the execution of the trust hereunder, but no credit has been allowed the assignee in his account herein for said payment. Out of said sum said co-partnership creditors received 20% of the principal amount of their claims, except John F. McIntyre, whose claim was figured at $30,814.63 instead of $38,423.64, the amount received by said claimant being $6,162.93.

Twenty-fourth. The balance remaining in the hands of the assignee, as stated in paragraph nineteenth of this report and any further interest re-
101 ceived from the funds of the assigned estate should be distributed by him as follows:

(a) The assignee should first pay the costs and expenses of this accounting, including the fees of the Referee and stenographer, and such allowances as may be granted by the Court.

(b) The assignee should next retain the amount of his commissions as found and allowed by paragraph twentieth hereof, namely $894.77, and 2½% on any further interest received.

(c) The assignee should then distribute the bal-
102 ance then found remaining after the deduction of said costs, expenses, fees, allowances and commissions as follows:

The assignee having already paid to the co-partnership creditors of Whitney & Kitchen a sum in excess of one-third of this estate, for which payment the assignee has received no credit in his account herein, said assignee is first entitled to credit his account with one-third of such balance.

Out of the remaining two-thirds the assignee will then pay the individual creditors of Girard N. Whitney their claims in full, with interest in the

Digitized by Google

amount set opposite their respective names, and at and for said amounts with interest as aforesaid, the said claims should be and they hereby are found to be valid claims against the assigned estate herein.

CLAIMS AGAINST GIRARD N. WHITNEY.

Name	Address	Description of Claim	Amount
Philip Blass,	22 Beaver Street, New York City,	Merchandise,	$14.00
Dann & Peckner,	50 Broadway, New York City,	Merchandise,	6.50
Matthew I. Fox,	Broadway & 25th St., New York City,	Merchandise,	355.50
D. S. and H. S. Harde,	25 Broad St., New York City,	Rent due and to grow due,	5,000.00
Jonas H. Monheimer,		Rent,	1,500.00
Reed & Barton,	5th Avenue & 32d St., New York City,	Merchandise,	89.25
Annie R. Spratley,	500 W. 111th St., New York City,	Money loaned,	20,000.00
Annie R. Spratley,	500 West 111th St., New York City,	Costs and allowances,	1,379.95
Weingarten & Pearl,	34 West 35th St., New York City,	Merchandise,	107.30
Percy H. Williams, M. D.,	222 West 72d St., New York City,	Medical attendance	55.00

104

105

The assignee will then credit his account with the difference between $47,777.61, heretofore paid by him to the co-partnership creditors and the amount credited to his account, as above directed, as the one-third part of this estate, to which the

Digitized by Google

106

co-partnership creditors were entitled. Out of the funds then in his hands the assignee should then pay to John F. McIntyre a sufficient amount to make the percentage paid to him as a co-partnership creditor of Whitney & Kitchen out of the estate of Girard N. Whitney, on account of his claims, equal to the percentage paid to the other creditors of Whitney & Kitchen out of the estate of Girard N. Whitney, namely the sum of $1,521.79.

The balance of the fund remaining in his hands the assignee will then distribute among the co-partnership creditors of Whitney & Kitchen, *pro rata*
107 to the amount set opposite their respective names, and at and for said amounts the said claims should be and they are hereby found to be valid claims against the co-partnership creditors of Whitney & Kitchen, and entitled to share in this estate as hereinabove directed.

108

Digitized by Google

Referee's General Report.

CLAIMS AGAINST CO-PARTNERSHIP OF WHITNEY & KITCHEN.

Name.	Address.	Description of Claim.	Amount
oger W. Babson, Inc.,	Wellesley Hills Station, Boston, Mass,	On Contract	$15.0
ena Beck,	124 Hobart Avenue, Bayonne, New Jersey,	" "	306.0
. Dudley Barlow,	290 Broadway, New York City,	" "	522.0
ulie Brightman,	3 East 63d Street, New York City,	" "	353.9
. Ethel Bowman,	Dickson Ave., Liberty, New York, Sullivan Co.,	" "	35.9
oseph Bogner,	443 West 47th Street, New York City,	" "	5165.8
lorence Mead Brightman,	C/o H. I. Brightman, 115 Broadway, New York City,	" "	252.3
. A. Buttrick & Co.,	18 Wall Street, New York City,	" "	20.2
harles W. Baker,	408 New Jersey Railroad Ave., Newark, New Jersey,	" "	7024.0
yrus O. Baker,	30 Church Street, New York City,	" "	13798.9
yrus O. Baker,	30 Church Street, New York City,	" "	7271.4
. Mont Benton Co.,	526 West 28th Street, New York City,	" "	14.5
eptima M. Collis,	C/o S. L. Levy, 133 Bank Ave., Philadelphia, Pa.,	" "	19824.9
dward B. Corey,	Far Rockaway, Long Island,	" "	43.1
ray Casement,	Painesville, Ohio,	" "	6540.3
. M. Coleman,	59 Cedar Street, New York, C/o Winslow, Lanier & Co.,	" "	1580.3
ohn F. Carroll,	3 East 14th Street, New York City, Fourteenth Street Bank,	" "	394.3
Villard S. Crossman,	15 West 4th Street, New York City,	" "	545.0
ane M. Craine,	7 Mount Morris Park West, New York City,	" "	.4
rchibald Douglas,	280 Broadway, New York City,	" "	3.9
ow, Jones & Co.,	44 Broad St., New York,	" "	15.0
Varren W. Erwin,	26 Beaver St., New York,	" "	18497.9
erris Faulkner,	320 Fifth Ave., New York,	" "	667.4
inancial Calendar Company,	25 West Broadway, New York City,	" "	25.0
ideon E. Fountain,	318 West 88th Street, New York City,	" "	13156.0
olin J. Gilroy,	165 Broadway, New York,	" "	1964.8
wynne Bros.,	38 Broad St., New York,	" "	29.8
innie Griffen,	C/o A. O. Whitney, "The Sutherland," 158th St. & Riverside Drive, New York City,	" "	512.3
erry & Murray,	75 Broad St., New York,	" "	8.8
. Hunt Hall,	100 William St., New York,	" "	1296.8
oseph Haas,	555 West 48th St., New York,	" "	258.4
harles B. Halsey,	1048 Fifth Ave., New York,	" "	1501.1
nna Fry Jones,	"The Cordova," Florida Avenue and 20th St. N. W., Washington, D. C.,	" "	845.0
r. J. D. Jones,	240 Genesee Street, Utica, New York,	" "	55.9

Digitized by Google

Digitized by Google

Louise Whitney Landeau, C/o A. O. Whitney, "The Sutherland," 158th Street & Riverside Drive, New York City,	"	"	5543..
H. Morgan Lewis, Rocky Hill, New Jersey,	"	"	438..
A. H. Laidlaw, 57 Duane Street, New York,	"	"	2138..
Arthur Lipper & Co., 20 New Street, New York,	"	"	7..
Thomas E. Murray, 57 Duane St., New York,	"	"	965..
John Mitchell, Jr., 1030 Lexington Avenue, New York City,	"	"	117..
Frances G. Maher, Cedar Avenue, Far Rockaway, Long Island,	"	"	70..
Max L. Meyers, O. J. Gude Company, 935 Broadway, New York City,	"	"	145..
Edward J. McKeever, 105 Sixth Ave., Brooklyn, New York,	"	"	4138..
James H. Mayhew, Fort Schuyler, Westchester County, New York,	"	"	1000..
Ellen C. Manning, 419 West 129th St., New York City,	"	"	1178..
George Mercer, Jr., 226 West 23d St., New York,	"	"	10249..
Godfrey S. Mahn, 6 Wall St., New York City,	"	"	4..
John F. McIntyre, 25 Broad Street, New York,	Judgment for Conversion,		36356..
John F. McIntyre, 25 Broad St., New York,	Costs in Appellate Division,		249..
John F. McIntyre, 25 Broad St., New York,	Allowance,		1817..
New York Financial Bulletin, 49 Broadway, New York,	On Contract,		5..
Louis C. Niedermeyer, 458 West 33d Street, New York City,	"	"	174..
New York News Bureau, 40 Stone St., New York,	"	"	30..
Charles F. Pope, 61 East 65th St., New York,	"	"	2438..
Postal Telegraph-Cable Co., 253 Broadway, New York,	"	"	3..
Postal Telegraph-Cable Co., 253 Broadway, New York,	"	"	3..
Redmond & Co., 33 Pine St., New York,	"	"	175..
Annie R. Spratley, 500 West 111th St., New York City,	"	"	1054..
Henry C. Spratley, 554 West 113th St., New York City,	"	"	89..
Edward B. Smith & Co., 27 Pine St., New York,	"	"	5..
Edward W. Steinicke, 129 Vernon Ave., Long Island City,	"	"	1252..
Daniel G. Tenney, 15 West 4th St., New York,	"	"	10..
S. H. Voorhees, 826 Arlington Avenue, Plainfield, N. J.,	"	"	32093..
Arthur B. Waring, Waring Hat Mfg. Co., Yonkers, New York,	"	"	18415..
Vernon Weston, C/o F. F. Ames, 44 Broad St., New York City,	"	"	217..
Albert O. Whitney, "The Sutherland," Riverside Drive & 158th Street, N. Y.,	"	"	6126..
William R. Willis, Broad and Maple Avenues, Morsemere, New Jersey, Ridgefield Post Office,	"	"	12936..
Annie R. Whitney, 620 West 116th St., New York,	"	"	667..
Emily A. Whitney, 509 West 110th St., New York,	"	"	2997..
Yost Writing Machine Co., 345 Broadway, New York City,	"	"	..

Digitized by Google

Digitized by Google

 109

That of the above claims the following have been assigned and payment should be made to the assignees of such claims in accordance with the assignments:

Septima M. Collis to Solomon L. Levy, March 10th, 1911,

Warren W. Erwin to Assets Realization Co., March 9th, 1909,

Ferris Faulkner to Assets Realization Co., Oct. 9th, 1908,

Charles B. Halsey to Assets Realization Co., Aug. 6th, 1908,

H. C. Spratley to Assets Realization Co., Aug. 11th, 1908, 110

Annie R. Spratley to Assets Realization Co., July 7th, 1908,

Annie R. Whitney to Assets Realization Co., July 7th, 1908,

Emily A. Whitney to Assets Realization Co., July 7th, 1908,

Arthur B. Waring, to the extent of Twelve thousand four hundred dollars ($12,400) to W. S. Prankard, February 8th, 1908, and by W. S. Prankard to the Assets Realization Company, July 18th, 1908.

Twenty-fifth. That after making the payments as above directed and taking the proper vouchers therefor, the Assignee is entitled to the usual order or decree discharging him and his surety from all liability in the premises. 111

The testimony taken and the exhibits offered in evidence before me are filed herewith.

All of which is respectfully submitted.

Dated, New York,

(signed) WILLIAM F. MCCOMBS,
Referee.

Digitized by Google

112 Referee's General Report.

Exhibit A.

This agreement made this day of , 1908, by and between the parties signing it, creditors of the firm of Whitney & Kitchen, and between them and Girard N. Whitney and James V. Geraghty, the members of the said firm, witnesseth:

First: That the amount of the claim of each creditor signing this instrument (hereafter referred to as assenting creditors) against the firm of Whitney & Kitchen and its assignee is hereby
113 liquidated and fixed at the amount set opposite his name in Schedule A, hereto annexed, together with interest thereon at six per cent. per annum from the 16th day of January, 1908.

Second: That one assenting creditor shall not have any priority whatever over another assenting creditor. If a non-assenting creditor claims a priority an assenting creditor may also claim one, but each assenting creditor receiving a preference agrees that the advantage so secured shall be shared by the other assenting creditors, so that the total amount received by each shall be the same percentage of his claim.

114 Third: That no assenting creditor shall make or join in any application to have said firm or either of its members adjudged a bankrupt. If the firm or either member, however, shall be adjudged a bankrupt the execution of this agreement shall not prejudice any right that an assenting creditor would otherwise have in the bankruptcy proceeding, either in respect of the amount of his claim or in any other respect.

Digitized by Google

115

Fourth: This agreement shall not be binding on the creditors until the following things have been done:

(A) Until deeds have been executed by the partners to the assignee covering all lands or land owned by either of them, or included in the assignments to Bayard L. Peck, either of the firm or of the individual members thereof, which deeds must include a release of all dower interest therein.

(B) Until mortgages upon real estate having an appraised value of at least fifty seven thousand eight hundred and fifty dollars ($57,850) shall be executed and delivered to the assignee, to secure the payments of debts due the said firm, by Henry Spratley and Horace P. Whitney to the amount of Twenty Five Thousand Two Hundred and Seventeen Dollars and Forty Five Cents ($25,217.45) and Eighteen Thousand Six Hundred and Fifty Seven Dollars and Ninety Two Cents ($18,657.92) respectively.

116

This agreement may be executed in any number of parts, which together shall be deemed but one instrument.

In witness whereof we have hereunto set our hands and affixed our seals the day and year first above written.

117

Witness

Digitized by Google

118 Referee's Special Report.

Referee's Report—Claims of John F. McIntyre.

SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Final Accounting of BAYARD L. Peck, as Assignee of Girard N. Whitney, under a General Assignment for the Benefit of Creditors.

119 Claims of John F. McIntyre.

The undersigned, appointed by this Court as sole Referee to take proof and report as to the persons entitled to share in the assigned estate, their respective priorities and proportions, having first taken the oath of office hereto annexed, and having heard and considered the allegations and proofs of John F. McIntyre and Bayard L. Peck, as Assignee, as to the claims of the said McIntyre, rejected by
120 the said Assignee as individual claims against the estate of Girard N. Whitney, and having heard Thomas F. Gilroy, Jr., Esq., of counsel for John F. McIntyre, and Daniel Burke, Esq., of counsel for the assignee, reports to the Court and decides and finds as follows:

Findings of Fact.

I. That on or about the 24th day of March, 1911, John F. McIntyre filed his claim against Girard N. Whitney with the assignee, reading as follows:

Digitized by Google

Proof of Claim.

"The undersigned hereby claims that Girard N. Whitney is justly indebted to him upon three certain judgments entered in his favor and against the said Girard N. Whitney in the office of the Clerk of the County of New York, as follows:

1st. A judgment for Thirty-six thousand, three hundred and fifty-six and 53/100 dollars ($36,356.53) entered and docketed in the office of the Clerk of the County of New York on May 10th, 1910, as modified by an order filed therein on July 28th, 1910, modifying an original judgment for twelve thousand, four hundred and sixty- two and 61/100 dollars ($12,462.61) entered and docketed in said County Clerk's office on the 10th day of May, 1910. 122

2nd. A judgment for two hundred and forty-nine and 29/100 dollars ($249.29) entered and docketed in the office of the Clerk of the County of New York on July 28th, 1910.

3rd. A judgment for nineteen hundred and forty-seven and 12/100 dollars ($1947.12) entered and docketed in the office of the Clerk of the County of New York on March 10th, 1911, on which one hundred and twenty-nine and 30/100 dollars ($129.30) has been paid by the United States Fidelity and Guaranty Company. 121

Transcripts of said judgments are hereto annexed.

Said judgments entered and docketed May 10th, 1910, as modified, is a judgment for damages recovered by the undersigned in an action against the said Girard N. Whitney and others for the con-

Digitized by Google

124 Referee's Special Report.

version by said Girard N. Whitney and others of five hundred (500) shares of Amalgamated Copper stock belonging to the undersigned, said judgment having been modified by the Appellate Division of the First Department on appeal therefrom and as modified affirmed; and said judgment as so modified having been thereafter affirmed by the Court of Appeals of the State of New York; the judgment of July 28th, 1910, being a judgment of affirmance thereof by the Appellate Division of the Supreme Court, First Department and the judgment of March 10th, 1911, being a judgment of af-

125 firmance thereof by the Court of Appeals.

No part of said claim has been paid except the sum of one hundred and twenty-nine and 30/100 dollars ($129.30) which has been paid by the United States Fidelity & Guaranty Company on the said judgment entered and docketed March 10th, 1911. There are no set offs or counterclaims to the same, and the undersigned has not now, nor has any person by his order or to the knowledge or belief of claimant, for his use, had or received any manner of security belonging to said Girard N. Whitney for said claim whatever.

This claim is made against the Estate of Girard

126 N. Whitney to the extent of any deficiency in the payment of said judgments or the interest thereon from the assets of the Estate of Whitney & Kitchen.

Dated, New York, March 21st, 1911.

JOHN F. McINTYRE.
Claimant.

THOMAS F. GILROY, JR.,
Attorney for Claimant,
Office and Post Office Address,
42 Broadway,
New York City.

Digitized by Google

127

State of New York, }
County of New York, } ss.:

John F. McIntyre, being duly sworn, deposes and says: I am the claimant named in the foregoing claim. I have read the claim herein and know the contents thereof and the same is true to my own knowledge.

JOHN F. McINTYRE.

Sworn to before me this 21st day of March, 1911.
WILLIAM A. BURKEL,
Notary Public, Kings Co.,
Certificate filed in N. Y. Co."

128

II. That the said Bayard L. Peck, as Assignee of Girard N. Whitney, duly rejected the whole claim of the said John F. McIntyre.

III. That the assignment by Girard N. Whitney to Bayard L. Peck was in form and language as follows:

Assignment of Individual Partner: Girard N. Whitney.

129

This indenture, made this 25th day of January in the year one thousand nine hundred and eight between Girard N. Whitney residing at No. 116 Riverside Drive in the City of New York in the State of New York,
now carrying on the business of banker and broker as a member of the copartnership of Whitney and Kitchen at No. 1 Nassau street in the city of New York in the state of New York, party of the first part, and Bayard L. Peck of 103 Montague Street, in the Borough of Brooklyn, City and State of New York, party of the second part, Wit-

Digitized by Google

130 Referee's Special Report.

nesseth, that whereas the party of the first part individually and as a member of said copartnership is indebted to divers persons in sundry sums of money which he is unable to pay in full, and is desirous of providing for the payment of same, so far as is in his power, by an assignment of all his property for that purpose:

Now, therefore, the said party of the first part, in consideration of the premises and of the sum of one dollar to him paid by the party of the second part, upon the ensealing and delivery of these presents, the receipt whereof is hereby acknowl-
131 edged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over, unto the party of the second part, his successors and assigns, all and singular the lands, tenements, hereditaments, appurtenances, goods, chattels, stock, promissory notes, claims, demands, property and effects of every description belonging to the party of the first part wherever the same may be, except such property as is exempt by law from levy and sale under an execution. To have and to hold the same, and every part thereof, unto the said party of the second part, his successors and assigns:

132 In Trust, nevertheless, to take possession of the same, and to sell the same with all reasonable despatch, and to convert the same into money, and also to collect all such debts and demands hereby assigned as may be collectible, and with and out of the proceeds of such sales and collections, to first pay and discharge all the just and reasonable expenses, costs and charges of executing this assignment, and of carrying into effect the trust hereby created, together with the lawful commission of the party of the second part for his services in executing said trust;

Digitized by Google

133

And then to pay and discharge in full, if the residue of said proceeds is sufficient for that purpose, all the debts and liabilities now due or to grow due from the said co-partnership of Whitney and Kitchen and from the said party of the first part, with all the interest moneys due or to grow due thereon; and if the residue of said proceeds shall not be sufficient to pay the said debts and liabilities and interest moneys in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities ratably and in proportion.

And if, after the payment of all the said debts and liabilities in full, there shall be any remainder or residue of said property or proceeds, to repay and return the same to the said party of the first part, his executors, administrators or assigns.

134

And, in furtherance of the premises, the said party of the first part does hereby make, constitute and appoint the said party of the second part his true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created, and to ask, demand, recover and receive of and from all and every person or persons all property, debts and demands due, owing and belonging to the said party of the first part, and to give acquittances and discharges for the same; to sue, prosecute, defend and implead for the same, and to execute, acknowledge and deliver all necessary deeds, instruments and conveyances. And that said party of the first part hereby authorizes the said party of the second part to sign the name of the said party of the first part to any check, draft, promissory note or other instrument in writing which is payable to the order of the said party of the first part, or to sign the name of the party of the first part to any instrument in writ-

135

Digitized by Google

136 Referee's Special Report.

ing, whenever it shall be necessary so to do, to carry into effect the object, design and purpose of this trust.

The said party of the second part does hereby accept the trust created and reposed in him by this instrument, and covenants and agrees to and with the said party of the first part that he will faithfully and without delay execute the said trust, according to the best of his skill, knowledge and ability.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year
137 first above written.

GIRARD N. WHITNEY (L. S.)
BAYARD L. PECK. (L. S.)

State of New York, }
County of New York, } ss.:

On this 25th day of January in the year one thousand nine hundred and eight before me personally came Girard N. Whitney and Bayard L. Peck to me known, and known to me to be the individuals described in, and who executed the foregoing instrument, and severally acknowledged that
138 they executed the same.

JAMES T. OATES,
Notary Public,
New York County.

IV. That on the 25th day of April, 1908, the claimant herein, John F. McIntyre, presented to and filed with the said Bayard L. Peck, the following proof of claim:

Digitized by Google

139

"In the matter of WHITNEY & KITCHEN. Bayard L. Peck, Assignee. Whitney & Kitchen to John F. McIntyre, Dr.

Proof of claim of John F. McIntyre.

To damages for conversion of five hundred (500) shares of Amalgamated Copper Stock, the property of John F. McIntyre, at 90-3/8 dollars that being the highest price of same between July 27th, 1907, the date when claimant purchased same, and January 16th, 1908, the date when claimant learned of said conversion, after deducting $15,000, part of the purchase price thereof advanced by Whitney & Kitchen and not repaid, the said stock having been converted by Whitney & Kitchen to their own use, ...$30,337.50

140

With interest thereon from July 27th, 1907.

State of New York,
City of New York,
County of New York, } ss.:

141

John F. McIntyre, being duly sworn, doth depose and say, that he is the claimant herein, and that the annexed statement of the account of Whitney & Kitchen lately doing business in 1 Nassau street, New York City, in the state of New York, is just, true and correct, that there is now due thereon the sum of Thirty thousand, three hundred thirty-seven & 50/100 ($30,337.50) Dollars, with interest thereon from July 27th, 1907, that no part thereof has been paid or satisfied,

Digitized by Google

142 Referee's Special Report.

and that there are no set offs or counterclaims thereto to the knowledge or belief of deponent. That the said claim is not secured by mortgage or otherwise, nor is it a specific charge on the real estate of Whitney & Kitchen.

JOHN F. McINTYRE.

Sworn to before me this 23rd day of April, 1908.

DAVID C. HIRSCH,
Commissioner of Deeds,
New York City."

143 V. On the 27th day of April, 1908, the said Bayard L. Peck wrote and duly delivered to the said John F. McIntyre the following communication:

"(Letterhead of Whitney & Kitchen)

New York, April 27th, 1908.

Mr. John F. McIntyre,
25 Broad street,
N. Y. City, N. Y.

Dear Sir:

144 I hereby notify you that your alleged claim against Whitney & Kitchen for $30,337.50, the verified statement of which was received by me on April 25th, is hereby rejected.

Very truly yours,

BAYARD L. PECK,
Assignee."

Digitized by Google

Referee's Special Report. 145

VI. On the 12th day of June, 1908, an action was begun by the said John F. McIntyre by the service of the following summons and complaint:

Summons.

SUPREME COURT,

NEW YORK COUNTY.

JOHN F. McINTYRE,
Plaintiff,
against

GIRARD N. WHITNEY and James V. Geraghty, co-partners, doing business under the firm name and style of Whitney & Kitchen, and Bayard L. Peck, as assignee for the benefit of creditors of said co-partnership of Whitney & Kitchen,
Defendants.

146

147

To the above named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken

Digitized by Google

148 Referee's Special Report.

against you by default for the relief demanded in the complaint.

Dated, New York, June 3d, 1908.

THOMAS F. GILROY, JR.,
Plaintiff's Attorney,
Office and Post Office Address,
No. 42 Broadway,
Borough of Manhattan,
New York City.

---

149 **Complaint.**

SUPREME COURT,

NEW YORK COUNTY.

JOHN F. McINTYRE,
Plaintiff,

against

150 GIBARD N. WHITNEY and James V. Geraghty, co-partners, doing business under the firm name and style of Whitney & Kitchen, and Bayard L. Peck, as Assignee for the Benefit of the Creditors of said co-partnership of Whitney & Kitchen,
Defendants.

The plaintiff above named, by Thomas F. Gilroy, Jr., his attorney, complaining of the defend-

Digitized by Google

151

ants above named, respectfully shows to this Court and alleges as follows:

First. On information and belief, that at all the times herein mentioned, the defendants Whitney & Geraghty were and still are general co-partners conducting the business of stock brokers in the City of New York under the firm name or style of Whitney & Kitchen.

Second. On information and belief, that heretofore and on or about January 16th, 1908, said co-partnership of Whitney & Kitchen, composed as aforesaid, duly made, executed and filed a general assignment for the benefit of creditors with the defendant Bayard L. Peck, and he duly qualified as such assignee and duly took possession of the assets of said co-partnership and is now in possession thereof, and ever since has been and is now acting as such assignee.

152

Third. That on or about July 27th, 1907, said co-partnership, at plaintiff's special instance and request, duly purchased for his account and risk five hundred (500) shares of the capital stock of the Amalgamated Copper Company at the then market price, to wit, ninety dollars ($90) a share, including the commission of said co-partnership.

153

Fourth. That upon said day plaintiff deposited with the said co-partnership the sum of five thousand dollars ($5,000) in cash as margin upon said transaction and as part payment of the purchase price of said shares.

Fifth. That the said co-partnership agreed to advance to plaintiff the balance of the purchase price of said shares and to hold the said shares as collateral security for such advances.

Sixth. That thereafter and on or about the 7th day of August, 1907, the plaintiff deposited with

Digitized by Google

154 Referee's Special Report.

said co-partnership at its demand and request, the further sum of ten thousand dollars ($10,000); and on or about the 15th day of August, 1907, the further sum of five thousand dollars ($5,000); and on or about the 17th day of October, 1907, the further sum of five thousand dollars ($5,000); and on or about the 23rd day of October, 1907, the further sum of five thousand dollars ($5,000); all of said sums being deposited as aforesaid with said co-partnership at its request and demand by plaintiff in money, as margins upon said transaction and as part payment of the purchase price of
155 said five hundred (500) shares of Amalgamated Copper Company, and as partial repayment of the said advances made by said co-partnership as aforesaid.

Seventh. On information and belief, that on or about the 27th day of July, 1907, the defendants Whitney and Geraghty, composing the said co-partnership as aforesaid, without the consent or knowledge of plaintiff and in violation of his ownership and of his rights in said stock, and in violation of the said agreement between plaintiff and said co-partnership, disposed of said five hundred (500) shares of stock of the Amalgamated
156 Copper Company and converted the same to their own use.

Eighth. That heretofore and prior to the commencement of this action, plaintiff has duly demanded from the defendants herein the return to him of said stock and has duly offered to pay the balance due thereon, but said defendants have failed, neglected and refused to return the same, and on information and belief the said stock is not in the possession of said defendants or of any of them.

Ninth. That plaintiff did not know of the said conversion of said five hundred (500) shares of

Digitized by Google

the Amalgamated Copper Company until on or about January 16th, 1908. 157

Tenth. On information and belief, that the highest price for which said stock sold on the open market between July 27th, 1907, and January 16th, 1908, was ninety dollars, thirty-seven and one-half cents ($90.37½) per share.

Eleventh. That on or about the 24th day of April, 1908, and prior to the commencement of this action, plaintiff duly presented to the defendant Peck, as assignee as aforesaid, due proof of his said claim against the assigned estate of which said Peck is assignee, as set forth herein, but that said assignee rejected the same and refused to allow said claim as a valid claim against said estate. 158

Twelfth. That by reason of the aforesaid, plaintiff has been damaged by the defendants in the sum of forty-five thousand, three hundred and thirty-seven and 50/100 dollars ($45,337.50), less fifteen thousand dollars ($15,000) of advances by said co-partnership remaining unpaid by plaintiff, and said defendants are indebted to plaintiff in the sum of thirty thousand three hundred and thirty-seven and 50/100 dollars ($30,337.50) with interest thereon from July 27th, 1907. 159

Wherefore, plaintiff demands judgment against the defendants for the sum of thirty thousand three hundred and thirty-seven and 50/100 dollars ($30,337.50) with interest thereon as aforesaid, besides the costs and disbursements of this action.

THOMAS F. GILROY, Jr.,
Attorney for Plaintiff,
Office and Post Office Address,
No. 42 Broadway,
Borough of Manhattan,
New York City.

Digitized by Google

160 Referee's Special Report.

State of New York, } ss.:
County of New York, }

John F. McIntyre, being duly sworn, deposes and says: I am the plaintiff named in the foregoing action. I have read the complaint herein, and know the contents thereof and the same is true to my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

JOHN F. McINTYRE.

Sworn to before me this }
161 9th day of June, 1908. }

DAVID C. HIRSCH,
Commissioner of Deeds,
New York City.

162

Digitized by Google

 163

VII. On the 26th day of September, 1908, a stipulation was signed amending the complaint as follows:

Stipulation Amending Complaint.

SUPREME COURT,

NEW YORK COUNTY.

164

JOHN F. McINTYRE,
Plaintiff,

against

GERARD N. WHITNEY and James V. Geraghty, co-partners doing business under the firm name and style of Whitney & Kitchen, and Bayard L. Peck, as assignee for the benefit of creditors of said co-partnership of Whitney & Kitchen,
Defendants.

165

It is hereby stipulated between the parties hereto that the Eighth paragraph of the complaint herein shall be amended so as to read as follows: In all respects as if said eighth paragraph had been so recorded in the complaint served herein:

"Eighth: That prior to the commencement of this action, and on January 16th, 1908, Janu-

Digitized by Google

166 Referee's Special Report.

ary 17th, 1908, and January 19th, 1908, plaintiff duly demanded from the defendants Whitney and Peck as assignee as aforesaid, and on January 21st, 1908, plaintiff duly demanded from the defendant Geraghty the return to him of said stock and at said times duly offered to pay the balance due thereon, but said defendants and each of them failed and neglected and refused to return the same and on information and belief said stock is not and was not then and has never since said conversion been in the possession of said defendants or of any of them."

167

And in all other respects said complaint remain as originally worded. This stipulation to take effect as of the day of service of the complaint upon the respective defendants herein.

Dated, New York, September 26th, 1908.

THOMAS F. GILROY, Jr.,
Attorney for Plaintiff.

BURKE & FAY,
Attorneys for Defendant Peck.

IVINS, MASON, WOLFF & HOGUET,
Attorneys for Defendant Whitney.

163

WHITMAN & VANDIVER,
Attorneys for Defendant Geraghty.

Digitized by Google

169

VIII. The following answers were duly served by the parties thereto upon Thomas F. Gilroy, Jr., attorney for the said John F. McIntyre:

Answer of Defendant Whitney.

SUPREME COURT,

NEW YORK COUNTY.

JOHN F. McINTYRE,
Plaintiff,

against

GIRARD N. WHITNEY and James V. Geraghty, co-partners doing business under the firm name and style of Whitney & Kitchen, and Bayard L. Peck, as assignee for the benefit of creditors of said co-partnership of Whitney & Kitchen,
Defendants.

170

171

The defendant Girard N. Whitney above named by Ivins, Mason, Wolff & Hoguet, his attorneys, answering the complaint of the plaintiff.

First. Denies that the defendants Whitney and Geraghty still are or since the 16th day of January, 1908, have been co-partners conducting the business of stockbrokers in the City of New York under the firm name or style of Whitney & Kit-

Digitized by Google

172

chen or otherwise, and admits each and every other allegation contained in paragraph "First" of the said complaint.

Second. Admits that heretofore and on or about January 16th, 1908, said co-partnership of Whitney & Kitchen, composed as aforesaid, duly made, executed and filed a general assignment for the benefit of creditors, with the defendant Bayard L. Peck, and denies that he has any knowledge or information of any of the other allegations contained in paragraph "Second" of the said complaint sufficient to form a belief thereof.

173

Third. Admits each and every allegation contained in paragraphs "Third" and "Fourth" of the said complaint.

Fourth. Denies that the said co-partnership agreed to hold the said shares as collateral security for such advances or otherwise, and admits each and every other allegation contained in paragraph "Fifth" of the said complaint.

Fifth. Denies on information and belief that the sums specified in paragraph "Sixth" of the said complaint were deposited with the said co-partnership as part payment of the purchase price of

174

said five hundred shares of Amalgamated Copper Company, and admits each and every other allegation contained in paragraph "Sixth" of the said complaint.

Sixth. Denies on information and belief each and every allegation contained in paragraph "Seventh" of the said complaint.

Seventh. Admits that heretofore and prior to the commencement of this action and on the 16th day of January, 1908, plaintiff demanded from this defendant the return to him of said stock and

Digitized by Google

admits that this defendant has failed to return the same, and admits that said stock is not and was not then in the possession of this defendant and denies, on information and belief, that at said time or at any other times plaintiff duly offered to pay to this defendant the balance due thereon, and denies upon information and belief that there ever was a conversion of said stock, and denies that he has any knowledge or information of any of the other allegations contained in paragraph "Eighth" of the said complaint as amended, sufficient to form a belief thereof.

Eighth. Denies that he has any knowledge or information of any of the allegations contained in paragraphs "Ninth," "Tenth" and "Eleventh" of the said complaint sufficient to form a belief thereof.

Ninth. Denies on information and belief, each and every allegation contained in paragraph "Twelfth" of the said complaint.

Wherefore this defendant demands judgment dismissing the complaint of the plaintiff, together with the costs of this action.

IVINS, MASON, WOLFF & HOGUET,
Attorneys for Defendant,
Girard N. Whitney,
Office and Post Office Address,
27 William Street,
Borough of Manhattan,
New York City

Digitized by Google

178 Referee's Special Report.

State of New York, }
County of New York. } ss.:

Girard N. Whitney, being duly sworn, deposes and says, that he is one of the defendants herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

GIRARD N. WHITNEY.

179 Sworn to before me this 3rd day of October, 1908.

K. RICHARD WALLACH,
Notary Public No. 201,
New York County.

180

Digitized by Google

 181

Answer of Defendant Geraghty.

SUPREME COURT,

NEW YORK COUNTY.

JOHN F. McINTYRE,
Plaintiff,

against

GERARD N. WHITNEY and James V. Geraghty, co-partners doing business under the firm name and style of Whitney & Kitchen, and Bayard L. Peck, as assignee for the benefit of creditors of said co-partnership of Whitney & Kitchen,
Defendants. 182

The above named defendant James V. Geraghty, by his attorneys, Whitman & Vandiver, answering the complaint of the plaintiff herein: 183

First. Defendant Geraghty admits that defendants Whitney and Geraghty were general co-partners as set forth in the complaint prior to the 16th day of January, 1908.

Second. Defendant Geraghty admits the allegations contained in Paragraph Second of said complaint.

Third. Defendant Geraghty admits the allegations contained in Paragraph Third of said complaint.

Digitized by Google

184 Referee's Special Report.

Fourth. Defendant Geraghty denies the allegations contained in Paragraph Fourth of said complaint.

Fifth. Defendant Geraghty denies that there was any agreement made by the firm of Whitney & Kitchen or by and between Girard N. Whitney or James V. Geraghty and this plaintiff, to advance to this plaintiff any of the balance of any purchase price of any shares or to hold the said shares as collateral security for such advances.

Sixth. Defendant Geraghty admits that the
185 sums mentioned in Paragraph Sixth of said complaint were paid on or about the dates alleged, and defendant alleges that said sums were paid by check and not in money, and that said sums were paid as margins upon the transactions which are set forth in said complaint and not as a partial payment of the purchase price of five hundred (500) shares of the Amalgamated Copper Company.

Seventh. Defendant Geraghty denies the allegations contained in paragraph Seventh of said complaint.

Eighth. Defendant Geraghty denies that this plaintiff ever demanded from this defendant
186 Geraghty or from the firm of Whitney & Kitchen the return of the stock, or that he has duly offered to pay the balance due thereon but defendant admits that he has not returned the same, and alleges that it is not now in the possession of this defendant.

Ninth. Defendant Geraghty denies that the firm of Whitney and Kitchen or this defendant ever converted the said five hundred (500) shares of the Amalgamated Copper Company as alleged in plaintiff's complaint, or that the said firm of Whitney & Kitchen or that the defendant Geraghty

Digitized by Google

converted any shares of the property of this plaintiff at any time; and he further alleges that he has no knowledge or information sufficient to form a belief as to what the plaintiff knew previous to or on or about the 16th day of January, 1908.

Tenth. Defendant Geraghty admits the allegation contained in Paragraph Tenth of said complaint.

Eleventh. Defendant Geraghty has no knowledge or information sufficient to form a belief as to the allegation contained in Paragraph Eleventh of said complaint, and therefore denies the same.

Twelfth. Defendant Geraghty denies the allegation contained in Paragraph Twelfth of said complaint.

Thirteenth. Save as hereinbefore expressly admitted or denied, defendant Geraghty denies each and every allegation in said complaint contained.

Wherefore, defendant Geraghty demands judgment dismissing the complaint herein as to him, together with the costs and disbursements of this action.

WHITMAN & VANDIVER.
Attorneys for Defendant Geraghty,
No. 32 Nassau Street,
Borough of Manhattan,
New York City.

State of New York, }
County of New York, } ss.:

James V. Geraghty, being duly sworn, deposes and says: that he is one of the defendants herein: that he has read the foregoing answer and knows the contents thereof; that the same is true of his

Digitized by Google

190 Referee's Special Report.

own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JAMES V. GERAGHTY.

Sworn to before me this 13th day of October, 1908.

FLOYD H. WILMOT,
Comm'r. of Deeds,
N. Y. City.

---

191 **Answer of Defendant Peck.**

SUPREME COURT,

NEW YORK COUNTY.

JOHN F. McINTYRE,
Plaintiff,

against

GIRARD N. WHITNEY & James V. Geraghty, co-partners doing business under the firm name
192 and style of Whitney & Kitchen, and Bayard L. Peck, as Assignee for the benefit of creditors of said co-partnership of Whitney & Kitchen,
Defendants.

The above named defendant, Bayard L. Peck, as assignee, by his attorneys, Burke & Fay, answering the amended complaint of the plaintiff herein,

Digitized by Google

 193

First. Admits that the defendants Whitney & Kitchen were general co-partners at the times mentioned in the complaint previous to the 16th day of January, 1908, but as to whether they are still general copartners he has no knowledge or information sufficient to form a belief.

Second. Admits the allegations contained in the paragraphs marked "Second," "Third" and "Tenth" in the plaintiff's complaint.

Third. Upon information and belief, denies the allegations contained in the paragraphs marked "Fourth," "Seventh" and "Twelfth" in the plaintiff's said complaint. 194

Fourth. Upon information and belief, defendant denies that there was any agreement by said Whitney & Kitchen to advance any balance of any purchase price for any particular time, but admits that such balances were advanced and that the shares were held as collateral security for such advances.

Fifth. Admits that the sums mentioned in the paragraph marked "Sixth" in the plaintiff's complaint were paid on or about the dates alleged. Denies that the said sums, however, were deposited in money, but admits that they were paid by check as margin upon the transactions alleged in said 195 complaint and as part payment of the purchase price of five hundred (500) shares of the Amalgamated Copper Company.

Sixth. Denies that the plaintiff ever demanded from this defendant the return of the stock or that the plainiff has duly offered to pay the balance due thereon. Defendant denies knowledge or information sufficient to form a belief as to any alleged demands of or offers to defendants Whitney and Geraghty.

Digitized by Google

196 Referee's Special Report.

Seventh. Admits that this defendant has not returned said stock and that it is not now in his possession and never has been; but defendant denies on information and belief all the allegations in said complaint contained and not expressly admitted or denied in this answer.

Eighth. Upon information and belief defendant denies that there was a conversion of the said five hundred (500) shares of the Amalgamated Copper Company, as alleged in plaintiff's complaint, and alleges that he has not knowledge or information sufficient to form a belief as to what the plain-
197 tiff knew previous to or on or about the 16th day of January, 1908.

Ninth. Defendant admits that he rejected a certain claim presented by plaintiff to him as assignee, and admits that he refused to allow said claim as a valid claim against the said estate.

Wherefore, defendant Peck demands judgment dismissing the complaint herein as to him, together with the costs and disbursements of this action.

BURKE & FAY,
Attorneys for Defendant,
Bayard L. Peck, as Assignee,
198 No. 44 Pine Street,
New York City.

State of New York, }
County of New York, } ss.:

Bayard L. Peck, being duly sworn, deposes and says: That he is one of the defendants herein; that he has read the foregoing answer to the amended complaint and knows the contents thereof and that the same is true to his own knowledge,

Digitized by Google

except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

BAYARD L. PECK.

Sworn to before me this 1st day of October, 1908.

BURDETTE LEMUNYAN,
Notary Public,
New York County.

IX. On the 24th day of June, 1909, pursuant to stipulation of counsel, the trial of the said action was begun before the Hon. Charles F. Brown as referee to hear and determine.

X. That defendant Peck moved to dismiss said complaint as against him on the ground that he was not a proper party to the action.

Prior to the entry of judgment, the parties entered into the following stipulation:

"It is hereby stipulated and agreed:

First. That the defendant Peck shall withdraw his motion for a dismissal of the complaint.

Second. That no costs shall be taxed against the said Peck on the entry of judgment herein and that no personal judgment shall be entered against the said Peck in any capacity, and that by remaining as a party to the suit and appearing therein the said Peck shall not be deemed to have waived any rights.

Dated, New York, October 28th, 1909.

THOMAS F. GILROY, JR.,
Attorney for Plaintiff

BURKE & FAY.
Attorneys for Defendant
Bayard L. Peck as Assignee, etc.

Digitized by Google

202 Referee's Special Report.

That the complaint was dismissed as against Bayard L. Peck, but the said Peck continued in said action and appeared and took part in the appeals thereof.

XI. That the following findings of fact and conclusions of law were made herein by the said referee:

Referee's Report.

SUPREME COURT,

203 NEW YORK COUNTY.

JOHN F. McINTYRE,
Plaintiff,

against

GIRARD N. WHITNEY and James V. Geraghty, co-partners doing business under the firm name and style of Whitney & Kitchen, and Bayard L. Peck, as assignee of said co-partnership of Whitney & Kitchen,
204 Defendants.

To the Supreme Court:

Having been duly appointed the referee to hear and determine the above entitled action by an order of this Court, dated June 9th, 1909, and having taken the oath prescribed by Section 1016 of

Digitized by Google

the Code of Civil Procedure, and having been attended by the parties and their respective counsel, and having duly heard the proofs offered and the argument of counsel, now all things having been duly considered, I find the following: 205

Facts.

First. That between July 27th, 1907, and January 16th, 1908, the defendants Whitney and Geraghty were general co-partners conducting the business of stock brokers in the City of New York, under the firm name and style of Whitney & Kichen. 206

Second. That on January 16th, 1908, and before the commencement of this action, the said co-partnership of Whitney & Kitchen made, executed and delivered to the defendant, Bayard L. Peck, a general assignment for the benefit of creditors which assignment was thereafter and before the commencement of this action duly filed in the office of the Clerk of the County of New York, and the said defendant Peck thereafter and before the commencement of this action duly qualified as such assignee and duly took possession of the assets of said co-partnership and is now in possession thereof and ever since has been and is now administering the affairs of such assigned estate. 207

Third. That on July 27th, 1907, the said copartnership, at plaintiff's special instance and request, duly purchased for his account and risk five hundred (500) shares of the capital stock of the Amalgamated Copper Company at $89⅞ per share, and plaintiff on said day paid to said co-partnership the sum of five thousand dollars ($5,000) as margin upon said transaction and as part payment of the

Digitized by Google

208 Referee's Special Report.

purchase price of said shares. That said co-partnership at said time agreed to advance to plaintiff the balance of the purchase price of said shares, to wit, forty thousand dollars ($40,000) and agreed to hold the said shares as collateral security for such advances. That notice of such purchase was sent by defendants Whitney and Geraghty and received by plaintiff on the afternoon of July 27th, 1907. That said notice read as follows:

"WHITNEY & KITCHEN,
1 Nassau Street,

209 New York, July 27, 1907.

Mr. J. F. McIntyre,

We have this day bought for your account and risk 500 A. C. P. A. 89⅞ Halsey & Hudnut.

It is hereby understood that on all marginal business we reserve the right to close transactions at our discretion—at any time when in our opinion the condition of the account warrants such action, without further notice, and to settle contracts in accordance with the rules and customs of the Exchange where orders are executed.

Yours respectfully,

210 WHITNEY & KITCHEN.

Pr. G. G."

Fourth. That thereafter and on July 29th, 1907, through the Clearing House of the New York Stock Exchange, the said co-partnership received the said five hundred (500) shares so purchased for the account of plaintiff, and at the same time, without the consent or knowledge of the plaintiff, delivered the said five hundred (500) shares so purchased for the account of plaintiff, through the Clearing House

Digitized by Google

211

of the New York Stock Exchange, to Brown, Williams & Burbank, another Stock Exchange firm, in partial repayment of a loan of eight hundred (800) shares of Amalgamated Copper Company stock then due by said co-partnership to Brown, Williams & Burbank. That on said July 29th, 1907, the said co-partnership paid for the stock so purchased for the account of plaintiff by being charged therefor the sum of forty-five thousand dollars ($45,000) on the books of the Clearing House of the New York Stock Exchange, and at the same time the said co-partnership received from Brown, Williams & Burbank, through the Clearing House 212
of the New York Stock Exchange, in return for the shares so delivered to said firm by said co-partnership, the sum of forty-five thousand eight hundred eighteen dollars and twenty cents ($45,818.20) by being credited therefor on the books of the Clearing House of the New York Stock Exchange.

Fifth. That thereafter plaintiff, on the respective dates herein set forth paid to the said co-partnership as margins upon said transaction and as part payment of the purchase price of said shares and as partial repayment of the advances agreed to be made by said co-partnership, the following sums, to wit: 213

On August 7th, 1907, $10,000.
On August 15th, 1907, $5,000.
On October 17th, 1907, $5,000.
On October 23rd, 1907, $5,000.

making a total payment, including the five thousand dollars ($5,000) paid by plaintiff on July 27th, 1907, of thirty thousand dollars ($30,000), paid by said plaintiff to said co-partnership as part of the purchase price of said stock and in repayment of the advances agreed to be made to him by said co-partnership.

Digitized by Google

214 Referee's Special Report.

Sixth. That on July 29th, 1907, at the time of the delivery by the said co-partnership to Brown, Williams & Burbank of plaintiff's stock and thereafter and up to the commencement of this action, the said co-partnership did not have on hand or under their control five hundred (500) shares of stock of the Amalgamated Copper Company in such situation that they could have delivered the same to plaintiff on payment of the balance due by him thereon.

Seventh. That prior to the commencement of this action and on or about January 16th, 1908, after
215 the assignment, plaintiff duly demanded from the said co-partnership and from the defendant Peck, as assignee as aforesaid, the delivery of his said shares and at the same time duly offered to pay the balance due thereon, but that said defendants and each of them failed and refused to return the same.

Eighth. That the plaintiff is an attorney at law, and has practiced his profession in the City of New York for thirty-three (33) years. That he has had other transactions with stock brokers since about 1890.

216 Ninth. That the plaintiff never gave any order to defendants, or any of them, to sell said five hundred (500) shares of stock at any time.

Tenth. That plaintiff did not learn of the delivery of his said shares by the said co-partnership to Brown, Williams & Burbank until January 20th, 1908.

Eleventh. That the market value of said shares in the open market in the City of New York on July 29th, 1907, including broker's commissions, was 90⅛ per share, making the total net market

Digitized by Google

217

value of said five hundred (500) shares on said day forty-five thousand one hundred and twenty-five dollars ($45,125).

Twelfth. That a reasonable time within which plaintiff might have replaced said shares, after he received knowledge of their delivery to Brown, Williams & Burbank, was fifteen (15) days after the 20th day of January, 1908. That the highest market value of shares of stock of the Amalgamated Copper Company between the 20th day of January, 1908, and fifteen (15) days thereafter, was $53-⅛, which, including broker's commissions, makes the highest net market value of five 218
hundred (500) shares of Amalgamated Copper Company within said period of twenty-six thousand six hundred and twenty-five dollars ($26,625).

Thirteenth. Had the defendants, Whitney & Geraghty, carried the stock during the entire period between the purchase and the assignment, charging interest on the amount agreed to be advanced, and crediting the plaintiff with the amount of a dividend of five hundred dollars ($500), which was declared on the shares of stock held, there would have been a balance owing from the plaintiff to the defendants Whitney & Geraghty of 219
fifteen thousand one hundred thirty-nine dollars and seventy-nine cents ($15,139.79).

Fourteenth. There is no evidence that any of the said stock ever came into the possession of the defendant Peck or that he ever elected to carry out the contract obligation of the defendants Whitney and Geraghty.

I find as

Digitized by Google

220 Referee's Special Report.

Conclusions of Law.

First. That the said co-partnership, consisting of Girard N. Whitney and James V. Geraghty, on July 29th, 1907, converted five hundred (500) shares of Amalgamated Copper Company stock, which was the property of the plaintiff, to their own use.

Second. That the plaintiff is entitled to a judgment against the defendants, Whitney and Geraghty, formerly composing the co-partnership of Whitney & Kitchen, for the difference between the
221 amount that it would have cost to replace the said shares of stock within a reasonable time after notice of the conversion, and the amount owed by the plaintiff to the defendants, Whitney and Geraghty, on account of the purchase price of the stock and the charges for carrying the same, less any dividends received by Whitney and Geraghty for his account.

Third. That a reasonable time within which plaintiff might have replaced said stock by the purchase of other shares was fifteen (15) days after the 20th day of January, 1908.

Fourth. That plaintiff is entitled to a judgment
222 against the said Whitney and Geraghty for eleven thousand four hundred eighty-five dollars and twenty-one cents ($11,485.21) and the costs of this action.

Fifth. That the defendant Peck, as assignee as aforesaid, is entitled to judgment against the plaintiff, dismissing the complaint as to him, without costs.

All of which is respectfully submitted.

Dated, May 6, 1910.

(S'd) CHARLES F. BROWN,
Referee.

Digitized by Google

 223

XII. On the 10th day of May, 1909, judgment was duly entered upon the report of said referee in the office of the Clerk of the County of New York as follows:

Judgment.

SUPREME COURT,

NEW YORK COUNTY.

JOHN F. McINTYRE,
Plaintiff,

against

GIRARD N. WHITNEY and James V. Geraghty, copartners doing business under the firm name and style of Whitney & Kitchen, and Bayard L. Peck, as Assignee for the benefit of creditors of said copartnership of Whitney & Kitchen,
Defendants. 224 225

This action having been commenced by the service of a summons and verified complaint upon the defendants, Whitney, Geraghty and Peck, respectively, on the 12th day of June, 1908, and the complaint having been thereafter duly amended before answer by stipulation of the parties, and thereafter the defendant Peck having duly appeared by Messrs. Burke & Fay, his attorneys, and having duly served his verified answer to the

Digitized by Google

226 amended complaint herein on October 1st, 1908; and by the defendant Geraghty having duly appeared by Messrs. Whitman & Vandiver, his attorneys, and having duly served his verified answer to the amended complaint herein on October 14th, 1908; and the defendant Whitney having duly appeared herein by Messrs. Ivins, Mason, Wolff & Hoguet, his attorneys, and having duly served his verified answer to the amended complaint herein on October 15th, 1908; and thereafter this action having been duly placed upon the calendar of this court and duly noticed for
227 trial; and the respective parties hereto having thereafter and on the 9th day of June, 1909, stipulated to refer this action to the Honorable Charles F. Brown, as referee, to hear and determine the issues herein; and an order having been duly entered and filed in the office of the Clerk of the County of New York on the 9th day of June, 1909, referring the issues herein to the Honorable Charles F. Brown, as referee, to hear and determine the same; and said action having duly come on for trial before the Honorable Charles F. Brown, the referee, on the 24th day of June, 1909, and having been duly continued from time to time before him, and having been duly submitted
228 to said referee on the 3d day of May, 1910; and the said referee having rendered his decision herein on the 6th day of May, 1910, together with his findings of fact and conclusions of law therein; and the said report and decision of the referee and his findings of fact and conclusions of law having been duly filed in the office of the Clerk of the County of New York on the 7th day of May, 1910; and Daniel Burke, Esq., having been duly substituted as attorney for the defendant Bayard L. Peck, in the place and stead of Burke & Fay, on

Digitized by Google

 229

the 24th day of March, 1909; and Joseph G. Deane, Esq., having been duly substituted as attorney for the defendant Geraghty, in the place and stead of Whitman & Vandiver, on the 30th day of March, 1910; and the said referee's report having found that there is due from the defendants Whitney and Geraghty to the plaintiff the sum of $11,485.21, and having further found that the defendant Bayard L. Peck is entitled to judgment against the plaintiff dismissing the action as to him without costs.

Now, on motion of Thomas F. Gilroy, Jr., attorney for the plaintiff, 230

It is ordered and adjudged,

That the plaintiff do recover of the defendants Girard N. Whitney and James V. Geraghty, copartners composing the firm of Whitney & Kitchen, the sum of $11,485.21, damages, together with the sum of $977.40 costs and disbursements, amounting in all to the sum of $12,462.61, and that he have execution therefor against the said defendants; and

It is further ordered and adjudged,

That the complaint herein be dismissed as to the defendant Bayard L. Peck as assignee for the benefit of creditors of Whitney & Kitchen, without costs. 231

Dated, May 10th, 1910.

WM. F. SCHNEIDER,
Clerk.

(Seal)

Digitized by Google

232 Referee's Special Report.

XIII. On the 28th day of July, 1910, pursuant to an order of the Appellate Division of the Supreme Court, First Department, judgment was duly entered in the office of the Clerk of the County of New York, as follows, modifying the judgment entered May 10th, 1910:

Judgment Entered Upon Remittitur of Appellate Division.

SUPREME COURT,

NEW YORK COUNTY.

233

JOHN F. McINTYRE,
Plaintiff-Appellant,

against

GIRARD N. WHITNEY and James V. Geraghty, co-partners doing business under the firm name or style of Whitney and Kitchen, and Bayard L. Peck, as assignee for the benefit of
234 the creditors of said co-partnership of Whitney and Kitchen,
Defendants-Respondents.

Postea on Judgment as Modified by Appellate Division.

This action having been commenced by the service of a summons and verified complaint upon the defendants, Whitney, Geraghty and Peck, respectively, on the 12th day of June, 1908, and the complaint having been thereafter duly amended

Digitized by Google

235

before answer by stipulation of the parties, and thereafter the defendant Peck having duly appeared by Messrs. Burke and Fay, his attorneys, and having duly served his verified answer to the amended complaint herein on October 1st, 1908; and the defendant Geraghty having duly appeared by Messrs. Whitman & Vandiver, his attorneys, and having duly served his verified answer to the amended complaint herein on October 14th, 1908; and the defendant Whitney having duly appeared herein by Messrs. Ivins, Mason, Wolff and Hoguet, his attorneys, and having duly served his verified answer to the amended complaint herein on October 15th, 1908; and thereafter this action having been duly placed upon the calendar of this court and duly noticed for trial; and the respective parties hereto having thereafter and on the 9th day of June, 1909, stipulated to refer this action to the Honorable Charles F. Brown, as referee, to hear and determine the issues herein; and an order having been duly entered and filed herein in the office of the Clerk of the County of New York on the 9th day of June, 1909, referring the issues herein to the Honorable Charles F. Brown, as referee, to hear and determine the same; and said action having duly come on for trial before the Honorable Charles F. Brown, as referee, on the 24th day of June, 1909, and having been duly continued from time to time before him, and having been duly submitted to said referee on the 3d day of May, 1910; and the said referee having duly rendered his decision herein on the 6th day of May, 1910, together with his findings of fact and conclusions of law thereon, and the said report and decision of the said referee and his findings of fact and conclusions of law having been duly filed in the office of the Clerk of the County of New York on the 7th day of May, 1910; and Daniel Burke, Esq., having been duly substituted as attorney for

236

237

Digitized by Google

238 Referee's Special Report.

the defendant Bayard L. Peck, in the place and stead of Burke & Fay, on the 24th day of March, 1909; and Joseph G. Deane, Esq., having been duly substituted as attorney for the defendant Geraghty in the place and stead of Whitman & Vandiver on the 30th day of March, 1910; and the said referee's report having found that there is due from the defendants Whitney and Geraghty to the plaintiff the sum of $11,485.21 as damages, and having further found that the defendant Bayard L. Peck was entitled to judgment against the plaintiff, dismissing the action as to him without costs; and thereafter
239 judgment having been entered herein in accordance with said report in the office of the Clerk of the County of New York on the 10th day of May, 1910, dismissing the complaint as to the defendant Bayard L. Peck as assignee for the benefit of creditors of Whitney and Kitchen, and in favor of the plaintiff and against the defendants Girard N. Whitney and James V. Geraghty, co-partners, composing the firm of Whitney and Kitchen, for the sum of $11,485.21 damages, together with the sum of $977.40 costs and disbursements as taxed, making in all the sum of $12,462.61; which judgment was on said last mentioned day duly docketed against the said defendants Whitney and Geraghty;
240 and the plaintiff having thereafter and on the 10th day of May, 1910, duly appealed to the Appellate Division of the Supreme Court, First Department, from so much of said judgment as fixed the damage to which he was entitled at the sum of $11,485.21, instead of at the sum of $30,125.00, with interest on said last mentioned sum from July 29th, 1907; and said appeal having duly come on to be heard on the printed case and exceptions and on the printed briefs of the parties, and having been duly decided by said Appellate Division of the Supreme Court, First Department, and an order having been duly entered on said decision modifying the judg-

Digitized by Google

 241

ment so appealed from by increasing the damages to which plaintiff was entitled to the sum of $30,125.00, with interest on $5,125.00 thereof from July 29th, 1907; on $10,000.00 thereof from August 7th, 1907; on $5,000.00 thereof from August 15th, 1907; on $5,000.00 thereof from October 17th, 1907, and on $5,000.00 thereof from October 23d, 1907, and as thus modified, affirming said judgment with costs to the appellant; and a remittitur having been duly filed in the office of the Clerk of the County of New York on the 26th day of July, 1910,

Now, on motion of Thomas F. Gilroy, Jr., Esq., attorney for the plaintiff, 242

It is ordered and adjudged that the judgment heretofore entered herein on the 10th day of May, 1910, be and the same hereby is modified by increasing the damages therein to the sum of $30,125.00, with interest on $5,125.00 thereof from July 29th, 1907, or $922.50; on $10,000 thereof from August 7th, 1907, or $1,783.33; on $5,000.00 thereof from August 15th, 1907, or $885.00; on $5,000.00 thereof from October 17th, 1907, or $833.30, and on $5,000.00 thereof from October 23d, 1907, or $830.00, making a total of $35,379.13 damages, besides the sum of $977.40 costs as taxed on the entry of judgment herein on May 10th, 1910, making a total of $36,356.53, instead of $12,462.61, and that the plaintiff have execution therefor against the defendants Girard N. Whitney and James Y. Geraghty, and it is further ordered and adjudged, 243

That the plaintiff recover of the said defendants, Geraghty and Whitney, the further sum of $249.29, the costs of this appeal.

And it is further ordered and adjudged,

That in all other respects the judgment entered herein on May 10th, 1910, in the office of the Clerk of the County of New York be unchanged.

Dated New York July 28th, 1910.

(Seal) Wm. F. Schneider,
Clerk.

Digitized by Google

244 Referee's Special Report.

XIV. On the 10th day of March, 1911, pursuant to an order of the Court of Appeals, judgment was duly entered in the office of the Clerk of the County of New York, as follows:

Judgment Entered on Remittitur of Court of Appeals.

SUPREME COURT,

NEW YORK COUNTY.

245

JOHN F. McINTYRE,
Plaintiff-Appellant,

against

GIRARD N. WHITNEY and James V. Geraghty, co-partners doing business under the firm name or style of Whitney and Kitchen, and Bayard L. Peck, as assignee for the benefit of the creditors of said co-partnership of Whitney and
246 Kitchen,
Defendants-Respondents.

Postea on Judgment as Modified by Appellate Division.

"This action having commenced by the service of a summons and verified complaint upon the defendants Whitney, Geraghty and Peck, respectively, on the 12th day of June, 1908, and the complaint having been thereafter duly amended before answer by stipulation of the parties and thereafter the defendant Peck having duly ap-

Digitized by Google

247

peared by Messrs. Burke & Fay, his attorneys, and having duly served his verified answer to the amended complaint herein on October 1st, 1908; and the defendant Geraghty having duly appeared by Messrs. Whitman & Vandiver, his attorneys, and having duly served his verified answer to the amended complaint herein on October 14th, 1908; and the defendant Whitney having duly appeared herein by Messrs. Ivins, Mason, Wolff & Hoguet, his attorneys, and having duly served his verified answer to the complaint herein on October 15th, 1908, and thereafter this action having been duly placed upon the calendar of this court 248
and duly noticed for trial and the respective parties hereto having thereafter and on the 9th day of June, 1909, stipulated to refer this action to the Hon. Charles F. Brown, as referee to hear and determine the issues herein; and an order having been duly entered and filed herein in the office of the Clerk of the County of New York on the 9th day of June, 1909, referring the issues herein to the Hon. Charles F. Brown as referee to hear and determine the same; and said action having duly come on for trial before the Hon. Charles F. Brown as referee, on the 24th day of June, 1909, and having been duly continued from time to time before him, and having been duly submitted 249
to said referee on the 3rd day of May, 1910, and the said referee having duly rendered his decision herein on the 6th day of May, 1910, together with his findings of fact and conclusions of law thereon, and the said report and decisions of the said referee and his findings of fact and conclusions of law having been duly filed in the office of the Clerk of the County of New York on the 7th day of May, 1910, and Daniel Burke, Esq. having been duly substituted as attorney for the de-

Digitized by Google

250 Referee's Special Report.

fendant Bayard L. Peck in the place and stead of Burke & Fay, on the 24th day of March, 1909; and Joseph G. Deane, Esq., having been duly substituted as attorney for the defendant Geraghty in place and stead of Whitman & Vandiver; and the said referee's report having found that there was due from the defendants Whitney and Geraghty to the plaintiff the sum of $11,485.21 as damages, and having further found that the defendant Bayard L. Peck as assignee for the benefit of creditors of the copartnership of Whitney & Kitchen was entitled to judgment against the plain-
251 tiff, dismissing the action as to him without costs and thereafter judgment having been entered herein in accordance with said report in the office of the clerk of the county of New York on the 10th day of May, 1910, dismissing the complaint as to the defendant Bayard L. Peck as assignee for the benefit of creditors of Whitney & Kitchen and in favor of the plaintiff and against the defendants composing the firm of Whitney & Kitchen for the sum of $11,485.21 damages, together with the sum of $977.40 costs and disbursements as taxed, making in all the sum of $12,462.65, which judgment was on said last mentioned day duly docketed against
252 the said defendants Whitney and Geraghty; and the plaintiff having thereafter on the 10th day of May, 1910, duly appealed to the Appellate Division of the Supreme Court, First Department, from so much of said judgment as fixed the damages to which he was entitled at the sum of $11,485.21 instead of the sum of $30,125, with interest on said last mentioned sum from July 29th, 1907; and said appeal having been duly decided by said Appellate Division of the Supreme Court, First Department, and an order having been duly entered on said decision modifying the judgment

Digitized by Google

so appealed from by increasing the damages to which plaintiff was entitled to the sum of $30,125, with interest on $5,125, thereof from July 29th, 1907; on $10,000 thereof from August 7th, 1907; on $5,000 thereof from August 15th, 1907; on $5,000 thereof from October 17th, 1907, and on $5,000 thereof from October 23, 1907, and as thus modified affirming said judgments with costs to the appellant, and a remittitur having been duly filed in the office of the Clerk of the County of New York on the 26th day of July, 1910, and the costs in the Appellate Division having been duly taxed at the sum of $249.29 and a judgment having been duly entered herein in the office of the 254
Clerk of the County of New York on the 28th day of July, 1910, on said order, a remittitur modifying the judgment theretofore entered herein on the 10th day of May, 1910, by increasing the damages therein to the sum of $30,000 with interest on $5,125 thereof from July 29th, 1907; on $10,000 thereof from August 7th, 1907; on $5,000 thereof from August 15th, 1907, on $5,000 thereof from October 17th, 1907, and on $5,000 thereof from October 23, 1907, besides the sum of $977.40 costs as taxed on the entry of the judgment herein on May 10th, 1910, making a total judgment of $36,605.82, and in all other respects affirming the 255
judgment entered herein on the 10th day of May, 1910, in the office of the Clerk of the County of New York; and the defendants Whitney, Geraghty and Peck having duly appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court of the State of New York for the First Department made in this action, herein entered and filed in the office of the Clerk of the said Appellate Division on the 19th day of July, 1910, and from the judgment of affirmance herein entered upon the said order modifying the judgment thereto-

Digitized by Google

256 Referee's Special Report.

fore entered in the office of the Clerk of the County of New York on the 10th day of May, 1910, as aforesaid, and from each and every part of said judgment and order as well as from the whole thereof except so much thereof as affirmed the judgment dismissing the complaint against the defendant Bayard L. Peck; and said appeal having duly come on to be heard on the printed case and exceptions and on the printed briefs of the parties, and having been duly decided by said Court of Appeals on the 14th day of February, 1911, and an order having been duly entered on said deci-
257 sion affirming the judgment of the Appellate Division of the Supreme Court, First Department aforesaid, and a remittitur having been duly filed in the office of the Clerk of the County of New York on the 9th day of March, 1911;

Now, on motion of Thomas F. Gilroy, Jr., attorney for plaintiff, it is

Ordered and adjudged, that the judgment heretofore entered herein on the 28th day of July, 1910, modifying the judgment entered herein on the 10th day of May, 1910, by increasing the damages as therein set forth and affirming said judgment entered herein on May 10th, 1910, as so modi-
258 fied, be and the same hereby is affirmed, and that the plaintiff have execution therefor against the defendants Girard N. Whitney and James V. Geraghty; and it is further

Ordered and adjudged, that the plaintiff recover of the said defendants James V. Geraghty and Girard N. Whitney composing the copartnership of Whitney & Kitchen, the further sum of $1,947.12, the costs of this appeal.

Dated, New York, March 10th, 1911.

WILLIAM F. SCHNEIDER,
Clerk.

Seal."

Digitized by Google

259

That the costs recited in said judgment include an extra allowance of $1,817.82, being five per cent. of the recovery granted by an order of the Supreme Court, signed and entered by the Hon. Charles R. Guy on the 8th day of March, 1911, upon motion of the plaintiff's attorney pursuant to Section 3253 of the Code of Civil Procedure.

XV. Thereafter and on or about the 24th day of March, 1911, the said claimant, John F. McIntyre, filed with the said Bayard L. Peck, the following proof of claim against the estate of Whitney & Kitchen:

260

Proof of Claim.

"The undersigned hereby claims that the co-partnership of Whitney & Kitchen, consisting of James V. Geraghty and Girard N. Whitney, general partners, is justly indebted to the undersigned upon three certain judgments entered in favor of the undersigned and against said Girard N. Whitney and James V. Geraghty, copartners composing the firm of Whitney & Kitchen, in the office of the County Clerk of New York, as follows, to wit:

1st. A judgment for thirty-six thousand three hundred and fifty-six and 53/100 dollars ($36,- 261
356.53), entered in the office of the Clerk of the County of New York on May 9th, 1910, the same being a modification as directed in an order filed in said County Clerk's office July 28th, 1910, to an original judgment for twelve thousand four hundred and sixty-two and 61/100 dollars ($12,462.61), entered and docketed on said 9th day of May, 1910.

2nd. A judgment for two hundred and forty-nine and 29/100 dollars ($249.29), entered and

Digitized by Google

262

docketed in the office of the Clerk of the County of New York on July 28th, 1911.

3rd. A judgment for nineteen hundred and forty-seven and 12/100 dollars ($1947.12) entered and docketed in the office of the Clerk of the County of New York on March 10th, 1911, on which the sum of one hundred and twenty-nine and 30/100 dollars ($129.30) has been paid by the United States Fidelity and Guaranty Company.

Transcripts of said judgments are hereto annexed.

Said judgment of May 9th, 1910, as modified, is
263 for damages recovered by the undersigned in an action then pending in the Supreme Court of the State of New York entitled 'John F. McIntyre vs. Girard N. Whitney and others,' for the conversion by said Girard N. Whitney and James V. Geraghty, copartners comprising the firm of Whitney & Kitchen of five hundred (500) shares of the stock of the Amalgamated Copper Company, the property of the undersigned, the said judgment having been modified by the Appellate Division of the Supreme Court, First Department, on appeal thereto, and as modified affirmed and said judgment as so modified having been
264 thereafter affirmed by the Court of Appeals of the State of New York; the judgment entered and docketed July 28th, 1910, being for costs on the affirmance of said first above named judgment by the Appellate Division of the Supreme Court, First Department, and the said judgment entered and docketed on March 10th, 1911, being the judgment entered on the affirmance thereof by the Court of Appeals.

No part of said claim has been paid except the sum of one hundred and twenty-nine and 30/100 dollars ($129.30), which has been paid in the judg-

Digitized by Google

ment entered March 10th, 1911, by the United States Fidelity and Guaranty Company. That there are no set offs or counterclaims to the same, and that the undersigned has not, nor has any person by his order or to his knowledge or belief, for his use had or received any manner of security belonging to said copartnership for said claim whatever.

Dated, New York, March 21st, 1911.

JOHN F. McINTYRE, Claimant.

THOMAS F. GILROY, JR.,
Attorney for Claimant, 266
Office and Post Office Address,
42 Broadway,
New York City.

State of New York, }
County of New York, } ss.:

John F. McIntyre, being duly sworn, deposes and says: I am the claimant named in the foregoing claim. I have read the same and know the contents thereof and the same is true to my own knowledge.

JOHN F. McINTYRE. 267

Sworn to before me this 21st }
day of March, 1911. }
WILLIAM A. BURKEL,
Notary Public,
Kings Co.
Certificate filed in N. Y. Co."

XVI. That the foregoing findings of fact were included in an agreed statement of facts, which was submitted to the Appellate Division of the First

Digitized by Google

268 Referee's Special Report.

Department on the 8th day of June, 1911; and the said statement of facts also contained the following:

XVII. That said Bayard L. Peck, as assignee of James V. Geraghty, has duly rejected the whole claim of the said John F. McIntyre.

XVIII. This is a proceeding brought under §26 of the Debtors' and Creditors' Law, to determine a disputed claim. Statement of controversy.

The said Bayard L. Peck, as assignee of Girard N. Whitney and of James V. Geraghty, individ-
269 ually, claims that upon the foregoing facts the claim of the said John F. McIntyre is not provable against and payable out of the separate estate of either said Girard N. Whitney or James V. Geraghty, and that the said claim is a claim provable only against and payable only out of the estate of the said co-partnership of Whitney & Kitchen, except in so far as any contract claim against a co-partnership may be proved against the estate of the individual partners, and that the said claim, to the amount of the costs and allowance of the action, is not provable against or payable by him out of any of the said three estates. All of which
270 the claimant denies and claims that he is entitled to prove his entire claim, basing it upon said judgments, including costs and allowance, on the trial of said action, against the estate of said co-partnership of Whitney & Kitchen and against the individual estate of the said Girard N. Whitney and against the individual estate of the said James V. Geraghty, and that he is entitled to be paid in full as an individual creditor out of the estate of Girard N. Whitney and out of the estate of James V. Geraghty to the extent of any deficiency that there may be after he has collected all that is possible from the estate of the co-partnership of Whitney &

Digitized by Google

Kitchen, before the payment from such individual estates of any creditors of the co-partnership of Whitney & Kitchen. 271

The controversy hereby submitted for decision is, whether or not, upon the foregoing facts, the claimant is entitled to prove and the assignee is bound to allow the claims of the said John F. McIntyre, based upon the said judgments, as claims against the estate of Girard N. Whitney individually and against the estate of James V. Geraghty individually as well as against the estate of the co-partnership of Whitney & Kitchen to the full amount thereof, so as to entitle the claim herein to be proved in full as a joint obligation of the firm and as the individual obligation of each partner; and whether or not the said claimant is entitled to prove as against any of said estates so much of his claim as is for the costs and allowance on the action; and the claimant asks an order of this Court allowing his said claim as above set forth. 272

XIX. That on said agreed statement of facts the Appellate Division of the First Department entered the following order: 273

Digitized by Google

274 Referee's Special Report.

"At a Term of the Appellate Division of the Supreme Court, First Department, held at the Court House, 26th Street and Madison Avenue, in the Borough of Manhattan, City of New York, on the day of July, 1911.

Present—Hon. GEORGE L. INGRAHAM, P. J.,
Hon. CHESTER B. MCLAUGHLIN,
Hon. FRANK C. LAUGHLIN,
Hon. NATHAN L. MILLER,
Hon. VICTOR J. DOWLING, J. J.

275

In the Matter
of
The Assignment of WHITNEY and KITCHEN, a co-partnership composed of Girard N. Whitney and James V. Geraghty, to Bayard L. Peck.

In the Matter
of
276 The Assignment of GIRARD N. WHITNEY to BAYARD L. PECK.

In the Matter
of
The Assignment of JAMES V. GERAGHTY to BAYARD L. PECK.

This proceeding having been commenced under Section 26 of the Debtors' and Creditors' Law, and

Digitized by Google

277

submitted to this Court on a submission of controversy under Section 1279 of the Code of Civil Procedure, presenting to this Court for decision a controversy between Bayard L. Peck as assignee of the co-partnership of Whitney & Kitchen, and as assignee of Girard N. Whitney, and as assignee of James V. Geraghty; and John F. McIntyre, a claimant against each of said assigned estates, submitting for decision the questions, 1st, whether or not upon the facts set forth in said submission the claimant is entitled to prove, and the assignee is bound to allow the claims of said John F. McIntyre, based upon the judgments set forth in said 278
submission as claims against the estate of Girard N. Whitney, individually, and against the estate of James V. Geraghty, individually, as well as against the estate of the co-partnership of Whitney & Kitchen, to the full amount thereof, so as to entitle the claim of said John F. McIntyre to be proved in full as a joint obligation of the firm and as the individual obligation of each partner, and 2nd, whether or not the said claimant is entitled to prove as against any of said estates so much of his claim as is for costs and allowance included in said judgments; and the said submission having been duly signed by the parties thereto and filed in 279
the office of the Clerk of this Court on the 23rd day of May, 1911; and the said submission having duly come on to be heard on the printed copy of said submission and the printed case and exceptions therein referred to, and on the printed briefs of the parties hereto, and upon the oral arguments of Thomas F. Gilroy, Jr., Esq., counsel for said John F. McIntyre, the claimant herein, and of Daniel Burke, Esq., counsel for the assignee, and the said controversy having been duly decided by the said Appellate Division of the Supreme Court, First Department;

Digitized by Google

280 Referee's Special Report.

Now, on motion of Thomas F. Gilroy, Jr., Esq., attorney for claimant,

It is ordered, adjudged and decreed, that Bayard L. Peck, as assignee of the co-partnership of Whitney & Kitchen, allow the claim filed by John F. McIntyre with the assignee and dated March 21st, 1911, against said estate as follows, to wit:

(1) A judgment for thirty-six thousand three hundred and fifty-six and 53/100 dollars ($36,356.53), with interest thereon from July 28th, 1910.

(2) A judgment for two hundred and forty-nine
281 and 29/100 dollars ($249.29), with interest thereon from July 28th, 1910.

(3) A judgment for nineteen hundred and forty-seven and 12/100 dollars ($1,947.12), with interest thereon from March 10th, 1911, less the sum of one hundred and twenty-nine and 30/100 dollars ($129.30), paid on account thereof, with interest thereon from March 10th, 1911. And

It is further ordered, adjudged and decreed, that as against the individual estates of Girard N. Whitney and James V. Geraghty, the above specified claims of John F. McIntyre be disallowed by the assignee as individual liabilities of the said
282 Whitney and Geraghty, and shall not be allowed as claims against said individual estates, except to the extent that claims against the co-partnership of Whitney & Kitchen are allowable under the terms of the individual assignments or otherwise.

And it is further ordered, adjudged and decreed, that judgment be and it is hereby directed accordingly without costs to either party as against the other."

XX. That the assets of the estate of Whitney & Kitchen are not sufficient to pay the firm creditors

Digitized by Google

283

in full. They have received in dividends out of the firm estate approximately thirty per cent. (30%) of their claims and out of the individual estate of Girard N. Whitney approximately twenty per cent. (20%) of their claims, and the figures before the Referee show that they will not receive more than twenty-five per cent. (25%) further from the estate of Whitney & Kitchen and that the firm creditors of Whitney & Kitchen cannot in any event be paid in full out of all the estates.

XXI. That the balance remaining in the estate of Girard N. Whitney is sufficient, if applied in accordance with this report, to pay all individual creditors in full and to pay the balance due to John F. McIntyre after payment to him of dividends due to him out of the assigned estate of Whitney & Kitchen, provided his claim were to be allowed as an individual claim against Girard N. Whitney and James V. Geraghty.

284

Conclusions of Law.

1. The claims of John F. McIntyre upon the said judgments, as follows, are disallowed as individual claims against the estate of Girard N. Whitney:

(a) A judgment for thirty-six thousand three hundred fifty-six and 53/100 dollars ($36,356.53), with interest thereon from July 28, 1910.

285

(b) A judgment for two hundred forty-nine and 29/100 dollars ($249.29), with interest thereon from July 28, 1910.

(c) A judgment for one thousand nine hundred forty-seven and 12/100 dollars ($1,947.12), with interest thereon from March 10, 1911, less the sum of one hundred twenty-nine and 30/100 dollars

Digitized by Google

286 Referee's Special Report.

($129.30), paid on account thereof with interest thereon from March 10, 1911.

2. That the said claims upon said judgments, but without interest, are allowed as and for claims against the firm of Whitney & Kitchen as follows:

(a) A judgment for thirty-six thousand three hundred fifty-six and 53/100 dollars ($36,356.53).

(b) A judgment for two hundred forty-nine and 29/100 dollars ($249.29).

(c) A judgment for one thousand nine hundred
287 forty-seven and 12/100 dollars ($1,947.12), less the sum of one hundred twenty-nine and 30/100 dollars ($129.30), paid on account thereof.

That said claims are entitled to share *pro rata* with other firm claims in the said estate of Girard N. Whitney in accordance with the report of the Referee.

Dated New York, February 3, 1912.

WILLIAM F. MCCOMBS,
Referee.

288

Digitized by Google

Referee's Opinion—General.

SUPREME COURT,

NEW YORK COUNTY.

In the Matter of The Assignment of GIRARD N. WHITNEY to Bayard L. Peck.	Opinion. *In re* disposition of Estate of Gerard N Whitney. 290

Girard N. Whitney was a member of the firm of Whitney & Kitchen. On January 16th, 1908, the co-partnership of Whitney & Kitchen made an assignment for the benefit of creditors, to Bayard L. Peck. On January 25th, 1908, the individual partners, Girard N. Whitney and James V. Geraghty each made an assignment for the benefit of creditors, to the said Bayard L. Peck.

The co-partnership estate was insolvent. Each of the co-partners had assets sufficient to pay his 291
individual creditors. Neither of the co-partners had assets sufficient to pay his individual and co-partnership obligations.

The assignment of the co-partnership provided for the distribution of the co-partnership estate, as follows:

> "And then to pay and discharge in full if the residue of said proceeds is sufficient for that purpose, all the debts and liabilities now

Digitized by Google

292 Referee's General Opinion.

due or to grow due *from the said co-partnership*, parties of the first part, with all interest moneys due or to grow due thereon. And if the residue of the said proceeds shall not be sufficient to pay the said debts and liabilities and interest moneys in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities, ratably and in proportion." (Exhibit 82, Fols. 16-17.)

The form of the two individual assignments was the same. These assignments provided for distribution of the estates of the individual co-partners,
293 as follows:

"And then to pay and discharge in full, if the residue of said proceeds is sufficient for that purpose, all the debts and liabilities now due or to grow due from the said co-partnership of Whitney & Kitchen, and from the said party of the first part, with all the interest moneys due or to grow due thereon; and if the residue of said proceeds shall not be sufficient to pay the said debts and liabilities and interest moneys in full, then to apply the said residue of said proceeds to the payment of said
294 debts and liabilities, ratably and in proportion."

It will be observed that the co-partnership assignment provided for the payment of co-partnership obligations only, while the individual assignments provided for the payment of co-partnership as well as individual obligations.

I think it was the clear intention of the co-partners to grant to the co-partnership creditors a preference in their individual estates, so that the joint creditors should share equally with the individual

Digitized by Google

295

creditors in the separate estates. It has been repeatedly held that insolvent co-partners could, by assignment, apply their individual assets to firm debts, even to the extent of excluding individual creditors, from any participation in the individual estates.

Crook vs. Rundskopf, 105 N. Y. 476.
Citizens Bank vs. Williams, 128 N. Y. 77.
Royer Wheel Co. vs. Fielding, 101 N. Y. 510;
Wheeler vs. Childs, 22 A. D. 613.
Becker vs. Leonard, 42 Hun, 221.

296

The equitable rule that co-partnership estates should be devoted to partnership debts and individual assets to individual debts, could be superseded by express direction in the assignment, and the individual estates would then be distributed according to the terms of the written instrument.

Mills vs. Parkhurst, 30 St. Rep. 142.
Matter of Whitney & Kitchen, 130 Supp. 629.

In the absence of statutory restriction, the individual partners would have had the unquestioned right to prefer the co-partnership creditors in the manner indicated in the individual assignments herein.

297

Tompkins vs. Hunter, 149 N. Y. 117-121.
Dodge vs. McKechnie, 156 N. Y. 314.

The General Assignment Act, Chapter 466, Laws 1877, contained no restriction as to preferences. Chapter 503, Laws 1887, amended that act by eliminating preferences to one-third of the assigned estate, after deducting wages and salaries and the

Digitized by Google

298 Referee's General Opinion.

costs and expenses of the execution of the trust. These amendments read as follows:

> "In all general assignments of the estates of debtors for the benefit of creditors hereafter made any preferences created therein, (other than for the wages or salaries of employees, under Chapter 328 of the laws of 1884 and Chapter 283 of the laws of 1886) shall not be valid except to the amount of one-third in value of the assigned estate left after deducting such wages or salaries and the costs and expenses of executing such trust; and should said one-
299 third of the assets of the assignor or assignors be insufficient to pay in full the preferred claims to which, under the provisions of this section, same are applicable, then said estates shall be applied to the payment of the same *pro rata*, to the amount of each said preferred claims."

Except for unimportant changes, Section 30 has remained unchanged to date. (Section 28, Debtors and Creditors Law—Chapter 17, Laws 1909.)

In the Matter of Dauchy, 169 N. Y. 460, decided in 1902, this section of the statute seems to have been applied for the first time to the assignment
300 of a co-partner in which a direction was made permitting firm creditors to share in the individual estate equally with the individual creditors. In that case the Court of Appeals held that Section 30 restricted the right of co-partners to prefer firm creditors in their individual estates. In Wheeler vs. Childs, 22 A. D. 613, decided in 1897, the Appellate Division of the Third Department, recognized the fact that Section 30, *supra*, applied to co-partnership estates and restricted preferences to firm creditors.

Apart from these two cases I have not been able to find any other authorities in this State bearing

Digitized by Google

upon this point. The cases which seem to express a rule different from that laid down in the Matter of Dauchy, *supra*, will be found to grow out of assignments made before the enactment of the amendment of 1887. Citizens Bank vs. Williams, *supra*, did arise after 1887. But question of preferences under Section 30 was not involved in that case and was not discussed by the Court.

The Matter of Dauchy came up on appeal in the Appellate Division of the Third Department. In that case as in this, the partnership and the individual co-partners made separate assignments to the same assignee. The co-partnership and the individual co-partners were all insolvent. The firm assets were distributed among the firm creditors. The assignment of the individual partner, Thomas Lape, directed certain preferences to the extent of one-third of his estate, and then, as assumed by the Court of Appeals and as held by the Appellate Division, directed a distribution of the remainder of his estate among the firm as well as the individual creditors, ratably and in the same proportion. The County Court directed that after the payment of the specific preferences, which were not to exceed one-third of the assigned estate, the remaining two-thirds should be distributed among the individual creditors of Thomas Lape to the exclusion of firm creditors. The Appellate Division modified the decision of the County Court and directed the distribution of the remaining two-thirds of the assigned estate among the individual and firm creditors of Lape. The prevailing opinion in the Appellate Division discussed Section 30 of the General Assignment Act and held that it did not prohibit an assigning co-partner from specifically preferring the statutory one-third of his estate and then directing a *pro rata* distribution of the remainder

301

302

303

Digitized by Google

304 Referee's General Opinion.

among his individual and firm creditors. In a dissenting opinion, Mr. Justice Kellogg took the position that the direction to distribute the estate *pro rata* among the firm and individual creditors resulted in the preference to the firm creditors; that the assignor had already exhausted his power to prefer by specifically directing the distribution of one-third of his estate, and that he had no power to grant any further preference.

The Court of Appeals reversed the decision of the Appellate Division and held the direction for distribution ratably among the firm and individual
305 creditors to be in contravention of Section 30 of the General Assignment Act. The Court in its opinion said:

> "The equitable rule of distribution is a rule of justice and it does not favor preferences. When the assets of a firm have been devoted entirely to the payment of the creditors of a firm, equity will not sanction the appropriation of the individual assets to the payment of the remaining claims of the firm creditors to the detriment of the individual creditors. If it did it would often result in the payment of the firm creditors in full, while the individual
> 306 creditors would receive but a small percentage on their claims. Our conclusions are that a preference was created by the direction contained in the assignment and not by the rule of equity; that under the statute the assignor had exhausted his power to prefer by the fourth clause of the assignment, and that his directions contained in the fifth clause, in so far as they are at variance with the equitable rule of distribution, are void and without force and effect."

Digitized by Google

Referee's General Opinion. 307

The decision in the Matter of Dauchy is controlling in this case and prevents the firm creditors of Whitney & Kitchen from sharing equally with the individual creditors of the co-partners in the entire individual estate. Under the statute, the preference to the firm creditors must be limited to one-third of the individual estate, the remaining two-thirds, or such part thereof as is required therefor being reserved for individual creditors only.

The attempt to grant a preference for more than one-third does not make the assignment void. The statute operates upon the preference and reduces the same to the amount allowed by law. 308

Bank vs. Seligman, 138 N. Y. 435.

I should have had no hesitation in concluding that the direction contained in the assignment herein was in conflict with Section 30 of the General Assignment Act, were it not for the fact that in the Matter of Whitney & Kitchen, 146 A. D. 45, the Appellate Division of the First Department indicated that a different distribution should be made herein. The question under consideration by the Court at that time was whether John F. McIntyre was entitled to prove his claim in full against the individual co-partners, Girard N. Whitney and James V. Geraghty, in addition to proving his claim 309 against the co-partnership. The claimant relied upon the fact that his judgment was recovered in tort and asserted that as such the indebtedness of the co-partnership was an individual as well as a firm obligation. The Court, without any difference of opinion, held that the obligation was joint, and that John F. McIntyre occupied the same position as any other of the firm creditors of Whitney & Kitchen. In the opinion of Mr. Justice Dowling, however, the Court stated that the claimant was entitled to share in the individual estate here-

Digitized by Google

310 in equally with the individual creditors for the balance of his claim remaining unpaid after the distribution of the partnership assets.

Mr. Justice Ingraham, in his opinion stated that by virtue of the terms of the assignment itself the claimant was entitled to prove his entire claim in the individual estate herein and to share equally in said estate with the individual creditors.

The question under discussion by the Court arose upon an agreed statement of facts submitted by John F. McIntyre and the assignee, Bayard L. Peck. Only two questions were submitted to the
311 Court:

1. Whether the claimant was entitled to prove his claim for costs, allowance and interest, and

2. Whether his claim was an individual as well as a joint obligation, and as such, entitled to be proved and allowed as a joint and several claim.

The parties did not submit to the Court the question as to the manner in which the claimant should share in the individual estates in the event that his claim was found to be joint and not joint and several. The Court, in its order, recognized this fact, for it confined the order strictly to the two
312 questions submitted by the parties. The directions in the order with reference to the allowance of the claim of John F. McIntyre were as follows:

> "It is ordered, adjudged and decreed, that Bayard L. Peck, as assignee of the co-partnership of Whitney & Kitchen, to allow the claim filed by John F. McIntyre with the assignee and dated March 21, 1911, against said estate, as follows, to wit:
>
> 1. A judgment for thirty-six thousand, three hundred and fifty-six and 53/100 dollars ($36,

Digitized by Google

313

856.53) with interest thereon from July 28th, 1910.

2. A judgment for two hundred forty-nine and 29/100 dollars ($249.29) with interest thereon from July 28th, 1910.

3. A judgment for one thousand nine hundred forty-seven and 12/100 dollars ($1,947.12) with interest thereon from March 10th, 1911, less the sum of one hundred twenty-nine and 30/100 dollars ($129.30) paid on account thereof, with interest thereon from March 10th, 1911, and

314

It is further ordered, adjudged and decreed that as against the individual estates of Girard N. Whitney and James V. Geraghty the above specified claims of John F. McIntyre be disallowed by the assignee as individual liabilities of the said Whitney and Geraghty, and shall not be allowed as claims against the said individual estates, except to the extent that claims against the co-partnership of Whitney and Kitchen are allowable under the terms of the individual assignments or otherwise.

And it is further ordered, adjudged and decreed that judgment be and it is hereby directed accordingly, without costs to either party as against the other."

315

The order disallows the claim as an individual liability and allows it against the individual estates "Only to the extent that claims against the copartnersip of Whitney and Kitchen are allowable under the terms of the individual assignments or otherwise."

The manner in which the co-partnership creditors are to share in the individual estates is expressly left open for future determination.

Digitized by Google

316 Referee's General Opinion.

I conclude therefore, that the observations made by the learned justice of the Appellate Division of the First Department with reference to the right of John F. McIntyre to share in the individual estates herein are dicta. Whether this is so or not, however, the order itself is controlling.

Hewlett vs. Wood, 67 N. Y. 394-399.
Fisher vs. Gould, 81 N. Y. 228-231.
Townsend vs. Nebenzahl, 81 N. Y. 644-645.
Moorehouse vs. R. R. Co., 185 N. Y. 520-526.

317 The Court speaks by its order and effect must be given to it according to its terms. Clearly the order has not foreclosed me from determining the method in which the individual estates herein should be distributed.

It will be observed that the opinions expressed by Mr. Justice Dowling and Mr. Justice Ingraham as to the right of Mr. John F. McIntyre to share in the individual estate, are not in harmony with the decision in the Matter of Dauchy, *supra*. I have carefully examined the briefs submitted in the Appellate Division in the Matter of Whitney and Kitchen, and find that in neither brief is the Matter of Dauchy referred to and that there is no discussion in said briefs of the method in which the claimant was to share in the individual estates, in the event that his claim was found to be joint and not joint and several. The Matter of Dauchy was not submitted to the Court and was not considered by it in deciding the Whitney and Kitchen case. I accordingly conclude that the co-partnership creditors are entitled to a preference in this estate to the extent of the statutory one-third of the assets.

318

The assignee has already paid to the co-partnership creditors out of this estate the sum of $47,-

Digitized by Google

777.61. No payments have been made to the individual creditors or the assignor. The fund remaining in the hands of the assignee, after deducting the $47,777.61 is shown by the account herein as $57,551.47. It is apparent that the assignee has already paid to the co-partnership creditors more than the amount of the preference to which they are entitled under the statute. In view of the fact, however, that the total of the individual claims herein is less than $40,000.00 while the assignee has a sum of $57,551.47, less disbursements, costs and allowances with which to pay the same, it is obvious that no injury can result to the individual creditors from the payments already made by the assignee to the co-partnership creditors. I cannot see how the individual creditors can be injured, but in order to preclude any such result I have directed in my report that the assignee shall be credited with the sum already paid to the co-partnership creditors only with the amount of the preferences to which the firm creditors are entitled; that the assignee shall apply the remaining two-thirds of the estate to the payment of individual obligations of the assignor, and that in the event of a surplus remaining, as it is evident there will be, he shall credit himself, first with the difference between the amount of the preference allowed by statute to the firm creditors and the amount already paid to them by him, and shall then apply the balance, if any, to the further payment of the co-partnership claims.

319

320

321

It would appear that the firm creditors cannot be paid in full, even combining the payments from the assets of the co-partnership, with the payments to be made out of the individual estates, and that there consequently will be no surplus for repayment to the assignor herein.

Digitized by Google

322 **Referee's Opinion—Claims of John F. McIntyre.**

SUPREME COURT,

NEW YORK COUNTY.

In the Matter of The Assignment of GIRARD N. WHITNEY, to BAYARD L. PECK.	*In re* Claim of John F. McIntyre. Opinion.

323

John F. McIntyre, hereinafter called the claimant, on April 25th, 1908, filed with the Assignee a proof of claim against Whitney & Kitchen, in the sum of $30,337.50 with interest from July 27, 1907, for damages for conversion of certain stock purchased by the co-partnership on margin for the account of the claimant. (Exhibit 82, Fols. 40-42.) This claim was rejected by the Assignee. (Exhibit 82, Fols. 47-48.)

324

Thereafter an action was commenced by the claimant against Girard N. Whitney and James V. Geraghty as copartners doing business under the firm name and style of Whitney & Kitchen, and the Assignee, to recover the sum of $30,337.50 with interest. (Exhibit 82, Fol. 49.)

Judgment was rendered in favor of the plaintiff in the sum of $11,485.21 with costs and disbursements, amounting in all to the sum of $12,462.61. (Exhibit 82, Fols. 146-156.)

Digitized by Google

325

From this judgment the claimant appealed. The Appellate Division modified the judgment below by increasing the amount of damages to $30,125.00, which with interest and costs amounted to $36,356.53, together with a further sum of $242.29 as costs of the appeal. (Exhibit 82, Fols. 157-172.)

On appeal to the Court of Appeals by the Assignee the judgment of the Appellate Division was affirmed, together with the further sum of $1,947.12 as costs of the appeal, $1,817.82 of which was an allowance of 5% under Sec. 3253 of the Code of Civil Procedure. (Exhibit 82, Fols. 174-184.)

326

On March 24, 1911, John F. McIntyre filed with the Assigne a second proof of claim against Whitney & Kitchen in conformity with the above judgment. (Exhibit 82, Fol. 195.)

The Assignee rejected the claim as to costs and allowances. (Exhibit 82, Fol. 205.)

On or about March 24th, 1911, the claimant filed a proof of claim against the estate of Girard N. Whitney for the full amount of the judgments above referred to, less the sum of $129.30 which had been paid. This claim was made against the estate of Girard N. Whitney to the extent of any deficiency of the payment of judgments with interest from the assets of Whitney & Kitchen. The claim was presented in full, payment being claimed only for deficiency. (Exhibit 82, Fols. 210-219.)

327

On or about April 7th, 1911, a similar proof of claim was filed by the claimant against the estate of James V. Geraghty. (Exhibit 82, Fols. 220-230.)

Thereafter the claimant and the Assignee submitted the controversy between them to the Appellate Division of the First Department on an agreed statement of facts, under Sec. 1279 of the Code of Civil Procedure. (Exhibit 82.)

Digitized by Google

328 **Referee's Special Opinion.**

The Assignee contended that the claimant was entitled to prove his claim only against the copartnership estate, except in so far as any contract claims might be proved against the individual estates and asserted that the claims for costs and allowances were not provable against any of the estates. (Exhibit 82, Fols. 230-232.)

The claimant contended that he was entitled to prove his claim in full against all three estates, and was entitled to be paid in full as an individual creditor out of the separate estates for any deficiency remaining after the distribution of the co-
329 partnership estate before the payment from such individual estates of any other creditors of the copartnership of Whitney & Kitchen. (Exhibit 82, Fols. 232-234.)

The exact statement of the controversy submitted is as follows:

> "* * * Whether or not * * * the claimant is entitled to prove and the Assignee is bound to allow the claims of the said John F. McIntyre, based upon the said judgments as claims against the estate of Girard N. Whitney, individually, and against the estate of James V. Geraghty, individually, as well as
> 330 against the estate of the copartnership of Whitney & Kitchen, to the full amount thereof, so as to entitle the claim herein to be proved in full as a joint obligation of the firm and as the individual obligation of each partner, and whether or not the said claimant is entitled to prove as against any of said estates so much of his claim as is for the costs and allowance on the action * * *" (Exhibit 82, fols. 234-236).

The decision of the Appellate Division on this submission appears in 146 A. D. 45.

Digitized by Google

 331

In the opinion of Mr. Justice Dowling in which Mr. Justice McLoughlin and Mr. Justice Laughlin concurred, the Court held that the Assignee was entitled to prove the judgments as recovered, including costs and allowance, as well as interest. With regard to the right of the claimant to prove his claims as joint and several obligations, the Court distinguished the Matter of Blackford, 35 A. D. 333, on which the claimant relied, and held the debt of Whitney & Kitchen to be joint and not joint and several, thus holding the claimant's demand to be a partnership, and not an individual obligation. Mr. Justice Dowling pointed 332
out, however, that the assignments of the individual members of the firm of Whitney & Kitchen provided that the assignee should pay and discharge in full all their debts, both those growing out of the copartnership of Whitney & Kitchen and those of the individual partners, and held "that the Assignee must allow the claim of John F. McIntyre for its full amount, including costs and allowance and accrued interest against the copartnership estate of Whitney & Kitchen, and that as against the individual estates of Girard N. Whitney and James V. Geraghty, the claimant is entitled to share equally therein with the individual creditors and the creditors of said firm to the extent of the balance 333
remaining due upon his claim against the firm."

Mr. Justice Miller concurred in the result: "On the last ground stated in the opinion of Mr. Justice Dowling and also on the authority of the Matter of Blackford, 35 A. D. 333."

In a separate opinion, Mr. Justice Ingraham reached the same conclusion as Mr. Justice Dowling with regard to the provability of the costs, allowance and interest, and also with respect to the nature of the claim, holding the same to be a joint and not a joint and several obligation.

Digitized by Google

334 Referee's Special Opinion.

In view of the provisions of the assignments of the individual partners, however, Mr. Justice Ingraham reached the conclusion that the claimant "was entitled to have his claim allowed by the Assignee of the individual estate, at its full amount, and entitled to receive the same proportion of the amount due him as the individual creditors recover."

The order entered by the Appellate Division upon the submission, after the usual introductory recitals, proceeds as follows:

"It is ordered, adjudged and decreed that
335 Bayard L. Peck, as Assignee of the copartnership of Whitney & Kitchen, allow the claim filed by John F. McIntyre with the Assignee and dated March 21, 1911, against said estate, as follows, to wit:

1. A judgment for thirty-six thousand three hundred and fifty-six and 53/100 dollars ($36,356.53) with interest thereon from July 28th, 1910.

2. A judgment for two hundred forty-nine and 29/100 dollars ($249.29) with interest thereon from July 28th, 1910.

336 3. A judgment for one thousand nine hundred forty-seven and 12/100 dollars ($1,947.12) with interest thereon from March 10th, 1911, less the sum of one hundred twenty-nine and 30/100 dollars ($129.30) paid on account thereof, with interest thereon from March 10th, 1911, and

It is further ordered, adjudged and decreed that as against the individual estates of Girard N. Whitney and James V. Geraghty the above specified claims of John F. McIntyre be dis-

Digitized by Google

337

allowed by the Assignee as individual liabilities of the said Whitney and Geraghty, and shall not be allowed as claims against the said individual estates except to the extent that claims against the copartnership of Whitney & Kitchen are allowable under the terms of the individual assignments or otherwise.

And it is further ordered, adjudged and decreed that judgment be and it is hereby directed accordingly without costs to either party as against the other."

It will be observed that the Court, in its order, did not provide for the method in which the claimant should share in the individual estates of Whitney and Geraghty. It disallowed the claim as an individual liability, and allowed it against the individual estates only "to the extent that claims against the copartnership of Whitney and Kitchen are allowable under the terms of the individual assignments or otherwise." The manner in which the copartnership creditors, among whom the claimant is included, are to share in the individual estates, is expressly left open for future determination.

338

The party submitted only two questions to the Court for its decision:

339

1. Is the claimant entitled to prove and the assignee bound to allow the claims of John F. McIntyre, so as to entitle the said claims to be proved in full as a joint obligation of the firm, and as the individual obligation of each partner?

2. Is the claimant entitled to prove the costs and allowances in the action?

All the judges were unanimous in holding that the claimant is entitled to prove for costs and allow-

Digitized by Google

340 Referee's Special Opinion.

ance and interest. All the judges reached the same conclusion with respect to the nature of the claim, namely, that it was a joint, and not a joint and several obligation. The opinions differed only as to the manner in which the claimant is entitled to share in the individual estates of the copartners.

The parties, in their submission of facts, did not ask the Court to determine how the claimant was to share in the individual estates in the event that the claim was held to be a joint and not a joint and several obligation. But the inquiry on this branch of the submission was confined to the nature of the
341 claim, as joint or joint and several. The claimant asserting that the judgment be in tort, the partners were tort feasors and hence liable individually as well as jointly. This was the question the parties sought to decide.

I have examined the briefs of the parties and find that neither the claimant nor the assignee discussed in their briefs any question other than the two above referred to. Neither party touched upon the manner in which the claimant should share in the individual estates in the event that his claim was held to be a joint obligation only.

In view of the foregoing, I am of the opinion that
342 the remarks of the Court, with reference to the manner in which the claimant should share in the individual estates, are dicta, and that I am not bound by same. Whatever view is taken of this question, however, it is clear that the order, and not the opinion, of the individual judges is controlling. The order is confined strictly to the questions actually submitted by the parties.

The Court speaks by its order and effect must be given to it according to its terms. The order cannot be qualified in its operation and effect by reference to the opinion of the Court.

Digitized by Google

Hewlett vs. Wood, 67 N. Y. 394-399.
Fisher vs. Gould, 81 N. Y. 228-231.
Townsend vs. Nebenzahl, 81 N. Y. 644-645.
Morehouse vs. R. R. Co., 185 N. Y. 520-526.

This question becomes of importance owing to the fact that the Appellate Division has found the claim of John F. McIntyre to be a joint obligation and hence to be the same as the other copartnership obligations of the firm of Whitney & Kitchen. If the claimant is entitled to share in the individual estate in the manner indicated by Mr. Justice Dowling in his opinion, then all the other copartnership creditors are similarly entitled to share in the individual estate, for the reason stated in my opinion filed herein. With regard to the distribution of the moneys in the individual estates, I have concluded that the copartnership creditors are not entitled to share in the individual estates, either in the manner indicated by Mr. Justice Dowling or in that indicated by Mr. Justice Ingraham. If the matter had already been adjudicated by the Appellate Division, I would feel compelled to follow its ruling and direct that all the copartnership creditors should share in the individual estates in the manner indicated in the opinion of Mr. Justice Dowling. Since I conclude that there has been no adjudication of this question, I have not followed the opinion of Mr. Justice Dowling in this respect in the distribution of the separate estates. I accordingly hold that the claimant is entitled to share in the individual estate of Girard N. Whitney as a joint creditor of the copartnership estate in the same manner as the other copartnership creditors, and as indicated in my report herein.

343

344

345

Digitized by Google

346 **Claimant McIntyre's Proposed Conclusions of Law.**

SUPREME COURT,

NEW YORK COUNTY.

In the Matter of The Final Accounting of BAYARD L. PECK, as Assignee of Girard N. Whitney, under a General Assignment for the Benefit of Creditors.	Claims of John F. McIntyre.

347

John F. McIntyre, one of the claimants in the above entitled proceeding, requests the Referee herein to find that as

Conclusions of Law.

348 First. The claims of John F. McIntyre upon the said judgments, as follows, are allowed as individual claims against the estate of Girard N. Whitney:

(a) Judgment for $36,356.53 with interest thereon from July 28th, 1910.

(b) Judgment for $249.29 with interest thereon from July 28th, 1910.

(c) Judgment for $1,947.12 with interest thereon from March 10th, 1911, less the sum of $129.30 paid on account thereof, with interest thereon from March 10, 1911.

Refused—W. F. M.

Digitized by Google

 349

Second. That the said claims upon said judgments are also allowed, as are claims against the firm of Whitney and Kitchen entitled to share pro rata with other firm claims in the said estate of Girard N. Whitney, in accordance with the report of the Referee, in addition to sharing therein as individual claims of said estate.

Refused—W. F. M.

Dated, N. Y., Jan. 2/12.

THOMAS F. GILROY, Jr.,
Attorney for Claimant,
42 Broadway,
N. Y. City. 350

Claimant McIntyre's Exceptions to Referee's Reports.

SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Final Accounting of BAYARD L. PECK, as Assignee of Girard N. Whitney, under a General Assignment for the Benefit of Creditors. 351

Sirs:

Please take notice that John F. McIntyre, a claimant herein, hereby excepts to the report of William

Digitized by Google

352 Exceptions to Referee's Reports.

F. McCombs, the Referee herein, and to his findings of fact and conclusions of law stated in said report, filed herein in the office of the Clerk of the County of New York on the 9th day of February, 1912, in the following particulars:

First. Claimant herein excepts to so much of the findings of fact and conclusions of law stated in the said Referee's report in the twenty-fourth paragraph thereof, sub-division C, of said paragraph, as fails to state that this claimant is an individual claimant of the estate of Girard N. Whitney, and entitled to payment of his claim in full with interest
353 thereon, and as fails to find the said claim of the claimant herein as a valid claim against said estate, and as fails to direct the payment to him as an individual creditor of Girard N. Whitney of his proportion of the remaining two-thirds of the assigned estate before the payment or distribution thereof among the co-partnership creditors of Whitney & Kitchen.

Second. Said claimant further excepts to the twenty-fifth paragraph of said Referee's report in so far as it directs the discharge of said assignee, and his surety, from all liability upon making the payments as therein provided without first paying to
354 this claimant his proportionate share of the two-thirds applicable to the payment of the individual creditors of Girard N. Whitney.

Third. The claimant herein further excepts to the refusal of the Referee to make the conclusion of law requested in paragraph first of claimant's proposed conclusions of law.

Fourth. Claimant further excepts to the refusal of the Referee to make the conclusion of law as requested in paragraph second of this claimant's proposed conclusions of law.

Digitized by Google

355

Fifth. Claimant further excepts to the first conclusion of law stated in the Referee's report on the claim of John F. McIntyre herein in so much as said conclusion of law disallows as individual claims against the estate of Girard N. Whitney the claims of said John F. McIntyre.

Dated, New York, February 16, 1912.

Yours, etc.,

THOMAS F. GILROY, Jr.,
Attorney for Claimant, John F. McIntyre,
Office & Post-Office Address,
42 Broadway,
Borough of Manhattan,
New York City.

356

To DANIEL BURKE, Esq.,
Attorney for Bayard L. Peck, as Assignee.

IVINS, MASON, WOLFF & HOGUET, Esqrs.,
Attorneys for Girard N. Whitney and
Joseph Rogner and Annie R. Spratley.

BERNARD J. YORK, Esq.,
Attorney for Edward J. McKeever.

JOHN R. HALSEY, Esq.,
Attorney for William R. Willis.

357

GEORGE W. PHILLIPS, Jr., Esq.,
Attorney for Dudley S. and Herbert S. Harde.

CHARLES A. RUNK, Esq.,
Attorney for Charles F. Pope.

JAMES COWDEN MEYERS, Esq.,
Attorney for Jonas Monheimer.

E. DUDLEY BARLOW, Esq.,
In Person and Attorney for Gray Casement
and W. Hunt Hall.

C. S. PINKNEY, Esq.,
Attorney for Arthur B. Waring.

Digitized by Google

858 Final Decree.

LEONIDAS DENNIS, Esq.,
Attorney for U. S. Fidelity & Guaranty Co.

RICHARD J. LEWIS, Esq.,
Attorney for Gideon E. Fountain.

T. A. LEARY, Esq.,
Attorney for E. C. Manning.

JAMES V. GERAGHTY, Esq.,
In Person.

WILLIAM J. SCHNEIDER, Esq.,
County Clerk of New York County.

859

Final Decree.

At a Special Term, Part III, of the New York Supreme Court, New York County, held at the County Court House, Borough of Manhattan, City of New York, on the 28th day of February, 1912.

Present—Hon. JOSEPH E. NEWBURGER, Justice.

860

In the Matter

of

The Final Accounting of BAYARD L. PECK, as assignee of Girard N. Whitney, under a General Assignment for the Benefit of Creditors.

A general assignment having been made by Girard N. Whitney, individually and as a co-part-

Digitized by Google

361

ner with James V. Geraghty, doing business under the firm name and style of Whitney & Kitchen, to Bayard L. Peck, for the benefit of creditors, dated the 25th day of January, 1908, and recorded in the office of the Clerk of the County of New York on the 25th day of January, 1908, and the said Bayard L. Peck having accepted the trusts thereby created, and having on the 25th day of March, 1908, filed an inventory of the assigned estate and a schedule of the debts and liabilities thereof, and having on the 24th day of February, 1908, filed his bond, duly approved, for the faithful discharge of his duties as such assignee, and having thereafter

362

duly advertised for creditors to present their claims, duly verified, against the said Girard N. Whitney, to him, and the time for the presentation of said claims having expired, and the said Bayard L. Peck having appeared and presented his accounts as such assignee to this Court, and a citation, dated the 12th day of July, 1911, having been duly issued out of and under the seal of this Court, to all persons interested in the estate, to attend the settlement of the said account, which said citation was returnable on the 5th day of September, 1911, and the said citation, with proof of due service thereof according to law, having been filed, and the following parties having appeared in this

363

proceeding:

The Assignee	by	Daniel Burke,
Edward J. McKeever	"	Bernard J. York,
William R. Willis	"	John R. Halsey,
Dudley S. and Herbert S. Harde	"	George W. Phillips, Jr.,
Jonas Monheimer	"	James Cowden Meyers,
Charles F. Pope	"	Charles F. Rank,
John F. McIntyre	"	Thomas F. Gilroy, Jr.,
Gray Casement	"	E. Dudley Barlow,

....

Digitized by Google

364 Final Decree.

W. Hunt Hall	"	E. Dudley Barlow,
Arthur B. Waring	"	C. S. Pinkney,
United States Fidelity & Guaranty Company	"	Leonidas Dennis,
Girard N. Whitney	"	Ivins, Mason, Wolff & Hoguet,
Joseph Bogner	"	Ivins, Mason, Wolff & Hoguet,
Gideon E. Fountain	"	Richard Lewis,
E. C. Manning	"	T. A. Leary,
Annie R. Spratley	"	Ivins, Mason, Wolff & Hoguet,
365 James V. Geraghty		in Person,
E. Dudley Barlow	"	Person,

and no other person or persons appearing, and an order having been made by this Court, which said order was duly entered on the 6th day of September, 1911, referring the said accounts to William F. McCombs, Esq., to take proof and report as to the persons entitled to share in the assigned estate, their respective priorities and proportions, and the report of said Referee, dated the 3rd day of February, 1912, having been duly made and filed, and due notice of such filing having been given, and no exceptions having been taken thereto, except the exceptions filed herein by Daniel Burke, as attorney for the assignee herein, and the exceptions filed by Thomas F. Gilroy, Jr., as attorney for John F. McIntyre herein, now, upon reading the papers and proceedings hereinbefore recited, the said report and testimony and the vouchers thereunto annexed, and the said exceptions, and upon reading and filing the notice of filing of the Referee's report, and proof of due service of the notice of filing upon all persons who have appeared herein, and the affidavit of Daniel Burke, verified on the 13th day of

366

Digitized by Google

867

February, 1912, and the affidavit of Bayard L. Peck, verified on the 14th day of February, 1912, and the affidavit of George W. Phillips, Jr., verified on the 17th day of February, 1912, and after hearing Daniel Burke, Esq., of counsel, in behalf of the assignee, and Thomas F. Gilroy, Jr., Esq., on the exceptions filed by him to the report, and due consideration thereunto being had, it is,

On motion of Daniel Burke, attorney for said assignee, ordered, adjudged and decreed:

First. That the said report of the said Referee be, and the same hereby is, in all respects confirmed,

868

and the accounts of the said Bayard L. Peck, as assignee aforesaid, be, and the same hereby are, audited and allowed as therein stated.

Second. And it appearing from the report that the said Bayard L. Peck is charged with the sum of $106,011.12 and that he is directed therein to credit himself with payments made by him to the amount of $47,777.61, for certain payments of dividends as hereinafter set forth, and that he has in his hands the sum of $58,233.51, it is further ordered that the said balance with which the assignee is charged, plus any further interest received from the funds of the assigned estate, should be distrib-

869

uted as follows:

(a) The assignee should first pay, if he has not already done so, to Daniel Burke, attorney for the said assignee, the sum of $910.00, taxable costs and disbursements in this proceeding, including the fees of the Referee and stenographer, as taxed by the Clerk, and should pay to Daniel Burke, attorney for the said assignee, the sum of $1,266.79 as and for an additional allowance herein, for fees and disbursements necessarily incurred since the filing of the account herein, and that the assignee next

Digitized by Google

370 Final Decree.

credit himself with the sum of $125 necessarily paid by him as a premium on his bond herein.

(b) The assignee is then ordered and directed to retain the amount of his unpaid commissions, being the sum of $894.77 and 2½% on any further interest received.

(c) The assignee should then distribute the balance then found remaining, after the deduction of said costs, expenses, fees, allowances and commissions, as follows: The assignee having already paid to the co-partnership creditors of Whitney & Kitchen a sum in excess of one-third of this estate,
371 after deducting the costs and expenses of the execution of the trust hereunder, for which payment the assignee has received no credit in his account herein, said assignee is first entitled to credit his account with one-third of such balance. Out of the remaining two-thirds the assignee will then pay the individual creditors of Girard N. Whitney their claims in full, with interest, in the amounts set opposite their respective names, and at and for said amounts, with interest as aforesaid, the said claims should be, and they hereby are, found to be valid claims against the assigned estate herein:

372.

Digitized by Google

Name	Address	Description of Claim	Amount
Philip Blass,	22 Beaver Street, New York City,	Merchandise,	$ 14.00
Dunn & Peckner,	50 Broadway, New York City,	"	6.50
Matthew I. Fox,	Broadway and 25th St., New York City,	"	355.50
D. S. & H. S. Harde,	25 Broad Street, New York City,	Rent due and to grow due,	5000.00
Jonas H. Monheimer,		Rent,	1500.00
Annie R. Spratley,	500 West 111th St., New York City,	Money loaned,	20000.00
Annie R. Spratley,	500 West 111th St., New York City,	Costs and allowances,	1379.95
Weingarten & Pearl,	34 West 35th St., New York City,	Merchandise,	107.50
Percy H. Williams, M. D.,	222 West 72d St., New York City,	Medical attendance,	55.00
Reed & Barton,	5th Ave. & 32d St., New York City,	Merchandise,	89.25

Digitized by Google

376 Final Decree.

The assignee will then credit his account with the difference between forty-seven thousand seven hundred seventy-seven dollars and sixty-one cents ($47,777.61), heretofore paid by him to the co-partnership creditors, and the amount credited to his account as above directed, as the one-third part of this estate to which the co-partnership creditors were entitled. Out of the funds then in his hands, the assignee should then pay to John F. McIntyre a sufficient amount to make the percentage paid to him as a co-partnership creditor of Whitney & Kitchen out of the estate of Girard N. Whitney,
377 on account of his claims, equal to the percentage paid to the other creditors of Whitney & Kitchen out of the estate of Girard N. Whitney, viz.: the sum of fifteen hundred twenty-one dollars and seventy-nine cents ($1,521.79); and out of the rest, residue and remainder of the said funds remaining in the hands of the said assignee, after making the payments hereinbefore provided for, the said assignee is directed to distribute the said balance then remaining among the following persons, creditors of the co-partnership of Whitney & Kitchen, *pro rata*, to the amounts hereinbelow set opposite their respective names, at and for which amounts the said claims are hereby allowed as valid claims
378 against the estate assigned herein:

Digitized by Google

Final Decree.

CLAIMS AGAINST CO-PARTNERSHIP OF WHITNEY & KITCHEN.

Name.	Address.	Description of Claim.		Amo
Roger W. Babson, Inc.,	Wellesley Hills Station, Boston, Mass.,	On Contract,		$1
Lena Beck,	124 Hobart Avenue, Bayonne, New Jersey,	"	"	30
E. Dudley Barlow,	290 Broadway, New York,	"	"	52
Julie Brightman,	3 East 63d St., New York,	"	"	35
H. Ethel Bowman,	Dickson Ave., Liberty, Sullivan Co., New York,	"	"	3
Joseph Bogner,	443 West 47th St., New York City,	"	"	51
Florence Mead Brightman,	C/o H. I. Brightman, 115 Broadway, New York City,	"	"	25
C. A. Buttrick & Co.,	18 Wall St., New York,	"	"	2
Charles W. Baker,	408 New Jersey Railroad Ave., Newark, New Jersey,	"	"	70
Cyrus O. Baker,	30 Church St., New York,	"	"	137
Cyrus O. Baker,	30 Church St., New York,	"	"	72
C. Mont. Benton Co.,	526 West 28th St., New York City,	"	"	
Septima M. Collis,	C/o S. L. Levy, 133 Bank Ave., Philadelphia, Pa.,	"	"	198
Edward B. Corey,	Far Rockaway, Long Island,	"	"	
Gray Casement,	Painesville, Ohio,	"	"	65
R. M. Coleman,	C/o Winslow, Lanier & Co., 59 Cedar St., New York,	"	"	15
John F. Carroll,	3 East 14th St., New York City, Fourteenth St. Bank,	"	"	3
Willard S. Crossman,	15 West Fourth St., New York City,	"	"	5
Jane M. Craine,	7 Mount Morris Park West, New York City,	"	"	
Archibald Douglas,	280 Broadway, New York,	"	"	
Dow, Jones & Co.,	44 Broad St., New York,	"	"	
Warren W. Erwin,	26 Beaver St., New York,	"	"	184
Ferris Faulkner,	320 Fifth Ave., New York,	"	"	6
Financial Calendar Company,	25 West Broadway, New York City,	"	"	
Gideon E. Fountain,	318 West 88th St., New York City,	"	"	131
John J. Gilroy,	165 Broadway, New York,	"	"	19
Gwynne Bros.,	38 Broad St., New York,	"	"	
Minnie Griffen,	c/o A. O. Whitney, "The Sutherland," 158th St. & Riverside Drive, New York City,	"	"	5
Gerry & Murray,	75 Broad St., New York,	"	"	
W. Hunt Hall,	100 William St., New York,	"	"	12
Joseph Haas,	555 West 48th Street, New York City,	"	"	2
Charles B. Halsey,	1048 Fifth Ave., New York,	"	"	15
Anna Fry Jones,	"The Cordova," Florida Avenue and 20th St., N. W., Washington, D. C.,	"	"	8

Digitized by Google

Digitized by Google

Final Decree.

Dr. J. D. Jones, 240 Genesee Street, Utica, New York,	"	"	
Louise Whitney Landeau, c/o A. O. Whitney, "The Sutherland," 158th St. & Riverside Drive, New York,	"	"	3
I. Morgan Lewis, Rocky Hill, New Jersey,	"	"	
A. H. Laidlaw, 57 Duane St., New York,	"	"	2
Arthur Lipper & Co., 20 New St., New York,	"	"	
Thomas E. Murray, 57 Duane St., New York,	"	"	
John Mitchell, Jr., 1030 Lexington Ave., New York City,	"	"	
Frances G. Maher, Cedar Ave., Far Rockaway, Long Island,	"	"	
Max L. Meyers, O. J. Gude Co., 935 Broadway, New York City,	"	"	
Edward J. McKeever, 105 Sixth Ave., Brooklyn, N. Y.,	"	"	4
James H. Mayhew, Fort Schuyler, Westchester County, New York,	"	"	1
Ellen C. Manning, 419 West 129th Street, New York City,	"	"	1
George Mercer, Jr., 226 West 23d St., New York,	"	"	10
Godfrey S. Mahn, 6 Wall St., New York,	"	"	
John F. McIntyre, 25 Broad St., New York,	Judgment for Conversion,		36
John F. McIntyre, 25 Broad St., New York,	Costs in Appellate Division,		
John F. McIntyre, 25 Broad St., New York,	Allowance,		1
New York Financial Bulletin, 49 Broadway, New York,	On Contract,		
Louis C. Niedermeyer, 448 West 33d St., New York,	"	"	
New York News Bureau, 40 Stone St., New York,	"	"	
Charles F. Pope, 61 East 65th St., New York City,	"	"	1
Postal Telegraph-Cable Company, 253 Broadway, New York,	"	"	
Postal Telegraph-Cable Company, 253 Broadway, New York,	"	"	
Redmond & Co., 33 Pine St., New York,	"	"	
Annie R. Spratley, 500 West 111th St., New York City,	"	"	
Henry C. Spratley, 554 West 113th St., New York City,	"	"	
Edward B. Smith & Co., 27 Pine St., New York,	"	"	
Edward W. Steinicke, 129 Vernon Avenue, Long Island City,	"	"	
Daniel G. Tenney, 15 West Fourth St., New York City,	"	"	
S. H. Voorhees, 826 Arlington Avenue, Plainfield, N. J.,	"	"	2
Arthur B. Waring, Waring Hat Mfg. Company, Yonkers, New York,	"	"	1
Vernon Weston, c/o F. F. Ames, 44 Broad St., New York,	"	"	
Albert O. Whitney, "The Sutherland," 158th St. and Riverside Drive, New York City,	"	"	
William R. Willis, Broad and Maple Avenues, Morsemere, New Jersey, Ridgefield Post Office,	"	"	1
Annie R. Whitney, 620 West 116th St., New York,	"	"	
Emily A. Whitney, 509 West 110th St., N. Y.,	"	"	
Yost Writing Machine Company, 345 Broadway, New York City,	"	"	

Digitized by Google

Digitized by Google

379

That of the above claims, the following have been assigned and payment should be made to the Assignees of such claims in accordance with the assignments:

Septima M. Collis to Solomon L. Levy, Mar. 10th, 1911;

Warren W. Erwin to Assets Realization Co., Mar. 9th, 1909;

Ferris Faulkner to Assets Realization Co., Oct. 9th, 1908;

Charles B. Halsey to Assets Realization Co., Aug. 6th, 1908;

380

H. C. Spratley to Assets Realization Co., Aug. 11th, 1908;

Annie R. Spratley to Assets Realization Co., July 7th, 1908;

Annie R. Whitney to Assets Realization Co., July 7th, 1908;

Emily A. Whitney to Assets Realization Co., July 7th, 1908;

Arthur B. Waring, to the extent of twelve thousand four hundred dollars ($12,400) to W. S. Prankard, February 8th, 1908, and by W. S. Prankard to the Assets Realization Company, July 18, 1908.

381

Third. That said assignee do take good and sufficient vouchers for each and every payment so made, and if, after reasonable diligence, any of the persons so entitled to share in the said distribution cannot be found or shall decline or neglect to accept their said share, then to deposit the said share so belonging to such person to the credit of such person in the Lincoln Trust Company in the City of New York.

Fourth. That on compliance with the foregoing provisions, the said assignee shall, upon present-

Digitized by Google

382 Final Decree.

ing due proof of the same to this Court, be entitled to an order relieving him of his liability as such assignee and releasing the surety from the bond filed by the said Bayard L. Peck, as assignee of the said estate, from all liability upon the matter or matters included in the aforesaid accounting, to all creditors who have appeared and such creditors who have not appeared after the citation and such creditors as have not presented their claims after due advertisement, and that the said application be made without further notice.

Enter,

383

J. E. N.,
J. S. C.

384

Digitized by Google

Statement on Appeal From Interlocutory Judgment. 385

The claimant, John F. McIntyre, appellant herein, also appeals from so much of an interlocutory judgment on remittitur entered herein upon an order of the Appellate Division of the Supreme Court, First Department, made in proceedings commenced under Section 26 of the Debtors and Creditors Law, and submitted to said Court on a submission of controversy under Section 1279 of the Code of Civil Procedure, which order was entered and filed in the office of the Clerk of said Appellate Division on the 18th day of September, 1911, and which interlocutory judgment on remittitur was entered in the office of the Clerk of the County of New York on the 4th day of October, 1911, as directs that the claims filed by John F. McIntyre with the Assignee of Girard N. Whitney, and dated March 21st, 1911, against said estate be disallowed by the Assignee as individual liabilities of the said Girard N. Whitney, and that the claims should not be allowed as claims against said individual estate except to the extent that claims against the copartnership of Whitney & Kitchen are allowable, under the terms of the individual assignments or otherwise. The printed papers used on that appeal are not incorporated as such herein for the reason that all of the facts agreed upon in that submission have been found by William F. McCombs, Esq., Referee herein, in his special report on the claims of John F. McIntyre, and commencing at page 40 of these printed papers on appeal. The Referee recites the order of the Appellate Division entered upon said submission and refers to the opinions of the Appellate Division rendered thereon, but he does not find as a fact the interlocutory judgment on remittitur entered upon said order nor the opinions. A copy of said interlocutory judgment on remittitur

386

387

Digitized by Google

388 Interlocutory Judgment on Remittitur.

is hereto annexed. This interlocutory judgment, together with the facts found in the Referee's special report herein and the opinion of the Appellate Division which is reported in 146 App. Div. 45, and printed herein, constitutes all the papers on the appeal from the interlocutory judgment on remittitur herein.

Interlocutory Judgment on Remittitur.

SUPREME COURT,

389 NEW YORK COUNTY.

In the Matter

of

The Assignment of WHITNEY & KITCHEN, a copartnership composed of Girard N. Whitney and James V. Geraghty, to Bayard L. Peck.

In the Matter

390 of

The Assignment of GIRARD N. WHITNEY to Bayard L. Peck.

In the Matter

of

The Assignment of JAMES V. GERAGHTY to Bayard L. Peck.

This proceeding having been commenced under Section 26 of the Debtors and Creditors Law, and

Digitized by Google

391

submitted to this court on a submission of controversy under Section 1279 of the Code of Civil Procedure, presenting to this court at an Appellate Division thereof in the First Department for decision a controversy between Bayard L. Peck as assignee of the copartnership of Whitney & Kitchen and as assignee of Girard N. Whitney, and as assignee of James V. Geraghty; and John F. McIntyre, a claimant against each of said assigned estate, submitting for decision the questions:

1st. Whether or not upon the facts set forth in said submission the claimant is entitled to prove, and the assignee is bound to allow the claims of 392
said John F. McIntyre, based upon the judgments set forth in said submission as claims against the estate of Girard N. Whitney, individually, and against the estate of James V. Geraghty, individually, as well as against the estate of the copartnership of Whitney & Kitchen, to the full amount thereof, so as to entitle the claim of said John F. McIntyre to be proved in full as a joint obligation of the firm and as the individual obligation of each partner; and

2nd. Whether or not the said claimant is entitled to prove as against any of said estates so much of his claim as is for costs and allowance included 393
in said judgments; and the said submission having been duly signed by the parties thereto and filed in the office of the Clerk of the Appellate Division of the Supreme Court, First Department, on the 23rd day of May, 1911, and in the office of the Clerk of the County of New York on the 23rd day of May, 1911; and the said submission having duly come on to be heard on the 8th day of June, 1911, before the said Appellate Division of the Supreme Court, First Department, on the printed copy of said submission and the printed case and exceptions therein

Digitized by Google

394 Interlocutory Judgment on Remittitur.

referred to, and on the printed briefs of the parties hereto, and upon the oral arguments of Thomas F. Gilroy, Jr., Esq., counsel for said John F. McIntyre, the claimant herein, and of Daniel Burke, Esq., counsel for the assignee, and the said Appellate Division of the Supreme Court having duly rendered its decision herein on the 7th day of July, 1911, and an order having been duly entered thereon dated the 7th day of July, 1911, providing and directing that Bayard L. Peck, as assignee of the copartnership of Whitney & Kitchen, allow the claim filed by John F. McIntyre with the assignee
395 and dated March 21st, 1911, against said estate as a judgment for thirty-six thousand three hundred and fifty-six and 53/100 dollars ($36,356.53), with interest thereon from July 28th, 1910; a judgment for two hundred and forty-nine and 29/100 dollars ($249.29), with interest thereon from July 28th, 1910, and a judgment for nineteen hundred and forty-seven and 12/100 dollars ($1947.12), with interest thereon from March 10th, 1911, less the sum of one hundred and twenty-nine and 30/100 dollars ($129.30), paid on account thereof, with interest thereon from March 10th, 1911; and further providing and directing that as against the individual estates of Girard N. Whitney and James V.
396 Geraghty, the above specified claims of John F. McIntyre be disallowed by the assignee as individual liabilities of the said Whitney and Geraghty, and shall not be allowed as claims against said individual estates, except to the extent that claims against the copartnership of Whitney & Kitchen are allowable under the terms of the individual assignments or otherwise and directing that judgment be entered accordingly without costs to either party as against the other; and a remittitur having been duly filed in the office of the Clerk of the County of New York on the 20th day of September, 1911;

Digitized by Google

Interlocutory Judgment on Remittitur.

Now, on motion of Thomas F. Gilroy, Jr., Esq., attorney for the claimant, John F. McIntyre, it is

Ordered, adjudged and decreed, that Bayard L. Peck, as assignee of the copartnership of Whitney & Kitchen, allow the claim filed by John F. McIntyre with the assignee and dated March 21st, 1911, against said estate as follows, to wit:

(1) A judgment for thirty-six thousand three hundred and fifty-six and 53/100 dollars ($36,356.53), with interest thereon from July 28th, 1910;

(2) A judgment for two hundred and forty-nine and 29/100 dollars ($249.29), with interest thereon from July 28th, 1910;

(3) A judgment for nineteen hundred and forty-seven and 12/100 dollars ($1947.12), with interest thereon from March 10th, 1911, less the sum of one hundred and twenty-nine and 30/100 dollars ($129.30), paid on account thereof, with interest thereon from March 10th, 1911; and it is further

Ordered, adjudged and decreed, that as against the individual estate of Girard N. Whitney and James V. Geraghty, the above specified claims of John F. McIntyre be disallowed by the assignee as individual liabilities of the said Whitney and Geraghty, and shall not be allowed as claims against said individual estates, except to the extent that claims against the copartnership of Whitney and Kitchen are allowable under the terms of the individual assignments or otherwise.

WM. F. SCHNEIDER,
Clerk.

Digitized by Google

400 Opinion of Appellate Division on Submission of Controversy.

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

June, 1911.

GEORGE L. INGRAHAM, P. J.,
CHESTER B. McLAUGHLIN,
FRANK C. LAUGHLIN,
NATHAN L. MILLER,
VICTOR J. DOWLING, JJ.

401 In the Matter

of

The Assignment of WHITNEY AND KITCHEN, a co-partnership composed of Girard N. Whitney and James V. Geraghty, to Bayard L. Peck.

In the Matter

of

The Assignment of GIRARD N. WHITNEY to Bayard L. Peck.

402 In the Matter

of

The Assignment of JAMES V. GERAGHTY to Bayard L. Peck.

} No. 1824.

This is a submission of controversy upon an agreed statement of facts.

THOMAS F. GILROY, Jr., for Claimant.
DANIEL BURKE, for Assignee.

Digitized by Google

403

DOWLING, J.:

Girard N. Whitney and James V. Geraghty were stockbrokers in the City of New York, doing business under the firm name and style of Whitney & Kitchen. On January 16, 1908, the firm made a general assignment for the benefit of its creditors, without preference, to Bayard L. Peck, and on January 25, 1908, the members of the firm made individual general assignments, without preference, to the same person, who duly qualified as assignee under all three assignments on January 17, 1908, February 24, 1908, and March 25, 1908, respectively. Thereafter, and on June 3, 1908, the claimant, John F. McIntyre, commenced an action against "Girard N. Whitney and James V. Geraghty, copartners, doing business under the firm name and style of Whitney & Kitchen, and Bayard L. Peck, as assignee for the benefit of creditors of said co-partnership," to recover the sum of $30,337.50, with interest, upon allegations of the copartnership of defendants in the business of stock-brokerage under the firm name of Whitney & Kitchen; of the making of the firm assignment before referred to; of the purchase by the copartnership, at plaintiff's special instance and request of 500 shares of Amalgamated Copper Company stock at the then market price of $90 a share, including the commission of said copartnership; of the deposit by plaintiff with the copartnership of the sum of $5,000 in cash as margin upon said transaction and as part payment of the purchase price of said shares; of an agreement by the copartnership to advance for plaintiff the balance of the purchase price of said shares and to hold them as collateral security for such advances; of the further deposit by plaintiff with said copartnership at its demand and request, between August 7th and October 23, 1907, of sums aggregating $25,000 as

404

405

Digitized by Google

406

margins upon the transaction and as partial repayment of the advances made by the copartnership. The complaint then further alleged: "Seventh: On information and belief, that on or about the 27th day of July, 1907, the defendants Whitney and Geraghty, composing the said copartnership as aforesaid, without the consent or knowledge of plaintiff and in violation of his ownership and of his rights in said stock, and in violation of the said agreement between plaintiff and said copartnership, disposed of said five hundred (500) shares of stock of the Amalgamated Copper Company and con-
407 verted the same to their own use." "Eighth:" (as amended) "That prior to the commencement of this action, and on January 16th, 1908, January 17th, 1908, and January 19, 1908, plaintiff duly demanded from the defendants Whitney and Peck as assignee as aforesaid, and on January 21, 1908, plaintiff duly demanded from the defendant Geraghty the return to him of said stock and at said times duly offered to pay the balance due thereon, but said defendants and each of them failed and neglected and refused to return the same and on information and belief said stock is not and was not then and has never since said conversion been in the possession of said defendants or of any of them." It was fur-
408 ther set forth that plaintiff did not know of the conversion of his stock until January 16th, 1908; that the highest market price of the stock between July 27th, 1907, and that date was $90.37-½ per share; and that due proof of claim had been presented against the assigned estate of the copartnership to the assignee, who had rejected the same. Thereafter the complaint was dismissed by stipulation against the defendant Peck, but he continued in the action and took part in the argument of the subsequent appeals. The suit having been sent to a referee to hear and determine, judgment was thereafter en-

Digitized by Google

409

tered on his decision in favor of the plaintiff and against the defendants "Girard N. Whitney and James V. Geraghty, copartners composing the firm of Whitney & Kitchen" in the sum of $11,485.21 damages together with $977.40 costs and disbursements. On appeal to this court the judgment was modified by increasing it to $36,356.53, with costs of the appeal amounting to $249.29 (McIntyre v. Whitney, 139 App. Div., 557). On appeal to the Court of Appeals the judgment of this court was affirmed, with costs. (201 N. Y., 526.) Included in the judgment in its present form is an allowance granted pursuant to the provisions of Sec. 3253, Code of

410

Civil Procedure. Thereafter proof of claim of the amounts due under the various judgments was duly filed with the assignee, wherein the plaintiff gave notice that he "claims that the copartnership of Whitney & Kitchen consisting of James V. Geraghty and Girard N. Whitney, general partners", is justly indebted to him in the amount thereof. At the same time he filed similar proofs of claims against the individual estates. The assignee rejected all of the claims against the copartnership estate beyond the principal thereof, with interest down to the time of the making of the assignment, and rejected in toto the claim against the individual estates.

411

The questions presented for decision are: (1) Are the judgments recovered a valid claim against the copartnership estate for the whole amount thereof with interest, or only for the amount admitted by the assignee? (2) Are the claims based on said judgments provable against the individual estates of the members of the firm, as well as against the copartnership estate, and if so, are they to be preferred in payment over the other firm debts and equally with the claims of individual creditors of the individual estates? To the first question we believe the answer must be returned that the judg-

Digitized by Google

412

ments are final and conclusive upon the assignee and all other persons interested in the copartnership estate, as well as upon the assignors. So far as the interest is concerned, the members of the firm determined the question for themselves when they directed their assignee, by the terms of the assignment, to pay and discharge in full, so far as the funds were sufficient, "all the debts and liabilities now due or to grow due from the said copartnership, parties of the first part, with all interest moneys due or to grow due thereon." But even apart from this provision the assignee could not question the
413 judgments, or seek to separate them and allow part and disallow the rest, when the judgments themselves are not attacked for fraud or collusion. "Where a cause of action has been prosecuted or reduced to judgment, the cause of action is swallowed up and merged in the judgment which is a higher and superior sort of security." (20 Am. & Eng. Ency. of Law, 2nd Ed., 509.) "After the recovery of this judgment, whether it was recovered for a tort or upon contract, the recovery became a debt which the defendant was under obligations to pay; and the law implied a promise or contract on his part to pay it. The previous cause of action, what-
414 ever it was, became merged in the judgment." (Gutta Percha Co. v. Major, 108 N. Y., 278.) "I am of the opinion, that in the absence of any suggestion of fraud, collusion, undue advantage or mistake, a judgment recovered against an assignor for benefit of creditors, even after the making of the assignment, on a litigation of the merits, and on a deliberate and intelligent decision by a court of competent jurisdiction, is conclusive on the assignee, as to the fact and amount of an indebtedness established thereby on a consideration existing before the assignment." (Austin Abbott, Referee, in Ludington's Petition, 5 Abb. N. C., 322.)

Digitized by Google

This is so even when the assignment is made pending the trial of the action. "Where during the pendency and before the trial of an action, the defendant makes a general assignment for the benefit of creditors, and the action after a trial at which the defendant appears and defends, results in a judgment in favor of the plaintiff, the judgment in the action is not only competent evidence as to the amount of the plaintiff's claim against the assigned estate, but, in the absence of fraud or collusion in the recovery of the judgment, is conclusive evidence thereof, against the assignee and the defendant's other creditors." (*In re* Roberts, 98 A. D., 155.) So in Merchants Nat. Bank vs. Hagemeyer (4 App. Div., 52) an assignee was allowed to become a party to an action where the assignment was made after the action was commenced, on the ground that the judgment to be rendered would be conclusive upon the assignee, whether made before or after the assignment. We are of the opinion, therefore, that whatever was incidental to the recovery of the judgment and involved therein as a necessary result of the litigation, including the costs and allowance therein, as well as the interest accruing because of the delay, became final and conclusive as against not only the assignors, but their assignee and creditors, in the absence of fraud and collusion. The present record not only fails to disclose the presence of such elements, but affirmatively establishes a most vigorous opposition to plaintiff's claim, carried to the court of last resort, with the assignee participating in the appeals.

The second question presented it seems to us necessitates the drawing of the distinction which was pointed out In Matter of Blackford, 35 App. Div., 333, (relied on by claimant) between a tort pure and simple and one arising out of the contractual relationship between the parties. It suf-

Digitized by Google

418

ficiently appears from the summary heretofore made of the original complaint that the tort alleged was that of the copartnership and that it arose out of a disregard of the contractual rights of plaintiff by the partnership. There is no allegation of any wrongful act of the individual members of the firm. No one of them is charged to have unlawfully converted or disposed of plaintiff's property. The claim is that the copartnership converted the stock, and the referee has found that the copartnership unlawfully delivered plaintiff's stock to another firm in payment of a copartner-

419 ship debt, the copartnership being credited with the value thereof on the books of the Clearing House of the New York Stock Exchange. This therefore is a joint debt, arising out of a violation by a copartnership of its contractual duties, with no profit accruing therefrom to the individual members but solely to the copartnership. Ordinarily, it would come under the rule of equity that joint creditors must look to the joint estate, and individual creditors to the separate estate of the partners, based on the principle that the joint creditors have extended credit on the faith of the firm property and the individual creditors on the faith of

420 separate estates of the partners. (Matter of Blackford, *supra*.) The cases relied upon by plaintiff as sustaining his contention that the liability herein is joint and several are either those wherein an individual liability has been created by members of a firm individually endorsing the firm notes, or such exceptional cases as Morgan v. Skidmore, 55 Barb. 263 (affd. 3 Abb. N. C. 92) where a member of a firm had personally made a false representation as to the solvency of his firm and the condition of the estate of one of the deceased members, in reliance upon which plaintiff had issued a draft for £12,000. It was there held that judgment could

Digitized by Google

be obtained against the estate of the member making such representation, even after plaintiffs had obtained judgment against the firm for the original amount due, nor was there anything inconsistent in the two suits, for they were not suing as creditors of the deceased, when his liability would be joint, but upon his representation, whereon his liability was personal.

But in this case the individual members of the firm have extended the usual rule by each directing in their individual assignments that their assignee shall pay and discharge in full "all the debts and liabilities now due or to grow due from 422
the said copartnership of Whitney & Kitchen and from the said party of the first part, with all the interest moneys due or to grow due thereon; and if the residue of said proceeds shall not be sufficient to pay the said debts and liabilities and interest moneys in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities ratably and in proportion." It was held in Mills *et al.* v. Parkhurst *et al.*, 30 N. Y. State Rep. 138, 142, that the application of the equitable rule by which partnership debts are primarily payable out of partnership assets and individual debts out of individual assets, with a preference to each class of debts over the other as respects the dis- 421
tribution of the corresponding fund, would be prevented only by express and unmistakable directions to the contrary in the instrument of assignment, but that when the intention of the assignor was clearly expressed that no distinction was to be made between his individual debts and those which arose from his connection with the firm, that intention must be effectuated. Such is the case with the assignment now under consideration.

It follows, therefore, that the assignee must allow the claim of John F. McIntyre at its full

Digitized by Google

424 Memorandum of Concurrence by Miller, J.

amount including costs, allowance and accrued interest, against the copartnership estate of Whitney & Kitchen, and that as against the individual estates of Girard H. Whitney and James V. Geraghty the claimant is entitled to share equally therein with the individual creditors, and the creditors of said firm, to the extent of the balance remaining due upon his claim against the firm.

Judgment is directed accordingly without costs.

McLoughlin and Laughlin, J.J., concur.

425

Memorandum of Concurrence by Miller, J.

MILLER, J.

I concur in result on the last ground stated in the opinion of Mr. Justice Dowling and also on the authority of Matter of Blackford (35 App. Div., 333).

426

Digitized by Google

Opinion of Ingraham, P. J. 427

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

JUNE, 1911.

Present—GEORGE L. INGRAHAM, Presiding Justice.
CHESTER B. MCLAUGHLIN,
FRANK C. LAUGHLIN,
NATHAN L. MILLER,
VICTOR J. DOWLING,
Justices.

428

In the Matter

of

The Assignment of WHITNEY AND KITCHEN, a copartnership composed of Girard N. Whitney and James V. Geraghty, to Bayard L. Peck.

In the Matter

of

The Assignment of GIRARD N. WHITNEY to Bayard L. Peck. 429

In the Matter

of

The Assignment of JAMES V. GERAGHTY to Bayard L. Peck.

INGRAHAM, P. J.

The firm of Whitney and Kitchen, composed of Girard N. Whitney and James V. Geraghty, were

Digitized by Google

430 stock brokers doing business in the city of New York. This firm had purchased on July 27, 1907, for account of the plaintiff, certain stocks on margin, but had deposited the stock without plaintiff's consent, whereupon plaintiff commenced an action against the said copartners, alleging in his complaint that the said copartners had sold the said stock without the consent or knowledge of the plaintiff and "in violation of his ownership and of his rights in said stock * * * and converted the same to their own use;" that plaintiff had subsequently demanded the return of said stock from
431 said copartners and had duly offered to pay the balance due thereon, but that said copartners had failed and refused to return the same, and that plaintiff had been damaged thereby in the sum of $45,337.50, less $15,000 of advances by said copartnership remaining unpaid by plaintiff, and that the copartners were indebted to plaintiff in the sum of $30,337.50, with interest thereon from July 27, 1907. The defendants in that action interposed an answer, and upon the trial thereof before a referee plaintiff obtained a judgment in his favor for $12,462.61. Plaintiff appealed from said judgment, and this Court modified the same by increasing the amount to which plaintiff was entitled to
432 $36,356.53. The defendants in that action appealed from such modification to the Court of Appeals, where the judgment of this Court was affirmed.

The referee found that the said copartnership of Whitney & Kitchen had purchased the stock for account of the plaintiff on July 27th, 1907, and had actually received the stock on July 29th, and on the same day, without the knowledge or consent of the plaintiff, had delivered the said stock to a Stock Exchange firm in partial repayment of a loan of stock then due to the firm to which it was delivered from the said copartnership of Whitney &

Digitized by Google

Kitchen, and that on July 29, 1907, said Whitney & Kitchen converted the said stock to their own use; that on January 16, 1908, the said copartnership of Whitney & Kitchen made a general assignment to Bayard L. Peck for the benefit of creditors.

This general assignment is made part of the submission. By it, the assignee is directed to sell the copartnership property assigned to him and to convert the same into money, and to collect all debts and demands due to the said copartnership, and out of the proceeds of such sale and collections, after payment of the expenses, costs and charges of executing the trust, to pay and discharge all debts 434 and liabilities of said copartnership with interest, and if said proceeds should not be sufficient to pay said debts, liabilities and interest in full, then to apply the said proceeds to the payment of said debts and liabilities ratably and in proportion. On the 25th day of January, 1908, Girard N. Whitney, one of said copartners of Whitney & Kitchen, executed an assignment of all his individual property to Bayard L. Peck, and on the same day James V. Geraghty, the other copartner, also made an assignment of his individual property to the said Bayard L. Peck. By these individual assignments the assignee was directed to sell the property assigned to him and collect the debts due to the 435 assignors and, after paying the expenses, costs and charges of the execution of the trust, to "pay and discharge in full, if the residue of said proceeds are sufficient for that purpose, all the debts and liabilities now due or to grow due from the said copartnership of Whitney & Kitchen and from the said party of the first part, with all the interest money due or to grow due thereon; and if the residue of the said proceeds shall not be sufficient to pay the said debts and liabilities and interest in full, then to apply the said residue of said pro-

Digitized by Google

436 Opinion of Ingraham, P. J.

ceeds to the payment of said debts and liabilities ratably and in proportion."

After the assignment for the benefit of creditors and on April 25, 1908, the plaintiff filed with the assignee a proof of claim against the copartnership, which claim the assignee rejected. After the affirmance of the judgment by the Court of Appeals and on March 24, 1911, the plaintiff again filed with the assignee a proof of claim as against the copartnership of Whitney & Kitchen on the judgments of this Court and the Court of Appeals. This claim the assignee rejected, but stated that he would
437 pay on the amount found to be due by the referee with interest to the date of the assignment. The plaintiff then filed with the assignee proof of claim on the judgments against the assignee of the individual property of the two copartners, claiming to be entitled to share in the proceeds of the individual property of the copartners as well as in the property of the copartnership, which claim the assignee has rejected.

After stating the claims of the respective parties, the submission is as follows: "The controversy hereby submitted for decision is, whether or not, upon the foregoing facts, the claimant is entitled
438 to prove and the assignee is bound to allow the claims of the said John F. McIntyre, based upon the said judgments, as claims against the estate of Girard N. Whitney individually and against the estate of James V. Geraghty individually as well as against the estate of the copartnership of Whitney & Kitchen to the full amount thereof, so as to entitle the claim herein to be proved in full as a joint obligation of the firm and as the individual obligation of each partner; and whether or not the said claimant is entitled to prove as against any of said estates so much of his claim as is for the costs and allowance on the action; and the claimant asks an

Digitized by Google

order of this Court allowing his said claim as above set forth."

I think this claim as established by the judgments of this Court and the Court of Appeals was a copartnership liability. The action was against the members of the copartnership. The complaint alleges a conversion by the copartners jointly, and also a breach of contract. The referee found that the stock purchased for the plaintiff was delivered by the copartners to discharge a copartnership obligation, and that act, delivery of the stock, which was the property of the plaintiff, was as between the copartnership and the plaintiff a conversion. It 440
is claimed that the plaintiff could not maintain an action against each copartner individually for a conversion. No act of either of the copartners was alleged as a conversion, nor did the referee find that either partner converted the plaintiff's property to his own use. The stock was delivered by the copartnership to discharge a copartnership obligation. The only relation of either of the copartners to the plaintiff was the obligation that they assumed to him as brokers to purchase stock for him and hold the same for him, subject to a lien on the stock purchased for the advances they had made in making the purchase. The relation was purely con-
tractual. When the copartnership disposed of the 441
stock purchased for plaintiff for its own purpose, the conversion of the stock was a copartnership act for the benefit of the copartnership for which the copartnership as such was liable. The right of the plaintiff to the stock therefore depended upon the contract with the copartnership and it was a breach of that contract that constituted the conversion which imposed a liability upon the copartnership. The distinction between this case and Roberts v. Johnson (58 N. Y., 613), and Matter of Blackford (35 App. Div., 330), is obvious, in de-

Digitized by Google

442 Opinion of Ingraham, P. J.

termining that the principle on which equity founds the rule that joint creditors must look to the joint estate and individual creditors to the separate estate of the partners. Mr. Justice Cullen in the latter case says: "This reasoning certainly does not obtain in a case like the present in which there was no contractual relation between the parties and the act of the defendant was a tort pure and simple."

In the case at bar there were contractual relations between the parties and the liability arose out of a breach of that contract which imposed a
443 joint liability upon the copartners.

The plaintiff presented his claim to the defendant as a liability of the copartnership. The defendant rejected the claim, whereupon the plaintiff brought an action against the copartners alleging a just liability and making the assignee a party. He recovered against the copartners, but the complaint as against the assignee was dismissed. There was thus established a debt or liability of the copartnership. The amount of that debt was the amount of that judgment. The firm assignment directed the assignee to apply the proceeds of the assigned estate to pay and discharge "all the debts and liabilities now due or to grow due from the said co-
444 partnership * * * with all interest and moneys due or to grow due thereon." The costs and interest on the amount found due to the time of payment was, I think, within the terms of the assignment, and plaintiff is entitled to have the amount of the judgments and interest thereon to that time allowed as the amount of his claim which he is entitled to recover if the proceeds are sufficient and if not then his proportion thereof. There is also the question as to whether plaintiff is entitled to prove his claim as against the individual estate of the copartners.

Digitized by Google

445

It is settled that the assignee is bound to strictly follow the assignment in the administration of the assigned estate. Unless the assignment is set aside it must control as to the persons entitled to share in the proceeds of the assigned property, and if the individual assignment provides for the discharge of the firm liabilities out of the individual property of each assignor then I can see no reason why plaintiff is not entitled to have his proportion of the individual property applied to the payment of his claim against the copartnership. The individual assignments were executed sometime after the copartnership assignment and were entirely separate

446

instruments. The fact that the same assignee was named is of no importance. They provided that the assignee should pay and discharge in full "all the debts and liabilities now due or to grow due from the said copartnership of Whitney and Kitchen and from the said party of the first part." The assignments thus placed upon the same footing the debts and liabilities of the firm and of the individual assignor and if the proceeds were not sufficient to pay said debts and liabilities in full the assignee was directed "then to apply the said residue of said proceeds to the payment of said debts and liabilities ratably and in proporiton." If the

447

copartnership had made no assignment I suppose there would be no doubt but that the firm creditors would have been entitled to have their claims paid in the same proportion as the claim against the assignor individually and it can make no difference that the assignor had before making the assignment joined in an assignment of copartnership property which was also to be applied to the payment of the claims against the copartnership. This is not a case where a court of equity has power to marshal assets in the absence of specific direction

Digitized by Google

448 Opinion of Ingraham, P. J.

as to the manner in which they should be disposed of, but here the assignor has by a specific provision, directed the assignee to pay the debts and liabilities of the firm of which he was a member and his individual liabilities "ratably and in proportion."

I think, therefore, that the plaintiff was entitled to have his claim allowed by the assignee of the individual estate at its full amount and entitled to receive the same proportion of the amount due him as the individual creditors recovered. Of course, if he was paid by the assignee of the firm property
449 the full amount of his claim he would not be entitled to receive any part of the estate of the individual partners on more of the individual estate than would be sufficient to pay his claim in full after applying the dividend received for the firm property.

Judgment should therefore be directed for the plaintiff in accordance with the views expressed, with costs.

450

Digitized by Google

Stipulation Waiving Certification. 451

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated and agreed that the foregoing printed record contains true and correct copies of the petition, order of reference, reports of referee, requests to find, exceptions, opinions of referee, final decree and notice of appeal therefrom by appellant to the Appellate Division of the Supreme Court, First Department, and of all the papers, documents, records, evidence and other proceedings before the Court and upon which the Court acted in entering said final decree, and of all papers before the Appellate Division on the submission of controversy herein referred to, which are material to the questions raised by this appeal, and certification of all of the same is hereby waived. 452

Dated, New York, May 25th, 1912.

Thomas F. Gilroy Jr.

Attorney for Appellant.

Daniel Burke

Attorney for Assignee-Respondent, and on behalf of all other Respondents.

453

Order Filing Record in Appellate Division.

Pursuant to Section 1353 of the Code of Civil Procedure, it is

Ordered, that the foregoing printed record be filed in the office of the Clerk of the Appellate Division in the First Judicial Department.

Dated, New York, May 27th, 1912.

William F. McCombs

Referee

Digitized by Google

454 **Notice of Appeal to Court of Appeals.**

SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Final Accounting of BAYARD L. PECK, as Assignee of
455 Girard N. Whitney, under a General Assignment for the benefit of creditors,
Respondent,

JOHN F. McINTYRE,
Claimant-Appellant.

Sirs:

Please take notice that John F. McIntyre, one of the claimants herein, hereby appeals to the Court of Appeals of the State of New York, from an or-
456 der of the Appellate Division of the Supreme Court of the State of New York, for the First Department, made in these proceedings, and entered and filed in the office of the Clerk of the said Appellate Division on the 3rd day of May, 1912, and from the judgment on remittitur entered thereon in the office of the Clerk of the County of New York, on the 8th day of May, 1912, affirming so much of a final decree entered herein on the 28th day of February, 1912, in the office of the Clerk of the County

Digitized by Google

of New York, confirming the report of William F. 457
McCombs, Esq., Referee, filed in the office of the Clerk of the County of New York, on the 9th day of February, 1912, as disallows the claims of said John F. McIntyre against the separate estate of Girard N. Whitney as individual claims against said estate, in addition to allowing the said claims as co-partnership claims against said estate, and from so much of said final decree as discharges the assignee and his surety from liability upon distribution of the said estate, as set forth in said final decree without first allowing said claims as individual claims against said separate estate, and from so much of said final decree as directs a dis- 458
tribution of said separate estate without first allowing said claims as individual claims and the payment thereof in full, with interest to the date of payment; and appellant will bring up for review on such appeal so much of an interlocutory judgment on remittutur entered upon an order of the Appellate Division of the Supreme Court of the State of New York for the First Department, made in proceedings commenced under Section 26 of the Debtors and Creditors Law and submitted to said Court on a submission of controversy under Section 1279 of the Code of Civil Procedure, entitled "In the Matter of the Assignment of Girard N. Whitney to Bayard L. Peck", which order was en- 459
tered and filed in the office of the Clerk of said Appellate Division on the 18th day of September, 1911, and which interlocutory judgment on remittitur was entered in the office of the Clerk of the County of New York on the 4th day of October, 1911, as directs that the claims filed by John F. McIntyre with the Assignee of Girard N. Whitney and dated March 21st, 1911, against said separate estate be disallowed by the Assignee as in-

Digitized by Google

460 dividual liabilities of the said Girard N. Whitney and that the claims should not be allowed as claims against said individual estate except to the extent that claims against the copartnership of Whitney & Kitchen are allowable under the terms of the individual assignment or otherwise.

Dated, New York, May 8th, 1912.

Yours, etc.,

THOMAS F. GILROY, JR.,
Attorney for Appellant,
John F. McIntyre,
No. 42 Broadway,
461 New York City.

462

Digitized by Google

Order of Appellate Division. 463

At a Term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department, in the County of New York, on the 3rd day of May, 1912.

Present—Hon. GEORGE L. INGRAHAM,
Presiding Justice.
" CHESTER B. MCLAUGHLIN,
" JOHN PROCTOR CLARKE,
" FRANCIS M. SCOTT,
" VICTOR J. DOWLING,
Justices. 464

In the Matter of The Final Accounting of BAYARD L. PECK, as Assignee of Girard N. Whitney, &c., Respondent, JOHN F. MCINTYRE, Appellant.	Affirmance of Order.

An appeal having been taken to this Court, by 465
John F. McIntyre, one of the claimants herein, from parts of a final order of the Supreme Court, entered on the 28th day of February, 1912, and said appeal having been argued by Mr. Thomas F. Gilroy, Jr., of counsel for the appellant, and by Mr. Daniel Burke, of counsel for the respondent; and due deliberation having been had thereon, it is hereby

Ordered and adjudged that the final order so appealed from be and the same is hereby affirmed, with costs.

Enter,

G. L. I.

Digitized by Google

466 **Judgment on Remittitur of Appellate Division.**

SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Final Accounting of BAYARD L. PECK, as Assignee of Girard
467 N. Whitney, under a General Assignment for the Benefit of Creditors,

JOHN F. McINTYRE,
Claimant.

John F. McIntyre, having presented claims against the assigned estate herein on the 24th day of March, 1911 amounting in the aggregate to the sum of thirty-eight thousand two hundred ninety-four dollars and thirty-four cents ($38,294.34) as individual claims against the said estate, and the
468 issues as to the allowance of said claims as individual claims having been submitted on an agreed state of facts to the Appellate Division of the Supreme Court, in the First Department, and counsel for the said John F. McIntyre and the said Bayard L. Peck as Assignee having been duly heard by said Appellate Division on the 8th day of June, 1911, and decision having been duly rendered disallowing the said claims as individual claims against the estate of Girard N. Whitney, and an order having been duly entered disallowing said claims as individual claims on the 18th day of Sep-

Digitized by Google

tember, 1911, and a judgment on remittitur having 469
been duly entered upon said order of the Appellate Division on the 4th day of October, 1911, and all the papers used on said submission and the complete record thereof having been duly offered and received in evidence before William F. McCombs, Esq., appointed on the 6th day of September, 1911, by the Supreme Court as a Referee to take and state the assignee's account and to take proof and report as to the persons entitled to share in the assigned estate, their respective priorities and proportions, and the said Referee having rendered his decision and report in accordance with the said order of the Appellate Division disallowing the said 470
claims as individual claims against the estate of Girard N. Whitney, and said report having been duly filed in the office of the County Clerk of the County of New York, and the said John F. McIntyre having filed exceptions to the said report on the 19th day of February, 1912, in which he excepted to the disallowance of the said claims, and the said report having been brought up on a motion for confirmation on the 21st day of February, 1912, before his Honor, Justice Joseph E. Newburger, at Special Term, Part III, of the Supreme Court, and an order having been duly entered confirming the said report and disallowing said claims as individual claims on the 28th day of February, 1912, 471
and directing a distribution of the said estate, and an appeal having been taken by the said John F. McIntyre from so much of the said final order as disallows the said claims as individual claims against said estate in addition to allowing said claims as copartnership claims against said estate and from so much of said final decree as discharges the assignee and his surety from liability upon distribution of said estate as set forth in said

Digitized by Google

472 final decree and from so much of said final decree as directs a distribution of any part of said separate estate exceeding one-third among the copartnership creditors of Whitney & Kitchen before the payment of claimant McIntyre's claims in full with interest to the date of payment, and notice having been given of intention to bring up for review so much of the interlocutory judgment on remittitur entered upon said order of the Appellate Division of the Supreme Court of the State of New York, for the First Department, entered and filed in the office of the Clerk of said Appellate Division on the 18th day of September, 1911, which interlocutory
473 judgment on remittitur was entered in the office of the Clerk of the County of New York, on the 4th day of October, 1911, as directs that the said claims filed by John F. McIntyre against said estate be disallowed as individual liabilities of the said Girard N. Whitney and that the claims should not be allowed as claims against said individual estate, except to the extent that claims against the co-partnership of Whitney & Kitchen are allowable under the terms of the individual assignments or otherwise, and the said appeal having duly come on to be heard on the 17th day of April, 1912, before said Appellate Division of the Supreme Court, First Department, on the printed papers on appeal
474 and on the printed briefs of the said claimant and said assignee, and due deliberation having been had thereon, and an order having been duly entered affirming the said final order of the said Supreme Court, so appealed from, with costs, and a remittitur having been duly filed in the office of the Clerk of the County of New York, on the 3rd day of May, 1912,

Now, on motion of Daniel Burke, attorney for Bayard L. Peck, as Assignee, it is

Digitized by Google

Ordered and adjudged, that the final order entered herein on the 28th day of February, 1912, be, and the same hereby is, affirmed. And it is 475

Further ordered, that the said Bayard L. Peck, as Assignee, recover of the said John F. McIntyre the sum of $92.12 as costs.

Dated, New York, May 8th, 1912.

WM. F. SCHNEIDER,
Clerk.

Memorandum of Affirmance by Appellate Division. 476

MATTER OF PECK. Order affirmed, with costs, on the authority of Matter of Whitney (146 App. Div. 45). Ingraham, P. J., dissenting on his dissenting opinion on said former appeal. Order filed.

477

Digitized by Google

478 **Affidavit of No Opinion.**

SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Final Accounting of BAYARD L. PECK, as Assignee of Girard N. Whitney, under a
479 General Assignment for the Benefit of Creditors,

Respondent,

JOHN F. McINTYRE,

Claimant-Appellant

State of New York, }
County of New York, } ss.:

Thomas F. Gilroy, Jr., being duly sworn, says: I am attorney for the claimant-appellant herein. No opinion or memorandum was given or rendered
480 by the Appellate Division of the Supreme Court, First Department, in this case, on the appeal from part of the final decree herein, other than the memorandum that appears on page 59 of the printed papers on appeal herein.

THOMAS F. GILROY, JR

Sworn to before me this 13th day of May, 1912.

ISIDOR UNGER,
Commissioner of Deeds,
City of New York.

Digitized by Google

Stipulation Waiving Certification. 481

COURT OF APPEALS OF THE STATE OF NEW YORK.

In the Matter

of

The Final Accounting of BAYARD L. PECK, as Assignee of Girard N. Whitney, under a General Assignment for the Benefit of Creditors, 482

Respondent,

JOHN F. McINTYRE,

Claimant-Appellant

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated and agreed that the foregoing printed record on appeal herein contains true and correct copies of the judgment roll, order of affirmance of the Appellate Division of the Supreme Court, First Department, on the appeal to it herein, judgment entered on said order and 483 notice of appeal by John F. McIntyre, claimant-appellant, to the Court of Appeals of the State of New York, now on file in the office of the Clerk of the County of New York, and also the memorandum of affirmance handed down by said Appellate Di-

Digitized by Google

484 vision, and all the papers and records before the Appellate Division, upon which the Court below acted, and certification thereof is hereby waived.

Dated, New York, May 13th, 1912.

THOMAS F. GILROY, JR.,
Attorney for John F. McIntyre,
Claimant-Appellant.

DANIEL BURKE,
Attorney for Bayard L. Peck,
Assignee-Respondent,
And on Behalf of all other Respondents.

485

486

Digitized by Google

Argued by
Thomas F. Gilroy, Jr.

FOR

Court of Appeals,

STATE OF NEW YORK.

In the Matter

of

The Final Accounting of BAYARD L. PECK, as Assignee of Girard N. Whitney under a General Assignment for the Benefit of Creditors,

Respondent,

JOHN F. MCINTYRE,

Appellant.

BRIEF FOR APPELLANT.

STATEMENT.

This is an appeal by John F. McIntyre, a creditor, from an order of the Appellate Division, First Department, and from the judgment on remittitur entered thereon in the County Clerk's Office, May 8th, 1912, which affirmed a final decree entered herein in the office of the Clerk of the County of New York on the 28th day of February, 1912 (fol.

Digitized by Google

359), confirming the report of William F. McCombs, Esq., the referee appointed to take and state the final account of Bayard L. Peck, as assignee of Girard N. Whitney, and to take proof and report as to the persons entitled to share in the assigned estate, their respective priorities and proportions. The appeal is limited to so much of said final decree as disallowed the claim of the appellant against the separate estate of said Girard N. Whitney as an individual claim against said estate in addition to allowing a claim in favor of said McIntyre founded upon the same cause of action against said estate as a co-partnership claim against the co-partnership of Whitney & Kitchen, of which co-partnership said Girard N. Whitney was a general partner. This appeal also brings up for review so much of an interlocutory judgment entered on a remittitur from the Appellate Division, First Department, in the New York County Clerk's office on October 4th, 1911, in proceedings submitted to it under Section 26 of the Debtors and Creditors Law, and Section 1279 of the Code of Civil Procedure, as directs that the said claim of John F. McIntyre against the separate estate of Girard N. Whitney be disallowed as an individual liability of said Girard N. Whitney, and that it should not be allowed against said separate estate, except to the extent that claims against the said co-partnership are allowable under the terms of the individual assignment (fols. 454-461).

Between July 27th, 1907, and January 16th, 1908, Girard N. Whitney, the assignor herein, and one Geraghty were co-partners conducting the business of stock brokers in the City of New York under the firm name of Whitney & Kitchen (fols. 205-206). On January 16th, 1908, the co-partnership made a general assignment for the benefit of creditors to Bayard L. Peck (fol. 206), and on January 25th,

Digitized by Google

1908, Girard N. Whitney, one of the co-partners of said firm, also made a general assignment to the same assignee (fol. 128 *et seq.*). Peck duly qualified as assignee of both estates (fols. 206, 57 and 58).

On June 12th, 1908, John F. McIntyre, the appellant herein, brought an action in the Supreme Court against "Girard N. Whitney and James V. Geraghty, co-partners doing business under the firm name and style of Whitney & Kitchen, and Bayard L. Peck, as assignee for the benefit of creditors of said co-partnership of Whitney & Kitchen" (fols. 145-147). The complaint in that action alleged (fol. 152 *et seq.*) that at plaintiff's special instance and request the co-partnership purchased for him five hundred (500) shares of Amalgamated Copper stock; "that on or about July 27th, 1907, the defendants Whitney and Geraghty, composing said co-partnership, as aforesaid, without the consent or knowledge of plaintiff, and in violation of his ownership and of his rights in said stock, and in violation of said agreement between plaintiff and said co-partnership, disposed of said five hundred (500) shares of stock of the Amalgamated Copper Company, and converted the same to their own use" (fol. 155). The defendants denied a conversion of plaintiff's stock (fols. 175, 196).

The action was tried before a Referee, who found for his first conclusion of law (fol. 220):

> "That said co-partnership, consisting of Girard N. Whitney and James V. Geraghty, on July 27th, 1907, converted five hundred (500) shares of Amalgamated Copper stock, which was the property of the plaintiff, to their own use."

On May 10th, 1910, judgment in favor of plaintiff for twelve thousand four hundred sixty-two dollars and sixty-one cents ($12,462.61) was en-

Digitized by Google

tered in the New York County Clerk's office, which adjudged:

> "That the plaintiff do recover of the defendants Girard N. Whitney and James V. Geraghty, co-partners composing the firm of Whitney & Kitchen, the sum of * * * $12,462.61, and that he have execution therefor against the said defendants" (fol. 230).

On appeal to the Appellate Division this judgment was modified on July 28th, 1910 (fol. 232), by increasing the damages to which the plaintiff was entitled to thirty thousand one hundred twenty-five dollars ($30,125), with appropriate interest and costs (fols. 233-243). The opinion of the Court on that appeal is reported in 139 A. D. 357. On appeal to this Court, the last mentioned judgment was affirmed without opinion (201 N. Y. 526), and a judgment for costs and allowance entered thereon (fols. 245-248).

On March 24, 1911, the appellant herein duly filed proof of his claim consisting of said three judgments against the separate estate of Girard N. Whitney with the assignee of said estate (fol. 120), and the assignee rejected the claim in its entirety (fol. 128).

Thereafter and in September, 1911, appellant herein and the said assignee submitted to the Appellate Division by a submission of controversy under Section 1279 of the Code, among other things, the point involved in this appeal, to wit: whether said judgments constituted an individual claim against the estate of Girard N. Whitney as well as a claim against the co-partnership of Whitney & Kitchen (fol. 270), and by an interlocutory judgment entered on a remittitur from said Court in the New York County Clerk's office on October 4th, 1911, that Court held that they were not entitled to be proved and allowed as an individual claim against the separate estates of the co-partners, ex-

Digitized by Google

cept to the extent that claims against the co-partnership of Whitney and Kitchen were allowable under the terms of the assignment or otherwise (fol. 399). The opinion of the Court on this submission is reported in 146 A. D. 45. That interlocutory judgment was not appealable to this Court. (Matter of Whitney [Harde], decided October, 1911, not reported.)

The action brought by appellant herein was instituted to recover damages for the wrongful conversion and disposition of his property by the defendants Whitney and Geraghty, who were co-partners in the firm of Whitney & Kitchen. As stated by Mr. Justice Miller in the opinion on appeal from the judgment in 139 App. Div. at page 560:

> "There would be no question of the plaintiff's right to ratify the sale and claim the proceeds. But there was a conversion, a wrongful appropriation of his property to the use of the defendants. Surely, he is not obliged to waive the tort in order to recover as damages the value of the thing converted at the time of the conversion,"

and again at page 558, he says,

> "Briefly stated, the facts in this case are that defendants Whitney and Geraghty, hereinafter referred to as the defendants, converted to their own use the plaintiff's stock."

In referring to the transaction complained of, Miller, J., calls it a conversion no less than eight times on page 558, and at page 560 says,

> "This is a case of misappropriation. The defendants converted to their own use the plaintiff's stock and never thereafter had a like amount of stock to deliver to him."

Digitized by Google

In a dissenting opinion, dissenting only on the question of the measure of damages, the Presiding Justice at page 563 says,

> "I concur with Mr. Justice Miller that there was a conversion of plaintiff's stock. * * * The defendants having converted the plaintiff's stock and the conversion having consisted of disposing of the stock and receiving therefor a sum of money in excess of that for which the stock had been purchased, plaintiff had an election to ratify and confirm the disposition of the stock, and would then have been entitled to receive the amount received by the defendants upon this disposition of the stock, or he could treat the disposition of his stock by the defendants as a conversion and sue for the damages sustained by reason thereof. *He elected to treat the disposition of his stock as a conversion and sued for the damages sustained.*"

The appellant contends here, and he contended in the Court below, both upon this appeal, and upon the submission of the controversy that Girard N. Whitney, as one of the partners of the firm of Whitney & Kitchen, was a joint tort-feasor in the conversion of the stock, and that he is, therefore, severally as well as jointly liable for that tort, and that appellant is entitled to prove his claim against the separate estate of Girard N. Whitney for that conversion. The Appellate Division held in substance that this was a tort "arising out of contractual relations" and was not a tort "pure and simple" (fol. 417), and that the liability of the defendants was joint and not joint and several (fol. 419).

The estate of the co-partnership has been distributed and was insufficient to pay the firm's claims in full. (fol. 283.) The undistributed balance in the individual estate of Girard N. Whitney is more than sufficient to pay in full, with interest, all claims for which said Girard N. Whitney is severally liable, including appellant's, after deducting

Digitized by Google

the amount already paid him on the distribution of the co-partnership estate (fol. 284). No claim is here made or advanced that appellant is entitled to more than a single satisfaction of his claim, but this appeal involves the difference between the full face amount of his claim with accrued interest, and the amount already received by him on account thereof on the distribution of the co-partnership estate, and there is a balance remaining in the hands of the respondent sufficient to pay that difference (fol. 284).

POINT I.

The assignor, Girard N. Whitney, is individually liable for the full amount of appellant's judgments, with interest thereon to the date of payment. The firm of Whitney and Kitchen was also liable thereon to the same extent and its assets having been distributed and found insufficient to pay appellant's claim in full, he is entitled to the payment of the unpaid balance out of the separate estate of the assignor Whitney before the payment out of said separate estate of partnership claims.

Claimant's appeal is based upon the fundamental rule of law, that individuals transacting business together as partners are, like all other joint tort feasors, severally as well as jointly liable for torts committed within the scope of their joint or partnership affairs. Respondent's contention and the ruling of the Appellate Division creates a new and radical classification of torts without distinctly de-

Digitized by Google

fining them, to wit, torts "pure and simple" and torts "arising out of contractual relations."

(a) THE FIRST QUESTION TO BE DETERMINED IS THE NATURE OF THE ACTION BROUGHT BY McINTYRE AGAINST WHITNEY, GERAGHTY AND PECK. THE ACT COMMITTED BY WHITNEY AND GERAGHTY CONSTITUTED A CONVERSION. IT HAS BEEN SO HELD BY THE APPELLATE DIVISION IN THE ACTION BROUGHT BY McINTYRE AGAINST THEM FOR THE UNLAWFUL DISPOSITION OF HIS STOCK (139 APP. DIV. 557), AND THAT DECISION HAS BEEN AFFIRMED BY THIS COURT (201 N. Y. 526).

In Content vs. Banner, 184 N. Y., 121, it was held, per Willard Bartlett, J., on page 124:

> "Under the contract arising by operation of law out of the relation between the parties, a sale of the stock by the brokers, without notice of the time and place of sale constituted a conversion, in the absence of an agreement dispensing with such notice or providing for otherwise disposing of the pledged property."

To the same effect see,

> Douglas vs. Carpenter, 17 App. Div. 329.
> Baker vs. Drake, 53 N. Y. 211.

Although the disposition of claimant's stock by Whitney and Geraghty constituted a conversion, he had an undoubted right of election either to treat that disposition of the stock as a conversion, or to ratify the unlawful appropriation of his stock and sue to recover the value thereof.

> Comstock vs. Hier, 73 N. Y. 269.
> Berley vs. Taylor, 5 Hill 582.
> Barber vs. Ellingwood, 137 App. Div. 702.

Digitized by Google

This right of election was recognized in McIntyre vs. Whitney, 139 App. Div. 557, and as was said by the Presiding Justice on page 563:

> "He (McIntyre) elected to treat the disposition of the stock as a conversion and sued for the damages sustained."

In the suit against Whitney and Geraghty, the nature of the action was treated by all parties as one in tort, and it was so regarded by the learned Referee and by the Appellate Division. The theory of the action which was adopted by the trial court with the acquiescence of the parties will govern in the appellate court for the purpose of review and the parties are bound thereby.

> 21 Encyc. Pl. & Pr. 664.
> Heimburg vs. Man. R. Co., 162 N. Y. 352.
> Snider vs. Snider, 160 N. Y. 151.
> Stapenhorst vs. Wolff, 65 N. Y. 596.
> Baird vs. New York, 96 N. Y. 567.

Regardless of this well settled proposition, however, on the submission of controversy to it herein, the Appellate Division practically treated claimant's action as one based upon the contractual relations of the parties and not one in tort.

Appellant submits that his action was in tort for the wrongful disposition of his stock by Whitney and Geraghty.

> "Although a pleading contains all the averments necessary to authorize a recovery upon a contract, other prominent averments may describe a tort in a manner so logical and orderly as to compel the conclusion that the action is in tort; (Ross vs. Mather, 51 N. Y. 108), and *averments showing the existence of contractual relations between the plaintiff and defendant are frequently regarded as mere matters of inducement preliminary to the statement of a cause of action in tort.*"

Digitized by Google

21 Encyc. Pl. & Pr. 657.
Bonds vs. Quigley, 59 N. Y. 265.
Keeler vs. Clark, 18 Abb. Pr. 154.
Heidelbach vs. Kilpatrick, 3 Civ. Pro. 209.
Ridder vs. Whitlock, 12 How. Pr. 208.
Townsend vs. Hendricks, 40 How. Pr. 143.

"Where, in the averment of a breach of the defendant's obligation, the pleader by the use of apt terms evidently intends to charge him with a breach of contractual stipulations, the action is probably *ex contractu;* but *if the breach is alleged to be a violation of duty growing out of the contract, and imposed by law, it points to an action ex delicto.*"

21 Encyc. Pl. & Pr. 660.
Orange Bank vs. Brown, 3 Wend. 158.
Atlantic R. Co. vs. Laird, 164 U. S. 393.

See also,

Wood vs. Hope, 2 Abb. N. Cas. 186.

Although the first six allegations of claimant's complaint in his action to recover judgment for the conversion of his stock, sets forth fully the contractual relations between the parties, the seventh paragraph is decisive of the nature of the action. It is there alleged that the defendants Whitney and Geraghty *"without the consent or knowledge of plaintiff, and in violation of his ownership and of his rights in said stock, and in violation of the said agreement between plaintiff and said co-partnership, disposed of said five hundred (500) shares of stock of the Amalgamated Copper Company, and converted the same to their own use"* (fol. 156).

"It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such legal duty may arise not merely out of certain relations of trust and confidence, inherent in the nature of the contract

Digitized by Google

itself, as in the cases referred to in the respondent's argument, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud. It has been well said that the liability to make reparation for an injury rests not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person so to conduct himself, or exercise his own rights as not to injure another. (Kerwhacker v. C. C. & C. R. R. Co., 3 Ohio St. 188.) Whatever its origin, such legal duty is uniformly recognized, and has been constantly applied as the foundation of actions for wrongs; and it rests upon and grows out of the relations which men bear to each other in the framework of organized society. It is then doubtless true, that a mere contract obligation may establish no relation out of which a separate or specific legal duty arises and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed. *The duty and the tort grow out of the entire range of facts of which the breach of the contract was but one.*"

Rich vs. N. Y. Central & H. R. R. Co., 87 N. Y. 382, 398.

Silverblatt vs. Brooklyn Tel. & Mess. Co., 73 Misc. 38.

Burr vs. Koster, 144 App. Div. 31.

Orange Bank vs. Brown, 3 Wend. 158.

The election made by claimant in that action is final and conclusive and binding upon all the parties herein. The first pronounced act of election made with full knowledge of the facts is final. It is the established law that the definite adoption of

Digitized by Google

one of two or more inconsistent remedies, by a party, cognizant of the material facts, is a conclusive and irrevocable bar to his resort to the alternative remedy.

7 Encyc. Pl. & Pr. 364.
Conrow vs. Little, 115 N. Y. 387.
Crossman vs. Universal Rubber Co., 127 N. Y. 34.
Mills vs. Parkhurst, 126 N. Y. 89.

(b) APPELLANT'S CLAIM BEING BASED ON A TORT, THE NEXT QUESTION WHICH ARISES IS THE NATURE OF THE DEFENDANT'S LIABILITY.

It is a familiar doctrine that joint tort feasors are jointly and severally liable for torts imputable to them.

Bouvier defines joint tort feasors, Vol. 2, page 16, as follows:

> "When several persons join in an offense or injury, they may generally be sued jointly, or any number less than the whole may be sued, or each one may be sued separately.
>
> Each is liable for himself, because the entire damages sustained were occasioned by each, each sanctioning the acts of the others, so that by suing one alone, he is not charged beyond his just proporiton. Any number less than the whole may be sued, because each is answerable for his companions' acts.
>
> Williams vs. Sheldon, 10 Wend. 654."

To the same effect see

Creed vs. Hartman, 29 N. Y. 591.

The general doctrine of the joint and several liability of joint principals for torts applies to partners.

Roberts vs. Johnson, 58 N. Y. 613.
Morgan vs. Skidmore, 55 Barb. 263.

Digitized by Google

Stockton vs. Frey, 4 Gill (Md.), 406.
McCrillis vs. Hawes, 38 Me. 566.
Head vs. Goodwin, 37 Me. 181.
Mode vs. Penland, 93 N. Car. 292.
White vs. Smith, 12 Rich (S. Car.), 595.
Wood vs. Luscom, 23 Wis. 287.
Brewing vs. Berryman, 15 N. Brun. 515.
Sadler vs. Lee, 6 Beav. 324.
Edmundson vs. Dan, 4 Esp. 14.

The appropriation or misapplication by one partner of moneys or other property in the custody of the firm within the scope of its business or in the custody of such partner as a representative of the firm renders *each partner* liable to the true owner for such conversion.

Castle v. Bullard, 23 How. (U. S.) 172.
Ex parte Biddulph, 3 De G. & Sm. 587.
Sadler v. Lee, 6 Beav. 324.

In Champion vs. Bostwick, 18 Wend. 175, on page 185, it was held by Chancellor Walworth:

> "That one partner is liable in tort for the acts of his co-partner in the prosecution of the co-partnership business, as well as upon contracts for the benefit of the joint concern, appears to be well settled."

The liability of partners for loss occasioned by any wrongful act or omission, or for the misapplication of money or property for which the firm is liable, is, as a general rule, joint and several.

Walker vs. Anglo-Am. Mtge. & Tr. Co., 72 Hun, 334.
Matter of Blackford, 35 App. Div. 330.
Roberts vs. Johnson, 58 N. Y. 613.
Metcalf vs. Robinson, 15 N. Y. Wkly Dig. 294.

Digitized by Google

In Creed vs. Hartman, 29 N. Y. 591, it was held, that there was no rule which compelled the joining of both joint tort feasors as parties defendant. Selden, J., in a concurring opinion, on page 597, said:

> "The ground upon which I have placed the liability of the defendant, furnishes an answer to the objection, that his partner should also have been made a defendant. The making of the excavation without license was a tort on the part of both the defendant and Eberspacher (the partner), and the liability for torts committed by more than one person is always several as well as joint."

In Lindley on Partnership (5th Ed.), 198, it is said:

> "For torts imputable to a firm, all the partners are liable jointly and severally."

And again at page 199:

> "In equity, the misapplication of the money is a breach of trust and imposes a joint and several liability on all the partners, on the ground that each partner is bound to see to the proper application of what is entrusted to the firm. In such cases as these, the several liability of each partner to the creditors of the firm is not affected by the circumstance that the act imposing such liability was done by one only of the members of the firm without the knowledge or consent and in fraud of the others. If the act in question imposes a liability which upon the principles of agency can be imputed to the firm, each member thereof is in equity severally liable for such act, just as much as if there had been no fraud in the case."

If a tort is imputable to a firm, an action in respect to it may be brought against all or any of the partners. If some only of them are sued, they cannot insist upon the other partners being joined as defendants, and this rule applies even where the

Digitized by Google

tort in question is committed by an agent or servant of the firm and not otherwise by the firm itself.

1 Lindley on Part. (5th Ed.) 283.
Stockton vs. Frey, 4 Gill (Md.) 406.
Hutton vs. Murphy, 9 Misc. 151.
Roberts vs. Johnson, 58 N. Y. 613.

In Walker vs. Anglo-Am. Mtge. & Tr. Co., 72 Hun, 334, suit was brought against the Anglo-American Mortgage & Trust Company, Burnham, Tulleys and Brown to rescind a purchase of fifty shares of stock issued by defendant corporation and to recover from the defendants the amount paid therefor. It appeared that the individual defendants were co-partners constituting the firm of Burnham, Tulleys & Co.

It was held, per Follett, J., at page 340:

"The individual defendants, under their firm name, organized the Anglo-American Mortgage and Trust Company, and *each partner is liable for the misrepresentations and concealments of the others, committed while engaged in promoting the enterprise.*

Chester vs. Dickenson, 54 N. Y., 1.
Getty vs. Devlin, 54 N. Y., 403.
Locke vs. Stearns, 1 Met., 560.
Rapp vs. Latham, 2 B. & A., 795.
1 Lind. Part. (3rd Eng. Ed.), 54, 310, 329.
Story Part., §§108, 131.
Big. Law Fraud, 240, Sec. 6.

Burnham is equally liable with his partners for their misrepresentations and concealments."

To the same effect see Downey vs. Finucane, 205 N. Y. 251.

The Matter of Blackford, 35 App. Div., 330, is a case analogous in principle and almost identical in fact with the case at bar.

Digitized by Google

There, Eugene G. Blackford was the assignee of a judgment, recovered against Edward B. Bartlett and others composing the firm of E. B. Bartlett & Co. for the tortious conversion of property arising from an illegal detention. After judgment was recovered, Edward Bartlett died, and the surviving partners subsequently made an assignment of the partnership estate for the benefit of creditors. The co-partnership estate was insolvent, and Blackford applied to the Surrogate's Court for an order directing Bartlett's executrix to pay the amount of the judgment from his separate estate. The executrix resisted on the ground that her testator's estate was insufficient to pay all its liabilities in full, and that the judgment assigned to Blackford was a co-partnership obligation and hence not entitled to payment out of the individual estate until after the satisfaction of the individual creditors of the deceased.

Cullen, J., held, at page 331:

> "The action in which petitioner's judgment was recovered was held by the Court of Appeals to be in tort. (Lockwood vs. Bartlett, 130 N. Y., 340.) *Therefore, though it arose out of partnership transactions, the liability of the parties was joint and several.*
>
> Roberts vs. Johnson, 58 N. Y., 613.
>
> Until the recovery of the judgment, the plaintiffs might have sued the defendants separately. In case they had taken such a course, it is not denied that any judgment recovered against an individual partner would have been entitled to payment out of his individual estate. But it is claimed that the plaintiffs were put to their election to proceed against the partners either individually or jointly, and that when an election was made to sue the parties jointly plaintiffs lost their rights as creditors of the several parties individually."

Digitized by Google

And at page 333:

> "We are, therefore, of the opinion that in this State, where a liability is both joint and several, the creditor has the right to enforce both liabilities. If this be so, we do not see that by the recovery of a joint judgment the creditor should lose his rights. Why should his position in bankruptcy or on the death of the parties be worse when the claim has been put into judgment than before? Nor do we see that the liability of joint tort feasors is different from that of parties to a contract by which, under its express terms, they become jointly and severally bound."

On well established principles of agency, the firm is liable for torts commited by one of the partners in the course of the partnership affairs, and within the scope of his authority, and each partner is severally liable therefor.

In the case at bar, not only has it been found that the conversion arose out of a partnership transaction (Referee's Report, fols. 205-223), but it was also shown that the proceeds of the conversion accrued to the benefit of the partnership account, the defendants Whitney and Geraghty using the stock to take up in part a firm obligation (fols. 210-212), and being credited with its value on the books of the Stock Exchange (fol. 419).

In Castle vs. Bullard, 64 U. S., 172, Justice Clifford laid down the principle as follows:

> "Thus, for example, if one of the partners should commit a fraud in the course of the partnership business, all the partners may be liable therefor, although they may not all have concurred in the act. So, if one of the firm of commission merchants should sell goods consigned to the firm, fraudulently, *or should sell goods so consigned in violation of instruction, all the partners would be liable.*

Digitized by Google

Story on Part., § 166.
Collyer on Part., §§ 445, 457.
Nicoll vs. Glinnie, 1 Maule & S., 588."

It is contended on behalf of the assignee herein, that the equitable rule of marshalling assets prohibits the allowance of claimant's claim as a separate liability of the estate of Girard N. Whitney, and prevents payment thereof equally with the individual liabilities of Girard N. Whitney. The rule of marshalling assets in equity is that joint debts are payable out of the joint estate and individual debts out of the several estates of the partners, but before this doctrine can be applied to the state of facts in the present case, it must first be determined whether McIntyre's claim is an individual liability of Girard N. Whitney. Once this question is determined, it is a simple matter to distribute the estate in compliance with the established rules of marshalling assets. But to argue that McIntyre's claim cannot be proved against Whitney's estate, because of this rule of marshalling assets, merely begs the question and does not assist in the arrival at any definite conclusion thereon.

Where there is a joint and several liability on the part of the partners, a creditor may file proof against both the partnership estate and against the individual estate of each partner.

Burdick on Part., 2nd Ed., 310.

The rule of marshalling assets in equity as concerns the state of facts existing in this case was stated by Rapallo, J., in Morgan vs. Skidmore, decided by the Court of Appeals in 3 Abb. N. Cas., 92, on page 110:

> "The second ground of objection to this recovery remains to be considered, viz., that it gives the plaintiffs a double preference. This is not an unusual result, nor is such a preference in conflict with any principle of equity.

Digitized by Google

When a partner by his own act makes himself individually liable for a debt of his firm, whether by express contract or otherwise, the creditor is entitled to the full benefit of that obligation in addition to the obligation of the firm.

A creditor holding the joint obligation of a firm and also the separate obligation of one of the co-partners as surety for the same debt, is entitled to payment out of the partnership assets in preference to the individual creditors of the partners; and if he fails to obtain any payment out of those assets, he is entitled to preference over the other partnership creditors in the distribution of the separate estate of the individual partners (Wilder vs. Keeler, 3 Paige, 167-176).

Such are the rules of marshalling assets in equity where the separate obligation of the individual partner rests in contract, and therefore it is not a just ground of objection to compensation for a wrong, that it would result in similar distribution. If it is equitable where the deceased partner has agreed to assume the individual obligation, it is equally equitable where the law compels him to assume it as a just compensation due to the party whom he has misled.

It is probable that the parties most interested in the fund in dispute are creditors. But their equity cannot be considered independently of those of the deceased partner."

To the same effect see:

N. Y. L. I. Co. vs. Chapman, 118 N. Y., 288.

Claimant's claim is entitled to bear interest to the date of payment, since Girard N. Whitney's separate estate is sufficient to pay the individual liabilities of the assignor in full.

Matter of Duncan, 10 Daly, 95.

Digitized by Google

(c) THE APPELLATE DIVISION MISCONSTRUED THE DECISION IN MATTER OF BLACKFORD, 35 APP. DIV., 330.

The opinion of the Court, per Dowling, J., so far as it pertains to the question involved in this appeal, is as follows:

> "The second question presented it seems to us necessitates the drawing of the distinction which was pointed out in Matter of Blackford, 35 App. Div., 333 (relied on by claimant), between a tort pure and simple and one arising out of the contractual relationship between the parties. It sufficiently appears from the summary heretofore made of the original complaint that the tort alleged was that of the co-partnership and that it arose out of a disregard of the contractual rights of plaintiff by the partnership. There is no allegation of any wrongful act of the individual members of the firm. No one of them is charged to have unlawfully converted or disposed of plaintiff's property. The claim is that the co-partnership converted the stock, and the referee has found that the co-partnership unlawfully delivered plaintiff's stock to another firm in payment of a co-partnership debt, the co-partnership being credited with the value thereof on the books of the Clearing House of the New York Stock Exchange. This therefore is a joint debt, arising out of a violation by a co-partnership of its contractual duties, with no profit accruing therefrom to the individual members, but solely to the co-partnership. Ordinarily, it would come under the rule of equity that joint creditors must look to the joint estate, and individual creditors to the separate estate of the partners, based on the principle that the joint creditors have extended credit on the faith of the firm property and the individual creditors on the faith of separate estates of the partners. (Matter of Blackford, *supra*.) The cases relied upon by plaintiff as sustaining his contention that the liability herein is joint and several

Digitized by Google

> are either those wherein an individual liability has been created by members of a firm individually endorsing the firm notes, or such exceptional cases as Morgan v. Skidmore, 55 Barb., 263 (affd. 3 Abb. N. C., 92), where a member of a firm had personally made a false representation as to the solvency of his firm, and the condition of the estate of one of the deceased members, in reliance upon which plaintiff had issued a draft for £12,000. It was there held that judgment could be obtained against the estate of the member making such representation, even after plaintiffs had obtained judgment against the firm for the original amount due, nor was there anything inconsistent in the two suits, for they were not suing as creditors of the deceased, when his liability would be joint, but upon his representation, whereon his liability was personal" (fols. 417-422).

In the Matter of Blackford, 35 App. Div., 330, on page 333, Cullen, J., uses this language:

> "The principle on which equity founds the rule that joint creditors must look to the joint estate, and individual creditors to the separate estate of partners, is that the joint creditors have extended credit on the faith of the firm property, and the individual creditors on the faith of the separate estates of the partners. This reasoning certainly does not obtain in a case like the present, in which there was no contractual relation between the parties, and the act of the defendant was a tort pure and simple."

The Appellate Division on the submission of controversy herein to it, on the authority of the last above quoted language, drew a distinction between a tort "pure and simple" and one "arising out of the contractual relationship between the parties" (fol. 417).

The language above quoted from Mr. Justice Cullen's opinion seems clearly to express the thought

Digitized by Google

he had in mind, which was the difference in the liability of partners when the claim was based on a breach of contract from their liability when the claim was based on tort. What is a tort "pure and simple," and wherein does it differ from one "arising out of the contractual relations of the parties"? It cannot be denied that if partners did not furnish an employee a safe place to work, and he was injured thereby, their liability would be joint and several, yet no liability could ever have arisen if the contractual relation of employer and employee had not first existed.

Mr. Justice Cullen's language was sufficiently clear in the Blackford case, but any lingering doubt as to his meaning will be resolved by an examination of the facts in the case in which the original judgment was recovered, which will show that he could not and did not have the slightest intention of drawing the distinction relied on by the Appellate Division or to make any classification of torts, or any change in the nature of the liability arising therefrom. He stated that the Court of Appeals, in Lockwood vs. Bartlett, 130 N. Y. 340, held the petitioner's judgment to be in tort, and that for that tort, although arising out of a partnership enterprise, the partners were jointly and severally liable.

Lockwood vs. Bartlett was an action brought to recover damages for the *alleged wrongful taking and detention* by the defendants Bartlett, Woodruff and Nitchie, who were partners constituting the firm of E. B. Bartlett & Co., and by the defendant Smith, health officer of the port, of certain rags, the property of plaintiffs. A conspiracy on the part of the defendants was also alleged. The facts are these: On June 3rd, 1885, plaintiff's rags, on board the ship Vigilant, were seized, pursuant to the directions of the collector of the port, and sent to the Brooklyn Warehouse, known as the Baltic Stores,

Digitized by Google

of the defendant copartners, for disinfection. E. B. Bartlett & Co. also had a disinfecting plant at Robbins Reef, at quarantine, and on or about June 19th, 1885, pursuant to the directions of the collector, plaintiff's rags on board the bark Bataglia, were unloaded, and by bonded lighters taken to the plant of E. B. Bartlett & Co. at Robbins Reef for disinfection. The lighterage charges were paid by E. B. Bartlett & Co. and bills for them and for the disinfection and storage, amounting to $4,904.90 on account of the rags taken from the Vigilant, and $409.25 on account of those taken from the Bataglia, were made out, and defendants, constituting the firm of E. B. Bartlett & Company, refused to deliver the rags to the plaintiffs unless those bills were paid. Plaintiffs paid under protest. Verdict was directed by the trial court against the defendants, Bartlett, Woodruff and Nitchie, and as against the defendant Smith, the jury disagreed.

The jury found a verdict against Bartlett, Woodruff and Nitchie for $8,000. and from judgment entered thereon the latter defendants appealed. The General Term reduced the damages to the amount paid by plaintiffs, with interest, and as so modified, affirmed the judgment.

The Court of Appeals, per Bradley, J., after an exhaustive examination of the laws of New York and of the United States pertaining to the quarantine regulations of the harbor of New York and of the orders and circulars of the Secretary of the Treasury, Collector of the Port, and the regulations of the Health Officer, decided that the original *taking* of the cargoes of rags belonging to the plaintiffs from the ship Vigilant and from the bark Bataglia, was lawful. It was said by the Court on page 350:

> "The direction of the collector that the rags be sent to the places where they were taken from the vessels, was pursuant to the regula-

Digitized by Google

tion or requirement that they should be disinfected, and it may be said to have been given pursuant to direction from the secretary of the treasury and in aid of the health officer in the execution of his official power by the observance of the regulations made by him in that behalf. And although these rags came within the rule or regulation adopted by him for disinfection, and by his approval and advice were sent to the place where they were taken for that purpose, he testified that he never gave any order for the disinfection of the rags on either of the two vessels. While his regulations provided that it be done, and for that purpose the transfer of the rags from the vessels to the warehouses was necessary, it does not appear that he employed anybody to do it. And so far as appears, the work of disinfection was not conducted under the supervision or control of the health officer, nor pursuant to his employment of the disinfecting company which owned the machine by which it was done, or of E. B. Bartlett & Co., who under an arrangement with the company operated the machine in performance of the work. The goods were sent to the warehouse apparently for the purpose of disinfection, and they assumed to do it without any employment or direction of the health officer and did it without any approval by him of the efficiency of the work or of the charges resulting from it. This method of creating charges against imported goods is not fairly within the purpose and meaning of the Statute. * * * The difficulty with the claim for disinfection is that the company or persons doing it had no direction of the health officer for that purpose, nor was it done by his employees. The statute contemplates that charges of this character shall be incurred only by means of the official action or in executing the orders of the health officer and be subject to his control to those whom he may employ to perform the services. His official sanction and responsibility were essential to the creation *in invitum* of charges upon the property of the plaintiffs. Those for the alleged

Digitized by Google

service of disinfection seem not to have had such support, and therefore were not a lien upon the rags. But this difficulty is not necessarily applicable to the charges for lighterage and storage. The Baltic Stores had, under the advice and approval of the health officer of the port of New York and the Health Commissioner of Brooklyn, been selected and designated by the secretary of the treasury as a warehouse for the storage and disinfection of imported rags. And Robbins Reef had also been duly designated as another place for disinfection of like goods. The collector, under his authority, in view of the regulation for disinfection, of the rags on the two vessels, adopted by the health officer, was justified in directing as he did the sending of the rags to those places, and the expenses of such transfer were presumptively a lien upon the property to which they related. No specific order or direction of the health officer is essential for that purpose. It is sufficient that it was done pursuant to regulations, within his power, made by him."

And continues on page 352, as follows:

"In view of what has already been observed, that which was done by way of transfer of the rags from the vessels to the selected and designated warehouses for the purposes contemplated, was within the power of the health officer and in aid of the exercise of which the direction of the collector to make the transfer may have been legitimately given and executed and as the case is now presented, it must be so treated. It follows that the charges for lighterage paid by Bartlett & Company according to the custom in such cases, and for the storage in their Baltic Stores, for the time the goods properly remained there, were a lien upon the rags. But so far as the defendants required the payment of the further claim for disinfection as a condition of the delivery, they were chargeable with duress of property."

Digitized by Google

On page 353 the Court reaches the conclusion that:

> "The money was paid by the plaintiffs to the defendants upon bills in favor of E. B. Bartlett & Co., who refused to deliver the possession of the rags to the plaintiffs until payment was made. All the members of that firm were for the purposes of relief equally chargeable to the plaintiffs."

Judgment of reversal was directed unless the plaintiff stipulated to reduce the judgment to the amount of the unlawful charge for disinfection only.

In the above case, although action was brought for the *unlawful taking and detention*, the *taking* was found to be legal and the *detention only* illegal. the defendants, including defendant Smith, assumed possession of the property under direct authority of law, and were in no way liable in damages for such taking. The damages finally recovered in the Court of Appeals by plaintiffs were limited to the charges paid by them for the disinfection, and the unlawful detention was due to the retention of the rags until those charges for disinfection had been paid. The Court of Appeals reduced the judgment to damages for the detention only.

The language used by Cullen, J., must therefore be construed in the light of the facts in the action in which the judgment against Bartlett was recovered. There were implied contractual relations existing between the parties, to wit, those of consignee and warehouseman, and the tort was actually based upon those contractual relations; nevertheless the partners were severally liable. The distinction he drew was between a contract liability and a tort liability, not between liability for different classes of torts.

Digitized by Google

In the case at bar it is undisputed that the possession of appellant's stock by Whitney and Geraghty was lawful, but the Appellate Division has found and that determination has been affirmed by this Court, that the wrong perpetrated on appellant consisted of "a wrongful appropriation of his property to the use" of Whitney and Geraghty.

139 App. Div., 557, 560.

The only distinction that could possibly be made between the case at bar and the Matter of Blackford (*supra*), is that in the latter case the defendants came into possession of the property by a contract implied in law, while here, Whitney and Geraghty obtained possession of the property by an express contract; but the legal effect of both is identical. In both cases, the possession was lawful, but in one, the detention, and in the other, the disposition, was illegal. The Blackford case, therefore, so far from being an authority upon which may be based a reason for denying appellant's right to prove his claim against the separate estate of Girard N. Whitney, is, on the contrary, direct authority in support of such claim.

(d) THE APPELLATE DIVISION ON THE SUBMISSION OF THE CONTROVERSY HEREIN TO IT SEEMED TO REGARD THE PARTNERSHIP OF WHITNEY & KITCHEN AS A LEGAL ENTITY, SEPARATE AND DISTINCT FROM THE INDIVIDUAL CO-PARTNERS, AND TREATED THE CONVERSION OF THE STOCK AS AN ACT OF THE CO-PARTNERSHIP AS SUCH A LEGAL ENTITY, IN THE SAME MANNER AS THOUGH IT WERE A CORPORATION.

That surely was the legal effect of its decision, for it held that the co-partners, as such, could not be held severally liable, without proof of their individual and personal participation in the illegal transaction complained of.

Digitized by Google

It is respectfully submitted that this position is erroneous. A partnership is not regarded as a legal entity separate and distinct from the members constituting it, but is only a fiction by means of which the partners conduct their joint business. It may be convenient for the partners, in keeping their partnership accounts, and where questions of marshalling assets in equity arise, the firm and the individual accounts are kept separate, but it has never before been held in this jurisdiction that these rules of marshalling assets, alter or affect the personal liability of partners for their acts. It is said in 22 Am. & Eng. (2nd Ed.), 75:

> "Though by a legal fiction a corporation is regarded as a legal person or entity, separate and distinct from its members or stockholders, yet in the case of partnerships, at least at common law, exactly the reverse is held, and a firm, as such, is not regarded as having any legal existence apart from the members composing it."

It was held in the case of Jones vs. Blun, 145 N. Y., 333, at page 341, per Edward T. Bartlett, J.:

> "It has been often pointed out that a partnership cannot properly be regarded as a legal entity, separate and distinct from the several persons therein.
>
> For certain purposes this fiction may be very properly indulged.
>
> In keeping partnership accounts and in marshalling the assets of an insolvent or liquidating firm, this is constantly done.
>
> It cannot be invoked, however, to shield the individual partner in a case like the one at bar, from the effect of a statute forbidding a preference, or to enable him to do as a partner that which the law prohibits him from doing as an individual."
>
> "The firm is not recognized by lawyers as distinct from the members composing it."

Digitized by Google

Bank of Buffalo vs. Thompson, 121 N. Y. 280, at page 283, per Earl, J.

At common law a partnership or firm is not regarded as a legal entity apart from its members, and as it is a general rule that actions can only be brought by and against persons natural or artificial, and partnerships are not considered persons, it is universally held that in the absence of express statutory authority all actions and suits involving partnership claims or liabilities, must be brought by or against the persons individually, who compose the firm.

15 Encyc. Pl. & Pr., 839.
Bentley vs. Smith, 3 Cai. (N. Y.), 170.
Crawford vs. Collins, 45 Barb., 269.

A co-partnership is nothing but a name through the intermediation of which the individual members conduct their joint business, and by means of which they are enabled to keep the joint accounts separate from their individual accounts. Claimant's judgment was, therefore, against Girard N. Whitney and James V. Geraghty, individually, and not against the firm of Whitney & Kitchen.

Appellant's claim should, therefore, be allowed as an individual obligation of the assignor, Girard N. Whitney, in full with interest to the date of payment, provision being made, however, that all payments heretofore made to appellant from the estate of Whitney & Kitchen, or otherwise, should be credited with interest thereon, so that all payments should not in the aggregate exceed the amount of his claim with interest to the date of payment.

Digitized by Google

POINT II.

The judgment on remittitur entered on the order of the Appellate Division affirming the final decree herein should be reversed and the final decree herein should be modified by directing the allowance and payment of appellant's claim as an individual claim of the estate of Girard N. Whitney, and that the unpaid balance of it should be paid in full with interest on the whole claim, before payment of the partnership claims out of said estate, and as so modified, said final decree should be affirmed, with costs.

Respectfully submitted,

THOMAS F. GILROY, JR.,
Attorney for Claimant-Appellant.

THOMAS F. GILROY, JR.,
ISIDOR UNGER,
Of Counsel.

Digitized by Google

The C. G. Burgoyne Printing Business, 72-78 Spring St., N. Y.

Court of Appeals,

STATE OF NEW YORK.

In the Matter

of

The Final Accounting of Bayard L. Peck as Assignee of Girard N. Whitney under a General Assignment for the Benefit of Creditors,

Respondent.

John F. McIntyre,

Appellant.

Brief of Respondent.

FOR RESP.

Daniel Burke

Statement.

This appeal brings up for review the single question: Whether the claims of John F. McIntyre, based on a judgment against a co-partnership for conversion arising out of breach of duty under an express contract with the co-partnership, having been allowed in full against the Assigned estate of the co-partnership liable for the tort, should also be allowed as individual claims against the estate of the individual members of the co-partnership, when there is no evidence that the act of conversion was committed by any one of the members of the firm and when all benefits of the tort accrued to the co-partnership. This question has been

Digitized by Google

decided by the Appellate Division of the Supreme Court, First Department, and an interlocutory order entered by the Appellate Division on the 18th day of September, 1911, disallowing the claims in controversy as individual claims the question having been presented on an agreed state of facts:

Opinions in support of the order of the Court were then written by his Honor, Justice DOWLING, with the concurrence of Justices MCLAUGHLIN and LAUGHLIN, and by his Honor, Justice INGRAHAM. Justice MILLER concurred in the opinion of Justice DOWLING on the last ground stated therein and on the authority of Matter of Blackford, 35 App. Div., 333. These opinions are reported in 146 App. Div., 45, and are found in the papers on appeal herein.

The matter again came before the Appellate Division composed of Justices INGRAHAM, DOWLING, MCLAUGHLIN, CLARK and SCOTT, on appeal from the final decree bringing up the same question and the Court affirmed the order on the opinion previously written, all judges concurring in the decision so far as the point now before this Court is concerned.

Facts.

The Appellant, John F. McIntyre, appeals from the order of the Appellate Division affirming the final decree entered in the office of the County Clerk of New York County, on the 28th day of February, 1912, confirming the report of the Referee appointed to take and state the final account of Bayard L. Peck, as Assignee of Girard N. Whitney, and to take proof and report as to the persons entitled to share in the assigned estate their respective priorities and proportions, in so far as said final decree disallows the claims of the appellant against the separate estate of Girard N. Whitney, as individual claims against said estate in addition to allowing the said claims as co-partnership claims against said estate. This appeal also brings up for review so much of an interlocutory

Digitized by Google

judgment entered on remittitur from the Appellate Division, First Department, in the office of the Clerk of the County of New York as directs that the said claims of John F. McIntyre against said separate estate be disallowed by the Assignee as individual liabilities of the said Girard N. Whitney and that the claims should not be allowed as claims against said individual estate, except to the extent that claims against the said co-partnership are allowable under the terms of the individual assignment.

On January 16th, and at all times previous thereto and hereinafter mentioned, Girard N. Whitney and James V. Geraghty were copartners, conducting a stock brokerage business in the City of New York, under the firm name and style of Whitney & Kitchen (fols. 205, 206). On January 16th, 1908, the said copartnership assigned for the benefit of the creditors of the said copartnership to Bayard L. Peck (fol. 206). Thereafter, and on the 25th day of January, 1908, Girard N. Whitney made a general assignment for the benefit of creditors to the said Bayard L. Peck (fol. 128 *et seq.*), and the said Peck duly qualified as such Assignee of both said estates.

On the 24th day of March, 1911, John F. McIntyre, the claimant herein, filed proof of claims, dated March 21st, 1911, against the estate of Gerard N. Whitney with the Assignee of said estate (fol. 120), which proof of claims reads as follows:

> "The undersigned hereby claims that Girard N. Whitney is justly indebted to him upon three certain judgments entered in his favor and against the said Girard N. Whitney in the office of the Clerk of the County of New York, as follows:
>
> "1st. A judgment for thirty-six thousand, three hundred and fifty-six and $\frac{53}{100}$ dollars ($36,356.53) entered and docketed in the office of the Clerk of the County of New York on May 10th, 1910, as modified by an order filed therein on July 28th, 1910, modifying an original judgment for twelve thousand, four hundred sixty-two and $\frac{50}{100}$ dollars, ($12,-

Digitized by Google

462.61), entered and docketed in said County Clerk's office on the 10th of May, 1910.

"2nd. A judgment for two hundred and forty-nine and $\frac{29}{100}$ dollars ($249.29) entered and docketed in the office of the Clerk of the County of New York on July 28th, 1910.

"3rd. A judgment for nineteen hundred and forty-seven and $\frac{12}{100}$ dollars ($1947.12) entered and docketed in the office of the Clerk of the County of New York on March 10th, 1911, on which one hundred and twenty-nine and $\frac{30}{100}$ dollars ($129.30) has been paid by the United States Fidelity and Guaranty Company.

"Transcripts of said judgments are hereto annexed.

"Said judgments entered and docketed May 10th, 1910, as modified, is a judgment for damages recovered by the undersigned in an action against the said Girard N. Whitney and others for the conversion by said Girard N. Whitney and others of five hundred (500) shares of Amalgamated Copper stock belonging to the undersigned, said judgment having been modified by the Appellate Division of the First Department on appeal therefrom and as modified affirmed; and said judgment as so modified having been thereafter affirmed by the Court of Appeals of the State of New York; the judgment of July 28th, 1910, being a judgment of affirmance thereof by the Appellate Division of the Supreme Court, First Department, and the judgment of March 10th, 1911, being a judgment of affirmance thereof by the Court of Appeals.

"No part of said claim has been paid except the sum of one hundred and twenty-nine and $\frac{30}{100}$ dollars ($129.30), which has been paid by the United States Fidelity and Guaranty Company on the said judgment entered and docketed March 10th, 1911. There are no set offs or counterclaims to the same, and the undersigned has not now, nor has any person by his order or to the knowledge or belief of claimant, for his use, had or received

Digitized by Google

any manner of security belonging to said Girard N. Whitney for said claim whatever.

"This claim is made against the Estate of Girard N. Whitney to the extent of any deficiency in the payment of said judgments or the interest thereon from the assets of the Estate of Whitney & Kitchen.

"Dated New York, March 21st, 1911.

"JOHN F. MCINTYRE,
"Claimant."

THOMAS F. GILROY, JR.,
Attorney for Claimant,
Office and Post Office Address,
42 Broadway,
New York City.

Bayard L. Peck, as Assignee of Girard N. Whitney, duly rejected such claims of John F. McIntyre in their entirety (fol. 128).

In order to obtain the judgments mentioned in the proof of claims and on the 12th day of June, 1908, an action had been begun by John F. McIntyre, the claimant herein against "Girard N. Whitney and James V. Geraghty, co-partners, doing business under the firm name and style of Whitney & Kitchen, and Bayard L. Peck, as Assignee for the benefit of creditors of the said co-partnership of Whitney & Kitchen" (fols. 145–147).

As summarized by Justice DOWLING in his opinion (fols. 404 *et seq.*), the complaint herein demanded damages in the sum of Thirty thousand three hundred thirty-seven dollars and fifty cents ($30,337.50), with interest, and alleged:

"The co-partnership of defendants in the business of stock brokers under the firm name of Whitney & Kitchen; the making of the firm assignment; the purchase by the co-partnership at plaintiff's special instance and request of five hundred (500) shares of Amalgamated Copper Company stock at the then market price of Ninety

Digitized by Google

Dollars ($90) a share, including the commission of said co-partnership; the deposit by plaintiff with the co-partnership of the sum of Five thousand dollars ($5,000) in cash as margin upon said transaction and as part payment of the purchase price of said shares; an agreement by the co-partnership to advance for plaintiff the balance of the purchase price of said shares and to hold them as collateral security for such advances; the further deposit by plaintiff with said co-partnership, at its demand and request, between August 7th and October 23d, 1907, of sums aggregating Twenty-five thousand dollars ($25,000) as margins upon the transaction and as partial repayment of the advances made by the co-partnership."

The complaint then further alleged:

"SEVENTH. On information and belief, that on or about the 27th day of July, 1907, the defendants Whitney and Geraghty, composing the said co-partnership as aforesaid, without the consent or knowledge of plaintiff and in violation of his ownership of the said agreement between plaintiff and said co-partnership, disposed of said five hundred (500) shares of stock of the Amalgamated Copper Company and converted the same to their own use.

"EIGHTH. (as amended). That prior to the commencement of this action, and on January 16th, 1908, January 17th, 1908, and January 19, 1908, plaintiff duly demanded from the defendants Whitney and Peck as assignee as aforesaid, and on January 21, 1908, plaintiff duly demanded from the defendant Geraghty the return to him of said stock and at said times duly offered to pay the balance due thereon, but said defendants and each of them failed and neglected and refused to return the same and on information and belief said stock is not and was not then and has never since said conversion been in the possession of said defendants or any of them."

Digitized by Google

The defendants denied the conversion (fols. 175–196).

The Honorable Charles F. Brown, Referee, appointed to hear and determine the issues in that action, after finding a technical conversion by use of stock to repay a loan found for his first Conclusion of Law (fol. 220):

> "That the said co-partnership consisting of Girard N. Whitney and James V. Geraghty, on July 29, 1907, converted the five hundred (500) shares of Amalgamated Copper Company stock, which was the property of the plaintiff, to their own use."

On May 10th, 1910, judgment was duly entered upon the report of said Referee in the office of the Clerk of the County of New York (fol. 223), as follows:

> "That the plaintiff do recover of the defendants Girard N. Whitney and James V. Geraghty, co-partners, composing the firm of Whitney & Kitchen, the sum of Twelve thousand four hundred sixty-two dollars and sixty-one cents ($12,462.61), and that he have execution therefor against the said defendants."

The above judgment was modified by the Appellate Division on July 28th, 1910 (fol. 233), by increasing the damages to which claimant was entitled against said defendants to Thirty thousand one hundred and twenty-five dollars ($30,125), with appropriate interest as set forth (fols. 233–243) in addition to costs (fol. 243).

The opinion of the Appellate Division in that action is reported in 139 App. Div., 557. Subsequently, on appeal to the Court of Appeals, the last-mentioned judgment was affirmed by that Court without opinion (201 N. Y., 526), and a judgment entered thereon (fols. 245–258), with additional costs and allowance (fol. 258).

Digitized by Google

Having obtained an advantage by proof of a technical conversion the claimant seeks further advantage over other firm creditors by the attempt to get a preference in both the firm and individual estates.

POINT I.

The plaintiff has recovered a judgment against the co-partnership only and has no provable claim against the individual partners to any other extent than other firm creditors.

The summons and complaint in the original action were entitled (fol. 145):

> "John F. McIntyre, Plaintiff, against Girard N. Whitney and James V. Geraghty, co-partners, doing business under the firm name and style of Whitney & Kitchen, and Bayard L. Peck, as Assignee for the Benefit of Creditors of said co-partnership of Whitney & Kitchen, Defendants."

It will be noticed that neither the individual partners nor their assignee, as such, are parties to the action, and that the action is brought solely against the partnership as a distinct entity.

Further evidence of this fact is found in the complaint (fols. 150 *et seq.*), which alleges the co-partnership, that the co-partnership made an assignment, with no mention of the individual assignments, that the said co-partnership purchased the stock, that the plaintiff deposited with the co-partnership the sum of Five thousand dollars ($5,000), that the co-partnership agreed to advance the balance and to hold the said shares, that subsequently the plaintiff deposited with the said co-partnership, at its demand, various

Digitized by Google

sums, as a partial re-payment of the advances made by the said co-partnership, and that the defendants Whitney and Geraghty, composing the said co-partnership, in violation of the agreement between the plaintiff and said co-partnership, converted five hundred (500) shares of the plaintiff's stock and that a claim was thereafter presented to the defendant Peck as assignee of the said co-partnership. Moreover, the proof of claim, which the assignee rejected, and on which the action was subsequently brought, recites (fols. 139, 140): That it is for damages for the conversion of five hundred (500) shares of Amalgamated Copper stock, the said stock having been converted by Whitney & Kitchen to their own use; and in the verification to the said proof of claim, the plaintiff alleges:

> "That he is the claimant and that the annexed statement of the account of Whitney & Kitchen * * * is just and true and correct, and that the claim is not secured by mortgage or otherwise, nor is it a specific charge on the real estate of Whitney & Kitchen."

Likewise, the letter rejecting the claim rejects it as a claim against Whitney and Kitchen and is signed by Bayard L. Peck as Assignee of Whitney & Kitchen (fol. 144).

In the requests to find, printed in the case on appeal, the plaintiff asked and the Referee found:

> "That the said copartnership received the said five hundred (500) shares so purchased for the account of the plaintiff, and at the same time, without the consent or knowledge of the plaintiff, delivered the said five hundred (500) shares * * * to Brown, Williams & Burbank, in partial repayment of a loan * * * then due by said copartnership to Brown, Williams & Burbank (fol. 210).
>
> "That on said July 29, 1907, the said copartnership paid for the stock so purchased * * *

Digitized by Google

and at the same time the said copartnership received from Brown, Williams & Burbank, in return for the shares so delivered to said firm by said copartnership, the sum of $48,818.20 (fol. 211).

"That prior to the commencement of this action * * * the plaintiff duly demanded from the said copartnership and from the defendant Peck as assignee, as aforesaid, the delivery of said shares (fol. 215).

"That the plaintiff did not learn of the delivery of the said shares by the said copartnership to Brown, Williams & Burbank until January, 1908" (fol. 216).

Numerous other references to the transaction as a co-partnership matter will be found by reference to the report and to the requests to find, and are referred to at this time to show that the plaintiff's contract was with the co-partnership and the wrongful use, if any, was committed by the co-partnership in the course of the co-partnership business and in violation of a partnership contract.

In the appellant's brief, it is stated that Whitney and Geraghty, co-partners doing business under the name and style of Whitney & Kitchen, converted the property in issue; and this was undoubtedly the ruling of the Court. But the case of Rich vs. New York Central & Hudson River Railroad Co., 87 N. Y., 382, and other cases cited as authority on behalf of the appellant, are really authorities for the respondent. There is no doubt that an action for tort may be maintained for an omission to perform a legal duty, which is dependent upon a contract relation; but it has been held, and the Appellate Division held in this case, that there are torts, proof of which could not be made without proof of the making of a contract and the breach thereof as a necessary foundation for the proof of the tort; and it is contended by the respondent that in such cases there is no several liability for a tort in any further

Digitized by Google

or other sense than a partner is severally liable in cases of breach of contract; and that at least in the application of the doctrines of marshalling to the distribution of insolvent estates of co-partners the same rule as in contract obligations should apply.

POINT II.

While a partnership may not be a legal person, nor an entity separate and distinct from the members who compose it, it is so considered in determining questions like the one now at bar.

The rule in equity for marshalling of partnership assets and liabilities is that partnership assets will be first applied to partnership debts and individual assets to individual debts. That individual assets should be first applied to individual debts before the partnership assets are so applied arises out of necessity, because no partner has any real assignable interest in the partnership assets until the partnership debts are paid (Menagh vs. Whitwell, 52 N. Y., 146), and therefore the individual creditors have no claim in equity upon the partnership assets until such payment. On account of this fact, and as a pure equity arising out of the basis on which credit is given, courts of equity have long held the rule, that firm creditors should not share in the individual assets until the individual creditors are paid; and for the purposes of this doctrine of marshalling, a question in which is now before the Court, whether it may be styled an entity or not, the partnership is to be regarded as separate from its members, and the very case cited by the appellant is authority for this. Jones vs. Blun, 145 N. Y., 333, at

Digitized by Google

page 341, where, as stated in appellant's brief (p. 12), Judge BARTLETT said:

> "For certain purposes this fiction (that a partnership is a legal entity separate and distinct from the several persons therein) may be very properly indulged. In keeping partnership accounts and in marshalling the assets of an insolvent or liquidating firm, this is constantly done."

The appellant next examines a number of cases, in which he says that the partners are held to be severally as well as jointly liable for any torts committed by the co-partnership within the scope of the partnership authority; but on examination, none of these will be found to be cases in which a breach of contract was the essential foundation of the tort.

Roberts vs. Johnson, 58 N. Y., 613, is a case of the negligence of a common carrier.

Creed vs. Hartman, 29 N. Y., 591, and *Hutton vs. Murphy*, 9 Mis., 151, are actions for negligence with no contractual relation.

Williams vs. Sheldon, 10 Wend., 654, is a case of trespass and no partnership is alleged.

Castle vs. Bullard, 23 How. (U. S.), 172 simply decides that partners are liable for fraudulent representations of a partner in the course of the business.

Champion vs. Bostwick, 18 Wend., 175; no one disputes the quotation from this case.

Downey vs. Finucane, "N. Y. Law Journal," April 23d, 1912, holds parties liable for the acts of a promoter. The question at bar did not arise.

Orange Bank vs. Brown, 3 Wend., 158, is an action for negligence, and at page 169 the very distinction pointed out by the respondent is clearly stated, where the Court says:

> "If the plaintiff states the custom and also relies on the undertaking, general or special, as in Boson v. Sanford, and some others, then the action may be said to be *ex delicto quasi ex contracto*, but

Digitized by Google

> in reality is founded on contract and to be treated as such. In Allen v. Sewall, 2 Wend., 338, in giving the opinion of the Court, I remarked that 'all the copartners should have been sued, as the action was *quasi ex contractu*.'"

In the case referred to an *action on the case* was brought against defendants as common carriers, and the Court said, "It is true that the plaintiffs should have brought their suit against all the copartners, as this is an action *quasi ex contractu*." That this is still the law, and that the opinion of the Appellate Division lays down no new principle is shown by Fern vs. Vanderbilt, 13 Abbots P. R., 72, and Catlin vs. Adirondack Co., 81 N. Y., 639, where the Court adopted the opinion of the Special Term reported in 11 Abbots, N. C., 377, approving Orange Bank vs. Brown. The last mentioned case was also approved by the Appellate Division, First Department, in Ward vs. St. Vincent's Hospital, 39 Appellate Division, 624, where the Court said, "Treating the phrases, suggestive of a duty most favorably to the defendant, we still have an action founded upon the contract. As was said in Orange Bank vs. Brown, 3 Wend., 158, 169 (then follows the passage quoted above).

Again the Orange Bank case was approved by the Appellate Division, Second Department, in Bates vs. Weir, 121 Appellate Division, 275, at page 278, where the Court said, "If the plaintiff declared on the custom solely the action was regarded as one in tort. If he declared on the undertaking to carry, the action was on contract, and if he declared on both, the action was said to be *ex delicto quasi ex contractu*."

Harris vs. Schultz, 40 Barb., 315, is a case held to be in contract and not tort.

Olmstead vs. Hotailing, 1 Hill, 317, is a case of actual fraud of one partner, where the other, consenting with the defrauding partner, took the goods.

Walker vs. Angla-American Mortgage, etc., Co., 72 Hun, 334, was a case of fraudulent representation, as

Digitized by Google

were *Chester vs. Dickerson*, 54 N. Y., 1, and *Getty vs. Devlin*, 54 N. Y., 403.

Lock vs. Stevens, 1 Met., 560, is a case of fraud.

Rapp vs. Latham & Parry, 2 B. & A., 795, was an action for money had and received and the question at bar did not arise.

POINT III.

The plaintiff's cause of action, although in tort, exists solely because he had a contract with the partnership and is not within the authority of the Matter of Blackford and the cases cited by the claimant. It is ex delicto quasi ex contractu. In the Blackford case, and others, the several liability of the partners was upheld because the liability was in tort "pure and simple," and entirely independent of any contractual relation.

(A) The claimant relies on Matter of Blackford, 35 App. Div., 330. This case involved the estate of a deceased partner, against which it was sought to prove a claim which had been reduced to judgment after suit brought for the wrongful taking and detention of the claimant's property. The appellant makes a labored argument to show that the judgment on which the claim was based and which was obtained in an action entitled Lockwood vs. Bartlett, reported in 130 N. Y., 340, was really a judgment for detention only and not for wrongful taking. In other words, recognizing the fact that Judge CULLEN, in the Blackford case, believed that a tort based upon a contractural relation between the parties and not a tort pure and

Digitized by Google

simple could not be the basis of an individual claim against the members of the partnership, the appellant attempts to show that the claim in the case at bar is as much a tort "pure and simple" as was the claim in the Matter of Blackford. An examination of the record in the Court of Appeals discloses the fact that in order to prove a tort in that case, it would not be necessary to prove any contractual relation between the parties, *and the taking*, which was held to be lawful, was lawful because of the Federal statutes requiring the disinfection of rags received at the Port of New York, and it was by virtue of these statutes that E. D. Bartlett & Company came into the possession of the rags. While they were in their possession, they proceeded to disinfect them without authority and then refused to deliver them without payment for the disinfection. On the other hand, in the case at bar, the right of possession of the certificates of stock never came to the claimant at all, except by virtue of his contract with the firm of Whitney & Kitchen.

The distinction still existing, then, between the Matter of Blackford and the case at bar, the dictum of Judge CULLEN in that case and the opinion of the Appellate Division in the case at bar, when the question was before it, remain good law.

The Blackford case largely concerned itself with the general rule of marshaling firm and individual assets; but it is cited by the claimant in support of the position that a tort claim is provable against the individual members of a co-partnership. The opinion of Judge CULLEN does contain this language:

> "The action in which petitioner's judgment was recovered was held by the Court of Appeals to be in tort. Therefore, though it arose out of the partnership transactions, the liability of the partners was joint and several (Roberts v. Johnson, 58 N. Y., 613)."

Roberts vs. Johnson (*supra*) was an action for the negligent driving of the defendant's coach and the re-

Digitized by Google

covery was solely in tort. It was a tort pure and simple. Judge CULLEN'S opinion then next discusses the effect on the petitioner's rights of his judgment against the partnership; and it seems to hold that the judgment did not alter the nature of the plaintiff's claim, although it did bar an action against the individuals. Whatever may be the correct theory as to the effect of the judgment as an election of remedy, it is not important to this controversy, for the assignee asserts that because of the contractual basis of the so-called conversion, the claimant never had any claim or cause of action against the individual partners in any other sense than other contract creditors.

And that this may be the law, Judge CULLEN clearly implies in his opinion in the Matter of Blackford (page 333):

> "The principle on which equity founds the rule, that joint creditors must look to the joint estate and individual creditors to the separate estate of partners, is that the joint creditors have extended credit on the faith of the firm property and the individual creditors on the faith of the separate estates of the partners. This reasoning certainly does not obtain in a case like the present, in which there was no contractual relation between the parties, and the act of the defendant was a tort pure and simple."

In the case at bar, it is undoubted that there was a contractual relation, alleged in the complaint and proved on the trial, and it is submitted that the reasoning referred to by Judge CULLEN does obtain, and the Appellate Division, when the question was submitted to it, was of that opinion.

Justice DOWLING, in his opinion (fol. 417) said:

> "The second question presented, it seems to me, necessitates the drawing of the distinction which was pointed out in Matter of Blackford, 35 App. Div., 333 (relied on by claimant), between a

Digitized by Google

tort pure and simple and one arising out of the contractual relationship between the parties. It certainly appears from the summary heretofore made of the original complaint, that the tort alleged was that of the co-partnership and that it arose out of the disregard of the contractual rights of plaintiff by the partnership. There is no allegation of any wrongful act of the individual members of the firm. No one of them is charged to have unlawfully converted or disposed of plaintiff's property. The claim is, that the co-partnership converted the stock and the Referee has found that the co-partnership unlawfully delivered plaintiff's stock to another firm in payment of a co-partnership debt, the co-partnership being credited with the value thereof on the books of the Clearing House of the New York Stock Exchange. This, therefore, is a joint debt arising out of the violation by the co-partnership of its contractual duties with no profit accruing therefrom to the individual members, but solely to the co-partnership. Ordinarily it would come under the rule of equity, that joint creditors must look to the joint estate and individual creditors to the separate estate of the partners, based on the principle that the joint creditors have extended credit on the faith of the firm property and the individual creditors on the faith of the separate estates of the partners. Matter of Blackford (*supra*). The cases relied upon by plaintiff as sustaining his contention, that the liability herein is joint and several, are either those wherein an individual liability has been created by members of a firm individually endorsing the firm notes, or such exceptional cases as Morgan v. Skidmore, 55 Barb., 263, affirmed Abb. N. C., 92, where a member of a firm had personally made a false representation as to the solvency of his firm and the condition of the estate of one of the deceased members, in reliance upon which plaintiff had issued a draft for Twelve thousand pounds (£12,-

Digitized by Google

000). It was there held, that judgment could be obtained against the estate of the member making such representation even after plaintiff had obtained judgment against the firm, for the original amount due; nor was there anything inconsistent in the two suits, for they were not suing as creditors of the deceased, when his liability would be joint, but upon his representation, whereon his liability was personal."

Justice INGRAHAM likwise in his opinion (fol. 439) said:

"I think this claim as established by the judgments of this Court and the Court of Appeals was a co-partnership liability. The action was against the members of the co-partnership. The complaint alleges a conversion by the co-partners jointly and also a breach of contract. The Referee found that the stock purchased for the plaintiff was delivered by the co-partners to discharge a co-partnership obligation, and that act, the delivery of the stock, which was the property of the plaintiff, was, as between the co-partnership and the plaintiff, a conversion. It is claimed that the plaintiff never maintained an action against each co-opartner individually for the conversion. No act of either of the co-partners was alleged as a conversion, nor did the Referee find that either partner converted plaintiff's property to his own use. The stock was delivered by the co-partnership to discharge a co-partnership obligation. The only relation of either of the co-partners to the plaintiffs was the obligation that they assumed to him as brokers to purchase stock for him and hold the same for him subject to a lien on the stock purchased for the advances they had made in making the purchase. The relation was purely contractual. When the co-partnership disposed of the stock purchased for the plaintiff for its own purpose, the conversion of

Digitized by Google

the stock was a co-partnership act, for the benefit of the co-partnership, for which the co-partnership, as such, was liable. The right of the plaintiff to the stock, therefore, depended upon the contract with the co-partnership, and it was a breach of that contract that constituted the conversion, which imposed a liability upon the co-partnership. The distinction between this case and Roberts v. Johnson, 58 N. Y., 613, and Matter of Blackford, 35 App. Div., 330, is obvious in determining that the principle on which equity founds the rule, that joint creditors must look to the joint estate and individual creditors to the separate estate of the partners.

"Justice CULLEN, in the latter case, says: 'This reasoning certainty does not obtain in a case like the present, in which there was no contractual relation between the parties, and the act of the defendant was a tort pure and simple.'

"In the case at bar, there were contractual relations between the parties, and the liability arose out of a breach of that contract, which imposed a joint liability upon the co-partners."

(B) Much of the argument made by the claimant is conceded.

A partnership, as such, is liable for the torts as well as the contracts of the partners.

Partners are likewise individually liable for the misfeasance of the partnership when that misfeasance constitutes a violation of another's *personal* rights of life, limb, body, health or reputation. The authorities cited by the claimant hold this and nothing more.

But such individual liability does not exist where the misfeasance is a violation, not of personal rights, but of rights which exist solely because of a *contractual* relation with the co-partnership.

The claimant's judgment is unquestionably a recovery for the alleged wrongful use of his stock, and to that extent may be treated as an action in form for

Digitized by Google

tort. But what is the gist of his action, out of what does his cause of action grow ?

Chitty, in his work on Pleadings, Vol. I., page 133, 2d Am. Ed., says :

> " The action of case is not confined to injuries *ex delicto :* it is a concurrent remedy with assumpsit for many breaches of contract, not merely for the payment of money, whether the breach were non-feasance, misfeasance or malfeasance. * * * If assumpsit be adopted, the contract or promise must be formally stated in the declaration ; but, in case it is otherwise, which circumstance constitutes the principal difference between the two forms of action."

Chief-Justice SHAW, in Tuttle vs. Cooper, 10 Pick., 284, says :

> " The two cases (Max v. Roberts, 2 Bos. & Pul., 454, and Powell v. Layton, 2 Bos. & Pul., 365) taken together establish the position that if the gist of the action is contract, though the action is in case, the rule of law in regard to contract applies, viz. : If all are not joined," etc.

An examination of the decision in the case of Powell vs. Layton, 2 Bos. & Pul., 365, is so important that we set forth the whole opinion of SIR JAMES MANSFIELD, Chief Judge, in that case :

> " On this day, the opinion of the Court was delivered by SIR JAMES MANSFIELD, Ch. J. The question upon this demurrer is, whether in this action, and upon a declaration framed as this is, the Defendant, who is sued alone, has a right to plead in abatement, that he is only liable jointly with his partners ? The substance of the declaration is, that he received the goods to carry for freight. It seems to be admitted, nor indeed can there be any doubt on that head, that if this

Digitized by Google

action is founded in contract, the plea in abatement is good. Now, on reading this declaration, does it not clearly appear, that it is founded on contract? Although the word suscepit is not used in the declaration, yet the nature of the charge is, that the Defendant agreed to carry the goods to Sicily, and has failed in the performance of his agreement. Can it then make any substantial difference that the word suscepit is not used? If it does make no difference, the plea is good, and the demurrer cannot be sustained. The word 'duty' is introduced in this declaration; but let us see what is meant by the Defendant's duty. How did he undertake any duty, except by his agreement to carry and deliver the goods? The duty of a servant, or the duty of an officer, I understand; but the duty of a carrier I do not understand, otherwise than as that duty arises out of his contract. Suppose a man to undertake to supply me as a builder with timber and other materials for building, he imposes on himself the duty of performing his contract, but no other duty, and I may maintain an action against him for a breach of contract, which, in that sense, will be a breach of duty. It was argued at the bar, on the difference supposed to exist, with respect to their acting. It was contended, that where one partner only acts, his negligence will be the ground of an action against him. That may be true as between him and his partners, but to the Plaintiff it matters not, whether one or all the partners were negligent, the default of one partner being the default of all, quoad those with whom they contract. The duty of one is the duty of all, viz., to carry the goods and deliver them. Whether such be the nature of this action or not may be tried by the consequences. I suppose there can be no doubt, and, indeed, it is so stated by Lord MANSFIELD in Hambly v. Trott, Cowp., 375, that if a common carrier accept goods to

Digitized by Google

carry, and then die, an action will lie against his executor. How is that? Why, because the action is founded on contract. Indeed, Lord MANSFIELD says, it must not be an action on the custom of the realm, which would be in tort, but it must be an action of contract. But the form of the action cannot alter the nature of the transaction; the form of the transaction is originally contract, and the circumstances of an action lying against the executor of the carrier shews that it is contract. How an action against a carrier on the custom ever came to be considered an action in tort I do not understand; but it is so considered, and a count in trover is joined with it; *and, yet, though the non-performance of that which is originally contract may be made the subject of an action of tort, the foundation of that action must still be contract.* In Dale v. Hall, 1 Wils., 282, Mr. Justice DENNISON considers the action against the carrier as founded in contract, and that the circumstance of the suscepit being omitted or introduced into the declaration makes no difference. *Can there be any doubt, that, in case of a loss of goods, either by the master, or any other person (subject to the question of negligence as between themselves) and a payment of the whole loss by one partner, that he would be entitled to contribution against his co-partner? If that be so, it is decisive to shew, that, though by breach of his contract, the carrier is liable to an action, yet that such action must be founded on contract;* for, in Merryweather v. Nixon, 8 Term. Rep., 186, it was ruled by Mr. Baron THOMPSON, and his opinion was confirmed by the Court of the King's Bench, that no action for contribution could be sustained as between two Defendants found guilty of a tort where the damages had been paid by one. If, then, this action be founded in contract, why may not this plea in abatement be used? It is true that a plea in abatement usuallly meets with no favor as being a dilatory plea; yet it is not in all cases

Digitized by Google

a mere dilatory plea, but may be necessary to the due protection of a Defendant. It is material to him in this case, because, if a verdict be obtained against all the partners, it is at least *prima facie* evidence that they are all liable to contribution, and it precludes any of them from resisting contribution on the ground that there was not a full and fair defense to the action. Whereas, if the recovery be against one partner only, he must prove the partnership, and the accident, and many other circumstances, before he can obtain contribution. It would, therefore, be a great hardship to deprive him of this plea; and it would be a great absurdity to restrain the right of the Defendant to make the Plaintiff join his partners in the action, merely because the Plaintiff has chosen to call an action of contract an action of tort. Had there been no cases decided upon this subject, such I confess would have been my opinion; but in truth there are several old and long-established authorities in support of that opinion. The leading authority upon the subject is the case of Boson v. Sandford, which is reported in Salkeld, Lezinz, Shower, Comberbach, and 3 Modern; in none of which books is there a doubt thrown out respecting the propriety of the decision. That case is also mentioned by Lord Chief Baron COMYNS, in his Digest tit. Abatement (F. s.), Joint Contractors (which shows he thought it a case of joint contract); and again in the same Digest, under title Action upon the case for negligence—(C) Action against a common carrier, in which latter place he says, "but all the part-owners must be joined." So in Danvers' Abridgment, p. 8, under title Action, it is referred to as law. Besides these confirmations to which I have alluded, Mr. Justice DENNISON, in the case of Dale v. Hall, approves of the case of Boson v. Sandford; and in Mitchell v. Tarbutt the Court of King's Bench seemed to consider it law, though distinguishable from the case then in judgment,

Digitized by Google

which was clearly a case of tort. Then followed the case of Buddle v. Wilson, which was as solemnly decided as a case could be, and though this point did not necessarily come in judgment at last, yet it was argued, and what fell from the Court upon it I must consider as no small authority in support of the plea. Thus, far, therefore, the case confirms the decision of Boson v. Sandford. But there is a late case of Govett v. Radnidge in the King's Bench, which is hardly distinguishable from the present, though I hope, as it does not seem to accord with the opinion we entertain in this case, it is to be distinguished, on account of the great respect due to those by whom it was decided. Much argument is introduced into that case to shew that Boson v. Sandord is not to be relied upon; but I do not think it is successfully impeached. Some stress is laid on the circumstances that three of the Judges were mistaken in supposing that the joint contract could not be pleaded in abatement; but it must be remembered that till the case of Rice v. Shute, 5 Burr., 2611, such a plea was not used. It is true that Lord Chief-Justice De Gray, in Abbott v. Smith, 2 Bl., 947, says that the rule laid down in Rice v. Shute is not novel, and refers to some cases in the year books, most of which are to be found in Comyns' Abridgment, tit. Abatement (E 12) Joint Contractors. But these are cases of debt on simple contract, which was the usual mode of declaring previous to Slad's case. It is, indeed, rather singular, when the action of assumpsit was substituted for the action of the debt, that a plea in abatement was not also immediately introduced for the form of action, but it was not, probably on the notion that a contract with two was not the same contract as that declared upon with one only, and, therefore, to be taken advantage of upon the evidence. However, at the time of Boson v. Sanford such a plea was not known in assumpsit,

Digitized by Google

nor was it used till after the case of Rice v. Shute. It can hardly be said, therefore, that the Judges in Boson v. Rice were mistaken who thought as all Judges before them had thought, and as all Judges continued to think till the decision of the case of Rice v. Shute caused great surprise in Westminster Hall; for before that case there had been an infinite number of nonsuits on the ground that other joint contractors should have been sued. It does not appear to me, therefore, that it should be imputed to the Judges who decided Boson v. Sandford; they mistook the law. (1) Upon the whole, it appears to me that this action is founded on breach of contract; that it is not distinguishable from any other action founded on contract; and that the Defendant is no more guilty of a breach of duty than every other person is who fails to perform his contract. We think, therefore, that the demurrer in this case cannot prevail, and that there must be judgment for the Defendant.

"Judgment for the Defendant.

"The Lord Chief-Justice then observed that he had omitted to notice the case of Dicken v. Clifton, 2 Wills., 319, which, he said, had decided that a count against a carrier on the custom may be joined with a count in trover, a point that had long been *vexata quæstio*, but that decided nothing that applied to the case in judgment. He added that it was imputed to the Chief Justice in the report of that case to have said that it depends merely on the judgment whether any two counts may or may not be joined, whereas in truth it depends not on the judgment only, but on the form of the plea also."

In Weill vs. King, 12 East., 451, the action was in case for deceit, and Lord ELLENBOROUGH held:

"The joint contract thus described is the foundation of the joint warranty laid in the declaration and essential to its legal existence and validity;

Digitized by Google

> and it is a rule of law that the proof of a contract must correspond with the description of it in all material respects; and it cannot be questioned that the allegation of a joint contract of sale was not only material but essentially necessary to a joint warranty alleged upon record to have been made by the supposed sellers, by whatever circumstances and in whatever action be the same debt, assumpsit or tort, the allegation of the contract becomes necessary to be made. * * * In this case a joint contract was necessary to be laid in order to maintain the ground of action stated upon the record; and being so laid and not being proved, the plaintiff was properly non-suited."

Collyer, in his work on Partnership, Vol. II, page 1030, contains this statement:

> "On the other hand it should seem that where the action is substantially and necessarily founded on contract, the form of it in tort will not prevent the plaintiff from being non-suited for the non-joinder of other persons interested."

In White vs. Smith, 12 Richardson, 600 (South Carolina Law reports), in an action for negligence to a slave the Court of Appeals of South Carolina said:

> "Whatever may be the form of the action wherever the non-performance of the contract is the basis of the suit and the contract must be proved as in case for breach of warranty of sale, the non-joinder of a joint contractor is fatal on plea of abatement; for the plaintiff will not be allowed by varying the form of his action to annul or obviate the rules of legal procedure concerning the parties to contracts."

The same distinction is recognized though not passed upon in the case of Metcalf vs. Robertson, decided by the General Term of the Second Department, Judges

Digitized by Google

CULLEN, BARNARD and DYKMAN, and reported in 15 N. Y. Weekly Digest, 294, where the plaintiff had obtained an order on the defendants as bailees for the delivery of certain rails, which the defendant wrongfully removed. The Court used this language:

> "The rule that in all actions of tort all parties are jointly and severally liable is applicable to actions against partners. That, as the alleged conversion by defendants' servant occurred when the rails were removed from the plaintiff's possession and after the defendants' contract connection with the property had entirely ceased, this case does not fall within the alleged exception to the rule just stated in favor of actions, which though tortions in form, arise out of contract."

A case in which we are not favored with an opinion, but which is specifically in point is the case of Mason vs. Wells, 2 Hun, 518, where, in an action for neligence, based upon the alleged neglect on the part of the defendants to keep renewed and continued in force certain insurance policies, the answer stated and the referee found that at the time mentioned the defendant and one Thomas N. Knight were co-partners in the insurance business and that Knight was jointly interested with the defendant in the insurance business. The complaint in that case was dismissed because only one partner was joined.

The reasoning of the foregoing decisions is clearly this: That where the wrong, on which action is brought, is in reality only a breach of contract, and where in order to prove the cause of action, it is absolutely essential to set forth and to prove the contract; in other words, where the wrong arose out of a contract relationship and where there could be no wrong except for the fact that there was a contract relationship, that such an action is in the eye of the law so intimately involved in the breach of contract that it is subject to the ordinary rule that joint contractors must

Digitized by Google

be sued together and that no several cause of action exists against one of two or more defaulting joint contractors.

The claim on which the plaintiff recovered judgment is precisely such a cause of action and the complaint so alleges it. The first six allegations of the complaint specifically allege and set forth the contract. In the seventh allegation the statement is used that the partnership converted the stock to their own use. The plaintiff, by stipulation, thought it necessary to add to his complaint an allegation that prior to the commencement of the action demand was made for the return of the stock. This allegation is important as showing the plaintiff's own theory of his cause of action. The conversion was complete by the loan of the stock without any demand for its delivery, but proof of demand and refusal was essential in proving a breach of the contract to deliver.

A further test of the contractual basis of the tort is found in the self-evident proposition for which the claimant would rightfully insist that his cause of action would have survived the death of either or both partners, and yet this would not be so in a tort of a purely personal nature where the action dies with the person.

Moreover, there can be little question that had either partner here paid the judgment, he would have an equitable right of contribution from the other, yet it is elemental that there is no contribution among joint tort feasors.

It is clear, therefore, that though the plaintiff has sued for and recovered for the conversion, his remedy, none the less, depended solely on the breach of the contractual obligation by the co-partnership.

If his action had been specifically considered as for the breach of contract, it could not be seriously urged that he had any provable claim against the individual parties. Certainly the contractual obligation was a joint obligation on which neither party could be sued individually. The mere form of action cannot make the parties liable in a way different from what was in law and fact their real liability, namely, as joint con-

Digitized by Google

tractors. This is the unbroken authority of the cases which bear on the point.

The claimant's cause of action was against the partnership; his judgment was against the partnership; his rights were against the partnership. The claimant could not have sued either Whitney or Geraghty alone. Having, therefore, no cause of action against the individual partners, he has no provable claim against their estates. But even though he had been able to sue either partner severally, the equitable doctrines of marshalling would prevent his proof of his claim as an individual claim against each partner. Other firm creditors cannot be paid in full in any event (fol. 283); and to allow double proof of this claim simply because the breach of contract allowed a pleading and judgment for a technical tort would manifestly give to the claimant an unfair advantage.

CONCLUSION.

The order of the Appellate Division affirming the order of the Special Term and the judgment of the Supreme Court should be affirmed with costs.

Respectfully submitted,
DANIEL BURKE,
Attorney for Assignee,
No. 44 Pine Street,
New York City.

Digitized by Google

Digitized by Google

IN THE

COURT OF APPEALS

OF THE STATE OF NEW YORK

IN THE MATTER

—OF—

THE REVIEW OF THE ACTION OF THE COMMITTEE WHICH DESIGNATED JOHN ANDERSON, JR., AS A CANDIDATE FOR MEMBER OF THE DEMOCRATIC STATE COMMITTEE IN THE THIRTY-THIRD SENATORIAL DISTRICT.

APPEAL BOOK

JOHN B. RILEY,
Attorney for Respondent,
Plattsburgh, N. Y.

DANIEL J. FINN,
Attorney for Appellant,
Glens Falls, N. Y.

THOMAS CARMODY, Attorney General,
Attorney for Secretary of State.

Saratoga Springs, N. Y.
1913

Appeal by D. J. Finn from order of 3rd
Dept. an order of Spec. Term dismissing a
review the designation of J. Anderson a
candidate for Democratic State Committee
33rd Senatorial District.

Digitized by Google

Digitized by Google

INDEX

	PAGE
Notice of appeal to Appellate Division	1
Final order dismissing proceedings	3
Order for hearing	5
Petition	7
Affidavit of Daniel P. DeLong, read in support of motion	10
Affidavit of Chester R. Grandley, read in support of motion	12
Affidavit of Elmer J. West, read in support of motion	13
Affidavit of A. Z. DeLong, read in support of motion	15
Affidavit of Daniel P. DeLong, Jr., read in support of motion	15
Affidavit of Nathan T. Hewitt, read in support of motion	16
Affidavit of John B. Riley, read in support of motion	20
Affidavit of John K. Collins, read in support of motion	22
Affidavit of Jeremiah W. Davern, read in support of motion	24
Affidavit of George S. Bixby, read in support of motion	25
Affidavit of Wilmer H. Dunn, read in support of motion	26
Party certificate of nomination	27
Letter of Secretary of State, read in support of motion	30
Protest, read in support of motion	31

Digitized by Google

PAGE

Objection by respondent in opposition to motion 32
Affidavit of John B. Riley, read in support of motion 43
Affidavit of John B. Trombley, read in support of motion 47
Affidavit of Michael J. Callahan, read in support of motion 49
Affidavit of John K. Collins, read in support of motion 51
Notice of meeting filed with the Secretary of State 52
Affidavit of Thomas J. Dunn, read in opposition to motion 53
Affidavit of B. T. McGuire, read in opposition to motion 60
Affidavit of Patrick H. McNulty, read in opposition to motion 63
Party certificate of nomination by a Senatorial convention 68
Affidavit of James T. Kavanaugh, read in opposition to motion 72
Affidavit of Edwin J. Worden, read in opposition to motion 73
Affidavit of C. Thurman Leland, read in opposition to motion 76
Affidavit of William M. Cameron, read in opposition to motion 77
Party certificate of nomination 79
Oath of permanent chairman 86
Oath of temporary chairman 86
Party certificate of nomination 88
Minutes of meeting of Thirty-third Senatorial District Committee 91

Digitized by Google

PAGE
Oath of permanent chairman..... 94
Oath of temporary chairman..... 95
Stipulation 102
Opinion of Mr. Justice H. T. Kellogg..... 103
Stipulation waiving certification..... 104
Order of Appellate Division appealed from... 105
Notice of appeal to Court of Appeals..... 107
Opinion of Mr. Justice Smith..... 108
Dissenting opinion of Mr. Justice Houghton.. 113
Stipulation that appeal book is correct..... 114

Digitized by Google

Digitized by Google

IN THE

Court of Appeals

OF THE STATE OF NEW YORK

NEW YORK SUPREME COURT — Clinton County. 1

IN THE MATTER
of the
Designation of the Candidate of the Democratic Party for State Committeeman for the Thirty-third Senatorial District.
JOHN B. TROMBLEY,
Appellant.

NOTICE OF APPEAL

SIRS:

You will please take notice that John B. Trombley, the petitioner in the above entitled proceeding, hereby appeals to the Appellate Division of the Supreme Court for the Third Judicial Department from the order made in the above entitled proceeding by Hon. H. T. Kellogg, Justice of the Supreme Court, on the 14th day of March, 1912, and entered in the office of the clerk of Clinton County on the 15th day of March, 1912, dismissing the above en- 2

Digitized by Google

titled proceeding, and from each and every part of said order.

Dated, March 16, 1912.

Yours, &c.,

JOHN B. RILEY,
Attorney for John B. Trombley,
Petitioner and Appellant,
Plattsburg, N. Y.

To DAVID J. FINN, Esq.,
Attorney for Senatorial Designating Committee and for himself and P. J. McNulty as Chairman and Secretary of said Committee;

HON. THOMAS CARMODY,
Attorney-General, Attorney for Secretary of State;

WALLACE TURNER,
Clinton County Clerk.

Digitized by Google

FINAL ORDER DISMISSING PROCEEDING 6

SUPREME COURT—Clinton County.

IN THE MATTER
of the
Summary Review under Section 56 of the Election Law of the Proceedings by which JOHN ANDERSON, Jr., was designated as the Candidate for Member of the Democratic State Committee in and for the 33d Senatorial District.

7

John B. Trombley, having presented his petition seeking a summary review of the proceedings by which John Anderson, Jr., was named as a candidate for member of the Democratic State Committee in the Thirty-third Senatorial District, on reading said petition, at the end of which is a jurat dated March 7, 1912; the affidavit of Daniel P. DeLong, verified March 6, 1912; of Chester B. Grandey, verified March 6, 1912; Elmer J. West, A. Z. DeLong, Daniel P. DeLong, Jr., each verified March 6, 1912; of Nathan T. Hewitt, verified March 4, 1912, with the exhibits thereto attached 8 of John B. Riley, verified March 4, 1912; of John K. Collins, verified March 4, 1912; of Jerome N. Davern, verified March 5, 1912; of George S. Bixby, verified March 6, 1912; of W. H. Dunn, verified March 6, 1912; the certificate to the Secretary of State, signed Archibald Z. DeLong and Nathan T. Hewitt, certifying John B. Trombley as the candidate for State Committeeman, verified March 4, 1912; the letter of the Secretary of State to Archi-

Digitized by Google

bald Z. DeLong; the objections of John M. Derby, filed with the Secretary of State to the Anderson certificate, Daniel J. Finn, appearing specially in opposition to the motion and making various preliminary objections noted in the minutes and hereby referred to, the Secretary of State, having appeared by Hon. J. A. Kellogg, Deputy Attorney-General, and taking no sides in the matter, on reading in opposition to the petition the affidavits of Thomas J. Dunn, verified March 12, 1912; of B. J. McGuire, of Patrick H. McNulty, verified March 13, 1912; the certificate of nomination of Michael J. Callanan; the affidavit of James T. Kavanagh, verified March, 11, 1912; of Edward J. Worden, verified March 11, 1912; of C. Thurman Leland, verified March 12, 1912, and of William M. Cameron, verified March 11, 1912, the petitioner thereupon having read the affidavits of John B. Riley, John K. Collins, Michael J. Callanan and John B. Trombley, all verified March 13, 1912, which had not been served upon the committee appearing in opposition, the court having entertained the preliminary objections to be decided with the merits of the motion, Daniel J. Finn appearing in person and Edgar T. Brackett as his counsel, opposed to the proceedings, and Hon. Frank E. Smith in favor of the petitioner John B. Trombley,

It is ordered, That said petition of the said John B. Trombley be and the same is hereby dismissed.

Dated, March 14, 1912.

H. T. KELLOGG,
J. S. C.

Digitized by Google

ORDER FOR HEARING

NEW YORK SUPREME COURT—Clinton County.

IN THE MATTER
of the
Designation of the Candidate of the Democratic Party for State Committæman for the Thirty-third Senatorial District of the State of New York to be voted for at the coming Primary Election appointed to be held on the 26th day of March, 1912, and of the objections to a certificate or certificates of nomination of a candidate filed in the office of the Secretary of State on the 5th day of March, 1912.

Upon the petition of John B. Trombley, sworn to March 7th, 1912, and the affidavits and papers thereto annexed, copies whereof are hereto annexed, and on motion of Hon. John B. Riley, attorney for said petitioner and complainant:

It is ordered that said petitioner and complainant and the matter and petition above entitled shall be heard at the court house in the city of Schenectady, County of Schenectady, on the 13th day of March, 1912, at five o'clock in the afternoon, upon notice to Daniel J. Finn and P. H. McNulty, or either of them, one having been the chairman and the latter the Secretary of the Senatorial Committee designating said Anderson and whose determination is to be reviewed; said notice shall be

Digitized by Google

15 given by service of a copy of this order and a copy of the petition and affidavits thereto annexed on or before noon of Monday, March 11th, 1912 either personally upon the said Daniel J. Finn or P. H. McNulty, or in case of the absence of either from his residence or office, by leaving the same at the office or residence of said Daniel J. Finn or P. H. McNulty, or either of them, with a person of suitable age and discretion.

It is further ordered that a copy of this order be served upon the Secretary of State of the State of New York on or before Monday, March 11th, 1912, and that he transmit certified copies to this
16 court of the certificates of nominations for State Committeeman of the Thirty-third Senatorial District of the Democratic Party, at the time and place fixed for the hearing above mentioned.

It is further ordered that a copy of this order and the petition and papers attached be served upon John Anderson, Jr., by mailing the same securely enclosed in a postpaid wrapper and addressed to him at his place of residence, Newcomb, Essex County, New York, on or before Monday, March 11th, 1912.

Dated, March 7th, 1912.

17

H. T. KELLOGG,
J. S. C.

Digitized by Google

PETITION

NEW YORK SUPREME COURT—Clinton County.

IN THE MATTER
of the
Designation of the Candidate of the Democratic Party for State Committeeman for the Thirty-third Senatorial District of the State of New York to be voted for at the coming Primary Election appointed to be held on the 26th day of March, 1912, and of the objections to a certificate or certificates of nomination of a candidate filed in the office of the Secretary of State on the 5th day of March, 1912.

John B. Trombley of Altona, Clinton county, New York, being duly sworn, deposes and says that he is a citizen of the United States of America and a resident and an enrolled Democratic elector of the Thirty-third Senatorial District, and county of Clinton, State of New York.

Deponent further alleges on information and belief that on or about October 3rd, 1910, a Democratic Senatorial Convention was held for said district at the city of Plattsburgh, N. Y., composed of three delegates from each of the counties of Clinton, Essex and Warren, comprising said Senatorial District, said delegates having been duly elected according to the rules and custom by the respective county conventions of the Democratic Party. That

Digitized by Google

at said convention one M. J. Callanan was nominated as a candidate for the office of Senator of said district. That said Senatorial Convention according to a custom and rule that prevailed in the Democratic party as long as deponent can recollect (and deponent's recollection extends back over twenty years), said convention by a resolution duly adopted, appointed and had power to appoint a Senatorial Committee in and for said Senatorial District, consisting of three members, one from each county, namely: Nathan T. Hewitt of Keeseville, Clinton county, N. Y., B. J. McGuire of Keeseville, Essex county, N. Y., and A. Z. DeLong of Glens Falls, Warren county, N. Y., giving said committee the usual powers to call future Senatorial Conventions, etc.

That on the 4th day of March, 1912, said committee pursuant to call, met at the village of Keeseville, Essex county, New York, and organized and duly designated deponent as the Democratic candidate for member of the State Committee for said district to be voted for at the coming Primary election, appointed to be held March 26th, 1912. That on the 5th day of March, 1912, said designation in the form of a certificate of nomination, a copy of which is hereto annexed, was filed in the office of the Secretary of State of the State of New York.

That on the 4th day of March, 1912, three delegates from each of the counties of Clinton, Essex and Warren, assuming the right to act as the committee to designate the Democratic candidate for State Committeeman for said district, met at the village of Keeseville, Essex county, N. Y., and designated one John Anderson, Jr., of Newcomb, Essex county, N. Y., as the Democratic candidate

Digitized by Google

for State Committeeman from said district. That 24
said designation was filed in the form of a certificate of nomination signed by Daniel J. Finn, Chairman, and P. H. McNulty, Secretary, in the office of the Secretary of State of the State of New York on the 5th day of March, 1912, and said latter designation was and is illegal and void as deponent verily believes.

That on or about the 5th day of March, 1912, objections were filed by an enrolled Democratic voter of the city of Plattsburgh, Clinton county, New York, to said designation of John Anderson, Jr., a copy of said objections being annexed hereto and made a part hereof. 25

That annexed hereto are the affidavits of John B. Riley and John K. Collins, verified the 4th day of March, 1912; Daniel P. DeLong, Jr., Daniel P. DeLong, Sr., A. Z. DeLong, Chester B. Grandey, Elmer J. West, George S. Bixby and Wilmer H. Dunn, verified the 6th day of March, 1912, Nathan T. Hewitt, verified the 4th day of March, 1912, and Jeremiah W. Davern, verified the 5th day of March, 1912, and they constitute the basis of this affidavit in so far as the same is made upon information and belief and said affidavits are made a part hereof and reference is also made to the certificates filed 26
with the Secretary of State and also the objections hereinbefore mentiond.

That as deponent has been informed and believes the Secretary of State has by letter notified the Chairman of the Committee which nominated deponent and also the Chairman of the Committee that designated said Anderson that he intends to recognize said Anderson as the duly nominated Democratic State Committeeman for the Thirty-third Senatorial District, because his certificate

Digitized by Google

27 was first filed, and a copy of said notification is hereto annexed and made a part hereof, of which decision and determination and acts of said committee nominating said Anderson, this deponent complains and respectfully asks that the same may be received and such order made in the premises as justice may require and declaring your petitioner the duly designated candidate for State Committeeman on such notice as the court or justice may direct.

That no previous application for this order has been made to any court or judge.

JOHN R. TROMBLEY.

28 Sworn and subscribed before me this
7th day of March, 1912.

W. J. Armstrong,
Notary Public,
(Seal) Albany Co., N. Y.

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK, } ss:
County of Warren. }

29 Daniel P. DeLong, being duly sworn, says:

That he resides in the city of Glens Falls, Warren county, N. Y.

That he was a delegate duly elected by the Democrats of Warren county to the Democratic Senatorial Convention held at Plattsburgh, N. Y., on October 3, 1910, and attended said convention at which Michael J. Callanan was nominated for Senator.

That after such nomination was made there was

Digitized by Google

appointed by said delegates to the convention a committee of three, one member from each county, as a senatorial committee for the Thirty-third Senatorial District for the purpose of calling further convention and to perform such other and further duties as might devolve upon said Democratic Senatorial Committee.

That Nathan T. Hewitt, of Clinton County, N. Y.; B. J. McGuire, of Essex county, and Archibald Z. DeLong, of Warren county, were duly elected by said convention as such Democratic Senatorial Committee, and the same persons were also given the further power to fill any vacancy that might occur.

That the election of such committee was in pursuance to the rules and customs prevailing at Democratic Senatorial Conventions held in the Thirty-third Senatorial District for many years past.

That at said convention, when it came to naming the man to be the member of said committee from Warren county this deponent conferred with Elmer J. West and E. J. Worden, the other two delegates to said convention from Warren county, and they agreed upon Archibald Z. DeLong, of Glens Falls, as the member of said committee from Warren county, and he was duly elected as such.

DANIEL P. DeLONG.

Subscribed and sworn to before me
this 6th day of March, 1912.

Satie E. Cochran,
Notary Public,
Warren County.

Digitized by Google

33 **AFFIDAVIT IN SUPPORT OF MOTION**

STATE OF NEW YORK, }
County of Warren. } ss:

Chester B. Grandey, being duly sworn, says: that he resides in the city of Glens Falls, Warren county, N. Y.

That he is the editor of the Post Star, published in Glens Falls, N. Y. That he attended the Senatorial Convention held in and for the Thirty-third Senatorial District on the 3d day of October, 1910, at the Cumberland House in the city of Plattsburg, N. Y., at which M. J. Callanan was nominated for
34 Senator.

That after said nomination was made a resolution was offered by Hon. John B. Riley, of Plattsburgh, which resolution empowered the delegates from each county, namely, the counties of Clinton, Essex and Warren, to name one man from each county to act as members of the Senatorial Committee for said district; that said resolution was duly seconded and passed, and Nathan T. Hewitt, of Clinton county; B. J. McGuire, of Essex county, and A. Z. DeLong, of Warren county, were duly elected members of said committee. That said
35 committee, besides being elected the Senatorial Committee for the Thirty-third District, was also given power to fill any vacancy that might occur on the senatorial ticket.

That after said convention had adjourned, deponent telephoned to the Post Star at Glens Falls a report of said convention and the following two paragraphs are a true and correct copy of the report as published on the 4th day of October, 1910:

"Plattsburgh, October 3rd. At the Democratic

Digitized by Google

Senatorial Convention of the Thirty-third District, 36
comprising the counties of Clinton, Essex and Warren, held here today, M. T. Callanan, of Keeseville, was unanimously nominated for State Senator; his was the only name mentioned before or during the convention.

"Elmer J. West, of Glens Falls, acted as chairman, and P. H. McNulty, of Ticonderoga, as secretary. The following Senatorial Committee was named: P. Hewitt, Keene; B. J. McGuire, of Keeseville, and A. Z. DeLong, of Glens Falls,"

CHESTER B. GRANDEY.

Subscribed and sworn to before me 37
this 6th of October, 1911.

J. Edward Singleton,
Notary Public,
Warren County.

AFFIDAVIT IN SUPPORT OF MOTION

Glens Falls, N. Y., March 6th, 1912.

Mr. A. Z. DeLong,
Glens Falls, N. Y.:

My Dear Sir: 38

You ask me, as the Chairman of the Senatorial Convention in and for the Thirty-third Senatorial District, held at Plattsburgh, on the 3rd day of October, 1910, to state whether you were at that time designated as a member of the Senatorial Committee then appointed.

While I am without interest as to your purpose in asking this question, I am, nevertheless, glad to state that at such convention a Senatorial Com-

Digitized by Google

mittee was by such convention appointed, and that after a conference of all the Warren county delegates you were named as the choice of the said Warren county delegates for that position.

The above are the facts, and if you desire it I shall be glad to make a sworn statement to that effect.

Yours truly,
ELMER J. WEST.

STATE OF NEW YORK, }
County of Warren. } ss:

Elmer J. West, being duly sworn, deposes and says that he was the chairman of the Senatorial Convention named in the above letter; that he has read the foregoing facts, and that the same are true to the knowledge of deponent.

ELMER J. WEST.

Sworn to before me this 6th
day of March, 1912.
Mary W. Robinson,
Notary Public.

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK, }
County of Warren. } ss:

A. Z. DeLong, being duly sworn says, that he resides in the city of Glens Falls, Warren county, N. Y.

That as a member of the Senatorial Committee in and for the Thirty-third Senatorial District, he

Digitized by Google

attended a meeting of said committee in pursuance 42
to a notice of call signed with deponent's name and the name of N. T. Hewitt, said meeting called to be held at the Commercial House in the village of Keeseville, N. Y. That deponent arrived in Keeseville about 12.30 p. m., and at 2.30 p. m. deponent, with N. T. Hewitt, waited on B. J. McGuire and informed him that the said Senatorial Committee would convene in Room 16 of the Commercial House at 2.30 p. m. Said McGuire nodded his head, but made no statement as to whether or not he would attend such convention. That said committee was in session until after three o'clock, and that McGuire did not put in an appearance at said 43
meeting.

A. Z. DeLONG.

Subscribed and sworn to before me
this 6th day of March, 1912.

J. Edward Singleton,
Notary Public,
Warren County.

AFFIDAVIT IN SUPPORT OF MOTION 44

STATE OF NEW YORK, } ss:
County of Warren. }

Daniel P. DeLong, Jr., being duly sworn, says: that he resides in the city of Glens Falls, Warren county, N. Y.

That on or about the 14th day of February, 1912, one Patrick H. McNulty called upon deponent at the Glens Falls Brick Company and inquired as to the whereabouts of Daniel P. DeLong, Sr., de-

Digitized by Google

45 ponent's father, and stated to deponent that said Daniel P. DeLong, Sr., was a member of the Senatorial Committee from the Thirty-third Senatorial District. Deponent informed McNulty that Daniel P. DeLong, Sr., was at that time in Kingston, Jamaica.

That McNulty then stated to deponent that he had been sent to find Mr. D. P. DeLong, Sr., by one John Anderson, Jr., who is the present State Committeeman from the Thirty-third Senatorial District, for the purpose of securing a proxy, as Mr. Anderson said he would have no trouble in getting said proxy. Upon being informed as to Mr. De-
46 Long's whereabouts he asked if he could cable him. Deponent informed him that he could, but it would probably be useless, as Mr. DeLong would not send him a proxy without knowing more about the conditions. Whereupon McNulty said he would report to Mr. Anderson and let said Anderson use his own judgment as to what he would do.

DANIEL P. DeLONG, Jr.

Subscribed and sworn to before me
this 6th day of March, 1912.

J. Edward Singleton,
Notary Public,
Warren County.

47

AFFIDAVIT IN SUPPORT OF MOTION

CLINTON COUNTY } ss:

Nathan T. Hewitt, being duly sworn, says; that he resides at Keeseville in said county, is a member of the Democratic party in said county and has

Digitized by Google

been for upwards of thirty years last past, and has 48
during that time taken an active part in the affairs of said party in said county.

That he was present as a delegate from said county of Clinton at the Senatorial Convention held at Plattsburg in said county by the Democratic party on the 3d day of October, 1910, and participated in the proceedings of said convention, and well remembers what occurred thereat.

That near the end of the proceedings of said convention, which was presided over by Mr. Elmer E. West, a delegate thereto from Warren county, Hon. John B. Riley, one of the delegates from Clinton county, offered, pursuant to the established rules 49
and customs of said party, a resolution that a committee of three persons be elected as a Senatorial District Committee with the usual powers to call senatorial conventions and authority to fill any vacancy occuring in the nomination for Senator made at said convention; that deponent seconded said resolution, and the same was thereupon put to a vote by the chairman and unanimously adopted. That thereupon the delegates from each of the three counties comprising said district presented the name of one member of such committee, the county of Warren naming Mr. Archibald Z. 50
DeLong; the county of Essex, Bernard J. McGuire, and the county of Clinton this deponent, all of whom were thereupon by vote of said convention elected as such committee, and their election duly declared by the chairman of said convention.

That on the 15th day of February, 1912, deponent received through the mail a notice in writing, a copy of which is hereto annexed and made a part of this affidavit, marked Exhibit "A". That said original notice bore the signature of said Ber-

Digitized by Google

51 nard J. McGuire in his genuine handwriting and no other signature. That subsequently thereto said McGuire told deponent that the hour and date for said meeting was 2.30 in the afternoon of March 4, 1912, and that he issued the said call and notice at the request and upon the advice of one P. H. McNulty, who, he stated to deponent, came to see him for that purpose on the day of the date of said notice or call. (Exhibit "A").

That subsequently thereto, and on the 22d day of February, 1912, deponent mailed to the Election Commissioners of the said counties of Clinton, Essex and Warren, and also the Secretary of State
52 at Albany, N. Y., copies of said notice and call, with requests that same be filed in the said respective offices..

That on the 4th day of March, 1912, in the said Commercial House in Keeseville, aforesaid, the place of meeting designated in said notice, at or shortly after 2 p. m., said McGuire, being in said place in the presence and with the assent of said Archibald Z. DeLong, deponent notified said McGuire that the said Senatorial Committee would meet at 2.30 o'clock sharp of that day in Room 16 in said Commercial House, and there proceed to designate a candidate for State Committeeman pur-
53 suant to his said call and notice (Exhibit "A"), and requested said McGuire to attend at said hour and room. That said meeting was accordingly held at the said hour in said room, with the doors open, and that said McGuire did not attend either in person or by proxy.

NATHAN T. HEWITT.

Subscribed and sworn to before me
this 4th day of March, 1912.

F. B. McKenzie,
Notary Public.

Digitized by Google

EXHIBIT "A". 54

Keeseville, N. Y., February 15, 1912.

To Nathan T. Hewitt, Member of the Thirty-third Senatorial District Committee from Clinton County.

You are hereby notified that there will be a meeting of the Senatorial District Committee of the Democratic party representing the 33rd Senatorial District at the Commercial House in Keeseville, Essex county, on Monday, March 4th, for the purpose of organization, and to designate a candidate for State Committeeman from said district, and also to designate three members as candidates for 55 said committee from each Assembly District within said Senatorial District, and to transact such other business as may properly come before said meeting.

Dated this 15th day of February, 1912.

B. J. McGUIRE,
Member of Committee.

Filed in the Secretary of State's office, February 23, 1912.

To the Secretary of State:

In pursuance of section 75 of chapter 891 of the Laws of 1911, we hereby certify that there will be a 56 meeting of the Democratic Senatorial Committee in and for the 33rd Senatorial District of the State of New York, on March 4th, 1912, at three o'clock in the afternoon, at the Commercial House in the village of Keeseville, N. Y., for the purpose of nominating a State Committeeman and members of the Senatorial Committee for said district, to be voted

Digitized by Google

for at the primary election to be held March 26, 1912.

NATHAN T. HEWITT,
A. Z. DeLONG,
Members of Senatorial Committee 33rd District.

Filed in the Secretary of State's office, February 20th, 1912.

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK, } ss:
County of Clinton. }

John B. Riley, being duly sworn, says:

First. That he resides in the city of Plattsburg, Clinton county, New York.

Second. That he was a delegate duly elected by the Democrats of Clinton county to the Democratic Senatorial Convention held at Plattsburg, New York, on October 3, 1910, and attended said convention, at which Michael J. Callanan was nominated for Senator.

Third. That after such nomination this deponent moved the appointment of a Democratic Senatorial Committee for the purpose of filling vacancies, calling further conventions and to perform such other and further duties as might devolve upon said Democratic Senatorial Committee.

Fourth. That Nathan T. Hewitt of Clinton County, B. J. McGuire of Essex County and Archibald Z. De Long of Warren County were duly elected by said convention as such Democratic Senatorial Committee.

Digitized by Google

Fifth. That the election of such committee was 60
in pursuance to the rule and custom prevailing at Democratic Senatorial Conventions held in this Senatorial District for many years past.

Sixth. That the deponent is informed and believes that a meeting of such committee was duly called by B. J. McGuire of Essex County to be held at the Commercial House in the Village of Keeseville, on March 4, 1912, at 2:30 p. m.

Seventh. That deponent is informed and believes meetings of the County Committees in the Counties of Clinton, Essex and Warren, composing the Thirty-third Senatorial District, were held pursuant to a request of the Democratic State Committee 61
for the purpose of appointing three delegates to designate a candidate for member of the Democratic State Committee from the Thirty-third Senatorial District. That such meetings in the various counties were requested upon information furnished to the State Committee that there was no Democratic Senatorial Committee in said district.

Eighth. That the meeting of the committee of three from each county in said district was called by one John K. Collins, a member selected by the Democratic County Committee of Clinton County, to be held at the Commercial House in the Village of Keeseville on the 4th day of March, 1912, at 2:30 62
p. m.

Ninth. That deponent was present at the time of such meeting and that said Collins stated to the members of the committee from the various counties that he had since learned that he had no authority to call said committee together, and declined to participate in its proceedings.

Tenth. That when said committee was organized, deponent informed the members that the regularly

Digitized by Google

63 appointed Democratic Senatorial Committee was then in session for the purpose of designating a member of the State Committee to be placed upon the official ballot; that the State Committee's action in the matter was based upon misinformation as to the existence of such Senatorial Committee; that they had no authority under the circumstances to designate a member of the State Committee, to be voted for at the primaries on March 26, 1912. That thereupon deponent withdrew from said meeting and declined to participate in its proceedings.

Eleventh. Deponent further says that he appeared at said meeting by virtue of a proxy duly
64 and properly executed, of Ernest C. Gordon, who had been duly designated by the Democratic County Committee of the County of Clinton.

JAMES B. RILEY.

Sworn to before me this 4th
day of March, 1912.

Benj. F. Feinberg,
Notary Public.

AFFIDAVIT IN SUPPORT OF MOTION

65 STATE OF NEW YORK, }
County of Clinton. } ss:

John K. Collins, being duly sworn, says:

1st. That he resides in the City of Plattsburg, Clinton County, New York.

2d. That he was present at the Democratic Senatorial Convention held at Plattsburg, New York, held on October 3, 1910, at which Michael J. Callanan was nominated for Senator. That at said

Digitized by Google

Convention, Nathan T. Hewitt, of Clinton County; 66
P. J. McGuire, of Essex County, and A. Z. DeLong, of Warren County, were elected members of a Senatorial Committee to perform the usual duties of such committee.

3d. Deponent further says that he is secretary of the Democratic County Committee of Clinton County; that said committee met at Plattsburg, New York, during the month of February; that a communication was read by deponent from the Democratic State Committee requesting the County Committee to elect three delegates to attend a meeting of delegates chosen in a like manner from the Counties of Clinton and Essex thereafter to be called for the purpose of naming a candidate for member of the Democratic State Committee to be voted for at the primaries on March 26, 1912. That Nathan T. Hewitt was present at said meeting and stated to deponent and to the members of the County Committee present that the State Committee was in error in stating there was no existing Senatorial Committee. After discussion the County Committee elected a committee of three members to confer with similar committees from the other counties of said district. That said delegates so named consist of deponent, Ernest C. Gordon and James Murray. That thereafter the committees from the various counties had a conference at Port Henry, New York, and decided to meet at the Commercial House in the Village of Keeseville at the same time and place designated as the place of meeting of the Senatorial Committee elected at the Senatorial Convention held at Plattsburg in October, 1910. It was understood that in the meantime the law should be examined and a conclusion would not be reached as to which committee was 67 68

Digitized by Google

the proper one to name the member of the State Committee to be voted for on March 26, 1912, until after a conference with the Senatorial Committee appointed as aforesaid in October, 1910. That at said conference deponent was elected chairman, and thereafter called a meeting to be held at the Village of Keeseville as aforesaid.

4th. That deponent attended said meeting held at Keeseville, New York, on March 4, 1912. That deponent, being satisfied that he had no authority to call said committee together, he so stated to the members attending, and informed them that under the law the meeting should have been called by the members of the State Committee from this district and that there was a legally elected Democratic Senatorial Committee charged with the duty of designating a person to be voted for as member of the Democratic State Committee on March 26, 1912. And that deponent could not consistently participate in the proceedings, whereupon deponent withdrew.

JOHN K. COLLINS.

Sworn to before me this 4th
day of March, 1912.

Annie P. Houcroft,
Notary Public.

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK, }
County of Clinton. } ss:

Jeremiah W. Davern, being duly sworn, says that he was a delegate from the County of Clinton to a

Digitized by Google

Democratic Senatorial Convention held in the City of Plattsburg on October 3, 1910, and attended such convention; that, upon motion of John B. Riley, who was one of the delegates in said convention, a Senatorial Committee, consisting of three persons, was elected by such convention; that he remembers that Bernard J. McGuire and Nathan T. Hewitt were elected as two members of such committee. 72

JEREMIAH W. DAVERN.

Subscribed and sworn to before me
this 5th day of March, 1912.
Benj. F. Feinberg,
Notary Public.

73

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK, } ss:
County of Clinton. }

George S. Bixby, being duly sworn, says that he was present at the Democratic Senatorial Convention held in the City of Plattsburg, on October 3rd, 1910; that after the nomination by such convention of a candidate for Senator, Bernard J. McGuire, Nathan T. Hewitt, A. Z. DeLong, were elected as a committee to fill vacancies, call future conventions and perform such other duties as may devolve upon such committees; deponent further says that it has been the custom for many years for Senatorial Conventions of the Democratic party to appoint a Senatorial Committee for the district comprising the Counties of Essex, Clinton and 74

Digitized by Google

75 Warren, for the purpose of filling vacancies and calling future conventions.

GEORGE S. BIXBY.

Subscribed and sworn to before me this
6th day of March, 1912.
Benj. F. Fienberg,
Notary Public.

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK, } ss:
76 County of Clinton. }

Wilmer H. Dunn, being duly sworn, says he lives in Champlain, Clinton County, N. Y., and that he is a member of the Democratic party in said county and has been for over thirty years; and that he was present at Plattsburg at a Democratic Senatorial Convention held in that city on or about October 3rd, 1910. That deponent was not a delegate, but was a spectator, and heard what was said and saw what was done. That deponent recalls the fact that a resolution was offered for the election of a Democratic Senatorial Committee, con-
77 sisting of one member from each of the other counties composing the Senatorial District. That Nathan T. Hewitt of Keeseville, Clinton County, N. Y., was thereupon elected as the Clinton County member of the Democratic Senatorial Committee. The deponent cannot recall the names of the committeemen from the other two counties, comprising such Senatorial District. That deponent was present when such resolution was voted on and the

Digitized by Google

same was declared carried by the chairman of the convention. 78

W. H. DUNN.

Subscribed and sworn to before me
this 6th day of March, 1912.
Jno. H. Crook,
Notary Public.

PARTY CERTIFICATE OF NOMINATION BY A SENATORIAL DISTRICT COMMITTEE READ IN SUPPORT OF MOTION

79

To the Secretary of State:

We certify that at a duly called meeting for the purpose of designation of the Thirty-third Senatorial Committee of the Democratic party (a political party which at the last preceding election at which a Governor was elected, cast ten thousand votes in this State for such officer), held at the Commercial House in the Village of Keeseville, N. Y., on the 4th day of March, 1912, in and for the Thirty-third Senatorial District, the following-named person was placed in nomination for an office to be filled at the next official primary to be held March 26, 1912. 80

Digitized by Google

Title of Office.	Name.	Name of Party.	Residence.	Place of Business.
Member of the Democratic State Committee	John B. Trombley	Democratic	Altona, N. Y.	Altona, N. Y.

Attached hereto and made a part of this certificate is a complete and accurate record of the proceedings of said committee. 84

We also certify that such convention appointed the following-named persons, namely: Archibald Z. DeLong, Glens Falls, N. Y.; Nathan T. Hewitt, Keeseville, N. Y., and Louis F. Roberts, Ausable Forks, N. Y., a committee for the purpose specified in Section 135 of the Election Law.

ARCHIBALD Z. DeLONG,
Chairman,
Glens Falls, N. Y.

NATHAN T. HEWITT, 85
Secretary,
Keeseville, N. Y.

STATE OF NEW YORK,
County of Clinton. } ss:

Archibald Z. DeLong and Nathan T. Hewitt, being severally sworn each for himself, says that the said Archibald Z. DeLong was the chairman of the meeting of the committee mentioned and described in the foregoing certificate, and that the said Nathan T. Hewitt was the secretary of said meeting, and that the said certificate and the statements therein contained are true to the best of his information and belief. 86

ARCHIBALD Z. DeLONG,
NATHAN T. HEWITT.

Severally subscribed and sworn to before me this 4th day of March, 1912.

John K. Collins,
Notary Public,
Clinton County.

Digitized by Google

87 **LETTER OF SECRETARY OF STATE, READ IN SUPPORT OF MOTION**

Mr. Archibald Z. DeLong,
Glens Falls, N. Y.:

Dear Sir:

At 5:30 p. m. on March 5th, 1912, there was received by this office a certificate signed by A. Z. DeLong, chairman, and Nathan T. Hewitt, secretary, that John B. Trombley, of Altona, N. Y., has been designated a member of the Democratic State Committee.

On March 5th, 1912, at 10:20 a. m. there was re-
88 ceived at this office a certificate designating John Anderson, Jr., of Newcomb, New York, for member of the Democratic State Committee, signed by Daniel J. Finn, chairman, and P. H. McNulty, secretary, of the Senatorial Committee of the Thirty-third Senatorial District. There was also received on March 5th, 1912, at 5:30 p. m., protest against the designation of said Anderson, signed by John M. Derby.

Acting upon the advice of the Attorney General I have to advise you that this office will certify to the appropriate custodian of primary records the name of John Anderson, since the certificate con-
89 taining his name was the one first received and filed in this office.

There is no provision of the Primary Law which gives jurisdiction to the Secretary of State to pass upon the validity of conflicting certificates.

A judicial review might be obtained under Section 56 of the Primary Law, to which your attention is called.

Yours truly,

(Signed) EDWARD LAZANSKY,
Secretary of State.

Digitized by Google

PROTEST READ IN SUPPORT OF MOTION 90

To the Secretary of State:

I, the undersigned, being a duly enrolled Democrat of the Fifth Ward of the City of Plattsburg, Clinton County, New York, which is a part of the Thirty-third Senatorial District, do hereby object to the filing of the alleged certificate of nomination or designation made by Daniel J. Finn, of Glens Falls, New York, as chairman, and P. H. McNulty, of Ticonderoga, New York, as Secretary, and filed in your office on the 5th day of March, 1912, at 10:20 a. m., which certificate alleges that John Anderson, of Newcomb, New York, was designated as the candidate of the Democratic party for State Committeeman from the Thirty-third Senatorial District, for the following reasons: 91

1. That the committee making such designation had no authority or power to make such designation under the law, there being a Senatorial Committee in and for the Thiry-third Senatorial District, which alone had authority to designate a candidate to go on the ballot as the Democratic nominee for State Committeeman.

2. That said Senatorial Committee duly appointed and existing, duly called a meeting as prescribed by law to designate a candidate for State Committeeman from the Thirty-third Senatorial District to be voted for at the primary election to be held March 26th, 1912. That said meeting was held on the 4th day of March, 1912, the entire committee agreeing to open the same at 2:30 o'clock, and it continued in session until after 3:15 o'clock, and said committee, first having organized and the officers having taken the oath as prescribed by law, did nominate and designate a candidate 92

Digitized by Google

93 for State Committeeman for said district, namely, John B. Trombley, of Altona, Clinton County, New York, and that he, said Trombley, is the duly designated candidate for State Committeeman from said district for the Democratic party and entitled to be placed on the primary ballot as such, as provided by law.

3. That the said meeting, which attempted to designate the said John Anderson as State Committeeman, as hereinbefore mentioned, was and is illegal and void.

JOHN M. DERBY,
41 Rugar Street,
94 Plattsburg, N. Y.

OBJECTION BY RESPONDENTS IN OPPOSITION TO MOTION

The defendant objects to the petition on the following grounds:

I. That the petition of John B. Trombley, upon which these proceedings are instituted, has no affidavit of verification, and is not an affidavit, and can not be used as such, for the reason that it con-
95 tains no venue, and there is nothing to show that it is taken within the jurisdiction of the officer who certifies to it as notary public. It is in the form of a petition and purports to have been taken before W. J. Armstrong, Albany County. There is no affidavit and no venue to the petition itself upon which these proceedings are instituted.

II. That the order upon which the proceedings are founded is not returnable before the Supreme Court or a justice thereof, as provided in Section

Digitized by Google

56 of the Election Law, but is returnable at the 96
Court House in the City of Schenectady, and fails to state before what officer or what court, whereas the section of the law requires that it shall be returnable before the Supreme Court or a justice thereof.

III. That the affidavit attached to the moving papers herein are not entitled in any action or proceeding, and are void and of no force or effect, that no indictment for perjury could be predicated upon the same if false, for the reason that it does not appear that it is made in the course of any judicial proceeding.

IV. That Section 56 of the Election Law, under 97
which these proceedings are instituted, is unconstitutional in that it fails to provide that direct notice shall be given to the person whose rights are affected by the determination to be made, and is in derogation of the constitutional provision that no person shall be deprived of his liberty or his property without due process of law, the section providing that the proceedings shall be heard upon such notice as the court or justice thereof shall direct, making it a matter of discretion with the justice or court to direct that notice might be given to the chairman or secretary of a committee or 98
other body without any notice whatever to the person who may be designated by a committee for nomination and the other persons mentioned in the statute, whose rights and interests would be affected by an adjudication without he or they having any opportunity to be heard.

That the section provides that notice to the chairman and secretary of a committee alone shall be sufficient.

V. That neither the Supreme Court nor a jus-

Digitized by Google

99 tice thereof in this judicial district has any jurisdiction to entertain these proceedings under Section 56 of the Election Law, for the reason stated by the counsel in his opening, that the committee who designated John Anderson, Jr., had no power or authority to do so, and that its proceedings in so doing were null and void and that another committee designating the petitioner was the only committee that had any authority or jurisdiction in the matter. That if the committee designating John Anderson, Jr., as candidate for State Committeeman had no legal existence, there is no authority or necessity for reviewing its action, and that in filing
100 a certificate of designation with the Secretary of State it acted without any authority whatever, and that the Secretary of State should not have received its certificate, and that it is his act in so receiving the certificate that is sought to be reviewed by these proceedings, and that it is his act and his act alone of which the petitioner can complain, and that any proceedings brought to review his determination should be brought in the judicial district where such act took place, to-wit, in the judicial district comprising the County of Albany, and must be there brought.

VI. That the action of the committee designat-
101 ing John Anderson, Jr., cannot be reviewed in these proceedings upon the theory that such committee had no legal existence and no power or authority to make any designation, and that some other committee designating the petition had such power and authority.

That the dispute between the power of the two committees is not within the scope or purpose of Section 56 of the Election Law, which merely provides for a review of the proceedings of a commit-

Digitized by Google

tee which acts improperly or irregularly, and that 102
that section has no reference to a dispute between two conflicting committees as to their power and authority, which dispute must be settled in a proper action or proceeding brought for that purpose.

VII. That upon the moving papers herein it is claimed that the committee designating John Anderson, Jr., as State Committeeman had no existence as a committee, and that its act of making the designation and filing the same with the Secretary of State was null and void and of no effect, and that the Secretary of State should have accepted the papers designating petitioner, and that upon 103
his failure to do so the petitioner had a remedy by mandamus and could not review the Secretary of State's action or the action of the committee under Section 56 of the Election Law, which is intended to review proceedings where in the first place the officer or the committee or the board had a right to make a choice or a determination.

VIII. That it does not appear from the moving papers that John B. Trombley, the petitioner, is aggrieved. That it does not appear that any proper notice of the meeting of the alleged committee designating him as a candidate for State Committeeman, stating the time, place and purpose of the 104
meeting to designate was mailed to each member of the committee designating him not less than fifteen days before the day fixed for such meeting, and that no waiver on the part of all the committeemen of such notice has been shown on the moving papers herein.

IX. Mr. McGuire, supposing he still had the right as a member of the committee on vacancy to designate, did give notice, which failed to state

Digitized by Google

105 the time when the meeting was to be held at the Commercial House, in the Village of Keeseville. He only sent that notice to one of the committeemen, Mr. Hewitt. The notice which he did send out instead of being sent to A. Z. DeLong, was sent to Daniel P. DeLong, who Mr. Hewitt supposed was on his committee. In the first place, before Mr. Trombley can come here and claim that he is aggrieved under this section of the law, he himself must show that he has taken all proper steps to comply with the law and to make a proper and legal designation.

X. That the petitioner fails to show that he was
106 aggrieved, and has no right to maintain this proceeding for the reason that he fails to show that notice of the meeting at which he claims to have been designated was filed not less than ten days before the day fixed for such meeting in the office of the Secretary of State, where designations by committees for the party position of State Committeeman are required by Section 47 of the Election Law to be filed, and that no waiver of such provision on the part of all the committeemen alleged to have designated petitioner has been shown, that in the absence of waiver of such filing the petitioner here can not be held to have been aggrieved.

107 XI. That petitioner has failed to show that he was aggrieved, for the reason that his moving papers show that B. J. McGuire, one of the committee which attempted to designate said Trombley, had no notice of said meeting fifteen days before, as required by Section 47 of the Election Law, and that the papers fail to show that said McGuire waived any such notice, the only proof in the moving papers being that a few minutes before the holding of the meeting at which it is alleged Mr.

Digitized by Google

Trombley was designated, DeLong and Hewitt, the other members of the committee, met, they informally stated to McGuire that they were going to have a meeting in an upper room of the hotel. 108

XII. That said petitioner has failed to show that he was aggrieved for the reason that the notice set forth in his moving papers as having been signed by B. J. McGuire, one of the members of the committee designating him, fails to show any time for the holding of a meeting, as required by Section 47 of the Election Law, and the moving papers fail to show that such notice was filed by said McGuire or by any one having authority from him in the office of the Secretary of State, as required by Section 47 of the Election Law. 109

XIII. That the petitioner fails to show that he is aggrieved, for the reason that the moving papers show on their face that the alleged meeting at which he was designated as a candidate for State Committeeman, was a meeting that was not open to the public as required by law. The papers show that it was held in a private room in a hotel, that no announcement was made that it was a public meeting, that no invitation was extended to anybody to attend, that the only persons attending were DeLong and Hewitt, and that while the moving papers show the door of the room was open, the said papers fail to show that the meeting was a public meeting or attended by the public or open to the public as required by law. 110

XIV. That the moving papers fail to show that the petitioner is aggrieved, for the reason that they fail to show that the steps leading up to the alleged designation of the petitioner was in compliance with the provisions of the Election Law, that no legal and proper notice of the time, place

Digitized by Google

111 and purpose of the meeting was mailed to each member of the committee at his post office address not less than fifteen days before the time fixed for the meeting, and no proper filing of such notice was shown in the office of the Secretary of State, and that the petitioner has failed to show that the meeting was conducted as required by Section 47 of the Election Law.

XIV. That the petitioner has failed to show that he was aggrieved, for the reason that his moving papers have failed to show any mailing of any notice by R. J. McGuire to A. Z. DeLong, who, with the said McGuire and Nathan T. Hewitt, com-
112 posed the committee which petitioner alleged designated him as candidate for State Committeeman. That while said McGuire mailed a notice to said Hewitt of a meeting of the committee which failed to state any time, there is nothing to show that any similar notice was mailed to A. Z. DeLong, the other member of the committee. That, on the contrary, no such notice was mailed, which fact counsel offers to prove by the affidavit of said McGuire, who, under a misapprehension, sent a similar notice to D. P. DeLong, who was not a member of this committee, and that if A. Z. DeLong received any such notice directed to D. P. DeLong and attended,
113 he himself then waived the fifteen days' notice which the law required, which is not shown as having been done by the moving papers.

XV. That the petitioner has failed to show that he is aggrieved, for the reason that Section 47 of the Election Law requires the mailing of a notice to each member of the committee and also the filing of such notice at least ten days before the meeting in the office of the Secretary of State. That such provisions of law are for the purpose of giving

Digitized by Google

notice so that the public may attend the meeting, 114
and are in the interests of the public, and for the purpose of providing a method of making these meetings public, and that no member of the committee can waive any such provision of the law by the committee as a whole or by any member of the committee.

XVI. That the petitioner has failed to show that he is aggrieved, for the reason that he has failed to show that the proceedings leading up to his alleged designation, were regular and in conformity with the law in that he has failed to show that any original notice of the time, place and pur pose of the meeting was filed with the Secretary 115
of State, as required by law.

GENERAL OBJECTIONS.

We now make general objections to the right of the petitioner to maintain these proceedings, and urge the following, and offer proof in support thereof, of our contention in reference to the matter herein stated:

1. That at a meeting of the Democratic State Committee of the State of New York, held February 16, 1912, a resolution was adopted declaring 116
that there was no existing Senatorial District Committee in the 33d Senatorial District, and provided for the formation of committee from the counties comprising that Senatorial District to designate a candidate for State Committeeman for that district, and that this resolution and rules and regulations were duly filed with the Secretary of State and are now on file there.

That in pursuance of such resolution, a committee was selected by the Democratic County Com-

Digitized by Google

117 mittee of the Counties of Warren, Essex and Clinton, and that such committee organized as a Senatorial Designating Committee for the Thirty-third Senatorial District, and in all respects complied with the law, and duly designated John Anderson, Jr.

2. That the action of the Senatorial Designating Committee as aforesaid for the Thirty-third Senatorial District was taken in pursuance of the action of the Democratic State Committee, which had passed upon the question as to the existence of a Senatorial Committee for that district, and made a finding of fact, which finding of the State Com-
118 mittee having jurisdiction under the law, is binding and conclusive until reversed by an order of the court.

3. That the finding of the Democratic State Committee that there was no existing committee in the Thirty-third Senatorial District cannot be called in question in this proceeding to which the State Committee is not a party, and that this petitioner cannot maintain this proceeding against the District Designating Committee to review their proceedings, but if he has any remedy under Section 56 of the Election Law, he must take proceedings against the Democratic State Committee and
119 review their action and such proceedings must be taken in the judicial district where the resolution was passed, to-wit, the district comprising New York City.

STATEMENT OF ATTORNEY GENERAL.

The Attorney General appearing for the Secretary of State made the following statement:

On the 5th day of March, 1912, there was filed in the office of the Secretary of State two certificates purporting to nominate candidates to be

Digitized by Google

voted for at the primary election for the office of 120
State Committeeman in the Thirty-third Senatorial District. One of these which was received in the morning purported to designate John Anderson, Jr., and was based upon the theory that no existing Senatorial Committee had been appointed by the respective county committees, comprising the Senatorial District of Clinton, Essex and Warren. One received later in the day purporting to designate John B. Trombley was based upon the theory that there was an existing Senatorial Committee having power to act under Sections 55 and 56 of the Election Law. There was no method of procedure whereby the Secretary of State could 121
distinguish as to the validity of these two. There was no means given to him to examine witnesses to enter into any inquiry, judicial or otherwise, to ascertain the merits, so we adopted an arbitrary rule which had been decided upon before, that the first certificate should be given precedence and should be recognized as such. Having received these two certificates he communicated with both parties to that effect and his letter stated, "acting upon the advice of the Attorney General I have to advise you that this office would certify to the proper custodian of primary records the name of 122
John Anderson, Jr., and that he would sign the certificate, his name being the one first received and filed in his office. There is no provision of the Primary Law which gives jurisdiction to the Secretary of State to pass upon the validity of conflicting certificates. A judicial review might be obtained under Section 56 of the Primary Law to which your attention is called." The Secretary of State gave the Anderson certificate the right of way, and notified the parties on the other side, that

Digitized by Google

123 a review might be had under Section 56. We stand neutral between these contesting parties. We have no means of ascertaining the rights or claims as to whether or not there was a Senatorial Committee in existence, and that a judicial review might be had. The last day to make a certificate will be next Tuesday. Whatever course the court may pursue will be cheerfully complied with.

Mr. Smith then offered to present to the court other affidavits.

The defendant objects to the right of presenting other affidavits, on the grounds that he will have no other possible opportunity to contradict them,
124 and that it is irregular and improper, that the plain intent of the statute is that the papers on which the review was to be made, must be served on the opposing parties so that the issue can properly be made up.

The Court: I will receive them.

The defendant excepts.

The additional affidavits presented by Mr. Smith were those of Riley, Callanan, Trombley, Collins, all verified March 13, 1912, as follows:

125

Digitized by Google

AFFIDAVIT IN SUPPORT OF MOTION

126

NEW YORK SUPREME COURT — Clinton County.

IN THE MATTER

of the

Designation of the Candidate for State Committeeman of the Democratic Party for the Thirty-third Senatorial District, etc.

STATE OF NEW YORK,
County of Albany,
City of Albany. } ss:

127

John B. Riley, being duly sworn, says:

1. I reside in the City of Plattsburg, Clinton County, New York, and have resided in said county for more than fifty years. I am a Democrat, and have been an elector of the Democratic party for upwards of thirty years, and during all that period have taken an active interest in the affairs of said party.

2. I have been a member of various committees of the Democratic party, not only in Clinton County, but in the Senatirial, Judicial and Congressional Districts of which Clinton County forms a part. I have been a delegate to various State Conventions, from Clinton County, and have attended many of the Judicial, Senatorial, Congressional and County Conventions of the said party, and I am familiar with the rules, customs and practice of the said party as in force in Clinton County, and in the other political districts of which said county forms a part.

128

3. It has been the practice of the Democratic party since at least 1896, when the present consti-

Digitized by Google

tution of the State was adopted creating Senatorial Districts, to have a State Committee which said committee has always consisted of one member from each Senatorial District in the State. The custom and practice of said party heretofore has been that the member of the State Committee from each Senatorial District should be selected by the delegates to the State Convention from the various districts within each Senatorial District, and the Senatorial District has been the unit of representation as regards the State Committee since long prior to 1894.

4. The usage and custom of the Democratic party in the Senatorial District, of which Clinton County forms a part, known as the Thirty-third Senatorial District—has been to hold a convention in each year in which a Senator was to be elected, which convention consisted of delegates appointed by each of the counties making up said district at and by the County Convention of each county. The practice as regards such County Convention, being that the delegates thereto were elected at various caucuses and primaries throughout said county at which the electors in said county voted; in other words, the delegates to the Senatorial Convention derived their authority through the County Convention from the people.

5. It has been the practice and custom of the Democratic party in said Senatorial District since as early as 1894 at the Senatorial Convention held in pursuance of the practice above stated, not only to nominate a candidate to be voted for by the people for the office of Senator, but to also appoint a committee known as the Senatorial Committee, which committee has always been clothed with power, not only to fill vacancies that might occur

Digitized by Google

with reference to the candidate for Senator, but 132
also to call future conventions and to do any other act that might be necessary to keep alive the continuity of the party, as without such committee there was no recognized machinery for calling the future Senatorial Convention; the committee so appointed has always been known as the Senatorial Committee. The same practice prevails as to the Judicial and Congressional Districts, a Judicial District Committee being appointed by each judicial convention to hold office until the next judicial convention was held at which its successor would be elected, such judicial convention being brought together upon the call of the judicial com- 133
mittee. So in regard to the Congressional Convention, it is called and brought together by the action of the committee appointed by the preceding convention.

6. In October, 1910, there was held at Plattsburg, N. Y., a Senatorial Convention of the Democratic party in and for the Thirty-third Senatorial District. This convention met upon the call of the Senatorial District Committee which had been appointed by the Senatorial Convention in the fall of 1908.

7. I was a delegate from Clinton County to the Senatorial Convention held in 1910. That conven- 134
tion in accordance with the usage and practice consisted of three delegates from each of the counties in said Senatorial District, namely, the Counties of Clinton, Essex and Warren. The delegates from Clinton County were Nathan T. Hewitt, Jeremiah W. Davern and myself; the delegates from Warren County were E. J. Worden, Daniel P. DeLong and Elmer West; the delegates from Essex County were B. J. McGuire, P. H. McNulty

Digitized by Google

135 and George L. Brown. Elmer West was elected chairman of the said convention and P. M. McNulty, secretary. M. J. Callanan was nominated as the candidate for Senator, and thereupon and immediately after the nomination of Mr. Callanan I offered a resolution which was not then reduced to writing, providing for the election or appointment of the usual Senatorial Committee to consist of one member from each county making up the Senatorial District to be selected by the delegates from each county, such committee to have power to fill any vacancy which might arise as regards the candidate for Senator and also to call the future
136 Senatorial Convention. This resolution was duly seconded by Nathan T. Hewitt, and was unanimously adopted by the convention; thereupon the delegates from Clinton county designated Nathan T. Hewitt as a member of said committee, the delegates from Essex county, B. J. McGuire, and the delegates from Warren county, A. Z. DeLong, and the persons so designated were duly elected by the unanimous vote of the convention members of the Thirty-third Senatorial District Committee.

No committee of any nature, other than the committee above referred to, was appointed by said convention and it has always been the practice of
137 the party at its Senatorial, as well as its Judicial and Congressional Conventions, to clothe the committee appointed with the power to fill vacancies, and a separate committee for that purpose never to my knowledge has been appointed.

JOHN B. RILEY.

Subscribed and sworn to before me,
this 13th day of March, 1912.

Wm. F. Kearney,
Commissioner of Deeds,
Albany, N. Y.

Digitized by Google

AFFIDAVIT IN SUPPORT OF MOTION 138

NEW YORK SUPREME COURT—Clinton County.

IN THE MATTER

of the

Designation of the Candidate for State Committeeman of the Democratic Party for the Thirty-third Senatorial District, etc.

STATE OF NEW YORK,
County of Albany,
City of Albany. } ss: 139

John B. Trombley, being duly sworn, says:

I reside in Altona, Clinton county, N. Y. I am an elector of the Democratic party, and have been for more than twenty years. I have been familiar with political matters in Clinton county and have taken an active interest in the affairs of the Democratic party for more than fifteen years. I have attended five State Conventions, and I know the custom and usage of the party with regard to its conventions and committees in and for each of 140 the political districts of which Clinton county forms a part. It has been the practice and usage of the party at each convention held in the district to create a committee with reference to the district for the purpose of keeping alive and preserving the continuity of party organization so that each convention might provide for the calling of its successor. This committee has usually been clothed with power to fill vacancies as regards the candidate for Senator and for the purpose of calling the

Digitized by Google

141 future convention, and a separate committee for the purpose of filling vacancies was never appointed.

I was present at the Senatorial Convention held at Plattsburg on October 3, 1910, although I was not a delegate; the convention organized by the election of Mr. Elmer West as chairman and P. H. McNulty as secretary, and Mr. Callanan was duly nominated for the office of Senator. Mr. Riley, a delegate from Clinton county, then offered a resolution for the appointment of the Senatorial Committee to consist of three members, one to be selected by the delegates from each county, such committee
142 to have authority to fill any vacancy that might occur in respect to the candidate for Senator, and to call the next convention, and to do such other acts and perform such duties as pertains to the office of such committee. This resolution was unanimously adopted, and thereupon the delegates from Clinton county suggested Nathan T. Hewitt for the member from Clinton, the delegates from Warren county suggested Mr. A. Z. DeLong, and the delegates from Essex, Mr. B. J. McGuire, and thereupon said persons were unanimously elected by said convention to be the Senatorial Committee.

JOHN B. TROMBLEY.

143

Subscribed and sworn to before me
this 13th day of March, 1912.

Wm. F. Kearney,
Commissioner of Deeds,
Albany, N. Y.

Digitized by Google

NEW YORK SUPREME COURT—Clinton County. 144

IN THE MATTER

of the

Designation of the Candidate for State Committeeman of the Democratic Party for the Thirty-third Senatorial District, etc.

STATE OF NEW YORK,
County of Albany,
City of Albany. } ss:

145

Michael J. Callanan, being duly sworn, says:

I reside at Keeseville, Essex County, N. Y. I know George L. Brown, the editor of the Elizabethtown Post and Gazette, a newspaper published at Elizabethtown, Essex County, N. Y. Said George L. Brown was one of the delegates from Essex County to the Senatorial Convention of the Thirty-third Senatorial District held at Plattsburg, October 3, 1910.

I just had a talk with Mr. Brown over the long-distance telephone, Mr. Brown being at Elizabethtown and myself at Albany. In this conversation 146
Mr. Brown said that he was one of the delegates from Essex county to that convention; that he attended said convention and remembers the action taken by that convention in regard to the appointment of a Senatorial Committee, and that such committee was appointed by that convention in the same manner as has been done by senatorial conventions for the last twenty years.

Attached hereto is a clipping from the Post and Gazette, the newspaper published by Mr. Brown at

Digitized by Google

147 Elizabethtown, said clipping being taken from the issue of said paper of October 6, 1910. I called Mr. Brown's attention over the phone to the statement in said printed clipping that Elmer J. West was one of the members of the Senatorial Committee appointed at said convention, and he stated that it was a mistake; that the person appointed from Warren county, by said Senatorial Convention, was A. Z. DeLong, instead of Elmer J. West.

I stated to Mr. Brown that I should make this affidavit as the substance of his conversation with me, as the time was too short in which to obtain Mr. Brown's affidavit to this effect, and Mr. Brown as-
148 sented to this use of his conversation.

M. J. CALLANAN.

Subscribed and sworn to before me
this 13th day of March, 1912.

Wm. F. Kearney,
Commissioner of Deeds,
Albany, N. Y.

(Copy of article referred to above.)

Michael J. Callanan, of Keeseville, nominated for State Senator by Democrats.

Michael J. Callanan, of Keeseville, was unani-
149 mously nominated for State Senator at the Democratic Senatorial Convention held at the Court House in the city of Plattsburg, Monday afternoon. Mr. Callanan is one of the most widely known and successful business men in northern New York, and will prove a particularly strong candidate.

The Senatorial Committee for the district is as follows: Nathan T. Hewitt, of Clinton county; B. J. McGuire, of Essex county; Elmer J. West, of Warren county.

Digitized by Google

AFFIDAVIT IN SUPPORT OF MOTION 150

NEW YORK SUPREME COURT—Clinton County.

IN THE MATTER
of the
Designation of the Candidate of the Democratic Party for the Thirty-third Senatorial District, etc.

COUNTY OF ALBANY, City of Albany. } ss:

John K. Collins, being duly sworn, says: Annexed hereto is a copy of the Plattsburg Press, a newspaper published in the city of Plattsburg, of the date of Tuesday, October 4th, 1910. This paper was obtained by me at the office of the Plattsburg Press in the city of Plattsburg on the 12th day of March, 1912. 151

JOHN K. COLLINS.

Subscribed and sworn to before me
this 13th day of March, 1912.
Wm. F. Kearney,
Com. of Deeds,
Albany, N. Y. 152

The following is a copy of so much of article in newspaper as is material:
Proceeding of Democratic Senatorial Convention.

* * * * * * *

"The convention then selected for Senatorial 'Committee, N. T. Hewitt of Clinton, B. J. Mc-'Guire, of Essex and A. Z. DeLong of Warren."

Digitized by Google

NOTICE OF MEETING FILED WITH SECRETARY OF STATE, READ IN SUPPORT OF MOTION

To the Secretary of State:

In pursuance of section 75 of chapter 891 of the Laws of 1911, we hereby certify that there will be a meeting of the Democratic Senatorial Committee in and for the Thirty-third Senatorial District of the State of New York on March 4th, 1912, at three o'clock in the afternoon, at the Commercial House, in the village of Keeseville, N. Y., for the purpose of nominating a State Committeeman and members of the Senatorial Committee for said district to be voted for at the primary election to be held March 26th, 1912.

NATHAN T. HEWITT,

A. Z. DeLONG,

Members of Senatorial Committee, 33d Dist.

Endorsed:

Filed Feb. 20, 1912.

EDWARD LAZANSKY,
Secretary of State.

STATE OF NEW YORK, }
Office of the Secretary of State. } ss:

I have compared the preceding copy of notice of meeting of 33rd Senatorial Dist. Committee with the orginal notice on file in this office, and do hereby certify that the same is a correct transcript therefrom and the whole thereof.

Given under my hand and the seal of office of the Secretary of State, at the city of Albany, this 12th

Digitized by Google

day of March, in the year one thousand nine hundred and twelve. 156

(Seal) JOSE E. PIDGEON,
Second Deputy Secretary of State.

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK, }
County of Warren. } ss:

Thomas J. Dunn, being duly sworn, deposes and says that he is thirty-three years of age and resides in the city of Glens Falls, N. Y., and that he 157
is and has been for two years last past Chairman of the Democratic County Committee of the county of Warren.

That on or about the 9th day of February, 1912, he received a telegram from Norman Mack, the Chairman of the Democratic State Committee, directing the calling of the Warren County Committee together for the purpose of selecting delegates to attend a Senatorial Designating Committee of the Thirty-third Senate District, comprising the counties of Warren, Essex and Clinton.

That thereafter, and on or about the 10th day 158
of February, 1912, deponent received a circular letter from the Democratic State Committee in reference to the calling of such Senatorial Designating Committee, a true copy of which is hereunto annexed and made a part hereof, and marked Exhibit "A".

That within a few days thereafter deponent received from the State Committee a copy of the resolutions and rules of the Democratic State

Digitized by Google

159 Committee, adopted at a meeting held February 16th, 1912, at the Hotel Knickerbocker, New York city, which resolutions and rules have been duly filed in the office of the Secretary of State.

That one of the resolutions adopted by the State Committee reads as follows:

"By reason of the fact that there are no existing Senatorial District Committee in the 23d, 25th, 33d, 40th, 42d, 44th and 47th Senatorial Districts, designations in these districts shall be made as follows:

In each such Senatorial District the members of the County Committee within each Assembly Dis-
160 trict shall choose three (3) persons from said Assembly District, who, together with three (3) members from the other Assembly Districts within such Senatorial Districts shall contitute the Senatorial District Designating Committee and such Senatorial District Designating Committee shall make designation of the party candidate for member of the State Committee from such District, to be voted for at the official primary on March 26, 1912."

That by virtue of such direction from the State Committee and said resolutions and rules, and at a meeting of the Warren County Democratic Com-
161 mittee, duly held at Warrensburg, in said county, on the 17th day of February, 1912, the following persons were selected as delegates to meet the delegates from the counties of Clinton and Essex to form the Senatorial District Designating Committee mentioned in said rule, Samuel C. Baker, of Horicon, N. Y., George R. Thompson, of Luzerne, N. Y., and Daniel J. Finn, of Glens Falls, N. Y.

That on Monday, March 4th, 1912, John E. Col-

Digitized by Google

lins, of the city of Glens Falls, N. Y., and deponent 162
ent, having written proxies from said Samuel C. Baker and George R. Thompson, together with Daniel J. Finn, attended a meeting of the Democratic Senatorial Designating Committee, held at the village of Keeseville, Essex county, N. Y., pursuant to a notice duly given therefor, which meeting was publicly held in one of the public rooms on the ground floor of the Commercial Hotel, at the time and place specified in said notice.

That at said meeting John K. Collins and James Murray, who were designated by the County Committee of Clinton county, also attended such meeting with Hon. John B. Riley, who produced a 163
written proxy from Ernest C. Gordon, who was the third member from Clinton county selected by the Clinton County Democratic Committee.

That the said meeting was also attended by Patrick H. McNulty and B. J. McGuire, who are the members designated by the Essex County Democratic Committee, and also by Hon. Edward T. Stokes, who produced a written proxy from Martin Tobin, who was the third member of said committee from Essex county selected by the Essex County Democratic Committee.

That said meeting of the Designating Committee was called to order by John K. Collins, who 164
acted as chairman, and that after calling the meeting to order and after the delegates and proxies had all presented their credentials, said Collins withdrew as chairman from said committee, and the said committee proceeded to elect Daniel J. Finn as temporary and permanent chairman and Patrick H. McNulty as temporary and permanent secretary; that the chairman took the oath of office and said committee thereupon proceeded to designate

Digitized by Google

165 a candidate for the position of State Committeeman for the Thirty-third Senatorial District, and that John Anderson, Jr., of Newcomb, Essex Co., N. Y., was designated as candidate for State Committeeman, each member upon the roll being called arising in his place and stating his choice for such nominee.

The minutes of these proceedings and the certificate of designation were thereafter and on the 5th day of March, 1912, filed in the office of the Secretary of State and are hereby referred to and made a part hereof as fully as if herein set forth in full.

THOMAS J. DUNN.

166 Subscribed and sworn to before me this
12th day of March, 1912.

Pearl Brayman,
Notary Public,
Saratoga Co.

Certificate filed in Warren County.

167

Digitized by Google

EXHIBIT "A." 168

Norman E. Mack, Chairman, Buffalo, N. Y.
John A. Mason, Secretary, 421 East 138th Street, New York City.
Arthur A. McLean, Treasurer, Newburgh, Orange Co., N. Y.

HEADQUARTERS
DEMOCRATIC STATE COMMITTEE.

State of New York
Century Building, 1 West 34th Street.

(Opposite Waldorf-Astoria.)

169

New York, February 10th, 1912.

Dear Sir:

A meeting of the State Committee is to be held in the city of New York, Friday, February 16th. At this meeting, such rules and regulations as are necessary to put into effect the provisions of the Primary Election Law in relation to Senatorial, Congressional and Judicial Committee will be adopted.

In a large majority of the counties there are at present on such committees, and where they do exist they were appointed with the intention of and 170 given only the power to call conventions.

For the purpose of uniformity throughout the State a rule will be adopted by the State Committee calling upon the County Committees of the various counties whose limits are not coterminous with their Senatorial, Congressional and Judicial Districts, to meet on Saturday, February 17th, and appoint three electors for each Assembly district in their county to act as committees for the purpose of designating candidates for members of such com-

Digitized by Google

mittees. The persons so designated from your county are to meet with the other persons so designated from the other counties within your Senatorial, Congressional and Judicial Districts, on February 19th, and determine the time and place of a meeting which must be held not later than March 5th, at which time they will designate candidates for the various committees which they represent. The Senatorial Committee will also designate the candidate for State Committeeman from the district. The person so designated will be the party candidate for members of such Senatorial, Congressional and Judicial District Committee and for members of the State Committee to be voted for at the spring primaries, March 26th, 1912.

These committees named at your meeting of Saturday, February 17th, must—not later than February 20th—file with the custodian of Primary Records in the various counties comprising your Senatorial, Congressional and Judicial Districts a statement of the convention to be held, the times and places where they are to be held, and a list of the committees and officers for which candidates are to be elected, together with the number of candidates and members of the committee.

Where Senatorial, Congressional and Judicial Districts are wholly within the limits of a county, the County Committee of such county is to act as the committees named above, and designate three electors from each Assembly district in the county, who are to be the party candidates for such Senatorial, Congressional and Judicial Committees, and who are to be voted for at the spring primaries. Where there is more than one Assembly district designated, the candidates from their district for the various committees, and the three delegates to

Digitized by Google

the State Convention, and the members from the Senatorial districts, if there be more than one within the county are to designate the membr of the State Committee.

County Committees in these counties must meet Saturday, February 17th, and set the date not later than March 5th for such meeting, to designate such candidates and officers, and the same notice as set forth above must be filed not later than February 20th with the Custodian of Primary Records.

You are, therefore, requested to call at once a meeting of your County Committee to be held Saturday, February 17th, to carry out the programme outlined above. You should give five days' notice to the members of your committee of this meeting and all meetings must be open to the public.

Any instructions in the letter of February 8th contradictory to the provisions of this letter are revoked.

You will receive letters containing rules adopted by the State Committee in time for use at your County Committee meeting.

Yours truly,

NORMAN E. MACK.

Digitized by Google

177 **AFFIDAVIT IN OPPOSITION**

NEW YORK SUPREME COURT — Clinton County.

IN THE MATTER
of the
Designation of a Candidate of the Democratic Party for State Committeeman for the Thirty-third Senatorial District of the State of New York to be voted for at the coming Primary Election appointed to be held on the 26th
178 day of March, 1912, and of the objections to a certificate or certificates of nomination of a candidate filed in the office of the Secretary of State on the 5th day of March, 1912.

STATE OF NEW YORK, }
Clinton County. } ss:

B. J. McGuire, being duly sworn, deposes and says that he resides in Keeseville, Essex County, New York; that he is an enrolled Democratic
179 voter, in said county, and has been actively engaged in the affairs of said party for upwards of twenty-five years. That he was a delegate duly elected at the Essex County Convention to the Democratic Senatorial Convention held at the court house in the City of Plattsburg, New York, on the 3rd day of October, 1910, and that he attended said convention as such delegate. That he was present in the City Court room where said convention was held during all of the proceedings

Digitized by Google

thereof, and took part in the same and that he well 180
remembers what took place thereat. That at said convention one M. J. Callanan was nominated for Senator for the Thirty-third Senatorial District.

That after the nomination of said Callanan, and as the convention was about to adjourn, the chairman, Elmer J. West, asked if there was any further business to come before the convention, and thereupon Hon. John B. Riley, a delegate to said convention, said that the Election Law required that there should be a committee appointed to fill any vacancies that might occur on the ticket and moved that such a committee be appointed. That said motion was put to the convention and declared 181
carried. That pursuant to such motion N. T. Hewitt was named as the member of the committee from Clinton County, that deponent was named as the member of said committee from Essex County, and that some man from Warren County, whose name deponent does not now remember, was named as the committeeman from Warren County.

That no further powers were conferred on said committee, and that the convention then adjourned.

Deponent further says that on or about the 15th day of February, 1912, one P. H. McNulty called upon deponent in the Village of Keeseville, Essex
County, New York, and said to him that no record 182
of any other committee could be found for the Thirty-third Senatorial District and that he (McNulty) assumed that such committee would be required to make designations for the said Senatorial District in the absence of a Senatorial District Committee. The said McNulty further said that the time required by law for the sending out of notices for the meeting of committees was drawing to a close and he, McNulty, advised deponent

Digitized by Google

183 to send a call for such meeting to N. T. Hewitt at Keeseville, N. Y., and to D. P. DeLong at Glens Falls, N. Y. That deponent sent such call. That shortly after sending such call deponent was informed that the Democratic State Committee had provided for the selection of a Senatorial District Committee to make designations for spring primary.

That upon being informed of such provision being made by the State Committee the deponent did not file said call with the Secretary of State, and deponent further says that he did not receive any other notice of a meeting of said committee
184 until about 2:20 p. m. Monday, March 4th, 1912, when he was asked by N. T. Hewitt if he, deponent, was coming to attend a meeting of the committee at 2:30 o'clock and deponent told said Hewitt that he would not attend the same.

Deponent further says that believing that a meeting of the Senatorial Committee appointed pursuant to the provisions and directions of the Democratic State Committee was the only legal and proper committee for said district attended the meeting of such committee as a member from Essex County.

B. J. McGUIRE.

185

Subscribed and sworn to before me
this 11th day of March, 1912.

H. A. Thomson,
Notary Public,
Clinton County.

Digitized by Google

AFFIDAVIT IN OPPOSITION

186

SUPREME COURT.

IN THE MATTER
of the
Designation of a Candidate of the Democratic Party for State Committeeman for the Thirty-third Senatorial District of the State of New York to be voted for at the coming Primary Election appointed to be held on the 26th day of March, 1912, and of the objections to a certificate or certificates of nomination of a candidate filed in the office of the Secretary of State on the 5th day of March, 1912.

187

STATE OF NEW YORK, }
County of Schenectady. } ss:

Patrick H. McNulty, being duly sworn, deposes and says that he is twenty-four years of age and resides at Ticonderoga, Essex County, N. Y., and that he was one of the delegates duly elected by the Democratic party of the County of Essex to attend the Senatorial Convention held in and for the Thirty-third Senatorial District, at the Court House, in the City of Plattsburg, N. Y., on the 3d day of October, 1910.

188

That deponent attended said convention as such delegate and was present during all of the proceedings thereof, and remembers clearly and distinctly the proceedings of such convention and what took place thereat.

Digitized by Google

That upon the organization of said convention Elmer J. West, of Glens Falls, N. Y., was duly elected chairman, and this deponent was duly elected secretary of said convention, and as such secretary kept the minutes of the proceedings thereof.

That Mr. West, the Chairman, then made a short speech as to the purpose of the convention, and the next proceeding was the nomination of a candidate for Senator. That M. J. Callanan was then nominated by John B. Riley, who made a speech to the convention in advocacy of his nomination, and that the nomination was seconded by Daniel P. DeLong, who made a short speech in favor of such nomination, and Mr. Callanan was unanimously nominated by said convention as the Democratic candidate for Senator for the Thirty-third Senatorial District.

That a man, claiming to represent the labor unions of Plattsburg, was then allowed the courtesy of the floor and made a speech praising the nomination of Mr. Callanan.

That after the nomination of Mr. Callanan and the delivery of the said speech, the Chairman, Mr. West, then asked if there was any further business to be done, and suggested that if there was not, an adjournment be taken. That John B. Riley, a delegate from Clinton County to said convention, then stated that the Election Law required that there should be a committee appointed to fill any vacancies that might occur on the ticket; and Mr. Riley then moved that a committee be appointed for that purpose, which motion was carried. That N. T. Hewitt of Clinton County, B. J. McGuire of Essex County, and Mr. DeLong of Warren County were then named as such committee, and that no

Digitized by Google

other committee was appointed, and that there was 192
no reference made to any general committee for the Senatorial District, and that nothing was said about this committee having any other powers than the power to fill vacancies.

That after this committee to fill vacancies had been appointed, as above stated, a motion was then made to adjourn, which motion was carried; and that a certificate of nominations, signed by Mr. West, as Chairman, and by this deponent, as Secretary, was then made out from the minutes which this deponent had kept of the proceedings of said convention; in which certificate the names of the persons appointed as such committee to fill vacan- 193
cies, as above stated, were inserted, and the same was thereafter filed in the office of the Secretary of the State of New York, a certified copy of which is hereto annexed, hereby referred to and made a part hereof.

That deponent has searched for the minutes which he then kept as secretary of said convention, but has been unable to find the same, and believes that they were destroyed after the preparation of said certificate, but that this deponent is certain that there was only one committee appointed and that that committee was appointed for the purpose 194
of filling vacancies, and that nothing was said at said convention about giving to said committee any other or additional powers, and that no general committee was then appointed.

That the said committee to fill vacancies, appointed at the Senatorial Convention on October 3, 1910, being the only committee appointed at that convention, this deponent understood, after the enactment of the Direct Primary Law, that such committee was the only committee that had power

Digitized by Google

195 to make designations for the party position of State Committeeman, but afterwards learned that a committee to fill vacancies had no such power.

That deponent has read what purported to be a copy of an affidavit made by Daniel P. DeLong, Jr., verified on March 6th, 1912, and that this deponent did have a conversation with said Daniel P. DeLong, Jr., on the 14th day of February, 1912, but that nothing was said by deponent in that conversation in reference to a proxy, or this deponent securing a proxy for Mr. Anderson or anyone else.

That deponent, on or about the 15th day of February, 1912, saw B. J. McGuire, who was one of
196 the committee to fill vacancies, and, still being under the impression that that committee, in the absence of any other, should make the designation, told McGuire that he thought he should issue a call for the meeting of that committee.

That deponent afterwards learned that said committee to fill vacancies had no power to meet and make designations, and that the Democratic State Committee had ruled and determined that there was no Senatorial Committee in the Thirty-third Senatorial District authorized to make designations, and provided for the choosing of a new committee for that purpose in said district, which rule
197 and determination of said State Committee is as follows, to-wit:

> "By reason of the fact that there are no existing Senatorial District Committees in the 23d, 25th, 33d, 40th, 42d, 43d, 44th and 47th Senatorial Districts, designations in these districts shall be made as follows:
>
> In each such Senatorial District the members of the County Committee within each Assembly District shall choose three (3) persons from said Assembly District, who, together

Digitized by Google

with three (3) members from the other Assembly Districts within such Senatorial Districts, shall constitute the Senatorial District Designating Committee and such Senatorial District Designating Committee shall make designation of the party candidate for member of the State Committee from such District, to be voted for at the official primary on March 26, 1912." 198

That a Senatorial District Designating Committee was thereafter chosen as provided by said rule, consisting of three members from each Assembly District within said Thirty-third Senatorial District. That said Senatorial District Designating Committee duly met at the Commercial Hotel, at Keeseville, N. Y., on the 4th day of March, 1912, and designated John Anderson, Jr., as the party candidate for member of the State Committee, to be voted for at official primary on March 26, 1912, and a certificate of such nomination was on the 5th day of March duly filed in the office of the Secretary of State. 199

That deponent has read the affidavit of Chester B. Grandey attached to the moving papers herein, in which he states that the Senatorial Convention was held at the Cumberland House, in the City of Plattsburg. That the only convention held at the Cumberland House on said 3rd day of October, 1910, was the Democratic Congressional Convention, which was held at the Cumberland House on the same day that the Senatorial Convention was held at the City Court House. 200

PATRICK H. McNULTY.

Subscribed and sworn to before me
this 13th day of March, 1912.

James A. Van Voast,
Notary Public.

Digitized by Google

201 **PARTY CERTIFICATE OF NOMINATION BY A SENATORIAL CONVENTION, READ IN OPPOSITION TO MOTION**

To the Secretary of State:

We certify that at a convention of delegates representing the Democratic Party (a political party which, at the last preceding general election at which a Governor was elected, cast ten thousand votes in the State for such officer), held at Plattsburg, N. Y., on the 3rd day of October, 1910, in and for the Thirty-third Senatorial District, the following named persons were placed in nomina-
202 tion for offices to be filled at the next ensuing general election:

203

Digitized by Google

Title of Office to be filled.	Name of the Candidate.	Name of the Party.	Place of Residence of candidate.	Place of business.
Senator	Michael J. Callanan	Democratic	Keeseville	Keeseville

204

205

206

Digitized by Google

207 We also certify that such convention appointed the following named persons, Archibald Z. DeLong and N. T. Hewitt, and B. J. McGuire, a committee for the purpose specified in section one hundred and thirty-five of the election law.

Attest:

ELMER J. WEST,
Presiding Officer of Convention,
Glens Falls, N. Y.

PATRICK H. NUTLY,
Secretary of Convention,
Ticonderoga, N. Y.

208 STATE OF NEW YORK,
County of Clinton,
City of Plattsburg. } ss:

Elmer J. West and Patrick H. Nulty, being severally sworn, each for himself, says that the said Elmer J. West was the presiding officer of the convention of delegates mentioned and described in the foregoing certificate, and that the said Patrick H. Nulty was the secretary of such convention, and that said certificate and the statements therein contained are true, to the best of his information and belief.

209 ELMER J. WEST.
PATRICK H. NULTY.

Severally subscribed and sworn to before me this 3rd day of October, 1910.

Ernest C. Gordon,
Notary Public,
Clinton County.

Endorsed:
Filed Oct. 7, 1910.

SAMUEL S. KOENIG,
Secretary of State.

Digitized by Google

STATE OF NEW YORK, } ss:
Office of the Secretary of State. }

I have compared the preceding copy of certificate of nomination of Michael J. Callaman with the original certificate on file in this office, and do hereby certify that the same is a correct transcript therefrom and the whole thereof.

Given under my hand and the seal of office of the Secretary of State, at the City of Albany, this 12th day of March, in the year one thousand nine hundred and twelve.

(Seal)

JOSE E. PIDGEON,
Second Deputy Secretary of State.

Digitized by Google

213 **AFFIDAVIT IN OPPOSITION**

NEW YORK SUPREME COURT—County of Clinton.

IN THE MATTER
of the
Designation of a Candidate of the Democratic Party for State Committeeman for the Thirty-third Senatorial District of the State of New York to be voted for at the coming Primary Election appointed to be held on the 26th
214 day of March, 1912, and of the objections to a certificate or certificates of nomination of a candidate filed in the office of the Secretary of State on the 5th day of March, 1912.

STATE OF NEW YORK, }
County of Clinton, } ss:

James T. Kavanagh, being duly sworn, deposes and says, that he is and has been for a number of years last past a reporter on the Plattsburg Press,
215 a newspaper published in the City of Plattsburg, Clinton County, New York, and that deponent resides in the City of Plattsburg aforesaid.

Deponent further says, that on the afternoon of October 3rd, 1910, deponent, while engaged in his work as reporter aforesaid, attended a Democratic Senatorial Convention for the Thirty-third Sena-

Digitized by Google

torial District of the State of New York, for the 216
purpose of reporting said convention. That the said convention was held in the City Court room on the first floor of the Court House in the City of Plattsburg aforesaid and that deponent was present during all of the proceedings of said convention. That as the said convention was about to adjourn and after one M. J. Callanan had been nominated for Senator, Hon. John B. Riley, who was present and taking part in said convention, said it was necessary for the convention to name a committee to fill any vacancy which might occur on the ticket, and that to the best of deponent's knowledge and recollection said John B. Riley 217
then made a motion to the effect that a committee to fill vacancies be appointed and that said motion was carried and a committee was appointed.

JAMES T. KAVANAGH.

Subscribed and sworn to before me
this 11th day of March, 1912.

John S. Sheddon,
Notary Public,
Clinton County.

218

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK, }
County of Warren. } ss:

Edwin J. Worden, being duly sworn, deposes and says that he resides at Lake George, Warren

Digitized by Google

219 County, New York, and was with Daniel P. De-
Long and Elmer J. West a delegate from Warren
County to the Senatorial Convention held at
Plattsburg October 3, 1910, at which Michael J.
Callanan was nominated a Senator.

That deopnent has a clear recollection that said convention was held at the City Hall. That when deponent arrived in Plattsburg in company with Mr. DeLong, Mr. West and Chester B. Grandey, they went first to the City Hall, where the convention was to be held, and were told by somebody there that the convention was to be held at the Cumberland House. That deponent and the three
220 persons above mentioned then went to the Cumberland House, and at the time they arrived there was a convention of some kind in session which shortly after adjourned. That at the Cumberland House the Warren County delegates then learned that the Senatorial Convention was not to be held at the Cumberland House, but was to be held at the City Hall, and then deponent and the other Warren County delegates went back to the City Hall, where the Senatorial Convention was then held.

Deponent recollects that some person moved that Elmer J. West be chairman, and the motion was
221 carried, and Mr. West then made a short statement in reference to the purpose for which the meeting was called. That deponent also recollects that Mr. Michael J. Callanan was nominated for Senator, and the fact that one or more speeches were made in advocacy of his nomination, and among others a man representing the labor unions.

Digitized by Google

That after the nomination of Mr. Callanan deponent has a recollection of the chairman saying that he supposed that there was nothing further to be done, and that somebody then made the suggestion that there was some further business in order to perfect the nomination. 222

That deponent has not a clear recollection of just exactly what the motion was, but it is his best recollection that it was a committee of some kind that was required to be appointed to name a candidate in case of a vacancy.

That deponent was not consulted by either Mr. West or Mr. DeLong in reference to naming any person on this committee, and that in reference to that particular fact deponent is clear and distinct. That the business of the convention did not exceed half an hour, and that during that time, after Mr. West had taken the chair, he did not leave that position to consult with deponent. 223

EDWIN J. WORDEN.

Subscribed and sworn to before me
this 11th day of March, 1912.

Pearl Brayman,
Notary Public,
Saratoga County.

Certificate filed in Warren County. 224

Digitized by Google

225 **AFFIDAVIT IN OPPOSITION**

STATE OF NEW YORK, }
County of Warren. } ss:

C. Thurman Leland, being duly sworn, says he is sixty-five years of age and resides at Schroon, Essex County, N. Y., and has been active in Democratic political affairs in said county and in the Senate, Judicial and Congressional Districts, of which said Essex County is a part, for over forty years.

That deponent has been familiar with the course and practice of said Democratic party in the mat-
226 ter of selecting committees and in the matter of holding conventions in such districts for that period of time.

That owing to the fact that the Senate, Judicial and Congressional Districts, of which Essex County has been a part, are so overwhelmingly Republican that the course and practice of the Democratic party has been very unsettled. In many cases no committees have been appointed. It has been the custom for some few men active in Democratic party affairs to assume the duties of committees without direct authorization from
227 any political body.

That no rules were formulated as to the appointment of committees, and that little or no attention was paid to regular procedure, owing to the fact that candidates in these districts had little or no probability of election.

C. THURMAN LELAND.

Subscribed and sworn to before me
this 12th day of March, 1912.

W. H. Adamson,
Notary Public.

Digitized by Google

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK, }
County of Warren, } ss:

William M. Cameron, being duly sworn, deposes and says that he is an attorney and counselor-at-law of the City of Glens Falls, N. Y., and is forty-seven years of age, and has resided in the City of Glens Falls and County of Warren for a period of over twenty-five years.

That deponent has held many Democratic party positions and that he has been State Committeeman for the Thirty-third Senate District, comprising the Counties of Warren, Essex and Clinton.

That deponent has also been chairman of the Democratic County Committee for the County of Warren a number of times, and has attended a number of Democratic Senatorial Conventions as a delegate and has taken part in their proceedings, and has also been delegate to numbers of Judicial and Congressional Conventions, and has also been member of the Assembly for the County of Warren, and is familiar with the rules and customs prevailing at the various Democratic conventions held in the Thirty-third Senate District for many years past.

That owing to the fact that the Senate, Congressional and Judicial Districts, of which Warren County is a part, being overwhelmingly Republican in the elections, little or no attention had been paid to the selection of committeemen to represent these districts, and the custom and usage prevailing at such conventions being very unsettled and far from uniform.

Digitized by Google

231 In the district conventions of which Warren County was a part it is usually difficult to secure a candidate to run for office on the Democratic ticket, and generally the business of the convention was considered as having been concluded when such a candidate was selected, and the only committee that would be appointed would be a committee to fill vacancies, which appointment was necessary by the law requiring the names of such committee to be on the certificate of nomination.

That owing to the loose custom and practice in reference to the appointment of committees, deponent knows of a number of instances when a
232 district convention was called by persons who had no authority from any former convention.

That no rules were ever formulated as to the appointment of committees at these conventions, and that oftentimes in the absence of a district committee the district conventions have been called by the State Committeeman.

WM. CAMERON.

Subscribed and sworn to before me
this 11th day of March, 1912.

Pearl Brayman,
Notary Public,
233 Saratoga County.

Certificate filed in Warren County.

Digitized by Google

PARTY CERTIFICATE OF NOMINATION 234

BY A SENATORIAL DISTRICT COMMITTEE PRODUCED BY SECRETARY OF STATE.

To the Secretary of State:

We certify that at a duly called meeting for the purpose of designation of the Thirty-third Senatorial Committee of the Democratic Party (a political party which at the last preceding election, at which a Governor was elected, cast ten thousand votes in the State for such officer), held at the Commercial House in the Village of Keeseville, New York, on the 4th day of March, 1912, in and for the Thirty-third Senatorial District, the following named person was placed in nomination for an office to be filled at the next official primary to be held March 26, 1912: 235

236

Digitized by Google

239	238	237
Title of Office.	Name.	Name of Party.	Residence.	Place of Business.
Member of the Democratic State Committee	John B. Trombley...	Democratic	Altona, N. Y.....	Altona, N. Y.

Digitized by Google

Attached hereto and made a part of this certificate is a complete and accurate record of the proceedings of said committee.

We also certify that such convention appointed the following named persons, namely: Archibald Z. DeLong, Glens Falls, N. Y., Nathan T. Hewitt, Keeseville, N. Y., and Louis F. Roberts, Ausable Forks, N. Y., a committee for the purpose specified in Section 135 of the Election Law.

ARCHIBALD Z. DeLONG,
Chairman,
Glens Falls, N. Y.

NATHAN T. HEWITT,
Secretary,
Keeseville, N. Y.

STATE OF NEW YORK, }
County of Clinton, } ss:

Archibald Z. DeLong and Nathan T. Hewitt, being severally sworn each for himself, says that the said Archibald Z. DeLong was the Chairman of the meeting of the committee mentioned and described in the foregoing certificate and that the said Nathan T. Hewitt was the Secretary of said meeting and that the said certificate and the state-

Digitized by Google

ments therein contained are true to the best of his information and belief.

ARCHIBALD Z. DeLONG,
NATHAN T. HEWITT.

Severally subscribed and sworn to before me this 4th day of March, 1912.

John K. Collins,
Notary Public,
Clinton County.

Minutes of a meeting of the Thirty-third Senatorial District Committee of the Democratic party. Held at the Commercial House in the Village of Keeseville on the 4th day of March, 1912, at 2:30 o'clock.

Keeseville, New York,
March 4th, 1912.

The Thirty-third Senatorial District Committee of the Democratic party convened at Keeseville, in the afternoon, on the 4th day of March, 1912, at 2:30 o'clock, the time fixed pursuant to notice heretofore filed for the opening thereof, a majority of the members of the committee being present.

The meeting was called to order by A. Z. DeLong, who nominated A. Z. DeLong as temporary chairman.

The roll of the members of the committee was then called by Nathan T. Hewitt and the following members responded: Archibald Z. DeLong and Nathan T. Hewitt from Warren and Clinton Counties.

Digitized by Google

The roll being called and each member arising 246
in his place declared his choice as Archibald Z. DeLong for Temporary Chairman, and Archibald Z. DeLong declared Archibald Z. DeLong duly elected Temporary Chairman.

Archibald Z. DeLong, before entering upon his duties as Temporary Chairman, took his oath as such, said oath being attached hereto and made a part hereof.

Pursuant to a resolution offered by Archibald Z. DeLong, Nathan T. Hewitt was elected Temporary Secretary.

Pursuant to a resolution offered by Archibald Z. DeLong, and upon a call of the roll, Archibald 247
Z. DeLong was chosen Permanent Chairman and Nathan T. Hewitt Permanent Secretary, and as Permanent Officers of said meeting.

The Permanent Chairman before entering upon his duties took his oath as such, which is annexed hereto and made a part hereof.

The following resolutions were adopted:

Resolved, That the committee proceed to the nomination of a member to the Democratic State Committee from the Thirty-third Senatorial District, and that the person so nominated be the official party candidate for such position to be voted 248
for at the Primary Election to be held March 26th, 1912.

That the roll be called and upon each member's name being called he arise in his place and state his choice for such position.

That the member of the committee from the County of Clinton be entitled to five votes, that

Digitized by Google

the member from the County of Warren be entitled to five votes, and the member from the County of Essex be entitled to four votes.

The resolution being seconded and voted upon was carried.

The roll being called the following votes were recorded: Nathan T. Hewitt from Clinton County votes five votes for John B. Trombley; Archibald Z. DeLong from Warren County votes five votes for John B. Trombley.

John B. Trombley having a majority of the votes cast, the chairman declared him to be the duly designated candidate for Member of the Democratic State Committee from the Thirty-third Senatorial District.

That the following named persons, Archibald Z. DeLong, Glens Falls, N. Y.; Nathan T. Hewitt, Keeseville, N. Y., and Louis F. Robert, Ausable Forks, N. Y., are hereby appointed a committee for the purpose specified in Section 135 of the Election Law.

The following resolution was then offered:

Resolved, That the committee now designate three members from each county to constitute the new Senatorial Committee for said District to be voted for at the primaries to be held March 26, 1912.

The resolution being seconded and voted upon, was carried.

The following members were then nominated:

From Clinton County: John B. Riley, Plattsburg, N. Y.; Nathan T. Hewitt, Keeseville, N. Y.; James DeF. Burroughs, Champlain, N. Y.

Digitized by Google

From Essex County: John C. Bowe, Chesterfield, N. Y.; George L. Brown, Elizabethtown, N. Y.; Louis F. Robert, Jay, N. Y. 252

From Warren County: Edwin J. Worden, Lake George, N. Y.; Walter H. Linindoll, Luzerne, N. Y.; Daniel P. DeLong, Glens Falls, N. Y.

And each of the foregoing named persons receiving ten votes, were declared by the chairman duly designated candidates for members of the Democratic Senatorial Committee from the Thirty-third Senatorial District.

On motion, the meeting adjourned.

We, Archibald Z. DeLong, Permanent Chairman, and Nathan T. Hewitt, as Permanent Secretary, 253 and as the permanent officers of the meeting of the Thirty-third Senatorial District Committee held for the purpose of designation, do hereby certify that the foregoing is a complete and accurate record of the proceedings of said meeting of the committee.

ARCHIBALD Z. DeLONG,
Permanent Chairman.

NATHAN T. HEWITT,
Permanent Secretary.

254

Digitized by Google

255 **OATH OF PERMANENT CHAIRMAN**

STATE OF NEW YORK, }
County of Essex. } ss:

Archibald Z. DeLong, being duly sworn, says: I am the Permanent Chairman of the meeting of the Senatorial District Committee of the Democratic party, now being held this 4th day of March, 1912, in and for the Thirty-third Senatorial District of said State, having been duly elected as such, and I do solemnly swear that I will faithfully perform the duties of my said office as Permanent Chairman of said meeting and all duties imposed
256 upon me by virtue of my said office as Permanent Chairman, as aforesaid. So help me God.

ARCHIBALD Z. DeLONG.

Sworn to before me this 4th
day of March, 1912.

F. B. McKenzie,
Notary Public,
Clinton County.

C. of filed in Essex County.

---

257 **OATH OF TEMPORARY CHAIRMAN**

STATE OF NEW YORK, }
County of Essex. } ss:

Archibald Z. DeLong, being duly sworn, says: I am the Temporary Chairman of the meeting of the Senatorial District Committee of the Demo-

Digitized by Google

cratic Party, now being held this 4th day of March, 1912, in and for the Thirty-third Senatorial District of said State, having been duly elected as such, and I do solemnly swear that I will faithfully perform the duties of my said office as Temporary Chairman of said meeting and all duties imposed upon me by virtue of my said office as Temporary Chairman, as aforesaid. So help me God. 258

ARCHIBALD Z. DeLONG.

Sworn to before me this 4th
day of March, 1912.

F. B. McKenzie,
Notary Public,
Clinton County. 259

C. of filed in Essex County.

Endorsed:

Filed Mar. 5, 1912, 5:30 p. m.

EDWARD LAZANSKY,
Secretary of State.

STATE OF NEW YORK,
Office of the Secretary of State. } ss: 260

I have compared the preceding copy of designation of John B. Trombley with the original designation on file in this office, and do hereby certify that the same is a correct transcript therefrom and the whole thereof.

Given under my hand and the Seal of Office of the Secretary of State, at the City of Albany, this

Digitized by Google

261 12th day of March, in the year one thousand nine hundred and twelve.

(Seal.)

JOSE E. PIDGEON,
Second Deputy Secretary of State.

PARTY CERTIFICATE OF NOMINATION BY A SENATORIAL DISTRICT COMMITTEE PRODUCED BY SECRETARY OF STATE

To the Secretary of State:

262 We certify that at a duly called meeting for the purpose of designation of the Thirty-third Senatorial District Committee of the Democratic party (a political party which at last preceding election at which a Governor was elected cast 10,000 votes in the State for such officer), held at Keeseville, Essex County, N. Y., on the 4th day of March, 1912, in and for the Thirty-third Senatorial District, the following named person was placed in nomination for an office to be filled at the next ensuing official primary to be held March 26, 1912:

263

Digitized by Google

Title of Office.	Name.	Name of Party.	Residence.	Place of Business.	
Member of the Democratic State Committee.....	John Anderson, Jr....	Democratic....	Newcomb, N. Y.	Newcomb, N. Y.	264
					265
					266

Digitized by Google

267 Attached hereto and made a part of this certificate is a complete and accurate record of the proceedings of the meeting of the committee.

We also certify that such convention appointed the following named person (or persons), John B. Riley, Edward T. Stokes and Thomas J. Dunn, a committee for the purposes specified in Section 135 of Election Law.

Attested:

DANIEL J. FINN,
Chairman,
36 Grove Ave. (?),
Glens Falls, N. Y.

268 Resident, city or town, street and number, if any.

P. H. McNULTY,
Secretary,
Ticonderoga, N. Y.

Resident, city or town, street and number, if any.

STATE OF NEW YORK,
County of Essex,
City of

Daniel J. Finn and P. H. McNulty, being severally sworn each for himself, says that the said
269 Daniel J. Finn was the chairman of the meeting of the committee mentioned and described in the foregoing certificate and that the said P. H. McNulty was the secretary of said meeting, and that the said certificate and the statement therein con-

Digitized by Google

tained are true to the best of his information and belief.

(Signed.)

DANIEL J. FINN,
Chairman.

P. H. McNULTY,
Secretary.

Severally subscribed and sworn to before me this 4th day of March, 1912.

E. T. Stokes,
Notary Public.

(This certificate should be filed with the Secretary of State before midnight on the 5th day of March, 1912).

MINUTES OF A MEETING OF THIRTY-THIRD SENATORIAL DISTRICT COMMITTEE OF THE DEMOCRATIC PARTY

held at Commercial House, in the village of Keeseville, on the 4th day of March, 1912.

Keeseville, N. Y., March 4, 1912.

The Thirty-third Senatorial District Committee of the Democratic Party convened at Keeseville, in the county of Essex, on the 4th day of March, 1912, at 2.30 o'clock, the time fixed pursuant to notice heretofore filed for the opening thereof, a majority of the members of the Committee being present.

Digitized by Google

273 The meting was calld to order by John K. Collins. E. T. Stokes nominated Daniel J. Finn as Temporary Chairman.

The roll of the members of the Committee was then called by P. H. McNulty and the following members responded: B. J. McGuire, Martin Tobin by E. T. Stokes, P. H. McNulty, Samuel C. Baker by J. E. Collins, George R. Thompson by T. J. Dunn, all John K. Collins, James Murray and E. C. Gordon by John B. Riley, County. All proxies were presented to the Secretary and filed herewith.

The roll being called and each member arising in his place, declared his choice, Daniel J. Finn
274 for Temporary Chairman, except John K. Collins, Riley and Murray, and P. H. McNulty declared Daniel J. Finn duly elected Temporary Chairman.

Daniel J. Finn, before entering upon his duties as Temporary Chairman, took his oath as such, said oath being attached hereto and made a part hereof.

Pursuant to resolution offered by E. T. Stokes, P. H. McNulty was elected Temporary Secretary.

Pursuant to resolution offered by George R. Thompson by T. J. Dunn and upon a call of the roll Daniel J. Finn was chosen Permanent Chairman, and P. H. McNulty Permanent Secretary, and
275 as Permanent Officers of said meeting.

The Permanent Chairman before entering upon his duties took his oath as such, which is annexed hereto and made a part hereof.

The following resolutions were adopted:

Resolved, That the Committee proceed to the nomination of a member to the Democratic State Committee from the Thirty-third Senatorial Dis-

Digitized by Google

trict, and that the person so nominated be the official party candidate for such position to be voted for at the Primary Election to be held March 26th, 1912. 276

That the roll be called and upon each member's name being called he arise in his place and state his choice for such position..

That each member of the committee from the county of Clinton be entitled to 1⅔ votes, that each member from the county of Essex be entitled to 1⅓ votes, that each member from the county of Warren be entitled to 1⅔ votes.

The resolution being seconded and voted upon was carried. 277

The roll being called the following votes were recorded: B. J. McGuire, E. T. Stokes, P. H. McNulty, of Essex county, Daniel J. Finn, John E. Collins and Thomas J. Dunn of Warren county, all voting for a John Anderson, Jr., of Newcomb, N. Y., who having a majority of votes cast, the Chairman declared him to be the duly designated candidate for member of the Democratic State Committee from the Thirty-third Senatorial District, the committeeman from Clinton County withdrew from the meeting.

That the following named person or persons, John B. Riley, Edward T. Stokes, Thomas J. Dunn, are hereby appointed a Committee for the purpose specified in Section 135 of the Election Law. On motion and roll-call the Permanent Chairman and Permanent Secretary were duly appointed Chairman ad Secretary of the Committee. On motion of meeting adjourned at 3:40 p. m. 278

Digitized by Google

279 We, Daniel J. Finn, as Permanent Chairman, and P. H. McNulty, as Permanent Secretary, and as the Permanent Officers of the Meeting of the Thirty-third Senatorial District Committee * * * held for the purpose of designating, do hereby certify that the foregoing is a complete and accurate record of the proceedings of said meeting of the Committee.

DANIEL J. FINN,
Permanent Chairman.

P. H. McNULTY,
Permanent Secretary.

280 Note—A copy of these minutes should be filed with the Secretary of State before midnight on the fifth day of March, 1912.

OATH OF PERMANENT CHAIRMAN

STATE OF NEW YORK, } ss:
County of Essex. }

Daniel J. Finn, being duly sworn, says: I am the Permanent Chairman of the meeting of the
281 Senatorial District Designating Committee of the Democratic Party, now being held this 4th day of March, 1912, in and for the Thirty-third Senatorial District, having been duly elected as such, and I do solemnly swear that I will faithfully perform the duties of my said office as Permanent Chairman of said Meeting and all duties imposed

Digitized by Google

upon me by virtue of my said office as Permanent 282
Chairman, as aforesaid. So help me God.

(Signed) DANIEL J. FINN.

Sworn to before me this 4th
day of March, 1912.

E. T. Stokes,
Notary Public.

OATH OF TEMPORARY CHAIRMAN

STATE OF NEW YORK, } ss: 283
County of Essex. }

Daniel J. Finn, being sworn, says: I am the Temporary Chairman of the Meeting of the Senatorial District Designating Committee of the Democratic Party, now being held this 4th day of March, 1912, in and for the Thirty-third Senatorial District, having been duly elected as such, and I do solemnly swear that I will faithfully perform the duties of my said office as Temporary Chairman of said Meeting and all duties imposed upon me by virtue of my said office as Temporary Chairman, as afore- 284
said. So help me God.

DANIEL J. FINN.

Sworn to before me this 4th
day of March, 1912.

E. T. Stokes,
Notary Public.
Port Henry, N. Y., March 4, 1912.

Digitized by Google

285 I, Martin Tobin, do hereby constitute and appoint E. T. Stokes my substitute to attend a meeting of the Senatorial Committee of the Democratic Party to be held at Keeseville, N. Y., this day.

MARTIN TOBIN.

In presence of
Fred J. Ring.

STATE OF NEW YORK, }
County of Essex. } ss:

On this 4th day of March, 1912, before me personally came Martin Tobin, to me known to be the
285 person described in and who executed the foregoing, and he duly acknowledged to me the due execution thereof..

FRED J. RING,
Notary Public.

Know All Men by These Presents: That, I Samuel C. Baker of the town of Horicon, Warren county, N. Y., do hereby constitute and appoint John E. Collins of the city of Glens Falls, N. Y., to be my lawful attorney, substitute and proxy for me and in my name to vote at any and all meetings, or adjournments thereof, of the Senatorial
287 Committee or Committees of the Thirty-third (33) Senatorial District of the Democratic Party to be held at the Commercial Hotel, Keeseville, Essex county, N. Y., March 4, 1912, for the purpose of designating a candidate for State Committeeman of the said Thirty-third (33) Senatorial District to be voted for at the Official Primary to be held

Digitized by Google

March 26th, 1912, and for such other business as may come before the Committee. 288

SAMUEL C. BAKER. (L. S.)

STATE OF NEW YORK, County of Warren. } ss:

On this 2d day of March, 1912, before me, the subscriber, appeared Samuel C. Baker, to me known to be the same person described in and who executed the foregoing instrument and he duly acknowledged the execution of the same.

WILLIAM M. CAMERON, 289
Notary Public.

STATE OF NEW YORK, Warren County Clerk's Office. } ss:

I, Edwin C. Sisson, Clerk of said County, and Clerk of the County and Supreme Courts, the same being Courts of Record in and for said County, do hereby certify that Wm. M. Cameron, whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument in writing and endorsed thereon, was, at the time of taking such 290
proof or acknowledgment, a Notary Public, in and for the county aforesaid, dwelling in said county, and duly authorized to take the same; and that I am well acquainted with the handwriting of the said Notary Public and verily believe that the signature to said certificate of proof or acknowledgment is genuine, and that said instrument is exe-

Digitized by Google

291 cuted and acknowledged according to the laws of the State of New York.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Lake George, N. Y., this 2nd day of March, 1912.

(Seal) E. C. SISSON,
Clerk.

Know All Men by These Presents: That I, George R. Thompson of Luzerne, Warren county, N. Y., do hereby constitute and appoint Thomas Dunn, of the city of Glens Falls, N. Y., to be my lawful attorney, substitute and proxy for me and
292 in my name to vote at any and all meetings or adjournments thereof of the Senatorial Committee or Committees of the Thirty-third (33) Senatorial District of the Democratic Party to be held at the Commercial Hotel, Keeseville, Essex county, N. Y., March 4th, 1912, for the purpose of designating a candidate for State Commiteeman of the said Thirty-third (33) Senatorial District to be voted for at the Official Primary to be held March 26th, 1912.

GEO. R. THOMPSON, M. D. (L. S.)

293 STATE OF NEW YORK, } ss:
County of Warren. }

On this 20th day of February, 1912, before me, the subscriber, appeared George R. Thompson, to me known to be the same person described in and who executed the foregoing instrument, and he duly acknowledged the execution of the same.

WM. M. CAMERON,
Notary Public.

Digitized by Google

STATE OF NEW YORK, } ss:
Warren County Clerk's Office. }

294

I, Edwin C. Sisson, Clerk of said County, and Clerk of the County and Supreme Courts, the same being Courts of Record in and for said County, do hereby certify that Wm. M. Cameron, whose name is subscribed to the certificate of proof or acknowledgment of the annexed instrument in writing and endorsed thereon, was at the time of taking such proof or acknowledgment, a Notary Public, in and for the county aforesaid, dwelling in said county, and duly authorized to take the same; and that I am well acquainted with the handwriting of the said Notary Public and verily believe that the signature to said certificate of proof or acknowledgment is genuine, and that said instrument is executed and acknowledged according to the laws of the State of New York.

295

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at Lake George, N. Y., this 2nd day of March, 1912.

(Seal) E. C. SISSON,
Clerk.

I hereby appoint J. B. Riley to attend for me and in my place and stead act and vote as fully as I might or could do if personally present, at a meeting of the Democratic Senatorial Committee for the Thirty-third Senatorial District named by the County Committees of the several counties comprising said district pursuant to a direction and resolution of the Democratic State Committee,

296

Digitized by Google

297 which meeting is appointed to be held at the Commercial House, in the village of Keeseville in said district, on the 4th day of March, 1912, and at any adjourned or subsequent session of said meeting of said committee.

ERNEST C. GORDON.

N. T. Hewitt.

To Senatorial District Committee of the 33d Senatorial District:

You are hereby authorized to meet, organize and elect a Chairman for the purpose of fixing a time of holding a meeting to designate Member of State
298 Committee for 33d Senatorial District and authorize your Chairman to call a meeting for that purpose on or before March 5th, 1912, and for the transaction of such other business as may properly come before the meeting at that time.

JOHN ANDERSON, Jr.,
State Committeeman, 33rd.

At a meeting of the Democratic Senatorial District Committee for the 33d Senatorial District, held at the Lee House, in the village of Port Henry, at 2:30 o'clock p. m., on Monday, Feb. 19th, 1912,
299 pursuant to the request of John Anderson, Jr., Democratic State Committeeman for said district, the following proceedings were had:

John K. Collins was named temporary Chairman and P. H. McNulty temporary Secretary of the meeting.

Mr. Collins called for the credentials and the following were presented: Clinton county, Ernest

Digitized by Google

C. Gordon, personally; John K. Collins, personally; James Murray, personally. Essex county, B. J. McGuire, by P. H. McNulty, proxy; Martin Tobin, personally, and P. H. McNulty, personally. Warren county, D. J. Finn, personally; Samuel C. Baker by D. J. Finn, proxy; George R. Thompson, by D. J. Finn, proxy. On motion of E. C. Gordon, temporary organization was made permanent. By unanimous consent, asked by Mr. Gordon, and upon roll-call, mailing of notice of meeting for designation was waived. On motion of P. H. McNulty, Mr. Collins was instructed to file with Secretary of State a call for meeting of Committee, at the Commercial House in Keeseville, on Monday March 4th, at 2:30 p. m., for the purpose of designating a State Committeeman for the 33d District. 300 301

Upon motion of Mr. Finn, the meeting was adjourned.

P. H. McNULTY,
Secretary.

Endorsed:

Filed Mar. 5-1912.

EDWARD LAZANSKY,
Secretary of State.

STATE OF NEW YORK,
Office of the Secretary of State. } ss: 302

I have compared the preceding copy of designation of John Anderson, Jr., with the original designation on file in this office, and do hereby certify that the same is a correct transcript therefrom and the whole thereof.

Given under my hand and the seal of office of the Secretary of State, at the city of Albany, this 12th

Digitized by Google

303 day of March, in the year one thousand nine hundred and twelve.

(Seal) JOSE E. PIDGEON,
Second Deputy Secretary of State.

It is conceded that the Democratic County Committee of Clinton county appointed three members as a designating committee to represent that county, to meet with three members from each of the other two, to designate a candidate for State Committeeman, pursuant to the resolution of the
304 State Committee. Such committee nominated John Anderson, Jr.

Mr. Trombley was the Chairman of the Democratic County Committee of Clinton county.

STIPULATION AT CLOSE OF HEARING

It is stipulated that this case shall be disposed of here by the judge in accordance with his own idea on the merits. That whichever way the decision may be the defeated party may immediately appeal
305 to the Appellate Division, and that the appeal so taken shall be brought on for argument at the earliest day on which the Appellate Division will hear it. The printing of papers and notice of appeal and all the matters required to perfect the appeal being waived and dispensed with to the end that whatever decision may be made in this proceeding may be reviewed by the Appellate Division at the term now sitting, in order that proper action may be taken.

Digitized by Google

OPINION

306

SUPREME COURT—Schenectady County.

IN THE MATTER

of the

Designation of the Candidate of the Democratic Party for State Committeeman for the 33rd Senatorial District of the State of New York, etc.

The action of certain person claiming to act as a party committee in the designation of a candidate for a party office is here sought to be summarily reviewed, on the ground that such persons were wholly without authority. 307

If such persons possessed no power as party officers they performed no official act which can be the subject of a judicial review. If they did possess such authority their action was entirely legal. Regarded, therefore, as a proceeding to review the action of a party committee or a pretended committee, the proceeding must fail. If it be a proceeding to review the action of the Secretary of State in reference to rival designations for the same party office, the proceeding must also fail for the reason that it was not instituted in the Judicial District "where the transaction, act or neglect of duty took place," as provided in section 56, chapter 891, Laws 1911. The act, neglect of duty or transaction of the Secretary of State took place in the city of Albany and in the Third Judicial District. The proceeding is therefore dismissed. 308

H. T. KELLOGG,
J. S. C.

Digitized by Google

909 **STIPULATION WAIVING CERTIFICATION.**

It is hereby stipulated pursuant to section 3301 of the Code of Civil Procedure that the foregoing are true and correct copies of the order made in the above-entitled proceeding of Mr. Justice H. T. Kellogg, dated March 14, 1912, and of the affidavits and other papers and proceedings upon which said justice acted in making said order, and also of the opinion written by him in said matter upon deciding said application, and of the notice of appeal from said order, all duly filed in Clinton county clerk's office, and of the whole of said papers and each of them, and certification thereof the clerk
910 is hereby waived.

Dated, March 16, 1912.

JOHN B. RILEY,
Attorney for Appellant.

DANIEL J. FINN,
Attorney for Committee-Respondent,

THOMAS CARMODY,
Attorney General, Attorney for Secretary of State, Respondent.

911

Digitized by Google

ORDER OF APPELLATE DIVISION APPEALED FROM 312

At a Term of the Appellate Division of the Supreme Court, of the State of New York, held in and for the Third Judicial Department of said State, at the Appellate Division Court Room, in the City of Albany, on the 19th day of March, A. D., 1912.

Present: HON. WALTER LLOYD SMITH,
Presiding Justice.

HON JOHN M. KELLOGG,
HON. JAMES W. HOUGHTON,
HON. JAMES A. BETTS, 313
HON. GEORGE F. LYON,
Associate Justices.

In the Matter of the Designation of the Candidate of the Democratic Party for State Committeeman in the Thirdty-third Senatorial District.

JOHN B. TROMBLEY,
Petitioner and Appellant.

314

The appeal from the order made by Mr. Justice Henry T. Kellogg in the above enttiuel matter on March 14th, 1912, and entered in Clinton County Clerk's office on March 15th, 1912, dismissing the above entitled proceeding coming on to he heard, and after hearing Mr. Thomas F. Conway counsel for the petitioner and appellant in support of the appeal and Mr. Edgar T. Brackett, counsel for a committee which designated John Anderson, Jr., as the candidate of the Democratic party to be placed

Digitized by Google

315 upon the official ballot to be used at the spring primary election of 1912, in opposition thereto and due deliberation had thereon, now on motion of John B. Riley, attorney for petitioner and appellant, it is

Ordered, that the said order of Mr. Justice Kellogg appealed from as aforesaid be and it hereby is reversed without costs. (Houghton and Kellogg, JJ. dissenting).

It is further ordered that the designation of John Anderson, jr., as the candidate of the Democratic party for the position of State Committeeman to be placed upon the ballot to be used at the
316 Spring Primary Election of 1912, a certificate of which designation or nomination was filed in the office of the Secretary of State on March 5th, 1912, be and is hereby is declared to be irregular and unauthorized and the said certificate is hereby vacated and annulled.

JOSEPH H. HOLLAND,
Clerk.

A copy
Joseph H. Holland,
Clerk.

317

Digitized by Google

NOTICE OF APPEAL TO COURT OF APPEALS

SUPREME COURT—County of Clinton.

IN THE MATTER
of
The Review of the Action of the Committee which designated John Anderson, Jr., as a candidate for member of the Democratic State Committee in the Thirty-third Senatorial District.

SIRS:

Take Notice; Daniel J. Finn hereby appeals to the Court of Appeals from the order of the Appellate Division, Third Department, entered in Clinton County this day, reversing the order of Mr. Justice Kellogg.

Dated, March 20th, 1912.

DANIEL J. FINN,
Attorney for Appellant,
Glens Falls, New York.

T. CLERK OF CLINTON COUNTY, N. Y., and
J. B. RILEY, Esq.,
Attorney for John B. Trombley.

Digitized by Google

321 **OPINION OF MR. JUSTICE SMITH**

SUPREME COURT—Appellate Division, Third Department.

In the Matter of the designation of a candidate of Democratic party for State Committeeman in the Thirty-third Senatorial District.

JOHN B. TROMBLEY,
Petitioner and Appellant.

Appearances :

322 For Appellant, THOMAS F. CONWAY.
For the Respondent, EDGAR T. BRACKETT.

SMITH, P. J.

By section 55 of the Election Law, as amended in 1912, party committees now existing are continued until their successors are elected, and are given power to make designations for the Spring primaries in 1912.

By the amendment of this year it was further therein provided that if there be no such committee for a district in and for which designations for candidates for public office and party positions for
323 such primary may be made a committee designation may be made as shall have been provided by the state committee by resolution of which a certified copy shall be filed in the office of the Secretary of State. The State Committeeman is elected from the senatorial district. Upon February 16, 1912, the Democratic State Committee, assuming the act under section 55, as amended provided that for the 33rd senatorial district, for want of a senatorial committee, the statecommitteeman should be elect-

Digitized by Google

ed by a committee composed of three representatives selected by each of the county committees of the three counties composing said district. The three representatives were named by the several county committees and has designated John Anderson, Jr. as the State Commiteeman for the 33rd senatorial district. This designation was filed in the office of the Secretary of the State on the 5th day of March, 1912. Thereafter upon the same day a designation of John B. Trombley was filed in the office of the Secretary of the State purporting to have been made by Nathan T. Hewitt and A. Z. DeLong, claiming to be two of three members of a senatorial committee regularly appointed at the senatorial convention held in 1910. With these two nominations filed the Secretary of the State gave notice to the effect that he would put upon the primary ballot the name of John Anderson Jr. as the nomination having been first filed in his office. The proceeding is brought under section 56 of the Election Law to summarily review both the determination of the Secretary of State and the action of the committee appointed by several county committees of the district pursuant state committee.

The first question raised is as to the jurisdiction of a judge in the fourth judicial district to review a determination of the Secretary of the State, made as it is claimed, in the third judicial district. The contention that the act of the Secretary of the State may be reviewed in the fourth judicial district finds some support in the Fairchild case, 131 N. Y., 357. If, however, the action of the Secretary of State be deemed to have occurred in the third judicial district and, hence, not reviewable in the fourth judicial district, nevertheless the determination of this committee appointed pursuant to the

Digitized by Google

327 direction of the state committee was made in the fourth judicial district and should be there reviewed. The learned judge has put the denial of relief to the petitioner upon the ground that the writ to review the action of this committee is only given upon the assumption that it was a lawful committee and if a lawful committee the nomination made thereby was valid. To this proposition I can not agree. It is not claimed here that if a senatorial committee existed the state committee was authorized to direct the nomination of a state committeeman from the 33rd district to be made by any other committee. If we hold that the facts
328 establish the existence of a senatorial committee in that district we must hold that the act of a committee appointed pursuant to a resolution of the state committee was void. It does not follow, however, that the committee did not exist under the appointment regularly made by the Democratic State Committee authorized by law to make the same in case of the non-existence of a senatorial committee which fact was determined by the state committee. The committee, therefore, which nominated John Anderson, Jr. was an existing committee whose acts could be summarily reviewed under section 56 of the Election Law, even though upon re-
329 view of its acts the court should determine that the conditions did not exist which authorized its appointment. Its determination therefore, that such condition did exist if such determination may be implied and in any event its determination as to the appointment of a state committeeman may in this proceeding by the special term in the fourth district be adjudged void and of no effect. The right of review given by section 56 is necessarily summary and the Court should not unnecessarily

Digitized by Google

circumscribe that right by a strict construction 330
which would render it ineffectual. Within both the letter and the spirit of the act the remedy in the case at bar should be allowed to be pursued in the fourth district where all the parties interested in the controversy reside, and tell the transactions out of which the controversy arises have taken place.

These considerations bring us to the fundamental questions as to whether there existed in this senatorial district a senatorial committee which under the law which authorized to make a nomination of a state committeeman to represent that district. This fact was not 331
determined by the judge below. By rule 3 of the general rules of practice as amended in 1910, we are authorized to look to the opinion of the court to find the ground upon which the order is made in the absence of a statement of such grounds in the order itself. It is conceeded by the affidavit of both parties that a senatorial committee was in fact created. It is claimed on behalf of the respondent here that the power of that committee is limited to the filling of vacancies. Affidavits have been read on the part of the appellant to the effect that it was appointed generally. Newspaper 332
accounts of the minutes of the convention given at the time of the convention would seem to indicate the appointment of a senatorial committee with general powers, including the power to call a convention. There seems to be no reason why after the appointment of such committee its powers should have been limited. The existence of such committee was important for the purpose of calling the next senatorial convention. The absence of any reason for limiting the powers of this committee,

Digitized by Google

333 and the existence of reasons for giving it general powers, and the accounts of the convention given at the time would seem to corroborate the affidavits of the appellant, and lead to the conclusion that the committee was appointed with general powers as a senatorial committee, and, as such, as the power to name a state committeeman.

In determining this question of fact we are required to consider the determination of the Democratic State committee, but are not to be controlled thereby. It does not appear and is not even claimed on its argument that the determination was made after any investigation or with the opportunity to
334 the parties interested to present the facts. In the absence of such evidence before the party committee its determination is not convincing.

We have considered other objections made by the respondent to the claims of the appellant here, and while, for lack of time, they will not be discussed in this opinion, we will simply say that upon examination we think these objections are not well founded.

The order should, therefore, be reversed, the determination of the committee designating John Anderson, Jr. as state committeeman should be annulled, and the designation of John B.Trombley
335 should be approved.

Digitized by Google

DISSENTING OPINION OF MR. JUSTICE HOUGHTON

336

SUPREME COURT—Appellate Division, Third Department.

In the Matter of the Designation of the Candidate of the Democratic Party for State Committeeman in the Thirty-third Senatorial District.

JOHN B. TROMBLEY,
Petitioner and Appellant.

Houghton J. (dissenting):

337

I dissent from the decision about to be made for the reasons stated by the learned court below, and also for the further reason that section 56 of chapter 891 of the laws of 1911, commands courts to consider the action and determination of the regularly constituted party authorities, and there being no proof in the record that the Democratic State Committee was deceived in deciding or that it did not fairly determine that the thirty-third senatorial district did not have a general committee empowered to designate a candidate for State Committeeman, its action in that respect should be deemed conclusive. Political parties are mere aggregations of individuals having more or less similar views respecting governmental affairs. Membership in a party involves no property right. The rules, therefore, which a party makes in conformity with or not contrary to the statute become its laws and the determination of its committees acting within their powers become party decrees and judgments. For aught that appears in the moving papers there may have been a hearing before the State

338

Digitized by Google

339 Committee and the same facts now presented may have been adduced and passed upon and a determination reached that the senatorial committee appointed in 1910 was a mere committee to fill vacancies, having no general power to call convention or to make designations under the primary law. The burden was on the appellant to show there was no such hearing and determination. Having failed to do so this Court should assume that the state committee, which is the supreme authority of the party, had decreed, after proper hearing, that the committee designating appellant had no authority so to do, and should treat such decree as binding and con-
340 clusive. For these reasons, as well as those given by the court below which need no elaboration because a mere statement of them shows their conclusiveness, irrespective of the merits of the controversy, I think the determination should be affirmed.

STIPULATION THAT APPEAL BOOK IS CORRECT

SUPREME COURT—County of Clinton.

IN THE MATTER

341 of

The Review of the Action of the Committee which Designated John Anderson, Jr., as a candidate for Member of the Democratic State Committee in the Thirty-third Senatorial District.

It is Hereby Stiuplated and Agreed, pursuant to Section 3301 of the Code of Civil Procedure, that

Digitized by Google

the foregoing is a true and correct copy of all the papers in the above entitled proceeding commenced before Mr. Justice H. T. Kellogg, and also a true copy of the order of the Appellate Division and of the notice of appeal to the Court of Appeals and the opinions of Mr. Justice Smith and Mr. Justice Houghton written in the Appellate Division, all of which are duly filed in the office of the Clerk of the County of Clinton, and that the foregoing are true and correct copies of the whole of said papers and each of them, and the certificate of the Clerk of the County of Clinton is hereby waived. 842

Dated March 27th, 1912.

843

JOHN B. RILEY,
Attorney for Respondent,

DANIEL J. FINN,
Attorney for Appellant.

THOMAS CARMODY,
Attorney General,
Attorney for Secretary of State.

Digitized by Google

Digitized by Google

IN THE

COURT OF APPEAL

OF THE STATE OF NEW YORK

In the Matter of the Summary Review under Section 56 of the Election Law, of the Proceedings by which John Anderson, Jr. was designated as the candidate for Member of the Democratic State Committee in, and for, the Thirty-third Senatorial District.

APPELLA
BRIE

This is an appeal by Daniel J. Finn from order of the Appellate Division of the Third partment, reversing an order theretofore m by Mr. Justice H. T. Kellogg, which Jud order denied the application of John B. Tr bley, the Respondent. (See Notice of Appea this Court, fols. 318, 319, Order Appellate Di ion, fols 312 to 317; Order of Judge Kellogg, f 6 to 12).

The order of Judge Kellogg was made at S nectady on the 14th day of March, 1912, denied the petition of said Trombley for a s mary review of the proceedings by which J

Digitized by Google

Anderson, Jr., was designated as the candidate in the Thirty-third Senatorial District of the State, for the position of Member of the Democratic State Committee for that District (See Order, fols. 6 to 12; Notice of Appeal to Appellate Division, fols. 1 to 5).

The proceeding comes up under Section 56 of Chapter 891 of the Laws of 1911, being the Election Law. That section, so far as it affects any question here raised, reads as follows:

"Sec. 56. Contests; Judicial Review. Any action or neglect of the officers or members of a political convention, or committee, or of any inspector of primary election, or of any public officer, or member, with regard to the right of any person to participate in a primary election, convention, or committee, or to enroll with any party, or with regard to any right given to, or duty prescribed for, any voter, political committee, political convention, officer or member, by this article, shall be reviewable by summary proceedings, upon the petition of any person aggrieved thereby, or upon a petition presented by the chairman of any political committee, which summary proceedings may be instituted before the Supreme Court or a justice thereof, within the judicial district which the transaction, act, or neglect of duty took place. Such proceeding shall be heard upon such notice as the Court, or justice thereof, shall direct. In reviewing such action or neglect, the Court, justice or judge, shall consider, but not be controlled by, any action or determination of the regularly constituted party authorities, upon the questions arising in reference thereto and shall make such decision

Digitized by Google

' and order as, under all the facts and circum-
' stances of the case, justice may require."

Proceeding under this section, John B. Trombley presented to Judge Kellogg a petition which was, in fact, unverified, although it had at the end a jurat proper for the verification of an affidavit, such jurat being certified as of the 7th day of March, 1912 (See Petition, fols. 18-28). In this petition Mr. Trombley sets out that he is an enrolled democratic elector of the Thirty-third Senatorial district, and of Clinton County, and that a Senatorial Convention for the Thirty-third District was held in the City of Plattsburg on or abou the 3rd day of October, 1910, said district comprising the counties of Clinton, Essex and Warren that having nominated a candidate for senator, in accordance with the custom of the party a Senatorial Committee consisting of three members, one from each county, was named and given the usual powers to call subsequent Senatorial conventions. This committee was Nathan T. Hewitt of Clinton County, B. J. Maguire of Essex, and A. Z. Delong of Warren, (fols. 19 to 22).

By an amendment to the election law of 1911, Chapter 4 of the Laws of 1912, it is provided by Section 55 that party committees existing at the time the amendment takes effect shall continue until their successors are elected as provided in the amendment, and shall have to power to make designations for the spring primaries in the year 1912 ' but
' if there be no such committee for a district in an
' for which designation of candidates for public
' offices, or party positions for such primary may
' be made, a committee designation may be made

Digitized by Google

' as shall have been provded by the statec commit-
' tee of the party by resolution, of which a certified
' copy shall be filed in the office of the Secretary of
' State."

The petition then states further that the committee thus appointed at the Senatorial Convenion in October, 1910, in pursuance of a call, met on the 4th day of March, 1912, and organized, and designated the petitioner as the democratic candidate for member of the state committee for said district, to be voted for at the primary election March 26th, 1912, and that the designation was filed in the office of the Secretary of State March 5, 1912, (fols. 22, 23).

It is provided by section 51 of the election law that the certificate of nomination having been filed with the Secretary of State, he shall, at least seven days before the primary election, send his certificate to the several custodians of primary records, setting forth the names and residences of such candidates, and the titles of the offices for which they are named, and the names of the party upon whose primary ballot they are to be placed.

The petition proceeds that, on the 4th day of March, 1912, three delegates from each of the counties of the district, assuming the right to act as the committee to designate the democraic candidae for said district, met at Keeseville and designated one John Anderson, Jr., of Newcomb, Essex County, as the democratic candidate for state committeeman for said district, said designation being in the form of a certificate signed by Daniel J. Finn chairman, and P. H. McNulty secretary, filed with the Secretary of State March 5, 1912, and that the designation is illegal (fols. 26,

Digitized by Google

27); that on the same day objections were filed to this designation of Anderson by an enrolled democratic voter of Clinton County (fols. 23, 24).

Annexed to the petition are various affidavits (fols. 29 to 90). The protest filed with the Secretary of State against the designation of Anderson appears at fols. 90, 94. These papers were served upon Mr. Finn, the chairman of the committee that designated Anderson, together with an order to show cause at the Court House in the City of Schenectady, March 13, 1912, at five o'clock, it not being stated before whom or what court such cause should be shown, (fols. 12 to 17) and it was provided that service of the papers should be made personally on Mr. Finn, or upon the secretary of the committee, or, if personal service could not be had, by leaving at the residence (fols. 14, 15). Notice to the Secretary of State was provided for (fols. 15, 16) and further provision was made that service by mail on John Anderson Jr., at Newcomb, should be made (fol. 16).

On the return of the order to show cause, Mr. Finn, the chairman, appeared in person and by counsel, and filed various objections to the proceeding, (fols. 9 4to 119). Thereupon, although they never had been served and no opportunity was had to answer them, the petitioner read various other affidavits and papers, in support of his petition (fols. 126 to 176).

In opposition to the motion there were read a number of affidavits (fols. 177 to 306). The various certificates of nomination were also read by the respective parties and appear in the record.

At the meeting of the Democratic State Committee held in the Ciy of New York, on the 16th

Digitized by Google

day of February, 1912, a resolution was adopted which, among other things, contained the following clause, " By reason of the fact that there are ' no existing senatorial district committees in the ' twenty-third, twenty-fifth, thirty-third, fortieth, ' forty-second, forty-third, forty-fourth and ' forty-seventh senatorial districts, designations ' in these districts shall be made as follows: In ' each said Senatorial District the members of ' the county committee within each assembly district shall choose three persons from said assembly districts who, together with three members ' from the other assembly districts within such ' senatorial district, shall constitute the Senatorial district designating committee, and such senatorial district desgnatng committee shall make ' designation of the party candidate for member ' of the State Committee from such district, to be ' voted for at the official primary on March 26, ' 1912." (fols. 197, 198).

The controversy between the parties is based upon the contention of the petitioner, Mr. Trombley, respondent here, that there was a general senatorial committee in existence when the amendment of 1912 went into effect, which amendment continued such existing committee, the appellant claiming that there was no such committee, the only one appointed by the Senatorial Convention of 1910 being a committee to fill vacancies that might occur in the ticket of 1910 The respondent was named by the three individuals who were named as a committee to fill any vacancies, he claiming that, besides the power to fill vacancies, they were also given the powers of a general senatorial committee, and, therefore, came within the

Digitized by Google

category of committees preserved by the act of 1912. Anderson was named by three members from each of the three counties of the district named as designating committees, in pursuance of the resolution of February 16, 1912, adopted by the State Committee.

The appellant, in the courts below, attacked, as he does attack here, the designation of Mr. Trombley, as irregularly made and without force, claiming among other things that the committee which named him was not called together upon fifteen days notice, as is required by the statute, (Election Law, Chapter 891, Laws, 1911, Section 47). There was no waiver of such notice by the members of the committee.

The facts with respect to the designation of Mr. Trombley are these, McGuire, one of the committee to fill vacancies appointed by the convention of 1910, sent out a notice asking the committee to meet at Keeseville on the 4th day of March, 1912. This call was issued by McGuire upon the suggestion of P. H. McNulty, they thinking at the time that the committee on vacancies named by the convenion of 1910, had power to make the designation, (fols. 181 to 184, 195, 196).

McGuire and McNulty learning afterward that the vacancy committee had no such powers, (fols. 183, 186, 1907). McGuire did not attend the meeting of the committee thus called (fol. 184). The notice sent out by McGuire was sent to Hewitt of Clinton County, who was a member of the vacancy committee and to Daniel P. Delong of Warren, who had no connection therewith, nor any position of any kind with respect to the transaction, A. Z. Delong being the member of such vacancy com-

Digitized by Google

mittee which, as respondent claims, was also the regular Senatorial Committee (fol. 183).

Notwithstanding the fact that no notice had been sent to A. Z. Delong, he and Hewitt, on the 4h day of March, 1912, did meet, asking McGuire to meet with them, which he declined to do, and designated the respondent as the candidate for State Committee. No waiver of the fifteen days notice of the meeting of the commitee was ever made by any member thereof, so far as shown, certainly none was ever filed with the secretary of State.

The notice thus sent out by McGuire did not contain any time of the day when the meeting would be held (fols. 54, 55). The designation of the committee who named John Anderson, Jr., as the candidate, was the one first filed in the Secretary of State's office (fols. 261, 262) and, later, in the same day, the designation of Mr. Trombley. The Secretary, having announced that he should certify to the proper officials the designation first filed, the proceeding was instituted to prevent the cerification of Anderson, and to require that of the petitioner.

John Anderson, Jr. named as the candidate for member of the State Committee by the proceeding defended here by the appellant, did not appear in the courts below and, so far as shown by the record, no notice was ever given to him as required b the order to show cause. The proceedings having been dismissed by the Judge in the first instance (fols. 6 to 12), the petitioner, Trombley, appealed to the Appellate Division (fols. 1 to 5) where the order dismissing was reversed (fols. 312 to 317) Justices Houghton and Kellogg dissenting, (fol.

Digitized by Google

315) whence the appellant, Daniel J. Finn, the Chairman of the Senatorial Committee which designated Anderson as State Committeeman, (fols. 14, 24) to whom, the original order to show cause ran (fol. 14) has appealed to this Court (fols. 318, 319).

The order of the Appellate Division should be reversed.

I

The court should determine the questions here presented notwithstanding the fact that the election of Trombley as a member of the State Committee has been had

1st: The matter, and the questions, are of sufficient importance to require their determination in the highest court, to prevent future embarrassment in the district to which the controversy relates, and to settle the questions upon which there may arise conflicts in the decisions of the Supreme Court.

Matter of Madden, 148 N. Y., 136, 139.
Matter of Fairchild, 151 N. Y., 359, 361.

2nd: The position of member of the State Committee has now been constituted an office, election to which, duties of which and everything pertaining to which, is prescribed by Statute. This being so, the appellant, on behalf of Anderson, has a right to review and set aside the erroneous result of the court below, and, if Anderson finds any one intruding into the office to which he alone was properly nominated, he can maintain quo war-

Digitized by Google

ranto proceedings to recover his place and his rights. See Sec. 33 of Code.

3rd: By section 39 of the Election Law, the entire election of a State Committeeman can be reviewed by a proceeding under section 56.

Chapter 4, Laws 1912, section 3, which amends section 39.

This preliminiary wrong should, therefore, be righted.

II

The original application below was not made in the proper judicial district. The proceeding here was taken to review the action of the Secretary of State, who had given notice that he would certify to the proper officials the nomination of John Anderson Jr.

The action of the two committees who designated the two candidates for State Committee had been completed and the results of their work had been filed. There was nothing further for either of such commtitees to do, or that they could do. The only remaining thing to be done was that the Secretary of State should certify the nomination of some one to the proper officials, so that the name would be placed upon the official ballot for the primary election on March 26th.

The proceeding, therefore, goes, and can only go, to a direction to the Secretary of State to certify one of the names, It is, therefore, the action of the Secretary of State that is to be controlled by the order made. Such being the case, it is

Digitized by Google

provided in section 56 that the proceeding must be instituted before the court, or justice thereof, "within the judicial district where the trans-'action, act, or neglect of duty took place."

The act of the Secretary of State in announcing that he was going to certify Anderson, the filing of the certificate in the Secretary of State's office naming Anderson, the certification by the Secretary of State, of Anderson, if ever made, all these were done, in the County of Albany, which is in the third judicial district, and not in the fourth, where the proceeding was instituted.

It comes, therefore, that the order denying the appellant's petition was properly made and the judge in holding that it was not the proper district in which to apply, decided correctly

The respondent relied, in his contention, upon the case Matter of Fairchild, 151 N. Y., 359, and claimed that that decision should control the Justice below. That was a proceeding to review the determination of the Secretary of State, upon a contested certificate of nomination. The statute authorizing the proceeding provided, "Any ques-'tions arising with reference to any devices, or 'to the political party, or other name designated, 'in any certificate of nomination filed pursuant to 'the provisions of this section, or of section 57 of 'this article, or with reference to the construc-'tion validity or legality of any such certificate, 'shall be determined in the first instance by the 'officer with whom such certificate of nomination 'is filed. Such decision shall be in writing and a 'copy thereof shall be sent forthwith by mail, by 'such officer to the committee, if any, named upon 'the face of such certificate and also to each can-

Digitized by Google

'didates nominated by any certificate of nomina-
'tion affected by such decision. The Supreme
'Court, or any justice thereof, within the judicial
'district, or any county judge within his county,
'shall have summary jurisdiction upon com-
'plaint of any citizens, to review the determina-
'tion and acts of such officer."

The Court held, Judge Martin writing, that, under the language quoted, the application should be made in the district where the candidates resided and not where the Secretary of State did the act.

The language of that act was equivocal and was capable of two constructions, and the Court held that, considering the burden of litigation that would be thrown upon the judges of the Third Judicial District, and the fact that the court on review could hear the matter anew, which would require witnesses to attend from long distances at great expense, the legislature did not intend that the matter should be held in the Third Judicial district.

The section which was then under consideration is now section 125 of the Election Law. The language of the present section 56 is materially different. It is not at all equivocal. It is clear, plain and distinct and there is no question of construction here.

In the Fairchild case, the Secretary of State had jurisdiction to determine the controversy in the first instance. He was empowered to hear and determine, and the whole controversy could be opened up anew in court, upon a review.

In the case at bar, the Secretary of State has no power or authority to make any determination.

Digitized by Google

His act is wholly ministerial, and if, in a proper case, he refuses to certify, he can be compelled to do so, either through mandamus proceeding, or a proceeding taken under the present section 56 of the Election Law. There can be no question of the power of the Legislature to restrict the area in which the application may be made. Here is an entirely new remedy provided by the act and, in giving such a remedy, the legislature had the right to say where it could be invoked. It might have said the proceeding should be had only in a County Court, or any tribunal selected by itself. This in no way impairs nor limits, the general jurisdiction of the Court, nor seeks to. It only affixes to a new remedy, a prescribed, exclusive procedure.

III

If the respondent is right in his contention as to the facts and the position he takes that the body that named John Anderson was not a committee, then there is no review possible, because John Anderson Jr. was named as a candidate by a body of men who were not a committee and had no standing whatever, and their action is not subject to review under the act. The respondent's contention, literally, cuts off the limb between himself and the tree.

These things may be reviewed under the provisions of section 56: "Any action or neglect of,

'(a) the officers or members of a political con-
' vention, or committee, or

Digitized by Google

'(b) of any inspector of primary election, or

'(c) of any public officer or member with 'regard to the right of any person to participate 'in a primary election convention, or committee, 'or to enroll with any party, or

'(d) with regard to any right given to or duty 'prescribed for any voter, committee, political 'convention, officer, or member by this article."

The only provisions of this section that can be held applicable here are those which relate to the review of the action of a committe. Now these men who designated John Anderson Jr., either were, or were not, a committee. If they were a committee, then their designation is correct and perfect and complete and regular and legal. If they were not a committee, then there is nothing to be said on the subject, because it is only the action of a committee that can be reviewed. In other words, the act provides for the review of some erroneous action of a true committee, but it does not provide for a review to determine the question of who constituted a legal committee,—certainly not under the guise of a review of something the committee has done. The respondent must be remanded to some other proceeding to test that fact. The Judge in Chambers in thus deciding, as one of the grounds on which the application was denied, decided correctly and his order should have been affirmed for that reason, if for no other.

Digitized by Google

IV

The respondent was not a person aggrieved so that he could institute the proceeding within the terms of section 56 authorizing a review. Whatever proceedings may be reviewed summarily, it must be done upon the petition of "any person aggrieved" or "a petition presented by the chairman of any political committee." There is nothing in the petiton, or moving papers, nor anywhere in the record, that shows that Mr. Trombley comes within the last provision, or comes into Court as chairman of a political committee. Indeed, no claim is made that such is the case. He, therefore, must be a "person aggrieved" to have any standing whatever, in court.

How does he claim to be aggrieved here? Manifestly, and it must be, because he claims that he has been properly designated as a candidate for a position, while Anderson, having been improperly designated, may, by his candidacy, deprive him, the respondent, of the place. If, therefore, the appellant was not, himself, properly designated, so that his name should be certified to the proper authorities and go on the primary ballot as a candidate, then he is certainly not aggrivede. Let us see, therefore, in what position Mr. Trombley is.

The contention of the respondents, as, of course, it must be, is that Hewitt of Clinton, McGuire of Essex and Delong of Warren were, and are, the general senatorial committee, which was continued by the express terms of the amendment of 1912. As be-

Digitized by Google

fore said, the appellant insists that they were only the committee to fill vacancies and with no other power. McGuire, of this committee, his attention having been called to it by McNulty, sent out a notice to Hewitt and (not to A. Z. Delong, the other member of the committee, but) to one Daniel P. Delong, asking them to meet at the Commercial Hotel, at Keeseville, on the 4th day of March, he at the time thinking that the vacancy committee had the power to designate the candidate for state committee, by reason of being such committee on vacancies. This notice did not specify any hour of the meeting. Having learned of his mistake and that such committee on vacancies had no such power of naming a candidate for member of the State Committee before the day of the meeting, he did not attend and declined to participate in the action of the committee, but Hewitt and A. Z. Delong, the other members of the vacancy committee, and, as the respondent claims, members of the general Senatorial Committee, did get together and named Mr. Trombley as the candidate for member of the State Committee.

Now, this geeting together of Hewitt and of A. Z. Delong was not regular, nor their action valid, for two reasons:

1st: No notice whatever was given to A. Z. Delong—the notice that McGuire had sent out was to Daniel P. Delong, who was not at all a member of the committee. The section (49) requires that notice of the time, place and purpose of, every meeting to be held to designate candidates, shall be duly mailed to each member of the committee at his post office address, not less than fifteen days before the day fixed for such meeting. Therefore,

Digitized by Google

the meeting was not called with the formalities, and upon the notice, required,—A. Z. Delong having never been notified at all, and no hour of meeting being stated.

2nd: Each such notice (that is notice of the call of the meeting) shall be filed not less than ten days before the day fixed for such meeting in the office in which this designation by the committee of candidates is required to be filed.

With respect to the fact that A. Z. Delong was not notified, the appellant will claim that he attended and that does away with the necessity of notice. But the perfect answer to that claim is, that each other member of the committee has a right to have his fellow members notified according to law. It is not an individual right of A. Z. Delong, so that he can say that he waives any legal notice. Mr. McGuire and Mr. Hewitt had a right to insist that Mr. Delong shall be notified according to law, unless they, too, waive and McGuire has not so waived, even by meeting with the other members. There is nowhere any suggestion that Delong did waive notice further than is comprehended in the fact that he participated in the meeting, but, if it is attempted to spell out that there was any such waiver, it stands that it is not good, because the right to waive was not individual to Delong, and McGuire had a right to insist that the formalities be complied with. He had a right to say that he would not meet with Hewitt and A. Z. Delong in pursuance of a call sent out to D. P. Delong, but not to A. Z. Delong, to which latter it should have gone.

The fifteen days notice calling the meeting of the committee was not filed as required by the

Digitized by Google

statute and no attempt is made to show that it was.

It comes, then, that the two gentlemen who name the respondent as candidate for member of the State Committee were utterly without any legal authority under the statute,—two justices of the peace, or two persons without even so much dignity as attaches to that office, might as well have made the designation

Having no such authority, Mr. Trombley was not legally named and, as he was not legally named, he is not a person aggrieved. Being, therefore, neither a chairman of a committee, nor a person aggrieved, he neither has nor had below any standing in court to attempt to review the designation of John Anderson Jr. as a candidate, or to take any step whatever with respect thereto.

V

The action of the State Committee should be, and should have been below, held as valid, to save the perpetration of an injustice on the democratic electors of the Thirty-third Senatorial District. Under section 56 such action is not controlling, but it is to be considered and it is certainly entitled to great weight.

The section provides that in review the court, justice or judge shall consider, but need not be controlled by, any action of the regularly constituted party authorities.

When the democratic state committee, at its meeting of February 16th, passed the resolution

Digitized by Google

declaring that there was no Senatorial Committee in the Thirty-third district, among others, the supreme authority in the party was taking action in good faith, believing the fact to be as stated and, thereupon, provided the method by which the candidates for, such committee should be selected. It must be presumed that this was done upon sufficient information, or proof. It certainly was not **ex gratia,** nor in bad faith.

Consider a moment the situation. Here is a committee that has been constituted and has designated John Anderson Jr. as the candidate, in strict accordance with the specific directions of this resolution of the supreme authority of the party. Grant everything that can be urged to the argument of the appellant, that the authority to name a new committee exists only where there was no old committee, it still stands that, on the question as to whether there was an old committee, the action of the State Committee must have great, if not final, force and weight. If these directions of the State Committee are to be disregarded, then two of the three counties, which, together, can absolutely name the candidate, were misled by the action of the State Committee and are to be punished by losing their choice, for having literally and strictly obeyed the mandate of the superior body. While it may be done, such a result should not be reached if it is possible to avoid it. Orderly and decent procedure require that, if there is any method by which the action of this Senatorial District can be squared with the action and directions of the State Committee, it should be done.

As is shown by the Fairchild case, supra, prior

Digitized by Google

to this legislation of 1912, the action of the State Committee was controlling without, any possible review or contravention It should still be potential.

Certainly it should stand as valid and binding until there is some reversal thereof, by some direct proceeding brought for that purpose. It was open to any person aggrieved to review that action of the State Committee, but, as it was taken in the first judicial district of the state, such review would have to be in the City of New York. Such resolution of the State Committee was filed with the Secretary of State so that every one had notice thereof. No action has ever been taken in any way to impeach it, or to challenge it. It would be grotesque if the supreme authority of the party, having thus decided and placed on record its determination, there should now be a contrary determination as to the correctness of action taken under it, without an opportunity of the State Committee to be present in court and give its reasons for its decision.

VI

While there is much of conflict in the affidavits read by the parties as to whether the Senatorial Convention of 1910 did in fact name a general senatorial committee, or only the committee to fill vacancies, as required by the statute to be inserted in the certificate of nomination, it is submitted with great confidence that the best of the contention rests with the appellant here, and that the

Digitized by Google

Judge below having denied the motion, his order should not have been reversed. There is no suggestion in the order that it is reversed on the question of fact and it must be presumed that the reversal was on a question of law. The affidavits filed by the appellant are clear, direct and positive, and accord with the probabilties of the proceedings in a democratic convention in a district so hopelessly republican as the one in queston. Indeed, the question of any committee at all was at the time nothing more than a form, as there was nothing of consequence for it to do. The facts were correctly disposed of by the Judge at chambers.

The additional affidavits filed by the respondent (fols. 126-152) should not be considered here, nor the facts therein detailed taken into account. These affidavits were simply read by the respondent on his application for a review without ever having been served upon the appellant, or without the slightest opportunity to contradict them. They should be eliminated from consideration in determining the questions here raised.

VII

The proceeding was not properly initiated in the first instance. There was presented to the court an unverified paper called a petition, (fols. 18-28) with which was served certain affidavits, (fols 29, 94) not one of which affidavits is entitled, or in any way identified as being in the proceeding in queston.

Digitized by Google

It may be conceded that the proceeding may be summary and that it is the intention that there shall be no delay in determining the questions brought up thereby, but there must be some conforming to the ordinary rules by which a party gets into court, and by which he is governed after he gets in. When the statute says that a petition may be presented, it means, and manifestly must mean, in any orderly proceeding, a verified petition. It cannot be that the whole matter can be thrown at the head of a justice of the Supreme Court, without proof, without affidavits, or verification, and still be regarded as a legal investigation. If any such proceeding as this can be sustained on the papers presented, then indeed we have reached a stage of "summariness" that must satisfy the speediest of our present day critics of the courts.

VIII

If the Appellate Division was right in believing that the order of the Judge at Chambers was wrong, it still was error for it to make a final order, declaring the Anderson certificate irregular and vacating and annulling it. In such case, the order should have been reversed and the matter remitted to the Judge, or a Judge, below for further proceedings.

The proceeding below was not a motion—it was a special proceeding and one in which the Judge was authorized to subpoena and examine witnesses.

Digitized by Google

The section (56) says: "The court, or a justice ' thereof, upon such proceeding, shall have the ' right to subpoena and examine witnesses, or, in ' its discretion, to hear and determine the case ' upon affidavits."

The proceeding, therefore, partakes more of the nature of a trial than a motion. The Judge at Chambers dismissed the petition and proceedings on the grounds,

1st: That the action of Mr. Finn and his associates could not be reviewed, unless they formed a committee, and, if they did form a committee, then their action was regular (fol. 307) and

2nd: That the proceeding could not be instituted in the Fourth District, its only object being to review the action of the Secretary of State in certifying Anderson's nomination, and, as that was done in the Third District, and section 56 says that the proceeding must be instituted in the District where the act complained of was done, any attempted review in the Fourth District must fail (fol. 308).

The judge did not, at all, pass on the facts set out in the petition and the various affidavits. Had he taken the view of the questions upon which he dismissed, as did the Appellate Division, then he would have been required to take up the facts. Upon the consideration of them he might have called witnesses—probably would where, as here, there was a sharp conflict. This being so, the analogy is where on a trial the case is dismissed, because the complaint is insufficient in law. Upon a reversal in such case, the Appellate Division can not render final judgment—it must order a new trial below.

Digitized by Google

So here, the judge having erred in dismissing the proceeding on the grounds named, he should have been directed to proceed and consider and decide the facts

Putnam v. Lincoln Safe Dep. Co., 191 N. Y., 166, 176.
Duclos v. Kelley, 197 N. Y., 76, 79, 80.
Elliott v. Guardian, 204 N. Y., 212.

The head note in the Putnam case states concisely and accurately the decision of the Court in this language: "The power conferred upon the 'Appellate Division to modify a judgment upon ap-' peal, is improperly exercised when, upon differ-' ent views of, or inferences from, the facts in evi-' dence it determines the controverted questions ' for itself, incorporates such determinations in its ' order, and renders final judgment accordingly, ' since it has no power to determine contraverted ' questions of fact and to render final judgment ' upon such determination, it being a Court of re-' view possessing no other power when it reverses ' than to order a new trial, where the questions of ' fact may be tried out anew."

The other cases cited are to the same effect.

IX

Finally, when the history of the agitation for, and the legislation providing for, direct primaries is considered, there is every reason why the order of the Judge at Chambers below should have been affirmed, on grounds of public policy. The Court

Digitized by Google

will take notice of the fact that the agitation for direct primaries and the legislation that followed such agitation, and authorized such primaries, was for the purpose of ascertaining the wishes of a party at, or near, the time when an election takes place. It was intended to do away with spring primaries, intended to do away with old committees which, selected at a remote time, were not selected with a view of the position of its members on any pending question, and did not represent fairly the sentiment of the party at the time action was taken. It was intended that the candidates should be nominated with a view of their record on immediately pending questions and that the last opinion of the people on the subject should be given as near to the time of nomination as might be.

Take the specific case here. A committee was named in 1910, if the appellant's contention is correct. No one dreamed that that committee was to have any power of naming a candidate for State Committee, nor made the slightest inquiry, nor gave any though to what the position of the members of that committee of 1910 would be on the subject. On the other hand, the designating committee which named Anderson was selected within a month of the time when Anderson's designation was made. It represented, and represents, the last and best thought of the democratic electors of the district on the subject. That wish should not be overruled by digging up from the remote past some committee that, on the merest technicality, can defeat the will of the electors.

Digitized by Google

The order of the Appellate Division should be reversed and that of the Judge at Chambers affirmed.

Saratoga Springs, N. Y.,
May 26, 1912.

DANIEL J. FINN,
EDGAR T. BRACKETT,
Counsel for the Respondent.

Digitized by Google

Stillman Appellate Printing Co., 51 Broad st., N. Y.

Argued by
Thomas F. Conway,
Counsel for Respondent.

FOR

In the Court of Appeals.

In the Matter

of

The Review of the Action of the Committee which designated John Anderson, Jr., as the candidate for Member of the Democratic State Committee in the 33rd Senatorial District.

JOHN B. TROMBLY,
Petitioner and Respondent.

DANIEL J. FINN,
Appellant.

June, 1912.

BRIEF FOR RESPONDENT, JOHN B. TROMBLY.

Appeal by Daniel J. Finn, Chairman of an alleged Senatorial District Committee, from an order of the Appellate Division, Third Department, reversing an order made by Mr. Justice H. T. Kellogg and granting the application.

This proceeding was begun under Section 56 of the Primary Election Law (Chap. 891 of 1911, as

Digitized by Google

amended by Chap. 4 of 1912), to review the action of an alleged Committee of the Democratic Party in the Thirty-third Senatorial District in designating one John Anderson, Jr., as the candidate of the party for the position of State Committeeman from that District, and to review the action of the Secretary of State in certifying the name of said Anderson to the local authorities to be placed on the official ballot to be used at the Spring Primary, held on March 26, 1912.

The proceedings were begun by John B. Trombly, an enrolled Democratic voter, residing in the 33rd District, before Hon. H. T. Kellogg, a Justice of the Supreme Court in and for the Fourth Judicial District. The venue of the proceeding was Clinton County, one of the counties making up the 33rd District. Trombly, the petitioner, is not only an enrolled voter, but also Chairman of the Democratic County Committee of Clinton County, and the person designated as the candidate for State Committeeman for the 33rd District by another committee of the party, claiming—and found by the Appellate Division—to be the regular Senatorial District Committee for the 33rd District.

The parties to the proceeding adverse to the petitioner were Finn and McNulty, chairman and secretary of the committee which designated Anderson, the Secretary of State, and Anderson, the nominee. Finn alone contested the application (fol. 10). The Secretary of State appeared but did not oppose (fols. 9, 119-125). Upon the hearing affidavits were read in opposition (fol. 10), but no request was made for any opportunity to submit further proofs. Mr. Justice Kellogg dismissed the petition:

First. As against the committee, because

(a) If it was not the lawful committee, then its act was a nullity and not subject to review;

Digitized by Google

(b) If it was the lawful committee, its action was regular.

Second. As against the Secretary of State, because brought in the wrong district.

The petitioner appealed, and the Appellate Division reversed the order, granted the application and declared the designation of Anderson illegal, and annulled his certificate.

Anderson did not contest and does not appeal.

The controversy is, of course, as to which committee is the legal one.

Facts.

The following facts are, we submit, established by the decision below:

(1) In October, 1910, there was held in the 33rd District a Convention of the Democratic Party, which, among other things, appointed a Senatorial District Committee, consisting of three persons, with all the powers and authority usually possessed by such committees under the usage of the party.

(2) On February 16, 1912, the Democratic State Committee adopted a resolution declaring that there was no party committee in the 33rd District, and directing each County Committee within the District to choose three persons, who, together with the persons similarly chosen from the other Assembly Districts, should constitute the Senatorial District Designating Committee, with power to designate the candidate for State Committeeman to be voted for at the Spring Primary on March 26, 1912.

(3) The Assembly District Committees in the 33rd District selected a Senatorial District Desig-

Digitized by Google

nating Committee in accordance with the resolution of the State Committee.

(4) On March 4, 1912, the committee created by the Convention of October, 1910, met, on due notice, two of the members attending and the third having had due notice, and designated John B. Trombly, the petitioner herein, as the candidate for the party position of State Committeeman from the 33rd District, and caused the certificate of such designation to be filed with the Secretary of State on March 5, 1910, at 5.30 P. M.

(5) The committee created under resolution of the State Committee also met on March 4, 1912, and designated John Anderson, Jr., as the candidate for the position of State Committeeman, and caused a certificate of such designation to be filed with the Secretary of State on March 5, 1912, at 10.20 A. M.

(6) On or about March 6, 1912, the Secretary of State notified the chairman of the committee appointed by the October Convention that the designation of John Anderson, Jr., as the candidate for State Committeeman for the 33rd District would be certified by him to the custodian of Primary records, because first received at his office.

This proceeding was begun the next day, March 7.

The court will, of course, take judicial notice that the Spring Primary has been held, and that Trombly has been elected Democratic State Committeeman for the 33rd District.

Digitized by Google

FIRST.

The appeal should be dismissed.

The controversy was as to whose name should go on the official ballot to be voted for at the Spring Primary, held March 26, 1912.

This Primary has been held and Trombly has been elected. It matters nothing now how his name was placed on the ballot. The electors had a right to vote for him whether his name was on the ballot or not. Even if his name was improperly placed there by the officials whose duty it was to prepare it, yet the voters had the right to adopt and ratify the act and did so by voting the ticket with his name on it. Any action which can now be taken by the Court will have no practical results. The Primary election has been held and what was then done cannot now be undone by any order made in this proceeding. Neither can the Secretary of State now certify any name to the local authorities as the candidate for the party position.

This Court will not decide questions which, by lapse of time, have become academic.

People *ex rel.* Geer v. Common Council of Troy, 82 N. Y., 575;
Matter of Manning, 139 N. Y., 446;
Williams v. Montgomery, 148 N. Y., 519;
Matter of Norton, 158 N. Y., 130;
Matter of Croker, 175 N. Y., 158;
Matter of Kehoe, 180 N. Y., 519.

Digitized by Google

SECOND.

The Appellate Division had power to find the facts.

The learned justice before whom the proceeding was instituted received all the proofs either side offered. He then, without determining the facts, dismissed the proceeding, because he held that, if, as the petitioner claimed, the Committee which designated Anderson was not the lawful Committee, its acts were not subject to review.

The Appellate Division, coming to the conclusion that the learned Justice was in error on this question of law and that the Court has power under the Primary Law to review the action of the Committee, then proceeded to do what the Justice below ought to have done, but did not,—that is, to determine the facts in regard to the creation of the Senatorial Committee by the Convention of 1910, and the powers conferred on it, and having found these facts in favor of the petitioner, not only reversed the order of the court below, but made the final order in his favor, which the court below ought to have made.

We submit that this was within the power of the Appellate Division, and that it was not bound to send the matter back for a rehearing. We are not unmindful of the rule that facts are to be found in the first instance by the Trial Court, but we submit that this is a rule of practice and procedure rather than of power or jurisdiction. The Constitution creates a single Supreme Court. All the powers possessed by that court, except as otherwise limited by law, might have been exercised by the late General Term and may now be exercised by the Appellate Division.

Syracuse Sav. Bank v. S. C. & N. Y. R. R Co., 88 N. Y., 110;

Digitized by Google

Matter of Barkley, 42 App. Div., 597; Appeal dismissed, 161 N. Y., 647.
Tracy v. Talmage, 1 Abb. Pr. 460.

In the *Barkley* case, FOLLETT, J., says (page 609):

> "Although the Appellate Division has jurisdiction to hear motions in the first instance, they are not required to, and will not, except in cases where some exigency seems to require that they shall do so in the interest of justice."

In *Tracy v. Talmage* (1 Abb. Pr. 460) MITCHELL, C. J., says:

> "Powers which by statute are granted to the Supreme Court may be exercised by the Court at either term, unless there be some statute specially restricting the Court."

Section 56 of the Primary Law, under which this proceeding was begun, authorizes a "summary proceeding" to be instituted before the "Supreme Court, or a justice thereof." The nature of the controversy was such that the proceeding must be speedily decided or it became useless. The matter was before the Appellate Division on March 18, and was decided on the 19th. The last day on which, under the statute, the Secretary of State could act in certifying the designation of candidates to be placed on the primary ballot was March 19th—the day on which the order of the Appellate Division was made. (Primary Law, §51.) Unless the whole proceeding was to be nullified, it was necessary for that court to decide the case and make a final order. This, we submit, it had the power and jurisdiction to do, even if such decision involved—as it did—the determination of the facts.

Had the case been one in which there was a constitutional right to a jury trial, the case might have been different. So also, if the Justice had dismissed

Digitized by Google

the proceeding upon the preliminary objections taken, without receiving all affidavits and proofs offered by the respective parties. As the case was originally heard, the objections afterwards sustained were taken, and then all proof offered was received; then it was stipulated that the case should be disposed of *on the merits.* (fol. 304) It was further stipulated that, no matter what the decision, an appeal should be at once taken to the Appellate Division, "to the end that whatever de-"cision may be made in this proceeding may be re-"viewed by the Appellate Division at the term now "sitting, in order that proper action may be taken."

The stipulation for a decision on the merits called for a determination of the facts and was a plain admission by both parties that the evidence necessary to such determination was before the Court. The learned Justice did not decide the case on the merits, as the parties had agreed in open court he should, but dismissed the proceeding on a point which had nothing to do with the merits. Of course when the learned justice came to the conclusion that he did not have jurisdiction of the subject matter he could not consistently exercise such jurisdiction by deciding the merits. But the stipulation did not stop here; it provided that the decision, whatever it might be, should be reviewed by the Appellate Division then in session, *"in order "that proper action may be taken."* This, we submit, was an agreement that between the two courts —the Trial Justice and the Appellate Division— such judicial action should be taken as should dispose of the merits of the controversy and enable the Secretary of State to do his duty according to law. Of course, consent cannot confer jurisdiction of the subject matter, but we submit that there is here no question as to the power and jurisdiction of the Appellate Division, not only to review, but

Digitized by Google

to decide facts. The power granted by the Primary Law is given to the "Supreme Court" and such power might be exercised in the first instance by the Appellate Division. It is the Supreme Court.

Conceding, of course, the general rule that the Appellate Division will not determine facts or entertain motions originally—although possessing the power to do so—yet we submit the present case comes within the exception expressed in the *Barkley* case (42 App. Div., 607):

> "When some exigency seems to require that they shall do so in the interest of justice."

THIRD.

The committee created by the October Convention of 1910 was a legal committee and had authority to designate the condidate for the State Committee.

The proof was clear that it had been the practice of the party in the 33rd District for many years past to have a Senatorial District Committee (fols. 131-133). It was and is such a committee as is recognized by section 64 of the Election Law. It was also the committee recognized by section 35 of the Primary Law as a Senatorial District Committee. The Primary Law recognized and preserved the existing party organization. Section 55 is:

> "*Existing Committees continued*: Party committees now existing shall continue until their successors are elected as provided for in this act, and shall have the power to make designations for the spring primaries in the year 1912."

Digitized by Google

An amendment was adopted by the Legislature of 1912, which took effect February 15, 1912, to meet a situation which might exist in districts in which no committee existed, as follows:

> "But if there be no such committee for a district in and for which designation of candidates for public offices and party positions for such primary may be made, a committee designation may be made as shall have been provided by the State Committee of the party by resolution, of which a certified copy shall have been filed with the Secretary of State.

It was under this amendment of 1912 that the State Committee attempted to create a District Designating Committee, which action is under review.

The fact is now established that there was an existing committee in the 33rd District, so that the State Committee had no power under this amendment to do anything. The Primary Law conferred upon the existing committee the power to make the designation for the party position in question (Section 46, subd. 3).

There is, we submit, no doubt but that the committee created by the convention of 1910 was the legal committee for the district and the only committee authorized to designate a candidate for the State Committee. The committee which assumed to designate Anderson, if it had any legal existence at all, had no power to do an act which the Primary Law itself required should be done by the other committee, and the State Committee had no power to invest it with such authority.

Digitized by Google

FOURTH.

The action of the pretended committee is subject to review.

Section 56 of the Primary Law, summarized, is as follows:

> "Any action * * * of the members of a political convention or committee * * * with regard to any right given to or duty prescribed for, any * * * political committee * * * by this Article shall be reviewable by summary proceedings, upon the petition of any person aggrieved thereby, or upon a petition presented by the chairman of any political committee which summary proceeding may be instituted before the Supreme Court or a Justice thereof, within the Judicial District where the transaction, act or neglect of duty took place. * * * In reviewing such action or neglect the Court, Justice or Judge shall consider, but need not be controlled by, any action or determination of the regularly constituted party authorities and shall make such decision or order as, under all the facts and circumstances of the case, justice may require."

It was the position of the appellant upon the original hearing that if the committee had no legal existence there is no authority or necessity for reviewing its action (Folio 99).

The statute (Section 56) was plainly intended to provide a summary and a judicial investigation of contests growing out of nomination for and election to public office. One of the commonest of such disputes is as to which of two rival bodies, calling themselves committees or conventions, is the one which has been lawfully constituted. In such case, one is a lawful body and the other is a usurper. If, when the usurpation is challenged in the courts under the statute the inquiry is defeated by proof

Digitized by Google

that the act complained of is usurpation, then the remedy provided is wholly illusory. But, we submit, this is not the meaning of the law.

In the present case, we have a body of men claiming the right to act as a District Committee and facts might or may exist which would make it a lawful body. It acted under color of right. It asserted itself to be a lawful body, and placed upon the public files a certificate which only a lawful committee has a right to make. Another public officer, who was required by law to recognize the act of the lawful committee, determined to recognize the act of the body in question and, unless the court interfere, effect will be given to an act of usurpation in the same manner and form as if it were a lawful act.

Legal proceedings which challenge directly the validity of some act done and seek to have it annulled by judicial action are not defeated by showing that the act complained of is utterly void, and was from the beginning. A judgment rendered by a court wholly without jurisdiction and, therefore, void, may be reviewed and reversed upon appeal.

Striker v. Mott, 6 Wend., 465.

In *Gillingham* v. *Jenkins* (40 Hun, 594) the Court say:

> "But a void judgment will support an appeal for the purpose of its review and reversal, and it will for that reason be reversed by the Appellate Court."

The determination of a body other than a court, assuming to exercise a judicial function which it does not possess, may be reviewed and reversed on certiorari.

People v. Judges of Suffolk, 24 Wend., 248.

Digitized by Google

In the case cited, an order had been made by certain highway commissioners with respect to a matter as to which they had no jurisdiction, so that their determination was void.

COWEN, J.:

> "An appeal to three judges does not lie from a determination which is void for want of jurisdiction. * * * Suppose a justice of the peace were to try and decide an action of ejectment; would the common pleas have power to review the proceeding on appeal? Clearly the whole would be void. Being out of the statute, the only direct proceeding for redress would be by certiorari. For this there would be no strict necessity, because the judgment might be regarded as a nullity and impeached collaterally. Still this court would perform what is the main office of a certiorari—the keeping of inferior magistrates within the compass of their power. We should, therefore, reverse the judgment of the magistrate. We might have reversed the order of the commissioners as an unwarrantable assumption of power. * * * The writ here is in the nature of a *special quo warranto*, to ascertain by what authority a particular judicial act is done. The writ goes on the assumption that powers have been usurped."

We charge that the act of the pretended Committee is a usurpation. The Committee seeks to avoid a judicial review of its act by admitting the charge and saying, because the act is illegal and wholly void, it is not official action and cannot be reviewed. We submit, on the contrary, that acts of usurpation on the part of political bodies are of all others the acts against which the summary review of the statute is directed. It is in effect what Judge COWEN called a *special quo warranto* to show by what authority the act is done and, if the authority fail, reversal of the act should follow.

Digitized by Google

FIFTH.

The action of the Secretary of State is also properly challenged.

The petition seeks to review, not only the act of the Committee in designating Anderson, but also the act of the Secretary of State in recognizing it as the valid designation (*fols.* 26, 27).

As regards the act of the Secretary of State, the trial court held it could not be reviewed in this proceeding, because the statute which gives the remedy requires it to be sought in the Judicial District where the transaction or act complained of took place, which, as regards the Secretary of State, the court found was Albany County.

The Appellate Division did not pass directly upon this question, but its order may be justified on the theory that the proceeding was maintainable against the Secretary of State even if the action of the Committee be not reviewable.

We submit that the act of the Secretary of State, depending upon the validity of the prior act of the Committee, can most properly be reviewed in a proceeding which challenges the acts of both, hence, as the venue of the proceeding is concededly right as regards the Committee, the Secretary of State was properly joined in the proceeding in the Fourth Judicial District and that venue would have been right—even had the proceeding been against the Secretary of State alone.

The point seems to be covered by *Matter of Fairchild* (151 N. Y., 359), in which it was held that a summary proceeding, under what is now Section 125 of the Election Law to review the decision of the Secretary of State upon conflicting certificates of nomination for Member of Congress, was properly brought in the District where the conflict

Digitized by Google

arose and the parties resided, and an order made by a judge in a proceeding instituted in the Third District, because the Secretary of State there resided, was reversed. In the *Fairchild* case nominations had been made by rival conventions for Member of Congress in the Westchester County District, each convention filing a certificate with the Secretary of State, who, after a hearing, decided in favor of the Fairchild certificate. Ward, the candidate in the other certificate, applied to Judge Edwards of the Third District for an order to review the matter under Section 125 (then 56) of the Election Law.

The only parties to the proceeding as brought were Ward, complainant, and the Secretary of State. Fairchild seems to have intervened. The contest was as to which of two local conventions was the legal and regular one.

> "The only question in either case was which "of the two conventions was regular."

Of course the locality of the two conflicting conventions was Westchester County in the Second District, and the order made by Mr. Justice Edwards in the Third District was reversed for want of jurisdiction. The statute then considered was:

> "The Supreme Court, or any justice thereof within the judicial district, or any county judge within his county, shall have summary jurisdiction, upon complaint of any citizen, to review the determination and acts of such officer."

MARTIN, J.:

> "The language of the statute is uncertain and presents the question within what judicial district or within what county can a justice of the supreme court or a county judge entertain jurisdiction of such a proceeding. Is it the county or district in which the officer making

Digitized by Google

> the determination resides or his office is located, or the county or district where the complainant resides and in which the district is located for which the nomination is made? If the former, then in every case where the nomination was made for a district which included more than one county, all such proceedings would have to be instituted in the Third District. Is it at all probable that such was the intent of this provision? I think not. I think it is not to be supposed that the legislature intended to impose on the justices of the supreme court in the Third District and the county judge of Albany County the entire burden of this class of litigation to the exclusion of all other judicial officers of the State. * * * I am of opinion that the district and county referred to in the statute are those within which the complainant and respondent reside and where the transaction arose which was the subject of the determination."

The *Fairchild* case is also an authority on the other branch of the decision now under review. It is evident that, as between two conflicting conventions or committees, only one is the legal body authorized to act for the party. The other is necessarily a usurper. But this Court found no difficulty in holding that Ward was not properly nominated.

SIXTH.

The statute authorizing a summary review of the acts of political conventions and committees is constitutional.

One of the objections urged below was that Section 56 of the Primary Law, under which this proceeding was instituted, is unconstitutional in that it does not provide that notice shall be given to the

Digitized by Google

person whose right may be affected by the action of the court, and hence is not due process of law.

It is true, as regards the present case, that the law does not require notice to be given to Mr. Anderson, who is the beneficiary of the wrongful and illegal action sought to be reviewed, although as matter of fact notice was duly given him.

Assuming that this notice was of no legal effect, because the law did not require it and that the law does in terms authorize and require a judicial review of the act of the Committee which has designated Mr. Anderson as a candidate for a party position without notice to *him* and without giving him an opportunitly to be heard—what of it?

Neither the "life" nor the "liberty" nor the "property" of Mr. Anderson will be affected, even if, as the result of such review, the action of the Committee in designating Mr. Anderson should be reversed, as it has been, and his name stricken from the ballot. The fallacy of the argument based on the "due process of the law" clause of the constitution is in the tacit assumption that the right to be a "candidate" is property. But we suppose it to be settled that an office is not property, and while the right to be a candidate is "safe from all devices human" (see *Matter of Callahan*, 200 N. Y. 59) yet such right is not a right of property within constitutional definitions. Hence statutes which authorize removal from office without notice to the incumbent are valid.

In *Throop on Public Officers* it is said (Section 345):

> "In this country an office is not regarded as property—nor has the officer any vested rights therein which are within the protection of the United States Constitution or the general provision of a State Constitution forbidding legislative interference with property or vested rights. It follows that the power of the Legis-

Digitized by Google

> lature in this respect is practically unlimited, except where it is limited by the provision of the Constitution having express or implied reference to this particular subject.

In *People ex rel. Gere v. Whitlock* (92 N. Y., 191, 198) the action of the Mayor of Syracuse in removing a public officer without notice or opportunity to be heard was before the court and sustained.

DANFORTH, J., (p. 198):

> "The next position of relators raises a more interesting general question; whether they were entitled to have notice or be heard before the final action of the mayor. At common law there could be no doubt as to this. *Bagg's Case* (11 Coke, 98) and many others cited stand upon the principle that no one shall be condemned unheard, but this, too, when applied to the term of office, is within the control of the legislature, and as it gave the power to appoint, may also give the power to remove."

If the Legislature may authorize removal from office without notice it would seem to follow that removal of a condidate's name from the ballot (leaving to the voters the right to replace it) may also be authorized on the principle that the greater includes the less.

SEVENTH.

Objections to moving papers not well taken.

The preliminary objections, so far as they relate to matters of form and procedure, were all waived by the stipulation made at the close of the hearing—that the case should be disposed of on the merits—and in any event the objections are untenable.

Digitized by Google

(a) *Petition not verified and as an affidavit has no venue.*

The statute does not require a verified petition. The present petition is verified by the oath of the petitioner, but there is no venue. The rule as to venue is confined to affidavits. A paper verified by oath is not defective for want of a venue.

Coleman v. Shattuck, 62 N. Y., 348.

(b) *The order not returnable at the proper place and time.*

This objection seems to be based on a misconstruction of Judge Kellogg's order. The parties appeared before him, even if the order did not in words so require.

(c) *The affidavits accompanying petition are not entitled in any action or proceeding.*

These affidavits are strictly regular. There was no suit or proceeding pending at the time they were sworn. The objection was that, if false, perjury could not be assigned upon them, because they did not appear to have been made in the course of a judicial proceeding. The objection has reversed the rule. Had the affidavits been entitled in a future proceeding, they would, under common law authorities, have been void.

In *Milliken* v. *Seelye* (3 Den. 54), BRONSON, J., says:

> "The affidavit should not have been entitled because when it was made there was no suit pending in court. As the affidavit purported to be made in a suit when there was none, the party could not be convicted of perjury for false swearing. In such case the affidavit cannot be used—it is a nullity. The rule has been too long settled to be shaken now."

See Code Section 728.

Digitized by Google

(d) *The proper remedy is mandamus to the Secretary of State.*

Possibly such remedy exists, but the utter insufficiency is apparent. Here is a dispute as to which of two Committees is the legal one as regards certain action. This depends on the question of fact as to what was done by the Convention of October, 1910. If relief had been sought by mandamus, it would have resulted in an alternative writ and a trial of the question of fact by a jury six months or a year hence. It was just such defects in the ordinary legal procedure that the summary proceeding of the statute was intended to remedy.

EIGHTH.

The Committee which designated Trombly was regularly convened.

It is said that notice of the meeting was not mailed to each member of the Committee fifteen days before the day of the meeting and filed in the office of the Secretary of State ten days before the day (Section 47 of Primary Law). The Statute required the Committee to meet between February 26, and March 5, 1912. This is what was done: The Committee consisted of three persons—McGuire, Hewitt and DeLong. On February 15th, McGuire sent by mail to Hewitt a notice that the Committee would meet at the Commercial House, Keeseville, on March 4, for the purpose of designating a candidate for State Committeeman for the 33rd District (fols. 50-54). This notice was eighteen days before the day of meeting. McGuire issued it on February 15, and Hewitt received it on the 15th. On February 20, a paper signed by Hewitt and DeLong, certifying that a meeting of the Democratic

Digitized by Google

Senatorial Committee for the 33rd District would be held at the Commercial House, Keeseville, on March 4, at 3 P. M., was filed in the office of the Secretary of State (fol. 51). On February 23, a copy of the notice signed by McGuire and served by him on Hewitt on February 15, was filed in the office of the Secretary of State (fol. 55). It thus appears that at least as early as February 20, all three members of the Committee had signed a paper asserting that a meeting of the committee would be held on March 4, at Keeseville. McGuire signed such paper on the 15th; Hewitt received such paper on the 15th, eighteen days before the meeting; DeLong signed such paper at least as early as February 20, —thirteen days before the meeting. The Secretary of State received and filed the notice more than ten days before the meeting.

It thus appears that all the members of the committee, except DeLong had fifteen days actual notice of the meeting; that DeLong had thirteen days actual notice and that the public, through the filing in the Secretary of State's office, had the full ten days' notice.

On March 4th, Hewitt and DeLong met at Keeseville, notified McGuire who was then in Keeseville, of the precise time and place at which the committee would meet, namely, Room 16, Commercial House, at 2.30 P. M. (Fols. 52-53). McGuire did not attend and Hewitt and DeLong did the work the Committee was called upon to do.

It is urged that the notice required by the Statute, *i. e.*, mailed to each member fifteen days before the meeting—has not been given.

It is a familiar rule that attendance at a meeting is an admission of due notice of it, so that as to Hewitt and DeLong there can be no question. As to McGuire, he is the one who called the meeting and it certainly does not lie in his mouth to deny

Digitized by Google

notice of his own acts. He assumed the right to call the committee together and the other members came in response to his call. He must of necessity have notice of his own acts, and it would be an absurd construction of the statute to require that one member of a committee, calling it together by notice mailed to other members, should also mail such notice to himself.

As to notice to the public through filing in the Secretary of State's office this was done in due season. (Fol. 57).

The meeting of the committee was public. It was held in a public house—a hotel—a room with open door. (fol. 53).

NINTH.

The action of the State Committee in deciding that there was no existing Senatorial Committee in the Thirty-third District is not final.

The statute authorized the State Committee to act only in case there was no local district committee. If there was such local committee, its rights were recognized and preserved by the statute. It was not in the power of the State Committee to deprive the local committee of rights secured to it by law, by passing a resolution declaring it to be dead. It was given jurisdiction to act, and, it may perhaps be said to decide the question of fact on which its jurisdiction rested. But it could not acquire jurisdiction by a false or mistaken decision as to the fact. If a court of competent jurisdiction attempt to administer the estate of one still living, by adjudging him "dead to all legal intents and purposes," its acts are all void.

Scott v. McNeal, 154 U. S. 34.

Digitized by Google

It may be said that such decision of the State Committee is a decision by a party tribunal, which, under the Fairchild case, is a controlling authority. But the Legislature on this point has overruled that case. Section 56 provides that the judge "shall "consider, but need not be controlled by any action "or determination of the regularly constituted "party authorities, * * * and shall make such "decision as, under all the circumstances of the "case, justice may require."

TENTH.

The committee which designated Trombly was regularly created as a party District Committee by the convention held in the District in October, 1910.

The existence of such committee is the whole question of fact in the case. It has been found in favor of the petitioner and such finding is we suppose not reviewable here. In any event it is amply sustained by the evidence.

It is not denied but that the general practice of the party in the State is to have a Senatorial District Committee. The resolution of the State Committee, in declaring the non-existence of such committee in seven of the districts of the State, impliedly asserts the existence of such committee as the general rule. The proof is clear that for many years past it has been the custom of the party in the Senatorial District in question to have a Senatorial District Committee (fols. 130-133, 140). This Committee is appointed by the convention held to nominate a candidate for Senator and is clothed with power not only to fill vacancies in reference to candidates, but also to call future conventions and

Digitized by Google

to do all things required to preserve party organization (fols. 130-133). This Committee is such a Committee as is recognized by Section 64 of the Election Law.

The last Convention of the party held in the Senatorial District was October 3, 1910, and it is admitted that at this Convention a Committee of three persons—Hewitt, McGuire and DeLong—was created (Affidavit McNulty, fol. 191). The only question in dispute is whether this Committee was one whose power was limited to filling vacancies on the ticket, as claimed by the appellant, or whether it was the usual general Senatorial Committee which it had been the custom of the party to appoint.

The October, 1910, Convention consisted of nine delegates. The testimony of six of these delegates was produced by the petitioner, all concurring in the statement that the Committee appointed was the ordinary Senatorial District Committee and that, while it was authorized to fill vacancies, it was not limited to that purpose (De Long, fol. 31; West, fol. 38; Hewitt, Fol. 50; Riley, Fols. 59, 135; Davern, fol. 72; Brown, fol. 145). This is fortified by what was published in the local press the day after the Convention. The Platsburgh Press (fol. 152), Elizabethtown Post (fol. 149) and Glens Falls Star (fol. 36) all stated that the persons named were made the Senatorial Committee. The testimony of spectators at the Convention is to the same effect (Grand, fol. 34; Collins, fol. 66; Bixby, fol. 74; Dunn, fol. 77; Trombly, fol. 142).

Against all this there is only the vague statement of McGuire (fol. 181) McNulty, (fol. 191), Worden, fol. 222) and Kavanaugh, fol. 217).

It, however, appears from McGuire's own acts and affiadavit that on February 15, 1912, he and McNulty met at Keeseville and had a conference,

Digitized by Google

which resulted in sending out the call for a meeting of the Committee, of which McGuire was a member, to designate a State Committeeman (fol. 182). So it is evident that as late as February 15, both these gentlemen supposed the Committee apointed in October, 1910, was the usual Senatorial Committee, for they then took steps to set it in motion as such.

We submit that the proof is clear and convincing that the Convention of October, 1910, apointed the usual Senatorial Committee. It follows that such Committee was authorized by law to designate the candidate for State Committeeman; that it has regularly done so, and that the petitioner Trombly is such candidate.

ELEVENTH.

The order of the Appellate Division should be affirmed or the appeal dismissed with costs.

JOHN B. RILEY,
Attorney for Appellant,
Plattsburgh, N. Y

THOMAS F. CONWAY,
FRANK E. SMITH,
Of Counsel.

Digitized by Google

Digitized by Google

COURT OF APPE

State of New York

C

THE PEOPLE OF THE STATE OF NEW
ELLIOTT-FISHER COMPAN
R

against

WILLIAM SOHMER, as Comptroller of the
York,
Defen

Papers on Writ of Certiorari to Revi
Tax Assessed by State Comptr

CORNELIUS C. BEEKMAN,
Attorney for Relator-Appell
257 Broadway,
N

THOMAS CARMODY,
Attorney-General, State of N
Attorney for Defendant

33
Appeal by Relator from
confirming on certiorari
determination of the
assessing a
foreign corporation.

THE REPORTERS CO., WALTON, N. Y.
New York Office: 253 Broadway, Room 205. Phone 5909 B
Brooklyn Office: 44 Fulton Street, Room 58. Phone 2300

Digitized by Google

Digitized by Google

Index.

	Page
Statement Required by Rule 41	1
Report 1906 to Comptroller	2
Account for License Tax	7
First Application for Revision	8
Second Application for Revision	11
Refusal of Comptroller to Revise	15
Receipt of State Treasurer for Tax (as affirmed)	16
Writ:	
Notice of Application for	16
Petition for	18
Undertaking for Costs	23
Approval of Undertaking	24
Order for Writ	24
Writ of Certiorari	26
Allowance of Writ	28
Return to Writ	28
Stipulation of Attorneys	30
Order of Appellate Division	31
Notice of Appeal to Court of Appeals	33
Opinion of Appellate Division	34
Stipulation Waiving Certification	38

Digitized by Google

Digitized by Google

1

SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT.

2

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, Elliott-Fisher Co.,

Relator,

against

WILLIAM SOHMER, as Comptroller, of the State of New York,

Defendant.

Statement Required by Rule 41.

3

This proceeding was begun June 12th, 1911, by the granting of the order and the issuing of the writ of certiorari herein to review the taxation of the relator for license tax under Chapter 558, Laws of 1901, Section 181.

Service of the writ was made on the Comptroller of the State of New York June 16th, 1911. The return to the writ herein was filed in the office of the Clerk of Albany County June 27th, 1911. The names of the original parties in full are as above stated.

Digitized by Google

Report to State Comptroller.

To the Comptroller of the State of New York:

As Secretary of the Elliott-Fisher Company, I make the following report of such Company for the year ending October 31, 1906, pursuant to the provisions of Section 182, Chapter 908, Laws of 1896, and acts amendatory thereof.

(1) The last preceding report made by this Company to the Comptroller of the State of New York under the provisions of the above acts was for the year ending October 31, 1905.

(2) Organized June 15th, 1903, under the laws of Delaware.

(3) This Company began business in the State of New York on..... 190

(4) Authorized capital stock of Company..... ..... $10,000,000

(5) Number of share of stock authorized:
Common 100,000
Preferred ..... None

(6) Number of shares of stock issued:
Common 94,000
Preferred ..... None

(7) Par value of each share:
Common $100
Preferred ..... None

(8) Amount paid into Treasury of Company on each share:
Common $100
Preferred ..... None

(9) Amount of Capital stock issued for cash or property $847,139.75

(10) Amount of Capital stock issued for good will,

Digitized by Google

copyrights, brands, patents, trade-marks, formulae, services etc., other than cash or property $8,552,860.25

(11) Amount of common stock on which dividends were declared ..... None

(12) Amount and date of each dividend on common stock ..... None

(13) Rate per cent per annum of dividends on common stock ..... None

(14) Amount of preferred stock on which dividends were declared ..... None 8

(15) Amount and date of each dividend on preferred stock ..... None

(16) Rate per cent per annum of dividends on preferred stock ..... None

(17) Nature of business in State of New York and how transacted .....
.....Sale of Typewriting and billing machines

(18) Place, street and number where such business was conducted ..... 329 Broadway, New York City

(19) Average value of stock in trade carried in the State of New York during the year ending October 31, 1906 ..... $26,000 9

(20) Average monthly bank balance employed in the State of New York during the year ending October 31, 1906 ..... $8,268.00

(21) Average value of bills and accounts receivable in State of New York during the year ending October 31, 1906 ..... $36,657.00

(22) Average value of shares of stocks of other corporations doing business in the State of New York and owned by this company during the year ending October 31, 1906 ..... None

Digitized by Google

(23) Average value of personal property including bonds, loans on call and other financial securities employed in the State of New York, other than heretofore mentioned, during the year ending October 31, 1906 ..... $1500

(24) Capital invested in real estate located in the State of New York during the year ending October 31, 1906, and where situated ..... None

(25) Total of assets above enumerated located in the State of New York during the year ending October 31, 1906 ..... $72,425

11

(26) Average value of stock in trade carried outside the State of New York during the year ending October 31, 1906 ..... $55,900.00

(27) Average monthly bank balance employed outside the State of New York during the year ending October 31, 1906 ..... $5,250.00

(28) Average value of bills and accounts receivable outside the State of New York during the year ending October 31, 1906 ..... $125,104

(29) Average value of shares of stocks of other corporations owned by this corporation, where such

12 corporations are doing business wholly without the State of New York ..... None

(30) Average value of personal property including bonds, loans on call and other financial securities employed outside the State of New York, other than heretofore mentioned, during the year ending October 31, 1906 ..... $402,171

(31) Capital invested in real estate located outside the State of New York, during the year ending October 31, 1906, and where situated ..... Harrisburg, Pa.

Digitized by Google

Value of patents, etc., owned by the company and employed exclusively outside of the State of New York at Harrisburg, Pa., where the company manufactures all of its goods covered by such patents.... ..... $1,400,000

(32) Total of assets located outside the State of New York during the year ending October 31, 1906 . ..... $1,988,425.00

LIABILITIES:

Bonds	$.....	14
Mortgages not secured by bonds ...	$.....	
Bills payable	$263,316.00	
Accounts payable		
Other liabilities, excluding capital stock	None	
Total liabilities	$263,316.00	

(33) Highest *bona fide* price at which stock sold during year ending October 31, 1906:

Preferred ..... None. No known sales
Common ..... None. No known sales

(34) Lowest *bona fide* price at which stock sold during year ending October 31, 1906:

Preferred ..... None. No known sales
Common ..... None. No known sales 15

(35) Percentage of capital stock of the company employed in the State of New York during the year ending October 31, 1906, in manufacturing and in the sale of the product of such manufacture .... None

(36) Are your goods manufactured for you by others? ..... No

Digitized by Google

16 *Report to State Comptroller*

(37) Do you operate a factory? .....
.....Yes, outside N. Y. State

REMARKS.

The undersigned, being the ..... of the above Company, estimates and appraises the Capital Stock of said Company as follows:

..... shares at .....dollars
..... cents per share, amounting in the whole to ..... /100 dollars.

17 IN WITNESS WHEREOF, I have set my hand this 12 day of December, 1906.

W. L. DENCH,
Secretary.
(Official Title.)

State of New York,
County of New York, } ss:

On this 12th day of December A. D., 1906, personally appeared before me, a Notary Public in and for the County of New York, W. L. Dench, Secretary of the above named Company, who, being duly sworn according to law, did depose and say that the foregoing report is just, true and correct and that it in-
18 cludes all dividends of any description declared by said Company during the year ending October 31, 1906.

W. L. DENCH.

Sworn to before me the
day and year aforesaid.
Edgar Beekman,
Notary Public,
for N. Y. Co.

Digitized by Google

Comptroller's Account Taxation. 19

COMPTROLLER'S OFFICE,

ALBANY, N. Y.

The Elliott-Fisher Company,
c/o William L. Dench, Secretary,
329 Broadway, New York City.

In account with the State of New York, Dr.

For license for the privilege of exercising its corporate franchise or carrying on business, based on amount of capital stock employed in New York State, per Chapter 558, Laws of 1901, Section 181. 20

Capital Stock, $1,030,240.00
Tax 1 1/4 mills $1287.80
Less amount paid on $97,894.69 ..... 122.37

$1165.43

21

Digitized by Google

22 **First Application for Revision.**

In the Matter

of

The application for a revision of the taxes assessed against the Elliott-Fisher Co., a foreign corporation, for the year ending October 31st, 1906.

State of New York, }
23 County of New York, } ss:

W. L. Dench, being duly sworn, deposes and says:

That he is the Secretary of the above named company, a corporation organized under the laws of the State of Delaware, with an authorized capital of $10,000,000, of which $847,139.75 was issued for cash and $8,552,860.25 was issued for patents, good will, etc.

That during the year ending October 31st, 1906, said company declared no dividends on, and there were no sales of its capital stock.

That during the year ending October 31st, 1906,
24 the assets of the company located within and without the State of New York, and the company's liabilities, exclusive of capital stock, were as follows:

Assets in New York State.

Average value of stock in trade	$26,000
Average monthly bank balance	8,268
Average value of bills and accounts receivable	36,657
Average value of shares of stocks of other corporations	None

Digitized by Google

Average value of personal property, other than heretofore mentioned	1,500
Capital invested in real estate	None
Total of assets located in the State of New York during the year ending Oct. 31st, 1906	$72,425

ASSETS OUTSIDE OF NEW YORK STATE.

Average value of stock in trade	$55,900
Average monthly bank balance	5,250
Average value of bills and accounts receivable	125,104
Average value of shares of stock of other corporations	None
Average value of personal property, other than heretofore mentioned	402,171
Total of assets located outside the State of New York during the year ending Oct. 31, 1906	$588,425

26

LIABILITIES:

27

Bonds	None
Mortgages not secured by bonds	None
Bills and Accounts payable	263,316
Total liabilities	$263,316

Therefore, during the year ending October 31st, 1906, the assets of the Elliott-Fisher Company exceeded its liabilities by $397,534.

Digitized by Google

28 *First Application for Revision*

Deponent further says that the Elliott-Fisher Company duly made its report to the Comptroller for the year ending October 31st, 1906, setting forth the figures herein stated, and upon said report the Comptroller settled an account for annual tax for said year against the company, amounting to $772.68, which was based upon an assessment of $1,030,240 at the rate of three-quarters of a mill; and also an account for license tax, amounting to $1,165.43.

Deponent is advised and believes that there was no warrant in the law for the taxation by the Comptroller, as aforesaid, for the reason that there were no
29 dividends declared upon the capital stock of the Elliott-Fisher Company during the period in question, and the difference between the company's assets and liabilities did not equal the amount of its capital stock, although the assets did exceed the liabilities by a substantial amount.

Wherefore, deponent respectfully requests the Comptroller to remit the taxes paid by the Elliott-Fisher Company for the year ending October 31st, 1906, and allow the company a credit upon the books of the Comptroller's office equal to the amount of the taxes which it paid for said year.

W. L. DENCH.

30 Sworn to before me this
29th day of Nov., 1907.
Edgar Beekman,
Notary Public,
for N. Y. Co.

Digitized by Google

Second Application for Revision.

31

In the Matter

of

The application for a revision of the taxes assessed against the Elliott-Fisher Company, a foreign corporation, for the year ending October 31st, 1906.

State of New York,
County of New York, } ss:

32

W. L. Dench, being duly sworn, deposes and says:

That he is the Secretary of the Elliott-Fisher Company, a corporation organized under the laws of the State of Delaware, in the year 1903, with an authorized capital of $10,000,000, of which $9,400,000 has been issued.

That during the year ending October 31st, 1906, the issued capital stock of said Company was $9,400,000, and there were no dividends declared upon said capital stock during such period.

That the average value of stock in trade carried in the State of New York during the year ending October 31st, 1906, was $26,000; that the average monthly bank balance employed in the State of New York during said year was $8,268, that the average value of bills and accounts receivable in this State during said year was $36,657; that the average value of shares of stock of other corporations doing business in this State and owned by this Company during said year was "None." That the average value of personal property employed in this State during said year, other than heretofore mentioned, was $1500; and that the capital invested in real estate located in this State during said year was "None."

33

Digitized by Google

34 *Second Application for Revision.*

That the average value of stock in trade carried outside the State of New York during the year ending October 31st, 1906, was $55,900; that the average monthly bank balance employed outside this State during said year was $5,250; that the average value of bills and accounts receivable outside this State during said year was $125,104; that the average value of shares of stock of other corporations owned by this corporation, doing business wholly without the State of New York was "None;" that the average value of personal property employed outside this State during
35 the said year, other than heretofore mentioned, and real estate located outside this State was $402,171; and that the value of patents owned by the Company and employed exclusively outside the State of New York, namely at Harrisburg, Pa., where the Company manufactures its product protected by such patents was $1,400,000.

That the Elliott-Fisher Company duly made its report to the Comptroller of the State of New York for the year ending October 31st, 1906, and therein set forth the facts above stated.

That upon said report the Comptroller assessed the Company as follows:

36 For annual tax for the year ending October 31st, 1906, on $1,030,240. Tax $772.68
For license tax on $1,030,240, less amount previously paid on, making additional license tax....$1,165.43

That in ascertaining the basis of said annual and license tax, as aforesaid, the Comptroller excluded from the assets of the Company employed outside of the State of New York the value of the Company's patents exclusively employed outside of the State of New York, namely, at Harrisburg, Pa., where the Company's manufacturing plant is located, and where it manufacturers its patent product, which amounted to $1,400,000.

Digitized by Google

87

That deponent is advised and believes that the aforesaid patents are exclusively employed outside of the State of New York; that their value represents capital employed outside of the State of New York; and that the Comptroller, in determining the amount of capital stock of the Elliott-Fisher Company which was employed in the State of New York during the year ending October 31st, 1906, erred when he excluded the value of such patents from the assets employed by the Company outside of the State of New York.

That the grounds of deponent's belief as to the 88
aforesaid error made by the Comptroller in assessing the Elliott-Fisher Company for taxes for the year ending October 31st, 1906, are as follows:

That within the meaning of Section 182 of the Tax Law—which provides, among other things, as follows:

> "For the privilege of doing business or exercising its corporate franchises in this State, every corporation * * * doing business in this State shall pay to the State Treasurer annually, in advance, 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. The measure of the amount of 89
> capital stock employed in this State shall be such a proportion of the issued capital stock as the gross *assets* employed in any business within this State bear to the gross *assets* wherever employed in business * * *."

the aforesaid patents are assets of the Elliott-Fisher Company, and being such, their value represents capital employed where such patents are put in use.

> People *ex rel.* Edison Electric Light Co. vs. Campbell, 138 N. Y., 553.

Digitized by Google

40 *Second Application for Revision.*

That such patents, as deponent has stated above, are used and employed exclusively within the State of Pennsylvania, and at the Company's manufacturing plant which is located in the City of Harrisburg; that they constitute assets employed outside of the State of New York, and should not have been excluded by the Comptroller from the assets of the Company employed outside of the State of New York in determining the amount of capital stock employed by the Company in the State of New York during the year ending October 31st, 1906.

41 Wherefore, deponent hereby makes application, pursuant to Section 195 of the Tax Law, for a revision, readjustment and resettlement of the annual and license tax assessed against the Elliott-Fisher Company for the year ending October 31st, 1906.

W. L. DENCH.

Sworn to before me this
7th day of February, 1908.
Edgar Beekman,
Notary Public,
for N. Y. Co.

42

Digitized by Google

Comptroller's Refusal to Revise. 43

STATE OF NEW YORK.

COMPTROLLER'S OFFICE.

Albany, May 3, 1911.

Mr. Edgar Beekman,
257 Broadway,
New York City.

Dear Sir:

This department desires to advise you that it has this day revised the assessment against the ELLIOTT-FISHER COMPANY, based on business for the year ending October 31, 1906, as per revised bill herewith rendered, it appearing that in the disallowance of the claim set up in the application dated February 7, 1908, the department overlooked an application that had been made prior to that date, January 3, 1908, that the company was entitled to a revision under the decision of the Court of Appeals, 198 N. Y., 238. The assessment of the license fee under Sec. 181 is affirmed. 44

Respectfully yours,
WM. SHOMER,
Comptroller. 45

Digitized by Google

46 **Receipt for Tax.**

STATE OF NEW YORK.

TREASURER'S OFFICE

$1165.43.

Albany, February 28th, 1907.

Received from above named Company One Thousand One hundred and sixty-five and 43/100 Dollars in full for above tax.

G. W. BUTTEN,
Deputy Treasurer.

P. C. DUGAN,
47 Deputy Comptroller.

Notice of Application for Writ.

SUPREME COURT,

NEW YORK COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* Elliott-Fisher Co.,
Relator,
48 against
WILLIAM SOHMER, as Comptroller, of the State of New York,
Defendant.

To Hon. William Sohmer, as Comptroller of the State of New York.

Sir:

Please take notice that upon the petition of the Elliott-Fisher Co., a copy of which is herewith served

Digitized by Google

upon you, and the undertaking herein, approved by a Justice of the Supreme Court, and filed with you, a motion will be made before the Supreme Court, at a special term thereof, part 1, to be held at the County Court House, in the City of New York, on the 1st day of June, 1911, at the opening of the Court on that day at half past ten o'clock in the forenoon, or as soon thereafter as counsel can be heard for an order for a writ of certiorari, and also for a writ of certiorari, to be issued by said Court directed to you, commanding you to certify and return, at the office of the Clerk of the County of Albany all and singular 50
your proceedings, decisions and actions relating to the assessment of the Elliott-Fisher Co., for license tax under Section 181 of the Tax Law, and all and singular the accounts, evidence, affidavits, documents, records and papers before you in the premises, concerning the said matter and matters stated in said petition, or duly certified or sworn copies, together with your statement of such facts as may be pertinent or material to the legality or illegality of such assessment, to the end that such decision made by you in the matter of the determination by you of the taxation of the relator for license tax under Section 181 of the Tax Law, being the account for taxes as stated in
said petition, may be reviewed, and the said assess- 51
ment and the account for said taxes may be revised, corrected and re-stated by said Court according to law and the facts, and for such other, further or different relief in the premises as is prayed for in said petition or to the Court may seem just.

Dated, New York, May 20, 1911.

Yours, &c.,

CORNELIUS C. BEEKMAN,
Attorney for Petitioner and Relator,
257 Broadway,
Manhattan,
New York City.

Digitized by Google

52 **Petition for Writ.**

SUPREME COURT,

NEW YORK COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* Elliott-Fisher Co.,
Relator,
against
WILLIAM SOHMER, as Comptroller,
53 of the State of New York,
Defendant.

To the Supreme Court of the State of New York:

The petition of the Elliott-Fisher Co., respectfully shows:

FIRST: Your petitioner is a foreign corporation organized and now existing under and by virtue of the laws of the State of Delaware with an authorized capital of $10,000,000, of which $9,400,000 has been issued, $847,139.75 thereof being issued for cash and property, and the balance amounting to $8,552,860.25
54 being issued for patents.

SECOND: That your petitioner duly made its report to the Comptroller for the year ending October 31st, 1906, pursuant to the provisions of Section 182 of the Tax Laws of the State of New York, in which the authorized and issued capital stock of your petitioner were stated to be the same as herein stated, and the tangible assets of your petitioner located in the State of New York were stated to be of the value of $72,425; the value of the tangible assets located outside of the State of New York was stated to be $588,425; the value of the company's patents for which the

Digitized by Google

55

aforesaid amount of capital stock was issued was stated to be $1,400,000; the indebtedness of your petitioner was stated to be $236,316; and that there were no dividends declared on or sales of its capital stock.

THIRD: Upon the report prepared in the manner above mentioned and filed as aforesaid, the Comptroller under the authority of Sections 181 and 182 of the Tax Law, determined that the amount of capital stock employed by your petitioner in the State of New York during the year ending October 31, 1906, was $1,030,240, and he accordingly assessed your petitioner for an annual tax and also the license tax in 56
question, both on the basis of $1,030,240, and settled an account against your petitioner for annual tax in the sum of $772.68, and for license tax in the sum of $1,287.80 less the amount of license tax previously paid amounting to $122.37.

FOURTH: On or about January 3rd, 1908, your petitioner made a written application to the Comptroller of the State of New York for a revision and re-settlement of the account for annual tax on its franchise or business for the year ending October 31st, 1906, and also of said license tax or fee.

FIFTH: On May 3rd, 1911, the Comptroller under the authority of People *ex rel.* Fifth Avenue 57
Building Co. vs. Glynn, 198 New York, 238, revised the annual tax assessed as aforesaid against your petitioner for the year ending October 31st, 1906, and re-settled the same on the basis of the *value* of such proportion of your petitioner's capital stock as its assets employed in the State of New York bore to its total assets wherever employed, but declined to make any revision or re-adjustment of the assessment of the license fee, claiming as your petitioner believes that the license fee provided for under Section 181

Digitized by Google

of the Tax Law, is upon the par value of the issued capital stock and not upon its actual value.

SIXTH: Your petitioner is aggrieved by the action of the Comptroller upon the said application for the revision of the license fee in that the Comptroller has determined that your petitioner is liable to the license fee aforesaid, and desires such determination to be reviewed by this Court.

SEVENTH: Your petitioner claims that the license tax under Section 181 of the Tax Law should be assessed on the same basis as the annual tax under
59 Section 182 of the Tax Law, which is the question in difference sought to be determined by this Court.

EIGHTH: William Sohmer is and at all times since the 1st day of January, 1911, has been Comptroller of the State of New York, but the office of Comptroller of the State of New York has been held by divers other persons at other times and in his petition the word "Comptroller" applies to the office or person who held such office at the time or times designated.

NINTH: Your petitioner, pursuant to the statute in such case made and provided, has paid the Treas-
60 urer of the State of New York the said license tax amounting to $1,165.43, that being the full amount of the license tax, penalty, and charges settled and determined by the Comptroller, and has filed with the Comptroller an undertaking with the National Surety Co., as surety in the sum of Five hundred dollars ($500), which undertaking was approved as to amount and sufficiency by the Hon. Henry Bischoff, one of the Justices of this Court, to the effect that if the writ of certiorari for which your petitioner was about to apply for the purpose of reviewing the said

Digitized by Google

61

determination of the Comptroller should be dismissed, or the determination of the Comptroller affirmed, the applicant for the writ would pay all costs and charges which might accrue against it in the prosecution of the writ, including costs of all appeals.

TENTH: Your petitioner further shows that said determination of the Comptroller of May 3rd, 1911, is final in this matter, and can only be reviewed by this Court on certiorari and that no application has been heretofore made to this Court for the issuance of the writ prayed for herein.

62

Wherefore, your petitioner, desiring to review both upon the law and the facts the determination of the Comptroller upon such application made to him by your petitioner for a revision and re-settlement of the account hereinbefore set forth, prays that a writ of certiorari may be issued and allowed by this Honorable Court, directed to William Sohmer, Comptroller of the State of New York, commanding him to certify and return to the office of the Clerk of the County of Albany all and singular his proceedings, decisions and actions in the premises, with the dates thereof, particularly setting forth in full all the accounts, affidavits, papers, writings and all the evidences submitted to him, or which were before him, or which are now before him, in, of, or concerning said matter or matters of the settlement of said account for license tax aforesaid against your petitioner, to the end that said account, revision or re-adjustment so refused, as aforesaid, and his decision or decisions thereon and therein, may be reviewed by this Court, both upon the law and the facts, and if said account and decision shall be found erroneous or illegal, either in point of law or fact, they may be revised, corrected and re-stated by this Court, and that

63

Digitized by Google

64 *Petition for Writ*

your petitioner shall have such other and further relief in the premises as to the Court may seem just.

Dated, New York, May 17th, 1911.

ELLIOTT-FISHER CO.,
By W. L. DENCH,
Secretary.

State of New York,
County of New York, } ss:

W. L. Dench, being duly sworn, deposes and says that he is the Secretary of the Elliott-Fisher Co., 65 the petitioner herein; that he has read the foregoing petition and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason why this verification is not made by the petitioner is that the petitioner is a foreign corporation.

W. L. DENCH.

Sworn to before me this
17th day of May, 1911.
Louise Maier,
Notary Public,
N. Y. Co.

66

Digitized by Google

Undertaking for Costs.

67

SUPREME COURT,

NEW YORK COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, Elliott-Fisher Co.,

Relator,

against

WILLIAM SOHMER, as Comptroller of the State of New York,

Defendant.

68

Whereas, the above relator, the Elliott-Fisher Co., is about to apply to the Supreme Court of the State of New York for a writ of certiorari to review the action of the Comptroller of the State of New York upon an application made to him by said corporation for a revision and re-settlement of its account for license tax assessed under and by virtue of the authority of Section 181 of Chapter 60 of the Consolidated Laws and to review the action of the said Comptroller in assessing said corporation for such license tax.

Now, therefore, the National Surety Company, having an office and place of business at No. 115 Broadway, Borough of Manhattan, in the City of New York, does hereby pursuant to the statutes in such case made and provided, undertake that if the said writ is dismissed, or the determination of the Comptroller affirmed, the applicant for said writ, the Elliott-Fisher Co., will pay all costs and charges which may accrue against such applicant in the prosecution of such writ, including costs of all appeals, not exceeding the sum of Five hundred ($500) dollars. 69

Dated, New York, May 18th, 1911.

NATIONAL SURETY CO.,

(L. S.) By Joel Rathbone,
4th Vice-President.

Attest:
E. Cashion,
Res. Asst. Secretary.

Digitized by Google

70 *Order for Writ of Certiorari*

(Endorsed): The within undertaking is hereby approved as to the amount and sufficiency. Dated May 18th, 1911. Henry Bischoff, Justice of Supreme Court.

Order for Writ of Certiorari.

At a Special Term, Part I of the Supreme Court, in and for the City and County
71 of New York, held at the County Court House in the City of New York, on the 12th day of June, 1911.

Present: Hon. Leonard A. Giegerich, Justice.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, Elliott-Fisher Co.,
Relator,
against
WILLIAM SOHMER, as Comptroller of the State of New York,
72 Defendant.

On reading and filing the petition for a writ of certiorari herein, verified the 17th day of May, 1911, together with the notice of motion for a writ of certiorari, with proof of due service on Julius Harburger, Esq., Deputy Comptroller of the State of New York, and the relator having previous to the application for such writ deposited with the State Treasurer of the State of New York the full amount of the tax to which such petition relates, and filed with the State Comp-

Digitized by Google

troler an undertaking to secure the payment of all costs and charges, including costs of all appeals, which undertaking was approved by the Hon. Henry Bischoff, one of the Justices of this Court; and after hearing Cornelius C. Beekman, attorney for the relator, in support of said motion and no one appearing in opposition thereto,

Now on motion of Cornelius C. Beekman, attorney for the relator, upon filing the opinion of the Court, it is,

Ordered that a writ of certiorari issue out of this Court, under its seal, according to the prayer of said petition, directed to William Sohmer, Comptroller of the State of New York, commanding him to certify and make return there to of all his acts and proceedings relative to the assessment of the relator for the license tax under Section 181 of the Tax Law, together with all the papers, documents and records before him pertaining to such assessment and the application of the relator for a revision and re-settlement thereof, or duly certified or sworn copies thereof, and also his statement of such facts as may be pertinent and material to show the legality or illegality of such assessment, and it is

Further ordered, that the said writ be, and it hereby is, made returnable at the office of the Clerk of the County of Albany, within twenty (20) days after service thereof.

Enter,

L. A. G.

Digitized by Google

76 **Writ of Certiorari.**

THE PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF THE ELLIOTT-FISHER CO. TO WILLIAM SOHMER, COMPTROLLER OF THE STATE OF NEW YORK, GREETING:

WHEREAS, we have been informed by the petition of the Elliott-Fisher Co., that the Comptroller of the State of New York, made and settled an account for license tax or fee under Section 181 of the Tax Law, which account for said tax so settled and determined against your petitioner amounted to the sum of
77 One thousand one hundred sixty-five and 43/100 Dollars ($1,165.43); and,

WHEREAS, the said William Sohmer, as Comptroller of the State of New York, upon an application for a revision, re-adjustment and re-settlement of said license tax did on the 3rd day of May, 1911, as such Comptroller, refuse to revise and re-adjust and resettle the said account theretofore, as aforesaid, determined and settled against the said Elliott-Fisher Co., and did, upon such application, determine that the assessment of the said One thousand one hundred sixty-five and 43/100 Dollars ($1,165.43), as an account for license tax, as aforesaid, did not include
78 taxes which could not have been lawfully demanded, and

WHEREAS, it is alleged by the petitioner that in imposing said tax, as originally settled and determined and in refusing to revise or re-adjust the same, injustice has been done to said petitioner, the Elliott-Fisher Co., and that the said tax so imposed by the State Comptroller, as aforesaid, is erroneous and illegal; and

WHEREAS, a notice of motion for a writ of certiorari, together with a copy of the petition, in the proceeding was duly served upon Julius Harburger,

Digitized by Google

Esq., Deputy Comptroller of the State of New York, and on the 1st day of June, 1911, said motion was duly granted and an order therefor made, and

We, being willing to be certified of your proceedings in the premises as such Comptroller in imposing and exacting such license tax, and in all things relating thereto, do command you, William Sohmer, Comptroller of the State of New York, to certify and return to us at the office of the Clerk of the County of Albany, in the City of Albany, within twenty (20) days after service hereof, all and singular your proceedings, decisions and actions in the premises, with the dates thereof particularly setting forth in full all the accounts, affidavits, papers, writings and all the evidence submitted to you, or which were before you, or which are now before you, in, of or concerning said matter or matters of the settlement of said account for license tax, aforesaid, against the said company, or upon the application made for the purpose of revising or re-adjusting said account for license tax to the end that said account, revision or re-adjustment, so refused, as aforesaid, and your decision or decisions thereon and therein, may be reviewed by this Court, both upon the law and the facts, and if found erroneous or illegal, either in point of law or fact, corrected and re-stated by this Court, and that such other and further relief may be granted to the relator as to the Court may seem just.

79

80

81

WITNESS, the Hon. Leonard A. Giegerich, one of the Justices of our Supreme Court in and for the County of New York, at a Special Term thereof, held at Chambers at the County Court House in the City of New York, on the 12th day of June, 1911.

By the Court,

(Seal.) WM. F. SCHNEIDER,
Clerk.

Cornelius C. Beekman,
Attorney for Relator,
257 Broadway,
Manhattan,
New York City.

Digitized by Google

82 *Return to Writ of Certiorari*

Endorsement on Writ.

The foregoing writ allowed.
Dated, N. Y. C., June 12th, 1911.

L. A. GIEGERICH,
J.

Return to Writ of Certiorari.

83 SUPREME COURT,

ALBANY COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, Elliott-Fisher Company,
Relator,
against
WILLIAM SOHMER, as Comptroller of the State of New York,
Defendant.

84 William Sohmer, as Comptroller of the State of New York, making return to the writ of certiorari issued out of this court on the 12th day of June, 1911, a copy of which is hereto attached,

Denies the allegations of the said writ that injustice has been done to the relator, the Elliott-Fisher Company or that the license tax imposed by the Comptroller was erroneous or illegal, but on the contrary alleges that said tax was justly and legally imposed by him on the said relator;

Digitized by Google

Further by virtue of and obedience to said writ of certiorari he hereby certifies and returns to this court the accounts and all the evidence taken before him on said application and all the papers and proofs upon the original statement of said account and all proceedings thereon, documents and records submitted to or considered by him together with his action and decision in the premises, to wit:

Exhibit A. Report of company for year ending October 31, 1906.

Exhibit B. Statement of the license tax involved in this proceeding.

Exhibit C. Affidavit of W. L. Dench, Secretary of the company, certified November 29, 1907, asking for revision and re-adjustment of the tax imposed.

Exhibit D. Affidavit of W. L. Dench, Secretary of the Company verified the 7th day of February, 1908, and application asking for revision and re-adjustment of the tax.

Exhibit E. Comptroller's letter and determination denying revision and re-adjustment of the license tax of the company.

IN WITNESS WHEREOF said Comptroller has hereunto set his hand and seal this 20th day of June, 1911.

WM. SOHMER,
Comptroller.

Filed in the office of the Clerk of Albany County, June 27th, 1911.

Digitized by Google

88 **Stipulation of Attorneys.**

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, Elliott-Fisher Company,
Relator,
against
WILLIAM SOHMER, as Comptroller
89 of the State of New York,
Defendant.

We hereby stipulate that the foregoing printed case contains true copies of all the papers and evidence and of the whole thereof in this proceeding, and that certification of the same by the Clerk of the County of Albany, be and it hereby is, waived pursuant to Section 3301 of the Code of Civil Procedure.

Dated, September 2nd, 1911.

CORNELIUS C. BEEKMAN,
Attorney for Relator,
257 Broadway,
Manhattan,
90 New York City.

THOMAS CARMODY,
Attorney General,
Attorney for Defendant,
Capitol,
Albany,
New York.

Digitized by Google

Order of Appellate Division.

At a Term of the Appellate Division held in and for the Third Judicial Department at the rooms of said Court in the City of Albany, commencing on the 14th day of November, 1911.

Present: Hon. Walter Lloyd Smith,
Justice Presiding.
Hon. John M. Kellogg,
Hon. Albert H. Sewell,
Hon. James A. Betts,
Hon. James W. Houghton,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, Elliott-Fisher Company,
Relator,
against
WILLIAM SOHMER, as Comptroller of the State of New York,
Respondent.

A writ of certiorari having been issued in the above entitled proceeding to review the determination of the Comptroller of the State of New York, in refusing to revise or readjust the account of taxes due from the relator herein under Section 181 of the Tax Law of the State of New York, and the Comptroller herein having filed a return to such writ in the office of the Clerk of Albany County on the 27th day of June, 1911, and the said proceeding having duly come on to be heard at this term of court, and counsel for the respective parties having submitted said proceeding to the determination of this court without argument, and due deliberation having been had.

Digitized by Google

94 *Order of Appellate Division*

Now, on motion of Thomas Carmody, Attorney-General, it is

Ordered that the determination of the Comptroller be unanimously confirmed with $50.00 costs and disbursements.

JOSEPH H. HOLLANDS,
Clerk.

Sir:

Take notice that the within is a copy of order duly filed and entered in the office of the Clerk of the Ap-
95 pellate Division, Third Department, on the 9th day of January, 1912, and a certified copy of which was filed and entered in the office of the Clerk of Albany County on the same date.

Yours, etc.,
THOMAS CARMODY,
Attorney-General.
Attorney for Respondent.

To:
Cornelius C. Beekman.
Attorney for Relator,
257 Broadway.

96

Digitized by Google

Notice of Appeal to Court of Appeals. 97

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, Elliott-Fisher Company,
Relator,
against
WILLIAM SOHMER, as Comptroller of the State of New York,
Respondent. 98

Sirs:

Please take notice, that Elliott-Fisher Company, the above named relator hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Third Department, made on the 9th day of January, 1912, and entered in the office of the Clerk of the County of Albany, on the same day, confirming the Comptroller's determination and from it and every part of said order.

Dated, March 2nd, 1912.

Yours, &c.,
CORNELIUS C. BEEKMAN, 99
Attorney for Relator-Appellant,
257 Broadway,
Bor. of Manhattan,
New York City, N. Y.

To:
Joseph H. Hollands,
Clerk of Appellate Div.,
Supreme Court, Third Dept.

To:
Clerk of the County of Albany.

To:
Thomas Carmody,
Attorney-General,
Atty. for Respondent.

Digitized by Google

Opinion of Appellate Division.

100

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

PEOPLE, *ex rel.*, Elliott-Fisher Company, against WILLIAM SOHMER, as Comptroller of the State of New York.	324-80.

101 Argued, November Term, 1911.
Decided, January Term, 1912.

This is a certiorari to review the determination of the Comptroller in assessing the relator for the license tax pursuant to Section 181 of the Tax Law, Chapter 47, Laws of 1906, for the privilege of doing business in this State and in refusing to make a revision or readjustment of said tax.

The relator is a foreign corporation organized under the laws of the State of Delaware, and in 1906, was transacting business in this State and had tangible assets here as well as elsewhere. The Comptroller de-
102 termined that the amount of its capital stock employed in this State during the year ending October 31, 1906, was $1,030,240 and fixed the license fee thereon at $1,287.80, less the amount of a license fee previously paid amounting to $122.37.

Before: Smith, Presiding Justice, Kellogg, Sewell, Houghton, Betts, Associate Justices.

Cornelius C. Beekman, for the relator.

The Attorney-General (Franklin Kennedy, Deputy of Counsel) for defendant.

Digitized by Google

KELLOGG, J.:

The only question presented to us is whether the license tax should be based upon the par value or the appraised value of the capital stock.

This license tax first came into our law by Chapter 240 of the Laws of 1895, which was entitled "An Act to provide for licensing foreign stock corporations." It provided a license fee of one-eighth of one per-centum "to be computed upon the basis of the amount of capital stock employed by it within this State during the year preceding that date." The tax was to be paid but once. Chapter 143 of the Laws of 1886, 104
imposed an organization tax of one-eighth of one per cent upon the capital stock of a domestic corporation, and in the year 1895, the Comptroller in his report to the Legislature suggested that foreign corporations were required to pay no organization tax here and therefore had an advantage, over domestic corporations, which was an inducement to corporations to organize outside of the State to transact business in the State and he suggested that such corporations should have no advantage over domestic corporations, and referred to the fact that the last Legislature had passed an Act which would compel foreign corporations to pay a tax similar to the organization tax of domestic 105
corporations but that the Act was so defective that it was not suffered to become a law; it is evident by the passage of the statute in question immediately following the report, and from the nature of the Act itself, that its purpose was to impose upon foreign corporations a tax similar to the organization tax required of domestic corporations. Notwithstanding this evident purpose this court felt compelled by former decisions to hold in People *ex rel.* Consolidated Gingseng Company v. Kelsey, 105 A. D., 175, that the license tax was not to be computed on the par value

Digitized by Google

of the stock of the corporation, which decision, June 16, 1905, was affirmed without opinion by the Court of Appeals in 182 N. Y., 526.

In People *ex rel.*, Commercial Cable Co. v. Morgan, 178 N. Y., 433, in a special franchise case, the court held that the basis upon which the tax was to be computed was not the issued capital but the money or property representing the capital, the Court saying at page 439: "What, then, is the basis upon which the tax is to be computed? Is it the share stock held by individuals, or is it the capital held by the corporation? The tax is upon the corporation. It would seem to 107 follow that the amount of the tax is to be measured by something that the corporation owns." It treated "capital stock" and "capital" as equivalent to each other, and this court in the Ginseng case felt controlled by those considerations.

In his report to the Legislature for the year 1906, the Comptroller called attention to this decision and the advantage which it gave foreign corporations over a domestic corporation, and continued: "It is respectfully suggested that Section 181 of the Tax Law be so amended that the domestic corporation is in at least as favorable relation to the taxing power of the State as is the foreign corporation coming within our bor- 108 ders to transact its business." The Legislature, thereupon, by Chapter 474 of the Laws of 1906, amended Section 181 by inserting the provision: "The measure of the amount of capital stock employed in this State shall be such a portion of the issued capital stock as the gross assets employed in any business within this State bear to the gross assets wherever employed in business."

I think the history of the Legislature up to that time and the use of the words "issued capital stock" in the statute, indicates clearly that the par value of the stock issued is to be the basis of taxation rather

Digitized by Google

than its appraised value. While it cannot be satisfactorily contested that the Legislature intended that the foreign corporation must pay a tax at least as great as the organization tax of the domestic corporation, it is urged upon us that we are precluded from giving the statute that construction by People *ex rel.*, Fifth Avenue Building Company v. Clark Wiliams, Comptroller, 198 N. Y., 238. The history of the statutes and of that case indicate otherwise. The license tax originated in an independent statute, designed for a special purpose, and was complete in itself, but in a revision of the Tax Law for convenience was brought into it and 110
became Section 181 of that law.

The Fifth Avenue case held that the franchise tax on a corporation paying no dividends was to be computed upon the appraised and not the par value of the stock. It conceded that Section 182 standing alone might fairly be held to mean otherwise, but that section must be read with Section 190, which related to the same subject, and the sections could not in any other way be harmonized and given full effect. But Sections 182 and 190 relate to a subject entirely different than 180 and 181, and would not be thought of in connection with this case were it not for the fact that in the consolidation of the Tax Laws the provision relating to the organization tax and the license tax 111
are Sections 180 and 181 and the separate provisions as to the franchise tax begin at Section 182. These taxes having a distinct origin and purpose may be considered separately and the sections imposing them may be given the same effect as if they had remained separate statutes and had not been brought together in the revision. The amendment inserting the word "issued" before the words "capital stock" indicates clearly that the stock referred to is the stock issued and not the money value representing the stock. I think the clear intention of the Legislature was that this tax

Digitized by Google

112 *Stipulation*

should be based upon the par value of the capital stock which is employed in business in the State. The determination of the Comptroller was right and should be confirmed, with fifty dollars costs and disbursements.

Stipulation Waiving Certification.

Pursuant to the provisions of Section 3301 of the
113 Code of Civil Procedure, we hereby stipulate that the foregoing are true copies, and of the whole thereof, of the evidence submitted to the Comptroller, his refusal to revise the assessment for license tax, notice of application and petition for writ of certiorari, undertaking for costs, order for and return to writ, order and opinion of Appellate Division and all the papers upon which the Appellate Division acted in making the order appealed from, and the notice of appeal to the Court of Appeals, now on file in the offices of the Clerks of the Appellate Division of the Supreme Court, Third Department and the County of Albany.

Dated, March 14th, 1912.

CORNELIUS C. BEEKMAN,
114 Atty. for Relator-Appellant,
257 Broadway,
New York City,
N. Y.

THOMAS CARMODY,
Attorney General,
Atty. for Respondent,
Capitol,
Albany,
N. Y.

Digitized by Google

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

To be argued by
CORNELIUS C. BEEKMAN.

FOR

IN THE

Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* ELLIOTT-FISHER COMPANY,
Relator-Appellant,
AGAINST
WILLIAM SOHMER, as Comptroller of the State of New York,
Defendant-Respondent.

APPELLANT'S POINTS.

Statement.

This is an appeal from an order of the Appellate Division of the Supreme Court, Third Department, made in this proceeding by *certiorari* to review the determination of the Comptroller in assessing the Elliott-Fisher Company, the relator-appellant herein, for license tax pursuant to Section 181 of the Tax Law for the privilege of doing business in this State, and in refusing to make any revision or readjustment of such taxation, which order confirms the Comptroller's determination (Petition for Writ, fols. 53-66; Order for Writ,

Digitized by Google

fols. 71-75; Writ of *Certiorari*, fols. 76-81; Order of Appellate Division, 91-96).

The proceeding was begun June 1st, 1911, by the granting of the motion for the order for the writ (fols. 49-79). The order was signed and the writ was issued on June 12th, 1911. Service of the writ was made on the Comptroller of the State of New York, June 16th, 1911. The return of the writ was filed in the office of the Clerk of Albany County, June 27th, 1911. The order of the Appellate Division confirming the Comptroller's determination was duly filed and entered January 9th, 1912, and the appeal therefrom was taken by the relator within the time prescribed by the Code of Civil Procedure. The names of the original parties in full are as above stated (fols. 2, 3, 71, 81, 87, 95, 98-99).

Facts.

The relator is a foreign corporation organized under and by virtue of the authority of the laws of the State of Delaware with an authorized capital of $10,000,000 of which $9,400,000 has been issued, $847,139.75 thereof having been issued for cash and property and the balance amounting to $8,552,860.25 having been issued for patents and good-will (fols. 23, 53).

The business carried on by the relator in the State of New York is the sale of book typewriters, billing and adding machines and typewriter supplies which are manufactured by the company in the State of Pennsylvania. In the prosecution of such business the relator during the year 1906 had tangible assets in this State of the value of $74,425. At that time the value of its tangible assets located outside of the State was $588,425 (fols. 11-14, 26, 34-36, 54). The relator's patents and goodwill for which capital stock was issued were valued at $1,400,000, and the then indebtedness of the re-

Digitized by Google

lator was $236,316. There were no dividends declared on or sales made of its capital stock during the period in question (fols. 7, 14, 54-56).

The relator duly made its report to the Comptroller for the year ending October 31st, 1906, setting forth the foregoing facts and figures, and upon such report the Comptroller under the alleged authority of Sections 181 and 182 of the Tax Law determined that the amount of capital stock employed by the relator in the State of New York during the year ending October 31st, 1906, was $1,030,240, and he accordingly assessed the relator for an annual tax and also the license tax in question both on the basis of $1,030,240, and settled an account against the relator for annual tax in the sum of $772.68, and for license tax in the sum of $1,287.80 less the amount of license tax previously paid amounting to $122.37 (fols. 20, 28, 56).

Applications for revision of such taxation of the relator were made (fols. 22-41), and the Comptroller under the stated authority of People *ex rel.* Fifth Ave. Bldg. Co. *vs.* Williams, 198 N. Y., 238 (fol. 44), revised the annual tax assessed against the relator for the year ending October 31st, 1906, and resettled the same on the basis of the value of such proportion of the relator's capital stock as its tangible assets employed in the State of New York bore to its total tangible assets wherever employed but declined to make any revision or readjustment of the assessment of the license fee, claiming that the license fee provided for under Section 181 of the Tax Law is upon the par value of the issued capital stock and not upon its actual or appraised value (fols. 43-45, 57-58).

Thereupon the relator, having paid the license tax which the Comptroller refused to revise, sued out this writ of *certiorari* as and in the manner and within the time provided by statute (fols. 43-47, 49, 51, 72, 79).

Digitized by Google

Question for Determination.

The question at issue in this proceeding is susceptible of definite statement in a very few words: Is the license tax under Section 181 of the Tax Law assessable on the par value or the actual value of the issued capital stock employed in this State?

POINT I.

The license fee under Section 181 of the Tax Law should be assessed on the actual value of capital stock, as is the annual tax under Section 182, when no dividends are declared.

In 1906 Section 181 of the Tax Law, under the authority of which the license tax in question was imposed, read in part as follows:

> "Every foreign corporation * * * authorized to do business under the General Corporation Law, shall pay to the State Treasurer, for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital stock employed by it within this state during the first year of carrying on its business in this state, and if any year thereafter any such corporation shall employ an increased amount of its capital stock within this state the same license fee shall be due and payable upon any such increase.
>
> "The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as

Digitized by Google

> the gross assets employed in any business in this state bear to the gross assets wherever employed in business."

In 1906 Section 182 of the Tax Law, under the authority of which the Comptroller first assessed appellant for annual tax on the par value of its capital stock, and then revised it by virtue of the decisions of this Court to the actual value, provided that as to corporations which declared no dividends or whose dividend or dividends amount to less than six per centum on the par value of the capital stock and whose assets do not exceed the liabilities, exclusive of capital stock, or whose stock sold during the year at an average price which did not equal or exceed its par value, the tax should be assessed at the rate of three-quarters of a mill upon "Each dollar of the amount of capital stock employed in this State."

The following provision was a part of Section 182 in 1906:

> "The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business in this state bear to the gross assets wherever employed in business."

This same provision expressed in exactly the same language was at that time and now is a part of Section 181, as will be found by referring back to the quotation from said section above set forth.

In that year (1906) Section 190 of the Taxes Law was so amended as to have no possible application to corporations declaring no dividends. It then related wholly to corporations with dividends of less than six per cent., but with assets in excess of liabilities, exclusive of capital stock, by an amount equal to or greater than the par value of capital stock, or whose stock had been sold during

Digitized by Google

the year at an average price equal to or greater than the par value of the capital stock. In other words, Section 190 did not then provide for the appraisal of capital stock of corporations declaring no dividends.

The Comptroller assessed the relator for the license tax in question as well as for the annual tax for the year 1906 under Sections 181 and 182 when these sections were in force as above mentioned. The license tax was assessed on the par value and the annual tax on the actual value of the issued capital stock of the relator employed in this State. At that time neither Section 182, under which the annual tax was assessed, nor Section 190, contained any provision for the appraisal of capital stock of corporations declaring no dividends, and there was no appraisal provision then to be found in Section 181. The annual tax for the year 1906 was revised by the Comptroller according to his own statement (fol. 44) as a result and by virtue of the authority of the decision of this Court in the case of People *ex rel.* Fifth Ave. Bldg. Co. *vs.* Williams, 198 N. Y., 238. That case is not authority for the Comptroller's action in revising the annual tax, as the tax there under consideration was assessed at a time when Section 190 of the Tax Law provided for an appraisal of capital stock of corporations declaring no dividends.

The revision of the relator's annual tax finds support, however, in the decision of this Court handed down at the same time in the case of People *ex rel.* N. Y. Mail & Newspaper Transportation Co. *v.* Gaus, 198 N. Y., 250, and in that case and not the Fifth Ave. case this Court held, notwithstanding the fact that Sections 182 and 190 contained no appraisal provision, that the annual tax under Section 182 should be assessed on the actual value of capital stock when no dividends are declared.

Digitized by Google

This Court said in the last mentioned case at pages 254-255:

> "The theory of the statute, as disclosed by its successive amendments, seems to indicate that when the capital stock is the basis upon which the tax is to be assessed, there shall be an appraisal or valuation of the capital stock at its actual value. It is true that no such provision is to be found in that subdivision of section 182 which relates to corporations comprising the second group, but neither does it provide in explicit terms for taking the capital stock at its par value as the basis of the tax. 'Each dollar of the amount of the capital stock employed in this state' is to be taxed under that subdivision, but whether that means the amount at its actual value or at its par value is not disclosed. The addition of a few words would have made the meaning of this part of the statute so clear as to preclude mistake or misunderstanding. As it stands, it is doubtful and equivocal. In his very forceful argument the learned attorney-general has presented all that can be said upon the subject, but the fact remains that we cannot adopt his views without construing this statute most strongly against the relator, and that is forbidden. In People *ex rel.* Mutual Trust Co. *v.* Miller (177 N. Y., 51) we reiterated the familiar rule that 'A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax' (p. 57). The application of that well-settled rule to the case at bar leaves nothing to be said except that the benefit of the doubt and uncertainty as to the meaning of this statute must be given to the relator and not to the state."

Referring now to the phraseology of Section 181 we find that the above quoted remarks of this Court

Digitized by Google

in the Mail & Transportation case are applicable to the case at bar, and should be controlling in the determination of the question on this appeal.

Taking up the remarks sentence by sentence, we find that the first sentence is just as applicable to the case at bar for the reason that this Court held in the case of People *ex rel.* Consolidated Ginseng Co. v. Kelsey, 105 App. Div., 175: affirmed 182 N. Y., 250, that under Section 181 before it was amended in 1906 by the addition of the paragraph

> "The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business in this state bear to the gross assets wherever employed in business";

that the license tax is assessable on the actual value of the capital stock employed in this State. There was no appraisal provision in Section 181 at the time the Consolidated Ginseng Co. case was decided and the only difference in the wording of the section at that time and at the time the license tax in question was assessed is the addition of the paragraph quoted above. Such paragraph also appears in Section 182 and this Court in the Mail & Transportation case evidently did not consider it offered any serious obstacle to the conclusion reached therein or some mention would have been made of it which was not done. It would seem, therefore, that it can be said that the theory of Section 181 as well as of Section 182 seems to indicate that there shall be an appraisal or valuation of capital stock at its actual value in assessing the license tax.

The second sentence of the above quoted remarks of this Court we find are even more applicable to Section 181 than the first sentence. There is no appraisal provision in Section 181, neither does it

Digitized by Google

provide in explicit terms for taking the capital stock at its par value as the basis of the tax. It states that the tax shall be computed upon the basis of the capital stock employed within this State, and that the measure of the amount of capital stock employed in this State shall be such a portion of the issued capital stock as the gross assets employed in any business in this State bear to the gross assets wherever employed in business. There is nothing said about the par value, and surely the words "issued capital stock" can refer to the actual value of issued capital stock as well as to the par value of issued capital stock. There is, therefore, doubt as to the meaning of the words "issued capital stock," as used in Section 181, and it cannot be denied that the remaining sentences of the above quoted remarks are applicable to any doubtful and equivocal statute, and in the words of this Court "the benefit of the doubt and uncertainty as to the meaning of this statute must be given to the relator and not to the State."

POINT II.

The amendment to Section 181 of the Tax Law in 1906 did not change the meaning thereof as interpreted by this Court in the Consolidated Ginseng case so as to preclude a valuation of capital stock, but merely changed the method of taxing the license fee so that it should be assessed on the proportion of capital stock employed in the State.

The Attorney-General in his brief in the Court below, claiming it was essential for the proper de-

Digitized by Google

termination of the issue herein, gave a full history of Sections 180, 181, 182 and 190 (now 193) of the Tax Law. In this connection he stated that in 1895 the Comptroller in his annual report to the Legislature, called attention to the fact that foreign corporations were transacting business in this State without paying for the privilege, and that the Legislature at his suggestion, at that session, enacted Section 181 of the Tax Law in substantially the same form as it was prior to the amendment of 1906. He claimed that the license tax, enacted to require the equivalent of the organization tax from foreign corporations, was not, if it was to serve its purpose, to be on the appraised value, but on the par value of that proportion of capital stock employed in this State. He stated also that in 1905 this Court decided otherwise in People *ex rel.* Consolidated Ginseng Co. *v.* Kelsey, 182 N. Y., 526, affirming without opinion the determination of the Appellate Division reported in 105 App. Div., 175, and that the effect of the decision was clearly to give foreign corporations a financial advantage over domestic corporations, and thus defeat the very purpose for which the license tax on foreign corporations was enacted. Then he claimed the State Comptroller, in his annual report to the Legislature in 1906, called its attention to this decision and its effect, and asked for an amendment to Section 181 so that it would unmistakably show that the license tax required of foreign corporations was to be upon the par value and not on its appraised value, and that the Legislature thereupon, at that session, amended Section 181 by Chapter 474 of the Laws of that year, and the following significant amendatory provision was inserted:

> "The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the

Digitized by Google

> gross assets employed in any business in this state bear to the gross assets wherever employed in business."

The Court below adopted this line of reasoning and held with him that the foregoing amendment nullified the Consolidated Ginseng decision, and that the license tax under Section 181 was assessable on the par value and not the actual value of capital stock. The Appellate Division held, as was claimed by the Attorney-General, that the use of the words "issued capital stock" in the amendment meant that the basis of the tax was the par value of the issued capital stock and not the actual value of the issued capital stock.

The Court below erred in holding that the amendment inserting the word "issued" before the words "capital stock" indicates clearly that the stock referred to is the par and not the actual value of the issued capital stock. At the time of the enactment of the amendment to Section 181 there was a general overhauling by the Legislature of Section 182, and that section was amended so as to include the same identical provision added at the time to Section 181. It is maintained that the amendment to Section 181 was made in order to make that section agree with Section 182 so that the measure of the amount of capital stock in the case of the license tax as well as the annual tax should be the same. Surely the amendment to Section 181 is not clear; on the contrary, it is most ambiguous, for the word "issued" can apply either to the par or actual value of such capital stock. Is it not therefore reasonable to suppose, when we consider that the amendment is ambiguous and the addition of a few words, as this Court said in the Mail & Transportation case, would have made the meaning so clear as to preclude mistake or misunderstanding, that the Legislature amended Section 181 to harmonize it with Section 182, as then re-

Digitized by Google

constructed, and not to make the basis of the license tax the par value of the issued capital stock. Granted that Section 181 has a totally different origin than Section 182, as was stated to be the case by the Court below, but the fact remains that Section 181 is by no means clear and unless the doubt is resolved in favor of the relator and the license tax thereunder is held to be assessable on the actual value of the issued capital stock, what becomes of the well-settled rule reiterated by this Court in the Mail & Transportation case that "A statute which levies a tax is to be construed most strongly against the Government and in favor of the citizen." That rule has been too firmly established in our jurisprudence to be upset to uphold a claim, similar to the one made and rejected by this Court in the Consolidated Ginseng case, that unless an ambiguous statute is construed in favor of the State of New York there will be a flagrant discrimination in favor of foreign corporations as against our own domestic corporations.

Wherefore, the appellant demands relief that the order of the Appellate Division be reversed, that it may be adjudged that the license fee in question was not imposed according to law and the facts, and that the Comptroller be directed to revise such license tax, resettle the same upon the basis of the appraised value of the relator's capital stock employed in the State of New York during the year ending October 31st, 1906, and refund to the relator the difference between the amount of

Digitized by Google

license tax found due by said resettlement and the amount of license tax paid, together with interest on the difference from the date of payment, or that the relator is entitled to such other or further relief as to the Court may seem just and proper, besides costs and disbursements in both courts.

Respectfully submitted,

CORNELIUS C. BEEKMAN,
Attorney for Relator-Appellant,
257 Broadway, Manhattan,
New York City, N. Y.

Dated April 25th, 1912.

Digitized by Google

Digitized by Google

Court of Appeals

To be argued by
FRANKLIN KENNEDY,
Deputy Attorney-Gen

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. ELLIOTT-FISHER COMPANY,
Relator-Appellant,
against
WILLIAM SOHMER, as Comptroller of the State of New York,
Defendant-Respondent.

FOR

BRIEF OF ATTORNEY-GENERAL.

STATEMENT.

This is an appeal to this court from an order of the Appellate Division made the 14th day of November, 1911, confirming unanimously the determination of the State Comptroller in refusing to revise the license tax required of the relator under section 181 of the Tax Law.

The determination of the Comptroller was made on May 3, 1911, and the writ of certiorari herein was issued on the 12th day of June, 1911, the return to which was filed in the County Clerk's Office of Albany county on June 27, 1912.

An opinion was written by the Appellate Division to be found at folios 100 to 112, pages 34 to 38.

Digitized by Google

FACTS.

The license fee involved was imposed in the fall of 1906 and amounts to $1,165.43 (fols. 19–20, 31–36, 55–56).

The relator is a foreign corporation organized under the laws of Delaware on June 15, 1903 (fol. 5). Its authorized capital stock is $10,000,000, of which it has issued $9,400,000 (fols. 5–7).

Relator made a report to the State Comptroller of its condition for the year ending October 31, 1906 (pages 2–16 of the record). On this report the comptroller determined the amount of its *issued* capital stock employed in this State for the year 1906 to be $1,030,240 (fols. 20, 55–56). A license fee of one-eighth of one per cent computed on this amount would be $1,287.80, which less a deduction of $122.37, credited to the relator by reason of a prior payment, makes $1,165.43 due as the license fee involved in this proceeding.

The relator, in two applications of November, 1907, and February, 1908, respectively, asked for a revision of this license fee (fols. 22–30, 31–42). Revision was denied (fols. 43–45) and hence this proceeding was brought.

QUESTION FOR DETERMINATION.

The question involved is simple: The Comptroller has imposed a license fee of the relator on that proportion of its issued capital stock employed in this State *on its par value;* the relator claims that the license fee, under section 181, should have been imposed on such proportion of its issued capital stock *on its appraised value.*

Digitized by Google

SECTION 181 AND ITS HISTORY.

It is essential for the proper determination of this question to know the history of section 181.

A license fee was first required in this State by chapter 240 of the Laws of 1895, entitled "An act to provide for licensing foreign stock corporations." Its enactment was prompted by the State Comptroller, and his purpose in securing its enactment is set forth in his report for 1895, an excerpt from which is set forth on pages 8 and 9 of this brief.

This act was as follows:

> "Section 1. Every foreign corporation except banking, fire, marine, casualty and life insurance companies, and corporations wholly engaged in carrying on manufactures in this state, co-operative fraternal insurance companies, endowment orders and building and loan associations, now authorized to do business in this state, under the provisions of chapter six hundred and eighty-seven of the laws of eighteen hundred and ninety-two, entitled "An act to amend the general corporation law," shall pay to the state treasurer for the use of the state, *a license fee of one-eighth of one per centum* for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, on the first day of December, eighteen hundred and ninety-five, *to be computed upon the basis of the amount of capital stock employed by it within this state during the year preceding that date*, and every such foreign corporation which shall hereafter be authorized to do business in this state shall pay a like license fee for the privilege, *to be computed upon the basis of the capital stock employed by it*

Digitized by Google

within this state for its business during the first year of carrying on its business in this state. The amount of capital upon which such taxes shall be paid shall be fixed by the comptroller, who shall have the same authority to examine the books and records in this state of such foreign corporations, and the employees thereof, and the same power to issue his warrant for the collection of such taxes, as he now has with regard to domestic corporations. Every such foreign corporation hereafter authorized to do business in this state shall, before receiving the certificate of authority provided by law, pay to the state treasurer, for the use of the state, the tax hereinbefore provided for. No action shall be maintained or recovery had in any of the courts of this state by such foreign corporation doing business in this state without obtaining the certificate of authority prescribed by law, and a receipt for the license fee hereby imposed." (Italics ours.)

In the statutory revision of 1896 this act became section 181 of the Tax Law (chap. 908).

This act was amended by chapter 558 of the Laws of 1901 as follows: The exemption theretofore existing in favor of foreign corporations "while engaged in carrying on manufacturers in this State" was stricken out and a provision inserted placing such corporations upon the same basis as other foreign corporations respecting this license tax; also it was further provided that when any corporation subject to the license fee should employ an increased amount of capital stock within the State, the same license fee should be payable upon such increase.

In 1905, this court affirmed by a divided court of four to three, the case of *People ex rel. Consoli-*

Digitized by Google

dated Ginseng Co. v. Kelsey, 105 A. D. 175, without opinion 182 N. Y. 526. Following this decision and because of it the section was again amended by chapter 474 of the Laws of 1906, at the suggestion of the Comptroller in his report to the Legislature, for the year 1906, an excerpt of which is quoted on pages 10, 11 and 12 of this brief. The section as amended in 1906 was amended as follows:

> "§ 181. *License tax on foreign corporations.*— Every foreign corporation, except banking corporations, fire, marine, casualty and life insurance companies, co-operative fraternal insurance companies and building and loan associations, authorized to do business under the general corporation law, shall pay to the state treasurer, for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; and if any year thereafter any such corporation shall employ an increased amount of its capital stock within this state, the same license fee shall be due and payable upon any such increase. The tax imposed by this section on a corporation not heretofore subject to its provisions shall be paid on the first day of December, nineteen hundred and one, to be computed upon the basis of the amount of capital stock employed by it within the state during the year preceding such date, unless on such date such corporation shall not have employed capital within the state for a period of thirteen months in which case it shall be paid

Digitized by Google

within the time otherwise provided by this section.] *The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located.* No action shall be maintained or recovery had in any of the courts in this state by such foreign corporation without obtaining a receipt for the license fee hereby imposed within thirteen months after beginning such business within the state, or if at the time this action takes effect such a corporation has been engaged in business within this state for more than twelve months, without obtaining such receipt within thirty days after such tax is due."

Explanation: Matter in italics is new; matter in [ ] is old law.

The license fee in this proceeding is for the year 1906 and therefore is controlled by the section as amended in 1906.

As a matter of interest it may be added that the section as enacted at the present time is the same except that the Commissioners on Statutory Consolidation inserted one provision from the original 1895 act on the belief that it had not been repealed (section 181, chap. 62, Laws of 1909). They did this, it seems, under a misapprehension and therefore the provision added by them should be disregarded (see White on Corporations, 7th Ed., pages 196, 197). Therefore the section, as it stands to-day, is the same as it was enacted by chapter 474 of the Laws of 1906.

Digitized by Google

SECTION 180.

Inasmuch as the license tax on foreign corporations imposed in section 181 was enacted as *the equivalent of the organization tax required of domestic corporations in section* 180, both of these sections, 180 and 181, must be construed together. Section 180 is therefore helpful in construing section 181.

An organization tax was first imposed on domestic corporations in this State by chapter 143 of the Laws of 1886, entitled "An act to tax stock corporations for the privilege of organization." That act provided in part as follows:

> "Every corporation, joint-stock company or association incorporated by or under any general or special law in this State, having capital stock divided into shares, shall pay to the State Treasurer, for the use of the State, *a tax of one-eighth of one per centum upon the amount of capital stock which said corporation*, joint-stock company or association *is authorized to have*, and a like tax upon any subsequent increase thereof." (Italics ours.)

In the statutory revision of 1896, this act became section 180 of the Tax Law (chapter 908). In 1901 the tax was reduced from one-eighth to one-twentieth of one per centum (chapter 448); and in 1906, and at the present time, section 180 (chap. 62, Laws of 1909) imposes upon organization of a domestic corporation "a tax of one-twentieth of one per cent upon *the amount of capital stock* which the corporation *is authorized to have*, and a like tax upon a subsequent increase." (Italics ours.)

Digitized by Google

POINTS.

I.

SECTION 181 OF THE TAX LAW CLEARLY REQUIRES THAT THE LICENSE TAX ON FOREIGN CORPORATIONS BE IMPOSED ON THE PAR VALUE OF THAT PROPORTION OF THEIR ISSUED CAPITAL STOCK EMPLOYED IN THIS STATE, AND NOT ON ITS APPRAISED VALUE.

As we have seen, by chapter 143 of the Laws of 1886, an organization tax was for the first time imposed on domestic corporations in this State. That act required a tax "as one-eighth of one per centum upon the amount of capital stock which the corporation * * * is authorized to have * * *."

Following the enactment of this act many corporations, whose business was entirely done in this State, sought foreign domiciles, such as New Jersey, on account of the milder taxes and the laxer laws of those States. Finally in 1895, the Comptroller, in his annual report, called the attention of the Legislature to this fact in the following statement:

> "Certain corporations organized under the laws of the states other than our own should not have a business or pecuniary advantage over our domestic corporations. As is well known, corporations organized under our own laws are compelled to pay an organization tax of one-eighth of one per centum on their capital. An Act was passed by the last Legislature which would have compelled corporations organized under the laws of other states to pay a like tax of one-eighth per

Digitized by Google

> cent upon the capital employed in this state. Owing to dangerous defects this bill was not suffered to become a law. Some measure of that kind would not only increase the revenues of the state but also to a considerable extent withdraw the inducement to organize under the laws of other states corporations whose business is to be very largely carried on in this state."

On his suggestion the Legislature, at that session, enacted, as we have seen, chapter 240 of the Laws of 1895, requiring all foreign corporations to pay "a license fee of one-eighth of one per centum * * * to be computed upon the basis of the amount of capital stock employed by it within this State * * *."

Thus it is clear that the license fee imposed on foreign corporations by the act of 1895 *was to be the equivalent, so far as they were concerned, of the organization tax required of domestic corporations by the act of* 1886:

1st. The rate of the organization tax and the license fee were the same, one-eighth of one per centum.

2d. The organization tax was "upon the *amount of capital stock*" which the corporation was "authorized to have;" the license fee was to be computed upon "*the amount of capital stock* employed by it within this State during the year preceding."

3d. The organization tax was to be paid but once on the organization of the corporation; foreign corporations were to pay a license fee but once, the first year they carried on business in the State.

Digitized by Google

Concededly the organization tax was not on the appraised value of the capital stock of domestic corporations, but on the par value of the authorized capital stock; and certainly the license tax, enacted to require the equivalent of such organization tax from foreign corporations, was not, if it was to serve its purpose, to be on the appraised value but on the par value of that proportion of their capital stock employed in this State.

However, this court in 1905 decided otherwise in the case of *People ex rel. Consolidated Ginseng Co.* v. *Kelsey*, 105 A. D. 175, which was affirmed by the Court of Appeals, without opinion, in 182 N. Y. 526, *by a divided court of four to three*. The effect of this decision was clearly to give foreign corporations a financial advantage over domestic corporations, and thus to defeat the very purpose for which the license tax on foreign corporations was enacted. Therefore the State Comptroller, in his annual report to the Legislature in 1906, called its attention to this decision and its effect, and asked for an amendment to section 181 so that it would unmistakably show that the license tax required of foreign corporations was to be upon the par value of that proportionate amount of capital stock employed in this State, and not on its appraised value.

The Comptroller says, on pages 37, 38 and 39 of his report, on this subject:

> "In 1895 the Legislature passed an act which became chapter 240 of that year's laws. This law provided for the payment of a license fee by a foreign corporation coming into this State to transact business. At the time of the passage of that act the organization tax in this State was at the rate of

Digitized by Google

one-eighth of one per centum upon the authorized capital stock, but has since been reduced to one-twentieth of one per centum, the license fee remaining as originally fixed. In order to restrain organizations capitalized largely with domestic capital from incorporating under the laws of other states, a license fee at the same rate was imposed upon the amount of capital stock of foreign corporations employed in doing business in this State. The purpose of restraining capital from organizing abroad was to obtain for the State of New York the legitimate organization fees belonging to the State, but at that time largely paid into the treasuries of other states. *Following out the clear intent of the Legislature, the Department based such license fees upon the amount of capital stock, rather than the value of the capital employed in the State of New York.* The provisions of section 240 of the Laws of 1895 were incorporated into and became a part of the General Tax Law, chapter 908, Laws of 1896. During the last fiscal year the Court of Appeals affirmed a decision of the Appellate Division, Third Department, (see People ex rel. Consolidated Ginseng Co. v. Kelsey, 105 App. Div.), holding that the property values of the corporation in this State constitute the basis of the license fee rather than the portion of capital stock employed within the State. Under this decision a corporation organized under the laws of another state, and having a capital stock of $2,000,000 can come into the State of New York, employ its whole capital stock in doing business here, and if the value of its assets is but $240,000 would pay a license fee of $300, whereas a similar corporation with a like amount of capital stock, organized under the laws of the State of New York would be obliged, under the present rate of organization tax, viz., one twentieth

Digitized by Google

of one per centum, to pay an organization fee of $1,000.

"It is respectfully suggested that section 181 of the Tax Law be so amended that the domestic corporation is in at least as favorable relation to the taxing power of the State as is the foreign corporation coming within our borders to transact its business. The same rule of apportionment suggested for use in section 182 would work equally as well in section 181 of the law."

The Legislature thereupon at that session amended section 181 by chapter 474 of the Laws of that year, and the following significant amendatory provision was inserted:

"The measure of the amount of capital stock employed in this state shall be such a portion of the *issued* capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business."

So that although the license tax continued to be computed upon the basis of the capital stock employed by it within this State, yet that was to be "such a portion of the *issued* capital stock as the gross assets," etc. There can be no mistaking the meaning of this amendment. This court, in the case of *People ex rel. Ginseng, supra*, had held "capital" and "capital stock" synonymous terms in interpreting the then section 181. There can be no such interpretation of the term "issued capital stock."

To hold otherwise would defeat the purposes of the amendment. If that proportion of the issued capital stock employed in this State by the relator herein is to be valued, it will pay a license tax of

Digitized by Google

only $197.46, instead of the tax imposed by the Comptroller of $1,287.80; while a domestic corporation would pay on the authorized capital stock of this company, a tax of $5,000. An interpretation of section 181, as contended for by relator, would be a flagrant discrimination in favor of foreign corporations as against our own domestic corporations.

4

Digitized by Google

II.

THE DECISION OF THE COURT OF APPEALS IN THE CASE OF PEOPLE EX REL. FIFTH AVENUE B. CO. v. WILLIAMS, 198 N. Y. 238, INTERPRETING SECTION 182 OF THE TAX LAW, IS NOT IN POINT OR CONTROLLING IN RELATION TO THE CONSTRUCTION OF SECTION 181 OF THE TAX LAW INVOLVED IN THIS PROCEEDING.

The relator claims that the case of *People ex rel. Fifth Avenue Co. v. Williams, supra,* has determined the force and effect of the amendment in 1906 of section 181; but that case construed section 182 of the Tax Law, a section imposing a tax of totally different nature from the license fee required of foreign corporations in section 181.

Section 182 imposes an annual franchise tax in advance on all corporations, irrespective of whether they are foreign or domestic, for the privilege of exercising their corporate franchises in this State. It is derived from section 3 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, etc."

Section 181, as we have seen, is derived from an independent and totally different statute, chapter 240 of the Laws of 1895; the purpose of its enactment, as shown above, being to require foreign corporations to pay an equivalent of the corporation tax on domestic corporations. It is to be paid but once, the first year the corporation does business in this State. The section also provides that

Digitized by Google

in order to maintain an action in this State a foreign corporation must not only have the certificate of authority, required by section 15 of the General Corporations Law, but a receipt showing it has paid its license fee under section 181. This requirement as to a receipt would seem to show conclusively that every foreign corporation was intended to pay some license fee; however, if their issued capital stock employed in this State is to be valued *a large class of foreign corporations will entirely escape paying a license tax.*

It is absurd to say that, because in the statutory revision of 1896 (chap. 908), the statute of 1895, requiring a license tax and the statute of 1880, requiring an annual franchise tax, were placed side by side as sections 181 and 182 of the Tax Law, the construction given to section 182 must necessarily be given to section 181; that, because valuation of capital stock is required by section 182, a valuation is required in imposing a license fee by section 181.

A consideration of the case of *People ex rel. Fifth Avenue Company, supra,* as well as the allied case of *People ex rel. New York Mail & N. T. Co.* v. *Gaus,* 198 N. Y. 250, makes this very clear. *It may be observed that both these cases were decided by a divided court of 4 to 3.* It appears from these cases that:

1. Section 182 is closely allied with the other sections (183 to 207) of Article IX of the Tax Law, and particularly with section 190 (now section 193), requiring a valuation of the capital stock of all corporations on which a franchise tax is required by section 182; and such allied sec-

Digitized by Google

tions, are all derived from the same source, the original franchise tax statute of 1880.

2. The court very extendedly and carefully considers the elaborate classification of corporations in section 182 for the purpose of franchise taxation, and the very elaborate and specific provisions contained in said section for the valuation of the capital stock of corporations taxed.

In the Fifth Avenue Building case, the court says, in reference to section 182:

> "It may be conceded that the language of this section, taken by itself, is capable of that construction (non-valuation of the capital stock of corporations declaring no dividends) but it is by no means clear and explicit."

The court therefore says, at page 248:

> "Under sections 182 and 190 *as read together*, corporations of the class to which the relator belongs are to be taxed upon the basis of the actual value of their capital stocks and not upon their par value."

And in the case of *The People ex rel. New York Mail & N. T. Co. v. Gaus, supra*, at page 250, the court in considering the intricate and confusing provisions of section 182, says: "As it stands it is doubtful and equivocal." Therefore it was to be construed against the State.

On the other hand, section 181, requiring a license tax on foreign corporations, as well as section 180, requiring an organization tax on domestic corporations, are derived, as we have seen, from totally dissimilar statutes than section 182 and its allied sections in Article IX. **FURTHER IN SECTION 181 THERE IS NO PRO-**

Digitized by Google

VISION WHATSOEVER FOR VALUATION ANYWHERE AND SECTION 190 (NOW SECTION 193) IS NOT IN ANY MANNER WHATSOEVER APPLICABLE TO SECTION 181. How, therefore, can these cases, interpreting the intricate provisions of section 182, be controlling or in point on the construction of the totally different provisions of section 181? The above decisions are clearly based on the particular provisions of section 182 and can have no application to the differing provisions of section 181, which has a totally different source, history and purpose.

And certainly, since the amendment of 1906, it cannot be said that the provisions of section 181 are equivocal or doubtful. The Comptroller, in prompting the amendment, clearly shows that the purpose of the amendments was to avoid a valuation of the capital stock on which a license fee on foreign corporations was to be computed.

It has been shown that, if a valuation is had the relator herein will pay an inconsiderable license fee *and that a large class of corporations will pay no license tax whatsoever*. Clearly such a construction would defeat the purpose of the section and the intention with which it was amended in 1906.

As Judge Vann said in *People ex rel. A. J. Johnson v. Roberts*, 159 N. Y. 70 at page 86:

> "It is a matter of common knowledge, as well as of grave public concern in this state, that, for the sake of a paltry license tax, certain sister states are competing with each other in granting loose charters without adequate protection for the public, and thus inducing the promoters of corporations to

Digitized by Google

> organize under their statutes, when there is no intention of investing capital or doing business in the state where the organization is effected. Such selfish and unfriendly legislation should not be encouraged by the courts of the state which is most injured by it."

(8) PEOPLE EX REL. CONSOLIDATED GINSENG COMPANY v. KELSEY, 105 A. D. 175; AFFIRMED 182 N. Y. 526.

As has been observed this court affirmed the decision of the Appellate Division in this case without opinion by a divided court of four to three.

It is respectfully suggested that the Appellate Division and this court in that case overlooked the radical distinction between sections 181 and 182 of the Tax Law, with reference to their sources, histories and purposes. The decision of the Appellate Division was wholly based on the case of *People ex rel. Commercial Cable Company* v. *Morgan*, 178 N. Y. 433. The Commercial Cable case involved the imposition of a corporate franchise tax *under section* 182 on a domestic corporation. In the Ginseng case it was assumed without question or argument that a decision applicable to the interpretation and construction of the provisions of section 182 was controlling on the construction of section 181. Clearly, however, for the reasons stated elsewhere in this brief, such assumption was erroneous.

In the Commercial Cable case, in interpreting section 182, this court clearly pointed out that the tax imposed under section 182 was *a franchise tax* saying "'capital stock' and 'capital' are practically the equivalent of each other when considered as a basis for a franchise tax." Section 181, on the contrary, does not impose a franchise

Digitized by Google

tax; — *it imposes a license fee, the equivalent of the organization tax required of domestic corporations.*

It is clear therefore, that the " amount of capital " upon which the license fee in section 181 is to be computed is not to be construed in the same manner as that phrase is construed or interpreted by the courts in section 182, but rather in accordance with the use of the phrase in section 180 providing an organization tax on domestic corporations. Section 180 provides a tax of one-eighth of one per cent " upon the *amount of capital stock* which said corporation * * * is authorized to have." There can be no question but that the phrase " amount of capital stock " under section 180 means share stock and not capital; must it not have the same meaning in section 181, *enacted to be the equivalent to section* 180 *in respect to foreign corporations.*

III.

THE ORDER OF THE APPELLATE DIVISION SHOULD BE AFFIRMED WITH COSTS TO THE RESPONDENT.

Dated, April 29, 1912.

Respectfully submitted,

THOMAS CARMODY,
Attorney-General,
Attorney for Defendant-Respondent, Office & Post Office Address, Capitol, Albany N. Y.

FRANKLIN KENNEDY,
Deputy Attorney-General,
Of Counsel.

Digitized by Google

Digitized by Google

IN THF

Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. ELLIOTT-FISHER COMPANY,
Relator-Appellant,

AGAINST

WILLIAM SOHMER, as Comptroller of the State of New York.
Defendant-Respondent.

Brief on Behalf of The Buffalo & Susquehanna Coal & Coke Company Intervening.

The Buffalo & Susquehanna Coal & Coke Company is a Pennsylvania corporation which has duly received authority to transact business in the State of New York and against which the Comptroller has assessed a license tax under section 181 of the Tax Law, amounting to Two hundred and seventy-one dollars and sixty-nine cents ($271.69). The Company has duly protested against this assessment and demanded a re-hearing, which proceeding in still pending in the office of the Comptroller. The question involved is identical with that raised on this appeal.

Digitized by Google

FACTS.

The report of the Buffalo & Susquehanna Coal & Coke Company to the Comptroller shows a total excess of assets over liabilities of two hundred seven thousand six hundred and ninety-six dollars and two cents ($207, 696.02). Of the total assets of the Company, eight hundred and eighty-nine thousand eight hundred and eighty-seven dollars and forty-three cents ($889,887.43), are shown to be located within the State of New York and four million seven hundred fifty-six thousand six hundred and seventy-five dollars and eighty-seven cents ($4,756,675.87) outside of the State of New York. In other words, 18.918 per cent. of the assets are employed within this state and under the law the tax is assessable on this percentage of the capital stock.

The Comptroller has assessed the tax on the par value of the stock, making the same two hundred and seventy-one dollars and sixty-nine cents ($271-.69) instead of on the appraised value which would make the tax only forty-nine dollars and eleven cents ($49.11).

POINT I.

Under the decisions of this Court the tax under Section 181 must be computed upon the actual value of the capital stock rather than upon its par value.

Section 181 of the Tax Law provides in part as follows:

Digitized by Google

"Every foreign corporation * * * shall pay to the State Treasurer, for the use of the State, a license fee of one-eighth of one percentum for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in this state, *to be computed upon the basis of the capital stock employed by it within this state, during the first year* of carrying on its business in this state * * * The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business * * *."

The language above used, upon which the present case must be decided, is almost identical with that employed in section 182 of the Tax Law under consideration by this court in the case of *People ex rel. New York Mail & Newspaper Transportation Company vs. Gaus*, 198 N. Y., 250.

In that case, this court went much farther than in *People ex rel. Fifth Avenue Building Company vs. Gaus*, 198 N. Y., 238, handed down at the same time, and yet the opinion of the learned Appellate Division in the case at bar does not refer to the former case at all. In the *Fifth Avenue Building* case, the decision rested on a construction of section 182 in conjunction with section 190 providing for an appraisal of the capital stock where no dividends were declared. In the *New York Mail*

Digitized by Google

& Newspaper Transportation Company case, however, as to the tax for the year 1907, the decision rested entirely on the construction of the language of section 182, because section 190 had been so amended in that year as to have no application to corporations in which no dividend had been declared. In other words, the decision by this court rested upon the interpretation of the meaning of the following words: "to be computed upon the basis of the amount of its capital stock, employed during the preceding year within the state, and upon each dollar of such amount." This is almost identical with the language of section 181, above quoted, under which the tax reviewed in the present proceeding was levied.

The discussion in the opinion of this Court at pages 252, 255, is absolutely in point in the present case. Both sections 181 and 182 prescribe the same rule for determining the amount of capital employed in this state, using identical language, to wit:

> "The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business."

In this sentence there is not even the variation of a letter between the two sections and in the provision previously quoted there is not the slightest variation in substance. Under these circumstances it seems perfectly clear that the decision

Digitized by Google

of this Court construing the meaning of this language when used in section 182 must be binding upon the construction of the same language and the same provisions used in section 181.

This Court, in the *New York Mail & Newspaper Transportation Company* case described the present situation as accurately as it described the situation there existing when it said (page 225):

> "The addition of a few words would have made the meaning of this part of the statute so clear as to preclude mistake or misunderstanding. As it stands, it is doubtful and equivocal. In his very forceful argument the learned attorney-general has presented all that can be said upon the subject, but the fact remains that we cannot adopt his views without construing this statute most strongly against the relator, and that is forbidden. In *People ex rel. Mutual Transit Co. vs. Miller* (177 N. Y., 51), we reiterated the familiar rule that 'A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well founded doubt as to the meaning of the act defeats the tax' (page 57). The application of that well settled rule to the case at bar leaves nothing to be said except that the benefit of the doubt and uncertainty as to the meaning of this statute must be given to the relator and not to the state."

Digitized by Google

POINT II.

The order of the Appellate Division should be reversed, the determination of the Comptroller annulled, and the proceedings remitted to the Comptroller for a re-assessment of the tax.

Respectfully submitted,

KENEFICK, COOKE, MITCHELL & BASS,

Attorneys for Buffalo & Susquehanna Coal & Coke Company,

558 Ellicott Square,

Buffalo, N. Y.

Dated March, 1912.

EDWARD H. LETCHWORTH,

Of Counsel.

PRESS OF "THE BUFFALO COMMERCIAL."

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google