48 Clerk of Errors
appe

IN THE COURT OF ERRORS AND APPEALS,

OF THE STATE OF NEW JERSEY.

George Meyer, *vs.* Cornelius W. Lawrence.
Richard Barker, et al, *vs.* the same.
Henry McFarland, *vs.* the same.
The Hamilton Manufacturing Company, *vs.* the same.
Edward Clarke, et al, *vs.* the same.
Ezra C. Dyer, et al, *vs.* the same.
George Howe, *vs.* the same.
James Alexander, *vs.* the same.
Jacob Wilcox, et al, *vs.* the same.
Thomas Burgess, et al, *vs.* the same.
Isaac Mansfield, et al, *vs.* the same.
Eliphalet Baker, et al, *vs.* the same.
Charles Frederick Adams, et al, *vs,* the same.
Lorenzo S. Cragin, et al, *vs.* the same.
Amos Lawrence, et al. *vs.* the same.
Benjamin F. White, *vs,* the same.
Henry M. Gassett, *vs.* the same.
George Hodges, *vs.* the same.
William M. Brown, *vs.* the same.
James Jamieson, *vs.* the same.
James Stiven, et al, *vs.* the same.
John Fyfe, *vs.* the same.
The Louisiana Sugar Refining Company, *vs.* the same.
Richard Hayes, *vs.* the same.
Alexander Dawson, *vs.* the same.
The Suffolk Manufacturing Company, *vs.* the same.
The New England Carpet Company, *vs.* the same.
The Maryland Manufacturing Company, *vs.* the same.
The Lowell Manufacturing Company, *vs.* the same.
William D. Cuthbertson, *vs.* the same.

SIR:—

Please take notice that I shall move the honorable Court of Errors and Appeals, on Tuesday, the twenty-fourth day of April inst. at the opening of the Court on that day, or as soon thereafter as counsel can be heard, that the rules for judgment entered in each of the above causes respectively, at the last October term of this Court, be amended so as to embrace therein a provision, authorizing the plaintiffs in the above causes respectively to take an issue of fact, in accordance with the consent signed by the Attorneys of the above parties respectively, dated the tenth day of January, 1848, by filing in the Supreme Court a sur-rejoinder in the terms expressed in the paper hereto annexed marked A, to the defendants' rejoinder to the plaintiffs' replication to the defendants' plea, by him secondly pleaded—or that the said rules be vacated—and for such further or other order as to the Court shall meet to grant.

And you will further please take notice that affidavits to be used on said motion will be taken before S. S. MORRIS, Esquire, Commissioner, at his office in the city of Newark, on Monday, the sixteenth day of April inst., at 12 o'clock at noon.

Dated this 11th day of April, 1849.

Yours, &c.,

A. C. M. PENNINGTON,

Attorney for the Plaintiffs in all the above entitled causes.

To B. WILLIAMSON, Esq., *Attorney for the Defendant in all the above entitled causes.*

NEW JERSEY SUPREME COURT.

vs. } *In Trespass.*
CORNELIUS W. LAWRENCE, }

And the said plaintiffs as to the said rejoinder of the said defendant, by him above rejoined, to the replication of the said plaintiffs to the plea of the said defendant, by him secondly above pleaded, say that the said plaintiffs by reason of any thing by the said defendant in that rejoinder alleged, ought not to be barred from having and maintaining their aforesaid action thereof, against him, the said defendant, because they say that, at the several times, when the said several trespasses in the said declaration mentioned were committed, and the said several causes of action accrued thereon, and during all the intervening time, and for a long time after, both the said plaintiffs and the said defendant did not reside in the State of New York, nor did they both reside in any other, and the same State, of the States of the United States of America, in manner and form as the said defendant hath above, in his said rejoinder, in that behalf, alleged; and this they, the said plaintiffs, pray may be inquired of by the country, &c.

ALEXANDER C. M. PENNINGTON,

Attorney for Plaintiff

EXAMINATION OF WITNESSES taken before me, STAATS S. MORRIS, one of the Commissioners for taking bail and affidavits in causes depending in the Supreme Court of New Jersey, at my office in the city of Newark, on the sixteenth day of April, in the year eighteen hundred and forty-nine, pursuant to the notice hereunto appended—

WILLIAM W. VAN WAGENEN, Esq. appeared as Counsel for the Plaintiffs, and

BENJAMIN WILLIAMSON, Esq., who appeared on behalf of the Defendants—and objected to the taking of the affidavits on the ground that there are no such causes depending in the Court of Errors and Appeals of the State of New Jersey—and at the same time insisting that if the affidavits are taken, they shall be taken to the aforesaid, and all other exceptions.

Benjamin Williamson, Esq., a witness produced on the part of the plaintiffs, being duly sworn according to law, deposeth and saith—

Question.—Were you Counsel in these causes in the Supreme Court of this State from the time of their commencement and in this Court?

Answer.—I was the Attorney upon record in the causes and retained as counsel in New Jersey.

Ques.—Who prepared the pleas in the Supreme Court?

Ans.—I prepared the plea of the statute of limitations in the Supreme Court. I don't know who prepared the other special plea except from hearsay. I understood it was prepared by Mr. White.

(Plaintiffs counsel objects to any testimony except from witness' own knowledge.)

Ques.—Who prepared the plea of the general issue?

Ans.—I did.

Ques.—After the plea of justification and of the statute of limitations were prepared as you have stated, were printed copies of them furnished to you to be filed, and if so, by whom?

Ans.—They were, and were furnished me by Mr. Willis Hall.

Ques.—Was the plea of the general issue one of the pleas thus furnished you?

Ans.—No.

Ques.—Were, and by whom was that plea procured to be printed?

Ans.—I had it printed myself.

Ques.—Did you state to Mr. Van Wagenen at Trenton, at the time of the argument of the demurrer before the Supreme Court, the circumstances attending the putting in of that plea, and if so, what did you state them to be?

Ans.—Mr. Van Wagenen was at Trenton attending these causes as counsel for the plaintiffs, and I had a good deal of confidential conversation with him respecting the putting in of the pleas and other matters connected with the causes, and my recollection is that I did state to him the facts and circumstances in relation to the putting in of those pleas. I cannot now recall the conversation I had with him, but I can state the fact respecting putting in the pleas, which was that the general issue was put in by me on my own responsibility, and

was afterwards struck out by the counsel in New York. I never dreamed at the time that Mr. Van Wagenen would take any advantage of a confidence which I then reposed in him, and I remember of my repeatedly saying to him, that what was said between us was in perfect confidence, and should never be repeated.

Ques.—Were we strangers when we met at Trenton on the occasion referred to? Had we ever had any personal intercourse but once? and was not that many years previous?

Ans.—I don't recollect that this conversation took place when I met Mr. Van Wagenen the first time at Trenton. My impression is, that it was after I had met him several times in Trenton. Boarding with him at the same house, and on terms of friendly and familiar intercourse.

Ques.—Had we ever met at Trenton until the argument of these causes in the Supreme Court?

Ans.—No, not that I recollect.

Ques.—Do you remember that a conversation of considerable length occurred walking backward and forward on the grounds in the rear of the State House after Mr. Whitehead finished his argument?

Ans.—I do.

Ques.—Do you not now remember that it was upon that occasion while expressing that you were not responsible for the position in which the causes stood upon the paper that you made these statements?

Ans.—I am quite sure that it was not, though I may be mistaken.

Ques.—Did you or did you not in that conversation state why the counsel in New York had not put in the general issue—and if so, what was that reason?

Ans.—I decline stating any further of a confidential conversation that occurred between Mr. Van Wagenen and myself. He doubtless remembers the conversation, and if he desires to take advantage of it, he must do it by making his own affidavit. It was confidential, and I did not treasure it up in my mind for future use.

Ques.—Have you in your possession, and will you produce a letter written by Mr. Van Wagenen, to you, from Newark, dated the 25th day of October last, which letter referred to these causes?

Ans.—That letter is, I have no doubt, in my office in Elizabeth Town. I had no expectation of being examined as a witness in this cause, until I was called upon, in this office, to be sworn. I had no notice to produce that letter, and I had no idea it would be wanted.

Ques.—Were you requested to produce it in open Court, on the late argument of motion before the Supreme Court, in these cases? Did you then decline, and what reason did you then assign?

Ans.—Mr. Van Wagenen gave me notice or requested me to produce that letter, either in Court or before a Commissioner; my impression is, before a Commissioner,—this was in Trenton. I told him I could not find the letter; this was true, I had looked for it and could not find it. I afterwards went home, made another search, and found the letter, but not among the papers, where it ought to have been found. On my return to Trenton, I saw Mr. Van Wagenen and apprised him of the fact, that I had found the letter.

Ques.—Had you not been requested, by letter, three several times, before going to Trenton, to furnish Mr. Van Wagenen with a copy of that letter?

Ans.—Mr. Van Wagenen wrote to me several times, to furnish him with a copy of that letter. I could not, for it was mislaid, and I could not find it. And I think I excused myself to Mr. Van Wagenen in this way, for not furnishing him with a copy; since I informed him I had found the letter no copy has been requested.

Ques.—Have you not been asked for the original since?

Ans.—If I have, I have forgotten it; I have not the most distant recollection that that is so.

Ques.—Prior to your finding the original, was proof taken, with your consent, of the contents of it?

Ans.—Mr. Van Wagenen had given me notice of taking of affidavits on motions, pending in the Supreme Court. He wished to prove the contents of that letter; and he did prove the contents by his own affidavit. We differed as to those contents. I don't recollect of any consent that I gave. It may be I waived the formality of notice to produce that letter. I felt really anxious to accommodate Mr. Van Wagenen by producing the letter; I regretted I could not find it, and expressed to him my anxiety to supply the loss in any way I could.

Ques.—Was the proof of the contents of that letter taken before you found the original, and did you state to the Commissioner that the examination was to be considered as taken in your presence, and did you object to the contents of that letter being proved?

Ans.—It was taken before I found the letter. I think I stated to the Commissioner, that if I was not present he might proceed with the examination the same as if I was there. I think I was not present when the contents of the letter were proved, and made no objections to the proof.

Ques.—Did not the Commissioner take to you, in Court, the deposition after being taken, but before being certified to by him; and did you not request him to interline the fact, that it was taken in your presence, and to certify the deposition?

Ans.—My impression is, that the Commissioner did bring to me, while I was in Court, the deposition, before it was certified; and that I told him to certify it. It is very possible that I suggested an interlineation; I do not recollect it now, though I have some indistinct impression about it.

Ques.—After you found the original did you state to me, that the contents of the letter, as proved, were substantially correct?

Ans.—I think I did.

Ques.—Was any other reason than that which you have heretofore suggested in your deposition, ever given by you, for not producing the original letter?

Ans.—I think not. I have no recollection of any.

Ques.—Did you state to Mr. Van Wagenen, prior to notice given of the late motions in the Supreme Court, any thing upon the subject of the intention of the defendant's Counsel, to amend their pleas in these cases, and if so, when and what?

Ans.—Mr. Van Wagenen and myself had some conservation about

this matter; I think in his office in New York. We were speaking of the agreement between the parties. I was not familiar with the contents of these agreements. They were entered into by the Counsel of the respective parties, in New York. I had not even a copy of them. Mr. Van Wagenen had lent me some of the originals or copies; which if I read at all, were read very hastily. Mr. Van Wagenen said, by those agreements the defendant had a right to make a technical amendment only, to the plea. I insisted upon it, that my impression was, the agreements did not prevent their putting in new pleas; at that time I had not consulted with the Counsel of the defendant as to what should be done; and I did not know what course was to be pursued as to the pleadings.

Ques.—Were not the consents referred to as being lent to you—lent to you at Trenton, upon your solicitation, on the ground that your associate Counsel, intended to throw upon you some of the responsibility of the withdrawal of the general issue?

Ans.—They were lent to me at Trenton, at my request, but not upon the ground that my associate Counsel intended to throw upon me some of the responsibility of withdrawing the general issue; they never attempted to throw upon me any such responsibility, nor have I said that they intended to. I did say, that that responsibility could not rest with me, but was done by agreement, with Counsel, in New York, with which I had nothing to do.

Ques.—For what reason did you request those consents to be lent you?

Ans.—I cannot tell now what reason then operated upon my mind. I was anxious to have in my possession a memorandum of the proceedings in the causes.

Ques.—Were any other consents lent to you, except the two signed by Mr. Hall and myself, and which had been combined in the consolidated agreement of the 14th of September; and have you not still in your possession that last consent, with the direction of Mr Hall and Mr. Van Wagenen, to Mr. Pennington and yourself, to sign it?

Ans.—I think the consents lent to me were embraced in the consolidated agreement. I think I have in my possession the consent with the request of Mr. Hall and Mr. Van Wagenen, as Counsel in the causes; that Mr. Pennington and myself should sign it as Attorneys.

Ques.—Had not, under the consolidated consent, the general issue been stricken from the record in all the cases, and the record amended as provided for in the remainder of the consents, and as amended, argued?

Ans.—Whatever was done as to striking out the general issue, must have been done by a rule of Court, as the general issue was upon file. I did not enter any such rule; and I do not know that I have ever seen it; if there is any such it will speak for itself; I did not participate in the argument; was present but part of the time; and paid but very little attention to it. I have no doubt myself that the causes were argued with the understanding, that the general issue was stricken out, and I believe there is no doubt about that fact, that the general issue was stricken out. The causes were argued upon demurrer.

Ques.—Did you not make up the record of Judgment in the Supreme Court?

Ans.—It was done under my advisement and direction, as Attorney and Counsel in the cause.

Ques.—Did that record of Judgment contain the plea of the general issue?

(The question objected to, as the record is the best evidence, and waived.)

Ques.—Were not those consents lent to you after the argument in the Court of Errors?

Ans.—Yes.

Ques.—Had you not a copy of the printed case in the Court of Errors at the time of the argument, or before the consents were lent to you?

Ans.—I don't know that I had, and I don't know that I have ever seen it—although I may have.

Ques.—Were you not present at the argument in the Court of Errors?

Ans.—I heard the greater part of Mr. Van Wagenen and Mr. White's argument: a small part of Mr. Hall's argument—just the commencement. I don't recollect whether I heard any of Mr. Vroom's or not.

Ques.—Was it not stated in your presence, in open court, by counsel, either in the Supreme Court or Court of Errors, that the general issue had been stricken out by consent?

Ans.—There is no doubt that it was stricken out by consent.

Ques.—Will you reflect, and with the present knowledge that you knew or believed that the general issue was stricken out by consent, state whether you could have requested possession of the two consents for the reasons you have before given?

Ans.—Yes.

Ques.—At the conversation alluded to, which took place at the office of Mr. Van Wagenen, did not Mr. Van Wagenen ask you in what manner Mr. Hall expected to amend his pleas?

Ans.—I had a good deal of conversation with Mr. Van Wagenen at his office. He very politely furnished me with a good cigar, which I was then enjoying. Our talk was very free and friendly: left no impression on my mind, and therefore it is, that if Mr. Van Wagenen asked me the question that he suggests he did, I do not recollect it.

Ques.—Did you not then know, and so communicate to Mr. Van Wagenen, that it was the intention of Mr. Hall to amend his pleas in the thirty-one causes in which judgment had been given in the Court of Errors for the defendant?

Ans.—I had seen Mr. Hall but for a moment. I do not believe that he had then made up his mind what to do. I believe he did not intend to rely upon his own judgment, and we were yet to consider what was to be done in the cases; and I think I either saw or wrote to Mr. Hall, advising what ought to be done.

Ques.—Did you not then state that it was your intention to put in amended pleas in those cases?

Ans.—I could not have said so, for I did not feel myself authorized

to do any thing in them except under the direction of Mr. Hall; and I am satisfied that neither he or myself had made up our mind what ought to be done.

Ques.—Did you not receive the copy of the rule for leave to the plaintiffs to surrejoin in the thirty-one cases, a month before the pleas were filed?

Ans.—Yes, about thirty days—within one or two days of it.

Ques.—When did you first know that the amended pleas in these thirty-one cases were to be filed?

Ans.—A few days before they were filed, I was informed that Chief Justice Hornblower was drawing up the pleas. They were sent to Trenton without my knowledge, and very soon after, the first time I saw Mr. Hornblower, I told him the pleas ought not to have been filed in those thirty-one cases.

Ques.—Did you give any notice, in any form, either to Mr. Pennington or myself, which would tend to invalidate those pleas, prior to the objection raised in open court by Mr. Hornblower?

Ans.—I drew up a notice and sent it up to Mr. Hornblower to be inspected by him, and to have a copy, if he approved of it, served on Mr. Pennington; and which, among other things contained a notice of a motion to the Supreme Court to strike out the surrejoinder put in by the plaintiffs, because the same was frivolous, and for other reasons. I would answer these questions more promptly had any notice been given to me that I was to be examined. I have not looked at the papers. There were two notices served on Mr. Pennington. The arrangement was that I was to prepare one of those notices and Mr. Hornblower the other, and we did so. Mr. Van Wagenen now shows me copies of these notices, except that the titles are not complete in the one: in the other they are. I now see that the notice in the cases of Hall and the American Print Works, was drawn by me, and the other by Mr. Hornblower.

(The said copies of notices are here offered and made exhibits, and are marked exhibits A. and B.)

Said notices are the only ones which were given to Mr. Pennington. Mr. Hornblower and myself talked of the necessity of giving notice of the withdrawal of pleas; but he stated, I think, that his statement to the Court that the pleas were filed by a mistake on his part, by information which Mr. Hall had given him, would obviate any difficulty that might arise on account of filing those pleas, and thatt he Court would allow him to withdraw them.

B. WILLIAMSON.

Sworn and subscribed before me this 16th day of April, A. D. 1849.

S. S. MORRIS.

This examination is adjourned by consent of the parties, to be resumed on Thursday, the 19th day of April, 1849, at eleven o'clock in the forenoon, at Jersey City.

April 19th, 1849.—This Examination is this day resumed in the presence of Mr. Van Wagenen of counsel for the plaintiffs, and Mr. Hall of counsel for defendant.

Alexander C. M. Pennington, Esq., a witness produced on the part of the plaintiffs, being duly sworn, deposed as follows :—

Ques.—Are you the attorney of record on the part of the plaintiffs in these causes?

Ans.—Yes.

Ques.—By whom have these causes respectively been exclusively managed and controlled on the two sides?

Ans.—I speak from my own knowledge when I say these causes have been managed on the part of the plaintiffs by Mr. William W. Van Wagenen. And speaking partly from hearsay and partly from personal knowledge, I have understood they have been managed on the part of the defendant by Mr. Hall and Mr. White of New York, principally by Mr. Hall.

Ques.—Did you receive from Mr. Williamson, prior to the pleas being filed, a copy of the pleas intended to be put in, and if so, please produce?

Ans.—About the time when the pleas should have been filed, according to the practice and upon information from Mr. Van Wagenen, that the counsel on both sides were desirous to expedite the hearing of the causes, I sent my clerk to Elizabethtown to procure from Mr. Williamson, the attorney of the defendant, copies of the pleas designed to be filed, supposing and understanding they were already prepared. My clerk on his return brought me this paper. (The paper produced is offered and made an exhibit, and marked Exhibit C, on the part of the plaintiffs.) My clerk informing me that that paper was furnished to him as setting forth the pleas which had been prepared, and were designed to be filed in the several cases. That clerk, Mr. Andrew L. Holbrook, is now dead.

The foregoing question and answer objected to as irrelevant—and the answer is objectionable as containing hearsay testimony.

Ques.—Did you subsequently receive copies of the pleas filed, and if so did they differ in any other respect than the mere filling up from the one to which you allude, and if so, in what respect did they differ?

(Question objected to as irrelevant.)

Ans.—I was about to add in answer to the last preceding question,

that within a few days after receiving the paper to which I have referred, I received from Mr. Williamson copies of the pleas actually filed in these causes, as I understand, differing as far as I can recollect from the pleas contained in that paper only in the filling up, and in the addition thereto of the plea of the general issue.

Ques.—To the pleas as filed, were pleadings put in and if so what?

(Question objected to as irrelevant and question waived.)

Ques.—Subsequently to the demurrer and replication put in, did you receive from me a letter on the subject of the withdrawal of the general issue, and if so produce it, and state when it is post marked?

(Objected to as irrelevant and incompetent.)

Ans.—I received on the 20th day of August a letter from Mr. Van Wagenen post marked the 19th of August, 1847, this letter:

(Letter produced and offered as an exhibit, and marked exhibit D on the part of the plaintiffs.)

Ques.—After the decision of these causes in the Court of Errors and Appeals were you served with copies of amended pleas; if so, by whom, when and what transpired on the occasion?

(Objected to for same reasons as above.)

Ans.—I was served with such copies by the late Chief Justice Hornblower. The substance of which were such as are contained in this paper, varying in the filling up.

(Paper produced and offered as an exhibit, and marked exhibit E on the part of the plaintiffs.)

I think they were served on the morning of the day when the amended pleas were required to be filed by the rule of the Supreme Court on the remittiters from the Court of Errors. I speak of the rule in the two cases, in which the plea of the statute of limitation had been originally filed and withdrawn, in the cases of the American Print Works and Thomas Hale. The conversation was short, hurried, as it occurred at the door of my residence, and was in substance as far as I suppose it can be of any importance to state. That he had prepared the pleas with great labor when pressed very much for time, that they had had to be sent to New York to be printed: if the Court would allow them to be filed, he thought they would be effectual; but what the Court would do with them he could not tell. I understood him to say that they were prepared and to be filed on consultation with Mr. Hall. I mean to convey the idea, that Mr. Hall had been consulted, but of this I do not feel the same confidence as I do in the other portion of my statement of this conversation.

Ques.—Have you frequently seen Mr. Hornblower and Mr. Williamson since that time, and have either of them or has Mr. Hall suggested to you that there was any mistake on the part of Mr. Hornblower in the filing of these pleas in these cases? (Objected idem.)

Ans.—I have since that time very frequently seen both Mr. Hornblower and Mr. Williamson, and Mr. Hall once only until to-day. I never received from either of them any intimation that they were filed by mistake or any other intimation in regard to them, except as contained in the formal notices served upon me as Attorney for the plaintiffs. The papers marked Exhibit A. and B. on the part of the plaintiffs are I believe copies of the notices I refer to.

Cross Examined—

Ques.—You have produced a paper marked Exhibit C. Was that the only paper you received at the time?

Ans.—I think it was; it was accompanied by no letter, but by verbal message sent through my clerk.

Ques.—Was that paper sent you as a copy of the pleas to be filed, or were you at the time informed that you would be furnished with copies of the pleas as filed, and that they might or would differ from Exhibit C.?

Ans.—An understanding existed between Mr. Williamson and myself by which it was agreed that we should mutually exchange copies of pleadings, and I sent to him for the sake of expedition for copies of his pleas. My clerk returned with this paper with the verbal message, that the pleas were printed, only needed to be filled up, would be immediately despatched to the files, and that this paper contained the substance of the pleas to be filed without any intimation of any expectation or design to alter them any respect. They were sent for to enable Mr. Van Wagenen to prepare the counter pleadings and my clerk was directed to inform Mr. Williamson of the object for which they were required. I am the more confident of this because Mr. Van Wagenen on the instant proceeded to prepare the counter pleadings.

(All that follows the words "in any respect," objected to as irresponsive and irrelevant.)

Ques.—Can you state the day when you received the paper marked Exhibit C.?

Ans.—I can't state the day exactly; it was prior to the 29th day of July 1847, and within a very few days, and I think less than a week of that time.

Ques.—In pursuance of the agreement between yourself and Mr. Williamson, did he furnish to you copies of the pleas as filed in these causes?

Ans.—I never saw the pleadings or any of them on file in my recollection—except those on the part of the plaintiffs—but I was furnished by Mr. Williamson with copies of the pleas which I have always understood to have been the pleas originally filed by him and which I have treated as such. These copies were furnished me under the agreement to which I have referred and embodied the plea of the general issue.

A. C. M. PENNINGTON.

Sworn and subscribed before me, this 19th day of April, A. D. 1849.
S. S. MORRIS.

William W. Van Wagenen, Esq., a witness produced on the part of the plaintiff, being duly sworn, deposeth and saith:

(It is agreed that the testimony of this witness be taken, subject to all legal exceptions, as fully as if objections were particularly entered.)

Previous to receiving from Mr. Hall a copy of the form of Plea, which, it was stated by him, it was intended to put in in all of the thirty-three fire causes, among which are those named in the title of these depositions, I did not know what pleas it was intended to file, nor had I any communication with Mr. Hall on the subject. The copy of the form of plea so delivered to me, was entitled the Hamilton Company against the defendant, Mr. Lawrence. At about the same time, or within a day or two after, I received a similar form from Mr. Pennington, as served by Mr. Williamson, and which is the Exhibit marked C. I immediately had printed a demurrer and replication—the demurrer being expressed to be to the plea firstly pleaded, and the replication to the plea secondly pleaded. Mr. Williamson did not file his pleas until the latter part of July—I think the 28th. When I received copies of the pleas so filed, through Mr. Pennington, I found the plea of the general issue had been superadded to the forms furnished me—having been pasted on. Without any communication with Mr. Hall, I had the word "firstly" in the demurrer erased with a pen and the word "secondly" substituted. And in the replication the word "secondly" erased and the word "thirdly" substituted. And these pleadings having been filled up were filed, I think, on the seventh day of August. On the eleventh day of August, being in the office of Mr. Hall, Mr. Hall asked me the meaning of the words "secondly" and "thirdly," and after some confusion in the mutual explanations I found that he had not been aware that Mr. Williamson had interposed the plea of the general issue. He expressed himself in strong and decided terms against Mr. Williamson for his interference with the pleadings. He distinctly stated that his object in not putting in the plea of the general issue was to gain the affirmative of the issue. He requested me to permit him to strike out that plea. I, after consideration, my main object being to avoid delay in the causes, and reflecting that if Mr. Hall voluntarily withdrew the general issue, he necessarily deprived the court the power to authorize him to replead it or to put in any other pleading in case he should be unsuccessful in the demurrer, finally consented, and the consent, of which I possessed the original until the testimony taken on the late motions in the Supreme Court and of which I believe the paper I now furnish is a true copy, was respectively signed by us, written in the office and on the desk of Mr. Hall, dated the eleventh day of August, 1847. Immediately after this paper was signed and before I left the office, Mr. Joseph L. White came in and was for the first time informed by Mr. Hall of the fact of Mr. Williamson having put in such a plea and of my consent to its withdrawal. He expressed his indignation at the step of Mr. Williamson and his approbation of mine. And the fact that the object in not putting in the plea of the general issue was to gain the affirmative of the issue, was spoken of by both Mr. White and Mr. Hall in that conversation. I wrote to Mr. Pennington the letter marked Exhibit D—which I have never seen since until this morning. I had desired Mr. Pennington to ascertain from one of the Judges whether there would be any probability that the Supreme Court would give us the preference for our argument in the October term. Mr. Pennington, some little time subsequently and after, as I think, the consent, a copy of

which I also furnish, dated the seventh day of September, 1847, had been entered into, informed me that Mr. Williamson refused to enter into any rules upon those consents without the written instructions of Mr. Hall. The two copies (consents) which I have referred to and which I furnish are made by the clerk of the Supreme Court, as copies of the original consents which were made Exhibits on the late motion before that court. And these two copies attached together I offer as Exhibits, and are marked Exhibit F on the part of the plaintiffs. These two consents were afterwards consolidated in one dated the 14th of September, 1847, and a like copy of which consent, except the titles, which were those of the whole thirty-three causes, I herewith furnish and offer as an exhibit (and is marked Exhibit G on the part of the plaintiffs). The causes were argued on demurrer in the October term of the Supreme Court, and the judgment of the court was pronounced on, I think, the 4th or 5th day of January, 1848. I did not see the opinion of the Chief Justice of that Court until, I think, the month of April following. On the 9th or 10th day of January, 1848, I carried to Mr. Hall the paper which I now furnish and offer as an exhibit (and which is marked Exhibit H on the part of the plaintiffs), excepting the memorandum on the margin of the first page and what follows the first date of the 10th of January, and I proposed to Mr. Hall to enter into a stipulation to that effect. He refused to do so until after consultation with Mr. White, and appointed the following day to give me a decision. On the following day he went with me to the office of Mr. White, and Mr. White stated that if they gave me leave to take an issue they must have leave to amend. I offered to consent that they should have leave to amend in any technical matter but not the right to put in any new plea. Mr. White at first assented, and I thereupon, on his desk, wrote the memorandum for interlineation, to be found in darker colored ink on the second page of this paper referred to.

Mr. White then in effect remarked—I do not know what that Court will decide to be a technical matter. I stated that I would not give them a right to put in a new plea. He expressed that he had no desire to put in a new plea, and it was then agreed that the consent should be so amended and be mutually executed. The consent was accordingly prepared and mutually executed by Mr. Hall and myself with a request to Messrs. Pennington and Williamson to sign it, and I hereby furnish a certified copy of that consent now on the files of the Supreme Court of this State. (Said consent is marked Exhibit I. on the part of the Plaintiffs.) After the vote was taken in the Court of Errors in the case of George Howe *vs.* the above defendant, I borrowed two remittiters on affirmance from the Clerk of the Supreme Court, and with those remittiters before us and with the consent of the 10th of January before us, the form of the remittiters to be made in these cases was discussed at considerable length between Mr. Williamson and myself. I expressly refused, although it was first pressed by him, to have the judgment entered as one nakedly of affirmance, on the express ground that by reason of this consent of the 10th of January the cases were not done with. No objection was taken by Mr.

Williamson at that time, nor ever to me until the argument of the late motion in the Supreme Court to the validity or effect of the consent of the 10th of January. And the remittiter as issued was finally agreed upon between us with this consent in view. The draft of the remittiter, as thus agreed upon, and which was immediately printed, was partly in the hand writing of Mr. Williamson, and partly in my own. Since the argument in the Supreme Court, I have made diligent search for it hoping to find it, but have been unable to do so and presume it was delivered directly to the printer to print from.—On the 1st day of November 1848, I think a rule was entered in the Supreme Court in the thirty-one cases in which this motion is made, giving leave to the plaintiffs upon filing of the consent of the 10th of January 1848, to sur-rejoin to the rejoinder of the defendant to the plaintiffs' replication to the plea of the statute of limitation, and copies of those rules were served upon Mr. Williamson, as I understand and believe, and no other rules or rule in these thirty-one causes had been entered or served. About the middle of November, Mr. Williamson called in my office and had a conversation chiefly with regard to matters which concerned himself alone in these cases, and which he requested me not to mention—but in the course of that conversation he stated to me that either Mr. Hall or himself, I am not positive which, intended to claim the right to amend their plea in these thirty-one cases. I asked him how it was expected to amend them? I think the words of his answer were, to put in a few words here and take out a few words there. Nothing definite was answered by me on this subject, and fearing upon reflection that the absence of a definite reply might be interpreted by Mr. Williamson into a consent, I wrote to Mr. Williamson from Mr. Pennington's office on the 25th day of November as I believe, a letter of which I herewith produce a notice to Mr. Williamson to produce at this examination. (The notice is offered an exhibit, and marked Exhibit K. on the part of the plaintiffs,) and which I now call upon Mr. Williamson to produce. (The letter is thereupon produced by the counsel for the defendant, and offered by plaintiffs' counsel as an exhibit, and marked Exhibit L. on the part of the Plaintiffs.

The sur-rejoinders were filed as I think on the same day of the date of the letter. On the second day of December, 1848, I received from Mr. Pennington copies of amended pleas in all the causes, similar to each other, except in the filling up and an interlineation, of the place where the property was contained, one of which has been made an Exhibit marked E. I have never received or seen any notice that such amended pleas were to be disregarded in these cases, nor that they had been put in by mistake or any verbal intimation to that effect, until Mr. Hornblower arose in open Court and made that statement. The only notice affecting these cases which I had received was the one the copy of which is made Exhibit B., and no testimony was taken by the defendant in support of those motions. The taking of testimony noticed in the cases of the American Print Works and Thomas Hale had been adjourned by consent, and on the 30th day of December last the consent which I now produce was entered into by

Mr. Hall and myself. (The consent is offered as an exhibit and marked Exhibit M. on the part of the Plaintiffs.) On the 4th of January last, a notice was given, a copy of which, together with the admission of service I offer as an exhibit, (and which is marked Exhibit N. on the part of the Plaintiffs.) Testimony was taken by me on the motions made by the defendant pursuant to the agreement entered into with Mr. Hall that testimony was limited to proof of the contents of my letter to Mr. Williamson of the 25th November last, to which I have referred, but no testimony was taken on the part of the defendant in these thirty-one cases neither in support of their motion nor in answer to mine.

The Supreme Court decided, as I understand, their decision that the sur-rejoinders must be stricken out, on the ground that the decision of the Court of Errors and Appeals was final, and the consent could not be regarded. I have not seen the opinion of the court, but such I understand to be its effect. At the time of the argument of the demurrer in these causes in the Supreme Court I met Mr. Williamson, I think, as a stranger; a conversation of considerable length passed between us while walking in the grounds back of the State House; and the fact that Mr. Hall and Mr. White had omitted in the first instance to put in the plea of the general issue, and had subsequently withdrawn it for the expressed reason for the desire to gain the affirmative of the issue, was spoken of [illegible] fact, equally in the knowledge of both; many comments were made by Mr. Williamson upon the course of the counsel, which he requested me not to repeat; but this fact, and his knowledge of this fact, was not treated or expressed to me in any manner confidential, for it was one within the knowledge equally of both—it was then entirely undisputed. Mr. Williamson communicated to me no new information except that he knew what I already knew. The opinion of the Court of Errors and the reasons for their judgment had not been pronounced at the time of the late argument of the motions in these cases in the Supreme Court, and I have not yet seen the opinion.

Cross Examined—

Ques.—Where did this interview between Mr. Williamson and yourself, that you have spoken of respecting the remittiters, take place, and when?

Ans.—A portion of it in the Court of Errors; a portion of it, I think, in the body of the Hall prior to the afternoon session of the Court of Errors, on the last day I think of the session of the Court of Errors.

Ques.—Did you not bring to him a remittiter drawn up in your hand writing during the afternoon session of the Court of Errors, and while he was then engaged in an argument of a cause before the Court?

Ans.—The first discussion had taken place previous to the opening of the Court. I supposed it had been fully understood and arranged between us how the remittiter was to be drawn. I drew up the form I think in the Clerk's office of the Supreme Court, in pursuance of what I believed to be the arrangement agreed upon. I took it to Mr.

Williamson in the court room, who was then one of the counsel in an argument progressing before the court; he postponed for me some few minutes until he could attend to it. He was not at the time actually engaged in the oral part of the argument when he expressed himself to be at leisure to attend to it; he took it up, and I think the discussion between us occupied probably half an hour before it was settled. On our moving the Court for a re-hearing on this part of the case, Mr. Williamson made a comment in open Court upon such motion being made without notice, and after the remittiter was agreed upon.

Ques.—Where did you first speak to Mr. Williamson about drawing these remittiters?

Ans.—I cannot be positive whether it was at the house at which we both boarded, on the way from that house to the State House, or in the Hall of the State House. I only know that it was in the interval preceding the afternoon session of the Court of Appeals on the day referred to.

Ques.—Where was it, in any discussion with Mr. Williamson about the remittiters, that you had before you any agreement between the parties that you have spoken of?

Ans.—Whether at the time of our first conversation on the subject of the remittiters, the agreement of the 10th of January, which is marked exhibit I, which is the one to which I refer, was read by us I cannot say, its contents then appeared to be as familiar to Mr. Williamson as myself; but at the time when the settlement of the remittiter was concluded in the court room, I can speak positively of that agreement not only being before us, but the agreement on which judgment was actually entered in the Court of Errors and Appeals, was then actually signed by Mr. Williamson and was dated October term, and not on any fixed day, in consequence of Mr. Williamson suggesting that he had received a telegraphic dispatch from Mr. Hall directing him to sign no consents; but he did not think this consent to complete the judgments, as it was embraced in the consent of the 10th of January already executed, was any violation of such instructions.

Ques—This last agreement you have spoken of as made with Mr. Williamson, has it been made an exhibit in the cause, and if so, how is it marked?

Ans.—It is not an exhibit in the cause, the original was filed on the following morning in the Court of Errors and Appeals.

Ques.—Have you got a copy of that paper, and if so will you produce it?

Ans.—I do not know that I have or have ever had a copy. I have here what I suppose is a duplicate, the original paper signed was copied by a clerk in the office of Gov. Vroom; this paper now shown appears to be in the hand writing of the same clerk, and the substance of the consent I recognize as being, I believe, in the same terms as that of the original consent to which I have referred. This was unsigned, and was never compared by me. I therefore can't say it is a copy.

(This paper is offered and marked exhibit I. on the part of the defendant.)

Ques.—Did not the greater part of the conversation about the re-

mittiters take place while Mr. Williamson was taking notes of the arguments of counsel opposed to him?

Ans.—No part of it took place while Mr. Williamson was taking notes. Several times Mr. Williamson suspended our conversation in court for the purpose of paying attention to something which the counsel opposed was saying; but my impression is that Mr. Whitehead was closing the argument, although with regard to that matter I am not certain.

Ques.—Did not Mr. Williamson tell you that he was then engaged and requested that the matter might be postponed; and did you not urge his immediate attention, upon the ground that the printer was waiting and the remittiters must be printed at once?

Ans.—Certainly it was not so, for Mr. Williamson had communicated to me his intention of leaving that afternoon, and it had been agreed that these remittiters should be filed for the express purpose of enabling the entries by the plaintiffs on the following morning of the rules of the Supreme Court.

Ques.—Did you not say anything to Mr. Williamson about having them printed?

Ans.—I did. It had been understood that they should be printed, and the printer was very probably waiting for the form to be agreed upon between Mr. Williamson and myself. I have simply said that Mr. Williamson requested no postponement, and I waited until he could and did attend to it.

Ques.—What do you mean by "it had been understood they should be printed"?

Ans.—I mean that before going up into the court at all that afternoon, I supposed that the form of the remittiter had been entirely agreed upon between us, and I had stated to Mr. Williamson that when it was approved by him I would have them printed. And when I took up the written form into the court room it contained what I understood to be the result of our mutual views.

Ques.—Had you shown Mr. Williamson any form of a remittiter before you showed it to him in the court room?

Ans.—I had shown to him the form in the cases I have referred to borrowed from the clerk of the Supreme Court. I had not shown him any form, for as yet none had been prepared in these cases. I had with the first forms I refer to before us, verbally arranged, as I supposed, how this form was to be prepared.

Ques.—Who were the parties in those forms of remittiter which you procured from the clerk of the Supreme Court?

Ans.—As I have before stated I have no recollection. The names of the parties were strangers to me. I borrowed them for the purpose of the formal part of the remittiter alone.

Ques.—Where was it you showed those forms to Mr. Williamson?

Ans.—My impression is that it was in the lobby on the first floor of the State House. I had procured the forms in the morning from the clerk and they were laid out for me. My impression is, although with regard to this I am not positive, that Mr. Williamson and myself had walked together from the boarding house to the State House after dinner.

Ques.—What Judges were present when the rules were entered in the Supreme Court in these causes?

Ans.—The Chief Justice certainly, Judge Nevius certainly,—that is all I can certainly name.

Ques.—Where was it that the court was sitting at the time?

Ans.—In the room in which the Court of Errors sat. The Court of Errors had been first opened and some, I think two, decrees settled. The Court of Errors then adjourned and the Supreme Court was then opened in the same room.

Ques.—Were the judgments of the Court of Errors read to that court when the formal motions for judgments were made?

Ans.—I stated to that court that the form of the remittiter had been agreed upon by Mr. Williamson and myself. I am unable to state whether either of the remitters was read or not. I have no recollection of reading it. I have a recollection of reading the consent.

Ques.—What consent?

Ans.—The consent to which I have referred, dated October term, of which Exhibit 1, on the part of the defendant, is believed to be a copy.

Ques.—Do you recollect who made the motion on behalf of the defendant in the thirty-one cases?

Ans.—I did, at the request of Mr. Williamson, and stated to the Court of Errors that it was at such request. On my way to the cars Mr. Whitehead informed me that he had made a motion in the case of George Howe (which was in fact the case argued) the previous evening after I left the court. I stated to him that Mr. Williamson had requested me to make the motion in all the cases. He said he had only requested him to make it in the case of George Howe, and he had done it.

Ques.—Where does George Meyer live?

Ans.—I decline answering the question, as having no application here.

Ques.—Will you state where the plaintiffs in the thirty-one cases respectively reside?

Ans.—I decline, so far as my knowledge extends, for the same reason.

Ques.—Are the plaintiffs in these suits all living?

Ans.—I believe and have no doubt they are.

Ques.—Where does Thomas Hale reside?

Ans.—I decline answering that question for the reason before stated.

Ques.—Have you any interest in these suits?

Ans.—I have.

Ques.—What interest?

Ans.—I shall be entitled to receive a portion of the amounts recovered in consideration of my services in seeking to enforce these claims against the corporation of the City of New York during an engrossing litigation for some years.

Ques.—What interest has George Meyer in the suit conducted in his name?

Ans.—He as well as each of the other parties have all the interest in the cases, excepting what has been agreed to be given to me upon the consideration I have before stated.

Ques.—Is that agreement in writing?

Ans.—That I decline answering.

Ques.—What interest has George Meyer in the suit conducted in his name?

Ans.—I have no other answer to give except that already given.

Ques.—State the precise nature and extent of that interest.

Ans.—That I decline doing. I have stated so much as to show that I have an interest in these cases—a fact which was communicated to Mr. Hall expressly as gentleman to gentleman and not as counsel in the cause.

Ques.—Do you know that Mr. Hall has betrayed that confidence or that he suggested these questions?

Ans.—I, of course, cannot know what has passed between the counsel in the cause. My only reason for being entitled to form any opinion is, that the fact was stated originally in the draft of the affidavit of Mr. Hall on the motions before the Supreme Court and then stricken out upon the ground of the objection I have now stated, and I have always understood Mr Hall to have the entire control and management of these cases.

Ques.—Do you know that any one ever saw that fact stated in the affidavit of Mr. Hall except yourself, when showed to you by Mr. Hall?

Ans.—That affidavit was brought by Mr. Hall to Newark, prepared for swearing to, I think on the 19th day of December last. The testimony of Mr. Hall was taken on the 3d day of January last at Trenton. The fact to which I refer was stricken out immediately before his affidavit was sworn to—but I have no doubt that prepared affidavit, containing that fact was shown to both Mr. Williamson and Mr. Hornblower, and when stricken out, if my recollection is right, it was so erased with a pen that it could be easily read.

Ques.—Who pays the expenses of conducting these suits?

Ans.—I do as a party in interest.

Ques.—Who is to pay the costs in case the judgments go against the plaintiffs?

Ans.—I as a party in interest.

(At this period of this examination, the same was adjourned to Saturday, the 21st day of April inst., at 9 o'clock A. M., to be continued at the same place.)

Saturday, 21st April, 1849.—Cross examination resumed, in the presence of the same parties as before.

Ques.—When you said to Mr. Hall that the information he had respecting your interest in these suits was received by him from you confidentially and that the same ought not to be repeated, did he not say that he was not aware that he had received any communication from you on this subject and that he had derived this information from other sources?

Ans.—He stated that he had not remembered that he first received this information from me under the circumstances referred to—that he had heard of it in other quarters—but of my own knowledge when the communication was made by me to Mr. Hall confidentially, sufficient passed between us to show that he could not then have heard of it from any other source.

Direct examination resumed—

I desire to give an explanation of a statement in my testimony made during the cross examination conducted by Mr. Williamson day before yesterday, on the subject of the preparation of the draft remittiter. I then stated that my impression was that Mr. Whitehead was then closing an argument at the time that draft was finally settled; I have subsequently carefully thought over the matter with the view of bringing to my recollection every thing which transpired, and I am satisfied that this fact was not so, because after the remittiter was placed in the hands of the printer, I had a consultation with Gov. Vroom on the subject of moving the Court for a re-hearing, and when I went into Court afterwards I think I found Mr. Williamson speaking, and when Mr. Williamson, among his objections to our application, suggested in no pleasant tone that he was surprised at this application, I think he used the expression, referring to the remittiter, "after what had passed (or transpired) between that gentleman and myself this afternoon." I followed Mr. Williamson into the entry on his leaving Court, and explained to him that I had not been able after our decision to make the motion, to communicate it to him.

Further, I am not so absolutely confident whether Judge Nevius was present on the following morning on granting the rules, although my impression is of the strongest character that he was. I wish further to state that I am absolutely confident that conversation to which I have referred as occurring between Mr. Williamson and myself on the subject of the pleadings in the Supreme Court passed on the day of the argument of demurrer in the Supreme Court. Mr. Williamson stated that the plea of the statute of limitations would not have been put in but for him, and that the reason why he had felt himself bound to interfere was that he had not been retained by Mr. Hall or Mr. White to act under their direction, but that he had been retained by Mr. Brady, the previous corporation counsel, who had sent him a reso-

lution of the corporation of the city of New York, which directed the corporation counsel to retain counsel in New Jersey to defend these causes. I will further state that these causes have always been and still are, as I understand and believe, defended by the corporation of the city of New York, and that as I understand and believe, fees to a large amount have already been paid by the officers of that corporation to the counsel or attorney on the part of the defendant. I now furnish a copy compared by myself of the original notice of motion in these causes as served by me personally on Mr. Williamson at Jersey City on the 12th day of April instant; it is a verbatim copy of the notice and proposed sur-rejoinder which precedes the depositions taken on this motion and prefixed thereto, excepting the order of arrangement of some of the titles, and that in addition to the titles contained in such prefixed notice, it also contains the title of "Charles H. Metevier, *vs.* the same."

(Which is made an exhibit and marked Exhibit O, on the part of the plaintiffs.)

I wish also to state that the remittiters in all these cases were filed as I believe in the office of the Supreme Court on the first day of November last, and that the reasons for the decision of the Court of Errors on the question of the statute of limitations were not furnished in writing until the last January term of that Court.

W. W. VAN WAGENEN.

Sworn and subscribed before me this 21st day of April, A. D. 1849.

S. S. MORRIS.

EXAMINATION OF WITNESSES on the part of the defendant, in the above stated causes, taken at Jersey City on the 21st day of April, 1849, before me. STAATS S. MORRIS, Commissioner as aforesaid; in the presence of Willis Hall, Esq., and L. B. Woodruff, Esq., of Counsel for defendant, and William W. Van Wagenen, Esq., of Counsel for plaintiffs.

Willis Hall, Esq., a witness produced on the part of the defendant, being duly sworn, deposeth and saith, as follows:

Ques.—State your connection with the causes named in notice of motion, under which this examination of witnesses is taken?

Ans.—I am Counsel for the defendant, and Mr. Williamson is the Attorney, and has acted in most things, under my direction.

Ques.—State who has acted as Counsel for the plaintiffs, and prosecutor of the claims made in these suits?

Ans.—I have known no one in the suits but Mr. Van Wan Wagenen, who, in his transactions with me, assumed to have the entire control and direction.

Ques.—What intimacy has heretofore subsisted between you and Mr. Van Wagenen, and how far has that been governed by confidence in him?

Ans.—Mr. Van Wagenen and myself have been on terms of great intimacy for the last fifteen years, and I have had the most unlimited confidence in his honor and integrity, believing him incapable of asking me to do ought which, under the circumstances, he himself would not have done.

Ques.—Has Mr. Van Wagenen, in the progress of these causes, asked from you any consents or stipulations therein?

(Mr. Van Wagenen objects to leading questions on the part of the Counsel, or to a reference by the witness to a prepared statement, which was desired to be introduced as a substitute for his testimony in order to derive the matter of his answers. He insists that the testimony of the witness, shall be upon his memory and not from a consultation with that paper.

In reply to this objection of Mr. Van Wagenen, Mr. Hall states as follows: I would state that for the purpose of saving time, and for the purpose of arranging the topics so as to omit nothing, I have thrown them together, and require a reference to them in order to suggest the subjects, on which I wish to make any statement or explanation.

Mr. Van Wagenen replies as follows:—I have objected and still object to the use of that prepared statement, on the express ground that language of different force and effect is used by the witness, orally, and in prepared statement. I proposed to Mr. Hall, before his examination commenced, that he should make his statement at his election—with or without questions being put;—he preferred to have the questions put so that the topics might be suggested in their

order, and I have no objection to that course, but wish the answers to be given from memory alone.

Mr. Hall further states, as follows; that it is not my intent to use the language of any prepared statement, or to state any fact which is not according to my present recollection or belief.)

Ans.—During the progress of these causes, Mr. Van Wagenen has obtained from me numerous consents and stipulations, some written, some verbal, all for his benefit, and most of them exclusively so. I am not aware that, on the part of the defendant, I have required or asked for any consent or stipulation.

Ques.—State what consents have been asked for and obtained from you by Mr. Van Wagenen, in their order, beginning with the first, and also what inducements, if any, were held out by him as a motive to such consents?

Ans.—The first consent was a verbal one, made soon after I took charge of these causes, in May, 1847; it was, that Mr. Van Wagenen should be permitted to file his individual bond, as security for costs in the thirty-three fire causes, instead of procuring that which the laws of New Jersey required in cases of suits, by strangers, which, is, I think, a bond of one or two freeholders, resident in the State of New Jersey—no inducement was held out to me or argument to give this consent, but purely a disposition to oblige Mr. Van Wagenen, believing, as I did, that his individual bond would be a sufficient security. And Mr. Van Wagenen's individual bond is now on file as the only security for costs, in these thirty-three cases.

Ques.—State the next consent so asked, and the inducements, if any, so held out by Mr. Van Wagenen?

(The witness, before answering, refers to the prepared statement referred to, and the objection already made is renewed; the answer of the witness, after referring to such paper, is given orally after laying such paper aside.)

Ans.—In the first instance the general issue was not filed—my impressions are very strong that, that omission was mainly induced by the arguments and solicitation of Mr. Van Wagenen. At this time he was in my office frequently, probably once or twice a week—this was the only business he then had with me, and my impressions and belief are very decided, that we frequently consulted on the subject of filing the general issue. He appeared particularly solicitous to obtain the opinion of reports of New Jersey, on the validity of the New York law, under and by virtue of which, it was alleged, the trespasses were committed. The necessity of having a trial before a jury, on an issue of fact in case the general issue should be filed, and the consequent great delay and expense, was urged. I think he also urged that the general issue was unnecessary, inasmuch as the defendant, he alleged, had publicly admitted the trespasses in a communication to the Common Council. I think I told him I would consult with Mr. White, my partner, but of this I cannot be positive. I did consult with him—he approved of not filing the general issue,—

(The paper being now again referred to, the same objection is urged and the witness proceeds as before.)

—and suggested that we should thereby have the affirmative of the issue and the consequent opening and reply.

My belief that these suggestions were made at this time by Mr. Van Wagenen is strengthened by the fact that last winter at Trenton, in my room, Mr. Van Wagenen, in conversation with me, told me that he believed that the first suggestion of the advantage of the affirmative issue was made by himself, and that Mr. White caught it up from him. I have no recollection that I made any promise to Mr. Van Wagenen, or entered into any specific agreement not to file the general issue, but when the pleadings were made up the general issue was omitted. The argument arising from having the affirmative of the issue never had much weight with me, yet it is possible I may have adopted it and repeated it; yet I have no recollection of having done so. The inducement upon my mind was, the avoiding of very great expense, unnecessary in case the courts of New Jersey should sanction the opinion of the courts of New York, and the great delay in obtaining that opinion which, if in favor of the validity of that law, I considered a turning point in the case against the plaintiffs. Next, that if the court should sustain the demurrer, that they would allow me to put in issue such disputed facts as justice should require, and to amend my pleadings if I desired it, even to the extent of putting in the general issue.

(The same objections is now again renewed to the witness's referrence to his prepared statement, which is again done by him.)

The argument of Mr. Van Wagenen, that the general issue was unnecessary on account of the defendant having confessed the trespasses, had not much weight with me, for the double reason that I was not well informed as to the facts of the case, and the proposition was not whether I should go to trial without the general issue, but, simply, whether it should be omitted to be filed in the first instance. I never consented to any such proposition or even intended so to consent, nor would I have done so at any time under any circumstances until I had had time and had actually examined all the circumstances in the case. This conclusion—not to file the general issue—induced as aforesaid, took a more tangible form in a subsequent written agreement between Mr. Van Wagenen and myself to withdraw it. The general issue was subsequently filed by the attorney without communication, according to my recollection, with the counsel for defendant. Mr. Van Wagenen did not object to it, as I suppose, because no promise or specific agreement, to my recollection, had been made with him not to file it in the first instance. After it had been thus filed, it was agreed between us to withdraw it for the same reasons which at first induced me not to file it.

(Reference being again made to the paper, objection was again renewed.)

Whether the same reasons were again repeated and at that time distinctly urged, I can not now distinctly recollect. It was considered by me as a part of the same transaction—as a foregone conclusion.—In my affidavit, made last January in the two fire causes in which the plea of the statute of limitation was withdrawn, I stated in substance

that Mr. Van Wagenen used great efforts to induce me to withdraw the general issue. At that time I did not suppose that this fact was doubted or that it would or could be denied. Since Mr. Van Wagenen's affidavit, denying this statement, I have reflected much on the subject and I have come to the conclusion that it is not improbable that I have confounded the withdrawal of the general issue with the omission to file it in the first instance, and have supposed that the reasons, which were in fact urged for not filing, were urged for the withdrawal. The reasons were the same, and I am quite confident that they were urged by Mr. Van Wagenen on the one occasion or the other. The great fact which I had in my mind was the absence of the general issue and the reason for it.

(Witness refers to the prepared statement and it is again objected to.)

I have no recollection of having any consultation with Mr. Williamson before the proceedings were settled, or as to their settlement. By far the greatest portion of my time, probably four-fifths, was spent in my office in City Hall place, where the city business was done at that time. I had also a small office—a room for private business principally—in the same building, in which J. L. White, Esq., had his office. and next door but one to the office of Mr. Van Wagenen, which I visited an hour or two a day for three or four times a week. I have no recollection of seeing Mr. Williamson at my principal office in City Hall place and do not believe he was ever there. I well recollect wishing to see Mr. Williamson before the pleas were filed, and I recollect hearing of his having called at my office in Wall street or of finding his card there, and I recollect on one or two occasions of Mr. White telling me that he had had interviews with Mr. Williamson. I recollect, too, of having some correspondence with Mr. Williamson on the subject of the plea of the statute of limitation. I remember a letter from him in which he refers me to the decisions of the New Jersey courts on the plea of the statute of limitation, and I remember well of going to the law library in the City Hall of New York and drafting a plea according to the precedent reported in the case of Southmayd *vs.* Beardsley, in 3d Green I think. I recollect of seeing Mr. Williamson on one or two occasions for a minute or two at a time, but not long enough to have any consultation.

The third consent obtained from me by Mr. Van Wagenen was to withdraw the plea of the statute of limitation in two cases, viz.: The American Print Works and Thomas Hale *vs.* this defendant.

Mr. Van Wagenen came to my office on this subject several times —I think three or four. He said that these parties did reside in New Jersey, within such time as not to bring them within the rule of the case of Southmayd and Beardsley. He offered to bring me affidavits to satisfy me of this fact, and said if I persisted he would be under the necessity of taking issue in those cases. And I think the same objections which had before been made as to the delay and expense of a trial before a jury were again urged, and I was appealed to not to drive him to that course. My recollections of these conversations are vague and I can speak with confidence only of the impressions created upon my mind. On having the fact of these plaintiffs residing in the State

of New Jersey inserted in the consent I agreed to sign it. I was induced to dothis by the same reasons which had previously induced me to file the general issue.

On the 14th of Sept. 1847, or thereabouts, Mr. Van Wagenen brought me a paper which, I think, he called a consolidation of the two consents. It was drawn up and prepared for signature. I understood it to be a copy of the two consents agreed upon, nor was I aware that it contained any thing having a different purport in any particular from those two consents which it was intended to embody, and I signed it under such supposition. On comparing this paper with those consents I find that it is not a copy. Instead of the language in the consent of the 11th of August 1847, "It is agreed between us that in the above cause and in thirty-two other cases, commenced by other plaintiffs against the same defendant, &c., the pleadings shall commence as follows, by striking out the general issue," &c.,—the consolidated agreement has it, "It is agreed between us that in all the above causes the defendant shall be at liberty to withdraw the plea of the general issue," &c. I have no recollection of ever asking for any such liberty, but on the contrary have always had the strongest impressi. n and belief that the general issue was omitted at the suggestion and request of Mr. Van Wagenen, and was afterwards withdrawn for the reasons urged by him.

Ques. by Jos. C. Hornblower, Esq.—What can you say with regard to the pretence that the consideration for allowing the withdrawal of the general issue was a verbal agreement to argue the cause in October?

Ans.—I have not the remotest recollection of any thing of the kind being said. I have no doubt that the pretence is perfectly factitious. If any thing was said about our arguing the case in October it could not have been in the way of a consent or agreement for consideration.

Ques.—Why not?

Ans.—For I had from the first promised to argue the cause at the earliest possible day, and for that purpose every obstacle and cause of delay was removed.

Ques.—I want you to state what you know about the fourth stipulation or consent?

Ans.—The next and fourth consent which I recollect as having been obtained from me by Mr. Van Wagenen is known is the stipulation of the 10th of January 1848, and may be found among the plaintiffs' exhibits, and marked Exhibit H.

(The prepared paper being referred to by witness, plaintiffs' counsel renewed his objections.)

This consent was signed after the Supreme Court had overruled all the demurrers or ordered them to be—by this stipulation which I was requested to sign, the defendant is asked in effect, first to consent to the plaintiffs' filing all necessary papers out of time in order to put the cases on the calender of the Court of Errors at its next term, which was within a week. Second, to waive all irregularities in the steps taken for that purpose. Third, that if the judgments of the Supreme Court be reversed, the same judgment that is entered up in the case of George Howe *vs.*

Cornelius W. Lawrence, shall be entered up in thirty other cases.—Fourth, that if the judgment in the Supreme Court should be affirmed that the plaintiffs should be allowed to traverse and deny the plea of the defendant in an issue of fact—the only stipulation in favor of the defendant being that they should be permitted, if the demurrers were sustained,to amend their pleas,but the leave not to embrace the right to put in a new plea. My apology or excuse for having signed this paper is, first, that it was urged upon me with great pertinacity and in great haste. Second, it was urged that it embraced nothing but matters of course, and that the merits of the causes were in no manner to be effected. Third, that the only object of the stipulation was to expedite the causes more rapidly than if the plaintiffs was held to the strict observance of the rules. Fourth, that it was not contemplated by me that the plaintiffs, in case the demurrers were overruled, might traverse and deny the facts, in those cases in which there was no dispute about the facts. The question of residence in which the demurrers in the thirty-one cases in which the statute of limitation was pleaded, turned was in fact admitted—that plea had been withdrawn from the only two cases in which it was suggested or pretended by the plaintiffs or any of them that they had either then or at any former time resided in New Jersey.

(The witness having since the last objection continued to read from the prepared statement before objected to, and having had it before him reading from it to the present time. The objection to the testimony is made on that account.)

Ques.—Was what you read from the prepared statement the facts according to your present recollection?

Ans.—Yes. It was a statement prepared by myself without counsel or suggestion, to be sworn to, that I might present facts more succinctly and to save time.

I wish merely to add, that by the stipulation of the party, plaintiff in case the decision was overruled, having leave to traverse or deny the fact, I supposed referred especially to the two cases in which the plea of the statute of limitations had been withdrawn. It had been strenuously contended in the State of New York that even under their statute the owners of the goods destroyed were entitled to compensation—in those cases I supposed Mr. Van Wagenen wished to plead in denial or avoidance of the justification. Fifth, that by the clause,—"the said defendants shall respectively have leave to amend their pleas, this leave not to embrace the right to put in a new plea," I understood that in case the defendants found it necessary to put in a new plea after the decision of the demurrer, they must apply to the Court as before for leave, and could not do it by reason of that consent. Sixth, one reason for signing the consent but for which it would not have been signed at all so far as amendments and pleadings were concerned, was that Mr. Van Wagenen assured me that the Supreme Court in which alone these orders could be entered and would be entered as a matter of course, if in session, would not be held till near three months after the Court of Errors adjourned. Whereas in point of fact, the Supreme Court was in session I believe at the time the judgments of the Court of Errors were given. I insisted strenuously that nothing should

be taken out of the hands of the Court, but was over-persuaded by assurances that nothing was sought to be obtained by this consent but to waive matters of form for the sake of expediting the causes, and to enter by consent such orders as the court would order if in session as a matter of course. I signed this stipulation pretesting that I did not thereby intend to effect the merits in the slightest degree. Seventh, to these reasons I would add that the stipulation never would have been signed but at the most earnest and importunate request of a friend in whom I had the utmost confidence that he would not take any unfair advantage or pervert the stipulation to purposes which he knew were not contemplated by me.

The Fifth Consent, which the said Van Wagenen induced me to sign, was made during or near the term of the Court of Errors, in which the decisions in these cases were given. I have no copy, but it may be found attached to my deposition, made in the cases of The American Print Works, and Hale vs. the same defendant in the Supreme Court of this State, at the last January Term, marked B. No. 1; my recollection of it is, that it consists of a letter prepared by Mr. Van Wagenen, and signed by me, and sent to Mr. Williamson, directing him to enter into stipulations:—

1st. That if either party should amend, it should be upon payment of costs, and within thirty days.

2nd. That the remaining thirty-one cases, should be put in the same situation as the two argued. The reason adduced by Mr. Van Wagenen for these two stipulations was to save time, and the first was obtained on the assurance that the Supreme Court of New Jersey always made the payment of costs a condition of amending.

3rd. The third stipulation in that consent is, that the venue in all those cases should be changed to Middlesex County. The reason given by Mr. Van Wagenen, for this stipulation, was, that the trial would then be held in New Brunswick, where, he said, he had some intimate friends, and could spend his time pleasantly during the long trials before us.

Shortly after this letter was given to Mr. Van Wagenen, to be delivered to Mr. Williamson, I discovered that these stipulations were not fairly obtained, and that the representations were not made in good faith, that the Court did not, as a matter of course, make the payment of costs a condition of amending, and that Mr. Van Wagenen might have other objects in view in changing the venue to Middlesex, than the enjoyment of the society of friends. I therefore sent a telegraphic dispatch to Mr Williamson, at Trenton, not to sign these consents.

(The witness having, from the statement beginning with the word "Fifth" as a reason for signing the consent of the 10th of January, read his testimony from the prepared statement before referred to, and the same having been taken down, therefrom, the same is objected to on that account.)

These are all the consents which I now recollect, and I have stated all the arguments and inducements for entering into them, and the circumstances attending the making of them according to my present

recollection and belief. In the hurry and pressure of a multitude of business calls, I cannot undertake to state particular facts and conversations with great positiveness, but as to the conclusions and impressions now left upon my mind I speak with certainty. All these written consents I believe, were originally drawn and prepared for signature by Mr. Van Wagenen; most if not all of them were brought by him to me, at my office—whether they were any of them afterwards modified, by suggestions of Mr. White or myself, I do not recollect, excepting that in the consent to withdraw the plea of the statute of limitations in the two cases, the suggestion that the parties resided in New Jersey, was probably made by me. I never went to the office of Mr. Van Wagenen with reference to these consents or any of them. I never sent for him to speak with him on the subject of these consents, according to the best of my recollection and belief, and I have no stronger impression on my mind, than that I have been acting on the defensive from the beginning to the ending of these causes, against the constant importunities for new consents, with which I have been assailed at every step. I do remember of repeatedly imploring Mr. Van Wagenen not to insist upon my assuming responsibilities in causes of so great magnitude.

Ques.—Do you know the plaintiffs mentioned in the notice of motion herein, or either of them, and where do they reside?

(Objected to as incompetent and irrelevant.)

Ans.—I am not aware that I am acquainted with any one of the plaintiffs, nor do I know where any of them reside, except by hearsay. After the most diligent inquiry, I have been unable to ascertain where many of the plaintiffs reside, even by rumor, or whether any such persons exist.

Ques.—It has been testified by Mr. Van Wagenen in your presence that his interest in these suits was communicated to you in confidence, that the fact should not be disclosed. How far was your information on the subject of a confidential nature?

Ans.—I have no recollection of Mr. Van Wagenen ever communicating any thing of this kind to me. I had heard it from various sources and stated it in my draft affidavit as a matter of information and belief, not having the remotest reference to him in that declaration. It had been told or suggested to me from three or four different sources in New York, and I believe it is a matter of notoriety there among those who are acquainted with these claims. On the suggestion, however, from Mr. Van Wagenen, that I had received this in confidence from him, I had it stricken out. I do not, however, think that any principle now requires me to interpose to prevent his being questioned as to a matter which I could have proved by many witnesses residing in the city of New York.

Cross-examined by Mr. Van Wagenen.

Ques.—Do you not remember, upon consideration, that the time of my communication to you of my interest in these claims was when my bonds for costs were given, and that the reason given by me for desir-

ing those bonds to be given was my interest in the claims and liability for costs?

Ans.—I cannot say that I have any recollection of any such communication to me, although I think it highly probable it was so.

Ques.—Were not those bonds given almost immediately after you had charge of the cases?

Ans.—I think they were. I think they must have been given in the month of May or early in June, 1847.

Ques.—You have referred to a conversation which took place between yourself and me, in your room at Trenton, last winter. Did not that conversation occur in the evening immediately after the testimony had been completed for motion?

Ans.—It occurred in my room in the UnitedStates Hotel in the afternoon of the day on which we completed the depositions.

Ques.—Was not the effect of that conversation on my part an endeavor to recall to your recollection what had transpired between us at the time the general issue was withdrawn?

Ans.—I do not recollect that it was specifically with regard to the withdrawing of the general issue, but it was to refresh my recollection with regard to the earlier facts connected with these cases.

Ques.—Did I not then say to you that at the time of the consent to withdraw the general issue, when you had expressed your disapprobation of its having been put in, I had remarked that I had supposed you wanted to gain the affirmative of the issue, and that you had replied that was just what I wanted?

Ans.—I do not recollect of your saying it at that time nor at any other—nor do I believe that I ever used that expression, "that was just what I wanted," with regard to gaining the affirmative of the issue.

Ques.—Had I ever, to your knowledge, any communication with or seen Mr. White on the subject of these cases until I met him in your office, after the consent to withdraw the general issue had been signed?

Ans.—Not to my knowledge. I do not know whether you had or not.

Ques.—Did I not communicate with you alone on the subject of these cases?

Ans.—That I do not know.

Ques.—Did we not have, subsequent to the withdrawal of the general issue, many conversations in which I contended that, that plea was of no value as putting alone in issue the direction given by the defendant, and that that direction had been admitted, not only in a written communication on the files of the Common Council, but by the defendant, as a witness in the original assessment before a jury in New York?

Ans.—I think you did, both before and after the general issue was withdrawn. You have always contended to me that the general issue was a very immaterial or useless thing.

Ques.—Had not Mr. Williamson expressed strong feeling on the subject of the withdrawal of the general issue?

Ans.—Never to me, nor to my knowledge, except from hearsay at a recent date.

Ques.—Was it not in such conversations between us, contended for by me, that the plea of common law necessity could be of no avail as the Jury in New York had found a verdict for the value of the property, under a charge of the Judge, that they should find a verdict only for such property as could have been saved had it not been blowed up?

Ans.—I think I recollect that something of that kind was contended for by you. I had not then seen the record of the proceedings of the Court, and I think I neither affirmed or denied your proposition; but I can say with truth, that I never at any moment contemplated going to trial before a Jury without the question of necessity being before them; I took it for granted that if the Supreme Court should sustain the demurrer to the plea of Justification, under the Statute of New York, they would of course permit me to go to a Jury on the plea of necessity and of the general issue if I desired it; in fact I supposed, and I thought you did, that we were making up the pleadings in the first instance with a view to obtain the opinion of the Court alone.

(This answer objected to as irresponsive.)

Ques.—Was not the reason expressed by me for anxiety to obtain an early judgment, that these were actions of trespass which would not survive?

Ans.—I recollect of your making that suggestion to me within the past year, but I do not recollect your making it to me in the early stage of these causes, though I have no doubt you did.

Ques.—Was not that offered as my reason for desiring to obtain the earliest possible hearing before the Supreme Court?

Ans.—I know that you were very anxious to obtain the earliest possible hearing, but I do not recollect of your alledging that as your reason.

Ques.—Have you the slightest doubt that that reason was urged to you before the causes were argued in October Term of the Supreme Court?

Ans.—I think it highly probable, although I have no other reason for thinking so, than it was a good reason and really existed, and you have pressed the causes as much as possible, and that you have made that suggestion to me, to my recollection, within the year past, and probably had done so previously.

Ques.—When in the early stages, urged to hasten these causes, did you not plead your great occupation in the City business, it as being a reason why you might not be able to have them argued as early as I might desire?

Ans.—I have no recollection of giving any such reason for not arguing the causes as soon as they should be ready. It may have been given as an excuse for some delay in the preparation of the special pleadings, but my general recollection is my earnest desire to co-operate with you in bringing on the arguments as soon as possible.

Ques.—The consent of the 14th of September, did I call a consolidated consent when I took it to you?

Ans.—I am unable to say from any precise recollection that you did.

I supposed it to be so, and that I was not called upon to sign anything new; but whether you told me so in so many words I cannot recollect distinctly.

Ques.—Did you not in your testimony, on motion before the Supreme Court, speak of that consent in the first instance as the first one which had been entered into between us?

Ans.—I do not recollect making any such statement, nor do I recollect making any attempt in that affidavit to enumerate the various consents which had been entered into between us.

Ques.—Did you then refer to either of the previous consents of the 11th of August or 7th of September in your first affidavit?

Ans.—I believe I have not seen my first affidavit since it was made, but I think I must have referred to those consents. I recollect speaking of the matter of these consents—the withdrawal of the general issue and the pleas of the statute of limitation, and also of the consent that you should file your individual bond; but I think I did not speak of them in their order and made no attempt to do so.

Ques.—At the time of the consent of the 14th of September was signed by you, did you not read it?

Ans.—Probably I did, but I do not recollect particularly—supposing it to be a mere repetition of what had before been agreed to, I paid but little attention to it.

Ques.—Do you mean to state of your knowledge and as an absolute fact, that you were told by me that that consent was a copy of the two preceding consents, or do you mean simply to state that it contained the substance of the agreement between us?

Ans.—I am very far from meaning to say in so many words that you told me it was a copy. I have no precise recollection as to this fact. I rather infer it from the circumstances. I am sure that I was not aware that I was signing new matter.

Ques.—At what time in January, 1848, was the decision of the Supreme Court given on the demurrer?

Ans.—That I do not know. I have understood it was early in January. On the 10th of January, or when Mr. Van Wagenen brought me the stipulation of that date, we knew of the decision.

Ques.—On the 10th of January, had either of us seen the opinion of the Court?

Ans.—I had not; nor had I heard it delivered, nor been told of its contents, nor am I aware that you had.

Ques.—When was the judgment record in all the causes filed?

Ans.—That I do not know: it was entirely in the hands of Mr. Williamson, the Attorney.

Ques.—Do you not know that they had not been made up nor filed at the time of that consent?

Ans.—I do not.

Ques.—Did you not argue these cases in the Court of Errors?

Ans.—I did.

Ques.—Was not the record a part of the case?

Ans.—I think the pleadings, consisting of the declarations, pleadings and demurrer, made up the case.

Ques.—Was not the case a transcript of the judgment?

Ans.—I do not know. I presume it was.

Ques.—Have you ever seen a case on writ of error which did not contain the judgment of the court below as a part of it?

Ans.—Not that I recollect of.

Ques.—Do you not remember that writs of error could not be brought in these cases in time for the January term of the Court of Errors, in consequence of Mr. Williamson not having filed records in the Supreme Court in time for that purpose?

Ans.—No, I do not. I think I was never aware of the fact if it be one.

Ques.—According to the rules of the State of New York on the decision of a demurrer, is not the rule to amend or take issue made a part of the judgment? (Objected to.)

Ans.—I cannot say that there is any uniform rule of that kind.

Ques.—When the consent of the 10th of January was signed, was it not intended that both parties should stand after the decision of the Court of Errors in the same position as to their rights in the Supreme Court as they then respectively enjoyed?

Ans.—I supposed that that stipulation was simply intended to obviate the difficulties which were anticipated from the Supreme Court not being in session when the decision of the Court of Errors should be given.

Ques.—Was it then suggested by you or admitted by me that any right then enjoyed by either party was to be surrendered?

Ans.—I did not so understand it.

Ques.—Was not the whole idea, that the view was to expedite the causes and escape difficulties of form, leaving the substantial rights of the parties as they then enjoyed them?

Ans.—That was my understanding of it. If I had anticipated that the Supreme Court would have been in session at the time the decisions of the Court of Errors were given, I should not have signed the stipulation; I should have left every thing to be regulated by such rules as the Supreme Court might see fit to direct.

Ques.—Was it suggested by you to me, or were you then aware that any technical objection could be raised to the granting by the Supreme Court of leave to take an issue of fact after the judgment of the Court of Errors?

Ans.—I think not.

Ques.—Was not one of the conditions of my bringing a writ of error proposed in that consent, the right to take an issue of fact in case of an adverse decision in the Court of Errors, and did you not then understand that I expected the same right to take an issue of fact after the judgment of the Court of Errors, that I would have had at the time of the consent?

Ans.—The right to amend was not proposed as a condition of bringing a writ of error or of any thing else. The taking the cause to the Court of Errors to ascertain the opinion of the Court of Errors upon the validity of the New York law, was I believe intended by both parties from the first. It was not intended on my part by that consent

to deviate from the rules and practice of the court, except so far as time and formal irregularities were concerned.

Ques.—Did you not from the last clause of that consent understand that it was my expectation on my entering into it, and as a part of it, to take an issue if the judgments should be affirmed in the Court of Errors?

Ans.—I think the impressions that passed through my mind at that time were, that in case judgment should be affirmed, you probably desired to plead something in avoidance of our justification under the statute of New York—perhaps to raise similar questions to such as had been raised in the courts of our own state; but if the demurrers to the plea of the statute of limitations were over-ruled, it did not occur to me that it was possible or was contemplated to put in any further plea.

Ques.—Did you not expect to stand in the same position in the Supreme Court in case of a decision against you in the Court of Errors as to your right to amend that you then engaged?

Ans.—I think I did.

Ques.—And did you not suppose the plaintiffs were to occupy a similar position as to their right to take issue?

Ans.—I did not suppose by that consent that either party lost any rights that they would otherwise have had; but I suppose that each party would have been entitled to the rights which the Supreme Court by their rules would give them had no such consent been made.

Ques.—Was it not stated to you that the right to amend and to take issue stood in precisely the same position?

Ans.—I do not recollect that it was.

Ques.—As to the time of the sitting of the Supreme Court did I state to you that I had any knowledge of its not being in technical session during the sitting of the Court of Errors; but was it not our mutual supposition, that as the terms of the one were the first Tuesday of the month, and the other the third Tuesday of the month, and the judges of the one sitting in the other, that both could not be in session at the same time?

Ans.—No, it was not our mutual supposition, for I knew nothing, and professed to know nothing of the matter. I knew or supposed that Mr. Van Wagenen was familiar with the course of the courts of New Jersey, not merely from his general knowledge, but from the engrossing interest which he took in these causes. He assured me unequivocally that a session of the Supreme Court would not be held for three months after the term of the Court of Errors, in which these decisions of the Court of Errors would be given, and on that ground mainly urged me to sign the stipulation of the 10th of January.

Ques.—As to the fifth consent which you have spoken of, did you not previous to countermanding by telegraph the directions to sign it, know the views of Mr. Williamson, that in his opinion, or according to his belief, the decision of the Court of Errors had been, or would be given against you in all the thirty-three causes?

Ans.—I think not. I had not seen Mr. Williamson. I think I had heard that it was probable that part of the causes would be decided against the defendant, but what part or how many I did not know.

Ques.—Were you ever asked by me for any other consent than those you have expressly specified?

Ans.—Aside from recent consents as to taking testimony, I have no recollection of any other at this moment.

Ques.—Do you not act in these causes by direction of the Corporation of the city of New York?

Ans.—I decline answering that question.

Ques.—Was not Mr. Williamson retained by virtue of a resolution of the Common Council of the city of New York?

Ans.—Mr. Williamson was in these causes before I had any thing to do with them: he was not retained or employed by me, and I have no knowledge, except by hear-say, by what authority he was retained.

Ques.—Do you not know that a bill of his, for services in these causes, has been presented and paid by virtue of a resolution of the Common Council of the city of New York?

Ans.—I do not. I think a bill of his was presented to some of the officers of the corporation.

(Counsel objects to any examination into this subject as irrelevant.)

Ans.—Do you not know from any source that that bill has been paid—and if so, from whom and by whom?

(Objected to.)

Ans.—I did not pay it, nor do I know that it has been paid.

Ques.—Did not the Controller of the City ever inform you that he had paid such a bill?

(Objected to as as hearsay and irrelevant.)

Ans.—Well I think not.

Ques.—Are you sure not?

Ans.—I have no recollection of his telling me so.

Ques.—Have you ever seen a resolution of the Common Council of the city of New York making an appropriation for the expenses already incurred, and to be incurred in this controversy?

(Objected to.)

Ans.—I think I have.

Direct examination resumed by Mr. Woodruff.

Ques.—For what reason did you decline answering whether you act in these causes by direction of the Corporation of the city of New York?

Ans.—Because I thought it irrelevant in the first place to the matter now in issue in these cases; and, second, because it struck me as infringing in some degree upon the privileged communications to counsel.

WILLIS HALL.

Sworn and subscribed before me this 21st day of April, A. D. 1849.
S. S. MORRIS.

It is agreed by the counsel in these causes respectively, that the depositions taken on both sides shall apply to all the cases in the notice of motion served Mr. Williamson.

The depositions are closed by the consent of counsel.

S. S. MORRIS.

April 21, 1849.

Exhibit A. on the part of the Plaintiffs.

NEW JERSEY SUPREME COURT.

CORNELIUS W. LAWRENCE, *adsm.* THOMAS HALE. } *In Trespass.*

CORNELIUS W. LAWRENCE, *adsm.* THE AMERICAN PRINT WORKS. } *In Trespass.*

SIR,—

You will please take notice, that I shall move the Justices of the Supreme Court at Trenton, on Thursday, the second day of January next, at the State House in the city of Trenton, at ten o'clock in the morning of that day, to vacate the rule obtained by you, in the above entitled causes, at the last term of the Supreme Court, "that a Writ of Inquiry to ascertain the plaintiffs' damages issue in the said causes respectively, unless the defendant amend his plea within thirty days after the notice of the said rule," upon the ground that the said rule was obtained contrary to law, and in violation of the rules of the Supreme Court, and because the plaintiffs, or either of them, were not entitled to such rule.

You will further take notice, that in the said causes respectively, I have filed with the Clerk of the Supreme Court, the pleas, copies of which have been furnished you, and that at the same time above mentioned, I shall move the said Justices that the pleas so filed do stand as pleas of record duly filed in the said suits.

And you are further notified, that in support of said motions, I shall take affidavits before S. S. MORRIS, Esq., a Commissioner of said Court, at his office in the city of Newark, on Wednesday, the twenty-seventh day of December instant, at ten o'clock in the morning, to be used on the hearing of the same.

Your ob'd't serv't,

B. WILLIAMSON,

Attorney for the Defendants in each of the above entitled causes.

A. C. M. PENNINGTON, Esq., *Attorney for the Plaintiffs in each of the above entitled causes.*

December 15th, 1848.

Exhibit B. on the part of the Plaintiffs.

CORNELIUS W. LAWRENCE, *adsm.* RICHARD HAYES. } *In Trespass.*

CORNELIUS W. LAWRENCE, *adsm.* ALEXANDER DAWSON. } *In Trespass.*

SIR,—

You will please to take notice, that I shall move the Justices of the Supreme Court, in each of the above entitled causes, at Trenton, on Tuesday, the second day of January next, at ten o'clock in the forenoon of that day, or as soon thereafter as the Court can attend to the same, to strike out, with costs of such motion, the sur-rejoinder filed by the plaintiff or plaintiffs in each of the said causes respectively, to the rejoinder filed in each of the said causes by the defendant therein, to the replication filed by the said plaintiff or plaintiffs in the said causes respectively, to the plea of the statute of limitations pleaded by the defendant in each of the said causes, on the ground that the said sur-rejoinder in each of the said causes is insensible and frivolous, and tenders an useless and immaterial issue, and for other reasons.

Your obedient servant,

B. WILLIAMSON,

Attorney for the Defendant in each and every of the above entitled causes.

Dated December 15th, 1848.

Exhibit D. on the part of the Plaintiffs.

My Dear Sir,—

Mr. Hall says that the addition of the plea of general issue was made without his approbation and he was not aware it had been put in. I therefore agreed to let him strike it out on condition that he would at all hazards argue the cause in October if the Court would hear it.

It is important that a consent rule should be entered on consent of Mr. Williamson and yourself, and please let the consent and rule be framed *"that the defendant have leave to withdraw his plea of the general issue,"* so as to put at rest all question after the argument on demurrer of right to replead it. Please have this done at once.—What says Judge N. as to our chance for October?

Yours, W. W. V. W.

Exhibit F. on the part of the Plaintiffs.

(Copy of Exhibit A.)

NEW JERSEY SUPREME COURT.

The American Print Works,
vs.
Cornelius W. Lawrence.

It is agreed between us that in the above cause and in thirty-two other cases commenced by other plaintiffs against the said defendant in the said New Jersey Supreme Court for blowing up personal property, the pleadings shall be amended as follows:

The plea of the general issue shall be stricken out, and in the demurrer to the plea the word "firstly" shall be substituted in the place of the word "secondly"—and in the replication, the word "secondly" shall be substituted in the place of the word "thirdly."

August 11, 1847. [Signed]

WM. W. VAN WAGENEN,
Of Counsel for Pltffs in all cases.

Willis Hall, *Counsel for Deft.*

(Copy of Exhibit B.)

NEW JERSEY SUPREME COURT.

The American Print Works,
vs.
Cornelius W. Lawrence.

Thomas Hale,
vs.
the same.

It is hereby agreed between us, the counsel for the respective parties in the two above entitled causes, that the plea of the statute of limitations together with the replication of the plaintiff thereto, and the rejoinder to such replication, be all withdrawn from the files of the Court—the above plaintiffs having been at the time of the trespasses, and until within two years, resident citizens of New Jersey—and that the said two causes stand upon the first special plea, and the demurrer thereto, as the only pleadings subsequent to the respective declarations therein.

Dated 7th September, 1847.

[Signed] WILLIS HALL,
Counsel for Deft.

Wm. W. Van Wagenen, *of Counsel for Pltffs respectively.*

Exhibit G. on the part of the Plaintiffs.

It is agreed between us that in all the above causes the defendant shall be at liberty to withdraw the plea of the general issue, and that the plaintiffs respectively shall be at liberty to amend their demurrers to the second pleas severally by substituting the word "firstly" for the word "secondly" therein, and their replication to the third pleas severally by substituting the word "secondly" for the word "thirdly" therein; and it is further agreed that in two of the above causes, to wit—"The American Print Works *vs.* Cornelius W. Lawrence, and "Thomas Hale *vs.* Cornelius W. Lawrence," the plea of the statute of limitations be withdrawn from the files of the Court together with the replication of the plaintiffs thereto; the plaintiffs therein respectively at the time of the commission of the supposed trespasses and until within two years having been resident citizens of New Jersey, and it is agreed that the pleadings shall be held and taken as respectively amended in the manner as above specified, and that either party at discretion shall be at liberty to enter a rule accordingly as by consent of parties.

Dated 14th September, 1847.

B. WILLIAMSON,
Attorney for Deft's.

Filed 15th January, 1848.

J. WILSON, *Clerk.*

[A true copy.]
J. WILSON, *Clerk.*

Exhibit H. on the part of the Plaintiffs.

NEW JERSEY SUPREME COURT.

THOMAS HALE,
vs.
CORNELIUS W. LAWRENCE,

GEORGE HOWE,
vs.
CORNELIUS W. LAWRENCE.

It is hereby stipulated and agreed between us the respective Attorneys for the parties respectively in the above causes, that a writ of error shall be brought forthwith in each of the said causes returnable in the Court of Errors and Appeals, and that all necessary papers shall be filed out of time so as to place the causes in condition to be placed on the calender and argued at the coming January term of the said Court; and we hereby agree to waive and hereby waive all irregularities in the steps taken to effect such purpose. And if the judgments of the Supreme Court be reversed, we hereby agree that such judgment as shall be entered in the Court of Errors and Appeals in the case of Thomas Hale *vs.* Cornelius W. Lawrence, shall also be entered in the case of the American Print Works *vs.* Cornelius W. Lawrence, and that such judgment as shall be entered in the said Court in the case of George Howe *vs.* Cornelius W. Lawrence shall also be entered in the thirty other cases brought at the same time in the Supreme Court against the said Cornelius W. Lawrence, and which were argued together in the said Supreme Court with the said above entitled causes,* and further, should the judgment of the Supreme Court be affirmed in either of the above entitled causes, it is then stipulated and agreed that in the cause in which judgment is so affirmed and in all similar causes as above mentioned, the plaintiffs respectively may enter a consent rule in the Supreme Court on this stipulation giving them leave to traverse and deny the plea of defendant in an issue of fact.

Dated 10th January, 1848.

* But that the said defendants respectively shall then have leave to amend their pleas—such leave not to embrace the right to put in a new plea.

DEAR SIR,—
Please sign above stipulation.
10th January, 1848.

W. W. VAN WAGENEN,
Of Counsel for Plaintiffs.
WILLLIS HALL,
Of Counsel for Deft.

To A. C. M. PENNINGTON, Esq.,
And BENJ. WILLIAMSON, Esq.

but that if such judgment be waived in any technical point, the said defendants respectively shall then have leave to amend their pleas, such leave not to embrace however the right to put in a new plea.

Darker colored ink, and erased with a pen.

Exhibit I. on the part of the Plaintiffs.

NEW JERSEY SUPREME COURT.

THOMAS HALE,
vs.
CORNELIUS W. LAWRENCE.

GEORGE HOWE,
vs.
CORNELIUS W. LAWRENCE.

It is hereby stipulated and agreed between us the respective Attorneys for the parties respectively in the above causes, that a writ of error shall be brought forthwith in each of the said causes, returnable in the Court of Errors and Appeals, and that all necessary papers shall be filed out of time so as to place the causes in condition to be placed on the calendar and argued at the coming January Term of the said Court: and we hereby agree to waive, and hereby waive all irregularities in the steps taken to effect such purpose. And if the Judgment of the Supreme Court be reversed, we hereby agree, that such Judgment as shall be given in the Court of Errors and Appeals, in the case of Thomas Hale vs. Cornelius W. Lawrence, shall also be entered in the case of the American Print Works vs. Cornelius W. Lawrence, and that such Judgment as shall be given in the said Court, in the case of George Howe vs. Cornelius W. Lawrence, shall also be entered in the thirty other cases brought at the same time, in the Supreme Court, against the said Cornelius W. Lawrence, and which were argued together in the said Supreme Court with the said above entitled causes, but that the said defendants respectively, shall then have leave to amend their pleas, such leave not to embrace, however, the right to put in new pleas. And further, should the Judgment of the Supreme Court be affirmed in either of the above entitled causes, it is hereby stipulated and agreed, that in the cause in which such judgment is so affirmed, and in all similar causes as above mentioned, the plaintiffs respectively may enter a consent rule in the Supreme Court, on this stipulation, giving them leave to traverse and deny the plea of the defendant, on an issue of fact.

Dated 10th of January, 1848.

A. C. M. PENNINGTON,
Attorney for Pl'ffs.
B. WILLIAMSON,
Attorney for Def'ts.

GENTLEMEN,—

Please sign above stipulation, 10th January, 1848.

W. W. VAN WAGENEN,
Of Counsel for Pl'ffs.
WILLIS HALL,
Of Counsel for Def't.

[A true Copy.]
J. WILSON, *Clerk.*

Exhibit K on the part of the Plaintiffs.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

GEORGE MEYER,
vs.
CORNELIUS W. LAWRENCE.

SIR:—You will please to take notice, that on the taking of affidavits in the above cause, and in all the other causes against the same defendant with notice of a motion in which before the above Court you have been served, you are required to produce a certain letter in your possession addressed to you, dated the 25th day of November, 1848, signed by William W. Van Wagenen, before S. S. Morris, Esquire, at the adjourned sitting for the taking of such affidavits, at the Philadelphia Hotel at Jersey City, on Thursday, the 19th day of April, instant, at 11 o'clock A. M., or that parol proof will be given of the contents thereof.

Dated this 16th day of April, 1849.

Yours, &c.

A. C. M. PENNINGTON, *Atty. for Pltffs.*

To B. WILLIAMSON, Esq., *Atty. for Defendant in the above and all the other causes referred to.*

I acknowledge due and legal service of the within notice upon me here at this time this day.

Dated Trenton, 17th April, 1849, 2½ o'clock, P. M.

B. WILLIAMSON, *Atty, &c.*

Exhibit L on the part of the Plaintiffs.

NEWARK, Nov. 25th, 1848.

BENJ. WILLIAMSON, Esq.,

MY DEAR SIR—I write at Pennington's office and have but a moment. You spoke of a right which the defendant in Fire cases would have to amend the 1st plea in cases where the judgment is affirmed. This is not so. Look at the consent. If you waive the statute of limitations you could do so; but the judgment is an effectual one on the whole record against us unless we take issue on the 2nd plea—and if we do so, *that is the only question open.*

You can't take the axe and give us only the handle.

I have heard nothing more from Hall, so that his good humor or senses have not yet returned.

I will send you copies of the sur-rejoinders, which are about being put in.

In haste, yours truly,

W. W. VAN WAGENEN.

Exhibit M. on the part of the Plaintiffs.

NEW JERSEY SUPREME COURT.

THE AMERICAN PRINT WORKS,
vs.
CORNELIUS W. LAWRENCE.

THOMAS HALE,
vs.
THE SAME.

It is hereby stipulated and agreed that the examination of witnesses and taking affidavits to be used on a motion noticed to be made in the above cases, and which affidavits were to have been taken before S. S. Morris, Esq., this day at Newark, stand adjourned without prejudice to either party till Wednesday next, the 3d of January, at Trenton, before such officers as may be designated by each party for their respective affidavits, in a notice of one hour to be given to us, the counsel, respectively, personally if at Trenton, otherwise of two days. And it is further stipulated that either party may take affidavits in like manner to be used on the motion heretofore noticed to be made in the thirty-one other causes against the same defendant in which we are respectively counsel.

And should the parties be unable to take their affidavits first above referred to at the time for that purpose above specified, the motions are to stand over and not to be brought on until such opportunity has been had, and the motions may then be brought on the following day.

December 30th, 1848.

[Signed] W. W. VAN WAGENEN,
of Counsel for Plffs respectively in all the 33 cases above referred to.

WILLIS HALL, *of Counsel for Deft. in same.*

Exhibit N. on the part of the Plaintiffs.

NEW JERSEY SUPREME COURT.

GEORGE HOWE,
vs.
CORNELIUS W. LAWRENCE.

SIR,—Please take notice that in the above cause, and in the thirty other causes against the same defendant, in which other parties are plaintiffs, commonly called the Fire cases, wherein the judgment of this Court was affirmed by the Court of Errors and Appeals, I shall move this Honorable Court, before the Justices thereof, on Saturday, the sixth day of January instant, at Trenton, at the opening of the Court on that day, or so soon thereafter as counsel can be heard, that the plea of the

statute of limitations filed therein and all proceedings thereon, in the said causes respectively be stricken out as void and abandoned by the filing of the pleas hereinafter referred to, or that in the event of the refusal of such application that the plea of the general issue and the two special pleas filed therewith be stricken out as irregular and filed contrary to the rules and practice of this Court, and for such further or other order as the said Court may see fit to grant.

4th of January, 1849.

A. C. M. PENNINGTON,
Attorney for Plffs. respectively, by
WM. W. VAN WAGENEN, *of Counsel.*

To BENJAMIN WILLIAMSON, ESQ.,
Attorney for Deft. in said causes respectively.

I hereby admit service this day, at 6 o'clock P. M., of the notice of which the within is a copy, and I hereby waive all objection that the titles of the causes therein referred to are not stated at length.

Dated 4th of January, 1849.

B. WILLIAMSON,
Attorney for Defts, by
W. HALL, *of Counsel.*

Exhibit 1. *on the part of the Defendant.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE AMERICAN PRINT WORKS, }
vs.
CORNELIUS W. LAWRENCE, }
And thirty other causes against the same.

It is hereby stipulated and agreed between us the respective Attornies for the parties in the above entitled suits, that such Judgment as shall be rendered in the Court of Errors and Appeals, in a case wherein Thomas Hale is plaintiff, and Cornelius Lawrence is defendant, shall be entered, by virtue of this consent, in the above entitled cause, wherein the American Print Works are plaintiffs, and the said Cornelius Lawrence is defendant, and that such Judgment as shall be rendered in the said Court, in a case wherein George Howe is plaintiff, and the said Cornelius W. Lawrence defendant, shall be entered, by virtue of this consent, in all the other above entitled causes respectively.

Dated, October Term, 1848.

SUPREME COURT.

THE AMERICAN PRINT WORKS,
vs.
CORNELIUS W. LAWRENCE.
} In Trespass.

This is one of thirty-three actions commenced by differen Plaintiffs, for damages sustained by the loss of property destroye on the 17th of December, 1835, by order of the Mayor and tw Aldermen of the City of New-York, to arrest the spread of a con flagration in that City.

The Plaintiffs complain that the Defendant, on the 17th o December, 1835, at the City of New-York, blew up by gunpow der, burnt and destroyed, divers goods, wares and merchandis of the Plaintiffs, of the value of $200,000.

The Defendant pleads in justification, that by a statute of th State of New-York, passed on the 9th day of April, 1813, it wa among other things enacted as follows, to wit: That when an building or buildings in the City of New-York shall be on fire, i shall be lawful for the Mayor, or in his absence the Recorder o the City, with the consent and concurrence of any two of the Al dermen thereof, or for any three of the Aldermen, to direct an order the same or any of the buildings which they may deem hazardous and likely to take fire, or to convey the fire to othe buildings, to be pulled down and destroyed. That, on the 17th o December, 1835, the aforesaid provision of the said act remaining

in full force and unrepealed, certain buildings, to wit: numbers 44 and 46 Exchange Place, in the City of New-York, were on fire: that the Defendant then being Mayor of the said City of New-York, and Edward Taylor and Egbert Benson, then being two of the Aldermen of said City, were present at the fire. That near to the said buildings so on fire, was a store which was by the said Mayor and Aldermen, and by each of them deemed and believed hazardous and likely to take fire, and that the Defendant, with the full consent, concurrence and approbation of the said Aldermen, caused and procured the said store to be blown up and destroyed. That the goods of the Plaintiffs were in the said building at the time it was so blown up and destroyed, and for the reason aforesaid, the aforesaid goods, wares and merchandise, in the Plaintiff's declaration mentioned, were blown up by gunpowder, burned up, and destroyed by the Defendant, as it was lawful for him to do, &c.

To this plea, there is a general demurrer and joinder in demurrer.

The only question presented by the pleadings and discussed upon the arguments of this cause, is whether the statute of the State of New-York, pleaded by the Defendant is a sufficient justification of the alleged trespass.

It is insisted on behalf of the Plaintiffs, that no statute can be constitutionally passed, which authorizes the destruction of private property without compensation. That private property cannot be taken by virtue of an act of the Legislature, without indemnity. That such taking is a violation of that clause of the Constitution, which provides, that private property shall not be taken for public use without just compensation. It is conceded that, while the statute has made provision for indemnifying all persons having an interest in the buildings destroyed, in pursuance of the act, the owners of personal property destroyed by the same instrumentality, having no interest in the building, are

left without compensation, nor is it denied, that the *destruction* of private property for public use is a *taking* of it within the meaning of the Constitution.

If the statute authorizes the destruction of private property for public use, within the meaning of the constitutional provision, then clearly, the act is unconstitutional, and cannot avail the defendant as a justification.

But is property destroyed to arrest the progress of a conflagration taken *for public use*, within the constitutional sense of the term ?

The right to take private property for public use, is an attribute of sovereignty—it is inseparable from the sovereign power. It is the right of eminent domain or transcental property in the goods of the subject. It is a right founded on the nature and end of sovereignty, growing out of the nature of the social compact, by virtue of which, every member of society holds his property upon condition that it is subject to be taken for the use of the State, whenever the public good requires it. It is justified on the ground of State necessity. It is founded on the same principle as the right of raising taxes and subsidies for the support of government, and the right of regulating the use of private property by sumptuary laws.

2 Burlam, 145, chap. 5, § vi.
Ibid. 149, chap. 5, § xxiv—xxix.
12 Coke, 13, Case of the Prerogative, &c.

But the right to destroy property to prevent the spread of a conflagration, rests upon other and very different grounds. It appertains to individuals, not to the State. It has no necessary connection with, or dependence upon the sovereign power. It is a natural right existing independently of civil government. It is both anterior and superior to the rights derived from the social

compact. It springs not from any right of property claimed or exercised by the agent of destruction in the property destroyed, but from the law of necessity. The principle, as it is usually found stated in the books, is that "if a house in a street be on fire, the adjoining houses may be pulled down to save the city." But this is obviously intended as an example of the principle rather than as a precise definition of its limits.

The principle applies as well to Personal as to Real Estate, to Goods as to Houses, to Life as to Property, in solitude as in a crowded city, in a state of nature as in civil society. It is referred by Moralists and by Jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard of goods in a tempest for the safety of the vessel; with the taking of food to satisfy instant demands of hunger; with trespassing upon the land of another to escape death from an enemy. It rests upon the maxim "necessitas incuici privi legium gouci jura privata."

Bacon's Elem., Reg. 5.
Noy's Maxims, Max. 25, Herring's ed. p. 30.
Puffen, lib. 2, ch. 6, § viii.
Witherspoon, Mor. Phil. 136, sec. xvi.
2 Kent's Com. (2d edit.) 338.
Stone et al vs. The Mayor et al, 25; Wend. 173.

And the common law adopts the principle of the natural law, and places the justification of an act otherwise tortious precisely upon the same ground of necessity.

It must be so pleaded in justification. Hence the plea in such case is not the public good, the eminent domain, the sovereign power, but necessity.

Com. dig Pleaded, 3, M. 30.
3 Chitty, 1118.

It is true, that by many writers of high authority, the ground of justification of an act done for the public good, and an act committed through necessity, arenot accurately distinguished. They are both spoken of as grounded on necessity, and they doubtless are so. But the one is *a State* the other *an individual* necessity, though ofttimes resulting in a public or general good. The one is a civil, the other a natural right. The one is founded on property, and is an exercise of sovereignty. The other has no connection with or dependence upon the one or the other.

Nor can property destroyed to prevent the spread of a conflagration, be said in any appropriate sense, to be destroyed for the public good.

It may be destroyed for the benefit of one, of a few or many, but it is not destroyed for the benefit of the State; nor is it taken in aid of any of those public objects which it is the peculiar and appropriate duty of every State to foster and promote. I am of opinion, therefore, that the destruction of buildings to prevent the spread of a conflagration, is not the taking of property for public use within the meaning of the Constitution.

Nor is the principle altered by the fact, that the destruction in the present instance was committed under Legislative sanction.

The right of destruction existed prior to the enactment. The statute created no new power.

It conferred no new right. It merely converted a right of necessity into a legal right. It regulated the mode in which a previously existing power should be exercised.

The statute does not authorize the destruction. It could not do so. It would be an attempt to take private property for private use.

Nor did the statute deprive any citizen of his natural right to destroy buildings to prevent the spread of a fire in case of necessity. Every citizen may, notwithstanding the statute, still exercise that right at the peril of being held responsible for an error of judgment as to the existence of the necessity. But the statute vested the power of judging of the existence of the necessity in the discretion of certain officers designated by the statute, and made their judgment conclusive of the existence of that necessity.

In so doing, I do not perceive that the Legislature acted unconstitutionally. The policy of the statute, and whether upon principles, equity provision should have been made to indemnify those whose property has been sacrificed for the safety of the City, are points upon which a difference of opinion may exist, but with which the Court has no concern.

It is further objected, that the act is unconstitutional upon the ground that the party whose property is injured, is deprived of the right of trial by Jury. The objection is not well founded. The party is not in point of fact, deprived of a trial by Jury. The evidence necessary to sustain the defence is changed, even if the party were deprived of a trial by Jury, the statute is not therefore necessarily unconstitutional.

Bonaparte vs. The Cam. & Amboy R. R. Co.
Balden, 220.
Scudder vs. The Trenton & Del. Falls Co.
Saxton, 684.
Beekman vs. The Sar. & Scho. R. R. Co. 3 Paige, 75.

The only remaining ground of objection to the validity of the plea, is, that the statute on which the defendant relies for justification, does not in terms authorise the destruction of personal property, but only of buildings deemed hazardous. That the Legislature have left the right to destroy personal property as it stood

at common law undisturbed by the provisions of the statute. It may be suggested moreover, that the necessity of destroying the goods did not result necessarily from the necessity of destroying the buildings. That though the destruction of the buildings may have been necessary, yet by a brief delay the goods of the Plaintiff might have been saved. That the justification therefore may be perfect as to the buildings, but fail as to the goods.

The act, however, which constitutes the Mayor and Aldermen judges of the necessity of destroying the buildings, must of consequence make them judges also of the time at which the act of destruction becomes necessary.

It must be assumed therefore, upon the pleadings, that the building was destroyed at the time and in the manner demanded by the imminency of the danger. It must further be assumed, that the destruction of the building necessarily involved the destruction of the goods.

The defendant then in this action is attempted to be made responsible for the consequences of an act which by the statute he was especially authorised to perform, for the performance of a duty which as a public officer he was bound to execute. He was acting for no private emolument, but in the discharge of a public duty. The act was not done for his individual benefit. He derived from it no advantage not shared in common with his fellow citizens. In performance of his duty, he acted, it must be assumed, with due skill and caution. There is no allegation or pretence to the contrary. Under these circumstances, I deem it clear, that the defendant is not liable for the destruction of the Plaintiff's goods, or for any other inevitable consequence of the destruction of the building.

It is a well settled principle, that where a person in discharge of a public duty, not acting for private emolument, unwittingly

injures another in the performance of the act while acting with due skill and caution, he is not answerable for damages.

The Governor, &c. vs. Meredith, 4 T. R. 790.
Sutton vs. Clark, 6 Taunt, 29.
Am. Law Mag. (April, 1843,) p. 52.
Simrickson vs. Jolinson, 2 Han. 129, 150.
Ten Eyck vs. The Del. & Rar. Canal Co. 3 Han. 200.

The demurrer must be overruled.