DECLARATION AND CHARTER

OF THE

American Surety Company of New York.

As amended to conform to the "Insurance Law" being "an Act in relation to insurance corporations, constituting Chapter 38 of the general laws" of the State of New York, and also known as Chapter 690 of the Laws of 1892. Approved by the Governor, May 18th, 1892.

Declaration in conformity with an Act of the Legislature of the State of New York, entitled: "An Act to provide for the incorporation of Life and Health Insurance Companies, and in relation to agencies of such companies," passed June 24, 1853, and the several acts amendatory thereof and supplemental thereto, and with reference to another Act of the Legislature of the State of New York, entitled: "An Act to facilitate the giving of bonds required by law," passed June 13, 1881.

We, the undersigned, as incorporators, do hereby declare that we do associate ourselves together, and that we intend to form and incorporate a company under the second department named in the aforesaid Act, passed June 24, 1853, for the purpose of guaranteeing the fidelity of persons holding positions of public or private trust, and of making or guaranteeing bonds and undertakings required by law; and to that end we propose to adopt a Charter, as follows:

CHARTER.

ARTICLE I.

The name of the company shall be the AMERICAN SURETY COMPANY OF NEW YORK.

ARTICLE II.

The principal office for the transaction of the business of the company shall be in the City of New York, where the company shall be located; but the business of the company may be transacted by means of agencies, branches, or otherwise, throughout the United States of America and elsewhere.

ARTICLE III.

The kind of business to be undertaken by the company shall be the guaranteeing the fidelity of persons holding places of public or private trust, guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed.

ARTICLE IV.

FIRSTLY. The corporate powers of the company shall be vested in a board of trustees, and shall be exercised by such board directly, and through such committees or officers as the said board may elect or appoint.

SECONDLY. The board of trustees shall consist of not more than fifty-one and not less than thirteen members, each of whom shall be a stockholder in the company, and a majority of whom shall be citizens of the State of New York. The first board of trustees shall consist of fifty-one members, and thereafter the number of the members of the board shall be such as from time to time shall be fixed by the by-laws of the company.

THIRDLY. The board of trustees shall have power to make the by-laws of the company, and to prescribe such regulation for the transaction of the business of the company as it shall deem necessary for the management of its affairs not inconsistent with the laws of this State and the United States, and it shall have power to alter, suspend, amend or add to the same at pleasure subject to a like restriction.

FOURTHLY. The said board shall have each and every power necessary to carry on the business of the company, and to enable it to exercise all the powers and franchises of the corporation, and may appoint an Executive Committee from their number having like powers when the board is not in session.

FIFTHLY. The board of trustees shall have power to provide by by-laws what number of trustees, not less than seven, constitute a quorum of the board for the transaction of business, and until the board shall so provide, seven members of the board shall constitute such quorum.

ARTICLE V.

FIRST. The board of trustees of the company shall be elected from the stockholders, and the first board of trustees shall be elected and shall hold office as hereinafter provided, and until their successors shall be elected.

SECONDLY. The board of trustees shall, at its first meeting, divide itself by lot into three classes, each of equal number. The term of service of the first class shall expire at the end of one year from the first Tuesday after the first Monday of January, 1882; that of the second class at the end of two years from such time, and that of the third class at the end of three years from such time. At the end of the first year, which shall be on the first Tuesday after the first Monday in January, 1883, and annually thereafter, one-third of the whole number of trustees shall be elected, and the persons so elected shall hold their offices for three years and until their successors are elected. In case of a reduction of the number of members of the board of trustees, then at any annual election only so many members shall be chosen as shall be needed to complete the board.

THIRDLY. The President of the company, prior to each annual election of the trustees, shall appoint three inspectors of such election.

FOURTHLY. Each election of trustees shall be by ballot, and a plurality of votes shall elect.

FIFTHLY. At meetings of stockholders each stockholder shall be entitled to one vote, in person or by proxy, for each share of the capital stock of the company held by him and transferred to him on the books of the company not less than thirty days immediately preceding such election.

SIXTHLY. The trustees shall, at their first meeting (and subsequently at the first meeting of the board after each election of trustees), elect from among their number a President and also a First Vice-President of the company, who shall respectively hold their offices for the term of one year and until their successors are elected.

SEVENTHLY. The board of trustees shall have power at any time to appoint additional vice-presidents, one or more secretaries or assistant secretaries, and such other officers and such agents and clerks as said board shall deem expedient and proper for carrying on the business of the company; and the persons so appointed shall hold office during the pleasure of the board.

ARTICLE VI.

FIRST. A vacancy occurring in the board in the intervals between the annual elections may be filled by the board for the unexpired term. The trustees of the company shall be eligible for re-election.

SECONDLY. The board of trustees shall have power to fill, by appointment, a vacancy occurring in the office of President or Vice-President until the annual election next after the happening of such vacancy.

ARTICLE VII.

The amount of capital stock of the Company shall be Two Million Dollars, divided into Forty thousand shares at Fifty Dollars each, which shall be transferable only upon the books of the Company in conformity with its By-Laws.

ARTICLE VIII.

The fiscal year of the company, after the 31st day of December, 1881, shall commence on and with the first day of January in each year, and the fiscal year shall terminate on and with the 31st day of December in each and every year.

ARTICLE IX.

B. H. Bristow, Lyman W. Briggs and William S. Opdyke, of New York City, shall act as commissioners on behalf of the corporators in opening books to receive subscriptions to the capital stock of the company, and to distribute the stock among the subscribers, if more than the necessary amount is subscribed, and to collect in the said capital and complete the organization of the company. They shall also act as inspectors of the election of the first Board of Trustees of the company, which election shall be held at such time and place as they shall appoint, and upon at least ten days notice given by advertisement in one or more newspaper published in the City of New York.

NEW YORK, October 18, 1881.

B. H. Bristow, R. S. Grant, O. D. Baldwin, Wm. S. Opdyke, Lyman W. Briggs, Asa P. Potter, James H. Wilson, A. V. Stout, E. O. Perrin, Julius Wadsworth, H. J. Jewett, G. R. Blanchard, Augustus Brandagee, Conn., F. N. Bangs, C. C. Baldwin, J. Tracy, Iowa, R. P. Flower, Theo. Houston, D. A. Heald, Jos. S. Decker.

ATTORNEY-GENERAL'S OFFICE,
ALBANY, December 7, 1881.

I do hereby certify that I have examined the annexed Charter of the American Surety Company of New York, and that I find the same to be made in accordance with the requirements of the act entitled "An Act to provide for the incorporation of life and health Insurance Companies, and in relation to agencies of such Companies," passed June 24, 1853, and the several acts amendatory thereof, and not inconsistent with the constitution or laws of the United States, nor of this State.

HAMILTON WARD,
Attorney-General.

[L. S.]

To HON. CHARLES G. FAIRMAN,
Superintendent of the Insurance Department.

The foregoing amended Charter has been duly authorized by a vote of stockholders representing more than three-fifths of the Capital Stock of the American Surety Company of New York, at a meeting of the stockholders called for that purpose pursuant to statute in such case made and provided, held at the office of said Company, No. 160 Broadway, New York City, N. Y., on the 30th day of November, 1892.

Dated New York, November 30th, 1892.

W. L. TRENHOLM,	WALTER S. JOHNSTON,	WM. DOWD,
WM. A. WHEELOCK,	J. A. HAYDEN,	JNO. W. HAMPTON, JR.,
HENRY D. LYMAN,	C. H. LUDINGTON,	DANIEL G. ROLLINS,
E. K. SIBLEY,	C. L. TIFFANY,	WILLIAM MERTENS,
M. W. COOPER,	EDWARD N. GIBBS,	JOHN H. INMAN,
H. H. COOK,	JOHN A. MCCALL,	CORNELIUS N. BLISS,
WM. B. KENDALL,	GEO. FREDERICK VIETOR,	GEORGE S. EDGELL,
W. S. GURNEE,	JOHN J. MCCOOK,	ELIHU ROOT,
HENRY D. WELSH,	HENRY TALMADGE,	E. F. BROWNING,

A majority of the Trustees of the American Surety Company of New York.

STATE OF NEW YORK,
City and County of New York. } *ss.:*

On the 30th day of November, 1892, before me personally came W. L. TRENHOLM, HENRY D. LYMAN, WM. A. WHEELOCK, E. K. SIBLEY, MARVELLE W. COOPER, HENRY H. COOK, WM. B. KENDALL, HENRY D. WELSH, WALTER S. JOHNSTON and JAMES A. HAYDEN, and

On the 1st day of December, 1892, before me personally came C. H. LUDINGTON, and

On the 3d day of December, 1892, before me personally came C. L. TIFFANY, and

On the 5th day of December, 1892, before me personally came EDWARD N. GIBBS, JOHN A. MCCALL, GEO. F. VIETOR, JOHN J. MCCOOK, W. S. GURNEE, HENRY TALMADGE, WM. DOWD, JOHN HAMPTON, JR., DANIEL G. ROLLINS, WM. MERTENS, JOHN H. INMAN, CORNELIUS N. BLISS, GEO. E. EDGELL and ELIHU ROOT, to me known and known to me to be individuals described in and who executed the foregoing and within instrument, and they thereupon severally acknowledged to me that they had executed the same.

L. E. CARMAN,
[L. S.] Notary Public, No. 83,
New York County.
Certificate filed in Kings Co.

STATE OF NEW YORK,
City and County of New York. } *ss.:*

On the 7th day of December, 1892, before me personally came E. F. BROWNING, to me known and known to me to be the individual described in and who executed the foregoing and within instrument, and he thereupon duly acknowledged that he executed the same.

L. E. CARMAN,
[L. S.] Notary Public, No. 83,
New York Co.
Certificate filed in Kings Co.

STATE OF NEW YORK,
Insurance Department,

~~New York,~~ Albany January 23rd 1894

I, JAMES F. PIERCE, Superintendent of Insurance of the State of New York, do hereby certify that I have compared the within copy, Declaration and Charter of the American Surety Company of New York as amended 1893, together with certificate of Attorney-General, with the originals thereof, now on file in my office, and that the same are true and correct transcripts therefrom and of the whole of said originals.

In witness whereof, I have hereunto set my hand and affixed my official seal at the Capitol in the City of Albany, this 23rd day of January 1894.

James F. Pierce

Superintendent of Insurance.

Declaration and Charter

OF THE

AMERICAN SURETY COMPANY

NEW YORK,

AS AMENDED

1893.

2.

Jan. 21

Dictated W.E.K.

American Surety Company,

OF NEW YORK.

160 Broadway,

New York, January 2, 1895. 189

Hon. W. L. Strong, Mayor,
New York City.

Dear Sir:--

This Company begs to submit a copy of its Charter and a Sworn Statement of its financial condition, with a view to obtaining your acceptance of its Bonds as sole surety for Auctioneers and such other persons as are required by the ordinances of the City of New York to file a bond with you.

We have for some years furnished Auctioneers' Bonds as sole surety to the State of New York, but not to the City of New York.

If you will kindly give this application your attention in your own good time we will appreciate it.

Yours respectfully,

American Surety Company,
by-

W. E. Keyes
Secretary.

L.B.

Law Department.
Office of the Counsel to the Corporation.

D.J.D.
B

New York, January 16, 1895

Job E. Hedges, Esq.,
Secretary.

S i r ;

I have received your letter of 3rd instant, enclosing a declaration and charter of the American Surety Company of New York, and its application to the Mayor for the acceptance of its bonds as sole surety for auctioneers and such other persons as are required by ordinance of the City of New York to file bonds.

It appears by the declaration and charter, and the accompanying certificate of the Superintendent of Insurance, that the company named has been duly incorporated pursuant to section 70 of Chapter 690 of the Laws of 1892, to make insurance guaranteeing the fidelity of persons holding places of public or private trust.

By Chapter 720, Laws of 1893, the acceptance of the bond of such a company by any public officer, for the purpose indicated, is authorized.

It does not appear, therefore, that there is any reason under the law why the Surety Company should not have the opportunity to furnish the bonds they desire to furnish.

I remain

Yours respectfully,

D. McClure

Counsel to the Corporation.

City of New York.

Law Department,

Office of the Counsel to the Corporation.

No 2 TRYON ROW.

January 21. 1895

Dear Mr Rogers.

I have just found the Enclosed documents in a bundle of papers where they had been placed by Mistake

Ther belong with the letter on the same subject which you have from the Department and so I send them to you Yours truly

Mr Jos E Rogers Counsel

Copy for the Mayor

FRANCIS LYNDE STETSON
CHARLES W. BANGS
CHARLES EDWARD TRACY
FREDERIC B. JENNINGS
CHARLES HOWLAND RUSSELL
HENRY L. SPRAGUE
CHARLES MAC VEAGH

STETSON, TRACY, JENNINGS & RUSSELL,
ATTORNEYS AND COUNSELLORS AT LAW,
MILLS BUILDING, 15 BROAD STREET, NEW YORK.

December 29, 1894.

John B. Devlin vs. The Mayor.

The Hon. William H. Clark,
Counsel to the Corporation.

My dear Sir:

Pursuant to your directions I have prepared, and herewith transmit, the printed proof of a brief for the Court of Appeals, and upon which I am prepared to make argument in behalf of the City's appeal, when the case shall be reached in January. I desire, however, to call your attention to the fact that Mr. Franklin Bartlett has also been of counsel for the City up to this point, and I shall be very glad, if it will be agreeable with your view, if Mr. Bartlett shall also be continued as counsel in the case. Upon the supposition that this will be agreeable to your view, I have printed his name at the bottom of the brief, which I shall be glad to have you send to him, with permission to me to consult him in the matter.

I think, however, that it is proper for me to inform you that, in my opinion, it is not likely that the appeal will prevail and that it would be for the advantage of the City if any settlement or compromise could be made short of payment of the entire amount involved in the judgment. In view of this recommendation it is proper that I should state to you somewhat in detail the reason for my advice.

This action grows out of the Hackley street cleaning contract made February 11, 1861, for the cleaning of the streets of New York for a term of five years, from February 26, 1861 to February 26 1866, for which work the contractor was to receive $279,000. a year in semi-monthly payments and all of the material removed from the streets.

The contract was rescinded by the City upon May 16, 1863, at which time there was due and unpaid by the City five instalments of two weeks each and also for three days additional.

The claim by the contractor and his assigns in consequence of this contract and its rescission was two-fold, first, to recover the unpaid instalments, amounting (without interest) to $60,450. and second, for the unliquidated damages for the profits which

might have been earned during the unexpired term of the contract, namely, about three years.

The case has been in litigation for thirty years, having been tried before several Referees several times at the General Term and once in the Court of Appeals.

Upon the former trial completed July 20, 1870, the Referee ordered judgment against the City for the sum of $400,339.90, made up of two items: (a) For moneys earned $94,179.90; and (b) for profits lost $306,160. The amount thus awarded in 1870 with twenty-four years' interest would now amount to more than $1,000,000.

This judgment was reversed by the General Term of the Common Pleas in 1874, but the Court of Appeals in 1875 reversed the General Term and ordered a new trial.

The cause coming back for new trial, proceeded before several Referees, until finally it was decided by Mr. Abraham Wakeman upon August 10, 1888, when he awarded judgment against the City for the sum of $576,000, made up, as before, of two parts: (a) For money earned, with interest, $165,408.97; and (b) profits lost, with interest, $410,618.70.

While it may appear that both these items were larger than found by the former Referee, this is only apparently so. The recovery for moneys earned was exactly and mathematically the same, the increase being on account of interest, and the recovery for profits lost was $140,000 less, the increase resulting from the very long period during which interest had been running.

The City having taken an appeal from this judgment to the General Term of the Common Pleas, after argument and a long consideration (Judge Pryor dissenting) the judgment was reversed as to all of the claim for unliquidated damages, and the claimants were required to abandon entirely that part of their claim ($410,615.70) holding on to their judgment only for the moneys actually earned prior to rescission, and to the interest thereon.

Much time having elapsed since the decision was rendered, and before the final judgment was perfected, it now results that the amount of the judgment against the City is $250,297.95, made up of the $60,450. originally due for moneys earned, and a vastly greater sum for interest and costs during the thirty years of litigation, amount to $189,847.95.

The subject matter of the appeal, therefore, is only as to the right to recover the amount of the moneys earned and unpaid at the time of rescission ($60,450.). The vastly greater amount of interest must, as matter of course, follow the disposition of this principal sum.

There are four grounds upon which the payment of this sum can be resisted, as follows:

First. That this action, properly construed, is not one for the recovery of these moneys earned, but only for the recovery by Charles Devlin of his one-eighth share in the profits lost, and that portion of the claim having been waived, no recovery whatever can be had against the City herein.

Second. That in any event the recovery for moneys earned is improper in this action, because of a receivership of the partnership established before this suit was brought.

Third. That no recovery can be had herein because of the failure of the claimants to make proper demand before bringing suit.

Fourth. That the contract was fraudulent in its inception and obtained by bribery and corruption.

In the brief which I herewith transmit I have set forth the first three points as forcibly as I can after ten years' study of the case. All of these points were presented at the General Term, were carefully considered and were overruled, and I much doubt the possibility of establishing them in the Court of Appeals. The remaining point, concerning fraud and bribery, is undoubtedly well founded in fact, though it was found adversely to the defense of the City by both the Referees, and Referee Wakeman's finding against fraud has been expressly affirmed by the General Term. In view of this fact and in view of the fact that our suggestions of fraud are only suggestions and are not susceptible of actual proof accessible at any time since I came into the case ten years ago,and considering also that the Court of Appeals will not examine a Referee's conclusions of fact affirmed by the General Term, I have not considered, and do not consider it wise to attempt to present this fraud issue in the Court of Appeals, for I feel that an ineffectual presentation would operate decidedly to the disadvantage of our other points, which are weak enough in themselves. I have, however, prepared an argument on this point and will present it if so

directed by you, though I should not advise its presentation.

In conclusion I repeat that, in my judgment, in view of all these facts, a reversal is unlikely, and it seems to me advisable to attempt a compromise upon any sum less than the amount of the judgment.

I am not less inclined to advise this course because of the possibility that the Court of Appeals might order a new trial upon both issues, in which event we would be exposed to the peril of some recovery on account of the profits lost. I do not expect or suppose that this disaster can properly overtake us, for I have cited cases indicating that where the damages are waived as they have been here, they cannot be made the subject of consideration by the Court of Appeals, and yet that Court is the final arbiter and can lay down the rule for itself, and if that Court should be of the same opinion as Judge Pryor- namely, that the claimants have made out a case entitling them to the prospective profits- the decision might be molded in such a way as to subject us to peril on this point. I therefore advise the settlement, but am prepared to proceed in the Court of Appeals according to your direction.

I have the honor to be,

Your obedient servant,

Francis Lynde Stetson.

P.S. I think that your office should promptly obtain from the Clerk of the Common Pleas a certified copy of the claimant's waivers of all demands for lost profits filed with that Clerk under the judgment.

FRANCIS LYNDE STETSON
CHARLES W. BANGS
CHARLES EDWARD TRACY
FREDERIC B. JENNINGS
CHARLES HOWLAND RUSSELL
HENRY L. SPRAGUE
CHARLES MAC VEAGH

STETSON, TRACY, JENNINGS & RUSSELL,
ATTORNEYS AND COUNSELLORS AT LAW,
MILLS BUILDING, 15 BROAD STREET, NEW YORK.

DEVLIN v. THE MAYOR. January 25, 1895.

THE HON. WILLIAM L. STRONG,
Mayor of the City of New York.

My dear Mr. Mayor:-

At the request and suggestion of the Counsel to the Corporation, I herewith transmit to you the copy of a letter sent by me to him under date of December 29, together with a copy of my brief (therein referred to) in the case of Devlin v. The Mayor.

As the letter will fully explain the situation, it is necessary for me now to state only that in this cause, which has been pending since 1863, I have been special counsel for the City since 1884; that the original claim, which at this time with interest would amount to nearly $1,000,000, has resulted at the General Term in a recovery against the City for about $255,000; that the case is now on appeal to the Court of Appeals, and is likely to be reached within the next three weeks; that in my opinion the Court of Appeals is likely to affirm the judgment, and for the reasons stated in my letter to the Counsel to the Corporation, it is also my opinion that it is desirable to settle the case at any amount less than its full face.

If desired, I shall be happy to advise you personally upon the subject, but as I shall be at Dr. Loomis' funeral on Saturday, and leave for Washington on Monday evening, Monday is the only day on which I shall be certain to call upon you.

Awaiting any intimation of your wishes, I am,

Your obedient servant,

Francis Lynde Stetson

Copy for Mayor Strong

City of New York.

LAW DEPARTMENT.

Office of the Counsel to the Corporation.

No. 2 Tryon Row. January 30, 1895.

Dear Mr. Mayor,

Mr. Stetson and myself tried to see you this morning but you were so busy with the members of the Board of Education that we decided not to wait.

The case of Devlin v. Mayor will be on the calendar of the Court of Appeals within a day or two, in fact Mr. Stetson fears that he may have to go to Albany tomorrow to argue the appeal. He thinks that perhaps he might be able to make the best settlement just before the beginning of the argument. I told him that so far as my inclination and judgment controlled I would be willing to abide by any settlement he might make. I know that the interests of the City are perfectly safe in his hands and that whatever he may do will be the best that can be done.

Do you feel as I do?

Yours,

W. H. Clark.

Hon. W. L. Strong.

I do.

W. L. Strong.

FRANCIS LYNDE STETSON
CHARLES W. BANGS
CHARLES EDWARD TRACY
FREDERIC B. JENNINGS
CHARLES HOWLAND RUSSELL
HENRY L. SPRAGUE
CHARLES MAC VEAGH

STETSON, TRACY, JENNINGS & RUSSELL,
ATTORNEYS AND COUNSELLORS AT LAW,
MILLS BUILDING, 15 BROAD STREET, NEW YORK.

John B. Devlin vs. The Mayor. January 30, 1895.

Gentlemen:

Pursuant to the instructions of the Counsel to the Corporation, I am now starting for Albany to argue this cause, which has appeared on the calendar for Thursday, January 31, though it is not likely to be reached before Friday.

I have received from the Counsel to the corporation a letter, of which I enclose a copy, with the accompanying endorsement of the Mayor. I have also had conference with the Comptroller and have brought to the attention of each of you my letter of December 29, 1894, addressed to the Counsel to the Corporation, and my letter of January 25th addressed to the Mayor, in which I expressed my doubt of success in this matter and recommended an attempt to compromise upon any sum less than the amount of the judgment. I now understand that the letter of the Counsel to the Corporation, with the endorsement of the Mayor, constitutes authority to me to settle and compromise this claim at any amount less than the face of the judgment, viz: $253,795.39 with interest from June 14, 1894, and I have to advise you that, in my view of the situation, it will become my duty to exercise the authority con-

ferred in me, and to settle this case at any amount less than the sum above indicated, and I shall understand myself as authorized to commit the City to such settlement unless I receive telegram to the contrary in care of the Clerk of the Court of Appeals at Albany, where I shall be on Thursday.

I have the honor to be

Your obedient servant,

Francis Lynde Stetson

To the Mayor of the City of New York,
To the Comptroller of the City of New York,
To the Counsel to the Corporation of the City of New York.

5th R

MARTIN B. BROWN, Printer and Stationer, Nos. 49 to 57 Park Place, N. Y.

(5853)

[REG. 9, FOL. 14.]

Court of Appeals

ON APPEAL FROM THE COURT OF COMMON PLEAS IN AND FOR THE CITY AND COUNTY OF NEW YORK.

JOHN B. DEVLIN, as Administrator of CHARLES DEVLIN,
Respondent,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Appellants,

and others,
Defendants–Respondents.

No. 151.
January, 1895.

Argument in behalf of the Mayor, Aldermen and Commonalty of the City of New York, appellants, on appeal from a judgment of the General Term of the Court of Common Pleas, affirming, as modified, a judgment entered upon the report of a Referee in favor of the plaintiff, and of all other defendants, against the City of New York.

Statement.

SEE FORMER APPEAL, 63 N. Y., 8.

Upon August 10, 1888, ABRAM WAKEMAN, Esq. (since deceased), as sole Referee, rendered his report (Case, fols.

228*–283*) in this action, which had been pending before him for eight years, whereby he found against the City (fol. 276*) for the sum of $576,027.67.

This aggregate finding was made in favor of the parties to the action (other than the City) severally as follows:

The PLAINTIFF, one-eighth part.

The defendant DONALDSON, four-eighths part.

The defendant BLISH, two-eighths part.

The defendant PRATT, one-eighth part.

One of the questions to be presented is whether in any aspect judgment could have been awarded in this action in favor of any one except the PLAINTIFF.

The aggregate finding was made up of four parts, viz.:

(*a*) Moneys earned (fol. 243*)...	$60,450 00	
(*b*) Interest thereon (fols. 243*-4*)	104,958 97	
		$165,408 97
(*c*) Damages (fol. 258*).....	$165,250 00	
(*d*) Interest thereon (fol. 259*)..	245,368 70	
		410,618 70
		$576,027 67

Upon appeal to the General Term the judgment was reversed (opinion by BISCHOFF, *J.*, BOOKSTAVER, *Ch. J.*, concurring, and PRYOR, *J.*, dissenting, fol. 2311 *et seq.*, reported 4 Misc., 106), as to the $410,618.70 constituting the unliquidated damages and interest, being subdivisions (*c*) and (*d*).

The remainder of the judgment, that is, $165,408.97, for the money earned and interest, being subdivisions *a* and (*b*) above, was affirmed upon condition that the claimants should stipulate to waive the rest of the judgment (fol. 2366).

This stipulation was given and judgment of affirmance entered as to the affirmed portion of the judgment (fol. 428*)

Prior to entry of this judgment, by agreement between parties, several other persons claiming under the four parties above-named were added or substituted as defendants, and the amount of the recovery (swollen by interest and costs) was apportioned among the several claimants, viz:

I. *Devlin Share*—			
John B. Devlin			$24,826 21
Joseph J. Marrin			46,726 46
Albert Cardozo			5,172 11
James M. Fiske			2,068 84
			$78,793 62
II. *Donaldson Share*—			
Harvey J. Donaldson		$81,719 27	
T. C. Cronin		46,726 46	
			128,445 73
III. *Pratt Share*—			
Charles Waite			10,344 20
IV. *Blish Share*—			
A. A. Smith, Administratrix		$5,172 11	
Edward Schenck		3,620 47	
Edward T. Schenck		5,172 11	
			13,964 69
V. *Anthony S. Hope Claim*—			
Katherine J. Robinson, Assignee		$3,103 25	
Parris G. Clark, Attorney		5,172 11	
			8,275 36
VI. *Thomas Hope Claim*—			
Crowell & Brewer, Executors		$8,799 68	
E. B. Crowell, Attorney		5,172 11	
			13,971 79
			$253,795 39

This recovery represents the amount alleged to have been earned under the contract before its rescission, and a *second question* raised by the City is whether *in this action any recovery whatever could be had for such moneys earned.*

The sum of the interest and costs embraced in this recovery ($193,345.39) is more than three times as large as the principal sum ($60,450) thus indicating the age of the claim, upon which this action was begun, January 11, 1864, since which date it has engaged the attention of many Referees, of many Judges of this Court at both Trial and General Term, and also repeatedly that of the Court of Appeals.

It is now presented by the City (fol. 376*), upon a case which contains *all* the evidence (page 46), and is duly authenticated (fol. 466*).

The claim grows out of the notorious Hackley street cleaning contract, which, upon a former appeal, Judge JOSEPH F. DALY characterized as undoubtedly the result of bribery (48 *How. Pr.*, 462).

The material facts concerning that contract; its execution in February, 1861; its performance or non-performance during the period of two years, two months and eighteen days until May 16, 1863; its rescission by the City on this latter day, and the attendant and consequent litigation, are set forth sufficiently for present purposes in the voluminous special findings of the REFEREE (fols. 2092–2307), but in view of the stipulation of the respondents (fol. 428), and the judgment of the General Term, eliminating all claims for unliquidated damages (*Whitehead* vs. *Kennedy*, 69 N. Y. 462, *Goodsell* vs. *W. U. Tel. Co.*, 109 N. Y. 147, *Lawrence* vs. *Church*, 128 N. Y. 324), and of the rule precluding inquiry here as to the Referee's findings of fact, much of the record requires no consideration.

In the nature of things the issue of non-performance could not have been satisfactorily investigated at this trial twenty years after the event, and the fraud issue referred to on the prior appeal can hardly be raised here in view of the existence of evidence accepted by the Referee and General Term as sufficient to defeat the defence.

Summary of Facts.

On December 29, 1860, bids upon the proposition theretofore advertised for cleaning the streets of the City of New York for a term of five years, from February 26, 1861, were opened by the Board of Common Council (fol. 2095).

There were 31 bids, of which 21 were lower than that of Andrew J. Hackley, who offered to do the work at the rate of $279,000 per annum (fol. 2096).

On the 11th day of February, 1861, Hackley's bid was confirmed by the Board of Councilmen and the Board of Aldermen, and on the succeeding day was approved by Mayor Wood (fol. 2101).

On the next day Hackley assigned a quarter interest in his contract to one Lewis Davis, who received the same on behalf of Benjamin Wood, a brother of the Mayor (fols. 2103–4), with whom at this time Hackley had had a conversation, and who thereafter claimed to control this interest in the contract.

About the time the contract was confirmed Hackley had a conference with one William H. Adams, to whom he stated that "money had to go up," and who, on that statement, gave him $10,000, and in return received a one-fourth interest in the contract (fols. 2131–32).

One-half of this one-fourth interest was acquired on January 17, 1863, by Charles Devlin (fol. 2140), who, having died, is now represented as to this interest by the present plaintiff as his administrator.

Four weeks later, on the 21st of February, 1863, Devlin began a suit in the *Supreme Court* against Anthony Hope, and his other co-owners of interests in the contract, which suit we shall refer to as *Devlin* vs. *Hope*, and in that suit, on the 31st of March, 1864, one Cyrus Curtiss was appointed Receiver to collect, on behalf of the contract, all unpaid *moneys earned*, which order has never been set aside or modified (fol. 249*).

On June 22, 1865, Receiver Curtiss petitioned the Supreme Court to be allowed in his suit of *Curtiss* vs. *Mayor*, for moneys earned, to recover *also* all damages which might have been earned under the contract, except for its unlawful rescission by the City (fol. 2154), and on July 12, 1865, his application was granted (fol. 2154), and suit by him was brought accordingly as his complaint shows (fols. 1210, 2155).

On January 14, 1867, in the present suit of *Devlin* vs. *The Mayor*, an application for a stay was made pending the determination of the the action of *Curtiss* vs. *The Mayor*, in the Supreme Court, on the ground that the same questions were involved in both actions (fols. 215–6).

On January 24, 1867, this application was granted on the ground that the Receiver Curtiss action covered not only the right of action for *moneys earned* but also the right to recover *damages* resulting from the rescission (fol. 2158).

On January 29, 1867, in the action of *Devlin* vs. *Hope*, it was stipulated, and on January 31, 1867, an order was entered by the plaintiff herein, that so much of the order as authorized Receiver Curtiss to sue for *damages* occasioned by the rescision should be vacated, thus leaving the Receiver at liberty to continue his suit for *moneys earned prior* to the breach on behalf of all interested in the contract, including notably the plaintiff herein (fols. 2159, 2160).

On April 20, 1868, in *Devlin* vs. *The Mayor* (this action), the portion of the stay which prevented the continuance of the same for the recovery of *damages* against the City, by reason of the rescission of the contract, was vacated (fol. 2162), leaving Mr. Devlin at liberty to prosecute *this action for damages.*

Thus partitioned as to subject matter, by Mr. Devlin's own acts and election, these actions continued *pari passu* for upward of ten years, this one obviously being for recovery of *damages* and the Receiver's action being for *moneys earned*, until—

On March 7, 1878, the Receiver's action for *moneys earned* under the contract was dismissed for want of prosecution (fol. 2163).

Going back to the initiation of this action against the City in 1864, we naturally inquire whether the statutory prerequisite of "demand" was complied with.

The law then in force was chapter 379 of the Laws of 1860 (sec. 2), which made it a condition precedent to the commencement of an action against the City that the complaint should allege that two consecutive demands had been made upon the Comptroller at intervals of twenty days, the last one in writing, and that he has refused to adjust or pay the claim so presented.

In the present case, it is not pretended that the making of demands under the act is pleaded by any one, nor in case of any claimant was it sought to be proven that two demands on each or either branch of the case, *i. e.*, damage or moneys earned were in fact made, and the General Term held (folio 2362) that no demand had been made in compliance with any statute.

The absence of such demand presents the *third question* raised by the City on this appeal.

Upon the issues raised by the pleadings, in connection with exceptions taken to the Referee's rulings on the evidence, to his refusals to dismiss the complaint, to his Report, to his findings and rulings at request of respondents, and to his refusals to make findings and rulings at request of appellants, we may now state the following as our

Theory of Appeal.

(1) This is a common law action to recover one-eighth of the *damages* occasioned by the alleged unlawful rescission of the Hackley contract, and in no way relates to any *moneys earned* and due thereunder prior to the date of the rescission, and the right to recover damages having been expressly waived, nothing is left in the action.

(2) Were all the claimants entitled to participate in any recovery against the City, still the action cannot be maintained because, in view of the Curtiss Receivership and the proceedings thereunder, the plaintiff's intestate had no right to begin this action.

(3) Whatever be the subject matter of this contract or the relative position of parties herein with respect to their right to obtain relief as against the City, this action cannot be maintained for the reason that two demands under chapter 379, section 6, Laws of 1860, were neither pleaded nor proved.

FIRST POINT.

This is a common law action begun by Charles Devlin and continued by his personal representatives to recover his one-eighth share in the damages occasioned by the unlawful rescission of the so-called Hackley contract.

The question is raised, viz:

(*a*) By exception No. 8 (fol. 300*) to the third conclusion of law of the Referee's (fols. 276*–7*).

(*b*) By exceptions Nos. 86–99 (fols. 335*–69*) to the refusal of the Referee (fols. 2245–47) to make appellant's proposed findings Nos. 9–12, 14,

(*c*) By exceptions Nos. 122–123 (fol. 349*–50*) to the Referee's findings (fol. 2291) made at the request of the respondents, and

(*d*) By exception (fol. 2087) to denial of motion to dismiss all claims, except that of plaintiff, and also that claim except as to one one-eighth of the damages (fol. 2083 2086).

First—That this is a common law action as distinguished from a suit in equity has been expressly declared by the General Term of the Court of Common Pleas.

Devlin vs. *Mayor*, 54 How. Pr., 50–58.

The City raised the point that it was an action involving charges of fraud which ought to be passed upon by a jury, and the Court (Judge C. P. Daly), in the following language said it was referable:

"I should certainly be in favor of having this case tried by a jury, if I thought that they could intelligently pass upon the whole case; and I do not see that we can separate the issue of fraud so as to have that tried in the first instance as a separate issue; and if that is found in favor of the plaintiff, then to order a reference for the purpose of as-

certaining the amount that he is entitled to recover. *This may be done in equitable actions, but this is not an action of that nature, but a common law action,* in which the plaintiff is entitled, under the Code, to a reference, if it involves the examination of a long account, and that it does is beyond dispute."

This declaration as to the character of the action was also adopted by Judge BISCHOFF in rendering the decision now under review (fol. 2332).

The inherent distinction between actions at law and suits in equity has not been destroyed by the Codes of Procedure, though the forms of action have been abolished. The settled rule to this effect was clearly stated by Judge DANFORTH in the case of *Stevens* vs. *The Mayor* (84 N. Y., 296, 305), in which the Court say:

"Though the names of actions no longer exist, we retain in fact the action at law and the suit in equity. The pleader need not declare that his complaint is in either; it is only necessary that it should contain facts constituting a cause of action; and if these facts are such as at the common law his client would have been entitled to judgment, he will, under the code, obtain it. If, on the other hand, they establish a title to some equitable interposition or aid from the Court, it will be given by judgment in the same manner as it formerly would have been granted by decree. So the complaint may be framed with a double aspect; * * * * * but in every case the judgment sought must be warranted by the facts stated. * * * But notwithstanding the liberality of the law which permits this construction, the plaintiff can have no relief that is not (consistent with the case made by his complaint and embraced within the issue). He must therefore establish his allegations, * * * * and if they warrant legal relief only he cannot have equitable relief upon the evidence."

An adjudication that the present action is one in which the demand is purely for legal relief is to be found not only in the cited opinion of Judge DALY, but also in the suggestion of Judge ALLEN (63 N. Y., 13), that one of the questions in the case was whether—"an action at law could be maintained for the work actually performed."

SECOND—THAT THE SUBJECT MATTER OF THIS ACTION IS THE PARTICULAR SHARE OR PORTION OF CHARLES DEVLIN WAS EXPRESSLY HELD BY JUDGE VAN BRUNT UPON THE MOTION FOR AN EXTRA ALLOWANCE.

Devlin vs. *Mayor*, 15 Abb. Pr., N. S., 31–38.

It is a common law action which involves distinctly the interest of the plaintiff—his proportionate part of the damages resulting from the rescission of the contract—and not an action in which is involved all the interests of all the parties. This was determined in this case in June, 1873, as will appear upon a reference to the language of the decision in the report above cited (p. 35), viz. (italics ours):

"In consequence of the manner in which the plaintiff brought this action, *the whole subject matter involved was the amount of* HIS *recovery.* Under section 119" (the section of the old Code providing that one may sue on behalf of himself and others similarly situated), "he might have brought an action for the benefit of all the owners of the Hackley contract; and if he had done so, he would have been entitled to enter judgment for the whole sum, leaving the distribution among the parties entitled to future action; and it is truly said that if he had recovered the whole he might have had an allowance upon the whole, and it would have come to the same thing as to give to each successful party an allowance upon the amount of his recovery. *But the difficulty is that for some reason best known to himself he did not chose to bring his action in that form. He chose to involve in that litigation only his own interest in that contract, and his recovery has been limited to that.* The parties jointly interested with the plaintiff in that contract having refused to unite with him in bringing that action and thus become plaintiffs and actors, and subject to the risks to which they would be exposed in case of defeat, and having succeeded cannot now claim the same advantages which would have accrued to them had they been actors in this action."

THIRD—THIS ACTION CONCERNS NO PART OF THE PAYMENTS ALLEGED TO HAVE BEEN EARNED AND WITHHELD PRIOR TO RESCISSION, BUT ONLY THE DAMAGES ALLEGED TO HAVE RESULTED FROM THE RESCISSION.

The record of thirty years ago tells the tale so plainly that it can be read and understood even by those who have come recently into the case, beyond possibility of dispute by even the learned counsel for the claimants, now long since entered upon the second quarter century of their service.

I.—The present action was begun on January 11, 1864, upon an allegation that the original plaintiff owned a quarter interest in the contract (fol. 41*).

In paragraph 8 of his complaint (fol. 35*) Charles Devlin alleged that *the profits of the contract during its unexpired term of two years and nine months* would have amounted to $400,000 and over; and he alleged (fol. 43*) that by reason of the wrongful and unlawful acts of the City he had been damaged $100,000, for which sum he demanded judgment.

This correspondence between his demand for $100,000 and his one-quarter interest in *prospective profits*, which he says would have amounted in the aggregate to $400,000, was not accidental, nor did such demand include, nor was it intended to include, any part of the *moneys due* prior to the rescission, which sum he had previously stated (fol. 28*) to be $116,250, being exactly the same sum which Samuel Donaldson, upon May 21, 1863, had declared (fol. 1319) in his communication to the Common Council to have been due at the time of the rescission, May 16, 1863, and being also exactly the same sum included and stated in the complaint of Cyrus Curtiss, Receiver (fol. 1220).

That is, Devlin alleged $116,250 to be the *amount unpaid* under the contract (fol. 28*), and following it up with allegations that the City had unlawfully broken the contract, and that, except for such breach, $400,000 of profits would have been saved in the unexpired term (fols. 35*–6*), he concluded his prayer for relief with a demand for $100,000 to cover his alleged quarter interest.

II.—What Charles Devlin meant upon the 11th day of January, 1864, when he verified his complaint for $100,000 as his quarter of *the damages*, is indicated by a considera-

tion of some matters then within Charles Devlin's knowledge, and his statements concerning the several claims, all of which were found as facts by the Referee.

From his own affidavit, made June 1, 1863, it appears (fol. 819), that as early as the 12th day of Februarv, 1863 (within four weeks after his acquisition of Adams' interest in the contract), he had obtained from Judge BARNARD an injunction (which continued in force until the 19th day of May, 1863 (fol. 820), and finding of Referee (fols. 2141–2, No. "88"), restraining all parties in interest from receiving any *money under the contract.*

On the 17th day of January, 1863, he bought Adams' interest in this contract (fol. 763), and upon the 12th of February brought his action against Hope and others for a Receiver of the *moneys earned* (fol. 820), for which in that action alone he undertook to fight.

In that prior action of *Devlin* vs. *Hope* (in which Devlin made his affidavit of June 1, 1863), an order to show cause was obtained from Judge MULLIN on June 2, 1863, (fol. 1175), and after argument before Judge SUTHERLAND, upon January 29, 1864 (fol. 1186), a decision was rendered upon which was based an order entered February 21, 1864 (fol. 1174); and finding of Referee, (fol. 2143, No. "92"), restraining not only the defendants in that suit, but the plaintiff himself from receiving or demanding from the Comptroller of the City of New York, or from any other other public officer or other person or persons, any *moneys due* or to become due under the contract (fol. 1178), and appointing Cyrus Curtiss, of the City of New York, as receiver, to demand, collect and receive from the said Comptroller of the City of New York *all moneys now due or which at any time hereafter may become due under the contract* (fol. 1179, and finding by Referee, fol. 2146-9, Nos. "93–4").

It is therefore clearly apparent that Charles Devlin, engaged from June, 1863, to February 21, 1864, in the prosecution of a suit to restrain himself as well as all other parties from the collection of *moneys under the contract*, and to obtain the appointment of a receiver to make such collection, did not during the pendency of that suit intend

by this second action, begun January 11, 1864 (fol. 47*), to sue for or demand any part of the *moneys earned and unpaid* under the contract prior to its rescission.

Is it conceivable—is it possible to believe that Charles Devlin, insisting upon an injunction order—granted January, 29, 1864 (fol. 1186)—did not know what he intended by this second suit begun (January 11, 1864, fol. 47*) after the injunction proceedings in his first suit had been submitted to Judge SUTHERLAND?

He was suing not for the $116,250 *alleged unpaid balance*, though he was not forgetful of that sum, for he mentioned it in his complaint (fol. 35*); but he was suing for $100,000, or a quarter of the other sum of $400,000, alleged damages from the alleged unlawful rescission.

III.—This matter, however, rests not solely upon the acts and intentions of Charles Devlin, at the time of the institution of this suit, but also upon the unequivocal procedure of counsel now before the Court, and orders obtained upon their motion defining, beyond controversy, the character and limitation of the present action.

In January, 1867, Mr. Joseph H. Dukes, one of the counsel for the City, learned that while this particular cause in the Common Pleas was set down for hearing before Referee Stuart on the 15th day of January (fol. 1895), an action by Mr. Curtiss as Receiver (who had filed his complaint—fols. 1210–1221—under an order of the Court—fols. 1199–1202), was also set down for trial at Circuit upon the succeeding day, January 16 (fol. 1895).

It is no wonder that at that critical point Mr. Dukes wanted to know which case was which. What was his procedure? He took the view, which, of course, was the safest view for counsel to take, that each of the cases covered the same subject matter, for the order which authorized Mr. Curtiss to sue covered both the *amount due and the moneys to become due* (*see* fols. 1199–1202). Therefore, said Mr. Dukes, "the City is being exposed to a double peril—an action by Charles Devlin for *damages and money due*, and an action by Cyrus Curtiss, Receiver of Devlin and others, for *money due and damages*.

The embarrassment of proceeding contemporaneously in the two cases, without any previous limitation of their respective reach, would undoubtedly have been very considerable; and as it appeared to Mr. Dukes that the same subject matter was involved in each action, he procured from Judge Brady in the present action a stay of proceedings (fols. 1897–1899), which stay was, upon hearing, to be continued (fols. 1852, 1853, and finding by Referee, fols. 2157–8, Nos. "100–1"), unless the order in the other action appointing the Receiver should be modified so as to limit his duty to the demand for *moneys earned*, concerning which the action in which he was appointed was instituted. In consequence of this suggestion, and by the consent of parties other than the City, notably Mr. Cronin, and upon motion of Mr. Marrin, an order was entered *in the other suit*, January 29, 1867, modifying the Receiver's power so as to withdraw from him all right to sue for *damages* sustained by reason of the violation of the contract (fols. 1194, 1196, 1201), and limiting his action to a recovery of all sums of *money due* or payable or receivable for or on account of or in connection with the contract (finding by Referee, fols. 2162–3, No. "104").

A motion in the Supreme Court by Mr. Dukes to vacate this order of modification (fols. 1837–1857) having been denied by Judge Sutherland (fols. 1865–1868), and the denial having been affirmed in that suit by the Supreme Court at General Term (fol. 1901), Judge Brady, in the Common Pleas *in this suit* on April 20, 1868, upon the motion of Mr. Marrin, and upon the express ground (fol. 1901) that the Receiver no longer had any right in his Supreme Court suit to recover damages for breach claimed by Devlin in this action in the Common Pleas, vacated the stay of proceedings theretofore obtained by the City, and permitted the continuance of this action (fol. 1902).

What did this determine? Mr. Dukes said, "I cannot try either one of these cases until the Court shall determine which shall have the precedence." Judge Brady said: "Mr. Dukes, you are right; this suit is clearly for damages; if the Receiver is also suing for these same

damages, then you are exposed to a double demand, and you are right in insisting that the same claim shall not be pressed in both actions. But if the Receiver is suing, not for damages, but only for *money due*, then you are wrong." Why wrong? Because the claim for *money due*, which was the subject of the Receiver's suit, was not included in this distinct suit of Devlin's. If it had been included in this suit, then there would have been no force in Judge Brady's suggestion that if the Receiver's suit were limited to a claim for *moneys earned*, then this suit might properly proceed as involving no part of the Receiver's claim—a suggestion at which Mr. Marrin eagerly grasped, and entered an order amending the Cyrus Curtiss complaint, and leaving that the sole and exclusive action for $116,250, as *money earned*.

The respondents say that the City has dismissed that complaint for failure to prosecute. What difference does that make? What if we had obtained a judgment in that suit the next day on the verdict of a jury --would not that have been a defense to a similar claim in this suit? Does the fact that we have defeated the other action in some other way enlarge the scope of this action? Can the scope of this action be made to depend on the result of the other action? Either this suit was for the *money earned* or it was not, and that issue having been precisely and distinctly determined upon motion of Mr. Marrin himself, these parties are *estopped* by the decision. It was determined that the Cyrus Curtiss suit involved the *money earned* and that only, and it is a necessary consequence of that decision that this suit does not concern *money earned* but concerns only the damages for the loss of prospective profits subsequent to breach.

IV.—If anything further be needed to define the specific subject matter of this action, it may be found in the demand of July 10, 1863, of which Mr. Marrin gave evidence in behalf of Mr. Devlin, where he read a paper marked Defendant's Exhibit "1," Nov. 28, 1884, which says (fol. 614):

"The undersigned, being the owner of one-fourth interest of the contract known as the Hackley contract, to clean the streets of the City of New York, *the same having been improperly and unlawfully declared to be cancelled and annulled* by the Corporation of the City of New York, one of the parties contracting thereto, on the 13th day of May, 1863, * * * and the subscriber being thereby deprived of the income and profits which may have been realizable by reason of his interests in the same, claims and demands for the loss of his said share, investment and interest in the said contract and share in the profits, rights and benefits under the same, the sum of one hundred thousand dollars for the *damages* and loss suffered in the premises.

New York, July 10, 1863.

CHARLES DEVLIN.

The payment of the above stated claim I hereby demand.

To MATTHEW T. BRENNAN,
Comptroller of the City of New York."

That was months after the institution of the suit of *Devlin* against *Hope* concerning profits—*moneys earned*—in the previous March; although the Receiver appointed in pursuance of that suit did not, until July, 1865, bring his action against the City for the recovery for these particular requisitions (fol. 1221).

This demand, now under consideration, upon which it is sought to maintain this action, is to be distinguished from the other demand referred to generally by Mr. Cronin (when testifying, fol. 616).

"*Q.* What other papers, if any, did you see in the Comptroller's office, relating to Mr. Devlin's claim?

"*A.* A paper signed by Charles Devlin, demanding the payment of *five requisitions* claimed to be due upon the Hackley contract."

Those five requisitions claimed to be due on the Hackley contract amount in all to $58,125 (*fol.* 1631), and the alleged demand in respect to those five requisitions obviously had no relation to the present action, because in *this* action there is no suggestion of any such sum.

The present action is that which was brought for $100,000, pursuant to the alleged demand of July 10, 1863,

after the plaintiff had already instituted his other action against *Hope*, in which he had just obtained the appointment of a Receiver for the further prosecution of a claim for the *moneys already earned.*

Authority, if needed, for our proposition that the character of the action and its meaning may be determined by an inspection of the demand made, is given by the case of *Stevens* against *The Mayor* (84 N. Y., 296–305).

The unsuccessful plaintiff there asserted that his action was not solely one for deceit, but was also a suit in equity upon the ground of mistake. Evidence was introduced of two preceding demands, and Judge DANFORTH, delivering the unanimous opinion of the Court, referred to these demands as being proper subjects for scrutiny in ascertaining the precise object and character of the action.

See also *O'Brien* vs. *Fitzgerald*, 143 N. Y., 377.

V.—It thus results—upon considering (1) Mr. Devlin's complaint in this action, and (2) his proceedings in the case of *Devlin* vs. *Hope*, as well as (3) the proceedings of his learned counsel, Messrs. Marrin and Cronin, and the orders and adjudications of the Court in this very action, and (4) finally Mr. Devlin's original demand on the Comptroller, that this complaint concerns, and was intended to embrace, only the claim for *damages for breach* of the contract, and *not* any part of the *moneys due* and unpaid prior to its rescission.

FOURTH—THE JOINDER OF THE OTHER PARTIES IN INTEREST AS PARTIES DEFENDANT IN NO WISE ENLARGES THE EXTENT OF POSSIBLE RECOVERY AGAINST THE CITY.

I.—They were for the plaintiff's own purposes, properly made parties to estop them from afterward calling him to account for any moneys by him recovered from the City on account of his part interest, for which he might maintain his separate action, unless objection were taken on the City's part by answer or demurrer, which was not done.

II.—In this common-law action, begun under the old Code, one defendant can obtain affirmative relief not against his co-defendant, but only against the plaintiff.

Moreover, in a *common-law* action a part owner cannot maintain an action covering his part interest merely by joining his joint owners as parties defendant. To do this there must be some independent ground of equitable relief.

Coster vs. *N. Y. & Erie R. R. Co.*, 3 Abb., 332.

Thus becomes apparent the significance of our two earlier propositions, (*a*) that the subject matter involved is solely the plaintiff's claim, and (*b*) that this is a common-law action.

This action might have been maintained (no special defense being taken) by Charles Devlin severally and separately, for, as between him and the City, the question whether or not he was entitled to all that he claimed, the question whether or not he was entitled to maintain the action in respect of his separate interest without joining the others as defendants—was a matter of convenience, and did not constitute a defect in his claim, or in his action, unless such defect were availed of by demurrer, if it appeared upon the face of his complaint, or by answer, if it did not.

The right of one partner to maintain his separate action in behalf of his separate interest, in cases of tort, and in cases of injury to the property interests of a partnership is not new; it has been determined for more than a century.

In the case of *Addison* vs. *Overend* (6 Durnford & East, Term Reports, 766), Lord KENYON, then referring back to a case which came up in the time of Croke James, held that though all the members of the firm ought to join in an action for the recovery of the goods of the firm, or for damages for their loss or injury, yet if only one sues he will be entitled to recover damages in respect *of his interest* in the goods.

There Addison, who was a partner, sued Overend, on account of damages done to a ship in which Addison,

with others, was part owner; and the action was maintained, because no objection had been taken for non-joinder by the defendants.

This decision was followed almost immediately afterwards by the case of *Sedgworth* vs. *Overend*, 7 Durnford & East, 279, in which another of the partners sued the same defendant for the same injury; and the Court held that the fact that the first partner had recovered from the defendant in a prior action, for his share, was no bar or answer to this action by the other partner for the injury to the latter's share in the ship.

These authorities have been followed in the case of *Bleaden* vs. *Hancock* (4 Carrington & Payne, 152), and by the Court of Appeals in the cases of *Merritt* vs. *Walsh* (32 N. Y., 685) and *Donnell* vs. *Walsh* (33 N. Y., 43; and the rule is laid down as established in *Lindley on Partnership*, page 482.

Charles Devlin, if he chose, could have brought a separate action at law for the injury to his joint venture, without reference to his associates, and unless the city chose (as it did not chose) to take advantage of the non-joinder of parties by demurrer or answer, that action could properly have proceeded to judgment in respect of the several interests of Charles Devlin. The joinder of the other parties was, for Charles Devlin, necessary or desirable only to bar them from any further contest as to the extent of his interest.

If we are right, as we believe we are, in the points that we have thus far made, we have reached the position: *That this is an action at common law solely for Charles Devlin's separate share in the damages resulting from the rescission.*

III.—Of course, we are met by the suggestion on part of the respondents, that on the former appeal (63 N. Y., 8) the following language was used by Judge ALLEN (at page 15):

"There was certainly no reason why there should not have been a recovery of *moneys* actually *earned*, even if

the contract had been terminated for every other purpose."

But the point now taken for the City was *not made before* the former Referee; certainly not before the General Term or the Court of Appeals, and it could not well have been made, for at that time the papers in the Curtiss suit, now before the Court and explaining the scope of that action, were not in evidence.

But in any event, this remark of Judge ALLEN was *obiter*, because the decision of the Court was that there should be a new trial, and was not that there should be a recovery of the *moneys* actually *earned*. This particular observation of that distinguished and able Judge, therefore, was in no way necessary to the decision actually rendered upon his opinion; it was a suggestion concerning a point not made, argued or decided in the case.

IV.—It may also be urged that under section 274 of the old Code, the Court may grant to the defendant any affirmative relief to which he may be entitled.

We submit, however, that on an examination of all the cases, with one possible exception, hereafter considered and distinguished, there cannot be found one in which affirmative relief was given to one defendant as against a co-defendant, that was not a suit in equity, as distinguished from an action at common law.

V.—It is further to be observed that section 1204 of the Code of Civil Procedure has no reference whatever to this action begun ten years before its enactment. (See Code of Civil Procedure, sec. 3347, Subd. 8). Moreover, section 1204 of the New Code would not help the defendant-claimants, for the City has never been served with any demand, pleading or process to which it is entitled under that very section before affirmative relief can be awarded between co-defendants and against one of them.

There is absolutely no evidence in support of the contrary twenty-fourth finding of the Referee (see fols. 2294–5, 2171–72).

This rule with respect to the necessity of service of the pleading upon the adverse defendant was specially laid down in the case of *Edwards* vs. *Woodruff* (90 N. Y., 396), where the Court say (p. 400):

"The defendants Woodruff, Spencer and Stout were not in a position to take a judgment against their co-defendant Wheeler without having served a copy of their answer upon him and given him notice of trial."

Much of the stress we have laid upon the point that this is a common-law action and not a suit in equity attaches to the following distinction:

In a strict action at common law concerning a single and separable money demand of the plaintiff, a defendant was never subjected to the embarrassment and confusion of simultaneously defending himself against the assault of the plaintiff and against a side attack from a co-defendant. In a suit in equity which rarely concerned such a separable demand, but frequently involved the ascertainment of common rights and liabilities in respect of a common subject-matter, the Chancellor was accustomed to dispose of all branches of possible controversy.

While the new Code has generally adopted this practice of the Chancellor, such a legislative result had not been accomplished at the time when this action was begun.

The case of *Derham* vs. *Lee*, 87 N. Y., 599, cited in support of the Court's opinion below, is no authority for allowing recovery by the defendants against the City.

The relief there demanded in the supplemental complaint was not money damages alone, but in addition it was that Sunderland, the defendant who recovered the judgment against his co-defendant Lee, have no interest in the claim of the plaintiff.

It was not strictly an action at common-law, Judge Danforth remarking: "It should be observed, the action is not as the appellant assumes, a mere common-law action seeking judgment for a sum of money, and no other relief"; and intimating that if the relief demanded in the complaint were confined to money damages the action would *not* have lost its common-law character and there could have been

no affirmative relief granted the defendant Sunderland as against the defendant Lee.

Moreover in *Chapman* vs. *Forbes*, 123 N. Y., 532, 542, Judge PECKHAM, referring to the *Derham* case, declares that there

"The action was changed, so far as appeared, by the consent of all the parties from a simple action at law to one in equity."

In the present case there was a specific protest (fol. 2087 *a–e*) in addition to a motion to dismiss made upon this very ground (fols. 2078–81), at the close of the case, and before its consideration by the Referee, notwithstanding the contrary erroneous impression at General Term.

VI.—Under neither the old nor the new Code, in such an action as this, can an affirmative judgment be taken by these defendant-claimants against their co-defendant the City.

Stephens vs. *Hall* 2 Robt., 674–676.

Decker vs. *Judson* (16 N. Y., 439–450), where DENIO, *J.*, says:

"But the Court is not necessarily required to make such determination, and I conceive that in order to do so *in a common-law* action, allegations in the nature of pleadings should first be allowed to be put in between the parties who become adverse litigants."

People vs. *Albany & Susquehanna R. R.* (5 Lansing, 25–34):

"The clause of section 274, which authorizes the Court to grant to the defendant any affirmative relief to which he may be entitled, does not apply to this case; the relief intended is relief against the plaintiff, and not against the co-defendant."

Met. Trust Co. vs. *Tonawanda, etc., R. R. Co.* (43 Hun, 521–7):

"*But, prior to the present Code*, the affirmative relief sought by the defendant in this action was not available as a counterclaim, because the practice did not provide for the service of pleadings by one defendant upon another, and thus permit to be brought before the Court upon the cause of action so alleged by a defendant the other parties defendant requisite to the determination of the claim."

(1) There is but one issue in the action, and that is the one raised by the complaint and answer of the defendant, the City, whether or not the plaintiff, Devlin, is entitled to the sum of $100,000 damages demanded in his complaint.

The other defendants cannot tender independent issues as among themselves or as between any one of them and the defendant, the City.

(*a*) In *Lansing* vs. *Hadsall* (26 Hun, 619–621), the Court says:

"It is true that section 1204 of the new Code provides that the judgment in an action 'may determine the ultimate rights of the parties on the same side as between themselves.' The same provision was in the old Code, (section 274) and Judge EARL said of that, in *Kay* vs. *Whittaker* (44 N. Y., 576), 'that defendants can have relief against each other only in a case in which they have appeared and answered in reference to the claim made against them by the plaintiff and as part of the adjustment of that claim, and that it must be based upon the facts involved in and brought out by the litigation and investigation of that claim.' The provisions of the Code referred to are simply declaratory of the pre-existing practice in chancery" (*Jones* vs. *Grant*, 10 Paige, 348).

(*b*) In other words, no affirmative relief to a defendant as against his co-defendant is permissible except as it effects the real subject matter of the action—in this case the one-eighth interest of the plaintiff.

(*c*) Even in equity cases, to which class the cases last cited belong, where the rules with respect to relief between the parties were more liberal, the defendant could not be forced to litigate an outside issue with his co-defendants.

Fink vs. *Allen*, 36 Supr. Ct., 350.
Hall vs. *Ditson*, 5 Abb. N. C., 198.

(*d*) The policy with respect to issues not embraced in the complaint is further declared in section 975 of the Code of Civil Procedure, that issues not necessary to the rendition of a proper judgment need not be tried.

VII.—If however it be assumed that these matters *could* be properly litigated in this action, still the recovery by these

defendant claimants must fail, inasmuch as they have not served their answer on their fellow defendant, with whom they desire to join issue. Until such service there was no issue pending between them which could become the subject of the Referee's determination.

The objection here taken applies with even greater force to the recovery granted the defendant Blish. While the other defendants neglected to comply with one of the conditions precedent—the service of their answer upon the Mayor—he (Blish) not only did not serve his answer upon the Mayor, but in his answer declined to tender any issue or demand any judgment against the Mayor.

The language of section 521 of the Code of Civil Procedure is mandatory in this respect, providing that—

"Where the judgment may determine the ultimate rights of two or more defendants as between themselves, a defendant who requires such determination (1) *must demand it in his answer*, and (2) *must at least twenty days before the trial serve a copy of his answer upon the attorney for each of the defendants to be affected by the determination.*"

VIII.—In fine, our point is as follows:

This action is not under the new Code, and if it were, there has been no compliance with section 521 thereof.

Under the old Code, in an action strictly for damages alleged to have been suffered by the plaintiff because of the unlawful act of one of the defendants, affirmative relief could not be given to one defendant as against another. The joinder of the other defendants operates merely to estop them from subsequently calling the plaintiff to account.

This rule specially applies to this case, as otherwise all the claimants against the City other than the plaintiff might assert their alleged rights with immunity from an obligation (discussed under our Third Point) to serve the statutory demand upon their co-defendant, the City.

IX.—To any suggestion that the answers of Blish and Donaldson raise the issue of *moneys earned* by an excess of demand over Devlin's $400,000, we have three replies :

(1) These answers unqualifiedly seek damages for prospective profits only, and state their estimate thereof.

(2) For reasons above stated any recovery must be limited to the plaintiff's share alone, and if other claimants raise the issue it cannot avail the plaintiff, who asserts that they are brought in of necessity, and merely to insure formality of procedure.

(3) The answers of A. S. Hope (fol. 89*) and Pratt (fol. 160*) seem expressly to deny the plaintiff's contention.

X.—The point has not been waived, as suggested by the Court below, by the City, in proceeding with the Reference, for upon August 2, 1887, it obtained an order expressly providing that such proceeding should be without prejudice on this point (Case, fol. 220*). This was more than a year before the Referee's opinion, which in its concluding sentence (Case, fol. 282*) reserved the question for further consideration. The only further consideration, as shown by the case (fol. 2087*a*), was on 10th November, 1888, when the Referee being about to proceed with this branch of the case, the City presented its timely objection, which was overruled by the Referee, who died before further proceeding (fol. 2087*c*). This objection showed also the fact that similar objection had been made before the Referee's report, in the request to find refused by the Referee and excepted to by the City (fol. 2247). The Court therefore erred in assuming that the City did not seasonably object. This objection goes to the merits of the judgment against the City in favor of its co-defendants, and of course may be raised by appeal; and it cannot have been disposed by the denial of any motion to vacate the judgment for irregularity.

SIXTH.—CONSEQUENTLY, WE SUBMIT THAT, UNDER ANY VIEW OF THE TESTIMONY, THERE MUST BE A REVERSAL AGAINST

THE CLAIMANTS ON EVERY POINT; CHARLES DEVLIN'S ONE-EIGHTH INTEREST IN THE DAMAGES HAVING BEEN WAIVED UNDER THE DECISION OF THE COURT BELOW.

SECOND POINT.

If it should be held that the subject-matter of the action is the entire claim of all parties in the money earned, still it is to be considered: That the present plaintiff is not the real party in interest, the right, if any, to recover them having vested in the Supreme Court and its Receiver, Cyrus Curtiss.

FIRST.—THE RIGHT, IF ANY, TO RECOVER THE MONEYS EARNED AND ALLEGED TO BE DUE VESTED IN THE SUPREME COURT AND ITS RECEIVER, MR. CURTISS.

This point was put in issue by the City's amended answer (fol. 208*).

Upon appeal the question arises, viz:

(*a*) By exceptions No. 12 (fol. 301*) to the seventh conclusion of the Referee's report (fol. 247*).

(*b*) By exceptions Nos. 101 and 107 (fols. 339*–341*) to the refusal of the Referee to make rulings of law as requested by appellant (fols. 2255–2256), and

(*c*) By exceptions Nos. 127–130 (fols. 354*–356*) to findings 27 and 28 made by the Referee at the request of the respondent (fols. 2296–7).

I.—If this action, as asserted by the claimants, includes a cause of action (*a*) for the recovery of moneys earned prior to rescission as well as (*b*) for damages for breach by rescission, then certainly the first right of action (*a*) vested in the Supreme Court and its Receiver, Mr. Curtiss.

The Referee finds as a fact (fol. 255*), although without any proof whatever, that Mr. Curtiss is dead.

What if he be dead? Trusts do not die because the trustees die. Charles Devlin came into the Supreme Court saying: "I am jointly associated with these others and I want to have this joint adventure wound up, and I ask the Court to appoint a Receiver to collect these moneys for the benefit of the several parties jointly interested," and upon his application the Receiver is appointed, and the Receiver brings the suit, and the Receiver afterward dies. Is his death a matter of consequence? Could the City come in and say "that right of action died with Cyrus Curtiss"? It is true that some causes of action do not survive the death of the plaintiff, but not so a cause of action vested in a Court acting by its officer. The Court appointing an officer could appoint his successor.

But counsel say further that the Receiver's suit is a matter of no consequence, because Cyrus Curtiss was negligent in the prosecution of that suit, and the City dismissed the complaint for his failure to prosecute. That does not change the fact that the Supreme Court has possessed itself of this controversy and of this claim, and if one of its officers was negligent it might have appointed another. The parties in interest could also sue Cyrus Curtiss and his bondsmen for any failure to protect the interests which were committed to him by the Court.

This receivership is to be distinguished from ordinary receiverships *pendente lite* ancillary to some principal litigation where the Receiver is a mere passive bailiff or stakeholder without need of title.

As appears by the Referee's findings (2141–2163), the main object and purpose of the parties to *Devlin* vs. *Hope*, in asking, and of the Court in appointing a Receiver, was to invest him with the right to sue for moneys earned. The equitable title to these moneys vested in him immediately on his appointment under the general principles of equity jurisdiction (High on Receivers [1894], § 539), and the act, chapter 112 of the Laws of 1845, then in force, expressly vested the Receiver with the right of action.

In *Wilson* vs. *Allen*, 6 *Barbour*, 542, 545, it was held per WILLARD, *J.*:

"At law, an ordinary Receiver was not considered as having the legal title, so as to authorize him to institute a suit in his own name for any debt or demand transferred to him, or to the possession or control of which he was entitled under an order of this Court, until the Act of April, 1845, in relation to the powers of Receivers and of committees of lunatics and habitual drunkards (Laws 1845, p. 90, sec. 2). By the statute referred to Receivers and committees of lunatics and habitual drunkards, appointed by any order or decree of the Court of Chancery, may sue in their own names for any debt, claim or demand transferred to them, or to the possession or control of which they are entitled as such Receiver or committee.' *It matters not whether this transfer be by an assignment of the party, under seal or by force of the order appointing the Receiver. In either case the title is complete, and the statute vests the right of action in the party who is clothed with the interest.* The principle of the Act of 1845 is carried out in this respect by sec. 91 of the Code of Procedure, requiring every action to be prosecuted in the name of the real party in interest (sec. 93)."

II.—The opinion of the General Term on this point (fols. 2337-2338) is confined entirely to the question whether the appointment of a receiver of the partnership did not merely divest the partners of their right to sue on partnership claims during continuance of the receivership, and the conclusion of the Court against the City is based on the ground that the Receiver being appointed *pendente lite* acquired no title and that therefore the action may be sustained under section 121 of the Code of Procedure and section 756 of the Code of Civil Procedure, which permit an action to be prosecuted in the name of the original parties notwithstanding a devolution of interest.

But this opinion, though correct, would not answer contention of the City.

Its contention is that the order appointing the Receiver invested him with the right to sue for moneys earned, and necessarily and by consent divested the plaintiff of the right to bring an action for the very same cause.

The opinion of the General Term tacitly admits that if title passed to the Receiver it would be fatal to plaintiff's right to recover, and rejected the City's point solely on the ground that no legal title passed, citing *Keeney* vs. *Home Ins. Co.* (71 N. Y., 396), which concerned not a right of action, but a substantial ownership, and *Decker* vs. *Gardner* (124 N. Y., 334), which holds only that receivers of a railway *corporation* pending foreclosure are not subject to suit on account of a claim against the *corporation* accruing *prior* to receivership.

Neither of these cases determine that a partnership receiver appointed upon application of the partners to collect one particular partnership claim is not vested with the sole right to sue for that claim.

When a receiver of a partnership is appointed, his control of the partnership property in respect of which he is appointed is exclusive, and even though the legal title may remain in the partners, they are divested of all control.

The authorities on this question are uniform.

In Beach on Receivers the rule is stated as follows:

"A receiver is, as between the parties to the suit, to be considered as appointed *from the date of the order of reference to the Master.* And thereafter neither the owner nor any other person can lawfully exercise any act of ownership over the property without the authority of the Court."

Upon this principal applications for receivers have been refused on the ground that the facts did not warrant the depriving of a surviving partner of all control of the partnership property.

Walker et al. vs. *House*, 4 Md., chap. 39.
Jacquin vs. *Buisson*, 11 How. Pr., 385–394.

The receiver becomes a trustee for the parties to the action in which he was appointed and the enforcement of their rights must come through him.

In High on Receivers it is stated (sec. 539):

"A receiver of the effects of a partnership appointed in an action for the settlement of the firm business is regarded as vested with the whole equitable title to the partnership property, without any assignment for that purpose, and in an action to obtain possession of the property he represents

the interests therein of all parties to the suit in which he was appointed."

Unless this view of the law be correct the whole object of the appointment of a receiver would be defeated. If one partner could apply for a receiver and subsequently commence an action to recover the very property in which the receiver had the equitable title, the latter would cease to represent the interests of all the parties to the suit in which he was appointed, and the property instead of being preserved would be the subject of a multitude of actions and to great loss.

The learned Court was in error in assuming as it did that *Devlin* vs. *Hope* (February 11, 1863), to which date the receivership relates back, was begun after this action (January 11, 1864), and of course erred in supposing that *subsequent* to the beginning of this action, there was a devolution of interest now asserted as preventing its continuance in the name of the original parties. The defect imputed to Devlin's present suit is that *prior*, not *subsequent*, to its institution he had deposited with the Supreme Court and its Receiver the sole right to sue for *moneys earned*. It would be legally absurd if the original parties themselves could prosecute a cause of action after having instituted proceedings then pending before the Court for the appointment of a receiver to prosecute it for them; the Court granting their request, the Receiver suing for their claim and the parties ratifying his action as to the claim now before the Court.

The learned Court also erred in assuming that the Receiver's power to sue for the moneys earned was ever revoked. On the contrary it was expressly affirmed, and the Referee finds only that it was revoked as to the right to sue for *lost profits* (fols. 2159–2161), leaving in full force the rest of the order which, as found by the Referee (fol. 2153), authorized the Receiver to sue for moneys due.

THIRD POINT.

This action, begun in 1864, could not be maintained or prosecuted except by pleading and proving two demands under chapter 379, section 2, Laws of 1860, and there has been an absolute failure to comply with either of these conditions.

This point arises upon appeal, viz.:

(*a*) By exceptions No. 5 (fol. 299*) to the 17th finding of the report (fol. 270*) to the effect that there has been a compliance with chapter 379 of the Laws of 1860, or that objection thereto has been waived by the City.

(*b*) By the exceptions Nos. 123*a* and 124 and 125 (fols. 351*–353*) to findings Nos. 23 and 24 at the request of the respondents (fols. 2292–4) to the same effect as the report upon this subject.

(*c*) By the exceptions Nos. 92–96 (fols. 337*–338*) to the refusal of the Referee to make conclusions of law Nos. 15–19 (fols. 2248–52) at the request of the appellant upon this subject.

(*d*) By exception No. 29*a* (fol. 310*) to the refusal of the Referee to find the 117th finding of fact proposed by the appellant (fol. 2171).

(*e*) By exceptions to denial of motions to dismiss the complaint on this ground (fols. 170, 768 and 2072).

I.—The report of the Referee in findings Nos. 11–15, inclusive (fols. 301*–303*), and his findings at request of appellant (fols. 2164–71) *admit* that no two demands in respect of the same subject-matter were made by any one.

This lack of two demands, properly pleaded and properly proved, not only defeats the plaintiff's claim, but furnishes additional reason why, in this particular case, no affirmative relief should be awarded to the co-defendants against the City of New York.

Since 1857 (Laws 1857, p. 871, sec. 22) it has been the established policy of legislation, at first concerning the City of New York, and afterward concerning all municipal corporations in this State, that these public bodies should not be subject to suit except after precise and formal demand.

The provision that A, proposing to bring an action against the City of New York, shall not do so without previously informing the proper public officer of his claim and submitting it for adjustment, is fatal to the doctrine that if A brings such a suit, then B, C, and all other interested parties can, as co-defendants, without such a demand, subject the City Treasurer to the adjudication of their claims.

It may be urged that the necessity of demand attaches only to a plaintiff about to institute an action, and that we cannot point to any statute requiring that a co-defendant should previously present a demand.

Such an assertion directly conflicts with the established policy of this State, which declares: A demand shall not be enforced by litigation against municipal corporations without prior presentation. Upon the suggested theory, all that it is necessary in a case involving several parties is to have one submit his demand for adjustment and let the rest come in and assert their claims, without any such previous demand against the corporation as co-defendant.

Under this point, which concerns the absolute and general failure of every claimant to lodge a proper demand, we made specific motions to dismiss upon the separate grounds that (*a*) so far as concerns *moneys earned*, no demand was lodged or proved by any one; and (*b*) so far as concerns *damages* alleged to have resulted from rescission of the contract (now eliminated from the case) no sufficient allegation had been made by any person, nor had any such allegation been proved.

We rely upon the act, chapter 379 of the Laws of 1860, to which special reference was made by Judge WILLARD BARTLETT (then counsel for the City) at the opening of the case, and we desire now to say that while Judge BARTLETT

cautiously, prudently, wisely, with reference to the presentation of that point, made his motion upon each of two statutes (fols. 146–149) that of 1860 and that of 1873, the City's present counsel by careful examination have satisfied their minds that this case is to be decided and governed by the Act of 1860, and not by any other act of the Legislature passed subsequently to the institution of this suit in 1864.

The Act of 1860 was in force when this action was instituted. It declared that (Laws 1860, chap. 379, sec. 2):

"No action or special proceeding shall be prosecuted or maintained against the said the Mayor, Aldermen and Commonalty of the City of New York, unless it shall appear by, and as an *allegation in the complaint* or necessary moving papers, that at least twenty days have elapsed since the claim or claims upon which said action or special proceeding is founded were presented to the Comptroller of said City for adjustment, and not then unless it shall further appear by and as an additional allegation in the said complaint that *upon a second demand, in writing*, being made upon the said Comptroller after the expiration of said twenty days, the said Comptroller neglected or refused to make an adjustment or payment thereof."

This action was instituted under that law, and no change in the law occurring subsequently to the institution of this action could make this action one that had been theretofore instituted as authorized by this prior law. It was for the claimants and their representatives to discontinue this action and to begin another, in conformity with any later law, if they so chose. This action is to be tested by its validity at the time it was instituted.

The law then in force required two separate demands twenty days apart—one in writing before suit brought, and each relating to the same cause of action.

A proper demand pleaded and proven in this case, therefore, is as vital to the maintenance of this suit as though it were against the indorser of a promissory note—and its absence is as fatal.

The proof offered (fols. 613–29) and illegally received under exception, would, if admissible, be wholly unavailing, as there is no pretense that any claimant in any case made two demands in respect of the same subject matter.

II.—In point upon this question are many decisions.

(1) In *Reining* vs. *City of Buffalo*, 102 N. Y., 308, the facts as stated in the opinion of the Court were as follows (p. 310):

"The sole question presented by this appeal is, whether the complaint, in an action against the City of Buffalo, should contain an allegation of the previous presentation of the claim declared on to its Common Council, and that forty days had expired since such presentation. The clause of the city charter requiring such a proceeding reads as follows: 'No action to recover or enforce any claim against the city shall be brought until the expiration of forty days after the claim shall have been presented to the Common Council in the manner and form provided.'"

The unanimous opinion of the Court was delivered by the late Chief Judge RUGER, whose instructive language upon this point we venture to quote at some length as follows (pp. 310–11, italics ours):

"The inquiry is whether this provision was intended to operate as a *condition precedent* to the commencement of an action, *or simply to furnish a defense* to the city in case of an omission to make such demand. We think the *plain language of the statute excludes any doubt* on the subject.

"It *absolutely forbids* the prosecution of any action until the proper demand has been made; it attaches to all actions whatsoever, and by force of the statute becomes *an essential part of the cause of action*, to be alleged and proved as any other material fact. It does not purport to give the city a defense dependent upon an election to use it, but expressly forbids the institution of any suit until the preliminary requirements have been complied with; the plain intent of the requirement was to protect the city from the costs, trouble and annoyance of legal proceedings, unless, after a full and fair opportunity to investigate and pay the claim, if deemed best, they declined to do so.

"It is not in such a case necessary that the thing required should constitute one of the elements of a common-law action, for if the Legislature had made even a step in their remedy a condition of it prosecution, it is essential not only that it should be taken, but that it *should be affirmatively alleged and proved* by the plaintiff. It is competent for them to attach a condition to the maintenance of a common-law action as well as one created by statute, and, when they have done so, its averment and proof cannot safely be

omitted; the Court, in *Nagel* vs. *City of Buffalo* (34 Hun, 1), in considering the statute in question seemed to think its requirement was in the nature of *a condition subsequent or proviso*, having no necessary connection with the proper statement of a cause of action, but we think they *erred* in their conception of the nature of the provision. Neither its language nor object is analogous to those provisions authorizing the defense of the Statute of Limitations, or other special and particular defenses constituting conditions subsequent, which may or may not occur in particular cases, and must, therefore, be averred to authorize the Court to take cognizance of them.

"Here *the requirement exists independent of proof*, in every case and is made to precede the institution of any suit whatever. *Its performance cannot for any purpose be presumed, but must, to be availed of, be alleged and proved.* The language is 'that no action' 'shall be brought' until, etc., and constitutes an express prohibition against the action until performance of the condition. *A non-compliance with this requirement can be raised by the defendant, at any stage of the action*, when it is called upon to act in the case."

(2) In *Curry* vs. *Buffalo*, 135 N. Y., 366, Judge EARL, reiterating the doctrine above enunciated, says (p. 369, italics ours):

"The section is imperative, *the action cannot be maintained* unless notice of intention to commence it * * * shall have been filed with the counsel to the corporation."

(3) See also—

Graham vs. *Scripture*, 26 How., 501.
Howland vs. *Edmonds*, 24 N. Y., 307.
Porter vs. *Kingsbury*, 5 Hun, 597; affirmed 71 N. Y., 588.
Fisher vs. *Mayor*, 67 N. Y., 73.
McLean vs. *Manhattan Medicine Company*, 22 J. & S., 371.
Downes vs. *Phenix Bank*, 6 Hill, 297.
Thompson vs. *Gardner*, 10 Johns., 404.

The case of *Harrigan* vs. *Brooklyn* (119 N. Y., 156) qualifies the doctrine of *Reining* case only as to actions *ex delicto*.

III.—The report of the Referee, it is true, in its findings of fact, eleventh to fifteenth, inclusive (fols. 259*-

268*), finds that certain demands were served upon the City by Devlin, Donaldson, Blish and Pratt, and upon these findings of fact was based against our fifth exception (fol. 299*), the seventeenth finding of fact (fol. 270*), in reality a conclusion of law.

The answer to the Referee's conclusion is, viz. :

(1) These findings, assuming that the evidence sustains them, must fall, for the reason that the evidence itself was wholly inadmissible, having been admitted under exception upon the ground that no averment under the statute was pleaded (fols. 613–29), no amendment thereof having been asked before the Referee or allowed by the General Term (fol. 2362).

Day vs. *Town of New Lots*, 107 N. Y., 148, 154.

(2) But conceding the evidence to have been admissible, the result is unchanged, for the reason that there is still wanting a second demand relating to the *same subject matter.*

For in every instance where two demands were sought to be proven (*ut supra*), one will be found to relate to *moneys earned prior to rescission* and the other to the entirely distinct subject of *damages subsequent* thereto (fols. 616–637).

This is absolutely fatal.

IV.—Possibly the answer made before the Referee will be repeated here, namely, that the complaint itself was a sufficient "second demand in writing."

It hardly needs argument to dispute such a contention when we consider that the law requires that the complaint itself shall contain an *allegation of further delay since the second demand* was presented.

Dawson vs. *Troy*, 49 Hun, 322.
Curry vs. *Buffalo*, 135 N. Y., 366, 370.

V.—The report further seeks to establish by the seventeenth finding of fact (fol. 270*), under our exception as

above stated, that the sufficient compliance above referred to was

"accepted as such compliance by the defendant, the said Mayor, Aldermen and Commonalty, and that any further or other compliance with the provisions of said statute was waived by said defendant.

That the objections and defense to the effect that said compliance was not sufficient was not raised nor interposed until after such acceptance and waiver, nor until any new action based upon any further or other compliance with said statute would be liable to be barred."

To this we answer:

(1) The act is to be satisfied not by a "substantial" but by a real compliance with its terms.

(2) That an acceptance of such compliance by the Mayor, etc., is *not* an acceptance by the "Finance Department," who alone, or through the Comptroller as its head, have been vested by the Legislature with jurisdiction of this subject (Laws 1857, ch. 444, sec. 22).

(3) That *O'Leary* vs. *Board*, 93 N. Y., 1, and similar cases which may be cited by respondents, are inapplicable, because—

(*a*) No waiver is claimed to have been made by the Comptroller.

(*b*) Even if the Comptroller had attempted to waive the defense, he could not do so in case of a statute making his duty to require a demand mandatory.

Veazie vs. *City of Rockland*, 68 Me., 511.

(*c*) Indeed, waiver by express contract could not be sustained.

Yavapai County vs. *O'Neil* (Supreme Court of Arizona), 29 Pacif. Reptr., 430.

(4) Finally, that to permit a waiver of the demand in question by the city officials will open the door to the very evil which it was the design of the act to overcome, namely:

"The improvident or conclusive allowance of such claims by municipal officers."

Curry vs. *Buffalo*, 135 N. Y., 366, 370.

VI.—The Referee also sought to establish the same proposition against our exceptions Nos. 123*a*–126 (fols. 351*–354*) by findings Nos. 23–25 (fols. 2292–5), made at the request of respondents, viz.:

"23d. No allegation of a want of sufficient demand by the parties herein was set forth in the answer herein by the City, or in any answer served by the City in any of the actions between the parties relating to recoveries on said contract, nor was any objection taken by the City on the first trial of this action on that ground, or setting it forth in any manner; that the cause of the City's failure to set it forth as not having been made was assumed as an admission that a sufficient demand had been made before suit was brought, and as a waiver of the question of a sufficiency of the demand, as the demands of the different parties as owners of different interests was made in different forms by each of them before suit brought.

"24th. The answers containing the demands of affirmative relief by the defendants were all either waived, not required or served on the Mayor and Commonalty of the City and notices of trial by the other defendants on The Mayor, etc., were served by all the defendants or waived or not required on the trial thereof.

"25th. That the Board of Aldermen and Councilmen at the time of the breach of the contract by them, 16th May, 1863, or immediately thereafter, had full notice of the claims of the owners of the contract, and demands in writing for money and damages sustained by a breach of the contract were made on them or served on them, and they acknowledged the notices and demands of the claimant parties hereto and negotiated and organized and attempted a settlement of the same."

To these contentions we answer *seriatim*, viz.:

(1) The hardship upon the respondents arising from the fact that this objection was not raised until the action had been barred by the Statute of Limitations can scarcely be allowed to work implied exception to the express language of the act, and it is in direct conflict with the language of *Reining Case*, *supra*, that the point may be taken

"At any stage of the action."

(2) The suggestion that the City has waived its defense by not setting it up in any answer interposed in this litigation, or by objecting to the sufficiency of any demand sug-

gested by claimants' answers, needs no further citation of authority than another reference to the *Reining Case* and the opinion of the General Term (fol. 2361).

(3) The claim that the Board of Aldermen had actual knowledge of the fact that the parties interested in the contract were claimants against the City is an absurdity which is answered for us by the language of the Court in *Dawson* vs. *City of Troy*, 49 Hun, 322–5, viz.:

"I do not think our sympathy should lead us to disregard the plain words of the statute. *We might as well say that if the Corporation Counsel had heard in the street that the plaintiff was about to commence this action, such hearing would relieve her from the requirements of that statute.*"

(4) It is true in *Russell* vs. *Mayor*, 1 Daly, 263, Judge HILTON volunteered the opinion that the City would have waived the defense had it failed to take advantage of it by answer.

(*a*) But there the City had taken the point and the point was sustained. What difference, therefore, if it was said that the point would have been waived if it had not been taken.

(*b*) Again, the General Term in this very case has overruled Judge HILTON on this point (fol. 2361).

(5) It is, moreover, impossible to reconcile any such doctrine with the cases above cited and the settled principle.

Montgomery Bank vs. *Albany Bank*, 7 N. Y., 459, 464, that the objection that the complaint does not state facts sufficient to constitute a cause of action (and in our case the Statute of 1860 prescribes what the all essential elements of the same shall be) can be taken at any stage of the action up to the entry of final judgment.

VII.—The General Term overruled this point solely upon the ground that subsequent to the beginning of this action the requirement of a demand had been displaced by a new statute.

(*a*) The Court is "unable to accede to the proposition of counsel for the respondents that the objections were

waived in the present instance, because not raised on the former trial" (fol. 2361).

(*b*) "It is apparent from the evidence and the Referee's findings that the necessary demands were not made" (fol. 2362).

(*c*) "This requirement constituted a *condition precedent* to plaintiff's right to institute and maintain the action" (fols. 2358–9).

The General Term, however, were of opinion that the the Act of 1860 was impliedly repealed by the Act of 1870, and that such implied repeal had retroactive force and relieved the respondents as of the date of the commencement of the action from presenting any demand whatsoever.

The language of Judge BISCHOFF, in discussing the subject, is as follows (fols. 2363–4):

"But the statute requiring the demands and their allegation in the complaint, however, did not in any sense abridge respondent's contractual rights or impair defendant-appellant's obligation. It affected the remedy only (*Taylor* vs. *Mayor*, etc., 20 Hun, 292; 82 N. Y., 11); and its subsequent repeal by chapter 383 of the Laws of 1870, which is in conflict therewith, was operative upon pending actions (*Stocking* vs. *Hunt*, 3 Den., 274; *Supervisors of Onondago* vs. *Briggs*, *Id.* 173; *Matter of Palmer*, 40 N. Y., 561). Upon the repeal of the statute in force at the time of the commencement of this action, respondents had a vested right of action against appellant-defendant arising under the contract with Hackley upon common-law principles which remained unaffected by subsequent legislation in so far as the effect of the latter would be to impair it (Myer on Vested Rights, 105 *et seq.*, and cases cited). Hence the exceptions which are founded upon the objections that the complaint does not conform to the requirements of chapter 379 of the Laws of 1860, and that the proof was insufficient under the same statute, are ineffectual."

As prefatory to our subsequent argument upon this branch of the case it will be convenient and necessary to refer to the provisions of law relating to the subject of demand at the time this suit was brought and as the same has continued to exist to date.

(*a*) Laws of 1860, chapter 379, entitled "An Act relating to actions, legal proceedings and claims against the Mayor, Aldermen and Commonalty of the City of New York," provides as follows (p. 645):

"Sec. 2. No action or special proceeding shall be prosecuted or maintained against the said the mayor, aldermen and commonalty of the city of New York, unless it shall appear by, and as an allegation, in the complaint, or necessary moving papers that at least twenty days have elapsed since the claim or claims upon which said action or special proceeding is founded were presented to the comptroller of said city for adjustment, and not then unless it shall further appear by, and as an additional allegation in the said complaint, that upon a second demand, in writing, being made upon the said comptroller after the expiration of said twenty days, the said comptroller neglected or refused to make an adjustment or payment thereof. If the plaintiff recover judgment in his action or in his special proceeding, he shall recover full taxable costs without regard to the amount of judgment."

(*b*) Laws of 1868, chapter 853, section 8, entitled "An act to make provision for the government of the City of New York" provides that (p. 2022):

"Sec. 8. The provisions of chapter three hundred and seventy-nine of Laws of eighteen hundred and sixty- are hereby adopted and made applicable to the corporation of said city, and hereby declared to be in force or effect and re-enacted; and in case any judgment or judgments or adjusted claims shall be recovered or exist against the said mayor, aldermen and commonalty of the city of New York at any time before the annual taxes for the year next succeeding shall have been levied, the said comptroller, in the name of and on behalf of the said mayor, aldermen and commonalty of the city of New York, is authorized to borrow, upon the credit of the corporation such sums of moneys as, from time to time, may be necessary for the payment of such judgment or judgments or adjusted claims, and the legal costs and expenses incident thereto, and to issue revenue bonds therefor in the usual form, the same to be payable at any time during the ensuing year from the taxes and other revenues of the corporation applicable to such purposes for that year; and the board of supervisors shall include an amount sufficient to pay such revenue bonds so issued, with interest thereon, in the annual tax levy for said year, in addition to the amounts provided in said levy for other purposes; and the same shall be collected in the manner provided by law for the collection of other taxes."

(*c*) Laws of 1869, chapter 876, section 14, entitled "An Act to make provision for the government of the city of New York," contains this provision (p. 2134):

"Sec. 14. No action shall be maintained against the mayor, aldermen and commonalty of the city of New York unless the claim upon which the action is brought has been presented to the comptroller and passed on by him, or he has unreasonably refused or omitted to take action on the same."

(*d*) Laws of 1870, chapter 383, section 17, entitled "An Act to make further provision for the government of the city of New York," provides that (p. 896):

"Sec. 17. No action shall be maintained against the mayor, aldermen and commonalty of the city of New York, unless the claim on which the action is brought has been presented to the comptroller, and he has neglected for thirty days after such presentment to pay the same. Before any execution shall be issued on any judgment recovered upon such a claim a notice of the recovery thereof shall also be given to the comptroller, and he shall be allowed ten days to provide for its payment by the issue of revenue bonds in the usual manner, according to law."

(*e*) Laws of 1873, chapter 335, section 105, entitled "An act to reorganize the local government of the city of New York"—after providing for numerous subjects concludes, viz (p. 513):

"No action shall be maintained against the mayor, aldermen and commonalty of the City of New York, unless the claim on which the action is brought has been presented to the comptroller and he has neglected for thirty days after such presentment to pay the same. Before any execution shall be issued on any judgment recovered upon such a claim a notice of the recovery thereof shall also be given to the comptroller, and he shall be allowed ten days to provide for its payment by the issue of revenue bonds in the usual manner according to law."

(*f*) Laws of 1882, chapter 410, section 1104, entitled "An Act to consolidate into one act and to *declare* the special and local laws affecting public interests in the city of New York," provides, viz.:

"Sec. 1104. No action or special proceeding shall be prosecuted or maintained against the said mayor, aldermen

and commonalty unless it shall appear by, and as an alle tion in the complaint or necessary moving papers, that at least thirty days have elapsed since the claim or claims upon which said action or special proceeding is founded were presented to the comptroller of said city for adjustment and that he has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment. If the plaintiff recover judgment in his action or in his special proceeding, he shall recover full taxable costs without regard to the amount of the judgment."

(4) An examination of these, being all the laws upon the subject, shows it to be the established policy of the State for more than a third of a century that no claim shall be enforced against the City unless a precedent demand shall have been made, and if authority be needed in support of our conclusion that such is the policy, it is supplied by the recent case of *Curry* vs. *Buffalo*, 135 N. Y., 366, in which Judge EARL used the following language in respect of a similar statute to that under consideration (p. 370):

"These actions against cities are numerous and the Legislature seems to have been solicitous to protect them so far as possible against unjust or excessive claims, and also against the improvident or collusive allowance of such claims by municipal officers."

The Legislature of 1870 cannot be held to have intended to give the Act of 1870, continuing the previous policy, a retrospective effect destructive of that established policy, and to release from the former prohibitions all claims from 1860 to 1870 merely by a renewal of the prohibition in slightly different language.

The learned Court's conclusion (fol. 2363) that chapter 383 of the Laws of 1870 repealed the Act of 1860, because in conflict therewith, is not sustained by the authorities cited. While these two acts differed in expression, there was between them no such *contrariety* as is necessary to effect a repeal by implication.

Sutherland on Statutory Construction, § 152.

(5) It is also to be observed that the language of the

Act of 1870 makes no attempt to give a retroactive effect to this provision, and without such intention clearly expressed no such intent can be imputed to it.

(*a*) In the case of *Syracuse Bank* vs. *Town of Seneca Falls*, 86 N. Y., 317, Judge EARL used this language (p. 322):

"It did not in terms or by necessary implication nullify judgments rendered under the Act of 1869. That judgment cannot be assailed on the ground that it was not based on a proper petition, because it was based upon a petition entirely proper and sufficient at the time it was acted upon, and for the conclusion we thus reach the case of *Wood* vs. *Oakley* (11 Paige, 400), is also an authority."

(*b*) In *Amsbry* vs. *Hinds* 48 N. Y., p. 57, Commissioners LOTT used the following language (p. 60):

"Every law is, as a general rule, to be so construed as to operate prospectively, and unless the legislative intent that it shall act retrospectively is expressed in clear and unambiguous language, such a construction must be given to it."

(*c*) *Wood* vs. *Oakley*, 11 Paige, 400, Chancellor WALWORTH (p. 403) used this language:

"It is a general rule in the construction of statutes that they are not to have a retroactive effect so as to impair previously acquired rights, and Courts of justice will apply new statutes only to future cases which may arise, unless there is something in the nature of the new provisions adopted by the Legislature or in the language of such new statutes which show they were intended to have a retrospective operation."

(*d*) *Quackenbush* vs. *Danks*, 1 Denio, 128, Chief-Justice BRONSON (p. 130) said:

"It is a well-established rule that a statute shall not be so construed as to give a retrospect beyond the time of its commencement, and there are many cases in the books where general words as comprehensive as those under consideration have been restricted in their influence so as not to reach past transactions."

(*e*) See also Am. & Eng. Encyc. of Law, Vol. 23, p. 448, and cases cited; and also *Bullock* vs. *Town of Durham*, 64 Hun, 380.

(6) It is further contended that even a declaration of retroactive effect in the Act of 1870 would not be con-

strued to apply to anything but living claims, and would not evidence an intent to revive claims barred by the Statute of Limitations, or *a fortiori* suits which had never had an inception.

(*a*) The claim for moneys earned, which is now the sole subject of litigation herein, arose, as appears from the admission of counsel in the case (fol. 1631), for installments of money which came due for fortnights ending respectively on dates as follows: May 14, 1861; May 28, 1861; March 15, 1863; May 1, 1863; May 16, 1863.

Thus the last of the items constituting this claim was barred by the Statutes of Limitations upon May 16, 1869, or nearly a year before the passage of the Act of 1870, which took place on April 16 of that year.

See *Dickinson* vs. *Mayor*, 92 N. Y., 584.

(*b*) In point upon this subject is the case of *Boorman* vs. *Juneau Co.*, 76 Wisc, 550, in which Justice CASSODAY, referring to the Statutes of Limitation of Wisconsin, which is identical in its phraseology (Annotated Statutes of Wisconsin, sections 4219–4222) with the Statutes of Limitations as contained in our Code of Civil Procedure in this State, sections 380–2, uses the following language in respect of statutes on the subject of demand similar to that involved in this suit:

"The right to make such objection and offer before the Board of Review having fully expired more than eight months prior to the passage of the repealing act, it is very manifest that the plaintiff was at that time barred by the Act of 1887 from being heard upon the question of such inequality 'in any action, suit, or proceeding.' Having thus lost her right of action by failing to make such objection and offer within the time prescribed by that act, the question recurs whether such right of action, so lost, was restored by such repealing act. That act does not purport to be retroactive."

* * * "An act of the Legislature is not to be construed as operating retrospectively, unless the intention that it should so operate is unmistakable (*Seamans* vs. *Carter*, 15 Wisc., 548; 82 American Decisions, 698; *Vanderpool* vs. *La C. & M. R. Co.*, 44 Wisc., 663.) While the repeal of the act, without a saving clause, may defeat pending actions based thereon, yet he would be slow to conclude that the mere repeal of a statutory bar or condi-

tion precedent would restore right of action which had previously been lost."

(7) The cases cited by the Court in support of the proposition that the supposed repeal by the Law of 1870 of the Law of 1860 would operate upon pending actions can be clearly distinguished from the case at bar.

(*a*) The case of *Stocking* vs. *Hunt*, 3 Denio, p. 274, was one in which a remedy was given by statute.

The Court held that the remedy was taken away when the statute was repealed, another suitable remedy being given which could be enforced.

The action being founded upon the statute, of course terminated with the statute.

(*b*) In the case of *Ex Parte Bennett*, 3 Denio, 175, it was held that fees should be taxed according to the law in force when they were due, which was at the end of the action.

There was no question of a statute affecting a pending action, as the Court held that the fees were not due until the action terminated.

(*c*) The case of *Matter of Courtland Palmer*, 40 N. Y., 561, had reference to a statute held to be retroactive in express terms of law, and therefore had no application.

(*d*) Myer on Vested Rights (p. 105), and cases referred to are all cited to sustain a proposition which is not involved in this case.

(9) But even assuming that the Act of 1870 were retroactive the position of the claimants is not bettered.

The Act of 1870 does not pretend to repeal that of 1860, and its purpose does not require any displacement of the former act. The two can and do stand together, and an implication of repeal is not necessary nor should it be tolerated.

Re Evergreens, 47 N. Y., 216.

People vs. *St. Lawrence Co.*, 103 N. Y., 541.

The Act of 1870 covers only a part of the subject of the Act of 1860, viz., the number of notices and length of notice to be given in requiring thirty days' notice instead of two notices of twenty days each.

The part of the Act of 1860 which says that the notice

must be pleaded still remained in force, so that the effect of the legislation as it stood in 1870 was still to require a *pleaded* notice.

The Consolidation Act of 1882 codifying the pre-existing law, it will also be noted, again combines the clauses requiring pleading and character of notice in the same section, and this subsequent statute is to be taken as *declaratory* of the pre-existing law, viz., that pleading of notice has at all times been required since 1860.

People vs. *Davenport*, 91 N. Y., 574, 591.

The title of the Consolidation Act expressly states its purpose to *declare* the pre-existing laws.

VIII.—It thus results that there should be a reversal of the judgment on this ground, independently of any other upon which this appeal is taken.

FOURTH POINT.

We are thus brought to the conclusion of our argument, in which it has been attempted to show :

First—That, as matter of law, this action concerns no part of the moneys payable under the contract, but only damages for unlawful rescission ; and those damages having been expressly waived, constitute no subject of recovery herein.

Second—That the present plaintiff, in any event, is *not* the proper party to sue for the moneys alleged to be due, nor, if he could, have the other claimants any right to recover.

Third—That the plaintiff cannot recover even his proportionate part of moneys saved, because of his failure to allege or prove sufficient demands within the Law of 1860, chapter 379, section 2 ; and this proposition applies with equal force to the other claimants.

FIFTH POINT.

The modified judgment should be reversed and judgment ordered for the City with costs.

1. Of course, in view of the respondents' stipulation waiving the unliquidated damages, there can be no new trial on that branch of the case.

Whitehead vs. *Kennedy*, 69 N. Y., 462.
Goodsell vs. *W. U. Tel.*, 109 N. Y., 147.
Lawrence vs. *Church*, 128 N. Y., 324.

2. And equally, of course, there need be no new trial on the points presented by this appeal, which involves only decisive questions of law.

New York, January 25, 1895.

Wm. H. Clark,
Counsel to the Corporation, and
Attorney for Appellants.

Francis Lynde Stetson,
Franklin Bartlett,
Of Counsel.

M.K.
G.L.S.

Law Department.
Office of the Counsel to the Corporation.

New York, January 31 or 1895.

Hon. William L. Strong,

Mayor.

Sir:-

I have received a letter, dated January 24th, 1895, from your Secretary requesting me to inform you whether the Common Council has authority to authorize the erection in the streets of stands for the sale of fruit and various other wares.

By § 86 of the New York City Consolidation Act, the Common Council is given power to make ordinances not inconsistent with the law and the Constitution of the State, and among other things "to grant permits for the "erection of booths and stands within stoop lines, the "owner or owners of said premises consenting thereto, for "thesale of newspapers, periodicals, fruits or soda water "only."

A person cannot legally maintain such a stand in the street unless :

1. It is within the stoop line.

2. A permit has been granted by ordinance of the Common Council.

3. The owner of the premises has consented.

4. The stand is used for the sale of newspapers, periodicals, fruits or soda water only.

If all of these conditions have been complied with, the stand cannot be legally removed.

If any one of these conditions has not been complied with, then it is the duty of the Superintendent of the Bureau of Incumbrances (a Bureau in the Department of Public Works) to summarily remove the stand as an illegal obstruction in the street.

Very respectfully,

Wm Clark

Counsel to the Corporation.

5

Opinion.

— FROM —

COUNSEL TO THE CORPORATION.

John Water

Street Stands

4.

DATED NEW YORK,

Jan. 31

S.D.

A.T.C.

Law Department
Office of the Counsel to the Corporation.

New York, February 5th 1895.

Hon. William L. Strong,

Mayor;

Sir:-

I have received your letter, dated January 28, 1895, enclosing resolution No. 938 of the Board of Aldermen, giving permission to Lippman Deutsch to erect, keep and maintain a stand for the sale of soda water and fruit in front of the premises No. 1 Avenue B at the corner of Houston Street.

In my letter to you, dated January 31, 1895, I held that under Section 86 of the Consolidation Act a stand can be legally maintained if the following conditions are complied with.

1. It is within the stoop line.

2. A permit has been granted by ordinance of the Common Council.

3. The owner of the premises has consented.

4. The stand is used for the sale of newspapers, periodicals, fruit or soda water only.

The resolution itself provides that the stand must be within the stoop line, and authorizes the sale

of soda water and fruit.

It also appears from an affidavit attached to the papers that the owner of the premises has consented, so that if you approve the proposed ordinance all of the conditions will have been complied with .

It is, of course, wholly within your discretion whether or not you shall give such approval.

Very respectfully,

Counsel to the Corporation.

Enclosures.

Affidavit, Resolution,
Report of Committee of
Law Department.

6.

Communication.

— FROM —

COUNSEL TO THE CORPORATION.

Dated New York,

Feb. 5

DEPARTMENT OF BUILDINGS,

No. 220 FOURTH AVENUE,
S.W. CORNER 18TH ST.,

THOMAS J. BRADY,
SUPERINTENDENT.

OFFICE OF ATTORNEY.

(Copy.)

New York, Nov 13th 1893

Commissioners of Charities & Correction
Third Avenue & 11th St
City.

Gentlemen:

I respectfully beg to call your attention again to the notices of the Superintendent of Buildings heretofore served upon you, requiring the providing of means of Escape in case of fire upon the premises on Blackwell's Island, known as the City Hospital, and Home for Female Nurses, being T.E. 1173 and 1174 of 1892.

These matters have already been the subject of correspondence between your Department and this, and I call it to your attention now so that the Escapes may be provided without delay, as at this time of the year the danger from fire

DEPARTMENT OF BUILDINGS,

No. 220 FOURTH AVENUE,
S.W. CORNER 18TH ST.,

THOMAS J. BRADY,
SUPERINTENDENT.

OFFICE OF ATTORNEY.

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New York, _____ 189__

Increases.

May I hope to hear from you at your Earliest Convenience.

Respectfully Yours
Eugene Otterbourg
Atty to Dept of Bldgs

Memo.
F. E. 1173 Law complied with

DEPARTMENT OF BUILDINGS,

No. 220 FOURTH AVENUE,
S.W. CORNER 18TH ST.,

THOMAS J. BRADY,
SUPERINTENDENT.

(C 0109)

New York, Sept 10th 1894

OFFICE OF ATTORNEY.

Alexander S. Webb Esq
President of the College of the City of New York
23rd Street and Lexington Avenue.

Sir:

I beg to notify you that an Inspector of this Department upon an Examination made Sept. 5th inst, reports that the requirements of the notice of the Superintendent of Buildings, for the providing of means of escape in case of fire in the building known as the College of the City of New York, have not been complied with. This notice was served last March, and it has been the subject of correspondence between the Superintendent of Buildings, yourself, Mr. Charles L. Holt, Trustee &c, and Mr. C. B. J. Snyder, Superintendent, &c et al.

In June last Mr. Snyder, on behalf of the Board of Education filed a plan in the Department, showing a proposed

DEPARTMENT OF BUILDINGS,
No. 220 FOURTH AVENUE,
S.W. CORNER 18TH ST.,

THOMAS J. BRADY,
SUPERINTENDENT.

OFFICE OF ATTORNEY.

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mode of Construction of Fire Escape on the College, and the same was approved on June 8th. Mr. Snyder accompanied that plan with a letter to the Superintendent of Buildings, dated June 6th, requesting immediate consideration of the plan, and stating that it was desired by the Board of Education to advertise the work of Erecting said Fire Escapes at once Specifications being then ready for Printing

It seems unnecessary to present any argument to impress upon you, and the other officials in charge of the College, the importance of providing means of Escape for the Scholars in case fire should take place there, especially in view of the great number of Students who attend,

DEPARTMENT OF BUILDINGS,
No. 220 FOURTH AVENUE,
S.W. CORNER 18TH ST.,

THOMAS J. BRADY,
SUPERINTENDENT.

OFFICE OF ATTORNEY.

3. New York, _____ 189__

many of whom are young boys.

It is a matter of some delicacy for one branch of the municipal Government to take legal proceedings to compel another branch to do its duty, but as this Department is charged by law with the duty of securing, as far as may be, the safety of occupants of buildings in the City of New York, such, among others, as the one under discussion, it would seem, in view of the non-compliance with the requirements of the notice in the present case that legal proceedings will have to be commenced.

Will you kindly let me know whether it is the intention of the

DEPARTMENT OF BUILDINGS,

Nº 220 FOURTH AVENUE,
S.W. CORNER 18TH ST.,

THOMAS J. BRADY,
SUPERINTENDENT.

OFFICE OF ATTORNEY.

4 New York, _____ 189_

Officials in charge of the College
to provide the Fire Escapes expedily,
I am, with great respect
Yours very truly
Eugene Allerbeck
Attorney to Department of Buildings

Law Department.
Office of the Counsel to the Corporation.

M *New York,* February 5th 1895.

Hon. William L. Strong,

Mayor.

Sir:-

I have received your letter, dated January 24, 1895, enclosing certain papers with reference to the College of the City of New York and the City Hospital.

Complaint is made by the Department of Buildings that the College of the City of New York on the south-east corner of 23rd street and Lexington Avenue, and the City Hospital on Blackwell's Island have not good and sufficient means of escape for the inmates in case of fire.

Notices have been served requiring the city authorities to put up balconies and make certain other changes necessary to facilitate egress from the buildings in case of danger.

The Building Department, organized under Chapter 275 of the Laws of 1892, has very extensive powers, and is doubtless acting within its jurisdiction in serving notices upon the city authorities to have these buildings put in a safe condition.

I am informed that the matter is urgent, and that in case of fire in either of the buildings it is quite possible that a great loss of life would occur.

I have sent one of the notices, which were enclosed with your letter, to the Department of Charities and Correc-

tion, and the other to the Board of Education which is all that I can do in the matter as it stands at present.

Very respectfully,

Counsel to the Corporation.

P.S. I suggest that you send for Mr. Porter. Print of the Dept of Char. and Cor. and Mr Knox of the Bd of Education and ascertain if there is not some appropriation out of which sufficient money can be obtained to pay the fire Escapes actually needed.

W.H.C.

Communication.

— FROM —

COUNSEL TO THE CORPORATION.

Re re
Fire Escapes
for
College Bain of N.Y.
&
City Hospital.

5.

DATED NEW YORK,

Feb. 5

City of New York.

Law Department.

Office of the Counsel to the Corporation.

No. 2 TRYON ROW.

March 12, 1895.

Hon. William L. Strong,

Mayor.

My dear Mr. Strong:

Ex-Senator John J. Linson was appointed by the Governor to hear the evidence introduced to sustain the charges preferred against the District Attorney of this county. Under the existing law the City and County of New York is chargeable with the payment of his fees as well as of the other expenses attending the investigation, and I have already advised the Comptroller that Mr. Linson's claim was a county charge.

Under the existing statute, however, Senator Linson would have to wait for his money until next year unless some provision were made for paying him sooner, and his friends have caused to be passed by the legislature a bill authorizing the issue of revenue bonds, payable out of the next tax levy, which can be sold now, and his claim adjusted at once.

I can see no objection to this bill upon the standpoint of the City, as in either case, whether the bonds be issued or not, the amount of his claim will have to be included in the tax levy for 1896, and there-

fore the only effect of objecting to the bill would be to postpone his compensation without any corresponding advantage to the City.

Yours very truly,

Francis M. Scott

Counsel to the Corporation.

City of New York.

Law Department.

Office of the Counsel to the Corporation.

No. 2 TRYON ROW.

March 27th 1895

My dear Mr Hedges.

In yr letter enclosing Report of Comm'r of Accounts in re Geo Croker, you refer to a copy of a letter of the Comptroller, but do not send it.

Yrs

J. C. A.

Jos Hedges Esq