NY CLS CPLR § 3018, Part 1 of 2

Current through 2025 released Chapters 1-207

New York

Consolidated Laws Service **>**

Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 30 Remedies and Pleading (§§ 3001 — 3045)

§ 3018. Responsive pleadings.

(a) Denials. A party shall deny those statements known or believed by him to be untrue. He shall specify those statements as to the truth of which he lacks knowledge or information sufficient to form a belief and this shall have the effect of a denial. All other statements of a pleading are deemed admitted, except that where no responsive pleading is permitted they are deemed denied or avoided.

(b) Affirmative Defenses. A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as arbitration and award, collateral estoppel, culpable conduct claimed in diminution of damages as set forth in article fourteen-A, discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, res judicata, statute of frauds, or statute of limitation. The application of this subdivision shall not be confined to the instances enumerated.

History

Add, L 1962, ch 308, eff Sept 1, 1963; amd, L 1962, ch 318, § 14, eff Sept 1, 1963; L 1980, ch 111, § 1; L 1980, ch 504, § 1, eff June 24, 1980.

Annotations

Notes

Derivation Notes

Earlier statutes: CPA §§ 30, 242, 243, 261 (1), 272; CCP §§ 413, 500, 514, 517, 522; Code Proc §§ 74, 149, 153.

Commentary

PRACTICE INSIGHTS:

ASSERTING COUNTERCLAIMS AND JURISDICTIONAL OBJECTIONS

By David L. Ferstendig, Law Offices of David L. Ferstendig, LLC

General Editor, David L. Ferstendig, Esq.

INSIGHT

A defendant with jurisdictional objections must be careful when asserting counterclaims. If the counterclaim is related to the main claim asserted by the plaintiff, a defendant can assert it and also contest jurisdiction. Asserting an unrelated counterclaim, however, will result in a waiver of jurisdictional defenses. The prudent attorney for the defendant could avoid asserting the counterclaim, litigate the jurisdictional objections and, if successful, sue the plaintiff in a more favorable jurisdiction.

ANALYSIS

Asserting related counterclaim does not waive defendant's jurisdictional objections.

Generally, in New York, counterclaims are not compulsory. Nevertheless, when sued, defendants frequently assert counterclaims, if available. If there are no jurisdictional issues, a defendant may freely assert those counterclaims. Moreover, if the counterclaim is related to the main claim, the defendant does not waive jurisdictional objections by pleading the counterclaim.

A counterclaim is related when such counterclaim could potentially be barred under principles of collateral estoppel. If, for example, an attorney sued a client for unpaid fees, the client could assert a counterclaim for malpractice and also assert a jurisdictional objection.

Asserting unrelated counterclaim will result in waiver of jurisdictional defenses.

Asserting an unrelated counterclaim, however, will result in a waiver of jurisdictional objections, "because defendant is taking affirmative advantage of the court's jurisdiction." *Textile Technology Exchange, Inc. v. Davis*, 81 N.Y.2d 56, 58-59, 595 N.Y.S.2d 729, 730, 611 N.E.2d 768, 769 (1993). *See also USI Sys. AG v. Gliklad*, 176 A.D.3d 555, 111 N.Y.S.3d 270 (1st Dep't 2019), *app. denied*, 35 N.Y.3d 910, 125 N.Y.S.3d 388, 149 N.E.3d 82 (2020) "Defendant's assertion of counterclaims that were unrelated to plaintiff's claim and to his own affirmative defenses effected a waiver of his argument that he was not subject to personal jurisdiction in New York (citations omitted). Accordingly, the requisite jurisdiction was established for purposes of this article 53 proceeding, in which defendant raised substantive challenges to recognition of the Swiss judgment (citation omitted). The facts and issues that underlie the affirmative defenses are wholly distinct from the facts and issues from which the counterclaims arise, in particular, alleged breach of contract, and alleged torts by Kristy AG and its co-director, Nikolai Makurin, in connection with the transfer of Kristy Oil's business to Kristy AG. Given that the counterclaims do not arise out of the same transaction as alleged in the complaint, and they seek distinct damages, the doctrine of equitable recoupment, codified by CPLR 203(d), is unavailable to defendant (citation omitted).").

As a result, if the counterclaim is unrelated, the better course could be for the defendant not to assert the counterclaim, litigate the jurisdictional objections and, if successful, sue the plaintiff in another jurisdiction, one preferably more advantageous to the defendant. If the jurisdictional challenge is denied, the defendant can then decide whether to move to amend to add the counterclaim or to bring a separate action. *See* CPLR 3025.

WAIVER OF AFFIRMATIVE DEFENSE LACKING PARTICULARITY

§ 3018. Responsive pleadings.

By James C. Gacioch, Leonard & Cummings, LLP

General Editor, David L. Ferstendig, Law Offices of David L. Ferstendig, LLC

INSIGHT

CPLR 3018(b) requires that all defenses which would surprise the adverse party or raise facts not evident in the prior pleading to be pleaded with particularity, and the statute lists examples. Because failure to plead affirmative defenses may result in waiver, a party should be liberal in the inclusion of affirmative defenses. Affirmative defenses can always be affirmatively waived by a subsequent writing, at the request of opposing counsel or unilaterally, to clean up the pleadings in advance of trial.

ANALYSIS

CPLR 3018(b) must be tempered by liberal construction tenets and with eye to real prejudice.

The Third Department succinctly analyzed waiver potential from failure to particularize in *Brodeur v. Hayes*, 305 A.D.2d 754, 760 N.Y.S.2d 569 (3d Dep't 2003), motion for leave to appeal dismissed, 5 N.Y.3d 871, 808 N.Y.S.2d 134, 842 N.E.2d 19 (2005), where the personal guarantor of a corporate promissory note sued an assignee of it. The assignee counterclaimed against the guarantor to collect upon the note. The guarantor asserted affirmative defenses in his reply, alleging the counterclaim was barred by lack of clean hands, laches, estoppel and waiver. Responding to the assignee's summary judgment motion, the guarantor asserted he had been released by another agreement among the parties. The assignor claimed waiver of the release defense by the former's failure to raise the same in the guarantor's answer. The trial court's grant of summary judgment was reversed, and the appellate court permitted the guarantor to amend his reply to assert the specific defense of release, noting that the pleader is entitled to the benefit of all reasonable intendments of his pleading when faced with such a motion. Absence of surprise or prejudice is a significant factor in these determinations. *Kuhl v. Piatelli*, 31 A.D.3d 1038, 820 N.Y.S.2d 149 (3d Dep't 2006).

Err on side of repetition.

Brodeur is an excellent example of the jeopardy of waiver and the generous interpreting skills of an appellate division which saved the practitioner. The practitioner should always err on the side of repetition when affirmative defenses are at issue. Counsel should reallege the facts giving rise to the defense, if there is any doubt about their applicability. Simply “repeating and realleging as if fully set forth above” may not be enough.

Avoid malpractice by raising statute of limitations or personal jurisdictional defenses at earliest available opportunity.

Counsel should note that failure to plead a foreign choice of law as an affirmative defense does not waive it, so long as the pleadings make it clear that the subject accident occurred extraterritorially. *Florio v. Fischer Dev., Inc.*, 309 A.D.2d 694, 765 N.Y.S.2d 879 (1st Dep't 2003), reargument denied, 2003 N.Y. App. Div. LEXIS 13627 (1st Dep't 2003).

Nevertheless, unless no factual or legal doubt exists as to their applicability, certainly all affirmative defenses referred to in CPLR 3211(e) should be raised at the earliest available opportunity, whether by responsive pleading or the first motion in the case. Waiver of the statute of limitations or personal jurisdictional defenses may result in severe prejudice to clients and the omnipresent threat of malpractice. If, notwithstanding this advice, a party fails to include a defense, that party should argue that the pleading nevertheless apprised the opponent of the basis for the defense. *See also Matter of New York City Asbestos Litig.*, 173 A.D.3d 519, 103 N.Y.S.3d 391 (1st Dep’t 2019) (“Personal jurisdiction is not an element of a claim, and matters that are not elements need not be pleaded in the complaint (citation omitted). Where the plaintiff has not alleged facts specifically addressing the issue of personal jurisdiction in its complaint, the defendant must assert lack of personal jurisdiction as an affirmative defense in order to give plaintiff notice that it is contesting it (citation omitted). Where the plaintiff elects to allege facts specifically addressing the issue of personal jurisdiction in its complaint, the defendant’s denial of those allegations may be sufficient to preserve defendant’s jurisdictional defense (citation omitted). In this case, while defendant’s denial of specific jurisdiction was sufficient to preserve

its defense, its claimed denial of general jurisdiction was insufficiently specific to preserve its defense. Accordingly, defendant waived its defense that the court lacked general jurisdiction over it. The specific allegations of plaintiff's complaint paragraph three track, almost verbatim, the language of personal jurisdiction in CPLR 302, which provides the bases for specific jurisdiction. Defendant's denial of these allegations is sufficient to provide notice to plaintiff that it is contesting specific jurisdiction. The allegations of plaintiff's complaint paragraphs 83 and 84 purport to establish a basis for general jurisdiction. They were not denied by defendant, rather defendant admitted them to the extent that it 'is a duly organized foreign corporation doing business in New York …' This answer, interposed in 2004, before the Supreme Court's ruling in *Daimler AG v Bauman*, 571 US 117 (2014), would have provided a basis for general jurisdiction. It, therefore, does not qualify as a specific denial that would have put plaintiff on notice that the defendant is contesting general jurisdiction. Defendant's failure to clearly provide an objection to general jurisdiction in its answer waived the defense and conferred jurisdiction upon the court (citation omitted)."). *Compare GMAC Mortgage LLC v. Coombs*, 191 A.D.3d 37, 136 N.Y.S.3d 439 (2d Dep't 2020) (*citing* ***Weinstein, Korn & Miller***) (Discusses RPAPL § 1302-a, signed into law on December 23, 2019, which provides that a standing defense in a residential mortgage foreclosure action involving a "home loan" is not waived under CPLR 3211(e) if a defendant fails to raise it in a responsive pleading or a motion to dismiss. Also reaffirms that generally a waiver of a standing defense under CPLR 3211(e) is to be "given the same force and effect as a waiver of the affirmative defenses specifically enumerated in CPLR 3211(d)(3) and (5)" and a waiver under CPLR 3211(e) can be retracted through the amendment of a pleading pursuant to CPLR 3025. The Court concluded that RPAPL § 1302-a places standing as a defense comparable to CPLR 3211(a)(2) (subject matter jurisdiction), 3211(a)(7) (failure to state a cause of action), and 3211(a)(1) (necessary parties). These are defenses/objections that can be raised "at any time," or by amendment to a pleading, where permitted, and are exempt from the CPLR 3211(e) waiver provisions. *See* David L. Ferstendig, *Second Department Deals With Relatively New RPAPL § 1302-a*, 723 N.Y.S.L.D. 4 (2021). The decision provides a useful primer on the waiver of defenses under CPLR 3211(e).).

Majority of the First Department casts doubt on conclusory assertion of statute of limitation defense in some circumstances.

A majority of the First Department cast doubt on whether the conclusory assertion of a statute of limitations defense is sufficient in all circumstances. In *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 8 N.Y.S.3d 143 (1st Dep't 2015), the court suggested that there could be an instance where more detail might be appropriate, such as the inclusion of the applicable statute of limitations. The majority asked the New York State Court of Appeals to "revisit" the issue since it appeared that its prior pronouncement in this area, *Immediate v. St. John's Queens Hospital*, 48 N.Y.2d 671, 421 N.Y.S.2d 875, 397 N.E.2d 385 (1979), held that a conclusory assertion of a statute of limitations defense — for example, "this action is barred by the applicable statute of limitations" — would be appropriate. The First Department saw a possible conflict with Form 17 of the official forms promulgated by the state administrator, pursuant to CPLR 107, which suggests the inclusion of the limitation period. The concurrence saw any conflict as being illusory since the majority acknowledged that Form 17 established a "ceiling, not a floor" for a proper pleading. Until this issue is "resolved," however, practitioners will have to assess whether it is appropriate or necessary to plead a statute of limitations or perhaps other defenses with more particularity. *See* Weinstein, Korn & Miller, *New York Civil Practice: CPLR* ¶¶ 3018.13, 3018.18 (David L. Ferstendig, 2d Ed. 2024); David L. Ferstendig, *Weinstein, Korn & Miller CPLR Manual* ¶ 19.10[b] (3d ed. LexisNexis Matthew Bender) and Ferstendig, *LexisNexis Answer Guide New York Civil Litigation* ¶ 3.05[2] (2024 Ed. Matthew Bender). *See also* David L. Ferstendig, *And So You Thought You Knew How to Plead a Statute of Limitations Defense?*, 656 N.Y.S.L.D. 3 (2015); *Canales v. State of New York*, 51 Misc. 3d 648, 651, 26 N.Y.S.3d 413, 416 (Ct. Cl. 2015) ("Moreover, it is significant that defendant's answer failed to assert a defense regarding service of the claim beyond the time permitted in the decision and order granting late claim relief. Rather, defendant raised the statute of limitations as a defense in only the most conclusory fashion (citations omitted)."); *Kobyleckyj v Kobyleckyj*, 2016 N.Y. Misc. LEXIS 3520, 2016 NY Slip Op 31827(U) (Sup. Ct. N.Y. Cnty 2015) ("Additionally, plaintiff's motion to dismiss defendants' third affirmative defense of statute of

limitations is also granted as the court finds that such defense is merely conclusory. The First Department has held that in pleading a statute of limitations defense, a defendant at the very least must "state the applicable period of limitations" in order to comply with the specificity requirement of CPLR § 3013 (citation omitted). Here, defendants' third affirmative defense merely asserts "that Plaintiff's claims in the Verified Complaint related to an alleged distribution of $1,250.00 due and owing for the year 2011 are barred by the statute of limitations" but it fails to state the applicable period of limitations or explain why such claim is time-barred."); *Northern Leasing Sys. Inc. v. Young*, 2017 N.Y. Misc. LEXIS 2889, 2017 NY Slip Op 50975(U) (Civ. Ct. N.Y. Cnty 2017) ("The statute of limitations defense is deficient because the pleading does not set forth the applicable period of limitation (citation omitted)."). *Compare US Bank N.A. v. Nelson*, 493 N.Y.S.3d 138 (2d Dep't 2019) ("The foregoing decisions establish that the issue of standing is waived absent some affirmative statement on the part of a mortgage foreclosure defendant, which need not invoke magic words or strictly adhere to any ritualistic formulation, but which must clearly, unequivocally, and expressly place the defense of lack of standing in issue by specifically identifying it in the answer or in a pre-answer motion to dismiss. A mere denial of factual allegations will not suffice for this purpose."), aff'd, *US Bank N.A. v. Nelson*, 36 N.Y.3d 998, 139 N.Y.S.3d 118, 163 N.E.3d 49 (2020) (holding standing defense waived "because the defendants failed to raise it in their answer or in pre-answer motions."); David L. Ferstendig, *What Is a Properly Pleaded Defense?*, 700 N.Y.S.L.D. 4 (2019); David L. Ferstendig, *Court of Appeals Finds That Defendant Waived Standing Defense*, 722 N.Y.S.L.D. 4 (2021); *Matter of Part 60 RMBS Put-Back Litig.*, 155 A.D.3d 482, 65 N.Y.S.3d 133 (1st Dep't 2017) ("Nor should the affirmative defense be deemed waived on the ground that it is too conclusory (citation omitted). It "would be an excessively severe result" to "treat the defense as waived" (citation omitted), especially since plaintiff has known since at least April 29, 2016 that defendant was disputing the effectiveness of Computershare's appointment.").

ASSERTING SERVICE DEFENSES PROMPTLY

By David L. Ferstendig, Law Offices of David L. Ferstendig, LLC

General Editor, David L. Ferstendig

INSIGHT

An improper service defense can be asserted in the answer, but a motion for judgment then must be made within 60 days after service of the answer. Alternatively, and perhaps the more prudent approach for the practitioner, is to make a pre-answer motion to dismiss to resolve the service objection promptly and avoid serious waiver issues.

ANALYSIS

Properly assert jurisdictional defenses.

Practitioners are well aware of the dangers inherent in asserting personal jurisdiction objections promptly, that is, in the answer to a motion to dismiss prior to the service of the answer. In addition, if a party moves on any of the grounds set forth in CPLR 3211(a), all jurisdictional objections must be included or waived. Service defenses carry their own particular pitfalls.

Past practice permitted defendants to delay unreasonably in bringing service objections to court's attention.

Prior to the amendment to CPLR 3211(e), many defendants would "bury" service defenses in their answers, wait until the statute of limitations would run, then move for summary judgment based on the defense. If successful, the plaintiff's action would be dismissed and plaintiff would be prevented from bringing another action because of the lapse of the limitations period. To prevent this result, astute plaintiffs would promptly move to dismiss the defendant's service defense.

1996 amendment to CPLR 3211(e) provided strict deadlines for asserting defense.

CPLR 3211(e), as amended in 1996, provides that if a defendant asserts improper service as a defense in an answer, a motion for summary judgment must be made within 60 days after service of the answer. As a result, the service objection is resolved promptly, thereby reducing

the number of circumstances where the statute of limitations becomes an issue, assuming the plaintiff does not unreasonably delay in commencing the action or attempting to effect service.

It has been held in *HSBC Bank USA, N.A. v. Maniatopoulos* , 175 A.D.3d 575, 108 N.Y.S.3d 17 (2d Dep't 2019) (citing *Weinstein, Korn & Miller*) that a defendant who serves its answer by mail (in New York), including an improper service defense, is not entitled to the extra five days when subsequently moving for dismissal. *See* CPLR 3211(e). Thus, its time to move was not extended from 60 to 65 days. *See* David L. Ferstendig, *Defendant Who Serves Answer by Mail Is Not Entitled to Five Extra Days for Motion Seeking Dismissal on Improper Service Grounds*, 708 N.Y.S.L.D. 4 (2019).

Service statutes are generally construed strictly.

Courts tend to construe service statutes strictly. In one case, for example, the court found that the plaintiff failed to establish that CPLR 308(4)'s "due diligence" requirement had been met. The process server made three attempts to serve the defendant during normal business hours or when the defendant was probably traveling to and from work. The court found that the process server never determined the defendant's business address or attempted service there. Because plaintiff did not establish "due diligence," the service under CPLR 308(4) nail and nail service was found to be defective as a matter of law. *Earle v. Valente*, 302 A.D.2d 353, 754 N.Y.S.2d 364 (2d Dep't 2003).

Note an exception to the 60-day rule in the Consumer Credit Fairness Act.

Various CPLR sections were amended or added in 2021 as part of a new law entitled, the "Consumer Credit Fairness Act," impacting a cause of action arising out of a consumer credit transaction where the defendant is a purchaser, borrower or debtor. Specifically, here, CPLR 3211(e) was amended to provide that the 60-day rule applicable to moving on improper service grounds does not apply to an action to collect a debt arising out of a consumer credit transaction where a defendant is a consumer. The sponsor's memorandum discussed the justification for the law: Debt collection actions are rife with poor service of process as confirmed in numerous

studies and by New York governmental institutions. Indeed, questionable service of process is the reason for the exceedingly high number of default judgments in consumer credit actions. Because consumer defendants rarely have attorneys, improper service is a defense they often unknowingly waive when they finally discover they have been sued, even though service of process is a requirement of due process rights afforded under the United States Constitution. Current law places time limits on a defendant's right to assert improper service as a defense or to seek dismissal of the case on this basis. To protect consumers from unknowingly waiving this legitimate defense, the bill would allow consumer defendants to assert improper service as a defense and seek dismissal of the lawsuit beyond the time limits in current law:

Debt collection actions are rife with poor service of process as confirmed in numerous studies and by New York governmental institutions. Indeed, questionable service of process is the reason for the exceedingly high number of default judgments in consumer credit actions. Because consumer defendants rarely have attorneys, improper service is a defense they often unknowingly waive when they finally discover they have been sued, even though service of process is a requirement of due process rights afforded under the United States Constitution. Current law places time limits on a defendant's right to assert improper service as a defense or to seek dismissal of the case on this basis. To protect consumers from unknowingly waiving this legitimate defense, the bill would allow consumer defendants to assert improper service as a defense and seek dismissal of the lawsuit beyond the time limits in current law.

Advisory Committee Notes

Subd (a) of this section is based upon CPA §§ 243, 261(1) and 272. The provision that allegations as to damages are never deemed admitted has been omitted.

Subd (b) of this section is taken, in large part verbatim, from CPA § 242. Other matters which may be the subject of a motion to dismiss under rule 3211(e) have been added in order to give warning since a waiver would result under rule 3211 from failure to raise them either by answer or motion to dismiss. The phrase "not arising out of the preceding pleadings" appearing

in CPA § 242 has been replaced by “not appearing on the face of a prior pleading.” The latter is more appropriate to the sense of the provision since all issues including those specifically referred to arise directly or indirectly out of the preceding pleadings.

Notes to Decisions

I.Under CPLR

A.In General

1.Generally

2.Burden and admissibility of proof as affected by pleadings

3.Correction or amendment of pleadings

4.Sufficiency of denials; general denials

B.Affirmative Defenses

5.Generally

6.Accord and satisfaction

7.Agency

8.Arbitration

9.Assumption of risk defense

10.Choice of law

11.Co-insurance

12.Counterclaims

13.Disability defense

14.Estoppel; collateral estoppel

15.Federal preemption

16.Forgery

17.Fraud

18.Illegality

19.Insurance coverage exclusion

20.Insurance policy cancellation

21.Intervenor’s standing

22.Jurisdiction

23.Licensing

24.Notice of claim

25.Offsets; setoffs

26.Payment; partial payment

27.Release

28.Res judicata

29.Seatbelt defense

30.Statute of frauds

31.Time limitations, generally

32.—Laches

33.—Statute of limitations

34.Warranties

II.Under Former Civil Practice Laws

A.How Objection Taken

35.Generally

36.Election of remedies where one barred

37.Motion to intervene

38.Suits against heirs and devisees

39.Short statute of limitations

40.Who may take advantage of statute

41.Pleading

42.Counterclaim

B.Pleading Certain Facts

i.In General

43.Generally

44.Courts

45.Defenses

46.When defense deemed controverted

47.Burden of proof

48.Effect of bill of particulars

49.Doubt as to whether special pleading required

ii.Particular Matters

50.Statute of Limitations

51.General release

52.Stipulation

53.Statute of Frauds

54.Election of remedies

55.Premature action

56.Illegality of contract

57.Ultra vires

58.Payment

59.Custom

60.Fraud

61.Mistake

62.Conditional delivery of contract sued on

63.Defendant a charitable institution

64.Ratification by infant

65.Foreign law

66.Good faith

67.Failure to comply with statute

68.Failure or lack of consideration

C.When Allegation Not Denied Is Deemed True

i.In General

69.Generally

70.Bill of particulars

71.Motion for judgment on pleadings

72.Motion to dismiss complaint

73.Hearing on question of effect of failure to deny

iiAllegations

74.Generally

75.When deemed admitted

76.When deemed denied

77.When deemed controverted by avoidance

iii.Denials

78.Generally

79.Inconsistent facts

80.Denial of knowledge

81.Doubt as to effect of general denial

82.Separate defenses

83.Amended answer

84.Issues created

85.—No issues of fact

iv.Reply

86.Generally

87.To counterclaim

88.To new matter in answer

89.—To defense of release

90.Voluntary reply

91.Among codefendants

92.Amendment of reply

93.Effect of failure to reply

v.Admissions

94.Generally

95.Admissions of law and legal constructions

96.Admission in complaint

97.Judgment and findings contrary to admission

98.Abandonment of count or defense containing admission

99.Arrest

100.Bills and notes

101.Contracts

102.—Payment

103.Conversion

104.Corporations

105.—Corporate existence

106.Deeds

107.Lease

108.Mortgages

109.Negligence

110.Rent

vi.Particular Actions or Proceedings

111.Habeas corpus

112.Libel

113.Mandamus

114.Will contest

D.Contents of Reply

115.Generally

116.Necessity for reply

117.Reply by or against codefendant

118.Changing cause of action

119.Form, requisites and sufficiency

120.—Denial of knowledge or information

121.New matter in reply

122.—Two or more avoidances

123.—Counterclaim

124.Verification

125.Effect of reply

126.Voluntary or unnecessary reply

127.Reply to amended answer

E.Contents of Answer

i.Denials

128.Generally

129.Failure to deny

130.Sufficiency of denials generally

131.Denial of conclusions or immaterial allegations

132.General denial

133.—Denial of allegations not specifically admitted or denied

134.Specific denial

135.Qualified denial

136.Negative pregnant

137.Denial of knowledge or information

138.—Variations from statutory language

139.—Matter known to defendant or denials otherwise incredulous as matter of law

140.— —Matters of record

141.—By executors, administrators or trustees

142.—Sufficiency of particular denials of knowledge or information

143.— —Denials of infancy

144.— —Promissory notes

145.— —Sales

146.Matter provable under general or specific denial

147.Matters not provable under general denial

148.Sufficiency of particular denials

ii.Defenses

a.In General

149.Generally

150.New matter generally

151.—Matters arising after commencement of action

152.Sham

153.Form of defense

154.Incorporation by reference

155.Admissions or denials as or in a defense

156.Counterclaim as a defense

b.Particular Defenses

157.Abuse of process

158.Accord and satisfaction

159.Account stated

160.Accrual of action

161.Act of God or the public enemy

162.Adequate remedy at law

163.Adverse possession

164.Agency

165.Agreement avoiding contract

166.Alien enemy

167.Allowance for materials

168.Arbitration

169.Assumption of risk

170.Attachment

171.Bankruptcy

172.Breach of warranty

173.Compromise and settlement

174.Constructive trust

175.Contributory negligence

176.—Burden of proof

177.—Evidence

178.—Instructions

179.—Foreign law

180.—Particular applications

181.—As defense to willful wrong

182.Damages not shown

183.Diplomatic immunity

184.Duress

185.Equitable defenses generally

186.Estoppel and waiver

187.Failure to state cause of action

188.Failure or lack of consideration

189.Foreign corporation

190.Foreign or international law

191.Foreign sovereignty

192.Fraud

193.—Corporate stock

194.—Insurance

195.—Promissory notes

196.—Undertakings

197.Illegality of contract or consideration

198.—Unconstitutionality

199.—Violation of statute

200.— —Gambling

201.— —Monopolies

202.— —Requirement as to trade names

203.—Public policy

204.—Lack of license

205.—Restraint by federal, state or local government or agency

206.Infancy and incompetency

207.Joint venture

208.Jurisdictional defect

209.Leave to sue not obtained

210.License or leave to do act complained of

211.Limitation of liability

212.Limitations and laches

213.—Limitations in special statutes

214.—Foreign statute of limitation

215.—Contractual limitations

216.—Laches

217.Liquidated damages

218.Military service

219.Partial defenses

220.Misjoinder or nonjoinder of parties

221.Misnomer of parties

222.Mistake

223.Nonperformance of conditions

224.Novation

225.Official duty

226.Patent infringement

227.Payment

228.Pendency of another action

229.Ratification

230.Real party in interest not plaintiff

231.Release

232.Representative capacity

233.Res judicata

234.—Negligence

235.Rescission and cancellation

236.Set-off

237.Statute of frauds

238.—Constructive trust

239.—Real property generally

240.—Specific performance

241.Subrogation

242.Tender

243.Unclean hands

244.Usury

245.—Usury of corporation

246.—Negotiable instruments

247.Workmen’s compensation

c.Defenses in Particular Actions

248.Accounting actions

249.Action on account stated

250.Action by or against attorney

251.Action to recover a chattel

252.Assault and battery

253.Bailment or pledge

254.Banks and banking

255.Bills and notes

256.—Checks, drafts and bills of exchange

257.Bonds and undertakings

258.Brokers

259.Carriers

260.Civil Damage Act

261.Charities

262.Chattel mortgages

263.Contracts generally

264.Conversion

265.Corporation matters

266.—Ultra vires

267.—Stocks and stockholders

268.—Actions against corporate officers

269.Creditor’s action

270.Dangerous animals

271.Death action

272.Debt

273.Duress action

274.Ejectment

275.Electricity

276.Executors and administrators

277.False arrest and imprisonment

278.Fraud and deceit

279.—Fraudulent representations

280.Guaranty

281.—Indemnity

282.Insurance generally

283.—Life insurance

284.—Liability insurance

285.—Fire insurance

286.Interest, action to recover

287.Judgment, action on

288.Landlord and tenant actions

289.Legacy, action to recover

290.Libel and slander generally

291.—Truth and justification

292.—Privilege and fair comment

293.—Partial defenses in action for defamation

294.Malicious prosecution, false arrest and imprisonment

295.Malpractice

296.Marital rights generally

297.—Divorce

298.—Annulment

299.—Separation

300.Mechanic’s lien

301.Mortgage foreclosure

302.Municipal corporations

303.Negligence

304.Nuisance

305.Parent and child

306.Partition

307.Partnership actions

308.Patent, copyright and trademark litigation

309.Penalties and fines

310.Quo warranto

311.Real property actions generally

312.Replevin

313.Sales

314.—Fair Trade Law

I. Under CPLR

A. In General

1. Generally

Report by Borough President relating to his investigation of a condemnation proceeding of property in his borough, and including pertinent and relevant statements concerning an appraiser involved therein, was absolutely privileged and could not be the basis of a libel action, even though the publication was malicious or false. Sheridan v Crisona, 14 N.Y.2d 108, 249 N.Y.S.2d 161, 198 N.E.2d 359, 1964 N.Y. LEXIS 1225 (N.Y. 1964).

CPLR 3018 cannot be used to support a holding that a default in answering is the equivalent of an interposed answer which fails to deny the substantive allegations of the complaint. Where defendants were in complete default and had been so for more than one year when plaintiff made application to restore the case to the trial calendar with the false statement that all pleadings had been served, the trial court erred in refusing to require plaintiff to proceed with respect to the defendants, and the motion of the defendants for leave to serve their answers, which obviously had merit, was granted. Ballard v Billings & Spencer Co., 36 A.D.2d 71, 319 N.Y.S.2d 191, 1971 N.Y. App. Div. LEXIS 4679 (N.Y. App. Div. 4th Dep't 1971).

Where husband admitted, by failing to specifically deny, that he and wife had entered into valid separation agreement which provided for monthly payments of $600 for alimony and child support, that he had failed to pay total of over $26,000 which had become due under the agreement over six-year period, and that wife, during preceding six years, had not known husband’s whereabouts and where husband had not moved to modify the agreement as provided therein, wife was entitled to recover in action for arrearages. Warner v Warner, 44 A.D.2d 904, 357 N.Y.S.2d 556, 1974 N.Y. App. Div. LEXIS 4892 (N.Y. App. Div. 4th Dep't 1974).

In action against wrecking company by building inspector who was injured in premises allegedly under demolition, admission in defendant’s answer that defendant was engaged in demolition work might have been intended to refer to fact that defendant had contract to demolish, and was not an admission that, at the very time of the accident, the actual demolition work had commenced. Shramko v Hills Wrecking Corp., 56 A.D.2d 764, 392 N.Y.S.2d 436, 1977 N.Y. App. Div. LEXIS 11027 (N.Y. App. Div. 1st Dep't 1977).

The defendant’s failure to comply with the trial court’s disclosure order in an action to recover damages for wrongful death and conscious pain and suffering did not warrant the sanction of striking an affirmative defense, but relief from such sanction was conditioned on the payment of $250 by the defendant’s counsel to the plaintiff’s counsel and the production of all the documents required under the original disclosure order. Shannon v Figueroa, 80 A.D.2d 848, 444 N.Y.S.2d 473, 1981 N.Y. App. Div. LEXIS 10681 (N.Y. App. Div. 2d Dep't 1981).

Matters raised under CLS Pub Health § 2805-d, while labeled defenses, are classic examples of matters which would raise issues of fact not appearing on face of prior pleading; as such, they are affirmative defenses as to which defendant is required to give bill of particulars. Rubino v Albany Medical Center Hospital, 117 A.D.2d 909, 498 N.Y.S.2d 912, 1986 N.Y. App. Div. LEXIS 53168 (N.Y. App. Div. 3d Dep't 1986).

Special Term properly denied defendant’s motion to compel acceptance of his answer to plaintiffs’ CLS RPAPL Art 15 action to terminate defendant’s rights in certain real property where motion failed to respond to plain-tiffs’ earlier cross-motion for default judgment since, after one justice issued decision granting cross-motion, second justice entertaining defendant’s motion “could not very well issue a contrary decision” on that motion. Loeb v Tanenbaum, 124 A.D.2d 941, 508 N.Y.S.2d 688, 1986 N.Y. App. Div. LEXIS 62258 (N.Y. App. Div. 3d Dep't 1986).

Defense that complaint does not state cause of action must be raised by motion pursuant to CLS CPLR § 3211, and cannot be interposed in answer. Bentivegna v Meenan Oil Co., 126 A.D.2d 506, 510 N.Y.S.2d 626, 1987 N.Y. App. Div. LEXIS 41648 (N.Y. App. Div. 2d Dep't 1987), abrogated in part, Butler v Catinella, 58 A.D.3d 145, 868 N.Y.S.2d 101, 2008 N.Y. App. Div. LEXIS 8568 (N.Y. App. Div. 2d Dep't 2008).

It was not improper for defendant to raise defense of lack of personal jurisdiction in his answer, thus delaying resolution of issue until trial; plaintiffs had option of moving to strike defense, and by failing to do so, risked unfavorable ruling after statute of limitations had expired. Bleier v Heschel, 128 A.D.2d 662, 512 N.Y.S.2d 902, 1987 N.Y. App. Div. LEXIS 44353 (N.Y. App. Div. 2d Dep't 1987).

In negligence action arising out of motor vehicle accident involving tractor trailer operated by defendant, plaintiffs were not entitled to have defendant’s answer stricken based on his plea of guilty to 2 counts of second degree vehicular manslaughter, since no statutory grounds existed for striking answer; applicability of doctrine of collateral estoppel or issue preclusion did not provide basis to strike answer. Abrahao v Perrault, 147 A.D.2d 824, 537 N.Y.S.2d 913, 1989 N.Y. App. Div. LEXIS 1582 (N.Y. App. Div. 3d Dep't 1989).

CPLR does not provide for striking of improper denials in answer; however, improper denials may be deemed admissions. Gilberg v Lennon, 193 A.D.2d 646, 597 N.Y.S.2d 462, 1993 N.Y. App. Div. LEXIS 4701 (N.Y. App. Div. 2d Dep't 1993).

Defendant's request that his answer be deemed timely should have been granted where (1) there was only brief delay in service of answer, (2) there was no evidence of willful inaction by defendant or prejudice to plaintiff, and (3) defendant's moving papers, which included verified answer, demonstrated meritorious defense; affidavit of merit was not required because delay was of reasonably short duration. Bardi v Warren County Sheriff's Dep't, 194 A.D.2d 21, 603 N.Y.S.2d 90, 1993 N.Y. App. Div. LEXIS 10087 (N.Y. App. Div. 3d Dep't 1993).

In action by school district to recover overpayments made to defendant food services company pursuant to contract to provide lunches to eligible school children, trial court properly allowed defendant to prove that it had not been reimbursed for costs incurred in processing federally donated food commodities in accordance with parties' contract, thereby offsetting district's claim of overpayment, although defendant had failed to allege any affirmative defenses or to assert counterclaim against district, since district failed to allege sufficient facts in its complaint to fairly apprise defendant of cause of action to which such defense could have been interposed; however, defendant's counterclaim would be denied for failure to timely satisfy notice of claim requirement under CLS Educ § 3813(1). East Islip Union Free Sch. Dist. v Educational Food Management Servs., 205 A.D.2d 489, 612 N.Y.S.2d 652, 1994 N.Y. App. Div. LEXIS 5966 (N.Y. App. Div. 2d Dep't 1994).

Plaintiff would be compelled to accept answer where (1) court granted defendants' motion to vacate their default on condition that they serve answer within 20 days of service of copy of order with notice of entry, and (2) proper notice of entry of order was never served on defendants. Lehifa Trading Co. v Russo Sec., 205 A.D.2d 738, 614 N.Y.S.2d 906, 1994 N.Y. App. Div. LEXIS 6621 (N.Y. App. Div. 2d Dep't 1994).

Permission to serve late answer should have been granted where there was no pattern of delay or other indication that default was willful, there was no showing that plaintiff would have been

prejudiced by late joinder of issue, defendant offered reasonable explanation for his default and meritorious defense to claims presented, and plaintiff failed to make necessary showing that but for negligent handling of case, he would have prevailed. Keles v Kennedy, 238 A.D.2d 185, 656 N.Y.S.2d 239, 1997 N.Y. App. Div. LEXIS 3725 (N.Y. App. Div. 1st Dep't 1997).

By answering amended complaint without challenging personal jurisdiction, defendants waived their contentions regarding improper service of both original and amended summons and complaint. Federal Home Loan Mortg. Corp. v Torres, 238 A.D.2d 306, 656 N.Y.S.2d 297, 1997 N.Y. App. Div. LEXIS 3407 (N.Y. App. Div. 2d Dep't 1997).

Defendant’s answer to amended verified complaint was timely where plaintiff failed to prove that he properly served defendant with order granting plaintiff leave to amend verified complaint. Anamdi v Anugo, 238 A.D.2d 366, 657 N.Y.S.2d 328, 1997 N.Y. App. Div. LEXIS 3867 (N.Y. App. Div. 2d Dep't 1997).

Plaintiff waived any claim that answer was not timely served where plaintiff retained answer for some 6 weeks without objection, during which time plaintiff responded to answer by apparently repleading his causes of action and served bill of particulars and authorizations for medical and employment records. Phillips v League for the Hard of Hearing, 254 A.D.2d 181, 679 N.Y.S.2d 40, 1998 N.Y. App. Div. LEXIS 11142 (N.Y. App. Div. 1st Dep't 1998).

Defendant did not waive defense of lack of personal jurisdiction by failing to raise such defense in answer to one of plaintiff’s several attempts to commence action where defendant had asserted such defense in his previous motion to dismiss plaintiff’s actions. Ferran v Benkowski, 260 A.D.2d 690, 687 N.Y.S.2d 464, 1999 N.Y. App. Div. LEXIS 3278 (N.Y. App. Div. 3d Dep't 1999).

Because a contractor’s request for relief under N.Y. C.P.L.R. 3018 was actually for a default judgment under N.Y. C.P.L.R. 3215(c), no relief was available since the request was not sought within one year after a housing authority’s alleged failure to answer; in any event, the contractor’s claim of non-receipt of the housing authority’s answer was too equivocal to warrant

a hearing. A & C Constr., Inc. of N.Y. v New York City Hous. Auth., 32 A.D.3d 762, 820 N.Y.S.2d 802, 2006 N.Y. App. Div. LEXIS 10924 (N.Y. App. Div. 1st Dep't 2006).

Defense that complaint fails to state a cause of action, even though unnecessary, may be asserted in answer, since it affords notice to plaintiff that defendant will assail the complaint as insufficient. Prompt Electrical Supply Co. v W. E. Tatem, Inc., 43 Misc. 2d 333, 250 N.Y.S.2d 906, 1964 N.Y. Misc. LEXIS 1764 (N.Y. Sup. Ct. 1964).

Where a defendant brought up for examination the affidavit and petition upon which an order was based permitting a wiretap of his telephone, the burden of proving perjury, falsity, and inaccuracy of those affidavits was upon him, and although the court found the wiretap order was based upon sufficient grounds, it was held that the defendant be supplied with a copy of the petition and affidavit and be given ten days within which to make any motion to vacate the order upon grounds of perjury, falsity, or inaccuracy. People v Rizzo, 50 Misc. 2d 458, 270 N.Y.S.2d 943, 1966 N.Y. Misc. LEXIS 1804 (N.Y. County Ct. 1966).

Theft policy endorsement, which provided that it was a condition precedent to liability and to effectiveness of policy that vehicles be equipped with an alarm system, that the system be maintained in working order and that proper inspection records be maintained, was not a provision limiting coverage by excluding all but a stated risk, but rather was an undertaking that some particular thing be done and was a “warranty” as defined in Insurance Law. Irv--Bob Formal Wear, Inc. v Public Service Mut. Ins. Co., 81 Misc. 2d 422, 366 N.Y.S.2d 596, 1975 N.Y. Misc. LEXIS 2399 (N.Y. Civ. Ct. 1975), aff'd, 86 Misc. 2d 1006, 383 N.Y.S.2d 832, 1976 N.Y. Misc. LEXIS 2564 (N.Y. App. Term 1976).

Failure to deny charges of misconduct contained in a notice of motion is deemed an admission thereof. Wood v Wood, 104 Misc. 2d 109, 428 N.Y.S.2d 136, 1980 N.Y. Misc. LEXIS 2401 (N.Y. Fam. Ct. 1980).

In action alleging, inter alia, breach of contract, false imprisonment, and battery, defendant’s affirmative defense alleging that the action was frivolous was more akin to a denial or an

assertion that the complaint failed to state a cause of action, than an affirmative defense, and should have been dismissed. Charnis v Shohet, 195 Misc. 2d 188, 757 N.Y.S.2d 671, 2002 N.Y. Misc. LEXIS 1784 (N.Y. Sup. Ct. 2002), aff'd, 2 A.D.3d 663, 768 N.Y.S.2d 638, 2003 N.Y. App. Div. LEXIS 13875 (N.Y. App. Div. 2d Dep't 2003).

A public official cannot recover damages in an action for libel against a critic of his official conduct, unless he can prove that the defamation was made with actual malice; that is, with knowledge that the statement was false or with reckless disregard of whether or not it was false. New York Times Co. v Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 1964 U.S. LEXIS 1655 (U.S. 1964).

2. Burden and admissibility of proof as affected by pleadings

In false arrest action, it was necessary for city to plead defense of justification as prerequisite to introducing evidence on such issue. Loomis v Binghamton, 43 A.D.2d 764, 350 N.Y.S.2d 213, 1973 N.Y. App. Div. LEXIS 2898 (N.Y. App. Div. 3d Dep't 1973), app. dismissed, 34 N.Y.2d 537, 354 N.Y.S.2d 101, 309 N.E.2d 871, 1974 N.Y. LEXIS 1779 (N.Y. 1974).

Insured was not entitled to directed verdict in action to recover under homeowner’s insurance policy merely because trial court, at close of evidence, dismissed insurer’s affirmative defenses alleging lack of coverage based on fraud, since assertion of affirmative defense in answer preserves defendant’s right to present evidence on issues raised therein but has no effect on plaintiff’s burden of proof, and there were numerous issues presented to jury as to whether loss actually occurred. Palmier v United States Fidelity & Guaranty Co., 135 A.D.2d 1057, 523 N.Y.S.2d 192, 1987 N.Y. App. Div. LEXIS 52916 (N.Y. App. Div. 3d Dep't 1987).

In action for goods sold and delivered, where answer specifically admitted allegations of complaint and raised single affirmative defense that buyer was entitled to credits for payments made to seller, court properly instructed jury that only real issue for determination was extent of credits and payments to which buyer might be entitled, and that buyer bore burden of proof as to

that issue. CIT Group/Factoring Mfrs. Hanover, Inc. v Supermarkets General Corp., 183 A.D.2d 454, 583 N.Y.S.2d 422, 1992 N.Y. App. Div. LEXIS 6802 (N.Y. App. Div. 1st Dep't 1992).

In action alleging that defendant was late in paying for building materials supplied by plaintiff, defendant did not waive its defense that any delay in payment was justified by nonconformance of materials, as plaintiff's assertion of having been surprised by unpleaded defense was unpersuasive, where its representatives received oral and written objections to quality of materials and attended meetings with defendant, architect and project owner to discuss failure of materials to meet contract specifications. Cranesville Block Co. v Merritt-Meridian Constr. Corp., 223 A.D.2d 834, 636 N.Y.S.2d 186, 1996 N.Y. App. Div. LEXIS 84 (N.Y. App. Div. 3d Dep't 1996).

Court properly denied plaintiff's motion to preclude defendants from offering evidence of plaintiff's consumption of alcohol on evening of accident because defendants were not required to plead intoxication as affirmative defense and plaintiff could not claim surprise and prejudice, given plethora of evidence concerning his alcohol consumption, including his statements to medical personnel and at his deposition, Cassidy v Gray, 234 A.D.2d 6, 650 N.Y.S.2d 553, 1996 N.Y. App. Div. LEXIS 12257 (N.Y. App. Div. 1st Dep't 1996).

In dismissing plaintiffs' allegations that defendant employer condoned or acquiesced in sexual harassment committed by male coworkers, court erred by imposing burden on plaintiffs to prove that they reported complained-of incidents to defendant, where defendant failed to plead affirmative defense that plaintiffs failed to take advantage of preventative or corrective opportunities provided by defendant so as to mitigate their damages; furthermore, had defendant pleaded such defense, burden would have been on it to establish defense, not on plaintiffs to disprove it in first instance. Vitale v Rosina Food Prods., 283 A.D.2d 141, 727 N.Y.S.2d 215, 2001 N.Y. App. Div. LEXIS 5748 (N.Y. App. Div. 4th Dep't 2001).

In action to foreclose mortgage securing repayment of note executed by defendant, failure to plead affirmative defense of offset did not preclude defendant from establishing payment through application of money payable under another contract between parties pursuant to which

he and his company provided construction services to plaintiff, as assertion of affirmative defense of payment in answer was sufficient to put plaintiff on notice of defense of offset asserted at trial where plaintiff obtained discovery regarding construction contract prior to trial, details of offset defense were disclosed and issue was discussed at pretrial conference, construction contract expressly referenced defendant's prior indebtedness to plaintiff and provided for application of portion of payments for construction work to existing debt, and plaintiff's counsel did not claim surprise or prejudice in objecting to such proof of payment of mortgage debt. Cammarota v Drake, 285 A.D.2d 919, 727 N.Y.S.2d 809, 2001 N.Y. App. Div. LEXIS 7619 (N.Y. App. Div. 3d Dep't 2001).

The employer of a judgment debtor could not raise the defense of improper service of an income execution in an action brought against it by the judgment creditor, where the employer had failed to raise that issue in its pleadings and was by its conduct subsequent to the alleged defective service estopped from raising that issue. Spatz Furniture Corp. v Lee Letter Service, Inc., 52 Misc. 2d 291, 276 N.Y.S.2d 219, 1966 N.Y. Misc. LEXIS 1192 (N.Y. Civ. Ct. 1966), aff'd, 54 Misc. 2d 359, 282 N.Y.S.2d 624, 1967 N.Y. Misc. LEXIS 1443 (N.Y. App. Term 1967).

In a medical malpractice action, defendants' motion to strike a demand for a bill of particulars would be denied, where the asserted basis of the motion to strike was that the bill sought the particulars of defendant's affirmative defense that plaintiff's claim of lack of informed consent was barred by Pub Health Law § 2805-d on the ground that plaintiff had the burden of proof as to lack of informed consent, and where lack of informed consent, as set forth in Pub Health Law § 2805-d(4), constitutes an affirmative defense within the meaning of CPLR § 3018(b), so that the burden of proof was on the defendant. Grossman v Osteopathic Hospital & Clinic, 121 Misc. 2d 533, 468 N.Y.S.2d 327, 1983 N.Y. Misc. LEXIS 3957 (N.Y. Sup. Ct. 1983).

CLS Veh & Tr § 1103 need not be pleaded as affirmative defense; thus, in negligence action by claimants who were involved in accident with state vehicle engaged in work on highway, defendant did not waive its qualified immunity by failing to interject "reckless disregard" standard

of care into litigation until close of evidence. McDonald v State, 176 Misc. 2d 130, 673 N.Y.S.2d 512, 1998 N.Y. Misc. LEXIS 83 (N.Y. Ct. Cl. 1998).

Because the facts relating to the existence of the emergency, a bomb allegedly left on a bus, were known to the injured passenger and would not raise new issues of fact not appearing on the face of the prior pleadings, the city transit authority and the driver did not have to raise it as an affirmative defense to the passenger's claim that she was injured when the driver negligently made an emergency stop of the bus; thus, there was no unfair surprise arising from the failure of the transit authority and the driver to plead those facts in their answer. Moreover, inasmuch as the passenger was given ample opportunity in opposition to the motion of the transit authority and the driver for summary judgment to challenge the application of the emergency doctrine, both procedurally and on the merits, the trial court did not err in considering the doctrine. Bello v Transit Auth., 12 A.D.3d 58, 783 N.Y.S.2d 648, 2004 N.Y. App. Div. LEXIS 12548 (N.Y. App. Div. 2d Dep't 2004).

In an action relating to the rights of the parties under an option to purchase property agreement, the seller's failure to plead the statute of frauds did not preclude the grant of summary judgment on that ground; the purchaser, pursuant to N.Y. C.P.L.R. 3018(b), should not have been surprised by such a defense, as warning of the defense was provided in the complaint. Red Hook Marble, Inc. v Herskowitz & Rosenberg, 15 A.D.3d 560, 789 N.Y.S.2d 737, 2005 N.Y. App. Div. LEXIS 1878 (N.Y. App. Div. 2d Dep't 2005).

In a specific performance action, it was held that the defense of failure to state a cause of action, a ground listed in N.Y. C.P.L.R. 3211(a)(7), may properly be interposed in an answer and prior cases holding otherwise no longer articulated the correct legal standard. However, it was noted that a party who asserted the defense of failure to state a cause of action in a pleading would not achieve the intended purpose of dismissal, unless and until he or she made an appropriate motion. Butler v Catinella, 58 A.D.3d 145, 868 N.Y.S.2d 101, 2008 N.Y. App. Div. LEXIS 8568 (N.Y. App. Div. 2d Dep't 2008).

3. Correction or amendment of pleadings

In products liability action wherein injured plaintiff settled with manufacturers of all-terrain vehicle before trial, and at trial was found to share comparative fault with non-settling defendant (retailer of vehicle), court should have granted non-settling defendant's post-verdict motion to amend its answer to invoke set-off rule codified in CLS Gen Oblig § 15-108(a) as affirmative defense even though it had failed to seek apportionment against manufacturer at trial, which foreclosed possibility of jury determining manufacturers' equitable share of fault, because remaining 2 modes of setoff (amount stipulated or amount paid by settling defendant) were still properly available to nonsettling defendant. Whalen v Kawasaki Motors Corp., U.S.A., 92 N.Y.2d 288, 680 N.Y.S.2d 435, 703 N.E.2d 246, 1998 N.Y. LEXIS 3212 (N.Y. 1998).

This section in no way inhibits the pleading of the affirmative defense of release by amended answer under CPLR 3025 subd (b). Rainone v France, 26 A.D.2d 855, 273 N.Y.S.2d 828, 1966 N.Y. App. Div. LEXIS 3351 (N.Y. App. Div. 3d Dep't 1966).

In action to recover for injuries sustained in automobile accident, in which defendant's answer failed to specifically deny that he was operating vehicle, but defendant's proof raised such issue, any error in trial court's denial of defendant's motion to conform pleadings to evidence was harmless, and trial court properly submitted to jury issue of whether defendant was operating the vehicle. Johnson v Munn, 57 A.D.2d 108, 393 N.Y.S.2d 609, 1977 N.Y. App. Div. LEXIS 10931 (N.Y. App. Div. 3d Dep't), app. denied, 42 N.Y.2d 804, 1977 N.Y. LEXIS 3725 (N.Y. 1977).

In an action for a declaration that plaintiffs owed defendant nothing on a contract by which defendant was to arrange a merger of a company owned by plaintiffs with another company, the trial court properly found that defendant had breached the contract by failing to provide certain reports to plaintiff, despite defendant's claim that plaintiffs' company waived this condition, where defendant waived this affirmative defense by failing to plead it. The trial court also acted properly in denying defendant's post-trial motion to amend its answer to assert waiver as an affirmative defense where defendant pled its performance of the condition under CPLR § 3015(a) by failing to allege otherwise in its answer, and was therefore not entitled to prove

waiver of performance. McIntosh v Niederhoffer, Cross & Zeckhauser, Inc., 106 A.D.2d 774, 483 N.Y.S.2d 807, 1984 N.Y. App. Div. LEXIS 21699 (N.Y. App. Div. 3d Dep't 1984), app. denied, 64 N.Y.2d 608, 488 N.Y.S.2d 1023, 477 N.E.2d 1107, 1985 N.Y. LEXIS 16242 (N.Y. 1985).

In personal injury action, joint tortfeasors were entitled to amend their answers to include affirmative defenses of settlement, payment and release, despite 16-month delay in moving to amend, where tortfeasors had already amended their answers to include defense of setoff pursuant to CLS Gen Oblig § 15-108; neither surprise nor prejudice resulted from delay since tortfeasors were merely substituting more technically correct affirmative defense for earlier one that simply gave general concept. Manginaro v Nassau County Medical Center, 123 A.D.2d 842, 507 N.Y.S.2d 455, 1986 N.Y. App. Div. LEXIS 60963 (N.Y. App. Div. 2d Dep't 1986).

In action by unsecured creditors of bankrupt toy wholesaler against wholesaler’s accountants for fraud and gross negligence in preparation of wholesaler’s certified financial statement upon which creditors allegedly relied in selling toys and games to wholesaler on open and unsecured credit, accountants’ allegations of unfair competition and breach of antitrust laws by creditors would not have merit as counterclaims since accountants suffered no direct injury therefrom; however, accountants would be allowed to replead those allegations negating creditors’ reliance upon factors alleged to be misleading in financial statements so as to clarify issues and to avoid surprise at trial. Hasbro Bradley, Inc. v Coopers & Lybrand, 128 A.D.2d 218, 515 N.Y.S.2d 461, 1987 N.Y. App. Div. LEXIS 43541 (N.Y. App. Div. 1st Dep't), app. dismissed, 70 N.Y.2d 927, 524 N.Y.S.2d 433, 519 N.E.2d 344, 1987 N.Y. LEXIS 19970 (N.Y. 1987).

In personal injury action under supplementary uninsured motorist coverage of insurance policy, defendant’s motion to compel plaintiff to accept untimely answer was properly granted where defendant’s delay was relatively brief, and excuse for delay was reasonable. Ribowsky v Allstate Ins. Co., 251 A.D.2d 484, 673 N.Y.S.2d 919, 1998 N.Y. App. Div. LEXIS 6891 (N.Y. App. Div. 2d Dep't 1998).

Court erred in denying defendant owner’s motion to amend its answer to assert affirmative defense of nonpermissive use where complaint specifically alleged that defendant driver

operated subject vehicle with express or implied consent of owner, and owner deny such allegations in its answer; since question of permissive use appeared on face of complaint and was denied in answer, owner arguably was not required to plead nonpermissive use as affirmative defense. Smith v D.L. Peterson Trust, 254 A.D.2d 479, 678 N.Y.S.2d 788, 1998 N.Y. App. Div. LEXIS 11279 (N.Y. App. Div. 2d Dep't 1998).

In declaratory judgment action, insurer, which initially disclaimed coverage on grounds of late notices of "occurrence" and lawsuit, could amend its answer to add affirmative defense that underlying assault was never intended to be covered "occurrence" within scope of policy; CLS Ins § 3420(d), which requires insurance company to give prompt notice of grounds for disclaimer and precludes insurer from later disclaiming on grounds not initially asserted, was not applicable since statute applies only to policy exclusions and not to disclaimer based on lack of coverage. Insurer, however, was precluded by CLS Ins § 3420(d) from amending its answer to add affirmative defense based on policy exclusion of for bodily injury that was "expected or intended from the standpoint of the insured"; insurer waived its right to rely on exclusion by its failure to invoke such policy provision in its original notice of disclaimer. Agoado Realty Corp. v United Int'l Ins. Co., 260 A.D.2d 112, 699 N.Y.S.2d 335, 1999 N.Y. App. Div. LEXIS 12358 (N.Y. App. Div. 1st Dep't 1999), modified, 95 N.Y.2d 141, 711 N.Y.S.2d 141, 733 N.E.2d 213, 2000 N.Y. LEXIS 1373 (N.Y. 2000).

In action alleging, inter alia, breach of contract and fraud in connection with cooperative conversion of apartment building, court erred in denying defendants' motion to amend answer to add counterclaim seeking refund of subsidies paid to plaintiff pursuant to terms of offering plan. But, court properly denied defendants' motion to amend answer insofar as it sought to add affirmative defense/counterclaim for breach of oral settlement agreement since agreement, not having been evidenced by properly subscribed writing, much less one reduced to form of order, was unenforceable. Lex Tenants Corp. v Gramercy North Assocs., 269 A.D.2d 297, 704 N.Y.S.2d 459, 2000 N.Y. App. Div. LEXIS 2040 (N.Y. App. Div. 1st Dep't 2000).

Court properly denied defendant's motion for leave to amend its answer where motion was brought only one month before trial, and defendant failed to show adequately why it could not have sought such relief sooner. Capstone Enters. of Port Chester, Inc. v County of Westchester, 272 A.D.2d 427, 708 N.Y.S.2d 418, 2000 N.Y. App. Div. LEXIS 5595 (N.Y. App. Div. 2d Dep't 2000).

Court improperly granted defendant's motion to amend his answer to assert SLAPP counterclaim, even if plaintiff's action was related to public participation by defendant because it was based in part on his statements to Public Service Commission, since action was based on conduct outside scope of Public Service Commission's oversight of plaintiff's permits or licenses, and plaintiff's action was supported by substantial argument for extension, modification, or reversal of existing law. Niagara Mohawk Power Corp. v Testone, 272 A.D.2d 910, 708 N.Y.S.2d 527, 2000 N.Y. App. Div. LEXIS 5165 (N.Y. App. Div. 4th Dep't 2000).

In a personal injury action, a third-party defendant should have been granted leave to serve a second amended third-party answer to assert an affirmative defense about a settlement because the settlement had not occurred when the initial pleadings were filed, and it was not shown that the settlement was reasonable. Thome v Benchmark Main Tr. Assocs., LLC, 125 A.D.3d 1283, 3 N.Y.S.3d 475, 2015 N.Y. App. Div. LEXIS 1008 (N.Y. App. Div. 4th Dep't 2015).

Where defendant seeks permission to amend his answer to assert affirmative defenses, if the defenses have merit, the court may, in its discretion, grant the relief requested. Annacchino v Annacchino, 61 Misc. 2d 636, 306 N.Y.S.2d 603, 1969 N.Y. Misc. LEXIS 986 (N.Y. Sup. Ct. 1969).

Defense of lack of personal jurisdiction cannot be asserted in amended answer to amended complaint when defense was omitted from original answer; if defendant neither moves nor interposes jurisdictional objection in his original answer, he has submitted person to jurisdiction of court in accordance with CLS CPLR § 3211(e), and plaintiff's service of amended complaint does not alter that status. Sanchez v L.L.H. Recycled Aggregates, 147 Misc. 2d 41, 554 N.Y.S.2d 398, 1990 N.Y. Misc. LEXIS 175 (N.Y. Sup. Ct. 1990).

Failure of non-settling defendants to request amendment of pleadings to reflect pre-trial release of settling defendants does not preclude granting reduction of ultimate judgment in view of policy considerations against double satisfaction of claim; non-settling defendants' failure to present evidence of settling defendants' equitable shares of liability does not constitute waiver of right to reduction of claim, but merely constitutes waiver of right to relief based upon equitable shares. Audrieth v Parsons Sanitarium, Inc., 588 F. Supp. 1380, 1984 U.S. Dist. LEXIS 24572 (S.D.N.Y. 1984).

4. Sufficiency of denials; general denials

Separate defense as pleaded, together with the facts adduced on the motion to dismiss for insufficiency which showed defendant's reference to statute, adequately raised the issues that plaintiff bought in at the execution sale with knowledge that the sheriff had proceeded upon only five days' notice of sale instead of the minimum of six days as prescribed by statute. Wholesale Service Supply Corp. v Rubin, 27 A.D.2d 957, 279 N.Y.S.2d 403, 1967 N.Y. App. Div. LEXIS 4388 (N.Y. App. Div. 2d Dep't 1967).

General denials in an answer are insufficient to raise triable issues. Iandoli v Lange, 35 A.D.2d 793, 315 N.Y.S.2d 752, 1970 N.Y. App. Div. LEXIS 3459 (N.Y. App. Div. 1st Dep't 1970).

Where the cause of action is based on documentary evidence, the authenticity of which is not disputed, a general denial, without more, will not suffice to raise an issue of fact. Gould v McBride, 36 A.D.2d 706, 319 N.Y.S.2d 125, 1971 N.Y. App. Div. LEXIS 4533 (N.Y. App. Div. 1st Dep't), aff'd, 29 N.Y.2d 768, 326 N.Y.S.2d 565, 276 N.E.2d 626, 1971 N.Y. LEXIS 980 (N.Y. 1971).

While use of general denial against verified complaint containing specific allegations of fact was to be condemned, it should not have resulted in summary judgment for plaintiff, particularly where pleadings before court indicated that several questions of fact were involved which should have been decided by a jury. Rouse v Champion Home Builders Co., 47 A.D.2d 584, 363 N.Y.S.2d 167, 1975 N.Y. App. Div. LEXIS 8681 (N.Y. App. Div. 4th Dep't 1975).

Ever since Court of Appeals sounded death knell on the theory of the pleadings, all vestigial distinctions between exact statements in complaint juxtaposed to manner of their denial in an answer have been put aside in favor of a policy that underscores substance rather than form. Johnson v Munn, 57 A.D.2d 108, 393 N.Y.S.2d 609, 1977 N.Y. App. Div. LEXIS 10931 (N.Y. App. Div. 3d Dep't), app. denied, 42 N.Y.2d 804, 1977 N.Y. LEXIS 3725 (N.Y. 1977).

City did not waive plaintiff's noncompliance with notice of claim requirement of CLS Gen Mun § 50-e, even though city's failure to specifically deny, in its answer, certain paragraph in complaint constituted admission of factual allegation that notice of claim was served after expiration of 90-day filing period, since city's omission was not admission of pleaded legal conclusion that service was timely, particularly where answer asserted, as affirmative defense, complaint's failure to state cause of action. Curtis Case, Inc. v Port Jervis, 150 A.D.2d 421, 541 N.Y.S.2d 32, 1989 N.Y. App. Div. LEXIS 6484 (N.Y. App. Div. 2d Dep't 1989).

In connection with counterclaim by law firm for services rendered in connection with representation of plaintiff in divorce proceeding, plaintiff was not required to provide item by item response in reply since his defense went to entirety of parties' dealings rather than to individual content of account. Green v Harris Beach & Wilcox, 202 A.D.2d 993, 609 N.Y.S.2d 505, 1994 N.Y. App. Div. LEXIS 3361 (N.Y. App. Div. 4th Dep't 1994).

When complaint affirmatively pleaded that limitations on liability set forth in CLS CPLR § 1601 did not apply because claims asserted by plaintiffs fell within exclusion set forth in CLS CPLR § 1602(6), and defendants denied that allegation in their answer, it was not necessary for defendants to plead issue as affirmative defense. Williams v Stimlinger, 229 A.D.2d 1022, 645 N.Y.S.2d 179, 1996 N.Y. App. Div. LEXIS 9105 (N.Y. App. Div. 4th Dep't 1996).

In law firm's action to recover legal fees, general denial in defendants' answer was insufficient to raise issue of fact as to reasonable value of firm's services as itemized in invoices annexed to complaint. Phillips Nizer Benjamin Krim & Ballon LLP v Chu, 240 A.D.2d 231, 659 N.Y.S.2d 4, 1997 N.Y. App. Div. LEXIS 6494 (N.Y. App. Div. 1st Dep't 1997).

In action for breach of contract, in which individual defendant sought partial summary judgment as to portion of complaint that sought damages attributable to greater expense of heating with oil while coal-fired boilers, which were subject of contract allegedly breached by defendants, were inoperable, individual defendant preserved his right to challenge veracity of plaintiff's assertions by denying relevant allegations of complaint, thus placing plaintiff on notice of matter in dispute, where sole question posed by motion was whether it was plaintiff or another that actually sustained consequential damages sought. Facilities Dev. Corp. v Miletta, 246 A.D.2d 869, 667 N.Y.S.2d 805, 1998 N.Y. App. Div. LEXIS 536 (N.Y. App. Div. 3d Dep't), app. dismissed, 92 N.Y.2d 843, 677 N.Y.S.2d 69, 699 N.E.2d 428, 1998 N.Y. LEXIS 1798 (N.Y. 1998).

Plaintiff in action for trespass and nuisance was entitled to partial summary judgment striking affirmative defense that complaint failed to state cause of action; such defense cannot be raised in answer but must be raised by motion under CLS CPLR § 3211(a)(7). Staten Island-Arlington, Inc. v Wilpon, 251 A.D.2d 650, 676 N.Y.S.2d 469, 1998 N.Y. App. Div. LEXIS 7954 (N.Y. App. Div. 2d Dep't 1998), abrogated in part, Butler v Catinella, 58 A.D.3d 145, 868 N.Y.S.2d 101, 2008 N.Y. App. Div. LEXIS 8568 (N.Y. App. Div. 2d Dep't 2008).

Defendant's letter, which was captioned "a reply" to the complaint, which was substantially responsive to allegations of the complaint and was replete with claim that the debt sued on had been paid over and above the amount claimed to be due, was sufficient to qualify as an answer and, hence, since letter was timely served, there was no default. Bambergers Div. of R. H. Macy Co. v Smith, 91 Misc. 2d 856, 398 N.Y.S.2d 945, 1977 N.Y. Misc. LEXIS 2431 (N.Y. County Ct. 1977).

The defendant insurer in an action on a standard form fire insurance policy is not entitled to summary judgment on the ground that plaintiff failed to give immediate written notice of loss as required by the policy since the defendant failed to deny satisfaction of the condition precedent "specifically and with particularity" in its answer (CPLR 3015, subd [a]); a general denial of the general allegation in the complaint that plaintiff has duly performed all the terms and conditions required by the policy is insufficient to "raise issues of fact not appearing on the face of" the

complaint as required by CPLR 3018 (subd [b]) as such denial is, for pleading purposes, an affirmative defense pursuant to CPLR 3018 (subd [b]); failure to plead the defense waives it, and since the general denial effectively conceded satisfaction of the notice condition and waived any defense of noncompliance, defendant is precluded from raising a contrary contention at trial or as a ground for summary judgment. 125 Skillman Ave. Corp. v American Home Assurance Co., 103 Misc. 2d 284, 425 N.Y.S.2d 716, 1980 N.Y. Misc. LEXIS 2110 (N.Y. Civ. Ct. 1980).

In petitioner Comptroller of the City of New York's request for a declaratory judgment that New York City, N.Y., Charter § 362(a), applied to intellectual property, where respondents, the Mayor of the City of New York, the New York City Marketing Development Corporation, and the New York City Department of Citywide Administrative Services, asserted new matter in their verified answer and the Comptroller did not reply thereto, as mandated by N.Y. C.P.L.R. 7804 (d), under N.Y. C.P.L.R. 3018(a), the new matter was admitted to be true by the Comptroller's failure to reply to those allegations. Comptroller v Mayor, 783 N.Y.S.2d 237, 5 Misc. 3d 190, 2004 N.Y. Misc. LEXIS 1138 (N.Y. Sup. Ct. 2004), aff'd, dismissed, 19 A.D.3d 230, 797 N.Y.S.2d 465, 2005 N.Y. App. Div. LEXIS 6788 (N.Y. App. Div. 1st Dep't 2005).

In a commercial summary holdover proceeding, the tenant sufficiently raised, under N.Y. C.P.L.R. 3018(a), noncompliance with the notice requirement, and defect in the landlord's prima facie case through the answer's denials of the landlord's allegations regarding the notice. Second & E. 82 Realty LLC v 82nd St. Gily Corp., 192 Misc. 2d 55, 745 N.Y.S.2d 371, 2002 N.Y. Misc. LEXIS 853 (N.Y. Civ. Ct. 2002).

Respondents' answer, which merely set forth a general denial of the statements contained in petitioner's complaint, was insufficient under CPLR 3018(b) to alert petitioner to respondents' later-articulated claim, that the petitions substantially complied with N.Y. Elec. Law § 6-140, even though they did not contain all the language set out in § 6-140, because § 6-140's residency requirement was unconstitutional. The court could not conclude that the facial invalidity of the petitions was excused on this ground as a matter of law, given the lack of specificity in respondents' pleadings and the fact that they had not submitted an affidavit on

personal knowledge or requested a hearing on the issue. McGuire v Gamache, 234 N.Y.L.J. 66, 2005 N.Y. Misc. LEXIS 3578 (N.Y. Sup. Ct. Oct. 4, 2005), aff'd, 22 A.D.3d 614, 804 N.Y.S.2d 333, 2005 N.Y. App. Div. LEXIS 10923 (N.Y. App. Div. 2d Dep't 2005).

B. Affirmative Defenses

5. Generally

Municipality was not precluded from relying on CLS Gen Oblig § 9-103 as defense in negligence action merely because municipality failed to plead it has affirmative defense or to move for dismissal or summary judgment prior to trial; although better practice would have been to raise this defense earlier by way of motion, statute is not affirmative defense that must be pleaded since, if it is applicable, its sole effect would be to establish substantive law defining extent of duty owed to injured plaintiff under facts asserted by plaintiff. Ferres v New Rochelle, 68 N.Y.2d 446, 510 N.Y.S.2d 57, 502 N.E.2d 972, 1986 N.Y. LEXIS 20857 (N.Y. 1986).

Where a triable issue of fact was presented as to plaintiff's good faith in acquiring a promissory note and mortgage on real property (see Personal Property Law § 403 subd 3, ¶ [a]), an order, denying plaintiff's cross motion for summary judgment in an action to foreclose the mortgage, should be modified in accordance with subd (b) of this section and CPLR 3016(b) to provide that defendants might serve an amended answer to alleged absence of good faith. Hamla Corp. v Ruffo, 26 A.D.2d 883, 274 N.Y.S.2d 395, 1966 N.Y. App. Div. LEXIS 3217 (N.Y. App. Div. 3d Dep't 1966).

In view of Rule 13 of the Court of Claims it is unnecessary for the state to plead an affirmative defense despite CPLR 3018, subd b. Hill v State, 29 A.D.2d 824, 287 N.Y.S.2d 533, 1968 N.Y. App. Div. LEXIS 4593 (N.Y. App. Div. 3d Dep't 1968).

General rule is that an affirmative defense is waived if not raised in the pleading. De Lisa v Amica Mut. Ins. Co., 59 A.D.2d 380, 399 N.Y.S.2d 909, 1977 N.Y. App. Div. LEXIS 13935 (N.Y. App. Div. 3d Dep't 1977).

Since complaint in action seeking declaration that insurer was obligated to defend property owners in negligence action did not allege issue of increased risk, insurer's contention that unnoticed purchase of potentially dangerous property materially increased hazards insured against constituted an affirmative defense and was waived where not pled. De Lisa v Amica Mut. Ins. Co., 59 A.D.2d 380, 399 N.Y.S.2d 909, 1977 N.Y. App. Div. LEXIS 13935 (N.Y. App. Div. 3d Dep't 1977).

Where defendant's argument that by its terms the dealer's contract was terminated by plaintiff's repossession of the trucks and, hence, that plaintiff was required to repurchase them and credit defendant with list price was not based on an appropriate answer, Special Term properly ignored it; in any event, repurchase provision was inapplicable since contract contemplated the dealer's having possession of the equipment, whereas by virtue of its default the equipment had been repossessed. Linde Hydraulics Corp. v Kenco Equipment Co., 59 A.D.2d 1016, 399 N.Y.S.2d 748, 1977 N.Y. App. Div. LEXIS 14294 (N.Y. App. Div. 4th Dep't 1977).

Village waived the affirmative defense of its failure to comply with Vill Law § 5-520(2) by its failure to plead this defense. Vrooman v Middleville, 91 A.D.2d 833, 458 N.Y.S.2d 424, 1982 N.Y. App. Div. LEXIS 19739 (N.Y. App. Div. 4th Dep't 1982), app. denied, 58 N.Y.2d 610, 462 N.Y.S.2d 1028, 449 N.E.2d 427, 1983 N.Y. LEXIS 3857 (N.Y. 1983).

Pleading of affirmative defense merely has effect of gratuitously advising the parties of the apparent insufficiency of the complaint, pursuant to CPLR § 3018(b), and does not constitute a waiver of the requirement that compliance with the ordinance be pleaded in order to state a cause of action, nor did it shift the burden of proving that issue to defendant city. Cipriano v New York, 96 A.D.2d 817, 465 N.Y.S.2d 564, 1983 N.Y. App. Div. LEXIS 19404 (N.Y. App. Div. 2d Dep't 1983).

In an action to foreclose a mortgage, in which defendant interposed an affirmative defense that he was forced to give the mortgage as a result of economic duress practiced upon him by plaintiff who held defendant's personal guarantee and a security interest in the vehicles, threatened to close defendant's business by enforcing the guarantee and the security interest unless defendant signed the mortgage, the affirmative defense was properly dismissed as a matter of law since a threatened exercise of a legal right cannot constitute duress. Marine Midland Bank, N.A. v Mitchell, 100 A.D.2d 733, 473 N.Y.S.2d 664, 1984 N.Y. App. Div. LEXIS 17728 (N.Y. App. Div. 4th Dep't 1984).

Insured was not entitled to strike affirmative defenses set forth in insurer's answer, on ground that they had not been raised in insurer's letter of disclaimer and were therefore waived, where one letter from insurer stated that it was not addressing any question other than scope of coverage, and insurer's disclaimer letter reserved right to reevaluate as new facts became available, and thus there were questions of fact as to whether challenged affirmative defenses had been waived. Powers Chemco, Inc. v Federal Ins. Co., 122 A.D.2d 203, 504 N.Y.S.2d 738, 1986 N.Y. App. Div. LEXIS 59533 (N.Y. App. Div. 2d Dep't 1986).

Affirmative defenses which alleged that plaintiff's claim was "contrary to documentary evidence" and was barred by "waiver and estoppel" and "accord and satisfaction," bereft of factual data, would be stricken with leave to re-plead; defenses which merely plead conclusions of law are insufficient. Bentivegna v Meenan Oil Co., 126 A.D.2d 506, 510 N.Y.S.2d 626, 1987 N.Y. App. Div. LEXIS 41648 (N.Y. App. Div. 2d Dep't 1987), abrogated in part, Butler v Catinella, 58 A.D.3d 145, 868 N.Y.S.2d 101, 2008 N.Y. App. Div. LEXIS 8568 (N.Y. App. Div. 2d Dep't 2008).

It was not abuse of discretion to strike affirmative defense that complaint failed to state cause of action since such claim may not be interposed in answer. Coluccio v Urbanek, 129 A.D.2d 551, 514 N.Y.S.2d 45, 1987 N.Y. App. Div. LEXIS 45221 (N.Y. App. Div. 2d Dep't 1987).

In action on insurance policy to recover value of allegedly stolen jewelry, trial court did not err in refusing to advise jury that it had dismissed insurer's affirmative defenses since evidence offered by insurer on such defenses was also relevant to disprove insured's allegations, and

thus there was no basis to believe that jury was confused as to proof required by respective parties. Palmier v United States Fidelity & Guaranty Co., 135 A.D.2d 1057, 523 N.Y.S.2d 192, 1987 N.Y. App. Div. LEXIS 52916 (N.Y. App. Div. 3d Dep't 1987).

Court properly denied plaintiff's motion to strike affirmative defense of failure to state cause of action since such pleaded defense is harmless surplusage and motion to strike it is unnecessary. Pump v Anchor Motor Freight, Inc., 138 A.D.2d 849, 525 N.Y.S.2d 959, 1988 N.Y. App. Div. LEXIS 2906 (N.Y. App. Div. 3d Dep't 1988).

In foreclosure action, defense of reformation was waived where it was not raised in pleading. Apex Two v Terwilliger, 211 A.D.2d 856, 621 N.Y.S.2d 197, 1995 N.Y. App. Div. LEXIS 33 (N.Y. App. Div. 3d Dep't 1995).

It was no defense in foreclosure action to assert that unrelated drug enforcement action by city, which was not party to mortgage agreement, resulting in one of commercial units being padlocked, decreased mortgagor's revenue and led to default. East N.Y. Sav. Bank v 924 Columbus Assocs., L.P., 216 A.D.2d 118, 628 N.Y.S.2d 642, 1995 N.Y. App. Div. LEXIS 6519 (N.Y. App. Div. 1st Dep't 1995).

Mortgagors failed to show meritorious defense to foreclosure that could have been presented had they not been wrongly advised by disbarred attorney since their claim that they made payments to disbarred attorney with belief that he would forward them to mortgagee was conclusory absent any documentary support, and in any event provided no defense but only right of action against disbarred attorney. Champion Mortg. Co. v Capalbi, 232 A.D.2d 339, 648 N.Y.S.2d 606, 1996 N.Y. App. Div. LEXIS 11221 (N.Y. App. Div. 1st Dep't 1996), app. denied, 89 N.Y.2d 810, 656 N.Y.S.2d 738, 678 N.E.2d 1354, 1997 N.Y. LEXIS 257 (N.Y. 1997).

Defendants were entitled to consideration of defenses raised for first time in their reply affirmation where plaintiff, in response to defendants' preanswer motion to dismiss complaint, alleged new facts showing that he had no cause of action; plaintiff was not prejudiced by defendants' raising of new theories in their reply papers, because defendants' motion to dismiss

complaint had been adjourned, with court's permission, to give plaintiff opportunity to respond, and plaintiff fully opposed defendants' amplified application in long sur-reply. Held v Kaufman, 238 A.D.2d 546, 657 N.Y.S.2d 82, 1997 N.Y. App. Div. LEXIS 4385 (N.Y. App. Div. 2d Dep't 1997), modified, aff'd, 91 N.Y.2d 425, 671 N.Y.S.2d 429, 694 N.E.2d 430, 1998 N.Y. LEXIS 608 (N.Y. 1998).

Worker injured in fall on allegedly defective premises was not entitled to strike lessor corporation's affirmative defense that his exclusive remedy consisted of workers' compensation benefits he had received through lessee corporation (his employer) where there was some evidence that corporations were related, creating fact issue as to whether lessor was alter ego of lessee. Alvarez v Jamnick Realty Corp., 260 A.D.2d 328, 687 N.Y.S.2d 671, 1999 N.Y. App. Div. LEXIS 3515 (N.Y. App. Div. 2d Dep't 1999).

Emergency doctrine was available to a transit authority as a defense to a passenger's personal injury claim, even though it had not been alleged as an affirmative defense in a responsive pleading; the facts leading to the stop of the bus were within the passenger's knowledge. The deposition of the bus driver provided a detailed description of the claim of an emergency stop, vitiating any later claim of surprise by the passenger. Edwards v New York City Tr. Auth., 37 A.D.3d 157, 829 N.Y.S.2d 462, 2007 N.Y. App. Div. LEXIS 1045 (N.Y. App. Div. 1st Dep't 2007).

Although a husband's allegations covering the entire period of the marriage were too vague to apprise the wife of the accusations being leveled against her, the wife's defenses regarding the lure and attraction of a paramour, justification, and constructive abandonment were not affirmative defense under N.Y. C.P.L.R. 3018(b). Dodd v Colbert, 64 A.D.3d 982, 881 N.Y.S.2d 711, 2009 N.Y. App. Div. LEXIS 5538 (N.Y. App. Div. 3d Dep't 2009).

Since a homeowner did not raise the affirmative defense of standing in his answer or in a pre-answer motion to dismiss the foreclosure complaint, he waived that issue. Bank of N.Y. Trust Co., N.A. v Chiejina, 142 A.D.3d 570, 36 N.Y.S.3d 512, 2016 N.Y. App. Div. LEXIS 5645 (N.Y. App. Div. 2d Dep't 2016).

Defendant waived her objection to plaintiff's standing by failing to raise the objection in an answer or in a pre-answer motion to dismiss the complaint. US Bank N.A. v Konstantinovic, 147 A.D.3d 1002, 48 N.Y.S.3d 182, 2017 N.Y. App. Div. LEXIS 1239 (N.Y. App. Div. 2d Dep't 2017).

Law firm’s failure to plead the existence of an alleged oral agreement as an affirmative defense was not fatal to their motion for partial summary judgment because its claim with respect to the alleged oral agreement was not likely to take an attorney by surprise and did not raise issues of fact that did not appear on the face of the pleadings. Capizzi v Brown Chiari LLP, 224 A.D.3d 1266, 205 N.Y.S.3d 301, 2024 N.Y. App. Div. LEXIS 508 (N.Y. App. Div. 4th Dep't 2024).

CPLR 3018(b) governs the pleading of affirmative defenses. Brotherton v New York State Supply Corp., 48 Misc. 2d 463, 264 N.Y.S.2d 1005, 1965 N.Y. Misc. LEXIS 1305 (N.Y. Sup. Ct. 1965).

An allegation contained in an affirmative defense of the defendant is deemed controverted and denied by the plaintiffs where they make no reply thereto and there has been no order requiring a reply. Deck v Chautauqua County Patrons' Fire Relief Ass'n, 73 Misc. 2d 1048, 343 N.Y.S.2d 855, 1973 N.Y. Misc. LEXIS 2352 (N.Y. Sup. Ct. 1973).

In matrimonial action, husband’s affirmative defense that complaint failed to state cause of action would be stricken from his answer where he failed to indicate in what respect such defense had merit. Molinari v Molinari, 134 Misc. 2d 998, 513 N.Y.S.2d 924, 1987 N.Y. Misc. LEXIS 2144 (N.Y. Sup. Ct. 1987).

In action by claimant whose car was hit by state trooper responding to nearby accident scene, state’s general denial in its answer and its assertion that it was “not negligent in any manner, nor guilty of any culpable conduct” did not embrace recklessness standard set forth in CLS Veh & Tr § 1104(e); defense under § 1104(e) should have been affirmatively raised in state’s answer, to enable claimant to evaluate merits of claim before proceeding to trial. Culhane v State, 180 Misc. 2d 61, 687 N.Y.S.2d 542, 1999 N.Y. Misc. LEXIS 105 (N.Y. Ct. Cl. 1999).

Pursuant to CLS CPLR § 3018(b), defendants were required to plead CLS CPLR Art 16 apportionment defense if, and only if, such defense would likely surprise plaintiff or if, and only if, apportionment would inject new factual issue. Maria E. v 599 W. Assocs., 188 Misc. 2d 119, 726 N.Y.S.2d 237, 2001 N.Y. Misc. LEXIS 139 (N.Y. Sup. Ct. 2001).

In the licensing consultant's action in which it sought to recover commissions under its representation agreement with the licensor, the failure of the licensor and licensee to plead as an affirmative defense in their answer pursuant to N.Y. C.P.L.R. 3018(b) the wraparound agreement, under which the licensor granted the licensee a royalty-free license, did not mean that summary judgment pursuant to N.Y. C.P.L.R. 3212 was improperly granted by the trial court; it was proper to grant summary judgment on an unpleaded defense, because the licensing consultant was not surprised and fully opposed the motion. Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp., 2 A.D.3d 266, 768 N.Y.S.2d 329, 2003 N.Y. App. Div. LEXIS 13313 (N.Y. App. Div. 1st Dep't 2003), app. denied, 2 N.Y.3d 702, 778 N.Y.S.2d 461, 810 N.E.2d 914, 2004 N.Y. LEXIS 551 (N.Y. 2004).

Because the differences between affirmative defenses and counterclaims set forth in N.Y. C.P.L.R. 3018(b) and 3019(b) were substantive, an insurer was not required to defend the insured against an affirmative defense filed in response to an action filed by the insured. P.J.P. Mech. Corp. v Commerce & Indus. Ins. Co., 65 A.D.3d 195, 882 N.Y.S.2d 34, 2009 N.Y. App. Div. LEXIS 4893 (N.Y. App. Div. 1st Dep't 2009).

Lack of consideration need not be pled as an affirmative defense under N.Y. C.P.L.R. 3018(b), and the court did not have to dismiss an affirmative defense that did not have to be pled. Armstrong v Forgione, 237 N.Y.L.J. 5, 2006 N.Y. Misc. LEXIS 4128 (N.Y. Sup. Ct. Dec. 5, 2006).

Doctor was not entitled to a comparative negligence charge as the doctor's assertion of an affirmative defense under N.Y. C.P.L.R. art. 16 and N.Y. C.P.L.R. 3018 did not provide a patient with notice that the doctor was asserting a comparative negligence defense under N.Y. C.P.L.R. art. 14-A; N.Y. C.P.L.R. 1603 required any person wishing to avoid the application of N.Y.

C.P.L.R. art. 16 to establish one or more of the exemptions enumerated in N.Y. C.P.L.R. 1602. Jones v Kalache, 915 N.Y.S.2d 479, 30 Misc. 3d 998, 2011 N.Y. Misc. LEXIS 80 (N.Y. Sup. Ct. 2011).

Acceleration of a note by a mortgagee's predecessor in interest was not a nullity because the order of discontinuance of the predecessor's prior action did not state standing was a basis or consideration in reaching the decision; since the defendants in the predecessor's action waived objections, the mortgagee could not raise an objection to its predecessor's standing and seek to use lack of standing to its advantage. HSBC Bank USA, N.A. v Islam, 63 Misc. 3d 796, 97 N.Y.S.3d 447, 2019 N.Y. Misc. LEXIS 1323 (N.Y. Sup. Ct. 2019).

Once the defendant health care facility invokes Public Health Law § 3082 and demonstrates pursuant to § 3082(1) that the statute applies, then § 3082(2) establishes the substantive law defining the scope of the facility's duty to the plaintiff, and the plaintiff must plead and prove that the harm or damages alleged were caused by an act or omission constituting willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm. Crampton v Garnet Health, 73 Misc. 3d 543, 155 N.Y.S.3d 699, 2021 N.Y. Misc. LEXIS 4808 (N.Y. Sup. Ct. 2021).

6. Accord and satisfaction

Claimant against State was not required to anticipate affirmative defense of accord and satisfaction and negate the same in his claim, but he was within his right by attacking affirmative defense by personal affidavit. Landers v State, 56 A.D.2d 105, 391 N.Y.S.2d 723, 1977 N.Y. App. Div. LEXIS 10025 (N.Y. App. Div. 3d Dep't), aff'd, 43 N.Y.2d 784, 402 N.Y.S.2d 386, 373 N.E.2d 281, 1977 N.Y. LEXIS 2571 (N.Y. 1977).

7. Agency

Defendant's contention that the lease negotiators lacked authority to bind the parties was an affirmative defense and defendant's failure to plead the defense in his answer or on a motion to dismiss waived said defense. Schaffer Stores Co. v Grand Union Co., 84 A.D.2d 614, 444 N.Y.S.2d 246, 1981 N.Y. App. Div. LEXIS 15722 (N.Y. App. Div. 3d Dep't 1981), app. dismissed, 56 N.Y.2d 570, 450 N.Y.S.2d 186, 435 N.E.2d 403, 1982 N.Y. LEXIS 3250 (N.Y. 1982), app. dismissed, 56 N.Y.2d 644, 1982 N.Y. LEXIS 5647 (N.Y. 1982).

In an action by a professional corporation seeking to recover for services rendered under an "oral-written contract," summary judgment was improperly granted where the affidavits and exhibits revealed the existence of doubt as to the number of issues, whether in fact there was a contract, the nature and scope or the services to be performed, the fee to be charged for, and for whom the services were to be formed, in that the exhibits clearly indicated that some of the services for which recovery was sought were rendered not to defendant but to an officer of the corporation and there was no showing or even a claim that appropriate corporate approval and authorization had been obtained; while the better practive would have been for defendant to plead the lack of authority issue as an affirmative defense, the failure to do so does not constitute a waiver. Ronder & Ronder, P.C. v Nationwide Abstract Corp., 99 A.D.2d 608, 471 N.Y.S.2d 716, 1984 N.Y. App. Div. LEXIS 16843 (N.Y. App. Div. 3d Dep't 1984).

In action for enforcement of mechanic's liens and for breach of contract to buy prefabricated home, court properly rejected defendants' claim that plaintiff's agent misled them into believing that they needed only $645 in cash to close deal for home and that they detrimentally relied on those misrepresentations where plaintiff had expressly limited its agent's authority in sales contract, so that agent lacked authority to bind plaintiff by oral representations; parties dealing with agent do so at their peril and must make necessary effort to discover agent's actual authority. Court also properly rejected defendants' claim that they did not authorize agent to act as general contractor to build house where they signed written agreement hiring agent to construct house for $33,868.48, they ordered building materials after their building loan was approved, house was built by agent, and house was in defendants' possession. Barden &

Robeson Corp. v Czyz, 245 A.D.2d 599, 665 N.Y.S.2d 442, 1997 N.Y. App. Div. LEXIS 12567 (N.Y. App. Div. 3d Dep't 1997).

Defendants' answer that they acted as agents for a disclosed principal was an affirmative defense under subd (b) of CPLR § 3018. Liberty Lumber Co. v Pye, 44 Misc. 2d 950, 255 N.Y.S.2d 782, 1965 N.Y. Misc. LEXIS 2364 (N.Y. Dist. Ct. 1965).

Defendant's contention that she acted as an agent for a disclosed corporate principal was an affirmative defense, and thus defendant had burden of proving that she so acted in making the contract sued upon. Judith Garden, Inc. v Mapel, 73 Misc. 2d 810, 342 N.Y.S.2d 486, 1973 N.Y. Misc. LEXIS 2087 (N.Y. Civ. Ct.), aff'd, 75 Misc. 2d 558, 348 N.Y.S.2d 975, 1973 N.Y. Misc. LEXIS 1606 (N.Y. App. Term 1973).

8. Arbitration

In an action by a drapery company to confirm an arbitration award generally in its favor arising out of the arbitration provisions of three unpaid invoices reflecting the sale of fabric by a manufacturer to the company, each containing a one-year period of limitation, the petition to confirm the award, with respect to breaches by the manufacturer which occurred more than one year prior to the initiation of arbitration, should have been granted, and the arbitrators did not exceed their authority in making an award with respect thereto, since the manufacturer's failure to assert the affirmative defense of the one-year period of limitation constituted a waiver thereof. Tilbury Fabrics, Inc. v Stillwater, Inc., 81 A.D.2d 532, 438 N.Y.S.2d 82, 1981 N.Y. App. Div. LEXIS 10997 (N.Y. App. Div. 1st Dep't 1981), aff'd, 56 N.Y.2d 624, 450 N.Y.S.2d 478, 435 N.E.2d 1093, 1982 N.Y. LEXIS 3292 (N.Y. 1982).

Requirement of CLS CPLR § 3018(b) that "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issue of fact not appearing on the face of a prior pleading" did not apply, and defendant's failure to plead arbitration as affirmative defense in its answer did not waive its right to bar plaintiff's claims of wrongful termination of dealership agreement, where there had been no arbitration and award, defendant

was not relying on arbitration as affirmative defense or as basis for dismissal of action, but rather claimed that dismissal was required by plaintiff's failure to contest termination by demanding arbitration within period specified in agreement, and defendant's claim rested on pleadings and did not raise new factual issued dehors contract. Island Cash Register v Data Terminal Sys., 244 A.D.2d 117, 676 N.Y.S.2d 146, 1998 N.Y. App. Div. LEXIS 8672 (N.Y. App. Div. 1st Dep't 1998).

9. Assumption of risk defense

Assumption of risk was affirmative defense which was waived where not specifically pleaded. Micallef v Miehle Co., Div. of Miehle-Goss Dexter, Inc., 39 N.Y.2d 376, 384 N.Y.S.2d 115, 348 N.E.2d 571, 1976 N.Y. LEXIS 2623 (N.Y. 1976).

The existence of an express assumption of risk by an injured party is a matter of defense upon which the burden of proof is on the party claiming to have been thus absolved of duty (CPLR § 3018[b]), and is a factual issue for the jury unless there is no real controversy as to the facts. Arbegast v Board of Education, 65 N.Y.2d 161, 490 N.Y.S.2d 751, 480 N.E.2d 365, 1985 N.Y. LEXIS 15867 (N.Y. 1985).

In action for specific performance of option to purchase real property, defendant's failure to plead statute of frauds as affirmative defense constituted waiver of issue regarding requirement that plaintiff's attorney have written authority in order to validly exercise purchase option included in property lease, since such argument constituted statute of frauds contention. Blechner v Pecoraro, 164 A.D.2d 878, 559 N.Y.S.2d 553, 1990 N.Y. App. Div. LEXIS 10574 (N.Y. App. Div. 2d Dep't 1990).

10. Choice of law

Court erred in striking defendant's affirmative defense that Florida law governed action where, inter alia, Florida had greater interest in having its laws applied to subject litigation, Florida's

laws would comport with parties' reasonable expectations, and Florida's applicable laws did not offend any relevant New York public policy. Sullivan v Alamo Rental Corp., 228 A.D.2d 430, 643 N.Y.S.2d 222, 1996 N.Y. App. Div. LEXIS 6208 (N.Y. App. Div. 2d Dep't 1996).

When a worker sued a general contractor under N.Y. Lab. Law §§ 200 and 240 for an injury that occurred in Connecticut, summary judgment dismissing those claims was proper as Connecticut law, rather than New York law, applied to the worker's suit, and the general contractor did not have to plead this as an affirmative defense because this was unlikely to take the worker by surprise and did not raise fact issues not appearing on the fact of a prior pleading, under N.Y. C.P.L.R. 3018(b). Florio v Fisher Dev., Inc., 309 A.D.2d 694, 765 N.Y.S.2d 879, 2003 N.Y. App. Div. LEXIS 11278 (N.Y. App. Div. 1st Dep't 2003).

11. Co-insurance

In action on fire policy, no triable issue with respect to coinsurance existed, since defendant insurer had failed to assert such an affirmative defense or even claim that a coinsurance clause was applicable. Rosenbaum Plus Two Printing, Inc. v Allstate Ins. Co., 59 A.D.2d 939, 399 N.Y.S.2d 458, 1977 N.Y. App. Div. LEXIS 14177 (N.Y. App. Div. 2d Dep't 1977).

12. Counterclaims

In an action to recover damages for breach of a bean-seed-sale contract, defendant supplier was entitled to summary judgment on its counterclaim, since plaintiff buyers' general denial did not suffice to raise claims concerning inferior quality or plaintiff's attempted rejection of substituted seed, and since plaintiff did not raise these factual issues in his pleadings (CPLR § 3018[B]). Munson v New York Seed Improv. Cooperative, Inc., 64 N.Y.2d 985, 489 N.Y.S.2d 39, 478 N.E.2d 180, 1985 N.Y. LEXIS 16677 (N.Y. 1985).

In contract action seeking payment of notes securing sale of cable television businesses, sellers were entitled to dismissal of buyer's affirmative defense alleging that buyer was permitted by

agreement to offset half of value of note owed sellers, due to failure of cable system to meet certain cash-flow tests, where agreement called for final determination of offset to be made in arbitration and buyer failed to bring matter to arbitration when it first became aware that cash-flow tests had not been met; however, since this affirmative defense should have been pleaded as counterclaim, buyer was entitled to re-plead defense as counterclaim. Kahn v New York Times Co., 122 A.D.2d 655, 503 N.Y.S.2d 561, 1986 N.Y. App. Div. LEXIS 59247 (N.Y. App. Div. 1st Dep't 1986).

13. Disability defense

In divorce action against mentally ill husband, failure of his co-guardians to assert his disability as affirmative defense under CLS CPLR § 3018(b) did not bar their reliance on CLS CPLR § 4519 as basis for objection to wife's testimony, since wife could not plausibly claim to be surprised by defendants' assertion of mental illness. Tworkowski v Tworkowski, 181 Misc. 2d 1038, 696 N.Y.S.2d 637, 1999 N.Y. Misc. LEXIS 429 (N.Y. Sup. Ct. 1999).

14. Estoppel; collateral estoppel

In a wrongful death action against the City of New York arising out of the criminally negligent homicide of the decedent who was beaten to death by a police officer, the trial court judgment against the City would be affirmed, although the plaintiff would be required to accept a reduction in the damages award or to undergo a new trial on the issue of damages only, where the individual officer responsible for decedent's death had already been tried and an award of damages in favor of the plaintiff had resulted, whether the jury in that case had been instructed to determine the full measure of damages sustained by the plaintiff or only those damages inflicted by the individual officer was in dispute, the City did not plead collateral estoppel on the issue of damages as an affirmative defense in its answer, and the City's oral motion urging the defense of collateral estoppel was insufficient to prevent a waiver of the defense. Rodriguez v New York, 92 A.D.2d 813, 460 N.Y.S.2d 306, 1983 N.Y. App. Div. LEXIS 17196 (N.Y. App. Div.

1st Dep't 1983), aff'd, 62 N.Y.2d 673, 476 N.Y.S.2d 291, 464 N.E.2d 989, 1984 N.Y. LEXIS 4282 (N.Y. 1984).

In a libel action, an order dismissing a complaint as against certain defendants would be affirmed where defendants asserted that the plaintiff was collaterally estopped from denying that he was negligent in the design of a sewage treatment plan, plaintiff had a full and fair opportunity to litigate that issue in a prior lawsuit brought against it by the municipality which had contracted with it to perform design work on the plant, and there was a sufficient identity of issues between the current action and the prior one for the invocation of the doctrine of collateral estoppel. Kartiganer Associates, P.C. v Wehran Engineering, P.C., 92 A.D.2d 911, 460 N.Y.S.2d 124, 1983 N.Y. App. Div. LEXIS 17313 (N.Y. App. Div. 2d Dep't 1983).

By asserting collateral estoppel as an affirmative defense party effectively waives any claim that the collateral judgment was void for lack of personal jurisdiction. Frantz v Frantz, 92 A.D.2d 950, 460 N.Y.S.2d 668, 1983 N.Y. App. Div. LEXIS 17374 (N.Y. App. Div. 3d Dep't 1983).

Deficiency judgment obtained in mortgage foreclosure action was not obtained in contravention of Sanders v Palmer, 68 NY2d 180, and thus did not have to be set aside, where (1) action involved only properties securing primary obligation and not, as in Sanders, property securing guarantee, and (2) language of judgment of foreclosure, unlike that in Sanders, provided for single sale of 4 parcels and allowed mortgagee to await conclusion of sale before seeking deficiency judgment. In foreclosure action, mortgagors were estopped from relying on Sanders v Palmer, 68 NY2d 180, as ground for setting aside mortgagee’s deficiency judgment where they participated in meeting with referee and agreed to method and mode of foreclosure sale. Adirondack Trust Co. v Farone, 245 A.D.2d 840, 666 N.Y.S.2d 352, 1997 N.Y. App. Div. LEXIS 13200 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 1002, 676 N.Y.S.2d 129, 698 N.E.2d 958, 1998 N.Y. LEXIS 1253 (N.Y. 1998).

Although automobile liability insurer had not in its answer specifically mentioned or pleaded estoppel as normally required, where plaintiff insured’s full knowledge of all matters obviated any possible surprise and insurer’s counsel had argued elements of estoppel in his favor,

estoppel was available to insurer on motion for summary judgment in action for declaratory judgment that insurer's attempted imposition of lien against any tort recovery by insured was impermissible. Pavone v Aetna Casualty & Surety Co., 91 Misc. 2d 658, 398 N.Y.S.2d 391, 398 N.Y.S.2d 630, 1977 N.Y. Misc. LEXIS 2384 (N.Y. Sup. Ct. 1977).

Insurer, who was not a party to a previous declaratory judgment (DJ) action, was not permitted to proactively invoke collateral estoppel to bar a medical provider, who was a party to the DJ action, from recovering no-fault benefits due to the finding of fraudulent incorporation because the insurer did not amend its answer to raise Mallela as a defense and hence create an apparent identity of issues between the DJ action and the instant matter. Downtown Acupuncture PC v State Wide Ins. Co., 50 Misc. 3d 461, 21 N.Y.S.3d 548, 2015 N.Y. Misc. LEXIS 4042 (N.Y. Civ. Ct. 2015).

15. Federal preemption

Although claim of federal preemption should have been pleaded as affirmative defense, waiver that would otherwise have resulted from this failure was retracted by assertion of defense in connection with summary judgment motion. Adsit v Quantum Chem. Corp., 199 A.D.2d 899, 605 N.Y.S.2d 788, 1993 N.Y. App. Div. LEXIS 12483 (N.Y. App. Div. 3d Dep't 1993).

Where defendant, driver of United States post-office truck which ran into plaintiff's vehicle, failed to plead or prove any facts upon which to base finding that defendant was operating post-office truck in the scope of his employment, defendant was not immune from liability for his negligence under federal statute providing immunity from tort liability to employee of federal government acting within scope of his office or employment. Dwyer v Mott, 87 Misc. 2d 965, 386 N.Y.S.2d 312, 1976 N.Y. Misc. LEXIS 2334 (N.Y. City Ct. 1976).

16. Forgery

Where plaintiff in partition action alleged that defendant claimed title based on a group deed from heirs and that signature of plaintiff, one of the several remaindermen, was a forgery, it was obligation of defendant to specifically assert the executrix' deed as an affirmative defense rather than merely referring to such executrix' deed in connection with oral motion for summary judgment which was granted, and in the interests of justice and because of a failure to comply with rule relating to pleading affirmative defenses a new trial was awarded. Fraioli v Lindine, 57 A.D.2d 543, 393 N.Y.S.2d 175, 1977 N.Y. App. Div. LEXIS 11483 (N.Y. App. Div. 2d Dep't 1977).

The statute of limitations must be set out in the answer in order to be availed of as a defense. Rodger v Bliss, 223 N.Y.S. 401, 130 Misc. 168, 1927 N.Y. Misc. LEXIS 957 (N.Y. Sup. Ct. 1927).

17. Fraud

A general release pleaded as a defense will be limited to the matter of a special claim mentioned as settled in said release, and cannot be extended to serve as a release from a claim not mentioned. Haskell v Miller, 221 A.D. 48, 222 N.Y.S. 619, 1927 N.Y. App. Div. LEXIS 6367 (N.Y. App. Div.), aff'd, 246 N.Y. 618, 159 N.E. 675, 246 N.Y. (N.Y.S.) 618, 1927 N.Y. LEXIS 1011 (N.Y. 1927).

Surety's assertion that bank lulled surety into failing to demand that bank foreclose fell far short of pleading fraud or misrepresentation which would release surety. Lincoln Rochester Trust Co. v Seneca Hotel Corp., 41 A.D.2d 888, 342 N.Y.S.2d 136, 343 N.Y.S.2d 136, 1973 N.Y. App. Div. LEXIS 4804 (N.Y. App. Div. 4th Dep't 1973).

Borrower's fraud claims were meritless where lenders made no binding commitment not to foreclose. Borrower's claim of negligent misrepresentation by lenders was properly rejected, absent evidence of relationship of special confidence and trust or of any misrepresentation; lenders kept their promise to afford borrowers limited, conditional accommodation, and they did not prevent that condition's fulfillment. Heller Fin. v Apple Tree Realty Assocs., 238 A.D.2d 198,

656 N.Y.S.2d 247, 1997 N.Y. App. Div. LEXIS 3769 (N.Y. App. Div. 1st Dep't), app. dismissed, 90 N.Y.2d 889, 661 N.Y.S.2d 833, 684 N.E.2d 283, 1997 N.Y. LEXIS 2301 (N.Y. 1997).

In action for enforcement of mechanic's liens and for breach of contract to buy prefabricated home, court properly rejected defendants' claim that plaintiff's agent misled them into believing that they needed only $645 in cash to close deal for home and that they detrimentally relied on those misrepresentations where plaintiff had expressly limited its agent's authority in sales contract, so that agent lacked authority to bind plaintiff by oral representations; parties dealing with agent do so at their peril and must make necessary effort to discover agent's actual authority. Court also properly rejected defendants' claim that plaintiff willfully exaggerated its mechanic's lien in violation of CLS Lien § 39, even though lien amount included goods that had not yet been shipped, where plaintiff testified that it was bound to supply those goods and ultimately did supply them. Barden & Robeson Corp. v Czyz, 245 A.D.2d 599, 665 N.Y.S.2d 442, 1997 N.Y. App. Div. LEXIS 12567 (N.Y. App. Div. 3d Dep't 1997).

Fraud claim was untimely where it was brought more than 6 years after alleged fraud and more than 2 years after plaintiff knew of facts from which fraud could reasonably have been inferred, and plaintiff failed to prove that defendants wrongfully induced it to refrain from commencing action so as to be equitably estopped from asserting statute of limitations as defense. Northridge Ltd. Pshp. v Spence, 246 A.D.2d 582, 668 N.Y.S.2d 220, 1998 N.Y. App. Div. LEXIS 385 (N.Y. App. Div. 2d Dep't 1998).

In action on behalf of decedent wife's estate to recover proceeds of insurance policy on her life after her husband was convicted of her murder, insurer was not entitled to summary judgment based on its claim that policy was procured as part of husband's fraudulent scheme to murder his wife where wife was coapplicant and coinsured, couple had daughter and infant granddaughter, wife held other insurance on her life, and thus insurer failed to prove that wife had no independent motivation to insure her own life. Estate of Grieco v Bankers Am. Life Assurance Co., 251 A.D.2d 446, 674 N.Y.S.2d 408, 1998 N.Y. App. Div. LEXIS 6836 (N.Y. App. Div. 2d Dep't 1998).

Defendants were entitled to summary judgment dismissing causes of action for breach of agreements to pay remaining consulting fee and to reimburse plaintiffs for their expenses in connection with proposed corporate merger where alleged breaches occurred before date of release and unambiguous hold harmless agreement, and allegations of fraud or duress were noticeably absent from both original and amended complaint. Allen v Bergleitner, 255 A.D.2d 668, 679 N.Y.S.2d 458, 1998 N.Y. App. Div. LEXIS 11659 (N.Y. App. Div. 3d Dep't 1998).

Plaintiff failed to state action by alleging that defendant, trading specialist on New York Stock Exchange, where plaintiff was employed as security guard, made false statements intended to deceive plaintiff and that caused plaintiff to allow defendant to enter Exchange with concealed, broken down pieces of shotgun, in violation of widely distributed Exchange rules prohibiting bringing of firearms onto its premises, and that as result, Exchange terminated plaintiff's employment, since allegedly deceitful statements were not set forth with sufficient particularity to satisfy CLS CPLR § 3016(b); further, while plaintiff and defendant owed duty to Exchange to abide by its rules, plaintiff failed to sufficiently set forth basis on which to establish that parties owed duty to each other. Kandros v Lutton, 256 A.D.2d 21, 680 N.Y.S.2d 522, 1998 N.Y. App. Div. LEXIS 12901 (N.Y. App. Div. 1st Dep't 1998).

In action for civil trespass, wherein it was undisputed that defendants gained entry to plaintiff's private medical office by having reporter pose as potential patient using false identity and bogus insurance card, court properly held that defendants' affirmative defenses based on consent and implied consent to enter premises were legally insufficient since consent obtained my misrepresentation or fraud is invalid; further, court properly held that affirmative defense premised on state and federal constitutional free speech guarantees was without merit inasmuch as such guarantees confer no privilege for trespass. Shiffman v Empire Blue Cross & Blue Shield, 256 A.D.2d 131, 681 N.Y.S.2d 511, 1998 N.Y. App. Div. LEXIS 14517 (N.Y. App. Div. 1st Dep't 1998).

In New York importer's action for fraud in connection with its purchase of textiles under contract requiring that textiles be manufactured in Bangladesh (so that they would not be subject to

quotas), in which importer supported its motion for partial summary judgment by submitting Bangladesh manufacturer's affidavit admitting his knowledge that subject textiles were manufactured in Pakistan, defendant bank's claim that affidavit was procured by fraud failed to raise triable issue of fact where it was supported only by unsworn letter from manufacturer's attorneys, not in admissible form. Regent Corp., U.S.A. v Azmat Bangl., Ltd., 253 A.D.2d 134, 686 N.Y.S.2d 24, 1999 N.Y. App. Div. LEXIS 2314 (N.Y. App. Div. 1st Dep't 1999).

Trial court erred in awarding the tenants damages for rent overcharge in the landlord's holdover summary proceeding because the tenants' answer did not allege that there was any fraudulent scheme to deregulate the apartment, they never moved to amend their answer to assert fraud during the one and one-half years the proceeding was pending prior to the enactment of the Housing Stability and Tenant Protection Act, no mention of fraud was made in the parties' detailed stipulation, and neither the sizeable increase in the apartment rent in 2006, based in part on apartment improvements, nor the court's skepticism about the quality or extent of those improvements, were sufficient to establish a colorable claim of fraud. 150 E. Third St LLC v Ryan, 71 Misc. 3d 1, 143 N.Y.S.3d 768, 2021 N.Y. Misc. LEXIS 762 (N.Y. App. Term 2021), aff'd in part, 201 A.D.3d 582, 158 N.Y.S.3d 555, 2022 N.Y. App. Div. LEXIS 500 (N.Y. App. Div. 1st Dep't 2022).

18. Illegality

In an action brought against former employees and their associates to restrain disclosures and the use of trade secrets relating to plaintiff's multi-media network television business, an answer reciting that plaintiffs had achieved a dominant position in its business by numerous acts of unfair competition and predatory practices, which failed to show any connection between plaintiff's alleged illegal practices and defendant's alleged wrongful conduct in appropriating trade secrets, was not a sustainable defense. TNT Communications, Inc. v Management Television Systems, Inc., 32 A.D.2d 55, 299 N.Y.S.2d 692, 1969 N.Y. App. Div. LEXIS 4072

(N.Y. App. Div. 1st Dep't 1969), aff'd, 26 N.Y.2d 639, 307 N.Y.S.2d 667, 255 N.E.2d 780, 1970 N.Y. LEXIS 1661 (N.Y. 1970).

In an action on a group insurance policy, the failure of the insurer to affirmatively plead the defense of illegality will not necessarily prevent the assertion of that defense, particularly if an issue of public policy has been raised. Carlson v Travelers Ins. Co., 35 A.D.2d 351, 316 N.Y.S.2d 398, 1970 N.Y. App. Div. LEXIS 3187 (N.Y. App. Div. 2d Dep't 1970).

In action to recover payment for goods sold and delivered, court should have dismissed buyers' affirmative defense and counterclaim asserting that seller discriminated against them in violation of federal and state antitrust laws by selling same goods to others at lower price, since alleged violation of antitrust laws is not defense to such action, and allegations of price discrimination did not state cause of action under state antitrust laws. TDK Electronics Corp. v M & A Enterprises, 172 A.D.2d 603, 568 N.Y.S.2d 424, 1991 N.Y. App. Div. LEXIS 4610 (N.Y. App. Div. 2d Dep't 1991).

In assignee's action to foreclose mortgage, defendant's vague and speculative assertion that assignment violated prohibition against champerty in CLS Jud § 489 was insufficient to raise triable issue of fact where assignee acquired mortgage as sound and legitimate business investment for valuable and substantial consideration, assignee did not seek to foreclose until about 5 months after assignment, and neither defendant nor any other party sought to satisfy underlying debt in interim. G.G.F. Dev. Corp. v Andreadis, 251 A.D.2d 624, 676 N.Y.S.2d 488, 1998 N.Y. App. Div. LEXIS 7920 (N.Y. App. Div. 2d Dep't 1998).

Borrower, who along with the lender was involved in bookmaking, waived his right to challenge the loan on the basis of illegality because it was not raised as an affirmative defense; even if the issue were not waived, the judgment in favor of the lender was enforceable because neither the agreement nor the performance of the agreement was illegal. Centi v McGillin, 155 A.D.3d 1493, 66 N.Y.S.3d 337, 2017 N.Y. App. Div. LEXIS 8483 (N.Y. App. Div. 3d Dep't 2017), app. dismissed, 31 N.Y.3d 1144, 108 N.E.3d 499, 83 N.Y.S.3d 425, 2018 N.Y. LEXIS 2177 (N.Y.

2018), aff'd, 34 N.Y.3d 1072, 139 N.E.3d 390, 115 N.Y.S.3d 769, 2019 N.Y. LEXIS 3583 (N.Y. 2019).

Facts showing illegality by statute or common law is a recognized affirmative defense (CPLR 3018, subd [b]), and although the defense of illegality is not included among defenses listed in CPLR 3211 (subd [a], par 5), the defense, commonly called the defense of public policy, is a ground for dismissal, pursuant to CPLR 3211 (subd [a], par 7), failure of the pleading to state a cause of action. McCall v Frampton, 99 Misc. 2d 159, 415 N.Y.S.2d 752, 1979 N.Y. Misc. LEXIS 2224 (N.Y. Sup. Ct. 1979), modified, 81 A.D.2d 607, 438 N.Y.S.2d 11, 1981 N.Y. App. Div. LEXIS 11099 (N.Y. App. Div. 2d Dep't 1981).

A village from which an engineering firm sought to recover for services rendered in planning a sewage treatment system could not avoid its contractual liability to the firm by interposing Vill Law § 5-520(2), which prohibited a village's entering into a contract unless the village had appropriated funds or authorized borrowing for the particular purposes of the contract, where the village's answer had not pled such statute as an affirmative defense and where the village had passed a resolution authorizing the issuance of bonds for construction to which the firm's services had been preliminary; even if the contract were void on the basis of such statute, the firm could recover under the doctrine of quantum meruit since the firm had acted in good faith, rendered substantial services to the village and provided the village with an approved set of plans for the construction of sewers; nor was ECL § 17-1901, which permitted any municipality to select a person or firm to perform necessary consulting engineering services with respect to a pure water program so long as the Commissioner of Health was a party to any contract between the municipality and the person or firm, a bar to the firm's action where the commissioner had directed the village to submit to the State Department of Health plans for a sewage treatment system, where the village's contract with the firm required the firm to formulate such plans, and where the commissioner had later approved the design and plans prepared by the firm. Vrooman v Middleville, 106 Misc. 2d 945, 436 N.Y.S.2d 662, 1981 N.Y. Misc. LEXIS 2035 (N.Y.

Sup. Ct. 1981), aff'd, 91 A.D.2d 833, 458 N.Y.S.2d 424, 1982 N.Y. App. Div. LEXIS 19739 (N.Y. App. Div. 4th Dep't 1982).

Trial court properly granted a cooperative corporation’s summary judgment motion pursuant to N.Y. C.P.L.R. 3212 and ruled in favor of a cooperative corporation in a tenant’s declaratory judgment action alleging that the cooperative’s managing agent improperly withheld consent to sublet an apartment; provisions of a lease and cooperative by-laws violated N.Y. Bus. Corp. Law § 501(c) by giving original purchasers more favorable subletting rights than non-original purchasers, and the cooperative did not waive its right to assert the illegality pursuant to N.Y. C.P.L.R. 3018(b). Spiegel v 1065 Park Ave. Corp., 305 A.D.2d 204, 759 N.Y.S.2d 461, 2003 N.Y. App. Div. LEXIS 5445 (N.Y. App. Div. 1st Dep't 2003).

19. Insurance coverage exclusion

If an insurer is to be relieved of a duty to defend a suit against its insured, it is obligated to demonstrate that the allegations of the underlying complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, in toto, are subject to no other interpretation; the insurer may not plead or prove facts which controvert or resolve ambiguities in the allegations of the underlying complaint or which independently establish the applicability of an exclusion from coverage so as to absolve it of its duty to defend. Accordingly, defendant insurer was under no duty to plead exclusions from coverage as an affirmative defense where the underlying complaints were annexed to and made a part of the insured’s complaint in its action to compel the insurer to defend said underlying actions, because it was required to test the applicability of those exclusions solely upon the allegations of the complaints, which appeared on the face of plaintiff insuered’s complaint; had the insured alleged facts bringing the actions within the general coverage clause of the policy and not incorporated the allegations of the underlying complaints into its own complaint, then the insurer would have had to specifically plead as an affirmative defense that the allegations of those complaints established the applicability of exceptions to coverage. Green Bus Lines v Consolidated Mut.

Ins. Co., 74 A.D.2d 136, 426 N.Y.S.2d 981, 1980 N.Y. App. Div. LEXIS 10445 (N.Y. App. Div. 2d Dep't), app. denied, 52 N.Y.2d 701, 436 N.Y.S.2d 1025, 1980 N.Y. LEXIS 4633 (N.Y. 1980).

20. Insurance policy cancellation

In an action for a declaratory judgment brought by the injured party in a one-car collision to determine which of three insurers is obligated to provide coverage upon his claim for personal injuries arising therefrom, it was error to grant motions by the three corporate defendants for judgment, the owner and operator of the car having failed to appear, after plaintiff presented evidence in the form of a letter from one of the insurers stating that it had at one time insured a person with the same last name as the driver residing at the same address given by the driver, but that the policy had been canceled for nonpayment of premiums some eight months prior to the accident; once it was established through the letter that this person had been insured, plaintiff had made out his prima facie case as it was not contended that the person insured was not the party who struck and injured the plaintiff, and it became incumbent on the insurer to go forward with proof of its affirmative defense that the policy had been canceled prior to the date of the occurrence, for, as between itself and the remaining parties, the former had pleaded and sought to rely on the cancellation and therefore had the burden of proof on the issue. In such circumstances, a denial of cancellation by the named insured is not a condition precedent to putting the insurer to its proof, and to whatever extent prior determinations may be read to the contrary, they are overruled. Viuker v Allstate Ins. Co., 70 A.D.2d 295, 420 N.Y.S.2d 926, 1979 N.Y. App. Div. LEXIS 12710 (N.Y. App. Div. 2d Dep't 1979).

In an action by a person who was injured by a motor vehicle against the insurer of the vehicle seeking a judgment declaring that the insurer’s cancellation of the policy covering the vehicle was invalid, the trial court’s judgment declaring the cancellation to be valid would be reversed and the cause remanded for a new trial where, although the insurer’s admission to the complaint’s allegation that it had denied any obligation served to make it unnecessary for the insurer to plead an affirmative defense based on cancellation, the insurer still retained the

burden of proving proper cancellation by demonstrating that both the legend on the front of the notice of cancellation and the financial security statement on the back of it were in 12-point type. Wilkerson v Apollon, 81 A.D.2d 141, 440 N.Y.S.2d 16, 1981 N.Y. App. Div. LEXIS 10504 (N.Y. App. Div. 1st Dep't 1981).

21. Intervenor's standing

Challenge to intervenor's standing was waived in action challenging New York City Charter amendment where it was not raised as affirmative defense or by way of motion to dismiss at Special Term. Fossella v Dinkins, 66 N.Y.2d 162, 495 N.Y.S.2d 352, 485 N.E.2d 1017, 1985 N.Y. LEXIS 20044 (N.Y. 1985).

22. Jurisdiction

In a medical malpractice action, the form of an affirmative defense asserting that "the court does not have jurisdiction of the person of defendant because defendant was not personally served with a copy of the summons and complaint" did not constitute a waiver of the defense that improper substituted service deprived the court of jurisdiction, since the more specific objection relative to substituted service was implied in the stated defense in that the only affidavit of service filed by plaintiff was of substituted service. Rich v Lefkovits, 56 N.Y.2d 276, 452 N.Y.S.2d 1, 437 N.E.2d 260, 1982 N.Y. LEXIS 3393 (N.Y. 1982).

Defendant waived any challenge to court's jurisdiction in personal injury action by failing to make motion to dismiss prior to service of its answer, and introductory paragraph in defendant's answer, which merely asserted that defendant was "sued herein incorrectly," did not suffice to effectively assert jurisdictional challenge in responsive pleading under CLS CPLR § 3018. Anastasiou v Fulton Street Pub, 133 A.D.2d 796, 520 N.Y.S.2d 178, 1987 N.Y. App. Div. LEXIS 51834 (N.Y. App. Div. 2d Dep't 1987).

Respondent insureds and their attorney should be given opportunity to submit responsive pleadings wherein they might raise any appropriate affirmative defense to insurer's petition seeking return of settlement proceeds where insurer was entitled to conversion of proceeding to action, jurisdiction over insureds and attorney was established by personal and alternative service of both notice of petition and petition, and affidavit of insureds in opposition to petition did not sufficiently conform with requirements of CLS CPLR § 3018 by denying each allegation of petition. Nationwide Mut. Ins. Co. v Hausen, 143 A.D.2d 577, 533 N.Y.S.2d 63, 1988 N.Y. App. Div. LEXIS 10100 (N.Y. App. Div. 1st Dep't 1988).

Any deficiency in manner in which summons and complaint first came into possession of foreign corporation did not render its first answer nullity, and therefore its failure to raise jurisdictional issue in that answer constituted waiver of affirmative defense of failure to acquire personal jurisdiction under long-arm statute. Urena v NYNEX, Inc., 223 A.D.2d 442, 637 N.Y.S.2d 49, 1996 N.Y. App. Div. LEXIS 513 (N.Y. App. Div. 1st Dep't 1996).

It was error to grant plaintiffs' motion to strike defendant foreign corporations' affirmative defense, alleging lack of personal jurisdiction, on grounds, inter alia, that defendants' sub-subsidiary was present in New York and shared same individual president-CEO since there was no basis to conclude as matter of law that sub-subsidiary was "mere department" of defendants, and there was no evidence that business of second tier subsidiary was controlled by defendants; moreover, fact that directors and officers of 2 entities overlap to certain extent is intrinsic to parent-subsidiary relationship and, by itself, is not determinative. Rotoli v Domtar, Inc., 224 A.D.2d 939, 637 N.Y.S.2d 894, 1996 N.Y. App. Div. LEXIS 1575 (N.Y. App. Div. 4th Dep't 1996).

Where defendant had taken no appeal from denial of its motion to dismiss for lack of personal jurisdiction, it was precluded from reasserting such claim as affirmative defense, and thus plaintiffs' motion to strike defense was properly granted and defendant's motion for summary judgment was properly denied. Health-Loom Corp. v Sixty-Six Crosby Assocs., 260 A.D.2d 158, 685 N.Y.S.2d 616, 1999 N.Y. App. Div. LEXIS 3222 (N.Y. App. Div. 1st Dep't 1999).

Defendant was not entitled to summary judgment dismissing matrimonial action on jurisdictional ground, under CLS Dom Rel § 230, that neither party had resided in New York during year immediately preceding start of action where his answer to complaint did not deny, and thus under CLS CPLR § 3018 admitted, that he had resided in New York during that period, and his answer even requested court to grant plaintiff divorce and decide parties' economic issues. Long v Long, 281 A.D.2d 324, 722 N.Y.S.2d 151, 2001 N.Y. App. Div. LEXIS 3041 (N.Y. App. Div. 1st Dep't 2001).

Defendant in matrimonial action was not entitled to amend his answer to deny New York residency during pertinent one-year period required for jurisdiction under CLS Dom Rel § 230 where (1) his motion to amend lacked any accompanying affidavit of merit or supporting evidence, (2) his answer to complaint did not deny, and thus under CLS CPLR § 3018 admitted, that he had resided in New York during that period, and (3) his answer even requested court to grant plaintiff divorce and decide parties' economic issues. Long v Long, 281 A.D.2d 324, 722 N.Y.S.2d 151, 2001 N.Y. App. Div. LEXIS 3041 (N.Y. App. Div. 1st Dep't 2001).

Summary judgment dismissal for lack of personal jurisdiction was proper regarding an action by a corporation to recoup real property taxes it allegedly paid to Vermont on a parcel of Vermont land that a landowner, who was a Virginia domiciliary, was adjudged to have adversely possessed against the corporation's claim of ownership. The landowner did not waive jurisdiction by filing a counterclaim for monetary sanctions pursuant to N.Y. C.P.L.R. 8303-a and N.Y. Comp. Codes R. & Regs. tit. 22, part 130 because that counterclaim was related to the corporation's claim and because the landowner asserted lack of personal jurisdiction as an affirmative defense. N.A.S. Holdings, Inc. v Pafundi, 12 A.D.3d 751, 784 N.Y.S.2d 218, 2004 N.Y. App. Div. LEXIS 13014 (N.Y. App. Div. 3d Dep't 2004).

23. Licensing

In action commenced in 1984 for breach of contract and work performed at defendants' apartment, plaintiff contractor had burden of pleading possession of home improvement

contractor license by virtue of CLS CPLR § 3015(e), applicable as of July 30, 1983; thus, court erred in denying defendants' summary judgment motion on ground that home improvement license requirement of NYC Admin Code § 20-385 was affirmative defense which should have been raised in defendants' answer pursuant to CLS CPLR § 3018. Chosen Constr. Corp. v Syz, 138 A.D.2d 284, 525 N.Y.S.2d 848, 1988 N.Y. App. Div. LEXIS 3068 (N.Y. App. Div. 1st Dep't 1988).

24. Notice of claim

In action to foreclose second mortgage after mortgagor, who had defaulted on first mortgage, had purchased property on judicial sale and sold it to purchaser who mortgaged premises to bank, issue of whether bank was a bona fide purchaser without notice was affirmative defense that should have been raised by answer and bank which had not served answer could not raise the defense on motion to dismiss complaint on ground the pleading failed to state a cause of action. Holland v Fulbert, Inc., 49 A.D.2d 86, 371 N.Y.S.2d 509, 1975 N.Y. App. Div. LEXIS 10341 (N.Y. App. Div. 3d Dep't 1975), app. dismissed, 39 N.Y.2d 772, 385 N.Y.S.2d 31, 350 N.E.2d 408, 1976 N.Y. LEXIS 2717 (N.Y. 1976).

In action against city for injuries sustained when child fell from playground apparatus in city park, plaintiffs were entitled to strike affirmative defense alleging that "notice of claim failed to state nature and substance of the alleged occurrence" where notice of claim stated that playground apparatus had improper landing surface and there were only 2 pieces of apparatus in playground. Basile v New York, 156 A.D.2d 239, 548 N.Y.S.2d 499, 1989 N.Y. App. Div. LEXIS 15515 (N.Y. App. Div. 1st Dep't 1989).

Subdivision c of section 3 of the Emergency Tenant Protection Act of 1974 (ETPA) (L 1974, ch 576) requires a municipality to proceed on notice prior to its invocation of a housing emergency; municipal action taken thereunder is presumed properly taken, as is the constitutionality of the statute. However, the legal sufficiency of subdivision c of section 3 of the ETPA, and of the procedures followed by the municipality in invoking and passing a resolution declaring an

emergency thereunder may, in addition to constitutional issues, be pleaded by the landlord as affirmative defenses in opposition to an action for a permanent injunction restraining him from violating the act. Berry Estates, Inc. v Marrero, 101 Misc. 2d 297, 420 N.Y.S.2d 970, 1979 N.Y. Misc. LEXIS 2673 (N.Y. Sup. Ct. 1979), modified in part, rev'd, 74 A.D.2d 871, 426 N.Y.S.2d 47, 1980 N.Y. App. Div. LEXIS 10652 (N.Y. App. Div. 2d Dep't 1980).

25. Offsets; setoffs

Whether setoff is affirmative defense or is more akin to counterclaim, facts in support thereof must be pleaded in answer, and defendant’s failure to do so constituted waiver. Kivort Steel, Inc. v Liberty Leather Corp., 110 A.D.2d 950, 487 N.Y.S.2d 877, 1985 N.Y. App. Div. LEXIS 48848 (N.Y. App. Div. 3d Dep't 1985).

In action by unsecured creditors of bankrupt toy wholesaler against wholesaler’s accountants for fraud and gross negligence in preparation of wholesaler’s certified financial statements upon which creditors’ allegedly relied in selling toys and games to wholesaler on open and unsecured credit, creditors were entitled to dismissal of accountants’ affirmative defenses, setoffs and recoupments alleging antitrust violations, unfair competition and breach of contract since accountants’ alleged fraud or negligence and creditors’ extension of credit in reliance thereon were independent acts wholly unrelated to creditors’ illegal competitive conduct set forth in defenses and setoffs, and accountants incurred no injury arising from creditors’ manipulation of toy market. Hasbro Bradley, Inc. v Coopers & Lybrand, 128 A.D.2d 218, 515 N.Y.S.2d 461, 1987 N.Y. App. Div. LEXIS 43541 (N.Y. App. Div. 1st Dep't), app. dismissed, 70 N.Y.2d 927, 524 N.Y.S.2d 433, 519 N.E.2d 344, 1987 N.Y. LEXIS 19970 (N.Y. 1987).

In action on bond, defendant partnership failed to raise triable issue of fact as to its offset defense where (1) it claimed that plaintiff was mere nominee of her husband, who was its former managing partner, and that it was entitled to offset because of his mismanagement of partnership, (2) financial schedule allegedly prepared by accounting firm and purporting to show partnership losses due to mismanagement by plaintiff’s husband was not verified or certified and

thus lacked evidentiary value, and (3) although claim against plaintiff's husband for breach of fiduciary duty was subject of separate, pending lawsuit, no evidence of liability or damages in that case was offered in support of present defense. Spodek v Park Prop. Dev. Assocs., 263 A.D.2d 478, 693 N.Y.S.2d 199, 130, 130D, 1999 N.Y. App. Div. LEXIS 7880 (N.Y. App. Div. 2d Dep't 1999).

Denial of an architect's motion for summary judgment dismissing contribution and common-law indemnification cross claim and counterclaims asserted against it by a subcontractor was error because, between a claimant and an alleged tortfeasor, although the alleged tortfeasor may have asserted the claimant's own culpable conduct as an affirmative defense and as a ground for the reduction or offset of the claimant's recovery, N.Y. C.P.L.R. 1411, 3018(b), in the absence of a direct tort claim against it by another party, the alleged tortfeasor may not properly have sought contribution, N.Y. C.P.L.R. 1401, or common-law indemnification from the claimant, whether by means of a counterclaim or otherwise, since the relief sought by the tortfeasor did not constitute an independent cause of action, N.Y. C.P.L.R. 3019(a); no party other than the architect asserted a direct tort claim against the subcontractor that would have given rise to contribution or common-law indemnification claims on behalf of the subcontractor against the architect. Accordingly, the architect established its prima facie entitlement to judgment as a matter of law dismissing the contribution and common-law indemnification counterclaims asserted against it by the subcontractor, and, in opposition thereto, the subcontractor failed to raise a triable issue of fact. Capstone Enters. of Port Chester, Inc. v Board of Educ. Irvington Union Free Sch. Dist., 106 A.D.3d 856, 966 N.Y.S.2d 138, 2013 N.Y. App. Div. LEXIS 3366 (N.Y. App. Div. 2d Dep't 2013).

In a wrongful death action filed by a widow whose husband died while he was incarcerated, the appellate court held that the State of New York's request for a collateral source offset should have been pled as an affirmative defense, but the State's application was timely because it was made before the Court of Claims of New York entered judgment, and in the exercise of its discretion, the appellate court deemed the State's answer amended to assert the defense and

remitted the case for further proceedings to determine the application for and, if necessary, the amount of the offset and the amount of the judgment to be entered. Wooten v State, 302 A.D.2d 70, 753 N.Y.S.2d 266, 2002 N.Y. App. Div. LEXIS 12885 (N.Y. App. Div. 4th Dep't 2002).

26. Payment; partial payment

In action to recover rents and other moneys due under sublease, court properly excluded evidence of partial payment since defendant failed to plead payment as affirmative defense in either its answer or motion to dismiss. Valente v Shuman, 137 A.D.2d 678, 524 N.Y.S.2d 770, 1988 N.Y. App. Div. LEXIS 1768 (N.Y. App. Div. 2d Dep't), app. denied, 72 N.Y.2d 805, 532 N.Y.S.2d 755, 528 N.E.2d 1228, 1988 N.Y. LEXIS 2786 (N.Y. 1988).

In action brought by insurer seeking declaration that it was not obligated to continue paying certain of insured’s medical costs, insureds’ affirmative defense of waiver, that insurer’s conduct of paying all medical expenses until time of action constituted intentional renunciation of known right, should have been dismissed since applicable Michigan law allowed no-fault insurer paying medical expenses right to retroactively evaluate medical necessity, so that unprotesting payment did not evince knowing surrender of right to challenge basis for, or extent of, payment obligations. Massachusetts Bay Ins. Co. v Stamm, 256 A.D.2d 181, 683 N.Y.S.2d 20, 1998 N.Y. App. Div. LEXIS 13723 (N.Y. App. Div. 1st Dep't 1998), app. denied, 1999 N.Y. App. Div. LEXIS 5187 (N.Y. App. Div. 1st Dep't Apr. 27, 1999).

Surrogate’s court improperly considered evidence that a corporation made monthly payments in February and March 2006 since the corporation waived its partial payment defense as it was not pled as an affirmative defense; the corporation could not submit evidence of partial payment, and the principal sums awarded to the executor were increased to reflect monthly payments due beginning in February 2006. Ross v Ross Metals Corp., 111 A.D.3d 695, 976 N.Y.S.2d 485, 2013 N.Y. App. Div. LEXIS 7422 (N.Y. App. Div. 2d Dep't 2013).

27. Release

Release, which was obtained in August, 1974, which ran from plaintiff to mall associates and which stated that it arose out of a certain claim for work, labor and services and materials furnished from August 1, 1973 and December 31, 1973 in specified amount, did not encompass balance owing under settlement of claim, as presented in December of 1973, for snow plowing at shopping center especially since defendant, who managed portion of shopping center, merely interposed a simple denial in response to summons and complaint seeking balance due under settlement agreement. Topat Equipment Co. v Porter, 50 A.D.2d 1098, 377 N.Y.S.2d 339, 1975 N.Y. App. Div. LEXIS 12132 (N.Y. App. Div. 4th Dep't 1975).

Release which absolved one motorist for any and all liability for personal injuries and medical expenses and hospital bills arising out of the accident, which then went on to recite only second motorist's personal injury and property damage as well as to indicate that only actions for damages were considered, and which was directly related to action for personal injuries did not, as a matter of law, cover second motorist's claim against first motorist for contribution with respect to recovery against second motorist by a third party as result of the same accident. Dury v Dunadee, 52 A.D.2d 206, 383 N.Y.S.2d 748, 1976 N.Y. App. Div. LEXIS 11981 (N.Y. App. Div. 4th Dep't 1976).

In action to recover $5,000 promissory note, jury questions were made by evidence relating to defendant's contentions that action was barred by release executed by plaintiff and that condition antecedent to payment of note was fulfilled at such time as to prevent running of statute of limitations. Richman v Kauffman, 54 A.D.2d 807, 388 N.Y.S.2d 147, 1976 N.Y. App. Div. LEXIS 14499 (N.Y. App. Div. 3d Dep't 1976), app. denied, 41 N.Y.2d 807, 1977 N.Y. LEXIS 3123 (N.Y. 1977).

Where defendant had notice of subrogated claim of insurer prior to insured's execution of releases, defendant was precluded from asserting defense of release. Scavone v Kings Craft Corp., 55 A.D.2d 807, 390 N.Y.S.2d 20, 1976 N.Y. App. Div. LEXIS 15610 (N.Y. App. Div. 4th Dep't 1976).

Dentist was not entitled to summary judgment in malpractice action based on release clause in patient's arbitration consent form (whereby patient agreed not to bring action against dentist) since dentist failed to plead release clause as affirmative defense. Kinckle v Gasthalter, 128 A.D.2d 504, 512 N.Y.S.2d 435, 1987 N.Y. App. Div. LEXIS 44198 (N.Y. App. Div. 2d Dep't 1987).

Where 81-year-old patient, who had been injured by slipping on polished wooden stairs in insufficiently lighted hall leading to tenant-doctor's office, sued the tenant-doctor after executing a release to the landowner-doctor, who was made a third-party defendant by the defendant-tenant and third party plaintiff, the landowner-doctor's motion to dismiss the third-party action was denied as the third-party plaintiff had not been a party to the release and the release had specifically reserved the plaintiff's rights against the third-party plaintiff. Rake v Corn, 67 Misc. 2d 986, 325 N.Y.S.2d 614, 1971 N.Y. Misc. LEXIS 1355 (N.Y. County Ct. 1971).

A release executed by plaintiff without counsel 20 days after the occurrence of a car accident in which plaintiff, upon acceptance of $775.75 from defendants' insurer for property damage to her car, agreed to release defendants from all claims for personal injuries and consequences therefor, would be limited to property damage only and thus could not be raised as an affirmative defense to plaintiff's personal injury action for an injury to her jaw that was not discovered until after she had executed the release since, despite the broad language found in the release, the intention of both sides was to settle only the property damage claim, inasmuch as both sides mistakenly believed that plaintiff suffered no significant personal injuries at the time the release was delivered and executed, and the mere fact that plaintiff complained of headaches was insufficient to constitute notice of an injury to the jaw. De Costa v Williams, 119 Misc. 2d 314, 462 N.Y.S.2d 799, 1983 N.Y. Misc. LEXIS 3505 (N.Y. Sup. Ct. 1983).

28. Res judicata

Where a suit against a college for alleged fraudulent representation made to an employee in the course of his employment was part of the same factual grouping and originated from the

identical agreement relative to a suit in tort and contract previously dismissed on the grounds of violation of the Statute of Frauds and Statute of Limitations, the previous dismissal was res judicata. Smith v Russell Sage College, 54 N.Y.2d 185, 445 N.Y.S.2d 68, 429 N.E.2d 746, 1981 N.Y. LEXIS 3120 (N.Y. 1981).

Where jury had been instructed, in action brought by lessor of automobile against lessee to recover for damage to the automobile, that if lessor had actually granted permission to lessee's underage friend to operate the vehicle, as he was at the time of the accident, the verdict must be for the lessee, and where jury had found for the lessee, the verdict served as res judicata to establish, in lessee's action against lessor in its status as a self-insurer, that the underage driver was driving with the actual permission of the lessor. Guercio v Hertz Corp., 50 A.D.2d 830, 377 N.Y.S.2d 103, 1975 N.Y. App. Div. LEXIS 11685 (N.Y. App. Div. 2d Dep't 1975), aff'd, 40 N.Y.2d 680, 389 N.Y.S.2d 568, 358 N.E.2d 261, 1976 N.Y. LEXIS 3087 (N.Y. 1976).

Although case adjudicating identical issues involved in instant case, decided after order of Special Term was entered and invoked by neither party on appeal, cannot have res adjudicata effect on instant proceedings, it is, however, persuasive authority. Anderson v Buscaglia, 80 A.D.2d 992, 437 N.Y.S.2d 476, 1981 N.Y. App. Div. LEXIS 10905 (N.Y. App. Div. 4th Dep't 1981).

In order to invoke the principles of res judicata and/or collateral estoppel as a defense to an action, it must be established, inter alia, that the issue in the prior action is identical to, and thus decisive of, the issues to be determined in the current action. Thus, in an action for medical malpractice allegedly committed between May 27, 1974 and June 22, 1974, a defendant doctor's motions for summary judgment and to amend his answer to assert the affirmative defenses of res judicata and collateral estoppel based on a default judgment the doctor received against the present plaintiffs in a previous action to recover for professional services rendered on or about May 21st, l974, were properly denied where the doctor failed to demonstrate the necessary identity of issues to preclude the plaintiffs' later malpractice action in that the doctor's prior action, by its terms, at most, determined the value of services rendered up to and including

May 21st, 1974, and the present plaintiffs should not be precluded thereby from presently litigating the question of malpractice regarding services rendered thereafter. Kossover v Trattler, 82 A.D.2d 610, 442 N.Y.S.2d 554, 1981 N.Y. App. Div. LEXIS 11841 (N.Y. App. Div. 2d Dep't 1981).

In an action seeking an order directing a school district to cure fire violations in an elementary school, the school district's motion to dismiss the complaint on the grounds of res judicata and collateral estoppel was properly denied where the motion was based on the dismissal on the merits of an Article 78 proceeding challenging the board of education's determination to transfer certain students to the elementary school in question, inasmuch as the issue of whether there was a need to correct the alleged dangerous conditions at the school was not necessarily decided in the prior proceeding. Coonradt v Pine Plains Cent. School Dist., 87 A.D.2d 602, 448 N.Y.S.2d 54, 1982 N.Y. App. Div. LEXIS 15890 (N.Y. App. Div. 2d Dep't 1982).

In a personal injury negligence action sustained in a vehicle accident plaintiff was collaterally estopped from relitigating the individual defendant's involvement in the accident after an arbitrator had decided the issue of involvement against plaintiff, despite the fact that the individual defendant was not a party to the arbitration proceeding and failed to plead collateral estoppel as an affirmative defense. Greenspan v Doldorf, 87 A.D.2d 884, 449 N.Y.S.2d 535, 1982 N.Y. App. Div. LEXIS 16385 (N.Y. App. Div. 2d Dep't 1982).

In an Article 78 proceeding seeking a declaration that an auction of certain real property be null and void, and seeking to enjoin the approval of a purchase bid for the property the tender of the property to the bidders, the petitioners were collaterally estopped from asserting their claims where their claims to ownership had been fully adjudicated in a previous action to establish their entitlement to the property. Van Wormer v Leversee, 87 A.D.2d 942, 451 N.Y.S.2d 237, 1982 N.Y. App. Div. LEXIS 16471 (N.Y. App. Div. 3d Dep't 1982).

In an action for reformation of a contract, the court properly dismissed defendant's affirmative defenses of final resolution of the issues and res judicata by virtue of an arbitration award where the arbitrator himself, in his written decision, removed any doubt as to whether he addressed the

issue by explicitly stating “[A]rbitration is not the forum for reform of the contract. That is a judicial function not to be usurped by arbitration.” An action cannot be precluded by arbitration and award if the arbitrator did not reach the question which is the subject matter of the action, even though the arbitrator could have ruled on the question. Independent Asso. of Plastic & Fibre Workers, Local No. 1 v Spaulding Fibre Co., 90 A.D.2d 972, 456 N.Y.S.2d 901, 1982 N.Y. App. Div. LEXIS 19249 (N.Y. App. Div. 4th Dep't 1982).

A school district’s action against the performance bond surety for a contractor that had been hired to construct a high school athletic facility, in which the school disctrict claimed substantial damages for the contractor’s allegedly defective performance, was properly dismissed by the trial court on the ground that the action was barred by res judicata due to the fact that the contractor had earlier obtained a default judgment against the school district for the final payment due under the contract, since a person who was not a party to a prior action, but who is only derivatively or vicariously liable for the conduct of another, may invoke the res judicata effect of a prior judgment on the merits in favor of the one who is primarily liable, and since a recovery by the school district against the surety would give rise to the contractor’s liability to the surety for indemnification, which would clearly act to impair or destroy the contractor’s rights as established through the prior judgment. New Paltz Cent. School Dist. v Reliance Ins. Co., 97 A.D.2d 566, 467 N.Y.S.2d 937, 1983 N.Y. App. Div. LEXIS 20179 (N.Y. App. Div. 3d Dep't 1983).

A former husband’s application to modify a stipulation and judgment of separation was properly denied where the husband had twice previously attempted to find fault with the stipulation provision at issue, and, though the husband was currently advancing a new theory, he was seeking essentially the same relief he had sought on the two prior occasions for harm that allegedly had arisen out of a single factual grouping, so that the husband’s current claim was barred by res judicata. Cimino v Cimino, 98 A.D.2d 706, 469 N.Y.S.2d 103, 1983 N.Y. App. Div. LEXIS 21006 (N.Y. App. Div. 2d Dep't 1983), app. denied, 62 N.Y.2d 605, 1984 N.Y. LEXIS 7743 (N.Y. 1984).

In former wife’s action to set aside provisions of separation agreement incorporated but not merged into divorce decree, Special Term erred in granting husband’s motion to dismiss on ground of res judicata where merits of wife’s contention that agreement was procured through fraud had not been previously litigated. Van Wie v Van Wie, 124 A.D.2d 353, 507 N.Y.S.2d 486, 1986 N.Y. App. Div. LEXIS 61377 (N.Y. App. Div. 3d Dep't 1986).

Mortgagors’ defenses in foreclosure action that mortgagee had charged usurious rate of interest on its loans were barred by doctrine of res judicata where mortgagors had brought related claim in federal court, state law usury claims were dismissed on merits, federal court did not expressly denominate its determination to be without prejudice, and thus its holding served as final determination of those claims in state court. Flushing Nat'l Bank v Durante Bros. & Sons, Inc., 148 A.D.2d 415, 538 N.Y.S.2d 569, 1989 N.Y. App. Div. LEXIS 2465 (N.Y. App. Div. 2d Dep't), app. dismissed, 74 N.Y.2d 841, 546 N.Y.S.2d 557, 545 N.E.2d 871, 1989 N.Y. LEXIS 2765 (N.Y. 1989).

Once appellate process has been exhausted, and absent exceptional circumstances set forth in CLS CPLR § 5015, final determination should remain inviolate even though it is predicated on principles of law that have been overruled. Bray v Gluck, 235 A.D.2d 72, 663 N.Y.S.2d 725, 1997 N.Y. App. Div. LEXIS 11145 (N.Y. App. Div. 3d Dep't 1997), app. dismissed, 91 N.Y.2d 1002, 676 N.Y.S.2d 129, 698 N.E.2d 958, 1998 N.Y. LEXIS 1290 (N.Y. 1998).

Earlier fact finding in main action against defendants-respondents was not binding as to defendant-appellant’s claim against them for indemnification on its liability to plaintiffs for maintenance and cure where judgment for plaintiffs was basis for judgment on indemnification cross claim, and trial court conceded that it was mistaken as to nature of defendant-appellant’s stipulation with defendants-respondents and that misunderstanding was incorporated into resulting judgment, so as to warrant its vacatur. Pires v Frota Oceanica Brasileira, S.A., 240 A.D.2d 324, 659 N.Y.S.2d 25, 1997 N.Y. App. Div. LEXIS 6762 (N.Y. App. Div. 1st Dep't 1997), app. denied in part, app. dismissed, 91 N.Y.2d 948, 671 N.Y.S.2d 709, 694 N.E.2d 877, 1998 N.Y. LEXIS 967 (N.Y. 1998).

In action by lake park commission against lodge owners to collect penalties for nonpayment of commercial dock fees, commission was entitled to summary judgment where affidavit of its executive officer proved prima facie case, owners did not submit proof of payment of fees or of error in computation, and owners' challenge to commission's authority to collect subject fees was barred by res judicata and collateral estoppel as result of prior Supreme Court decision upholding constitutionality of commission's annual dock and mooring fees and their applicability to defendant owners. Lake George Park Comm'n v Salvador, 245 A.D.2d 605, 664 N.Y.S.2d 847, 1997 N.Y. App. Div. LEXIS 12557 (N.Y. App. Div. 3d Dep't 1997), app. dismissed in part, app. denied, 91 N.Y.2d 939, 670 N.Y.S.2d 402, 693 N.E.2d 749, 1998 N.Y. LEXIS 892 (N.Y. 1998).

Creditor's election to proceed against principal debtor in bankruptcy proceeding, in which debt was expunged, barred him from relief in subsequent action against guarantor to recover on promissory note where creditor had full and fair opportunity to litigate claim in bankruptcy; guarantor could use bankruptcy decision defensively under general rule that prior judgment on merits in favor of principal absolves surety of liability. Weiss v Hagopian, 251 A.D.2d 400, 674 N.Y.S.2d 123, 1998 N.Y. App. Div. LEXIS 6620 (N.Y. App. Div. 2d Dep't 1998).

Res judicata barred fraud action against accounting firm and its principal by executrix of decedent's estate where decedent's prior action had been dismissed under CLS CPLR §§ 3016(b) and 3211(a)(7), actions were based on same transactions, and to extent that prior dismissal was based on absence of allegation that decedent had "undertake[n] an independent appraisal of the risk he was assuming" in subject transactions, dismissal was on merits and not merely for technical pleading defect, because it was based on finding that decedent's failure to use due diligence precluded him from prevailing on his fraud claim against defendants, regardless of what other facts he might have alleged; even if prior dismissal did not preclude second complaint alleging that decedent had conducted due diligence investigation, present complaint failed to correct defect or supply such omission in earlier complaint. Lampert v

Ambassador Factors Corp., 266 A.D.2d 124, 698 N.Y.S.2d 234, 1999 N.Y. App. Div. LEXIS 12101 (N.Y. App. Div. 1st Dep't 1999).

Mother was not entitled to reconsideration of visitation order where she did not allege any material change in circumstances but merely sought to relitigate old allegations and issues previously adjudicated by Family Court in numerous prior proceedings concerning custody and visitation. King v King, 266 A.D.2d 546, 698 N.Y.S.2d 906, 1999 N.Y. App. Div. LEXIS 12297 (N.Y. App. Div. 2d Dep't 1999).

Prior dismissal of plaintiff's action for legal malpractice and negligence barred, by res judicata, present action against same defendant, even though plaintiff added claim for breach of contract and alleged additional malpractice committed on later date, where new allegations arose from same attorney-client relationship and should have been pleaded in original complaint. Harley v Hawkins, 281 A.D.2d 593, 722 N.Y.S.2d 393, 2001 N.Y. App. Div. LEXIS 3080 (N.Y. App. Div. 2d Dep't 2001).

Buyers' second fraud action against sellers of land was barred by res judicata, even though it was based on different theories and sought different remedies from those involved in first action, where all causes of action asserted in second action were based on same allegations made in first action concerning condition of land. Pappas v Cerrone, 281 A.D.2d 608, 722 N.Y.S.2d 262, 2001 N.Y. App. Div. LEXIS 3088 (N.Y. App. Div. 2d Dep't 2001).

In an action by an insurer, as subrogee of its insured injured in an automobile accident with defendants, to recover the amount it paid on the insured's claim under supplementary uninsured motorist insurance after the settlement of the insured's prior action against defendants, defendants would be collaterally estopped from relitigating the issue of liability by virtue of a default judgment entered against them on the liability issue on the prior action, since there was an identity of parties, through subrogation, and an identity of issue, and since the default occurred on the insured's motion for summary judgment after issue had been joined and defendants purposefully elected not to answer same. Metropolitan Property & Liability Ins. Co. v

Cassidy, 127 Misc. 2d 641, 486 N.Y.S.2d 843, 1985 N.Y. Misc. LEXIS 2925 (N.Y. Sup. Ct. 1985).

29. Seatbelt defense

Submission of proof by defendant as to availability and nonuse of seat belts was properly denied in action arising from automobile accident where defendant did not submit an affirmative pleading and, since neither vehicle itself nor photograph of its interior were available to plaintiff, any attempt by plaintiff to refute defendant's testimony on ground that seat belts were not in good working order, or were not properly installed or worn, would have been hindered by plaintiff's inability to examine physical evidence. Davis v Davis, 49 A.D.2d 1024, 374 N.Y.S.2d 482, 1975 N.Y. App. Div. LEXIS 11380 (N.Y. App. Div. 4th Dep't 1975).

If defense must be specifically asserted, amended answer is required for defendant to introduce evidence at trial and argue particular defense before jury under CPLR § 3018(b); defendant car rental agency's answer that accident had been caused by plaintiffs' own negligence is not sufficient statement of defense based on plaintiff's nonuse of seat belt. Brodvin v Hertz Corp., 487 F. Supp. 1336, 1980 U.S. Dist. LEXIS 11284 (S.D.N.Y. 1980).

30. Statute of frauds

Where the statute of frauds was not raised as a defense in the answer, defendant would be deemed to have waived that defense. Chester Nat'l Bank v Rondout Marine, Inc., 46 A.D.2d 985, 362 N.Y.S.2d 268, 1974 N.Y. App. Div. LEXIS 3268 (N.Y. App. Div. 3d Dep't 1974), app. denied, 37 N.Y.2d 706, 375 N.Y.S.2d 1025, 1975 N.Y. LEXIS 2817 (N.Y. 1975).

Plaintiff's motion to dismiss the affirmative defense of the statute of frauds in a contracts action would be granted since an express agreement between a cohabitating unmarried couple to compensate one of the parties for services rendered in connection with such a venture is

enforceable even without a writing. Spertell v Hendrix, 93 A.D.2d 788, 461 N.Y.S.2d 823, 1983 N.Y. App. Div. LEXIS 17635 (N.Y. App. Div. 1st Dep't 1983).

In action by landlord to recover damages for tenant's alleged breach of lease by abandoning premises following landlord's renewal of lease, trial court properly rejected tenant's argument during trial that landlord did not validly exercise option to renew lease under statute of frauds, where such point had not been raised either by motion to dismiss or as affirmative defense in tenant's answer. Goldman v Orange County Chapter, N.Y. State Ass'n for Retarded Children, Inc., 121 A.D.2d 683, 503 N.Y.S.2d 884, 1986 N.Y. App. Div. LEXIS 58672 (N.Y. App. Div. 2d Dep't 1986).

In matrimonial action, husband's failure to plead statute of frauds as affirmative defense to oral contract of property conveyance was properly deemed waiver of that defense and permitted trial court to deem contract valid and binding; fact that wife also asserted request for specific performance and imposition of constructive trust (which court denied) did not remove necessity of pleading statute of frauds, even though statute of frauds is not defense to constructive trust claim, since allegations underlying distinct claim for specific performance nonetheless placed contract within statute of frauds as agreement made in consideration of marriage. Marcoux v Marcoux, 123 A.D.2d 844, 507 N.Y.S.2d 458, 1986 N.Y. App. Div. LEXIS 60965 (N.Y. App. Div. 2d Dep't 1986).

Statute of frauds defense was timely interposed in amended answer made as of right to amended complaint, even though defense was not interposed in original answer to original complaint. Aeromar C. Por A. v Port Authority of New York & New Jersey, 145 A.D.2d 584, 536 N.Y.S.2d 173, 1988 N.Y. App. Div. LEXIS 13866 (N.Y. App. Div. 2d Dep't 1988).

Defendant waived affirmative defense of statute of frauds by failing to assert it either in its answer or in motion to dismiss, and indeed mentioning it only as footnote in its eve-of-trial motion for summary judgment. 23/23 Communs. Corp. v GMC, 257 A.D.2d 367, 683 N.Y.S.2d 43, 1999 N.Y. App. Div. LEXIS 72 (N.Y. App. Div. 1st Dep't), app. denied, 93 N.Y.2d 805, 689 N.Y.S.2d 430, 711 N.E.2d 644, 1999 N.Y. LEXIS 796 (N.Y. 1999).

Defendant did not waive an affirmative defense for violation of the statute of frauds, N.Y. Gen. Obl. § 5701, when defendant asserted an affirmative defense under N.Y. Gen. Obl. § 5701(a)(1), but the lower court found instead that dismissal was warranted under N.Y. Gen. Obl. § 5701(a)(10), because plaintiff had notice that defendant intended to assert a statute of frauds defense. Kuhl v Piatelli, 31 A.D.3d 1038, 820 N.Y.S.2d 149, 2006 N.Y. App. Div. LEXIS 9436 (N.Y. App. Div. 3d Dep't 2006).

31. Time limitations, generally

The 60-day time limitation prescribed by subd [a] of § 9 of the Emergency Tenant Protection Act (L 1974, Ch 576) within which a landlord may file an application for an adjustment of the initial legal regulated rent after the effective date of a local legislative resolution declaring a housing emergency, is not a statute of limitations to be affirmatively pleaded as it is not subject to the affirmative pleading requirement of CPLR § 3018 as it is not an “action” within the meaning of CPLR § 201 and therefore is in the nature of a condition precedent, the failure to comply therewith extinguishes the right and the time limitation need not be asserted as an affirmative defense to an action based on such a right. People ex rel. Office of Rent Admin. v Berry Estates, 87 A.D.2d 161, 450 N.Y.S.2d 845, 1982 N.Y. App. Div. LEXIS 16128 (N.Y. App. Div. 2d Dep't), aff'd, 58 N.Y.2d 701, 458 N.Y.S.2d 905, 444 N.E.2d 1324, 1982 N.Y. LEXIS 3918 (N.Y. 1982).

32. —Laches

In an action for damages for breach of a lease and unlawful eviction, brought by a husband 11 months after he had been forced to surrender an apartment rented by his wife during her lifetime with the representation to the landlord that her husband would not be living with her, the trial court improperly refused to strike the landlord’s affirmative defense of laches, where the action was one at law in which plaintiff sought only damages, not the equitable remedy of restoration of possession, where the 11-month delay between surrender and the commencement of the action was not so unconscionable as to warrant the conclusion that the landlord was prejudiced, and

where the action was brought well within the statutory period of limitation. Spence v Franklin Plaza Apartments, 91 A.D.2d 897, 457 N.Y.S.2d 516, 1983 N.Y. App. Div. LEXIS 16172 (N.Y. App. Div. 1st Dep't 1983).

Defendant employer was not required to plead partial or complete performance of oral modification of employment contract where it pleaded breach of contract, laches, and both equitable and promissory estoppel, and its answer set forth sufficient recitation of its position to avoid surprise. Taylor v Blaylock & Partners, L.P., 240 A.D.2d 289, 659 N.Y.S.2d 257, 1997 N.Y. App. Div. LEXIS 6658 (N.Y. App. Div. 1st Dep't 1997).

Assignee of mortgage and promissory note was entitled to deficiency judgment after foreclosure sale where any defenses of mortgagors, including laches, were precluded by stipulation stating that mortgagors agreed to waive any defenses to foreclosure action, that mortgagors “shall be jointly and severally liable for any deficiency and shall consent to the entry of judgment against them for the full amount of said deficiency,” and that agreement would be binding on parties’ successors and assigns. National Loan Investors, L.P. v Goertzel, 251 A.D.2d 639, 676 N.Y.S.2d 605, 1998 N.Y. App. Div. LEXIS 7891 (N.Y. App. Div. 2d Dep't 1998).

Laches did not bar an individual and organization from contesting the issuance of a certificate of appropriateness to remodel a building designated as a landmark, under New York City, N.Y., Admin. Code § 25-305, because (1) the claims were not unreasonably delayed, (2) the four-month statute of limitations in N.Y. C.P.L.R. 217(1) ensured against stale claims, and (3) the developers who obtained the certificate proceeded at the developers’ own risk, despite knowing of opposition to the remodeling. Matter of Allison v New York City Landmarks Preserv. Commn., 944 N.Y.S.2d 408, 35 Misc. 3d 500, 2011 N.Y. Misc. LEXIS 6583 (N.Y. Sup. Ct. 2011).

Trial court properly denied a summary judgment motion filed by a son and a wife in a suit brought by a husband for breach of the wife’s promise in a divorce settlement agreement to sell the marital home and give the husband one-half of the proceeds as laches was an equitable defense that the wife and son waived as they did not assert it in their answers; further, laches was inapplicable to actions at law, and did not bar the husband’s breach of contract and fraud

claims to the extent that they sought money damages. Fade v Pugliani, 8 A.D.3d 612, 779 N.Y.S.2d 568, 2004 N.Y. App. Div. LEXIS 9259 (N.Y. App. Div. 2d Dep't 2004).

33. —Statute of limitations

In a personal injury action against defendant, a private corporation which contractually operated buses with a county which owned the buses and leased them to defendant, the Appellate Division improperly granted plaintiff's motion to strike defendant's affirmative defense that the action could not be maintained because plaintiffs failed to file a notice of claim required by Gen Mun Law § 50-e, where the local law creating the transit system imposed on the county a statutory duty to operate it, and where the imposition of such duty created an obligation that the county indemnify defendant for any damages recovered against it, thereby requiring a notice of claim against the county. Coleman v Westchester Street Transp. Co., 57 N.Y.2d 734, 454 N.Y.S.2d 978, 440 N.E.2d 1324, 1982 N.Y. LEXIS 3659 (N.Y. 1982).

In a negligence action against a subsidiary of the Metropolitan Transportation Authority in which plaintiffs failed to plead or comply with a demand requirement of Pub A Law § 1276, an order granting the subsidiary's motion for summary judgment dismissing the complaint and remitting the matter for a hearing on plaintiffs' contention that the subsidiary should be estopped from asserting plaintiffs' failure to comply with the statute would be affirmed, since the 30-day demand rule of Pub A Law § 1276(1) survived the 1976 amendment (L 1976, Ch 745, § 4) to Subd 6 of that section in actions against subsidiary corporations of public authorities, and the lack of the demand is not a matter required by CPLR § 3018 to be pleaded as an affirmative defense, in that the demand is a condition to consent of the State and the passage of 30 days since the demand is required to be alleged in the complaint. Fleming v Long Island Railroad, 59 N.Y.2d 895, 465 N.Y.S.2d 938, 452 N.E.2d 1266, 1983 N.Y. LEXIS 3221 (N.Y. 1983).

Summary judgment based on running of limitation reversed where there was a question of whether defendant had waived a one year limitation period contained in an insurance contract.

Gartenberg v St. Paul Fire & Marine Ins. Co., 40 A.D.2d 599, 336 N.Y.S.2d 47, 1972 N.Y. App. Div. LEXIS 3868 (N.Y. App. Div. 1st Dep't 1972).

Statute of limitations is an affirmative defense which is waived unless raised by timely motion or answer. Doroski v Mintler, 49 A.D.2d 990, 374 N.Y.S.2d 721, 1975 N.Y. App. Div. LEXIS 11319 (N.Y. App. Div. 3d Dep't 1975).

In action to recover $5,000 promissory note, jury questions were made by evidence relating to defendant's contentions that action was barred by release executed by plaintiff and that condition antecedent to payment of note was fulfilled at such time as to prevent running of statute of limitations. Richman v Kauffman, 54 A.D.2d 807, 388 N.Y.S.2d 147, 1976 N.Y. App. Div. LEXIS 14499 (N.Y. App. Div. 3d Dep't 1976), app. denied, 41 N.Y.2d 807, 1977 N.Y. LEXIS 3123 (N.Y. 1977).

Statute of limitations, urged by employer to have run prior to time subcontractor, named as defendant in suit by injured employee, commenced third-party action against employer for apportionment of damages, was an affirmative defense and, not having pled statute in answer or raised statute by motion prior to time limitation, employer waived its right to urge defense. Grabicki v Penn York Constr. Corp., 55 A.D.2d 258, 390 N.Y.S.2d 232, 1976 N.Y. App. Div. LEXIS 14558 (N.Y. App. Div. 3d Dep't 1976).

Defense of statute of limitations was insufficient where it did not state prescribed period or periods of limitations upon which defendant relied. Cuddihy v Frank, 59 A.D.2d 932, 399 N.Y.S.2d 445, 1977 N.Y. App. Div. LEXIS 14161 (N.Y. App. Div. 2d Dep't 1977).

Omission of statute of limitations defense in defendant's amended answer did not constitute waiver in view of procedural history of case, including facts that defendant had interposed limitations defense in original answer and had moved for partial summary judgment on basis of such defense, that plaintiff was later permitted to amend complaint to allege that facts on which action was based had been fraudulently misrepresented, that defendant cross-moved for partial summary judgment in response to plaintiff's motion for leave to amend complaint (which motion

was denied), and that defendant later made third motion for summary judgment based on deposition which had been taken only after amended answer was served. McIvor v Di Benedetto, 121 A.D.2d 519, 503 N.Y.S.2d 836, 1986 N.Y. App. Div. LEXIS 58495 (N.Y. App. Div. 2d Dep't 1986).

In legal malpractice action, former clients were not entitled to dismissal of attorney's affirmative defenses based upon failure to state cause of action and statute of limitations where issue of fact was presented whether attorney-client relationship existed between parties, since determination of that issue necessarily must precede any determination of whether malpractice action was timely brought. Mazzei v Pokorny, Schrenzel & Pokorny, 125 A.D.2d 374, 509 N.Y.S.2d 100, 1986 N.Y. App. Div. LEXIS 62657 (N.Y. App. Div. 2d Dep't 1986).

Statute of limitations did not constitute appropriate basis for court to grant defendants' motion for reargument and to vacate previous grant of summary judgment to plaintiff where defendants, in opposing summary judgment motion, never argued or even hinted that plaintiff's claims were time-barred, nor did they assert statute of limitations as affirmative defense in their answer as required by CLS CPLR § 3018; having neither been pleaded nor asserted in motion to dismiss, statute of limitation defense was waived. Walden v F. W. Woolworth Co., 138 A.D.2d 261, 525 N.Y.S.2d 224, 1988 N.Y. App. Div. LEXIS 2179 (N.Y. App. Div. 1st Dep't), app. dismissed, 72 N.Y.2d 840, 530 N.Y.S.2d 555, 526 N.E.2d 46, 1988 N.Y. LEXIS 1103 (N.Y. 1988).

Defendant did not waive statute of limitations when he incorrectly cited CPLR instead of EPTL in his answer since simple statement of statute of limitations as defense is sufficient to raise and preserve it, and citation to specific statutory provision is unnecessary. DeSanctis v Laudeman, 169 A.D.2d 1026, 565 N.Y.S.2d 303, 1991 N.Y. App. Div. LEXIS 846 (N.Y. App. Div. 3d Dep't 1991).

Defendants would be estopped from asserting either affirmative defense of statute of limitations or untimeliness of supplemental notice of claim for wrongful death and conscious pain and suffering in medical malpractice action where they had (1) actively concealed plaintiff's mother's death, and (2) failed to reasonably and diligently inquire or ascertain whereabouts of mother's

relatives prior to releasing her body to city mortuary for funeral. Drysdale v New York, 182 A.D.2d 566, 582 N.Y.S.2d 716, 1992 N.Y. App. Div. LEXIS 6361 (N.Y. App. Div. 1st Dep't), app. dismissed, 81 N.Y.2d 759, 594 N.Y.S.2d 718, 610 N.E.2d 391, 1992 N.Y. LEXIS 4381 (N.Y. 1992).

Court erred in dismissing breach of contract action as time-barred by 4-year statute of limitations under CLS UCC § 2-725 where defendant neither pleaded affirmative defense of statute of limitations in its answer nor moved to dismiss on ground of statute of limitations, and court took "judicial notice" of statute of limitations; although court without request may take judicial notice of common law, constitutions, and statutes of United States and of every state, it may not take judicial notice sua sponte that action is barred by statute of limitations. Mendez v Steen Trucking, Inc., 254 A.D.2d 715, 680 N.Y.S.2d 134, 1998 N.Y. App. Div. LEXIS 10389 (N.Y. App. Div. 4th Dep't 1998).

Trial court erred in sua sponte raising the bar of the statute of limitations with respect to a telecommunications company's request for a tax refund, as the county had failed to raise the issue as an affirmative defense in its pre-answer motion to dismiss or in its answer, and the company was prejudiced by its inability to respond thereto. Matter of Level 3 Communications, LLC v Essex County, 129 A.D.3d 1255, 11 N.Y.S.3d 334, 2015 N.Y. App. Div. LEXIS 4794 (N.Y. App. Div. 3d Dep't), app. denied, 26 N.Y.3d 907, 40 N.E.3d 576, 18 N.Y.S.3d 598, 2015 N.Y. LEXIS 3266 (N.Y. 2015).

Office of Temporary and Disability Assistance waived the statute of limitations defense, contending that an applicant's claim alleging that he was denied public assistance solely as a result of his immigration status was subject to a four-month statute of limitations and, therefore, class members could obtain relief with respect to denials occurring only up to four months before the commencement of the article 78 proceeding, because the agency did not plead the defense in its answer. Matter of Karamalla v Devine, 159 A.D.3d 1368, 73 N.Y.S.3d 819, 2018 N.Y. App. Div. LEXIS 2206 (N.Y. App. Div. 4th Dep't 2018).

The statute of limitations must be pleaded as an affirmative defense and may not be imposed by a mere general denial. Harbor Hills Landowners v Manelski, 65 Misc. 2d 682, 318 N.Y.S.2d 793, 1970 N.Y. Misc. LEXIS 1024 (N.Y. Dist. Ct. 1970).

Where respondents in proceeding brought upon an order to show cause to review a determination made by board of estimate and apportionment of the city abolishing position of senior stenographer in department of assessment and taxation failed to raise the defense of statute of limitations in their answer or by motion made prior to time to answer, and respondents did not seek leave to amend their answer, the defense was waived, and hence respondent's motion to dismiss the proceeding would be denied. Mangano v Hanna, 82 Misc. 2d 1018, 370 N.Y.S.2d 838, 1975 N.Y. Misc. LEXIS 2765 (N.Y. Sup. Ct. 1975).

Despite defendant's assertion that cause of action charging breach of warranty was time barred because it was brought more than four years after delivery of allegedly defective product, where defendant, not plaintiff, was only party who knew date of delivery and moving papers did not set forth date when delivery was tendered, motion to dismiss cause of action alleging breach of warranty as being time barred should be denied. Mead v Warner Pruyn Div., Finch Pruyn Sales, Inc., 87 Misc. 2d 782, 386 N.Y.S.2d 342, 1976 N.Y. Misc. LEXIS 2303 (N.Y. Sup. Ct. 1976), aff'd, 57 A.D.2d 340, 394 N.Y.S.2d 483, 1977 N.Y. App. Div. LEXIS 10965 (N.Y. App. Div. 3d Dep't 1977).

Affirmative defense of untimeliness was raised with sufficient particularity to meet requirements of CLS Ct C Act § 11(c) where State of New York, as defendant, answered: "Claimant served neither a notice of intention nor the claim on the State within ninety (90) days of the claim's alleged accrual, as required by Court of Claims Act § 10(3). The Court, therefore, lacks personal jurisdiction over the State and subject matter jurisdiction over the claim." Ramirez v State, 171 Misc. 2d 677, 655 N.Y.S.2d 791, 1997 N.Y. Misc. LEXIS 49 (N.Y. Ct. Cl. 1997).

34. Warranties

The defense of implied warranty of fitness, although it should have been pleaded as an affirmative defense, was nevertheless an issue in the trial for breach of contract by farmer against canner who refused tomatoes because their condition and quality was unacceptable and the verdict for the farmer was properly set aside as compromise. Robusto v Furber, 34 A.D.2d 1093, 312 N.Y.S.2d 642, 1970 N.Y. App. Div. LEXIS 4387 (N.Y. App. Div. 4th Dep't 1970).

II. Under Former Civil Practice Laws

A. How Objection Taken

35. Generally

A party who claimed the benefit of CPA § 30 concerning objection based on statute of limitations, was under the burden of bringing himself within it. Beattys v Straiton, 142 A.D. 369, 126 N.Y.S. 848, 1911 N.Y. App. Div. LEXIS 313 (N.Y. App. Div. 1911).

CPA § 30 relating to taking objection concerning limitation of action did not apply to proceedings in the nature of certiorari to review. People ex rel. Connor v Purroy, 19 N.Y.S. 907 (N.Y.C.P. 1892).

Where a separate defense to an action sets up the statute of limitations plaintiff is entitled to an examination before trial for the purpose of avoiding the defense. Rosenthal v Gordon, 201 N.Y.S. 682, 1923 N.Y. Misc. LEXIS 1306 (N.Y. App. Term 1923).

Objection that proceeding under CPA § 1293 (§§ 404, 7804(f) herein) was barred by statute of limitations could have been presented by motion or answer. Firestone v Town Board of Oyster Bay, 134 N.Y.S.2d 882, 1954 N.Y. Misc. LEXIS 2841 (N.Y. Sup. Ct. 1954).

36. Election of remedies where one barred

CPA § 30 cited in holding that the doctrine of election of remedies could not be applied where one of such two remedies was barred by the statute, even though the statute, to be operative as bar, had to be set up by defendant. Schenck v State Line Tel. Co., 207 A.D. 454, 202 N.Y.S. 378, 1923 N.Y. App. Div. LEXIS 5978 (N.Y. App. Div. 1923), aff'd, 238 N.Y. 308, 144 N.E. 592, 238 N.Y. (N.Y.S.) 308, 1924 N.Y. LEXIS 682 (N.Y. 1924).

Where plaintiff does not admit any part of the answer, allegations of new matter therein are deemed controverted. Mather v Clyde S.S. Co., 37 F.2d 49, 1930 U.S. App. LEXIS 2498 (2d Cir. N.Y. 1930).

37. Motion to intervene

Question of application of statute of limitations to claim of an intervener should not be determined on the motion to intervene. Maas v Sullivan, 207 N.Y.S. 181, 124 Misc. 295, 1924 N.Y. Misc. LEXIS 1045 (N.Y. Sup. Ct. 1924), aff'd, 213 A.D. 820, 208 N.Y.S. 895, 1925 N.Y. App. Div. LEXIS 8741 (N.Y. App. Div. 1925).

38. Suits against heirs and devisees

CPA § 30 did not apply to suits against heirs and devisees (Selover v Coe, 63 NY 438); but any person interested in an estate as heir, devisee or legatee, or creditor, could have, without the concurrence of the executor, interposed the statute as a defense to a claim brought against the estate. Butler v Johnson, 41 Hun 206, 4 N.Y. St. 151 (N.Y.), aff'd, 111 N.Y. 204, 18 N.E. 643, 111 N.Y. (N.Y.S.) 204, 19 N.Y. St. 85, 1888 N.Y. LEXIS 1005 (N.Y. 1888).

39. Short statute of limitations

In order to make a defense under what is called the short statute of limitations, it must be made to appear that all its requirements have been complied with in every respect. Hedges v Conger, 10 N.Y. St. 42.

40. Who may take advantage of statute

A corporation could have availed itself of CPA § 30 as a defense. Olcott v Tioga R. Co., 20 N.Y. 210, 20 N.Y. (N.Y.S.) 210, 1859 N.Y. LEXIS 183 (N.Y. 1859).

A foreign corporation could not have availed itself of CPA § 30 in an action in the courts of this state. Rathbun v Northern C. R. Co., 50 N.Y. 656, 50 N.Y. (N.Y.S.) 656, 1872 N.Y. LEXIS 475 (N.Y. 1872).

A foreign corporation sued in this state cannot avail itself of the statute of limitations and this although it has for the time specified in the statute, before the commencement of the action, continuously operated a railroad in this state, and has property and offices therein. Boardman v Lake S. & M. S. R. Co., 84 N.Y. 157, 84 N.Y. (N.Y.S.) 157, 1881 N.Y. LEXIS 387 (N.Y. 1881).

Where one receiving money in his own right is afterwards, by evidence or construction changed into a trustee, he may plead the statute of limitations as a bar in an action to recover the money. Price v Mulford, 107 N.Y. 303, 14 N.E. 298, 107 N.Y. (N.Y.S.) 303, 12 N.Y. St. 18, 1887 N.Y. LEXIS 1014 (N.Y. 1887).

An executor is bound to interpose the defense of the Statute of Limitations. Miller v Longshore, 147 A.D. 214, 131 N.Y.S. 1041, 1911 N.Y. App. Div. LEXIS 2861 (N.Y. App. Div. 1911).

A representative of an estate may plead Statute of Limitations as defense to claim against estate upon judicial settlement. In re Hall's Estate, 259 N.Y.S. 455, 144 Misc. 616, 1932 N.Y. Misc. LEXIS 1260 (N.Y. Sur. Ct. 1932).

41. Pleading

An action upon a sealed instrument may be brought within twenty years; and an answer which pleads the statute of limitations based on a shorter period is objectionable; if the plaintiff does not prove a sealed instrument he may have leave to amend and then it will be time enough to

set up a defense based on shorter periods of limitation than twenty years. Burstein v Levy, 98 N.Y.S. 853, 49 Misc. 469, 1906 N.Y. Misc. LEXIS 600 (N.Y. App. Term 1906).

It is true that a right to divert waters and to cast them upon another's land may arise through prescription through adverse use but such rights thus acquired constitute a statute of limitations and hence, can be availed of only if pleaded. It is an elementary rule of law that a statute of limitations operates only as a bar to a remedy and if not pleaded, must be considered waived. Therefore, title by prescription is an affirmative defense and must be affirmatively alleged and proved. Foster v Webster, 8 Misc. 2d 61, 44 N.Y.S.2d 153, 1943 N.Y. Misc. LEXIS 1476 (N.Y. Sup. Ct. 1943).

42. Counterclaim

Error of defendant pleading limitations in naming the statute was not fatal. Belmont v New York, 191 A.D. 717, 182 N.Y.S. 173, 1920 N.Y. App. Div. LEXIS 4795 (N.Y. App. Div. 1920).

B. Pleading Certain Facts

i. In General

43. Generally

A point which was not raised at the trial may not be urged in the court of appeals as a basis for a reversal of the judgment. Flagg v Nichols, 307 N.Y. 96, 120 N.E.2d 513, 307 N.Y. (N.Y.S.) 96, 1954 N.Y. LEXIS 1005 (N.Y.), reh'g denied, 307 N.Y. 804, 121 N.E.2d 627, 307 N.Y. (N.Y.S.) 804, 1954 N.Y. LEXIS 1497 (N.Y. 1954).

CPA § 242 did not limit or impair the right of a defendant to move under CPA § 476 (§ 4401, Rule 5012 herein), for judgment on the pleadings, or to move for judgment where the complaint on its face failed to allege facts sufficient to constitute a cause of action. Harmon v Alfred Peats

Co., 216 A.D. 368, 214 N.Y.S. 353, 1926 N.Y. App. Div. LEXIS 9229 (N.Y. App. Div.), rev'd, 243 N.Y. 473, 154 N.E. 314, 243 N.Y. (N.Y.S.) 473, 1926 N.Y. LEXIS 774 (N.Y. 1926).

CPA § 242 cited in discussing what omission from complaint would have been bad on motion for judgment on the pleadings. Richardson v Gregory, 219 A.D. 211, 219 N.Y.S. 397, 1927 N.Y. App. Div. LEXIS 10877 (N.Y. App. Div.), aff'd, 245 N.Y. 540, 157 N.E. 849, 245 N.Y. (N.Y.S.) 540, 1927 N.Y. LEXIS 696 (N.Y. 1927).

Portions of an answer which plead fraud and deceit in an action for false arrest and malicious prosecution may constitute a valid counterclaim but at the same time be insufficient as defenses to the plaintiff’s causes of action where they do not purport to show that the plaintiff’s action is not maintainable or to show avoidance thereof. Jones v Freeman's Dairy, Inc., 283 A.D. 667, 127 N.Y.S.2d 200, 1954 N.Y. App. Div. LEXIS 4834 (N.Y. App. Div. 1954).

44. Courts

CPA §§ 242 and former 265 held applicable to court of claims. Dulinak v State, 30 N.Y.S.2d 799, 177 Misc. 372, 1941 N.Y. Misc. LEXIS 2330 (N.Y. Ct. Cl.), aff'd, 262 A.D. 1064, 30 N.Y.S.2d 838, 1941 N.Y. App. Div. LEXIS 7223 (N.Y. App. Div. 1941).

In surrogate’s court, where party has reason to believe that defenses relied upon by opponent are affirmative in nature, he is entitled to have formal pleadings submitted thereon. In re Sheeler's Will, 89 N.Y.S.2d 342, 195 Misc. 187, 1949 N.Y. Misc. LEXIS 2269 (N.Y. Sur. Ct. 1949).

Former RCP 13 meant that the state was not required to answer since allegations of a claim were deemed to be denied and RCP 13 of the Court of Claims which conflicted with CPA § 242 was a result of the power conferred upon the Court of Claims by section 9, subdivision 9 of the Court of Claims Act. All that the rule absolved the state from doing by its express terms was filing an answer and a defense was deemed interposed although no answer was filed. Easley v State, 10 Misc. 2d 370, 169 N.Y.S.2d 354, 1957 N.Y. Misc. LEXIS 1958 (N.Y. Ct. Cl. 1957).

45. Defenses

Plea that injured workman has lost his right to sue third party because of statutory assignment is plea based on collateral facts showing action not to be maintainable, and must be pleaded affirmatively. Massi v Alben Builders, Inc., 270 A.D. 482, 60 N.Y.S.2d 494, 1946 N.Y. App. Div. LEXIS 3723 (N.Y. App. Div.), aff'd, 296 N.Y. 767, 70 N.E.2d 746, 296 N.Y. (N.Y.S.) 767, 1946 N.Y. LEXIS 1317 (N.Y. 1946).

In an action to enjoin defendants from utilizing or disclosing a secret process, the defendant may allege as an affirmative defense that the plaintiff has no property in the process sought to be protected in that it is known to one employed by at least ten other competing firms in the same field and is generally available to the trade. National Starch Products, Inc. v Polymer Industries, Inc., 273 A.D. 732, 79 N.Y.S.2d 357, 1948 N.Y. App. Div. LEXIS 4676 (N.Y. App. Div.), reh'g denied, 274 A.D. 822, 81 N.Y.S.2d 278, 1948 N.Y. App. Div. LEXIS 3538 (N.Y. App. Div. 1948).

In an action for false arrest and malicious prosecution, allegations in the answer based on claims of negligence setting out nonfeasance of the plaintiff as a corporate officer are insufficient as defenses as they do not purport to show that plaintiff’s action is not maintainable or to show avoidance. Jones v Freeman's Dairy, Inc., 283 A.D. 667, 127 N.Y.S.2d 200, 1954 N.Y. App. Div. LEXIS 4834 (N.Y. App. Div. 1954).

In an action to recover on insurance policy, the defense of extinguishment of insurable interest should be pleaded in the answer. Federowicz v Potomac Ins. Co., 7 A.D.2d 330, 183 N.Y.S.2d 115, 1959 N.Y. App. Div. LEXIS 9618 (N.Y. App. Div. 4th Dep't 1959).

Ambiguity in writing as basis of contract must be affirmatively pleaded as such, and pleader’s version thereof must be set forth. Reliable Press, Inc. v Bristol Carpet Cleaning Co., 21 N.Y.S.2d 76, 174 Misc. 521, 1939 N.Y. Misc. LEXIS 2786 (N.Y. City Ct. 1939), rev'd, 261 A.D. 256, 25 N.Y.S.2d 70, 1941 N.Y. App. Div. LEXIS 7301 (N.Y. App. Div. 1941).

Defendant’s insurer, impleaded by third-party complaint because it refused to defend automobile injury case, was denied dismissal if trial be without jury, and was granted separate trial if with

jury. Remch v Grabow, 70 N.Y.S.2d 462, 193 Misc. 731, 1947 N.Y. Misc. LEXIS 2420 (N.Y. Sup. Ct. 1947).

In action for attorney's services, defendant should raise issue of plaintiff's violation of canons of ethics by pleading it in his answer. Shelton v Gwathmey, 107 N.Y.S.2d 653, 201 Misc. 75, 1951 N.Y. Misc. LEXIS 2405 (N.Y. Sup. Ct. 1951).

Where an assignment of a cause of action to the plaintiff as executrix of an estate is alleged and is denied by the defendant, the issue is properly presented and the defendant is not required to plead affirmatively. Goddard v Gladstone, 8 Misc. 2d 624, 168 N.Y.S.2d 99, 1957 N.Y. Misc. LEXIS 2309 (N.Y. Sup. Ct. 1957).

Where an action was brought on an insurance policy, a defense which was not pleaded as was required under CPA § 242 could not be considered. Zeller v Preferred Mut. Fire Ins. Co., 9 Misc. 2d 855, 168 N.Y.S.2d 260, 1957 N.Y. Misc. LEXIS 2277 (N.Y. Mun. Ct. 1957).

In shipper's action against carrier, any change in the relationship of the carrier and shipper by operation of law is an affirmative defense and must be pleaded. Storm v Pennsylvania R. Co., 30 Misc. 2d 757, 220 N.Y.S.2d 347, 1961 N.Y. Misc. LEXIS 2538 (N.Y. Sup. Ct. 1961).

In an action to foreclose for delinquent taxes failure to make proper credits against a delinquent tax account was held to be a matter of defense. In re List of Delinquent Taxes, 132 N.Y.S.2d 831, 1954 N.Y. Misc. LEXIS 2699 (N.Y. Sup. Ct. 1954), aff'd, 285 A.D. 1084, 141 N.Y.S.2d 507, 1955 N.Y. App. Div. LEXIS 6732 (N.Y. App. Div. 1955), app. dismissed, 309 N.Y. 912, 131 N.E.2d 909, 309 N.Y. (N.Y.S.) 912, 1955 N.Y. LEXIS 1649 (N.Y. 1955).

Where answer does not indicate to what cause of action allegations of defense are directed, same must be tested as defense to entire complaint. Naphtali v Naphtali, 138 N.Y.S.2d 735, 1955 N.Y. Misc. LEXIS 2675 (N.Y. Sup. Ct. 1955), app. denied, 2 A.D.2d 811, 156 N.Y.S.2d 966, 1956 N.Y. App. Div. LEXIS 4508 (N.Y. App. Div. 2d Dep't 1956).

46. When defense deemed controverted

Affirmative defense that valid divorce was granted in Nevada was deemed controverted. Taubenfeld v Taubenfeld, 100 N.Y.S.2d 546, 197 Misc. 1072, 1950 N.Y. Misc. LEXIS 2154 (N.Y. Sup. Ct. 1950).

Allegations of fact, implicit in affirmative defenses, are deemed denied by traverse or avoidance. De Luca v Dowling, 106 N.Y.S.2d 229, 1951 N.Y. Misc. LEXIS 2032 (N.Y. Sup. Ct. 1951).

47. Burden of proof

Whether appropriate or not under CPA § 242, defendant's pleading that goods sold did not conform to the contract, as a separate defense, did not shift the burden of proof. Frankel v Foreman & Clark, Inc., 33 F.2d 83, 1929 U.S. App. LEXIS 2666 (2d Cir. N.Y. 1929).

48. Effect of bill of particulars

A bill of particulars served after service of the answer does not have the effect of making the complaint bad or the answer good, and does not cure defendant's failure to plead the Statute of Frauds or nullify the waiver or abandonment of that defense. Harmon v Alfred Peats Co., 243 N.Y. 473, 154 N.E. 314, 243 N.Y. (N.Y.S.) 473, 1926 N.Y. LEXIS 774 (N.Y. 1926).

Omission to plead special damage cannot be supplied by statements in a bill of particulars without amending the complaint. Jennings v Piwinski, 241 N.Y.S. 349, 136 Misc. 447, 1928 N.Y. Misc. LEXIS 1260 (N.Y. County Ct. 1928).

49. Doubt as to whether special pleading required

Where it was doubtful whether the matters alleged by affirmative defenses in the reply could have been proved under a general denial, order striking out same was reversed. Steinberg v Levy, 248 N.Y.S. 642, 139 Misc. 453, 1931 N.Y. Misc. LEXIS 1157 (N.Y. App. Term 1931).

ii. Particular Matters

50. Statute of Limitations

Appeal record must contain pleading of statute of limitations or motion to dismiss on such ground, in order to make such defense available. Dunning v Dunning, 300 N.Y. 341, 90 N.E.2d 884, 300 N.Y. (N.Y.S.) 341, 1950 N.Y. LEXIS 852 (N.Y. 1950).

Complaint for price of materials furnished village under contract need not allege that action was timely commenced or that notice of claim was timely filed. O'Connell Electric Co. v Macedon, 93 N.Y.S.2d 901, 197 Misc. 22, 1949 N.Y. Misc. LEXIS 3027 (N.Y. Sup. Ct. 1949).

Since the statute of limitations is an affirmative defense, the objection must be pleaded affirmatively in the answer or must be taken by motion under Rule 107. Mesiano v Mazzeo, 12 Misc. 2d 858, 172 N.Y.S.2d 913, 1958 N.Y. Misc. LEXIS 3637 (N.Y. Sup. Ct. 1958).

Motion to amend at trial to interpose defense of statute of limitations will be denied where objection is made and petitioner shows prejudice. Foster v Municipal Housing Authority, 15 Misc. 2d 373, 180 N.Y.S.2d 904, 1958 N.Y. Misc. LEXIS 2073 (N.Y. Sup. Ct. 1958).

Statute must be pleaded, to be considered as bar to objections to allowance of items in executor’s final account. In re Gulbenkian's Estate, 59 N.Y.S.2d 445, 1946 N.Y. Misc. LEXIS 1766 (N.Y. Sur. Ct. 1946).

Where defendant moves to dismiss complaint on ground that cause of action was barred by limitations and where answer does not affirmatively allege limitations as defense but specifically admits that action was timely commenced, yet defendant may move at trial to amend answer to include defense of limitations and exclude admission of timely commencement. Iacono v New York, 136 N.Y.S.2d 767, 1954 N.Y. Misc. LEXIS 3519 (N.Y. Sup. Ct. 1954).

Defendant defaulting in pleading was held to have waived statute of limitations. Corsaro v Lustig, 196 N.Y.S.2d 797 (N.Y. City Ct.), rev'd, 28 Misc. 2d 583, 208 N.Y.S.2d 407, 1960 N.Y. Misc. LEXIS 2162 (N.Y. App. Term 1960).

51. General release

Release of cause of action ordinarily must be pleaded, but State need not plead release of claim unless it interposes counterclaim. Podzuweit v State, 78 N.Y.S.2d 108, 192 Misc. 528, 1948 N.Y. Misc. LEXIS 2228 (N.Y. Ct. Cl. 1948).

52. Stipulation

Defendant city, sued for personal injuries, desiring to rely upon stipulation by parties adjourning examination of plaintiff who filed claim, must plead stipulation as affirmative defense. Di Bartolo v New York, 293 N.Y. 114, 56 N.E.2d 71, 293 N.Y. (N.Y.S.) 114, 1944 N.Y. LEXIS 1325 (N.Y.), reh'g denied, 293 N.Y. 756, 56 N.E.2d 749, 293 N.Y. (N.Y.S.) 756, 1944 N.Y. LEXIS 2178 (N.Y. 1944).

53. Statute of Frauds

Defense of Statute of Frauds should be presented in the answer. Kottler v New York Bargain House, Inc., 242 N.Y. 28, 150 N.E. 591, 242 N.Y. (N.Y.S.) 28, 1926 N.Y. LEXIS 957 (N.Y. 1926).

The defense of the Statute of Frauds held not sustained, it appearing the agreement out of which the dispute arose had been partially performed. Waters v Hall, 218 A.D. 149, 218 N.Y.S. 31, 1926 N.Y. App. Div. LEXIS 5878 (N.Y. App. Div. 1926).

In action to rescind written contract of sale of laundry machinery, for breach of implied warranty of fitness where such contract provided there are “no implied warranties”, complaint was insufficient as matter of law, and defendant was not required to plead such disclaimer. Freemantle v United States Hoffman Machinery Corp., 2 A.D.2d 634, 151 N.Y.S.2d 856, 1956 N.Y. App. Div. LEXIS 5495 (N.Y. App. Div. 3d Dep't 1956).

It is not necessary for a defendant to prove his counterclaim when there is no reply. Charlton v Ward, 168 N.Y.S. 876, 102 Misc. 238, 1918 N.Y. Misc. LEXIS 619 (N.Y. Sup. Ct. 1918).

The Statute of Frauds was a defense to an action on an oral contract allegedly embodied in a subsequent 2-year written contract even though the defense was not affirmatively pleaded. Small v Weissberg, 7 Misc. 2d 492, 163 N.Y.S.2d 892, 1957 N.Y. Misc. LEXIS 2882 (N.Y. City Ct. 1957).

The Statute of Frauds must be pleaded in order for defendant to avail himself of it on a trial. Adsit v First Trust & Deposit Co., 7 Misc. 2d 651, 164 N.Y.S.2d 937, 1957 N.Y. Misc. LEXIS 2723 (N.Y. Sup. Ct. 1957), aff'd, 5 A.D.2d 1050, 174 N.Y.S.2d 227, 1958 N.Y. App. Div. LEXIS 6048 (N.Y. App. Div. 4th Dep't 1958).

In action by tenant to compel landlord to execute lease in accord with oral agreement, landlord should plead Statute of Frauds. See Cahill v Mirando, 141 N.Y.S.2d 567, 1955 N.Y. Misc. LEXIS 2689 (N.Y. Sup. Ct. 1955).

54. Election of remedies

Election of remedies, to be available, must be pleaded by defendant as affirmative defense. Lumber Mut. Casualty Ins. Co. v Friedman, 28 N.Y.S.2d 506, 176 Misc. 703, 1941 N.Y. Misc. LEXIS 1914 (N.Y. Sup. Ct. 1941).

55. Premature action

Municipal corporation must plead special agreement in answer as affirmative defense that action against it was premature. Di Bartolo v New York, 293 N.Y. 114, 56 N.E.2d 71, 293 N.Y. (N.Y.S.) 114, 1944 N.Y. LEXIS 1325 (N.Y.), reh'g denied, 293 N.Y. 756, 56 N.E.2d 749, 293 N.Y. (N.Y.S.) 756, 1944 N.Y. LEXIS 2178 (N.Y. 1944).

56. Illegality of contract

It is not necessary to plead the illegality of a contract which is contrary to public policy. Attridge v Pembroke, 235 A.D. 101, 256 N.Y.S. 257, 1932 N.Y. App. Div. LEXIS 7894 (N.Y. App. Div. 1932).

Where defendant's intention is to plead illegality of contract in their answer the mere words "illegality of contract" are insufficient as a factual pleading. Schorr v Bernarr MacFadden Foundation, Inc., 5 A.D.2d 151, 170 N.Y.S.2d 199, 1958 N.Y. App. Div. LEXIS 7014 (N.Y. App. Div. 1st Dep't), reh'g denied, 5 A.D.2d 861, 172 N.Y.S.2d 532, 1958 N.Y. App. Div. LEXIS 6672 (N.Y. App. Div. 1st Dep't 1958), app. denied, 4 N.Y.2d 677, 1958 N.Y. LEXIS 1457 (N.Y. 1958), app. denied, 5 N.Y.2d 706, 1958 N.Y. LEXIS 1578 (N.Y. 1958).

If a defense rests upon illegality of contract, sufficient must be alleged to establish that the action is not maintainable. Dodge v Richmond, 5 A.D.2d 593, 173 N.Y.S.2d 786, 1958 N.Y. App. Div. LEXIS 5937 (N.Y. App. Div. 1st Dep't 1958).

Airplane carrier must plead in defense its lack of power to make particular contract to transport passenger. Warshak v Eastern Air Lines, Inc., 78 N.Y.S.2d 413, 191 Misc. 503, 1948 N.Y. Misc. LEXIS 2257 (N.Y. City Ct. 1948).

In action to recover damages for fraud and deceit in inducing plaintiff to deliver sum of money to third person, where whole transaction was illegal, defendant should have pleaded illegality as affirmative defense and cannot contend that he was surprised by plaintiff's testimony. Fellner v Marino, 4 Misc. 2d 16, 158 N.Y.S.2d 24, 1956 N.Y. Misc. LEXIS 1231 (N.Y. Mun. Ct. 1956).

Since New York City Municipal Court must allow amendment of pleading at any stage of the cause if substantial justice will be promoted thereby (NYC Mun Ct C § 93), the court deemed defendant's answer amended to raise the defense of illegality. Zinchuk v Taddonio, 16 Misc. 2d 545, 182 N.Y.S.2d 268, 1958 N.Y. Misc. LEXIS 3899 (N.Y. Mun. Ct. 1958).

Defense of noncompliance with Administrative Code of New York City by filing plans before commencing work on building, first raised by affidavit after jury's verdict, was not available to

defeat action for services and materials. Soviero v Amato, 71 N.Y.S.2d 101, 1947 N.Y. Misc. LEXIS 2514 (N.Y. App. Term 1947).

Where court directed a verdict dismissing complaint because contract was illegal, even though defense of illegality had not been affirmatively pleaded. Klein v D. R. Comenzo Co., 207 N.Y.S.2d 739 (N.Y. Mun. Ct. 1960).

57. Ultra vires

Defense of ultra vires must be pleaded. Emigrant Industrial Sav. Bank v McGoldrick, 268 A.D. 277, 50 N.Y.S.2d 955, 1944 N.Y. App. Div. LEXIS 3157 (N.Y. App. Div. 1944).

Affirmative defenses of premature action and ultra vires must be pleaded by plaintiff. International Supply Corp. v Lifton, 52 N.Y.S.2d 123, 183 Misc. 555, 1944 N.Y. Misc. LEXIS 2676 (N.Y. App. Term 1944).

58. Payment

Payment is an affirmative defense and must be pleaded. Commercial Exch. Bank v Woodward, 198 A.D. 769, 191 N.Y.S. 51, 1921 N.Y. App. Div. LEXIS 8176 (N.Y. App. Div. 1921).

Where former wife established that divorce awarded her alimony and remained unmodified at decedent’s death, his estate had burden of pleading and proving payment. In re Bassford's Will, 91 N.Y.S.2d 105, 1949 N.Y. Misc. LEXIS 2542 (N.Y. Sur. Ct. 1949), modified, 277 A.D. 1128, 101 N.Y.S.2d 136 (N.Y. App. Div. 1950).

Payment is affirmative defense and should be so pleaded; if it is only partial defense, it should be so labeled. Prygocki v Prydatko, 105 N.Y.S.2d 205, 1951 N.Y. Misc. LEXIS 1897 (N.Y. Sup. Ct. 1951).

59. Custom

A custom to charge a broker who procures insurance, with the premium, must as a general rule be pleaded. Globe & Rutgers Fire Ins. Co. v Lesher, Whitman & Co., 215 N.Y.S. 225, 126 Misc. 874, 1926 N.Y. Misc. LEXIS 1135 (N.Y. City Ct. 1926).

60. Fraud

Proof of fraud may sometimes be made by circumstantial evidence. Van Iderstine Co. v Barnet Leather Co., 242 N.Y. 425, 152 N.E. 250, 242 N.Y. (N.Y.S.) 425, 1926 N.Y. LEXIS 1001 (N.Y. 1926).

In action for personal injuries by fall into hotel elevator pit, defendant, desiring to show that plaintiff and fiancee registered as husband and wife under assumed names, must plead such imposture in its answer as defense. Rapee v Beacon Hotel Corp., 293 N.Y. 196, 56 N.E.2d 548, 293 N.Y. (N.Y.S.) 196, 1944 N.Y. LEXIS 1302 (N.Y. 1944).

A cause for fraud and deceit is not rendered invalid by reason of the fact that the alleged tortfeasor committed the acts complained of on behalf of a corporation of which he was an officer. Jones v Freeman's Dairy, Inc., 283 A.D. 667, 127 N.Y.S.2d 200, 1954 N.Y. App. Div. LEXIS 4834 (N.Y. App. Div. 1954).

In an action for false arrest and malicious prosecution, allegations of the answer pleading fraud and deceit are insufficient as defense to plaintiff’s causes of action as they do not purport to show that plaintiff’s action is not maintainable or to show avoidance. Jones v Freeman's Dairy, Inc., 283 A.D. 667, 127 N.Y.S.2d 200, 1954 N.Y. App. Div. LEXIS 4834 (N.Y. App. Div. 1954).

Fraud must be affirmatively alleged and proved. 154 West Fourteenth Street Co. v D. A. Schulte, Inc., 202 N.Y.S. 737, 121 Misc. 853, 1923 N.Y. Misc. LEXIS 1436 (N.Y. Sup. Ct. 1923), aff'd, 210 A.D. 851, 206 N.Y.S. 942, 1924 N.Y. App. Div. LEXIS 7478 (N.Y. App. Div. 1924).

Defense that plaintiff’s conveyance to defendant was made with intent to defraud plaintiff’s creditors must be pleaded. Nebbia v Nebbia, 111 N.Y.S.2d 813, 1952 N.Y. Misc. LEXIS 2571 (N.Y. Sup. Ct. 1952).

61. Mistake

Though new matter in an answer is deemed to have been controverted by traverse or avoidance, mistake is not a ground of traverse, and, unless sufficient as a defense, may not be ranked as an avoidance. Susquehanna S.S. Co. v A. O. Andersen & Co., 239 N.Y. 285, 146 N.E. 381, 239 N.Y. (N.Y.S.) 285, 1925 N.Y. LEXIS 966 (N.Y. 1925).

62. Conditional delivery of contract sued on

A defense to a suit on a contract that the contract had been delivered conditionally under CPA § 242 had to be pleaded in order to be available. Camp v Horn, 208 A.D. 122, 203 N.Y.S. 7, 1924 N.Y. App. Div. LEXIS 4991 (N.Y. App. Div. 1924).

In action on negotiable check, failure to plead as defense conditional delivery precludes proof thereof under general denial. Ensign v Klekosky, 25 Misc. 2d 536, 208 N.Y.S.2d 490, 1959 N.Y. Misc. LEXIS 2586 (N.Y. Sup. Ct. 1959), aff'd, 12 A.D.2d 680, 210 N.Y.S.2d 501, 1960 N.Y. App. Div. LEXIS 6752 (N.Y. App. Div. 3d Dep't 1960).

63. Defendant a charitable institution

In an action against a hospital wherein the gravamen of plaintiff’s cause of action was a breach of the defendant’s contract with the plaintiff and the defendant’s negligence in the performance of that contract, held that the defendant should be permitted to set up the separate defense that the defendant was a charitable institution and conducted the hospital for the benefit of the public and not for private gain. Klein v New York Eye & Ear Infirmary, 210 A.D. 770, 201 N.Y.S. 218 (1923).

64. Ratification by infant

It is incumbent upon a plaintiff to prove ratification by a minor, after she attains majority, of a contract made by her while a minor for the purchase of the goods for the value of which he sues. Saxe v Neil, 221 A.D. 492, 224 N.Y.S. 660, 1927 N.Y. App. Div. LEXIS 6478 (N.Y. App. Div. 1927).

Ratification of pledgee's purchase of pledgor's property may be pleaded as such as fact and not conclusion, but it is nevertheless affirmative defense to be pleaded and proved by defendant. Donohue v First Trust Co., 1 Misc. 2d 443, 145 N.Y.S.2d 838, 1955 N.Y. Misc. LEXIS 2298 (N.Y. Sup. Ct. 1955), aff'd, 1 A.D.2d 573, 151 N.Y.S.2d 989, 1956 N.Y. App. Div. LEXIS 5321 (N.Y. App. Div. 3d Dep't 1956).

65. Foreign law

Where complaint states action in conversion, affirmative defense need not set out evidentiary facts, enough must be stated to show legal effect of foreign law or statute upon which defense depends. Raul International Corp. v Howard Morrison Corp., 282 A.D. 1042, 126 N.Y.S.2d 271, 1953 N.Y. App. Div. LEXIS 5760 (N.Y. App. Div. 1953).

An answer is improper where it pleads legal effect of foreign statutes rather than their substance and it is also necessary to plead that foreign statutes were in effect at time of alleged transaction and to negative any exceptions excluded by the foreign statutes from their operation. Szarf v Blumenfeld, 5 A.D.2d 887, 172 N.Y.S.2d 982, 1958 N.Y. App. Div. LEXIS 6545 (N.Y. App. Div. 2d Dep't 1958).

66. Good faith

In action for malicious prosecution by saleswoman against employer, who had detained her until she had signed statement that she had taken purse, good faith of employer had to be pleaded. Gill v Montgomery Ward & Co., 284 A.D. 36, 129 N.Y.S.2d 288, 1954 N.Y. App. Div. LEXIS 3334 (N.Y. App. Div. 1954).

67. Failure to comply with statute

In action on negotiable check, failure to plead compliance with requirement of Real Property Law (§ 442-d) governing actions to recover brokerage precludes proof thereof under general denial. Ensign v Klekosky, 25 Misc. 2d 536, 208 N.Y.S.2d 490, 1959 N.Y. Misc. LEXIS 2586 (N.Y. Sup. Ct. 1959), aff'd, 12 A.D.2d 680, 210 N.Y.S.2d 501, 1960 N.Y. App. Div. LEXIS 6752 (N.Y. App. Div. 3d Dep't 1960).

68. Failure or lack of consideration

In action on negotiable check, failure to plead failure or lack of consideration precludes proof thereof under general denial. Ensign v Klekosky, 25 Misc. 2d 536, 208 N.Y.S.2d 490, 1959 N.Y. Misc. LEXIS 2586 (N.Y. Sup. Ct. 1959), aff'd, 12 A.D.2d 680, 210 N.Y.S.2d 501, 1960 N.Y. App. Div. LEXIS 6752 (N.Y. App. Div. 3d Dep't 1960).

C. When Allegation Not Denied Is Deemed True

i. In General

69. Generally

CPA § 243 required each material allegation of the complaint not controverted by the answer to be taken as true. Conselyea v Swift, 103 N.Y. 604, 9 N.E. 489, 103 N.Y. (N.Y.S.) 604, 4 N.Y. St. 278, 1886 N.Y. LEXIS 1098 (N.Y. 1886).

Defendant cannot create right to remove case to federal court by amending its answer to set forth removable claim, such as one under Sherman or Clayton Acts. United Artists Corp. v Ancore Amusement Corp., 91 F. Supp. 132, 1950 U.S. Dist. LEXIS 2700 (D.N.Y. 1950).

70. Bill of particulars

Where the defendant’s answer denies all the material allegations of the complaint, the fact that the defendant’s counsel, when cross-examining the president of the plaintiff, who had verified the complaint and bill of particulars, asked if the facts stated on the bill of particulars were true, does not entitled the plaintiff to introduce the bill of particulars as evidence against the defendant. Roscoe Lumber Co. v Standard Silica Cement Co., 62 A.D. 421, 70 N.Y.S. 1130, 1901 N.Y. App. Div. LEXIS 1265 (N.Y. App. Div. 1901).

71. Motion for judgment on pleadings

On defendant’s motion for judgment on pleadings, all allegations of complaint are admittedly true. Bogart v Westchester County, 270 A.D. 274, 59 N.Y.S.2d 77, 1945 N.Y. App. Div. LEXIS 2852 (N.Y. App. Div. 1945), app. denied, 295 N.Y. 934, 68 N.E.2d 36, 295 N.Y. (N.Y.S.) 934, 1946 N.Y. LEXIS 1079 (N.Y. 1946), app. dismissed, 296 N.Y. 701, 70 N.E.2d 531, 296 N.Y. (N.Y.S.) 701, 1946 N.Y. LEXIS 1264 (N.Y. 1946).

Motion to dismiss complaint, made on pleadings, cannot be granted on basis of allegations contained in defense, which are deemed controverted by traverse or avoidance. Owens v Owens, 1 A.D.2d 844, 148 N.Y.S.2d 813, 1956 N.Y. App. Div. LEXIS 6336 (N.Y. App. Div. 2d Dep't 1956).

Allegations of new matter in answer cannot sustain judgment on pleadings, since they are deemed controverted. Rothrock Syosset, Inc. v Kreutzer, 2 A.D.2d 777, 154 N.Y.S.2d 816, 1956 N.Y. App. Div. LEXIS 4583 (N.Y. App. Div. 2d Dep't), app. denied, 2 A.D.2d 814, 154 N.Y.S.2d 847, 1956 N.Y. App. Div. LEXIS 4493 (N.Y. App. Div. 2d Dep't 1956).

On a motion for judgment on the pleadings the court would not consider defenses contained in the answer because such defenses were deemed controverted by plaintiff under CPA § 243. Shapiro v Thompson, 6 A.D.2d 608, 180 N.Y.S.2d 528, 1958 N.Y. App. Div. LEXIS 3896 (N.Y. App. Div. 3d Dep't 1958), app. dismissed, 6 N.Y.2d 747, 186 N.Y.S.2d 279, 158 N.E.2d 851, 1959 N.Y. LEXIS 1477 (N.Y. 1959).

New matter in answer calls for no reply; is deemed to be controverted; and will not be considered on motion for judgment on the pleadings. Brennan v Barnes, 232 N.Y.S. 112, 133 Misc. 340, 1928 N.Y. Misc. LEXIS 1177 (N.Y. Sup. Ct. 1928).

See Blessington v McCrory Stores Corp., 91 N.Y.S.2d 73, 195 Misc. 710, 1949 N.Y. Misc. LEXIS 2535 (N.Y. Sup. Ct. 1949).

On defendant's motion for judgment on pleadings under CPA § 476 (§ 4401, Rule 5012 herein) defendant was not entitled to benefit of any allegations in answer since they were deemed denied; sole inquiry related to sufficiency of complaint. Klein v Ekco Products Co., 135 N.Y.S.2d 391, 1954 N.Y. Misc. LEXIS 3008 (N.Y. Sup. Ct. 1954), aff'd, 285 A.D. 908, 139 N.Y.S.2d 258, 1955 N.Y. App. Div. LEXIS 6085 (N.Y. App. Div. 1955), app. denied, 285 A.D. 1060, 139 N.Y.S.2d 923, 1955 N.Y. App. Div. LEXIS 6674 (N.Y. App. Div. 1955).

New matter pleaded as a separate defense was deemed controverted in plaintiff's motion for judgment on the pleadings. Lidgerwood v Hale & Kilburn Corp., 47 F.2d 318, 1930 U.S. Dist. LEXIS 1643 (D.N.Y. 1930).

72. Motion to dismiss complaint

Matters of fact alleged in an answer are not to be regarded as admitted by the complaint for the purpose of a motion to dismiss such complaint; proof of such allegations must be given. Bannister v Michigan Mut. Life Ins. Co., 111 A.D. 765, 97 N.Y.S. 843, 1906 N.Y. App. Div. LEXIS 250 (N.Y. App. Div. 1906).

Where complaint is challenged after service of answer, complaint cannot be dismissed because of any defense in answer since such defenses are deemed controverted. Ohmeis v Schatzkin, 86 N.Y.S.2d 68, 1948 N.Y. Misc. LEXIS 3878 (N.Y. Sup. Ct. 1948).

73. Hearing on question of effect of failure to deny

On motion to open a default it is discretionary with the court to refuse to decide the question as to the effect of a failure to reply to a counterclaim and refer it for determination to the ordinary proceedings in the action. Traitteur v Levingston, 13 N.Y.S. 603, 59 N.Y. Super. Ct. 140, 1891 N.Y. Misc. LEXIS 1589 (N.Y. Super. Ct. 1891).

ii Allegations

74. Generally

Allegations are material unless they may be struck out as surplusage. Mayor of Albany v Cunliff, 2 N.Y. 165, 2 N.Y. (N.Y.S.) 165, 1849 N.Y. LEXIS 7 (N.Y. 1849).

An allegation may be material in one form of constructing a complaint and immaterial in another in declaring on the same cause of action. Anable v Conklin, 25 N.Y. 470, 25 N.Y. (N.Y.S.) 470, 1862 N.Y. LEXIS 155 (N.Y. 1862).

75. When deemed admitted

An admission in an answer that a check properly indorsed was presented for payment as alleged in the complaint is not an admission that it was indorsed by the company when the complaint has averred the fraudulent alteration of the check and its presentment so altered and raised and properly indorsed, by the agent of the company. National City Bank v Westcott, 118 N.Y. 468, 23 N.E. 900, 118 N.Y. (N.Y.S.) 468, 1890 N.Y. LEXIS 990 (N.Y. 1890).

A failure to deny a material allegation of the complaint is equivalent to an admission of such allegation and is but a reenactment of a rule as old as the principles of pleadings. Mussinan v Willner Wood Co., 69 A.D. 448, 74 N.Y.S. 1026, 1902 N.Y. App. Div. LEXIS 460 (N.Y. App. Div. 1902).

Where the allegations of a complaint are nowhere adequately denied by the answer, they are deemed admitted. Commercial Exch. Bank v Woodward, 198 A.D. 769, 191 N.Y.S. 51, 1921 N.Y. App. Div. LEXIS 8176 (N.Y. App. Div. 1921).

Where plaintiff failed to demur to defendant's counterclaim because not stating new matter the allegations of fact contained in the counterclaim stood admitted for purposes of the trial. Smith v Snowber, 198 A.D. 820, 191 N.Y.S. 248, 1921 N.Y. App. Div. LEXIS 8189 (N.Y. App. Div. 1921).

An admission in an original pleading is evidence of the fact admitted, even after amendment of the pleading. Levy v Delaware, L. & W. R. Co., 211 A.D. 503, 207 N.Y.S. 592, 1925 N.Y. App. Div. LEXIS 10648 (N.Y. App. Div. 1925).

Where a party has once admitted facts alleged in the pleadings he must abide by his admission, although he much desires to prove the contrary. Levy v Delaware, L. & W. R. Co., 211 A.D. 503, 207 N.Y.S. 592, 1925 N.Y. App. Div. LEXIS 10648 (N.Y. App. Div. 1925).

Amended answer did not destroy admissions in original answer by permission to amend it. Arinsky v Arsinskiy, 280 A.D. 820, 113 N.Y.S.2d 883, 1952 N.Y. App. Div. LEXIS 3810 (N.Y. App. Div. 1952).

An admission by failure to deny was equivalent to a formal admission, and was conclusive. Even after amendment, admission in original pleading is evidence of the fact admitted. Ward v Davega City Radio, 297 N.Y.S. 361, 163 Misc. 335, 1937 N.Y. Misc. LEXIS 1377 (N.Y. City Ct. 1937).

On motion by corporate defendant at the close of its case to dismiss the complaint as to it, it appeared that the complaint alleged that at the time of an automobile accident the truck involved was in the custody and under control of the corporate defendant; the original answer did not deny this allegation, but an amended answer did; the original answer was offered as an admission against the proof of control introduced by the corporate defendant. The constructive admission in the original answer was not available as evidence against the corporate defendant,

especially since the answer was superseded by the amended answer. Doughty v Pallissard, 3 N.Y.S.2d 452, 167 Misc. 55, 1938 N.Y. Misc. LEXIS 1450 (N.Y. Sup. Ct. 1938).

In an article 78 (Article 78 herein) proceeding new matter contained in an answer is admitted unless put in issue in a reply and this differs in a procedure from actions where new matter is deemed to be controverted by traverse or avoidance, as the case requires, unless a reply is ordered by the court in the absence of a counterclaim. Marasco v Morse, 9 Misc. 2d 296, 22 N.Y.S.2d 315, 1940 N.Y. Misc. LEXIS 1348 (N.Y. Sup. Ct. 1940), aff'd, 263 A.D. 1063, 34 N.Y.S.2d 823, 1942 N.Y. App. Div. LEXIS 8057 (N.Y. App. Div. 1942).

Allegations contained in the answer could not have been considered upon a motion for judgment on the pleadings under former RCP 112 as they were deemed controverted by traverse or avoidance, unless it appeared from the face of the complaint itself that the allegations in the answer were correct. Ostrander v Coppins, 11 Misc. 2d 1001, 175 N.Y.S.2d 396, 1958 N.Y. Misc. LEXIS 3348 (N.Y. Sup. Ct. 1958), rev'd, 8 A.D.2d 989, 188 N.Y.S.2d 687, 1959 N.Y. App. Div. LEXIS 7620 (N.Y. App. Div. 4th Dep't 1959).

A pleading prepared by an attorney is an admission by one presumptively authorized to speak for his principal. Kunglig Jarnvagsstyrelsen v Dexter & Carpenter, Inc., 32 F.2d 195, 1929 U.S. App. LEXIS 3743 (2d Cir. N.Y.), cert. denied, 280 U.S. 579, 50 S. Ct. 32, 74 L. Ed. 629, 1929 U.S. LEXIS 665 (U.S. 1929).

76. When deemed denied

In an action to recover damages for personal injuries, wherein defendant pleaded as a separate defense a release, which plaintiff claimed he signed under misrepresentations of the defendant, as a receipt for wages, held, the release was new matter deemed to be controverted, and the burden of establishing it rested on the defendant. Boxberger v New York, N. H. & H. R. Co., 237 N.Y. 75, 142 N.E. 357, 237 N.Y. (N.Y.S.) 75, 1923 N.Y. LEXIS 686 (N.Y. 1923).

General rule that allegations of new matter in the answer are deemed to be controverted should not be applied when for the purposes of trial plaintiff clearly and necessarily is compelled to rely on such allegations in order to make out his own case. Situation illustrating nonapplication of the rule. Shea v Export S.S. Corp., 253 N.Y. 17, 170 N.E. 477, 253 N.Y. (N.Y.S.) 17, 1930 N.Y. LEXIS 794 (N.Y. 1930).

In an action for failure to deliver merchandise as per contract, all the plaintiff is required to allege in the complaint is the contract, its breach, and the damages caused; if the defendant then pleads an extension agreement, such allegation will be deemed denied without the service of a reply. Globe Elevator Co. v American Molasses Co., 207 A.D. 9, 201 N.Y.S. 723, 1923 N.Y. App. Div. LEXIS 5886 (N.Y. App. Div. 1923).

Allegations in affirmative defenses, were deemed controverted. Schechner v Holmes Electric Protective Co., 254 A.D. 483, 5 N.Y.S.2d 289, 1938 N.Y. App. Div. LEXIS 6457 (N.Y. App. Div. 1938).

Where plaintiff sought to take advantage of a judgment as a bar or in avoidance of an answer not containing a counterclaim, it need not have been, and could not have been pleaded, because a reply was not authorized; but under CPA § 243 was fully available to plaintiff without a reply. Dickson v Niles, 206 N.Y.S. 101, 123 Misc. 740, 1924 N.Y. Misc. LEXIS 1182 (N.Y. Sup. Ct. 1924).

A defense of the Statute of Frauds as to the assignment of lease is deemed controverted and in any event presents only a rule of evidence to be determined on a trial. Herrmann v Seider, 9 Misc. 2d 969, 170 N.Y.S.2d 879, 1958 N.Y. Misc. LEXIS 3889 (N.Y. Sup. Ct. 1958).

Absent order requiring reply to affirmative defense, the allegations thereof are deemed denied. Stone v Ransel Trading Corp., 16 Misc. 2d 757, 190 N.Y.S.2d 84, 1958 N.Y. Misc. LEXIS 2076 (N.Y. Sup. Ct. 1958).

77. When deemed controverted by avoidance

Where defendant in an action for breach of promise of marriage pleaded a release and plaintiff served no reply, as she might have been compelled to do under CPA § 274 (§ 3011 herein), but offered evidence that her signature to the release was procured by fraud, the new matter thus set up by the defendant was deemed controverted by avoidance rather than by traverse, and the burden of establishing the claim of fraud rested upon plaintiff. Lynch v Figge, 200 A.D. 92, 192 N.Y.S. 873, 1922 N.Y. App. Div. LEXIS 8129 (N.Y. App. Div. 1922).

iii. Denials

78. Generally

In action to recover deposit for the purpose of guaranteeing payment for repair parts subsequently purchased, a counterclaim that defendant be allowed to retain the deposit and a further sum as damages for failure to buy automobiles contracted for, held not to controvert allegation that such sum was deposited merely as security, defendant having abandoned its claim for damages. Wood v Glens Falls Auto. Co., 174 A.D. 830, 161 N.Y.S. 808, 1916 N.Y. App. Div. LEXIS 8307 (N.Y. App. Div. 1916).

Where denial is insufficient to raise an issue, allegation of complaint must be taken as true. Edwards v MacArtney, 193 A.D. 334, 183 N.Y.S. 851, 1920 N.Y. App. Div. LEXIS 5549 (N.Y. App. Div. 1920).

Where the complaint sets forth allegations material to the cause of action, and a conclusion of law therefrom, the former not being controverted by the answer, a denial of the latter will not avail to let in evidence in contradiction of the admissions thus made. Getty v Hamlin, 46 Hun 1, 11 N.Y. St. 96 (N.Y.).

79. Inconsistent facts

A material fact alleged in a complaint is not controverted or put in issue by matter alleged in an answer which is merely inconsistent with the facts set forth in the complaint or from which a denial of such facts may be implied or inferred. The specific facts stated must be such as necessarily controvert the allegations in the complaint. Soper v St. Regis Paper Co., 76 A.D. 409, 78 N.Y.S. 782, 1902 N.Y. App. Div. LEXIS 2573 (N.Y. App. Div. 1902).

Material allegations of a complaint are not put in issue by inconsistent allegations in the answer, even though the intention to deny them is plainly inferable or to be implied from the inconsistent allegations, as denials are not liberally construed. Pullen v Seaboard Trading Co., 165 A.D. 117, 150 N.Y.S. 719, 1914 N.Y. App. Div. LEXIS 9353 (N.Y. App. Div. 1914).

80. Denial of knowledge

Admissions are made by qualified and pretended denials. See Williams v Hayes, (1859) 20 NY 58; and by an insufficient reply. 9 N.Y. 291.

An allegation “that the defendant has not sufficient knowledge or information to form a belief” as to certain allegations in the complaint “and therefore denies the same” is not a scientific pleading. Johnson v Andrews, 68 N.Y.S. 764, 34 Misc. 89, 1901 N.Y. Misc. LEXIS 151 (N.Y. Sup. Ct. 1901).

In action on a note, answer that defendants “deny that they have any information sufficient to form a belief as to the allegations contained in” certain paragraphs did not put in issue any material allegations of the complaint, and entire answer must fall. Bank of Long Island v Schildkraut, 162 N.Y.S. 699 (N.Y. Sup. Ct. 1916).

81. Doubt as to effect of general denial

Where a reply had been ordered and it was doubtful whether matters alleged therein by affirmative defenses could have been proved under a general denial, order striking such

defenses was reversed. Steinberg v Levy, 248 N.Y.S. 642, 139 Misc. 453, 1931 N.Y. Misc. LEXIS 1157 (N.Y. App. Term 1931).

82. Separate defenses

Where allegations in a complaint are not denied but separate defenses against such allegations are interposed, such allegations must be taken as true and the separate defenses are unavailable to the defendants. Driscoll v Brooklyn U. E. R. Co., 95 A.D. 146, 88 N.Y.S. 745, 1904 N.Y. App. Div. LEXIS 1941 (N.Y. App. Div. 1904).

83. Amended answer

Where an amended answer contains no denial whatsoever, each and every allegation of the complaint stands admitted and must be taken as true. Halliday v Barber, 77 N.Y.S. 98, 38 Misc. 116, 1902 N.Y. Misc. LEXIS 317 (N.Y. App. Term 1902).

84. Issues created

Allegation in defense to mortgage foreclosure that defendant had been present in state for longer period than 6 years, was put in issue by CPA § 243. Chapin v Posner, 299 N.Y. 31, 85 N.E.2d 172, 299 N.Y. (N.Y.S.) 31, 1949 N.Y. LEXIS 1000 (N.Y. 1949).

In an action against a stockbroker for a balance due on stock sold for plaintiff's account, wherein the answer was a general denial except as to the delivery of the stock and its sale for the account of plaintiff, and defendant was permitted to show that the difference between the amount for which plaintiff's stock was sold and the amount remitted to him was balanced by purchase of stock for plaintiff's account, plaintiff should have been permitted to prove that such payment had not been made owing to the fraud of the defendant in selling to plaintiff his own stock or because he had not actually expended for plaintiff the amount charged. Fitch v Weir, 208 A.D. 630, 203 N.Y.S. 904, 1924 N.Y. App. Div. LEXIS 5106 (N.Y. App. Div. 1924).

Defenses of new matter in answer are deemed controverted, and may not be considered on motion for judgment on pleadings. In re Provisero's Estate, 281 A.D. 844, 119 N.Y.S.2d 108, 1953 N.Y. App. Div. LEXIS 3501 (N.Y. App. Div. 1953).

Neither CPA § 243 nor CPA § 274 (§ 3011 herein) required the plaintiff in an action against a municipal corporation, wherein the defendant relied upon the defense that the contract which was the basis of the action was ultra vires, to plead that the defendant was estopped to raise such defense. Salmon v Rochester & Lake Ontario Water Co., 197 N.Y.S. 769, 120 Misc. 131, 1923 N.Y. Misc. LEXIS 1488 (N.Y. Sup. Ct. 1923).

Under general denial of conversion of property under bailment, defendant could prove a theft thereof. Mohr v Feldman, 214 N.Y.S. 90, 126 Misc. 566, 1926 N.Y. Misc. LEXIS 603 (N.Y. App. Term 1926).

In ordinary action, new matter in answer, other than counterclaim, was deemed controverted under CPA § 243, unless reply was ordered by court under CPA § 274 (§ 3011 herein). Kelly v Monaghan, 139 N.Y.S.2d 846, 208 Misc. 31, 1955 N.Y. Misc. LEXIS 3050 (N.Y. Sup. Ct. 1955).

Absent order requiring reply to affirmative defense, the allegations thereof are deemed denied. Stone v Ransel Trading Corp., 16 Misc. 2d 757, 190 N.Y.S.2d 84, 1958 N.Y. Misc. LEXIS 2076 (N.Y. Sup. Ct. 1958).

In a suit on notes wherein the complaint alleged the incorporation of the parties plaintiff and defendant, the execution and delivery of the notes by the defendant, and the ownership of the notes by plaintiff and their nonpayment, and the defendant’s answer specifically admitted the nonpayment, but, except as so specifically admitted, denied any knowledge or information sufficient to form a belief as to each and every allegation “in the fourth paragraph of the complaint,” held that the answer, by not denying, admitted the first, second, and third paragraphs of the complaint, but was sufficient to put in issue plaintiff’s ownership of the notes alleged in the 4th paragraph. General Inv. Co. v Interborough Rapid Transit Co., 193 N.Y.S. 881, 1921 N.Y. Misc. LEXIS 2006 (N.Y. Sup. Ct. 1921).

85. —No issues of fact

The plaintiff may recover without evidence if the answer does not deny the allegations of a complaint which shows a cause of action. Bacon v Cropsey, 7 N.Y. 195, 7 N.Y. (N.Y.S.) 195, 1852 N.Y. LEXIS 106 (N.Y. 1852).

As a defendant may apply for judgment upon a counterclaim if the plaintiff fails to reply thereto, a plaintiff, by serving a reply, is not estopped from subsequently moving to strike out irrelevant and scandalous matter contained in a separate defense. Sheridan v Tucker, 138 A.D. 436, 122 N.Y.S. 800, 1910 N.Y. App. Div. LEXIS 1549 (N.Y. App. Div. 1910).

Complaint in action by administrator for an accounting as to property in hands of fiduciary, which alleged that decedent died intestate and that plaintiff was appointed administrator, must be taken as true where not controverted by answer, and this applies on defendant's motion to vacate an order compelling him to submit to an examination before trial. Whitley v Speed, 171 A.D. 102, 156 N.Y.S. 973, 1916 N.Y. App. Div. LEXIS 10324 (N.Y. App. Div. 1916).

An immaterial allegation in a complaint may be disregarded by the defendant. Bulova v E. L. Barnett, Inc., 181 N.Y.S. 247, 111 Misc. 150, 1920 N.Y. Misc. LEXIS 1263 (N.Y. App. Term), modified, 193 A.D. 161, 183 N.Y.S. 495, 1920 N.Y. App. Div. LEXIS 5519 (N.Y. App. Div. 1920).

Allegation of complaint that board of directors of defendant corporation duly approved and adopted agreement between plaintiff and another defendant was admitted by failure to deny in answer. Sasmor v V. Vivaudou, Inc., 103 N.Y.S.2d 640, 200 Misc. 1020, 1951 N.Y. Misc. LEXIS 1660 (N.Y. Sup. Ct. 1951).

iv. Reply

86. Generally

Each material allegation of new matter in the answer not controverted by the reply, where a reply is required, must, for the purposes of the action, be taken as true. But an allegation of new

matter in the answer, to which a reply is not required, or of a new matter, in a reply, is deemed to be controverted by the adverse party, by traverse or avoidance as the case requires. Sullivan v Traders' Ins. Co., 169 N.Y. 213, 62 N.E. 146, 169 N.Y. (N.Y.S.) 213, 1901 N.Y. LEXIS 794 (N.Y. 1901).

A conjunctive denial of facts alleged conjunctively in the complaint denies only the conjunction and not the separate existence of either fact. McClave v Gibb, 31 N.Y.S. 847, 11 Misc. 44, 1895 N.Y. Misc. LEXIS 55 (N.Y. Super. Ct. 1895), aff'd, 157 N.Y. 413, 52 N.E. 186, 157 N.Y. (N.Y.S.) 413, 6 N.Y. Ann. Cas. 253, 1898 N.Y. LEXIS 593 (N.Y. 1898).

Reply, pleading defense of limitations to counterclaim for slander spoken over year before counterclaim was interposed, was deemed controverted by defendant, thus barring plaintiff’s motion for judgment on pleadings. Rosner v Globe Valve Corp., 92 N.Y.S.2d 343, 196 Misc. 409, 1949 N.Y. Misc. LEXIS 2824 (N.Y. Sup. Ct. 1949).

87. To counterclaim

A statement in an answer, which contains no words importing that defendant claims to recover upon it against the plaintiff, does not constitute a counterclaim, but should be treated merely as a defense. Bates v Rosekrans, 37 N.Y. 409, 37 N.Y. (N.Y.S.) 409, 1867 N.Y. LEXIS 159 (N.Y. 1867).

New matter, in an answer not constituting a counterclaim, is deemed controverted, and may be traversed or avoided in any way; for that purpose, competent evidence takes the place of pleading. Arthur v Homestead Fire Ins. Co., 78 N.Y. 462, 78 N.Y. (N.Y.S.) 462, 1879 N.Y. LEXIS 937 (N.Y.), modified, People ex rel. Smith v Nelliston, 79 N.Y. 638, 79 N.Y. (N.Y.S.) 638, 1879 N.Y. LEXIS 1038 (N.Y. 1879).

Where, in an action for a tort, the answer alleges that a former recovery was had for the same tort against a joint tortfeasor, the failure of the plaintiff to reply to the answer is not an admission of the allegation that such judgment was paid, as such defense is not a counterclaim and

requires no reply; it merely sets out matter in avoidance. Reno v Thompson, 111 A.D. 316, 97 N.Y.S. 744, 1906 N.Y. App. Div. LEXIS 153 (N.Y. App. Div. 1906).

A defense consisting of new matter not constituting a counterclaim is deemed controverted; the plaintiff without pleading may traverse or avoid it and is entitled to the benefit of every possible answer to it the same as if pleaded. Rose v White Plains, 146 A.D. 470, 131 N.Y.S. 334, 1911 N.Y. App. Div. LEXIS 1915 (N.Y. App. Div.), reh'g denied, 147 A.D. 931, 132 N.Y.S. 554, 1911 N.Y. App. Div. LEXIS 3238 (N.Y. App. Div. 1911).

In action to remove cloud from title, where plaintiff alleged drainage proceeding was void, a paragraph in answer setting out proceeding in detail, with conclusion that it was legal, was not a counterclaim and no reply was necessary. Whitney v Considine Investing Co., 173 N.Y.S. 66, 104 Misc. 688, 1918 N.Y. Misc. LEXIS 896 (N.Y. Sup. Ct. 1918), aff'd, 187 A.D. 960, 175 N.Y.S. 926, 1919 N.Y. App. Div. LEXIS 7036 (N.Y. App. Div. 1919).

CPA § 272, which required a reply to a counterclaim, applied only where the new matter in the answer was specifically described as a counterclaim; and where the new matter was not so described, but pleaded as a defense, it was to be deemed controverted by plaintiff by traverse or avoidance, as provided by CPA § 243, and defendant’s motion for judgment for want of a reply was denied. Favilla v Moretti, 13 N.Y.S. 707, 1890 N.Y. Misc. LEXIS 3250 (N.Y. Sup. Ct. 1890).

On a motion to open a default of plaintiff, it is within the discretion of the court to refuse to decide that plaintiff is not entitled to recover, where defendant has set up a counterclaim for damages for plaintiff’s negligence in what was apparently the same transaction mentioned in the complaint to which there was no reply, especially in view of the possibility that the plaintiff would procure, if it were proper, relief against the consequences of a want of a reply. Traitteur v Levingston, 13 N.Y.S. 603, 59 N.Y. Super. Ct. 140, 1891 N.Y. Misc. LEXIS 1589 (N.Y. Super. Ct. 1891).

88. To new matter in answer

New matter alleged in an answer not directed to anything alleged in the complaint will be deemed to be denied for all purposes of the action although no reply is served and plaintiff may give any evidence which will avoid it. Fox v Powers, 65 A.D. 112, 72 N.Y.S. 573, 1901 N.Y. App. Div. LEXIS 2086 (N.Y. App. Div. 1901).

The allegations of an answer setting up a contract are deemed to be traversed or avoided although no reply is served. Nesbit v Jencks, 81 A.D. 140, 80 N.Y.S. 1085, 1903 N.Y. App. Div. LEXIS 852 (N.Y. App. Div. 1903).

In action on a policy of credit insurance, breach of warranty in application set up by defendant was affirmative defense which plaintiff could controvert by traverse or avoidance without filing reply. L. Black Co. v London Guarantee & Acci. Co., 190 A.D. 218, 180 N.Y.S. 74, 1919 N.Y. App. Div. LEXIS 4104 (N.Y. App. Div. 1919), aff'd, 232 N.Y. 535, 134 N.E. 561, 232 N.Y. (N.Y.S.) 535, 1921 N.Y. LEXIS 564 (N.Y. 1921).

New matter in separate defenses pleaded must be deemed controverted by the plaintiff by traverse or avoidance as the case requires, though no reply is filed. Baird v Grace Church of Millbrook, 197 A.D. 272, 189 N.Y.S. 583, 1921 N.Y. App. Div. LEXIS 7450 (N.Y. App. Div. 1921).

Plaintiff need not plead facts establishing mistake in accepting payment, alleged by defendant. Port Chester Electrical Const. Corp. v Hartsdale Manor Homes, Inc., 276 A.D. 1101, 96 N.Y.S.2d 604, 1950 N.Y. App. Div. LEXIS 5927 (N.Y. App. Div. 1950).

Where a defense consisting of new matter is interposed the plaintiff may rest upon the provisions that the defense is deemed to be controverted. Continental Sec. Co. v Belmont, 129 N.Y.S. 777, 72 Misc. 94, 1911 N.Y. Misc. LEXIS 336 (N.Y. Sup. Ct.), aff'd, 146 A.D. 889, 130 N.Y.S. 1108, 1911 N.Y. App. Div. LEXIS 3528 (N.Y. App. Div. 1911).

In action to recover broker’s commission, where defendant set up as affirmative defense an agreement under sale as the agreement of employment, the answer was deemed to be controverted, and plaintiff had right to introduce evidence showing that by reason of lack of

consideration or because of fraud the writing was not binding upon the parties. Wiederman v Verschleiser, 159 N.Y.S. 226, 95 Misc. 276, 1916 N.Y. Misc. LEXIS 1041 (N.Y. App. Term 1916).

New matter set forth in the answer is deemed controverted when a reply is not required. Saragovitz v Cohen, 264 N.Y.S. 201, 147 Misc. 557, 1933 N.Y. Misc. LEXIS 1124 (N.Y. Sup. Ct. 1933).

Contents of answer to petition for will probate will ordinarily be deemed denied by proponents. In re Aspenleiter's Will, 61 N.Y.S.2d 555, 187 Misc. 167, 1946 N.Y. Misc. LEXIS 2076 (N.Y. Sur. Ct. 1946).

In action for price of goods sold, allegation in answer that after goods had been ordered parties entered into special agreement whereby plaintiff agreed to take back certain goods must be deemed denied. Reichenthal v Glockner, 158 N.Y.S. 699 (N.Y. App. Term 1916).

In proceeding to compel father of inmate of state insane institution to contribute to son’s support, where his answer alleges illegal commitment, reply was unnecessary to effect traverse, but petitioner as condition precedent must allege legal commitment. In re Brinkler, 33 N.Y.S.2d 778, 1942 N.Y. Misc. LEXIS 1429 (N.Y. Sup. Ct. 1942).

In action for fraud inducing purchase of automobile, defense that contract signed by plaintiff excluded warranty and precluded misrepresentation, was new matter requiring no reply. Reile v Parkhurst Motors, Inc., 94 N.Y.S.2d 274, 1949 N.Y. Misc. LEXIS 3078 (N.Y. Sup. Ct. 1949).

Allegations of defendant that plaintiff’s cause of action is outlawed are deemed denied where no reply served, and court must disregard such defense in passing on sufficiency of cause of action attacked by motion under Rule 112. Collins v Davis, 108 N.Y.S.2d 394, 1951 N.Y. Misc. LEXIS 2513 (N.Y. Sup. Ct. 1951).

89. —To defense of release

In action for negligent death where defendant set up general release, where no reply was applied for or filed, plaintiff could offer evidence to avoid the release on equitable grounds. Linker v Jamison, 173 A.D. 349, 159 N.Y.S. 469, 1916 N.Y. App. Div. LEXIS 6607 (N.Y. App. Div. 1916).

No reply having been required or served, allegations of general release in answer were deemed controverted. Lynch v Figge, 194 A.D. 126, 185 N.Y.S. 777, 1920 N.Y. App. Div. LEXIS 6614 (N.Y. App. Div. 1920).

In action for damages from failure of assignee of conditional seller to comply with statutes in replevying to retain possession and give notice of sale, defense of release was deemed controverted, and its validity was issue to be determined. Fisk Discount Corp. v Brooklyn Taxicab Trans. Co., 270 A.D. 491, 60 N.Y.S.2d 453, 1946 N.Y. App. Div. LEXIS 3725 (N.Y. App. Div. 1946).

Consent and release deemed controverted, in action to restrain use of plaintiff’s name for trade purposes. Goldston v Quaker Oats Co., 272 A.D. 158, 70 N.Y.S.2d 358, 1947 N.Y. App. Div. LEXIS 3242 (N.Y. App. Div.), app. denied, 272 A.D. 978, 73 N.Y.S.2d 483, 1947 N.Y. App. Div. LEXIS 4471 (N.Y. App. Div. 1947).

In a personal injury action, where defendant set up a release, plaintiff need not serve a reply to attack the release upon the trial. Writting v New York & Long Island Traction Co., 153 N.Y.S. 1081, 91 Misc. 231, 1915 N.Y. Misc. LEXIS 880 (N.Y. County Ct. 1915).

In action by guest against host for negligent operation of automobile allegations of general release as separate defense are deemed denied without reply. House v Scheffler, 27 N.Y.S.2d 681, 1940 N.Y. Misc. LEXIS 2625 (N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 1088, 27 N.Y.S.2d 1002, 1941 N.Y. App. Div. LEXIS 8905 (N.Y. App. Div. 1941).

90. Voluntary reply

The act does not authorize a voluntary reply to new matter by way of avoidance, but only where the new matter is in the nature of a counterclaim; if no reply be required the new matter in the answer is deemed to be controverted. Davis Confectionery Co. v Rochester German Ins. Co., 141 A.D. 909, 126 N.Y.S. 723, 1910 N.Y. App. Div. LEXIS 3990 (N.Y. App. Div. 1910).

A reply voluntarily submitted by plaintiff to a defense constituting new matter in an answer will be stricken on motion of defendant. Union Trust Co. v Barber, 177 N.Y.S. 590 (N.Y. Sup. Ct. 1919).

91. Among codefendants

No reply by a defendant upon whom a codefendant has served an answer demanding affirmative relief is now required to put at issue all the facts alleged in the answer upon which is based the right to such affirmative relief against a codefendant. Havana C. R. Co. v Ceballos, 49 A.D. 421, 63 N.Y.S. 422, 1900 N.Y. App. Div. LEXIS 761 (N.Y. App. Div. 1900).

Where one defendant counterclaims against plaintiff who in his reply alleges liability over against another defendant, latter need not plead further. Paretta v White Acres Realty Corp., 76 N.Y.S.2d 69, 190 Misc. 649, 1948 N.Y. Misc. LEXIS 2046 (N.Y. Sup. Ct. 1948).

92. Amendment of reply

Amendment of reply to release, voluntarily made, to include allegation of fraud, was denied. Youngs v Vandenburgh, 278 A.D. 775, 103 N.Y.S.2d 814, 1951 N.Y. App. Div. LEXIS 4705 (N.Y. App. Div. 1951).

93. Effect of failure to reply

Where a counterclaim has been interposed to which there was no reply, but the trial proceeded as if all the matter set up in the counterclaim were at issue, and no point was raised that the counterclaim was admitted, the point cannot be taken on appeal. Jordan v National Shoe & Leather Bank, 74 N.Y. 467, 74 N.Y. (N.Y.S.) 467, 1878 N.Y. LEXIS 768 (N.Y. 1878).

Plaintiff's failure to reply will not prevent him from controverting allegations of so-called second counterclaim which was in fact a defense. Calagna v Green, 281 A.D. 1033, 121 N.Y.S.2d 192, 1953 N.Y. App. Div. LEXIS 4231 (N.Y. App. Div. 1953).

Defendant is entitled to examination of plaintiff before trial for the purpose of proving affirmative defenses though no reply has been served, but the law is different as to counterclaims. Blair v Wagner, 170 N.Y.S. 547 (N.Y. Sup. Ct. 1918).

By omitting to reply to counterclaim plaintiff only admits that every material allegation constituting it "shall, for purpose of action, be taken as true." Lipman v New York Herald Tribune, Inc., 114 N.Y.S.2d 7, 1952 N.Y. Misc. LEXIS 2835 (N.Y. Sup. Ct. 1952).

v. Admissions

94. Generally

What has been admitted by a pleading cannot be contradicted by a subsequent pleading at the trial or by the verdict. Paige v Willet, 38 N.Y. 28, 38 N.Y. (N.Y.S.) 28, 1868 N.Y. LEXIS 42 (N.Y. 1868).

An answer admitting that an execution was left with defendant's deputy with instructions not to levy until directed admits delivery to defendant, in an action against a sheriff for failure to collect an execution. Smith v Smith, 60 N.Y. 161, 60 N.Y. (N.Y.S.) 161, 1875 N.Y. LEXIS 158 (N.Y. 1875).

The equity rule that a verified answer denying allegations of a bill was equal to evidence and required two witnesses to rebut it is not now operative. Stilwell v Carpenter, 62 N.Y. 639, 62 N.Y. (N.Y.S.) 639, 1875 N.Y. LEXIS 595 (N.Y. 1875).

In trespass, an answer alleging a right of way and an entry to remove obstructions, denying other allegations, admits the ownership in plaintiff though he had failed to prove possession. Potter v Smith, 70 N.Y. 299, 70 N.Y. (N.Y.S.) 299, 1877 N.Y. LEXIS 623 (N.Y. 1877).

In an action to recover personal property purchased by the plaintiff, the defendant claimed under an unfiled chattel mortgage from the vendor. The answer admitted that the plaintiff purchased the property, but alleged knowledge of the existence of defendant's prior mortgage. Held, that the whole admission must be taken together, and if relied on to establish the purchase, it must be held to establish the other fact; but the plaintiff might disprove the allegation of knowledge. Gildersleeve v Landon, 73 N.Y. 609, 73 N.Y. (N.Y.S.) 609, 1878 N.Y. LEXIS 681 (N.Y. 1878).

The answer of a sheriff in an action for escape that does not deny that the execution was duly issued does not conclusively admit its regularity. Goodwin v Griffis, 88 N.Y. 629, 88 N.Y. (N.Y.S.) 629, 1882 N.Y. LEXIS 149 (N.Y. 1882).

An admission in the pleadings may be used to support a judgment in accordance therewith, although not correct as arrived at without considering such admission. Teall v Consolidated Electric Light Co., 119 N.Y. 654, 23 N.E. 985, 119 N.Y. (N.Y.S.) 654, 1890 N.Y. LEXIS 1203 (N.Y. 1890).

Only material allegations of complaint are deemed to be admitted by failure of answer to deny them. Post v Lyford, 285 A.D. 101, 135 N.Y.S.2d 62, 1954 N.Y. App. Div. LEXIS 3288 (N.Y. App. Div. 1954).

In action to enjoin maintenance and operation of elevated in front of plaintiff's property, or to recover damages, allegation that consent had been given by plaintiff's grantor but had been revoked was mere surplusage, and plaintiff could introduce evidence to show that consent was invalid because not recorded, where such consent was set up in the answer, and deemed denied in view of this section. Maybeck v New York M. R. Corp., 171 N.Y.S. 848, 104 Misc. 330, 1918 N.Y. Misc. LEXIS 686 (N.Y. Sup. Ct. 1918), aff'd, 188 A.D. 982, 176 N.Y.S. 910, 1919 N.Y. App. Div. LEXIS 7489 (N.Y. App. Div. 1919).

A single material allegation of a complaint may be proved under a general denial. Bulova v E. L. Barnett, Inc., 181 N.Y.S. 247, 111 Misc. 150, 1920 N.Y. Misc. LEXIS 1263 (N.Y. App. Term), modified, 193 A.D. 161, 183 N.Y.S. 495, 1920 N.Y. App. Div. LEXIS 5519 (N.Y. App. Div. 1920).

The whole of an admission or confession relied on with its modifying allegations must be taken together. Goodyear v De La Vergne, 10 Hun 537 (N.Y.).

95. Admissions of law and legal constructions

The rule has no application to mistaken admissions of law. Union Bank v Bush, 36 N.Y. 631, 36 N.Y. (N.Y.S.) 631, 1867 N.Y. LEXIS 94 (N.Y. 1867).

A party is not estopped by not taking issue upon matter of law set forth in his adversary's pleading. Jordan v National Shoe & Leather Bank, 74 N.Y. 467, 74 N.Y. (N.Y.S.) 467, 1878 N.Y. LEXIS 768 (N.Y. 1878).

An answer that a foreign corporation, plaintiff, has not complied with certain provisions of the General Corporation Law, being merely a conclusion, is not admitted by a demurrer. E. T. Burrowes Co. v Rapid Safety Filter Co., 97 N.Y.S. 1048, 49 Misc. 539, 18 N.Y. Ann. Cas. 153, 1906 N.Y. Misc. LEXIS 627 (N.Y. App. Term 1906).

Qualified denial was unauthorized by CPA § 261. Rothman v Rothman, 67 N.Y.S.2d 96, 1946 N.Y. Misc. LEXIS 3188 (N.Y. Sup. Ct. 1946).

96. Admission in complaint

In an action brought upon an account for work, labor and materials, the complaint alleged the amount of the account to be $541.90 and that there was a balance due, after deducting all payments, of $175.75. Held, that the complaint admitted a payment of $365.15, and that defendant was not precluded from insisting upon his admission, by disputing the correctness of the items of the account. White v Smith, 46 N.Y. 418, 46 N.Y. (N.Y.S.) 418, 1871 N.Y. LEXIS 271 (N.Y. 1871).

97. Judgment and findings contrary to admission

A judgment contrary to an admission by failure to deny an allegation, is not erroneous necessarily, if affirmative matter of defense is stated. Newell v Doty, 33 N.Y. 83, 33 N.Y. (N.Y.S.) 83, 1865 N.Y. LEXIS 84 (N.Y. 1865).

A pleading which sets out that "the defendant—for an answer to the amended complaint herein states: 1. That the defendant herein denies that he has any knowledge or information sufficient to form a belief as to the allegations," etc., is sufficient; but denials of knowledge or information sufficient to form a belief should refer either generally to all the averments of the complaint thus intended to be denied, or specifically to such as are to be met by that particular form of plea. Kirschbaum v Eschmann, 205 N.Y. 127, 98 N.E. 328, 205 N.Y. (N.Y.S.) 127, 1912 N.Y. LEXIS 1198 (N.Y. 1912).

98. Abandonment of count or defense containing admission

No admission can be used in evidence against a pleader when he has expressly abandoned the count or defense containing it. See Fry v Bennett, 28 N.Y. 324, 28 N.Y. (N.Y.S.) 324, 1863 N.Y. LEXIS 74 (N.Y. 1863).

99. Arrest

Admission of the due issue of a body execution and of arrest thereunder by failure to deny, is not qualified by allegations of new matter of the unlawfulness of such arrest. H. Herrmann Lumber Co. v Bjurstrom, 131 N.Y.S. 689, 74 Misc. 93, 1911 N.Y. Misc. LEXIS 597 (N.Y. App. Term 1911).

100. Bills and notes

The ownership of a note by plaintiff is not denied by an answer that plaintiff received it as collateral from one to whom it was entrusted for a specific purpose and that other parties claim it. Moody v Andrews, 64 N.Y. 641, 64 N.Y. (N.Y.S.) 641, 1876 N.Y. LEXIS 149 (N.Y. 1876).

Where a complaint stated a clear cause of action against the indorser of a note and the answer contained no denial but alleged that the note was an accommodation note and was taken by plaintiff at a usurious discount, held, that this was not sufficient to put the allegations of the complaint in issue; that the failure to controvert the plaintiff's allegations has the effect of a formal admission; and that, under the pleadings, defendant was not at liberty to prove any state of facts inconsistent with his admission. Fleischmann v Stern, 90 N.Y. 110, 90 N.Y. (N.Y.S.) 110, 1882 N.Y. LEXIS 360 (N.Y. 1882).

101. Contracts

The complaint alleged that the parties entered into a co-partnership under a written agreement (reciting its contents), and that it was continued by a new agreement on the same terms, a copy of which was annexed. Defendant admitted the first agreement, and that it was continued by a new agreement upon the same terms, but denied that the agreement annexed to the complaint was a true copy of such new agreement. No part of the answer expressly admitted the copartnership. Held that, reading the pleadings together, the copartnership was not admitted. Haberkorn v Hill, 2 N.Y.S. 243, 1888 N.Y. Misc. LEXIS 121 (N.Y. Sup. Ct. 1888).

In an action for the value of specific merchandise sold and delivered, an answer which denies each and every allegation of the complaint but admits that at the time alleged plaintiff furnished "certain" goods, but not of the value alleged, does not admit the purchase of the goods referred to in the complaint. Claffy v O'Brien, 7 N.Y.S. 499, 1889 N.Y. Misc. LEXIS 1138 (N.Y. City Ct. 1889), aff'd, 10 N.Y.S. 103, 1890 N.Y. Misc. LEXIS 1983 (N.Y.C.P. 1890).

The failure to deny the allegation of a complaint that plaintiff demanded of defendant the amount due her under a certificate which she is informed and believes is $3,000, admits that sum to be due in the certificate. Doty v New York State Mut. Ben. Ass'n, 9 N.Y.S. 42, 55 Hun 612, 1890 N.Y. Misc. LEXIS 21 (N.Y. Sup. Ct. 1890), aff'd, 132 N.Y. 596, 30 N.E. 1151, 132 N.Y. (N.Y.S.) 596, 1892 N.Y. LEXIS 1269 (N.Y. 1892).

In an action for breach of contract to pay a certain amount “in trade,” an answer not denying an allegation of a refusal to deliver goods, but alleging that defendant had always been ready and willing to furnish goods, but that plaintiff failed to leave any complete order, creates no issue. Hand v Belcher Mosaic Glass Co., 9 N.Y.S. 738, 1890 N.Y. Misc. LEXIS 357 (N.Y. City Ct. 1890).

Plaintiff brought an action to recover compensation for his services and expenses while in the employment of defendant. Defendant admitted that a contract had been made, but denied that defendant had rendered services under it, and alleged that the contract in suit was made with another company, and signed by defendant’s officers, through a mutual mistake, and that the services rendered were on behalf of the latter company. Held, that the plaintiff started on the trial with his contract admitted, and it rested on defendant to prove the matters alleged in the second portion of the answer. Held, that as defendant did not allege payment in its answer, but denied it, there was nothing for submission to the jury. Teall v Consolidated Elec. Light Co., 50 Hun 602 (1890).

In an action for work and materials furnished defendant at an agreed price, the answer admitted that plaintiff did the work and furnished the materials, but alleged as a counterclaim that plaintiff agreed to do the work in a workmanlike manner and to furnish suitable material, but that he had not done so. Held, the allegation of the complaint was denied by the answer. Meisner v Brennan, 39 N.Y. St. 277 (Mass. Super. Ct. 1891).

102. —Payment

A complaint alleging the sale of specified goods and admitting payments, while the answer admits the sale of “a large quantity of merchandise, and that he paid therefor the several sums” credited in the complaint, denying everything not admitted, leaves the plaintiff to prove the items of the account, times of sale and prices. Albro v Figuera, 60 N.Y. 630, 60 N.Y. (N.Y.S.) 630, 1875 N.Y. LEXIS 240 (N.Y. 1875).

A general denial puts in issue all matters which plaintiff is bound to prove and nothing more. Norris v McMechen, 236 N.Y.S. 486, 134 Misc. 866, 1929 N.Y. Misc. LEXIS 1241 (N.Y. Sup. Ct. 1929).

103. Conversion

In an action for the conversion of coupons, the complaint alleged that plaintiff was the owner of a certain number of coupons, each of a nominal and actual value of a specified sum, issued by a company designated by its corporate name, in connection with its first mortgage bonds. Held, that the absence of any denial of these allegations in the answer operated as an admission of the corporate capacity of the company, and of the lawful issue of the securities; but that the allegation as to the nominal and actual value of the coupons, not being issuable, was not admitted by the failure to deny it. DeGraaf v Wyckoff (N.Y.C.P. Dec. 28, 1885), aff'd, 110 N.Y. 617, 17 N.E. 869, 110 N.Y. (N.Y.S.) 617, 16 N.Y. St. 994, 1888 N.Y. LEXIS 917 (N.Y. 1888).

The answer admitted the possession by defendant of a like number of coupons purporting to be issued by the same corporation as the coupons mentioned in the complaint, but denied any knowledge or information sufficient to form a belief as to whether or not they were the identical coupons mentioned in the complaint. Held, that this was sufficient to put in issue the identity of the coupons. DeGraaf v Wyckoff (N.Y.C.P. Dec. 28, 1885), aff'd, 110 N.Y. 617, 17 N.E. 869, 110 N.Y. (N.Y.S.) 617, 16 N.Y. St. 994, 1888 N.Y. LEXIS 917 (N.Y. 1888).

104. Corporations

An admission by a corporation of the employment of plaintiff for one year, is an admission of the authority of the president to make the contract. Merrill v Consumers' Coal Co., 114 N.Y. 216, 21 N.E. 155, 114 N.Y. (N.Y.S.) 216, 1889 N.Y. LEXIS 1086 (N.Y. 1889).

Where it is alleged in the complaint that defendant is “manager and superintendent,” a denial that defendant is “superintendent” admits that he is “manager.” Sugerman v Dennett Surpassing

Coffee Co., 148 A.D. 330, 132 N.Y.S. 1084, 1911 N.Y. App. Div. LEXIS 205 (N.Y. App. Div. 1911).

An admission in an answer that a corporation accepted a draft must be taken as true and the corporation cannot subsequently avail itself of allegations of the answer stating that it received no consideration and that the acceptance was unauthorized. Bernstein v Crow, 48 N.Y.S. 531, 22 Misc. 99, 1897 N.Y. Misc. LEXIS 765 (N.Y. App. Term 1897).

An answer admitting that a person then president of a corporation signed certain papers does not admit his authority to execute the papers for the company. Gallatin Nat. Bank v Nashville, C. & St. L. R. Co., 4 N.Y. St. 714.

105. —Corporate existence

Corporate existence is not put in issue by a general denial of averments not admitted, but is admitted by an admission of making a contract with the company and failing to deny its incorporation. Commerical Bank of Keokuk v Pfeiffer, 108 N.Y. 242, 15 N.E. 311, 108 N.Y. (N.Y.S.) 242, 13 N.Y. St. 506, 1888 N.Y. LEXIS 578 (N.Y. 1888).

The fact that plaintiff is a corporation is admitted by failure to deny it. .

106. Deeds

An admission that a deed was executed is an admission that it was sealed, signed and delivered. Thorp v Keokuk Coal Co., 48 N.Y. 253, 48 N.Y. (N.Y.S.) 253, 1872 N.Y. LEXIS 284 (N.Y. 1872).

107. Lease

Complaint to adjudge lease to be in full force, alleging that no demand for rent as it accrued was made, was admitted by failure to deny. M. & E. Design Co. v Whitney's Cadillac Rental, Inc., 75 N.Y.S.2d 924, 1947 N.Y. Misc. LEXIS 3517 (N.Y. Sup. Ct. 1947).

108. Mortgages

An answer admitted the execution of a bond and mortgage as alleged and the due transfer thereof to the plaintiff, but alleged usury. The trial court found usury and also that the bond and mortgage were never delivered to the mortgagees, which latter finding was error, there being no waiver of the admission in the pleadings. Dunham v Cudlipp, 94 N.Y. 129, 94 N.Y. (N.Y.S.) 129, 1883 N.Y. LEXIS 403 (N.Y. 1883).

In an action on the guaranty of the payment of a bond and mortgage, the admission that the property covered by the mortgage has been sold at a judicial sale to a purchaser under foreclosure yielding no surplus must be taken to be true for the purposes of the action. Crouse v Rowley, 3 N.Y.S. 863, 49 Hun 610, 1888 N.Y. Misc. LEXIS 969 (N.Y. Sup. Ct. 1888), aff'd, 117 N.Y. 629, 22 N.E. 1128, 117 N.Y. (N.Y.S.) 629, 1889 N.Y. LEXIS 1484 (N.Y. 1889).

109. Negligence

A complaint that plaintiff without any fault or want of care on his part fell into unguarded highway ditch and an answer denying that plaintiff without any fault or want of care on his part did fall therein, puts in issue the falling and the exercise of care by plaintiff. Wall v Buffalo Water Works Co., 18 N.Y. 119, 18 N.Y. (N.Y.S.) 119, 1858 N.Y. LEXIS 116 (N.Y. 1858).

Allegation in complaint on information and belief that injuring automobile was used with owner’s permission, not specifically denied by defendant, was deemed admitted by him, and so plaintiff’s motion to compel defendant specifically to admit or deny such allegation was denied. Kot v Counrtyman, 262 A.D. 1054, 30 N.Y.S.2d 244 (N.Y. App. Div. 1941).

110. Rent

In an action for rent a failure of the defendants to deny an allegation in the complaint that the defendants entered and have since been in possession, is vital and it must be deemed admitted

as true for all purposes of the action. Forgotson v Becker, 81 N.Y.S. 319, 39 Misc. 816, 1903 N.Y. Misc. LEXIS 69 (N.Y. App. Term 1903).

vi. Particular Actions or Proceedings

111. Habeas corpus

Facts not traversed or denied, alleged in a petition for a writ of habeas corpus instituted to procure the relator's discharge from imprisonment under an order adjudging her to be in contempt, even if not admitted, constitute evidence upon the hearing of the writ, and if they show that she was not guilty of contempt, she is entitled to be discharged. In re Depue, 185 N.Y. 60, 77 N.E. 798, 185 N.Y. (N.Y.S.) 60, 1906 N.Y. LEXIS 874 (N.Y. 1906).

112. Libel

Justification in libel case must be as broad as the libel alleged or it stands admitted. Tully v New York Times Co., 137 N.Y.S. 962, 78 Misc. 165, 1912 N.Y. Misc. LEXIS 956 (N.Y. App. Term 1912).

Where answer to libel complaint alleged that article was published in response to letter published by plaintiff, reply with not required, as such new matter was deemed denied. Thomas v Hunt, 58 N.Y.S.2d 754, 1945 N.Y. Misc. LEXIS 2518 (N.Y. Sup. Ct. 1945), aff'd, 270 A.D. 923, 62 N.Y.S.2d 612, 1946 N.Y. App. Div. LEXIS 4660 (N.Y. App. Div. 1946).

113. Mandamus

The denial of unlawful removal in a return to an alternative writ of mandamus to compel restitution to office is required in order to permit the setting up of separate defenses. People ex rel. McEnroe v Wells, 89 A.D. 89, 85 N.Y.S. 438, 1903 N.Y. App. Div. LEXIS 3687 (N.Y. App. Div. 1903).

114. Will contest

By SCA § 76, in construction proceeding, surrogate is not bound by undenied interpretation of will, and new matter in answer of will objectors will be deemed controverted. In re Sheehan's Will, 91 N.Y.S.2d 455, 195 Misc. 964, 1949 N.Y. Misc. LEXIS 2629 (N.Y. Sur. Ct. 1949).

D. Contents of Reply

115. Generally

Where the parties to an action have stipulated to submit the case to the trial court upon the pleadings and an agreed statement of facts the failure of plaintiff to serve a reply to a counterclaim is of no importance. Autocar Sales & Service Co. v Hansen, 270 N.Y. 414, 1 N.E.2d 830, 270 N.Y. (N.Y.S.) 414, 1936 N.Y. LEXIS 1563 (N.Y. 1936).

Where plaintiff failed to demur to defendant’s counterclaim because not stating new matter, the allegations of fact contained in the counterclaims stood admitted for purposes of the trial. Smith v Snowber, 198 A.D. 820, 191 N.Y.S. 248, 1921 N.Y. App. Div. LEXIS 8189 (N.Y. App. Div. 1921).

The plaintiff and a codefendant, who are in default for failure to reply to defendant’s counterclaim, will be given further time to reply but on penalty of judgment on the counterclaim on a second default. Noeller v Duffy, 214 N.Y.S. 304, 126 Misc. 799, 1926 N.Y. Misc. LEXIS 629 (N.Y. Sup. Ct. 1926).

Until a reply to a counterclaim is served, no issue of fact with respect thereto is presented, and defendant is not entitled to an order for examination of plaintiff. Blair v Wagner, 170 N.Y.S. 547 (N.Y. Sup. Ct. 1918).

116. Necessity for reply

If the answer set up facts which if true would destroy the cause of action set up by the complaint, plaintiff may meet them by proof in rebuttal or avoidance. It is not necessary that he should reply. Hier v Staples, 51 N.Y. 136, 51 N.Y. (N.Y.S.) 136, 1872 N.Y. LEXIS 547 (N.Y. 1872).

Where defendant answered that premises alleged to have been trespassed upon was a public highway, defendant may show without reply that proceedings discontinuing the highway have been reversed. Briggs v Bowen, 60 N.Y. 454, 60 N.Y. (N.Y.S.) 454, 1875 N.Y. LEXIS 202 (N.Y. 1875).

Defense by way of new matter not constituting a counterclaim as deemed controverted, without reply. Arthur v Homestead Fire Ins. Co., 78 N.Y. 462, 78 N.Y. (N.Y.S.) 462, 1879 N.Y. LEXIS 937 (N.Y.), modified, People ex rel. Smith v Nelliston, 79 N.Y. 638, 79 N.Y. (N.Y.S.) 638, 1879 N.Y. LEXIS 1038 (N.Y. 1879).

If a composition or discharge in bankruptcy is set up by the answer it may be met by proof of fraud without a reply. Argall v Jacobs, 87 N.Y. 110, 87 N.Y. (N.Y.S.) 110, 1881 N.Y. LEXIS 324 (N.Y. 1881).

The failure of the plaintiff to reply to an answer, setting up a former judgment as a defense, is not an admission of the allegation that said judgment was paid, as such a defense is not a counterclaim and requires no reply; it merely sets out new matter in avoidance. Reno v Thompson, 111 A.D. 316, 97 N.Y.S. 744, 1906 N.Y. App. Div. LEXIS 153 (N.Y. App. Div. 1906).

Where defendant pleads certain facts as “a defense and new matter” without designating such matter as a counterclaim, no reply is required, and plaintiff and the trial court are justified in treating the facts pleaded as constituting a defense. McCarter v Davis, 202 A.D. 519, 194 N.Y.S. 688, 1922 N.Y. App. Div. LEXIS 4926 (N.Y. App. Div. 1922).

If an answer does not designate the facts pleaded as a counterclaim, the plaintiff may rebut the testimony offered by defendant without serving a reply; hence the better practice is to

denominate the counterclaim as such. National Bank of Rochester v Erion-Haines Realty Co., 213 A.D. 54, 209 N.Y.S. 522, 1925 N.Y. App. Div. LEXIS 8432 (N.Y. App. Div. 1925).

Plaintiff not required to serve reply where new matter in answer is not designated as counterclaim but as defense. Cooley Trading Co. v Goetz, 247 A.D. 607, 288 N.Y.S. 831, 1936 N.Y. App. Div. LEXIS 8332 (N.Y. App. Div.), app. dismissed, 272 N.Y. 501, 4 N.E.2d 251, 272 N.Y. (N.Y.S.) 501, 1936 N.Y. LEXIS 986 (N.Y. 1936), aff'd, 273 N.Y. 488, 6 N.E.2d 417, 273 N.Y. (N.Y.S.) 488, 1936 N.Y. LEXIS 1497 (N.Y. 1936).

On plaintiff's motion for summary judgment in foreclosure, where defendant's counterclaim with affidavits presented issues of fact, and plaintiff served no reply to counterclaim, summary judgment was properly denied. United States Trust Co. v Hardwood Operating Corp., 271 A.D. 233, 62 N.Y.S.2d 812, 1946 N.Y. App. Div. LEXIS 2728 (N.Y. App. Div. 1946).

In absence of order compelling reply to affirmative defense of suicide in action on life policy, there is no necessity to reply, and matter contained in defense is deemed denied. Forrest v Mutual Ben. Life Ins. Co., 86 N.Y.S.2d 910, 195 Misc. 12, 1949 N.Y. Misc. LEXIS 1857 (N.Y. Sup. Ct.), aff'd, 275 A.D. 939, 89 N.Y.S.2d 488, 1949 N.Y. App. Div. LEXIS 5171 (N.Y. App. Div. 1949).

Where plaintiff has served no reply to a counterclaim, its motion for summary judgment was properly denied on that ground alone. Josef Weindl, Inc. v Braverman, 13 Misc. 2d 435, 180 N.Y.S.2d 666, 1958 N.Y. Misc. LEXIS 3038 (N.Y. App. Term), app. denied, 6 A.D.2d 1014, 178 N.Y.S.2d 616, 1958 N.Y. App. Div. LEXIS 4868 (N.Y. App. Div. 2d Dep't 1958).

The provision which requires a reply to a counterclaim applies only when the new matter in the answer is specifically described as a counterclaim. Favilla v Moretti, 13 N.Y.S. 707, 1890 N.Y. Misc. LEXIS 3250 (N.Y. Sup. Ct. 1890).

A counterclaim must be described as such to require a reply. Morris v Chamberlin, 14 N.Y.S. 702, 60 Hun 580, 1891 N.Y. Misc. LEXIS 2463 (N.Y. Sup. Ct. 1891).

A reply should be served where it is doubtful whether the answer contains a counterclaim. Teets v Throckmorton, 8 N.Y. St. 897.

117. Reply by or against codefendant

No answer or reply by a defendant upon whom a codefendant has served an answer demanding affirmative relief is now required to put at issue all the facts alleged in the answer upon which is based the right to such affirmative relief against the codefendant. Furshpin v Monticello Co-operative Fire Ins. Co., 249 A.D. 366, 293 N.Y.S. 150, 1937 N.Y. App. Div. LEXIS 9592 (N.Y. App. Div. 1937).

Plaintiff, against whom one defendant has interposed counterclaim, may set up in his reply cross-claim for liability against another defendant. Paretta v White Acres Realty Corp., 76 N.Y.S.2d 69, 190 Misc. 649, 1948 N.Y. Misc. LEXIS 2046 (N.Y. Sup. Ct. 1948).

Civil Practice Act made no provision for reply to contingent cross-claim. Quick v Bauer, 102 N.Y.S.2d 379, 1950 N.Y. Misc. LEXIS 2402 (N.Y. Sup. Ct. 1950).

118. Changing cause of action

When a complaint for conversion alleges that the defendant originally obtained lawful possession of the property, the plaintiff cannot plead by way of reply to the defense of a discharge in bankruptcy that the possession was obtained by fraud. Young v Dresser, 137 A.D. 313, 122 N.Y.S. 29, 1910 N.Y. App. Div. LEXIS 673 (N.Y. App. Div. 1910).

A reply cannot be resorted to for the purpose of amending complaint or to introduce a new cause of action by way of counterclaim. Swertz v Swertz, 28 Misc. 2d 904, 211 N.Y.S.2d 252, 1961 N.Y. Misc. LEXIS 3389 (N.Y. Sup. Ct. 1961).

A reply cannot be employed for the purpose of amending a complaint, nor can it be used to introduce a new cause of action. Eidlitz v Rothschild, 33 N.Y.S. 1047, 87 Hun 243 (1895).

A plaintiff cannot alter the cause of action as stated in the complaint by his reply. Lablache v Kirkpatrick.

119. Form, requisites and sufficiency

The court is not justified in striking out portions of a reply as redundant and irrelevant where it is not claimed that the matter in question is immaterial to the issue, and the only objection thereto is that averments have been reiterated in several instances, and it does not appear that the defendant will be prejudiced in its defense if such matter is allowed to remain. Pope Mfg. Co. v Rubber Goods Mfg. Co., 100 A.D. 349, 91 N.Y.S. 828, 1905 N.Y. App. Div. LEXIS 49 (N.Y. App. Div. 1905).

When, in an action for the breach of a contract, the answer, as a counterclaim, alleges a breach of the contract by the plaintiff's assignor after said contract was modified in particulars set forth, a reply which alleges that the defendant "has at all times had knowledge of the manner" in which the plaintiff's assignor carried out the provisions of the contract "and fully assented to the carrying out of the same" in that manner, does not state a defense to the counterclaim. Pope Mfg. Co. v Rubber Goods Mfg. Co., 110 A.D. 341, 97 N.Y.S. 73, 1905 N.Y. App. Div. LEXIS 3916 (N.Y. App. Div. 1905).

The circumstances stated in the Domestic Relations Law, former § 3, under which a marriage by a person whose husband or wife is living is not absolutely void need not be specifically negatived in pleading capacity to marry, and a reply to the defendant's allegation that the plaintiff was incompetent to enter into a contract of marriage, by reason of the fact that another husband was living, is sufficient when it alleges that at the time of her former marriage the other party was married to another woman now living, and that no divorce or annulment of that marriage had been obtained. Stein v Dunne, 119 A.D. 1, 103 N.Y.S. 894, 1907 N.Y. App. Div. LEXIS 3838 (N.Y. App. Div.), aff'd, 190 N.Y. 524, 83 N.E. 1132, 190 N.Y. (N.Y.S.) 524, 1907 N.Y. LEXIS 1436 (N.Y. 1907).

Reply alleging that contractor accepted certain sum on condition that general release with reservations should be effective in reserving to plaintiff its claims for extras held insufficient. Oakhill Contracting Co. v New York, 262 A.D. 530, 30 N.Y.S.2d 567, 1941 N.Y. App. Div. LEXIS 5418 (N.Y. App. Div. 1941).

Where complaint on life policies was based on theory of assignment to plaintiff widow, she could not in her reply allege affirmatively that she was last bona fide beneficiary. Rosen v Rosen, 267 A.D. 770, 45 N.Y.S.2d 216, 1943 N.Y. App. Div. LEXIS 6175 (N.Y. App. Div. 1943).

A reply may controvert all the allegations of the answer set up by way of counterclaim or any portion thereof. Williams v Williams, 35 N.Y.S. 263, 14 Misc. 79, 1895 N.Y. Misc. LEXIS 787 (N.Y. Sup. Ct. 1895).

A reply must deny the allegations of the counterclaim. D. H. Hayden Co. v Mitchell-Tappen Co., 247 N.Y.S. 537, 139 Misc. 480, 1931 N.Y. Misc. LEXIS 1053 (N.Y. Sup. Ct. 1931).

Allegations in reply held insufficient as pleading that an alleged partner had assigned his interest in the partnership to the plaintiffs. Sparber v Spot Delivery Garment Co., 194 N.Y.S. 92, 1922 N.Y. Misc. LEXIS 1188 (N.Y. App. Term 1922).

Where complaint and reply allege valid marriage between plaintiff and male defendant, there is no inconsistency in saying in complaint that marriage resulted from ceremony in August, 1933 and in saying in reply that marriage resulted from matrimonial cohabitation after impediment to marriage had been removed by divorce in October, 1933. Untermeyer v Untermeyer, 87 N.Y.S.2d 774, 1949 N.Y. Misc. LEXIS 1997 (N.Y. Sup. Ct. 1949).

In an action for accounting, where defendants answered that they had discovered errors in the account upon a certain day, begging permission to prove them, a reply charging defendant with laches in not sooner attempting to correct the errors, if any existed, was bad for alleging no fact not appearing in the answer. Croome v Craig, 6 N.Y.S. 136, 53 Hun 350, 1889 N.Y. Misc. LEXIS 451 (N.Y. App. Term 1889).

120. —Denial of knowledge or information

Denials of a reply should separately relate to each and every allegation of a stated paragraph of the answer, as to which, so far as justified by the facts, plaintiff might deny any knowledge or information sufficient to form a belief. Wedemann v United States Trust Co., 240 N.Y.S. 20, 136 Misc. 515, 1930 N.Y. Misc. LEXIS 1023 (N.Y. Sup. Ct. 1930), aff'd, 232 A.D. 665, 247 N.Y.S. 1007, 1931 N.Y. App. Div. LEXIS 14054 (N.Y. App. Div. 1931).

A general denial of knowledge or information sufficient to form a belief as to the correctness of an offer set forth is not a sufficient reply to new matter in an answer which sets forth such offer and an acceptance thereof, which new matter, if true, is fatal to plaintiff’s claim; if he is in doubt as to the correctness thereof, he should demand an inspection. Steinway v Steinway, 26 N.Y.S. 657, 74 Hun 423 (1893).

121. New matter in reply

The plaintiff, in addition to denials relating to the counterclaim, can insert in his reply “in ordinary and concise language” new matter constituting a defense to the counterclaim if not inconsistent with the complaint. Dumar v Witherbee, Sherman & Co., 88 A.D. 181, 84 N.Y.S. 669, 1903 N.Y. App. Div. LEXIS 3119 (N.Y. App. Div. 1903).

A reply which alleges the modification of the contract on which a counterclaim is founded is not a denial thereof, but at most a partial defense, and if pleaded as a complete defense it is bad. Pope Mfg. Co. v Rubber Goods Mfg. Co., 110 A.D. 341, 97 N.Y.S. 73, 1905 N.Y. App. Div. LEXIS 3916 (N.Y. App. Div. 1905).

New matter contained in reply held insufficient and improper. Streeter v Cloud, 171 A.D. 572, 157 N.Y.S. 698, 1916 N.Y. App. Div. LEXIS 5333 (N.Y. App. Div. 1916).

In an action to recover the amount paid for two steamship tickets which were invalid and worthless where the defendant sets up a general release the plaintiff may show that he did not know the contents of the instrument and signed it in consequence of a misrepresentation as to

its import. Creshkoff v Schwartz, 103 N.Y.S. 782, 53 Misc. 576, 1907 N.Y. Misc. LEXIS 299 (N.Y. App. Term 1907).

Affirmative defense to counterclaim must be pleaded by plaintiff. International Supply Corp. v Lifton, 52 N.Y.S.2d 123, 183 Misc. 555, 1944 N.Y. Misc. LEXIS 2676 (N.Y. App. Term 1944).

A reply may contain only denials or defenses, but not a plea by way of recoupment or setoff. Seligmann v Mandel, 19 Misc. 2d 418, 190 N.Y.S.2d 388, 1959 N.Y. Misc. LEXIS 3574 (N.Y. Sup. Ct. 1959).

122. —Two or more avoidances

The last sentence of CPA § 272 was to be taken as referring to the instances in which a reply was authorized. Dickson v Niles, 206 N.Y.S. 101, 123 Misc. 740, 1924 N.Y. Misc. LEXIS 1182 (N.Y. Sup. Ct. 1924).

123. —Counterclaim

A plaintiff cannot in his reply plead an independent counterclaim to a counterclaim set up by the defendant. White v Joy, 13 N.Y. 83, 13 N.Y. (N.Y.S.) 83, 1855 N.Y. LEXIS 58 (N.Y. 1855).

Counterclaim could not be properly included in reply. Baitzel v Rhinelander, 179 A.D. 735, 167 N.Y.S. 343, 1917 N.Y. App. Div. LEXIS 8072 (N.Y. App. Div. 1917).

An independent cause of action unconnected with the transaction constituting the counterclaim pleaded in the answer cannot be set up as a counterclaim in the reply. Goossen v Goossen, 32 N.Y.S. 814, 11 Misc. 86, 1895 N.Y. Misc. LEXIS 67 (N.Y.C.P. 1895).

The fact that a counterclaim set up in a reply does not state facts sufficient to constitute a cause of action may not be pleaded as a defense. Schlesinger v Thalmessinger, 92 N.Y.S. 575, 46 Misc. 403, 1905 N.Y. Misc. LEXIS 77 (N.Y. City Ct.), modified, 93 N.Y.S. 381 (N.Y. App. Term 1905).

A counterclaim is unauthorized by this section, and the remedy for the plaintiff on receipt of the answer setting up the counterclaim is to move for leave to amend the complaint. Fett v Greenstein, 92 N.Y.S. 736, 46 Misc. 574, 1905 N.Y. Misc. LEXIS 133 (N.Y. App. Term 1905).

CPA § 272 permitted plaintiff to include in his reply only denials and defenses, to the exclusion of counterclaims. Phillips v Manufacturers Trust Co., 26 N.Y.S.2d 58, 175 Misc. 1009, 1940 N.Y. Misc. LEXIS 2605 (N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 946, 27 N.Y.S.2d 185, 1941 N.Y. App. Div. LEXIS 8230 (N.Y. App. Div. 1941).

Recoupment or setoff must be pleaded as counterclaim and not as defense, and so allegations of reply which are in nature of matter in recoupment ordered stricken from reply. Phillips v Manufacturers Trust Co., 26 N.Y.S.2d 58, 175 Misc. 1009, 1940 N.Y. Misc. LEXIS 2605 (N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 946, 27 N.Y.S.2d 185, 1941 N.Y. App. Div. LEXIS 8230 (N.Y. App. Div. 1941).

A plea by way of recoupment or setoff can only be pleaded as a counterclaim, and not as a defense or in a reply. Seligmann v Mandel, 19 Misc. 2d 418, 190 N.Y.S.2d 388, 1959 N.Y. Misc. LEXIS 3574 (N.Y. Sup. Ct. 1959).

A reply cannot be resorted to for the purpose of amending complaint or to introduce a new cause of action by way of counterclaim. Swertz v Swertz, 28 Misc. 2d 904, 211 N.Y.S.2d 252, 1961 N.Y. Misc. LEXIS 3389 (N.Y. Sup. Ct. 1961).

The remedy for counterclaims improperly in a reply is by motion to strike them out. .

124. Verification

The superintendent of banks or one of his special deputies may verify and interpose a reply to a verified counterclaim in an action brought by him in pursuance of his duties in liquidating the affairs of a bank. Union Bank of Brooklyn v Kanturk Realty Corp., 129 N.Y.S. 635, 72 Misc. 96, 1911 N.Y. Misc. LEXIS 337 (N.Y. Sup. Ct. 1911).

125. Effect of reply

By replying plaintiff waives objections to the form of the pleading and to the introduction of evidence thereunder. 8 N.Y. 283.

An objection that a counterclaim in conversion is not admissible is not waived by reply. Smith v Hall, 67 N.Y. 48, 67 N.Y. (N.Y.S.) 48, 1876 N.Y. LEXIS 344 (N.Y. 1876).

A reply was the last pleading contemplated by the Code, and any new matter therein is necessarily deemed denied and subject to any available defense on the part of the defendant. Biggs v Steinway & Sons, 191 A.D. 526, 182 N.Y.S. 101, 1920 N.Y. App. Div. LEXIS 4750 (N.Y. App. Div.), rev'd, 229 N.Y. 320, 128 N.E. 211, 229 N.Y. (N.Y.S.) 320, 1920 N.Y. LEXIS 686 (N.Y. 1920).

A reply which denies the allegations of the counterclaim does not, by setting up new matter in avoidance of it, admit those allegations. Del Valle v Navarro, 21 Abb NC 136.

126. Voluntary or unnecessary reply

In an action to recover damages upon an alleged policy of fire insurance, the defendant set up as a defense an award of damages, to which the plaintiff replied denying the making of the award and that if it was made it was obtained by fraud, as the defendant did not return the reply or raise any question upon the trial as to its contents, the plaintiff, although the reply was unnecessary, has a right to establish the facts alleged therein. Sullivan v Traders' Ins. Co., 169 N.Y. 213, 62 N.E. 146, 169 N.Y. (N.Y.S.) 213, 1901 N.Y. LEXIS 794 (N.Y. 1901).

A reply put in improperly to an answer containing only new matter by way of avoidance should be stricken out. Avery v New York C. & H. R. R. Co., 6 N.Y.S. 547, 1889 N.Y. Misc. LEXIS 678 (N.Y. Super. Ct.), aff'd, 117 N.Y. 660, 22 N.E. 1134, 117 N.Y. (N.Y.S.) 660, 1889 N.Y. LEXIS 1543 (N.Y. 1889).

A reply voluntarily submitted to defense constituting new matter will be stricken on defendant's motion. Union Trust Co. v Barber, 177 N.Y.S. 590 (N.Y. Sup. Ct. 1919).

127. Reply to amended answer

Order permitting amendment of answer setting up offset or counterclaim should give plaintiff right to serve reply. Newgold v Bon Ray Hotel Corp., 265 A.D. 821, 37 N.Y.S.2d 337, 1942 N.Y. App. Div. LEXIS 5963 (N.Y. App. Div. 1942).

Where the counterclaim contained in an answer and the counterclaim contained in an amended answer thereafter served are substantially alike, and a reply has been served to the original answer, it is not necessary to serve another reply to the simple repetition of the matter already replied to. Lamberty v Roberts, 10 N.Y.S. 190, 56 Hun 649, 1890 N.Y. Misc. LEXIS 2025 (N.Y. Sup. Ct. 1890).

E. Contents of Answer

i. Denials

128. Generally

Every fact impliedly averred in the complaint may be traversed by the answer the same as if it were expressly averred. Prindle v Caruthers, 15 N.Y. 425, 15 N.Y. (N.Y.S.) 425, 1857 N.Y. LEXIS 20 (N.Y. 1857).

If material allegations are denied, though unintentionally, the issues cannot be disposed of by summary judgment. Youngs v Kent, 46 N.Y. 672, 46 N.Y. (N.Y.S.) 672, 1871 N.Y. LEXIS 315 (N.Y. 1871).

CPA § 261 and CCP § 500, were the same, as regarded the requirements as to the denial of material allegations, as Condemnation Law, § 9, formerly Code of Civ Proc, § 3365. Old

Homestead Water Co. v Treyz, 202 A.D. 98, 195 N.Y.S. 723, 1922 N.Y. App. Div. LEXIS 4861 (N.Y. App. Div.), aff'd, 234 N.Y. 612, 138 N.E. 467, 234 N.Y. (N.Y.S.) 612, 1922 N.Y. LEXIS 809 (N.Y. 1922).

Facts controverting the allegations of the complaint and the issues raised thereby should be availed of by direct denial, and not set out by way of counterclaim. L. Heller & Son, Inc. v Lassner Co., 214 A.D. 315, 212 N.Y.S. 175, 1925 N.Y. App. Div. LEXIS 10507 (N.Y. App. Div. 1925).

In an answer the order should be: 1st, a denial or denials, 2nd, a defense or defenses sometimes referred to as “affirmative defenses” or “affirmative defenses of new matter”; a “denial” can have no place in a defense. Staten I. M. R. Co. v Hinchcliffe, 68 N.Y.S. 556, 34 Misc. 49, 9 N.Y. Ann. Cas. 407, 1901 N.Y. Misc. LEXIS 141 (N.Y. Sup. Ct. 1901).

Facts alleged in a defense, inconsistent with and contradictory of allegations of the complaint, cannot supply a failure to deny such allegations in due form; a denial cannot be a material part of a defense. Pascekwitz v Richards, 75 N.Y.S. 291, 37 Misc. 250, 1902 N.Y. Misc. LEXIS 94 (N.Y. Sup. Ct. 1902).

Denials must be stated before and apart from affirmative allegations of an answer, so that if the denials are frivolous, the plaintiff may move for judgment on them, or if the affirmative allegations are immaterial or frivolous, the plaintiff may move to strike them out or demur to them in case they are insufficient as a defense. Carpenter v Mergert, 80 N.Y.S. 615, 39 Misc. 634, 1903 N.Y. Misc. LEXIS 24 (N.Y. Sup. Ct. 1903).

Where an answer contains no denials, although it contains a good affirmative defense, it is insufficient. Banzer v Richter, 123 N.Y.S. 678, 68 Misc. 192, 1910 N.Y. Misc. LEXIS 381 (N.Y. Sup. Ct. 1910), aff'd, 146 A.D. 913, 131 N.Y.S. 1103, 1911 N.Y. App. Div. LEXIS 3720 (N.Y. App. Div. 1911).

Noncompliance with CPA § 261 subd 1 rendered answer insufficient. Steinberg Press, Inc. v Charles Henry Publications, Inc., 68 N.Y.S.2d 793, 1947 N.Y. Misc. LEXIS 2154 (N.Y. Sup. Ct. 1947).

Defendant could not intermix and combine plea permissible under CPA § 261 subd 1 which was limited to general or specific denial, with plea permissible under CPA § 261 subd 2 (§ 3011 herein) which consisted of new matter. Susi Contracting Co. v Continental Casualty Co., 115 N.Y.S.2d 156, 1951 N.Y. Misc. LEXIS 2141 (N.Y. Sup. Ct. 1951).

For notes on denials in pleadings, see 14 Abb NC 319, 15 Abb NC 259.

129. Failure to deny

By failing to deny allegations in complaint defendant admitted them, despite his statement inconsistent with facts thus admitted. Bowery Sav. Bank v 185 Montague Street, Inc., 267 A.D. 911, 47 N.Y.S.2d 140, 1944 N.Y. App. Div. LEXIS 5474 (N.Y. App. Div. 1944).

Where part of an answer was intended as a separate and affirmative defense, in determining the sufficiency of this affirmative defense, all the allegations of the complaint not controverted in the affirmative defense should be treated as admitted. Eells v Dumary, 84 A.D. 105, 82 N.Y.S. 531, 1903 N.Y. App. Div. LEXIS 1716 (N.Y. App. Div. 1903).

A defendant by failing to deny that it operated stage coaches on a certain street where the plaintiff, a passenger, claims to have been injured, does not admit that it was operating the coach in which the plaintiff was traveling. Sturgis v Fith Ave. Coach Co., 122 A.D. 658, 107 N.Y.S. 270, 1907 N.Y. App. Div. LEXIS 2525 (N.Y. App. Div. 1907).

An allegation that the defendant was engaged in constructing and repairing a building is admitted by a failure to deny it. Zettel v Taylor, 128 A.D. 251, 112 N.Y.S. 639, 1908 N.Y. App. Div. LEXIS 441 (N.Y. App. Div. 1908).

Undenied allegations of complaint are admitted. Messing v Messing, 76 N.Y.S.2d 375, 190 Misc. 979, 1947 N.Y. Misc. LEXIS 3590 (N.Y. Sup. Ct. 1947), aff'd, 275 A.D. 818, 89 N.Y.S.2d 713, 1949 N.Y. App. Div. LEXIS 4608 (N.Y. App. Div. 1949).

All the allegations of the complaint must be properly denied to prevent their being taken as true. Averell v Day, 26 Hun 319 (N.Y.), aff'd, 98 N.Y. 624, 98 N.Y. (N.Y.S.) 624, 1885 N.Y. LEXIS 662 (N.Y. 1885).

A denial in an answer expressly referring to a certain paragraph of the complaint and putting in issue in the precise words of the allegation certain averments of that paragraph, but avoiding all reference to other paragraphs therein, has the force of an express admission of the portion which is not denied. Ramsay v Barnes, 12 N.Y.S. 726, 1891 N.Y. Misc. LEXIS 853 (N.Y.C.P. 1891).

An allegation in a complaint that the plaintiff is a corporation is admitted by failure to affirmatively deny it in the answer. Platt & W. .

Where an answer sets forth certain matters, and then proceeds to submit the defendant’s rights to the court, “neither admitting nor denying any other of the matters not hereby answered in said complaint alleged, but leaving the plaintiff to the proof of the same,” and concludes by asking for a dismissal with costs, and such other judgment as to the court seems right, held, that the answer did not put in issue a deed which was set forth in the complaint, and not affected by the special matters set up in the answer. Townshend v Townshend, 1 Abb NC 81.

130. Sufficiency of denials generally

The answer should describe the allegations intended to be controverted so that any person of intelligence could identify them without reference to any other pleading, so the answer may be complete in itself. Baylis v Stimson, 110 N.Y. 621, 17 N.E. 144, 110 N.Y. (N.Y.S.) 621, 16 N.Y. St. 175, 1888 N.Y. LEXIS 922 (N.Y. 1888).

The fact that denials, contained in an answer, of material allegations of the complaint, are preceded by the words, “for a second further, separate and distinct defense,” does not render them inoperative to raise an issue to such allegations, nor does it relieve the plaintiff, in the event of defendant’s making default at the trial, from the necessity of proving the allegations so denied. Hopkins v Meyer, 76 A.D. 365, 78 N.Y.S. 459, 1902 N.Y. App. Div. LEXIS 2563 (N.Y. App. Div. 1902).

The material allegations of a complaint are not controverted or put in issue by allegations inconsistent therewith, from which a general denial may be implied or inferred. Altman v Cochrane, 131 A.D. 233, 115 N.Y.S. 870, 1909 N.Y. App. Div. LEXIS 781 (N.Y. App. Div. 1909).

Material allegations of a complaint are not put in issue by inconsistent allegations in the answer, even though the intention to deny them is plainly inferable or to be implied from the inconsistent allegations, as denials are not liberally construed. Pullen v Seaboard Trading Co., 165 A.D. 117, 150 N.Y.S. 719, 1914 N.Y. App. Div. LEXIS 9353 (N.Y. App. Div. 1914).

The fact that defendant’s denials are defective in form does not render them a nullity. Gellens v Continental Bank & Trust Co., 241 A.D. 591, 272 N.Y.S. 900, 1934 N.Y. App. Div. LEXIS 8315 (N.Y. App. Div. 1934).

Allegations of the complaint are not put in issue merely by statements inconsistent therewith contained in the answer, and consequently where the plaintiff alleges an unlawful entry of her dwelling and a battery of her person, the defendant’s answer, that he entered under authority of a chattel mortgage on the plaintiff’s goods and to assist in removing them, and did not assault her, raises no issue and makes the answer frivolous. Zwerling v Annenberg, 77 N.Y.S. 275, 38 Misc. 169, 1902 N.Y. Misc. LEXIS 334 (N.Y. Sup. Ct. 1902).

The facts to be answered must be denied in a plain and unambiguous manner. Pfaudler Process Fermentation Co. v McPherson, 3 N.Y.S. 609, 51 Hun 636, 1889 N.Y. Misc. LEXIS 42 (N.Y. Sup. Ct. 1889).

It is always permissible in denial where half truth has been pleaded to admit half truth and then deny the implication which would be drawn from it. Standard Acci. Ins. Co. v Dineen, 95 N.Y.S.2d 826, 1950 N.Y. Misc. LEXIS 1481 (N.Y. Sup. Ct. 1950).

Unless it is indefinite, uncertain, or ambiguous, or constitutes a negative pregnant, 102, infra, the denial of the complaint in its own language is not bad pleading. Parker v Tillinghast, 1 N.Y. St. 296.

That allegations are denied conjunctively instead of disjunctively merely does not make the answer bad. Livingston v Hammer, 20 Super Ct (7 Bosw) 670; see Beach v Barons, 13 Barb. 305, 1850 N.Y. App. Div. LEXIS 15 (N.Y. Sup. Ct. Sept. 5, 1850); Otis v Ross, 8 How. Pr. 193, 1853 N.Y. Misc. LEXIS 111 (N.Y. Sup. Ct. 1853).

131. Denial of conclusions or immaterial allegations

A denial merely of a conclusion of law, puts in issue none of the facts alleged in the complaint. Emery v Baltz, 94 N.Y. 408, 94 N.Y. (N.Y.S.) 408, 1884 N.Y. LEXIS 284 (N.Y. 1884).

A general or specific denial in an answer controverts only material allegations, or such facts as the plaintiff would be compelled to prove to establish his cause of action. Linton v Unexcelled Fire-Works Co., 124 N.Y. 533, 27 N.E. 406, 124 N.Y. (N.Y.S.) 533, 1891 N.Y. LEXIS 1395 (N.Y. 1891).

The complaint in an action to foreclose a mechanic’s lien upon a municipal improvement need not allege that the action was commenced within three months of the filing of notice of lien; even though such necessary allegation be made, a mere denial thereof in the answer uncoupled with an affirmative allegation that the three months had expired does not raise an issue, for no issue can be raised on an unnecessary or immaterial allegation. Romeo v Chiangone, 126 A.D. 402, 110 N.Y.S. 724, 1908 N.Y. App. Div. LEXIS 3364 (N.Y. App. Div. 1908), aff'd, 196 N.Y. 546, 89 N.E. 1111, 196 N.Y. (N.Y.S.) 546, 1909 N.Y. LEXIS 924 (N.Y. 1909).

An immaterial allegation in a complaint may be disregarded by the defendant. Bulova v E. L. Barnett, Inc., 181 N.Y.S. 247, 111 Misc. 150, 1920 N.Y. Misc. LEXIS 1263 (N.Y. App. Term), modified, 193 A.D. 161, 183 N.Y.S. 495, 1920 N.Y. App. Div. LEXIS 5519 (N.Y. App. Div. 1920).

In an action on a promissory note, allegations of presentment for and refusal of payment may be denied for want of knowledge or information, but such denial raises no issue since such allegations are unnecessary. Doppelt v Raeden, 192 N.Y.S. 835, 118 Misc. 203, 1922 N.Y. Misc. LEXIS 1028 (N.Y. Sup. Ct. 1922).

An answer in an action of foreclosure, which admits of the making of a mortgage as security for a debt, admits the cause of action; and a denial of the remaining allegations is aimed at a mere legal conclusion, and puts nothing in issue. Kay v Churchill, 25 Hun 193 (N.Y. 1881).

132. General denial

It would seem that a denial in this form “he says that he denies each and every allegation,” is a good general denial. Jones v Ludlum, 74 N.Y. 61, 74 N.Y. (N.Y.S.) 61, 1878 N.Y. LEXIS 706 (N.Y. 1878).

Without specifying “each and every allegation.” D. & G. Girl Coat Co. v Kafka, 218 A.D. 607, 218 N.Y.S. 509, 1926 N.Y. App. Div. LEXIS 5986 (N.Y. App. Div. 1926), aff'd, 245 N.Y. 646, 157 N.E. 893, 245 N.Y. (N.Y.S.) 646, 1927 N.Y. LEXIS 831 (N.Y. 1927).

A general denial in an action on contract cannot be construed as setting up an affirmative defense of a special contract, or a modification of a contract, thereby placing the burden of proof upon the defendant. Lehman v Gross, 193 N.Y.S. 23, 118 Misc. 262, 1922 N.Y. Misc. LEXIS 1052 (N.Y. App. Term 1922).

Motion to strike granted because of denials under CPA § 261, subdivision 1, as to “the” allegations, instead of as to “each” or “each and every” allegation. Bland v White, 246 N.Y.S. 532, 138 Misc. 715, 1930 N.Y. Misc. LEXIS 1694 (N.Y. Sup. Ct. 1930).

Denial of “the allegations” is bad pleading. In re Aquino's Will, 59 N.Y.S.2d 595, 186 Misc. 15, 1946 N.Y. Misc. LEXIS 1776 (N.Y. Sur. Ct.), aff'd, 270 A.D. 994, 63 N.Y.S.2d 214 (N.Y. App. Div. 1946).

An answer denying “the complaint in each and every allegation therein contained” is a good denial of all the allegations of the complaint. People v Tunnicliffe, 7 N.Y.S. 91, 54 Hun 633, 1889 N.Y. Misc. LEXIS 943 (N.Y. Sup. Ct. 1889).

“Defendant denies each and every allegation of the complaint,” is the usual form of general denial. Kellogg v Church, 4 How. Pr. 339.

133. —Denial of allegations not specifically admitted or denied

It is a good general denial to deny each and every allegation of the complaint not before admitted or denied. Griffin v Long I. R. Co., 101 N.Y. 348, 4 N.E. 740, 101 N.Y. (N.Y.S.) 348, 1 N.Y. St. 56, 1886 N.Y. LEXIS 637 (N.Y. 1886).

The denial must be in such a form as to show at once upon what allegations issue is taken; it is therefore not sufficient to deny such portions of the complaint as are not otherwise admitted or avoided, unless the remainder of the answer specifically identifies the allegations to which it refers. Griffin v Long I. R. Co., 101 N.Y. 348, 4 N.E. 740, 101 N.Y. (N.Y.S.) 348, 1 N.Y. St. 56, 1886 N.Y. LEXIS 637 (N.Y. 1886).

A denial contained in an answer of all the allegations contained in specified folios of a complaint, except as hereinafter admitted, is not a good pleading; it should not, however, be treated as a nullity and thereby deprive the defendant of his right to trial or to amend; the proper remedy is by motion to have the answer made more specific and certain. Thompson v Wittkop, 184 N.Y. 117, 76 N.E. 1081, 184 N.Y. (N.Y.S.) 117, 1906 N.Y. LEXIS 1344 (N.Y. 1906).

“Denies each and every other allegation in said complaint contained not hereinbefore specifically admitted, controverted or denied.” Rawlings v Alexander, 28 N.Y.S. 748, 8 Misc. 514, 1894 N.Y. Misc. LEXIS 514 (N.Y. City Ct. 1894).

An answer denying each and every allegation in the complaint not otherwise specifically admitted or denied is authorized in form. Owens v R. Hudnut's Pharmacy, 12 N.Y.S. 700, 58 Hun 611, 1890 N.Y. Misc. LEXIS 2646 (N.Y. Sup. Ct. 1890).

An answer admitting that plaintiff was a foreign corporation and the residence of the defendant, and then denying “each and every other allegation,” was not in accordance with the requirements of CPA § 261. J. M. & L. A. Osborn Co. v Kennedy, 186 N.Y.S. 721, 1920 N.Y. Misc. LEXIS 1985 (N.Y. App. Term 1920), aff'd, 197 A.D. 919, 188 N.Y.S. 928, 1921 N.Y. App. Div. LEXIS 7673 (N.Y. App. Div. 1921).

General denial of each allegation of complaint not expressly admitted, denied or controverted, in answer having 111 numbered paragraphs, was insufficient. Brooklyn Trust Co. v Wheeler, 81 N.Y.S.2d 762, 1948 N.Y. Misc. LEXIS 2950 (N.Y. Sup. Ct. 1948).

Denying the allegations in the third section of the complaint, except as specifically admitted, is a good answer. Gallatin Nat. Bank v Nashville, C. & St. L. R. Co., 4 N.Y. St. 714.

A complaint alleged that plaintiff consigned goods to defendant; that he sold them and received a certain amount, which he refused to pay on demand. The answer admitted plaintiff’s copartnership; that defendant was their agent; that they consigned goods to him; that he sold some of the goods and received some of the sale price, and denied each and every other allegation. This was a denial of the allegation that he had not paid the money over. Harland v Howard, 10 N.Y.S. 449, 57 Hun 113, 1890 N.Y. Misc. LEXIS 2164 (N.Y. Sup. Ct. 1890).

An answer denying knowledge, etc., as to the allegations of the complaint, “not hereinafter specifically admitted or denied,” is sufficient to put such allegations in issue, and if it is objectionable in form, the objection must be taken before the trial. McGuinness v New York, 13 NY Week Dig 522.

134. Specific denial

Specific denial should controvert only matter alleged in complaint; introduction of new matter in specific denial is improper. Westchester County v Harrison, 85 N.Y.S.2d 374, 1946 N.Y. Misc. LEXIS 3459 (N.Y. Sup. Ct. 1946).

A mere statement of facts inconsistent with the allegations of the complaint is not a specific denial. WOOD v WHITING, 21 Barb. 190, 1855 N.Y. App. Div. LEXIS 141 (N.Y. Sup. Ct. Dec. 3, 1855); WEST v AMERICAN EXCH. BANK, 44 Barb. 175, 1865 N.Y. App. Div. LEXIS 57 (N.Y. Sup. Ct. Mar. 6, 1865); see also, Loosey v Orser, 17 Super Ct (4 Bosw) 391; Hamilton v Hough, 13 How. Pr. 14, 1856 N.Y. Misc. LEXIS 38 (N.Y. Sup. Ct. Apr. 1, 1856).

A denial must be specific if it is not general. 24 Hun 657.

A statement in an answer that the defendants deny that a true copy of the agreement sued on is set forth in the complaint is neither a general nor specific denial, but an affirmative defense. .

135. Qualified denial

The service of the notice, required by § 2 of the Employers' Liability Act, is a condition precedent to the commencement of the action; the service of such notice is not admitted by an answer which denies the service of the notice, except one received subsequent to the service of the summons and complaint. Hope v Scranton & Lehigh Coal Co., 120 A.D. 595, 105 N.Y.S. 372, 1907 N.Y. App. Div. LEXIS 1263 (N.Y. App. Div. 1907).

A defense which contains neither a specific nor general denial and only certain pretended denials, so qualified as to be ineffective, must be stricken out; a denial of each and every allegation of the complaint, "except as herein admitted, qualified or controverted," cannot be sustained unless the excepted matter is so clearly specified that there can be no doubt as to what was intended to be covered by the general denial. Zimmerman v Meyrowitz, 69 N.Y.S. 800, 34 Misc. 307, 1901 N.Y. Misc. LEXIS 231 (N.Y. Sup. Ct. 1901), rev'd, 77 A.D. 329, 79 N.Y.S. 159, 12 N.Y. Ann. Cas. 271, 1902 N.Y. App. Div. LEXIS 2858 (N.Y. App. Div. 1902).

City's answer denying specified allegation of complaint relating to service of notice if claim "except it admits that paper purporting to be notice of claim was served", was sufficient to raise issue of sufficiency of required notice of claim. Mink v Albany, 121 N.Y.S.2d 164, 203 Misc. 94, 1952 N.Y. Misc. LEXIS 2288 (N.Y. Sup. Ct. 1952).

Answer denying allegations of particular paragraph of complaint "except admits receiving from plaintiff self-serving declaration charging defendant with having made statements which had not been made and demanding apology," was improper, as not confined to specific denials or admissions. Kraushaar v Lavin, 39 N.Y.S.2d 880, 1943 N.Y. Misc. LEXIS 1591 (N.Y. Sup. Ct. 1943).

136. Negative pregnant

Where the complaint sets forth the condition of a bond, and avers the execution of a mortgage as collateral security for the same debt "with the same condition as the said bond," an answer repeating the words of the condition, as stated in the complaint, and averring that it is not contained in the mortgage, is not a denial that such was in substance the condition of the mortgage. Dimon v Dunn, 15 N.Y. 498, 15 N.Y. (N.Y.S.) 498, 1857 N.Y. LEXIS 31 (N.Y. 1857).

An answer, alleging that a telegraph company was not responsible for delay, error or remissness in delivering a message, to an action for not sending it, admits the complaint. Baldwin v United States Tel. Co., 45 N.Y. 744, 45 N.Y. (N.Y.S.) 744, 1871 N.Y. LEXIS 205 (N.Y. 1871).

The complaint alleged that "William Stuber was directed by the defendant to go down and do certain work in an excavation which the defendant had caused to be made in West 116th St. in the city of New York, between Seventh and Eighth avenues, in said city, about 400 feet or thereabouts east of Eighth avenue"; a denial in that he directed William Stuber "to go down," etc., following the exact words of the complaint, is not a denial authorized by the statute; it is a species of negative pregnant. Stuber v McEntee, 142 N.Y. 200, 36 N.E. 878, 142 N.Y. (N.Y.S.) 200, 1894 N.Y. LEXIS 741 (N.Y. 1894).

When an answer is in any respect vague or uncertain a plaintiff has the right to compel a correction thereof by proper preliminary motion, and if he fails to do so the answer is to be construed most strongly against him; a negative pregnant is a denial "pregnant with the admission of a substantial fact which is apparently controverted; or, in other words, one which, although in the form of a traverse, really, admits the important fact contained in the allegation." Electrical Accessories Co. v Mittenthal, 194 N.Y. 473, 87 N.E. 684, 194 N.Y. (N.Y.S.) 473, 1909 N.Y. LEXIS 1304 (N.Y. 1909).

Where the plaintiff in an action serves an amended complaint and the defendant serves an answer "to the complaint," such answer should not be stricken out as frivolous, simply because it fails to state that the answer was interposed to the amended complaint; an answer which denies in haec verba all the substantive allegations of a paragraph in the complaint is not improper, where the denial is not framed in such a manner as to form a negative pregnant. Donovan v Main, 74 A.D. 44, 77 N.Y.S. 229, 11 N.Y. Ann. Cas. 180, 1902 N.Y. App. Div. LEXIS 1782 (N.Y. App. Div. 1902).

Where an answer instead of making a general denial denies the complaint in haec verba as alleged, it is a negative pregnant and is no denial of the complaint; on such a pleading the defendant's motion for a bill of particulars should be denied. A motion for minute and unnecessary particulars is an imposition on the court, which it is not obliged to pick out from among unnecessary requests those to which the plaintiff would have been entitled. Shepard v Wood, 116 A.D. 861, 102 N.Y.S. 306, 1907 N.Y. App. Div. LEXIS 49 (N.Y. App. Div. 1907).

An answer which simply denies in the precise words of the complaint "that in the month of April plaintiff did not work" constitutes a negative pregnant and must be construed to mean that plaintiff rendered the services at some time other than as alleged, and the trial justice may treat the allegations of the complaint as having been admitted. Levin & Meyer Contracting Co. v Jackson, 92 N.Y.S. 307, 46 Misc. 445, 1905 N.Y. Misc. LEXIS 94 (N.Y. App. Term 1905).

Denying "that the rights, shares and interests of the parties hereto are correctly alleged in said complaint" in partition is a nullity. Nolan v Skelly, 25 Hun 193 (N.Y. 1881).

137. Denial of knowledge or information

It is sufficient to deny upon information and belief the allegations of the complaint not otherwise admitted. Griffin v Long I. R. Co., 101 N.Y. 348, 4 N.E. 740, 101 N.Y. (N.Y.S.) 348, 1 N.Y. St. 56, 1886 N.Y. LEXIS 637 (N.Y. 1886).

Generally a denial upon information and belief of a material allegation of the complaint in a verified answer is good. Bennett v Leeds Mfg. Co., 110 N.Y. 150, 17 N.E. 669, 110 N.Y. (N.Y.S.) 150, 16 N.Y. St. 841, 1888 N.Y. LEXIS 864 (N.Y. 1888).

A denial in an answer of “knowledge or information sufficient to form a belief” was a substantial and reasonably strict compliance with CPA § 261 which provided that an answer could contain a denial of “any knowledge or information thereof sufficient to form a belief.” Hidden v Godfrey, 88 A.D. 496, 85 N.Y.S. 197, 1903 N.Y. App. Div. LEXIS 3182 (N.Y. App. Div. 1903).

An answer denying sufficient knowledge or information to form a belief as to certain paragraphs is equivalent to a general denial and should not be declared frivolous. Curran v Arp, 141 A.D. 659, 125 N.Y.S. 993, 1910 N.Y. App. Div. LEXIS 3928 (N.Y. App. Div. 1910).

A general or specific denial under CPA § 261 could have been upon information and belief. Lazarus v Wiernicki, 195 A.D. 830, 187 N.Y.S. 194, 1921 N.Y. App. Div. LEXIS 4843 (N.Y. App. Div. 1921).

An answer denying that defendant has any knowledge or information sufficient to form a belief as to the truth of any allegations contained in the complaint is not frivolous. Rourke v Regnault, 32 N.Y.S. 794, 11 Misc. 622, 1895 N.Y. Misc. LEXIS 211 (N.Y. City Ct. 1895).

A denial of knowledge or information sufficient to form a belief, although adequate to form an issue in pleading, is not a sufficient denial of a fact stated positively in an affidavit. People ex rel. Wanzor v Sturgis, 77 N.Y.S. 1008, 38 Misc. 433, 1902 N.Y. Misc. LEXIS 406 (N.Y. Sup. Ct. 1902).

An answer in which defendants deny that they have any knowledge or information sufficient to form a belief as to the allegations contained in the complaint is sufficient, and it is not necessary to deny such knowledge or information as to each material allegation of the complaint. Hinds, Noble & Eldredge v Bonner, 116 N.Y.S. 663, 63 Misc. 258, 1909 N.Y. Misc. LEXIS 93 (N.Y. App. Term 1909).

In action on a note, answer that defendants "deny that they have any information sufficient to form a belief as to the allegations contained in" paragraphs 5, 6, 7, did not put in issue any material allegations of the complaint, and entire answer must fall. Bank of Long Island v Schildkraut, 162 N.Y.S. 699 (N.Y. Sup. Ct. 1916).

It is the correct form where the defendant has no personal knowledge of the facts, but is satisfied or has information to make him believe that the allegation is not true. Wood v Raydure, 39 Hun 144 (N.Y.).

An answer may deny allegations of the complaint on information and belief and where the party has no personal knowledge, he is not only permitted but bound to make his denials in that form. Wood v Raydure, 39 Hun 144 (N.Y.).

Corporations may answer in this way: Macauley v Bromell & Barkley Printing Co., 67 How. Pr. 252, 1884 N.Y. Misc. LEXIS 132 (N.Y. Sup. Ct. July 1, 1884).

There was no objection to the pleading using the exact words of CPA ? 261 and denying ?any knowledge or information of the allegations of the complaint sufficient to form a belief.? Musgrove v New York, 51 Super Ct (19 Jones & S) 528.

Under the former Code of Procedure the defendant might, in his answer, deny positively, when his denial was really upon information and belief; but the Code of Procedure did not allow such a denial, and under CPA § 261 a denial upon information and belief had to be so expressed in the answer. Stent v Continental Nat. Bank, 5 Abb NC 88.

138. —Variations from statutory language

As to an allegation that defendant has no recollection, or is ignorant, or not informed of the facts, see Forbes v Waller, 25 N.Y. 430, 25 N.Y. (N.Y.S.) 430, 1862 N.Y. LEXIS 152 (N.Y. 1862).

Under CPA § 261 a denial that “on information and belief he denies each and every allegation set forth in said complaint except as herein admitted, qualified or explained” would be stricken out, as being neither general nor specific. Barton v Griffin, 36 A.D. 572, 55 N.Y.S. 477, 1899 N.Y. App. Div. LEXIS 102 (N.Y. App. Div. 1899).

Answer denying allegations of complaint on information and belief and verified by attorney, held sufficient. American Audit Co. v Industrial Federation of America, 84 A.D. 304, 82 N.Y.S. 642, 1903 N.Y. App. Div. LEXIS 1763 (N.Y. App. Div. 1903).

Issues raised by denials on information and belief in action to collect personal tax in New York City considered. New York v Streeter, 91 A.D. 206, 86 N.Y.S. 665, 1904 N.Y. App. Div. LEXIS 360 (N.Y. App. Div.), aff'd, 180 N.Y. 507, 72 N.E. 631, 180 N.Y. (N.Y.S.) 507, 1904 N.Y. LEXIS 1322 (N.Y. 1904).

An answer which “denies knowledge or information sufficient to form a belief as to the truth in any of the allegations” in specified paragraphs of a complaint, is insufficient as a denial of those allegations and raises no issue thereon. Jurgens v Wichmann, 124 A.D. 531, 108 N.Y.S. 881, 1908 N.Y. App. Div. LEXIS 2138 (N.Y. App. Div. 1908).

An answer which after making certain admissions and averments, states “that as to the other material allegations in said complaint the defendant has not any knowledge or information thereof sufficient to form a belief,” is defective in that it leaves the question open as to what allegations the pleader regards as material. Swing v Engle, 143 A.D. 181, 127 N.Y.S. 322, 1911 N.Y. App. Div. LEXIS 795 (N.Y. App. Div. 1911).

An answer containing a denial of each and every allegation of the complaint upon information and belief cannot be disregarded as frivolous. Cook v Broughton, 183 A.D. 46, 171 N.Y.S. 28, 1918 N.Y. App. Div. LEXIS 5983 (N.Y. App. Div. 1918).

An allegation that he “has not sufficient knowledge or information to form a belief” and that “he therefore denies the same,” is a slovenly and unscientific allegation for the “denial” permitted by CPA § 261. Johnson v Andrews, 68 N.Y.S. 764, 34 Misc. 89, 1901 N.Y. Misc. LEXIS 151 (N.Y. Sup. Ct. 1901).

A defendant, under an answer denying “any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in the complaint” is entitled to introduce testimony bearing upon the issues raised thereby. Scully v Wolf, 107 N.Y.S. 181, 56 Misc. 468, 1907 N.Y. Misc. LEXIS 809 (N.Y. App. Term 1907).

It has been said that an allegation in an answer that the defendant has no information sufficient to form a belief concerning the matters alleged in paragraph second of the complaint herein, and therefore denies the same, is not one of the forms of denial authorized. Locomobile Co. of America v De Witt, 110 N.Y.S. 413, 59 Misc. 221, 1908 N.Y. Misc. LEXIS 487 (N.Y. App. Term 1908).

An allegation in an answer that defendant “has no knowledge or information sufficient to form a belief as to the truth of” certain allegations of the complaint is unsufficient to raise an issue. White v Gibson, 113 N.Y.S. 983, 61 Misc. 436, 1908 N.Y. Misc. LEXIS 124 (N.Y. Sup. Ct. 1908).

A denial of knowledge or information sufficient to form a belief as to the truth of allegations of specified paragraphs of complaint was good. Jacobs v Wanamaker, 138 N.Y.S. 387, 77 Misc. 563, 1912 N.Y. Misc. LEXIS 1202 (N.Y. City Ct. 1912).

Denial omitting “sufficient to form a belief” held not to have misled plaintiff. Sanchez v Spitzka, 48 N.Y.S.2d 184, 183 Misc. 413, 1944 N.Y. Misc. LEXIS 1913 (N.Y. Sup. Ct. 1944).

An answer which simply denies that the defendant has any knowledge or impression as to the allegations contained in the complaint sufficient to form a belief, is sufficient and cannot be stricken out as frivolous. Hagadorn v Edgewater, 13 N.Y.S. 687, 59 Hun 625, 1891 N.Y. Misc. LEXIS 1640 (N.Y. Sup. Ct. 1891).

CPA § 261, while not requiring admissions on the part of the defendant, did not authorize a qualified denial, “except as admitted or denied,” and while it permitted denial upon information and belief the issues could not be left in doubt by unwarranted denials. Landau v Lavner, 195 N.Y.S. 301, 1922 N.Y. Misc. LEXIS 1384 (N.Y. Sup. Ct. 1922).

Denial of knowledge or information as to truth of each and every allegation in designated paragraphs of complaint is sufficient denial to raise in issue controversies between parties. Union Free School Dist. v Gumbs, 133 N.Y.S.2d 499, 1954 N.Y. Misc. LEXIS 2241 (N.Y. Sup. Ct. 1954).

A denial of allegations of a complaint in an answer verified by the defendant, which is stated to be made by him “either upon his own knowledge or as not having any knowledge or information thereof sufficient to form a belief in respect to the same” is insufficient; it being impossible to distinguish the allegations denied upon knowledge from those denied from want of knowledge or information sufficient to form a belief. Sheldon v Sabin (N.Y.C.P. Mar. 15, 1883).

An answer which states that defendant answers on information and belief is not sufficient, the mode prescribed must be substantially followed. Peatt Mfg. Co. v Jordan Iron & Chem. Co., 33 Hun 143, 67 How. Pr. 230, 1884 N.Y. Misc. LEXIS 135 (N.Y. App. Term June 1, 1884).

And an answer stating that the defendant on information and belief denies “all allegations in the complaint contained not herein before admitted or denied” after having made specific admissions, does not make any issue. Schroder v Wanzor, 36 Hun 423, 2 How. Pr. (n.s.) 13 (N.Y.).

An answer is proper which says “defendant answers to the complaint herein upon information and belief, as follows: he alleges that no allegation of said complaint is true, except,” etc. Metraz v Pearsall, 5 Abb NC 90.

139. —Matter known to defendant or denials otherwise incredulous as matter of law

The denial of all knowledge or information sufficient to form a belief as to the allegations of a personal transaction with the defendant is frivolous. Bloch v Bloch, 131 A.D. 859, 116 N.Y.S. 339, 1909 N.Y. App. Div. LEXIS 913 (N.Y. App. Div. 1909).

Where matter alleged in complaint must be known to defendant, he cannot deny that he has information sufficient to form a belief as to the truth of the allegation. Edwards v MacArtney, 193 A.D. 334, 183 N.Y.S. 851, 1920 N.Y. App. Div. LEXIS 5549 (N.Y. App. Div. 1920).

An answer denying any knowledge or information sufficient to form a belief as to a material allegation of a complaint, raises an issue and cannot be stricken out as sham, and the court cannot say that such a denial is untrue merely because the party making it presumably had sufficient knowledge absolutely to deny the allegation if untrue. Nichols v Corcoran, 78 N.Y.S. 242, 38 Misc. 671, 1902 N.Y. Misc. LEXIS 466 (N.Y. Sup. Ct. 1902).

An answer in an action for rent, that defendant has no knowledge or information sufficient to form a belief as to an allegation of the complaint that, by a deed recorded the day of its date, the premises were conveyed to plaintiffs by a former owner, defendant’s lessor, and denies the same, raises no issue, as defendant cannot plead ignorance of a public record. Schwartz v Ribaudo, 101 N.Y.S. 599, 52 Misc. 102, 1906 N.Y. Misc. LEXIS 423 (N.Y. App. Term 1906), different results reached on reh'g, 110 N.Y.S. 352 (N.Y. App. Term 1908).

It is possible in some instances that denials of knowledge or information are incredible as a matter of law; e. g., maker of note so denying consideration, delivery and nonpayment. Doppelt v Raeden, 192 N.Y.S. 835, 118 Misc. 203, 1922 N.Y. Misc. LEXIS 1028 (N.Y. Sup. Ct. 1922).

Plea of denial of knowledge or information sufficient to form belief is reserved for defendant who is honestly without any knowledge or information. Lybrand v Publix Shirt Corp., 136 N.Y.S.2d 867, 1954 N.Y. Misc. LEXIS 3538 (N.Y. Sup. Ct. 1954).

Where in an action upon a covenant in a written lease to pay rent the answer admits the making of the lease pleaded, and sets forth that defendant has no knowledge or information sufficient to form a belief as to the conditions thereof, or whether defendant warranted to pay the rent

reserved in the lease, or as to the performance by plaintiff of the conditions thereof, such answer pleads no defense, and is frivolous, and judgment should be granted thereon. Collis v Alburtis (N.Y.C.P. Feb. 1, 1886).

Denials upon information and belief are not favored in pleadings put in upon leave of the court. O'Brien v Catlin, 1 NY Code R NS 273.

140. — —Matters of record

Where a complaint, in an action for negligence, alleges filing of notice of intention to begin an action, a denial of knowledge or information sufficient to form a belief as to the allegation is frivolous and insufficient to raise that issue. Bogart v New York, 128 A.D. 139, 112 N.Y.S. 549, 1908 N.Y. App. Div. LEXIS 400 (N.Y. App. Div. 1908).

A denial of knowledge or information sufficient to form a belief as to matters of public record is frivolous. Allen v National Surety Co., 144 A.D. 509, 129 N.Y.S. 228, 1911 N.Y. App. Div. LEXIS 4180 (N.Y. App. Div. 1911).

Denials of sufficient knowledge or information were frivolous, since the facts were obtainable from public records. Bischoff v Isadore Holding Corp., 233 A.D. 682, 249 N.Y.S. 130, 1931 N.Y. App. Div. LEXIS 11728 (N.Y. App. Div. 1931).

A denial of information sufficient to form a belief is insufficient as a denial of matters of public record, such as the time when the Public Service Commission put certain gas and electric rate schedules into effect. Oswego v People's Gas & Electric Co., 190 N.Y.S. 39, 116 Misc. 354, 1921 N.Y. Misc. LEXIS 1647 (N.Y. Sup. Ct. 1921).

Denial of knowledge or information of plaintiff's allegation of ownership is not frivolous since record title is not conclusive as to ownership. Paliotto v Brunswick-Balke-Collender Co., 23 Misc. 2d 226, 199 N.Y.S.2d 729, 1959 N.Y. Misc. LEXIS 2840 (N.Y. Sup. Ct. 1959), aff'd, 210 N.Y.S.2d 766 (N.Y. App. Div. 1960).

Denial of knowledge or information of public rezoning hearing, adoption of changes in zoning, adoption of resolution rescinding changes, and proceeding to annul such resolution, all of which were matters of public record, was frivolous. Paliotto v Brunswick-Balke-Collender Co., 23 Misc. 2d 226, 199 N.Y.S.2d 729, 1959 N.Y. Misc. LEXIS 2840 (N.Y. Sup. Ct. 1959), aff'd, 210 N.Y.S.2d 766 (N.Y. App. Div. 1960).

141. —By executors, administrators or trustees

Answer denying knowledge or information sufficient to form a belief, in action against executrix upon claimed obligation of her intestate, was held sufficient to preclude summary judgment under RCP 113 (Rule 3212(a)–(f) herein) where supporting affidavit while showing her presence during part of negotiations culminating in alleged obligation, did not show knowledge on her part of actual assumption of obligation. Woodmere Academy v Moskowitz, 212 A.D. 457, 208 N.Y.S. 578, 1925 N.Y. App. Div. LEXIS 9479 (N.Y. App. Div. 1925).

Denials of information and belief, lack of knowledge, etc., by an executor are considered differently from ordinary cases, and do not create a suspicion of frivolity and interposition for delay. Edelman v Public Nat'l Bank & Trust Co., 239 N.Y.S. 335, 136 Misc. 213, 1930 N.Y. Misc. LEXIS 983 (N.Y. City Ct. 1930).

A trustee, in order to question the validity of consents to the revocation of the trust, may interpose an answer denying that it had any knowledge or information sufficient to form a belief as to the execution of the consents. Breuchaud v Bank of New York & Trust Co., 283 N.Y.S. 812, 157 Misc. 375, 1935 N.Y. Misc. LEXIS 1595 (N.Y. Sup. Ct. 1935).

142. —Sufficiency of particular denials of knowledge or information

Answer will not be insufficient because it alleges nonexistence of a corporation upon information and belief. Joint-Stock Co. of Volgakama Oil & Chemical Factory v National City Bank, 240 N.Y.

368, 148 N.E. 552, 240 N.Y. (N.Y.S.) 368, 1925 N.Y. LEXIS 742 (N.Y.), reh'g denied, 241 N.Y. 509, 150 N.E. 532, 241 N.Y. (N.Y.S.) 509, 1925 N.Y. LEXIS 575 (N.Y. 1925).

An answer which denies knowledge or information sufficient to form a belief as to whether a bond and mortgage in suit had been assigned to the plaintiff and which allege payments other than those stated in the complaint, is not a sham. Reese v Walworth, 61 A.D. 64, 69 N.Y.S. 1115, 1901 N.Y. App. Div. LEXIS 886 (N.Y. App. Div. 1901).

An answer which denies any knowledge or information sufficient to form a belief as to the allegations of the complaint in regard to the execution and delivery of a certain bond or mortgage and a default in payment, is good and cannot be stricken out as sham. Alexander v Aronson, 65 A.D. 174, 72 N.Y.S. 640, 1901 N.Y. App. Div. LEXIS 2103 (N.Y. App. Div. 1901).

An allegation that a claimant against the city duly presented his claim to the comptroller and that no part of the claim has been paid, is put in issue by a denial by the city that it has any knowledge or information sufficient to form a belief as to said allegation. Mack Paving Co. v New York, 142 A.D. 702, 127 N.Y.S. 738, 1911 N.Y. App. Div. LEXIS 374 (N.Y. App. Div. 1911).

President of express company could deny any knowledge or information sufficient to form a belief as to ownership of truck which hit plaintiff. Walsh v Barrett, 154 A.D. 461, 139 N.Y.S. 68, 1913 N.Y. App. Div. LEXIS 9010 (N.Y. App. Div. 1913).

While a denial on information and belief that plaintiff is still the owner of a mortgage being foreclosed is in proper form under this section, it raises no issue in a case wherein the complaint alleges the assignment to the plaintiff of the mortgage and its recordation, as these allegations are not effectively denied. D. & G. Girl Coat Co. v Kafka, 218 A.D. 607, 218 N.Y.S. 509, 1926 N.Y. App. Div. LEXIS 5986 (N.Y. App. Div. 1926), aff'd, 245 N.Y. 646, 157 N.E. 893, 245 N.Y. (N.Y.S.) 646, 1927 N.Y. LEXIS 831 (N.Y. 1927).

An answer admitting incorporation and alleging “that it has no knowledge or information sufficient to form a belief as to the truth of all the other allegations contained in said complaint,” is bad. Collins v North Side Pub. Co., 20 N.Y.S. 892, 1 Misc. 211, 1892 N.Y. Misc. LEXIS 71

(N.Y. City Ct. 1892), aff'd, 22 N.Y.S. 1132, 3 Misc. 635, 1893 N.Y. Misc. LEXIS 398 (N.Y.C.P. 1893).

In view of CPA § 261 authorizing denial of knowledge or information sufficient to form a belief as to an allegation of a complaint, where a complaint alleges an assignment and the answer denies, on information and belief, that it was executed as permitted by law, the defendant was entitled as a matter of law to defend the action, and the court has no power, under RCP 113 (Rule 3212(a)–(f) herein), to strike out the answer and grant a summary judgment. Rogan v Consolidated Coppermines Co., 193 N.Y.S. 163, 117 Misc. 718, 1922 N.Y. Misc. LEXIS 1068 (N.Y. Sup. Ct. 1922).

Denials going to the existing validity of a mortgage, as security made upon the information and belief of the defendant, are sufficient to present an issue. Zimmerman v Hunt, 7 N.Y. St. 778.

143. — —Denials of infancy

Where the infancy of plaintiff who disaffirmed his contract was clearly established, denial of knowledge or information sufficient to form a belief, was insufficient. Bower v M. Samuels & Co., 226 A.D. 769, 234 N.Y.S. 379, 1929 N.Y. App. Div. LEXIS 9875 (N.Y. App. Div.), aff'd, 252 N.Y. 549, 170 N.E. 138, 252 N.Y. (N.Y.S.) 549, 1929 N.Y. LEXIS 619 (N.Y. 1929).

144. — —Promissory notes

A denial of information sufficient to form a belief as to an allegation of ownership by plaintiff of negotiable paper sued upon was proper and sufficient in form under CPA § 261. General Inv. Co. v Interborough Rapid Transit Co., 200 A.D. 794, 193 N.Y.S. 903, 1922 N.Y. App. Div. LEXIS 8278 (N.Y. App. Div. 1922), aff'd, 235 N.Y. 133, 139 N.E. 216, 235 N.Y. (N.Y.S.) 133, 1923 N.Y. LEXIS 1158 (N.Y. 1923).

Where the maker of a promissory note, on information and belief denies consideration, presentment for payment, nonpayment and refusal to pay, motion for judgment on the pleadings

is proper. Doppelt v Raeden, 192 N.Y.S. 835, 118 Misc. 203, 1922 N.Y. Misc. LEXIS 1028 (N.Y. Sup. Ct. 1922).

In action on note, part of answer denying knowledge or information sufficient to form a belief as to whether defendant paid or gave a new note in renewal was sham, but such an allegation as to whether plaintiff had indorsed note and discounted it with a bank and had paid part of old note should not be stricken. McNeil Lumber Co. v Chase, 154 N.Y.S. 872 (N.Y. Sup. Ct. 1915).

An issue as to the due endorsement and delivery of a note is properly raised by a denial of knowledge or information sufficient to form a belief thereon. Bank of Coney Island v Weinberg, 190 N.Y.S. 203, 1921 N.Y. Misc. LEXIS 1677 (N.Y. Sup. Ct. 1921).

A denial of endorsement and delivery of a note held to imply a denial that plaintiff is a holder in due course and for value, and to permit proof of want of consideration. Bank of Coney Island v Weinberg, 190 N.Y.S. 203, 1921 N.Y. Misc. LEXIS 1677 (N.Y. Sup. Ct. 1921).

145. — —Sales

In action for purchase price of goods, where defendant entered denial on information and belief, plaintiff's remedy was to move to strike out answer as frivolous and give defendant opportunity of proving that denials were made in good faith in that transaction was not with defendant personally. Lazarus v Wiernicki, 195 A.D. 830, 187 N.Y.S. 194, 1921 N.Y. App. Div. LEXIS 4843 (N.Y. App. Div. 1921).

In an action to recover for goods sold and delivered, the defendant may deny each and every allegation in the complaint contained on information and belief. Richards v Frechsel.

146. Matter provable under general or specific denial

The history of the rule of evidence under the general issue in assumpsit, examined and fully commented upon in McKyring v Bull, 16 N.Y. 297, 16 N.Y. (N.Y.S.) 297, 1857 N.Y. LEXIS 73 (N.Y. 1857).

Nor need special damages be claimed by the answer where property has been taken from defendant. See Wright v Delafield, 25 N.Y. 266, 25 N.Y. (N.Y.S.) 266, 1862 N.Y. LEXIS 131 (N.Y. 1862).

Any evidence to disprove an allegation of the complaint denied by the answer is admissible. Wheeler v Billings, 38 N.Y. 263, 38 N.Y. (N.Y.S.) 263, 1868 N.Y. LEXIS 88 (N.Y. 1868).

That work was unskillfully done or worth less than the amount claimed on a quantum meruit. Gates v Preston, 41 N.Y. 113, 41 N.Y. (N.Y.S.) 113, 1869 N.Y. LEXIS 230 (N.Y. 1869).

Or to disprove wholly or in part any fact necessary to be established by the plaintiff. Weaver v Barden, 49 N.Y. 286, 49 N.Y. (N.Y.S.) 286, 1872 N.Y. LEXIS 169 (N.Y. 1872).

That a part of the amount has been received by a sheriff suing sureties, to himself for damages. O'Brien v McCann, 58 N.Y. 373, 58 N.Y. (N.Y.S.) 373, 1874 N.Y. LEXIS 511 (N.Y. 1874).

Another written agreement which controlled the one for a royalty on a patented machine, sued on. Marsh v Dodge, 66 N.Y. 533, 66 N.Y. (N.Y.S.) 533, 1876 N.Y. LEXIS 261 (N.Y. 1876).

That the note on which the action was brought has been altered since its execution, by adding the words “with interest.” SCHWARTZ v OPPOLD, 74 N.Y. 307, 74 N.Y. (N.Y.S.) 307, 56 How. Pr. 156, 1878 N.Y. Misc. LEXIS 264 (N.Y. Sup. Ct. 1878).

That a carrier suing for freight failed to perform his conduct. Dunham v Bower, 77 N.Y. 76, 77 N.Y. (N.Y.S.) 76, 1879 N.Y. LEXIS 741 (N.Y. 1879).

In an action for damages for breach of covenant of seizin in a deed, a general denial puts in issue the allegations of breach. Woolley v Newcombe, 87 N.Y. 605, 87 N.Y. (N.Y.S.) 605, 1882 N.Y. LEXIS 47 (N.Y. 1882).

That no personal loan was made for which the check in suit was given. Koehler v Adler, 91 N.Y. 657, 91 N.Y. (N.Y.S.) 657, 1883 N.Y. LEXIS 88 (N.Y. 1883).

Knapp v Roche, 94 N.Y. 329, 94 N.Y. (N.Y.S.) 329, 1884 N.Y. LEXIS 274 (N.Y. 1884).

Under our former system of practice, and under every rational logical system of pleading, the defendant had to be, under a general denial, permitted to controvert by evidence everything which the plaintiff was bound in the first instance to prove to make out his cause of action. Griffin v Long I. R. Co., 101 N.Y. 348, 4 N.E. 740, 101 N.Y. (N.Y.S.) 348, 1 N.Y. St. 56, 1886 N.Y. LEXIS 637 (N.Y. 1886).

In an action upon an account stated, that the account, although standing upon his books in the name of plaintiff was actually the account of another, whom plaintiff represented; that all of the dealings were with and the indebtedness was to such other person; and so, that defendant had incurred no responsibility to plaintiff. Field v Knapp, 108 N.Y. 87, 14 N.E. 829, 108 N.Y. (N.Y.S.) 87, 12 N.Y. St. 790, 1888 N.Y. LEXIS 556 (N.Y. 1888).

The incorporation of a foreign corporation. See Commerical Bank of Keokuk v Pfeiffer, 108 N.Y. 242, 15 N.E. 311, 108 N.Y. (N.Y.S.) 242, 13 N.Y. St. 506, 1888 N.Y. LEXIS 578 (N.Y. 1888).

That plaintiff was a partner and not an employee of defendant. Healy v Clark, 120 N.Y. 642, 24 N.E. 316, 120 N.Y. (N.Y.S.) 642, 1890 N.Y. LEXIS 1331 (N.Y. 1890).

A defense in an action against a director of a corporation to enforce his personal liability for debts of the corporation because of failure to file annual reports, which specifically alleges that the debts were paid by a third party, and if paid by the plaintiff were paid by him as agent therefor, is sufficient in law upon its face—that it might be proved under a general denial in the answer does not prevent it from being pleaded. Staten I. M. R. Co. v Hinchliffe, 170 N.Y. 473, 63 N.E. 545, 170 N.Y. (N.Y.S.) 473, 1902 N.Y. LEXIS 1082 (N.Y. 1902).

In an action to recover final payment claimed to be due upon a building and loan contract, the defendant may prove under general denial facts tending to show that final payment is not yet due upon said contract. Adams v Lawson, 188 N.Y. 460, 81 N.E. 315, 188 N.Y. (N.Y.S.) 460, 1907 N.Y. LEXIS 1149 (N.Y. 1907).

Allegation of damages in complaint may be disputed by defendant though not denied by answer or plea. Separate concurring opinion of McClelland v Climax Hosiery Mills, 252 N.Y. 347, 169 N.E. 605, 252 N.Y. (N.Y.S.) 347, 1930 N.Y. LEXIS 631 (N.Y. 1930).

It appears that where facts set forth in a separate defense could have been proved under the general denial, that such facts did not constitute a separate defense within CPA § 261, subd 2 (§ 3011 herein) and the remedy of the plaintiff was by motion to strike out such defense. Kraus v Agnew, 80 A.D. 1, 80 N.Y.S. 518, 1903 N.Y. App. Div. LEXIS 499 (N.Y. App. Div. 1903).

The defenses which are and the defenses which are not available under general denial—considered. Grant v Pratt & Lambert, 87 A.D. 490, 84 N.Y.S. 983, 1903 N.Y. App. Div. LEXIS 2679 (N.Y. App. Div. 1903).

The defendant may make the defense, that a contract is illegal and void as against public policy, under a general denial. Landes v Hart, 131 A.D. 6, 115 N.Y.S. 337, 1909 N.Y. App. Div. LEXIS 723 (N.Y. App. Div. 1909).

Where the fact that a contract is illegal upon the grounds of public policy appears upon the face of the complaint, or necessarily appears from the plaintiff's evidence, the defense may be taken under a general denial. Clifford v Hughes, 139 A.D. 730, 124 N.Y.S. 478, 1910 N.Y. App. Div. LEXIS 2286 (N.Y. App. Div. 1910).

Where complaint was so drawn that it could be claimed that it was brought for damages under a common-law liability as well as under the Employers' Liability Act, fact that notice was not served within 120 days, and also that action was not brought within one year, could be set up as a "defense." Kelliher v New York C. & H. R. R. Co., 153 A.D. 617, 138 N.Y.S. 894, 1912 N.Y. App. Div. LEXIS 11236, 1912 N.Y. App. Div. LEXIS 9330 (N.Y. App. Div. 1912), aff'd, 212 N.Y. 207, 105 N.E. 824, 212 N.Y. (N.Y.S.) 207, 1914 N.Y. LEXIS 861 (N.Y. 1914).

In an action to recover for damages by an alleged negligent use of an employee of defendant, the defendant under a general denial is entitled to prove that the damage complained of was

caused by those for whose acts he was not responsible. Kiers v Rathjen, 111 N.Y.S. 599, 60 Misc. 105, 1908 N.Y. Misc. LEXIS 632 (N.Y. App. Term 1908).

In an action to recover an amount alleged to be due the plaintiff upon a participation agreement, a defense that the plaintiff is not the real party in interest may be proved under a general denial. Ketcham v Rowland & Shafto, Inc., 128 N.Y.S. 695, 71 Misc. 439, 1911 N.Y. Misc. LEXIS 253 (N.Y. App. Term 1911).

A single material allegation of a complaint may be proved under a general denial. Bulova v E. L. Barnett, Inc., 181 N.Y.S. 247, 111 Misc. 150, 1920 N.Y. Misc. LEXIS 1263 (N.Y. App. Term), modified, 193 A.D. 161, 183 N.Y.S. 495, 1920 N.Y. App. Div. LEXIS 5519 (N.Y. App. Div. 1920).

Under a general denial defendant is permitted to explain his silence in an action on account stated and to go into facts of past transaction in order to show circumstances which may sustain his denial that there was an account stated. Gravel Products Div. v Sunnydale Acres, Inc., 10 Misc. 2d 323, 171 N.Y.S.2d 519, 1958 N.Y. Misc. LEXIS 3753 (N.Y. Sup. Ct. 1958).

Although facts that plaintiff never loaned money to defendant; that defendant was a “straw man”; and that plaintiff was in fact borrowing the money were provable under defendant’s general denial, defense alleging such facts would not be stricken. Mark v Prentice, 19 Misc. 2d 907, 193 N.Y.S.2d 891, 1959 N.Y. Misc. LEXIS 2844 (N.Y. Sup. Ct. 1959).

That a contract of hiring sued on was conditional and had terminated. Danebaum v Person, 3 N.Y.S. 129 (N.Y. City Ct. 1888).

An answer, denying the allegations of the complaint that plaintiff was rightfully entitled to the immediate possession of a parcel of land under a certain lease, puts in issue the right of possession. Wilkins v Williams, 3 N.Y.S. 897, 49 Hun 605, 1888 N.Y. Misc. LEXIS 974 (N.Y. Sup. Ct. 1888).

A defendant need not set out the evidence of his title in his answer when his title by possession is assailed, but may show any facts to defeat the claim against him. Loeb v Chur, 6 N.Y.S. 296,

53 Hun 637, 1889 N.Y. Misc. LEXIS 546 (N.Y. Sup. Ct. 1889), aff'd, 125 N.Y. 726, 26 N.E. 756, 125 N.Y. (N.Y.S.) 726, 1891 N.Y. LEXIS 1552 (N.Y. 1891).

The general denial allowed permitted a defendant to disprove anything that alleged or any fact that plaintiff must establish to show a cause of action, or to mitigate the damages, but not to prove a defense founded on new matter. Wemple v McManus, 15 N.Y.S. 86, 59 N.Y. Super. Ct. 418, 1891 N.Y. Misc. LEXIS 3060 (N.Y. Super. Ct. 1891).

Breaches of a contract for services by plaintiff who alleges due performance. Weinberg v Blum (N.Y.C.P. Dec. 28, 1885).

In ejectment, title not in plaintiff may be so proved. Benton v Hatch, 43 Hun 142, 6 N.Y. St. 203 (N.Y.), aff'd, 122 N.Y. 322, 25 N.E. 486, 122 N.Y. (N.Y.S.) 322, 1890 N.Y. LEXIS 1604 (N.Y. 1890).

That goods were not delivered as alleged. Dietrich v Dreutel, 43 Hun 342, 6 N.Y. St. 528 (N.Y.).

That contract was not valid, as being for lobby services. Cary v Western Union Tel. Co., 47 Hun 610, 15 N.Y. St. 204 (N.Y.).

In an action for conversion, no conversion or no title may be proved under general denial. Terry v Munger, 2 N.Y.S. 348, 49 Hun 560, 1888 N.Y. Misc. LEXIS 174 (N.Y. Sup. Ct. 1888), aff'd, 121 N.Y. 161, 24 N.E. 272, 121 N.Y. (N.Y.S.) 161, 1890 N.Y. LEXIS 1387 (N.Y. 1890).

That the owner supplied or became surety for a part of the materials for which a mechanic’s lien is claimed. Close v Clark, 9 N.Y.S. 538, 1890 N.Y. Misc. LEXIS 256 (N.Y.C.P. 1890).

Evidence of a custom or of usage known to both parties, to show that the real contract was not as alleged in the complaint. Miller v Insurance Co. of N. A. 1 Abb NC 470.

In negligence, whether the injury was done by others or another cause. Schaus v Manhattan Gas Light Co. 36 Super Ct (4 Jones & S) 262.

147. Matters not provable under general denial

Upon covenant, either a mutual abandonment, or nonperformance of conditions precedent by plaintiff. 10 N.Y. 371.

Former recovery. Brazill v Isham, 12 N.Y. 9, 12 N.Y. (N.Y.S.) 9, 1854 N.Y. LEXIS 106 (N.Y. 1854).

The fact of being a domestic corporation. Bank of Genesee v Patchin Bank, 13 N.Y. 309, 13 N.Y. (N.Y.S.) 309, 1855 N.Y. LEXIS 88 (N.Y. 1855).

Confession and avoidance. McKyring v Bull, 16 N.Y. 297, 16 N.Y. (N.Y.S.) 297, 1857 N.Y. LEXIS 73 (N.Y. 1857).

McKyring v Bull, 16 N.Y. 297, 16 N.Y. (N.Y.S.) 297, 1857 N.Y. LEXIS 73 (N.Y. 1857).

For the history of the rules upon this subject, see McKyring v Bull, 16 N.Y. 297, 16 N.Y. (N.Y.S.) 297, 1857 N.Y. LEXIS 73 (N.Y. 1857).

A release and accord. McKyring v Bull, 16 N.Y. 297, 16 N.Y. (N.Y.S.) 297, 1857 N.Y. LEXIS 73 (N.Y. 1857).

A defense arising out of Laws 1859, ch. 325, § 3, prohibiting banks from paying out notes not received at par. Codd v Rathbone, 19 N.Y. 37, 19 N.Y. (N.Y.S.) 37, 1859 N.Y. LEXIS 6 (N.Y. 1859).

Cause of action not accrued at commencement of action. Smith v Holmes, 19 N.Y. 271, 19 N.Y. (N.Y.S.) 271, 1859 N.Y. LEXIS 32 (N.Y. 1859).

Morford v Davis, 28 N.Y. 481, 28 N.Y. (N.Y.S.) 481, 1864 N.Y. LEXIS 3 (N.Y. 1864).

Discharge in bankruptcy. Cornell v Dakin, 38 N.Y. 253, 38 N.Y. (N.Y.S.) 253, 1868 N.Y. LEXIS 86 (N.Y. 1868).

Defense founded upon new matter, as that defendant is a bona fide purchaser for value. Weaver v Barden, 49 N.Y. 286, 49 N.Y. (N.Y.S.) 286, 1872 N.Y. LEXIS 169 (N.Y. 1872).

That the defendant was a bona fide purchaser for value of bonds transferred from plaintiff without his knowledge. Weaver v Barden, 49 N.Y. 286, 49 N.Y. (N.Y.S.) 286, 1872 N.Y. LEXIS 169 (N.Y. 1872).

That a sale for which plaintiff claims credit was made against orders and below value. Wood v Belden, 54 N.Y. 658, 54 N.Y. (N.Y.S.) 658, 1873 N.Y. LEXIS 106 (N.Y. 1873).

Want of consideration of deed. Dubois v Hermance, 56 N.Y. 673, 56 N.Y. (N.Y.S.) 673, 1874 N.Y. LEXIS 251 (N.Y. 1874).

Special property in goods converted. Wehle v Butler, 61 N.Y. 245, 61 N.Y. (N.Y.S.) 245, 1874 N.Y. LEXIS 633 (N.Y. 1874).

Nor in an action for conversion, a special property in the goods, where another ground of such special property was pleaded but not proved. See Wehle v Butler, 61 N.Y. 245, 61 N.Y. (N.Y.S.) 245, 1874 N.Y. LEXIS 633 (N.Y. 1874).

That plaintiff's appointment as an officer was in excess of the number allowed by law, or that funds for payment were exhausted. Brennan v New York, 62 N.Y. 365, 62 N.Y. (N.Y.S.) 365, 1875 N.Y. LEXIS 515 (N.Y. 1875).

That plaintiff did not own the claim sued on. Smith v Hall, 67 N.Y. 48, 67 N.Y. (N.Y.S.) 48, 1876 N.Y. LEXIS 344 (N.Y. 1876).

An answer not alleging that plaintiff did not own certain property, a mortgage thereof cannot be given in evidence. Hoffman v Conner, 76 N.Y. 121, 76 N.Y. (N.Y.S.) 121, 1879 N.Y. LEXIS 469 (N.Y. 1879).

Under CPA § 261 which required that new matter constituting a defense of counterclaim must be pleaded, a party was not entitled under a general denial to introduce in evidence a judgment

entered in another action between the same parties. Lytle v Crawford, 69 A.D. 273, 74 N.Y.S. 660, 1902 N.Y. App. Div. LEXIS 419 (N.Y. App. Div. 1902).

In an action against a sheriff for converting property under an execution against the plaintiff's wife, the defendant may under a general denial give evidence of facts showing that the plaintiff by his dealings with the judgment creditor is estopped from asserting that the wife did not own the property although the facts are not pleaded as an estoppel. Feinberg v Allen, 143 A.D. 866, 128 N.Y.S. 906, 1911 N.Y. App. Div. LEXIS 945 (N.Y. App. Div. 1911), aff'd, 208 N.Y. 215, 101 N.E. 893, 208 N.Y. (N.Y.S.) 215, 1913 N.Y. LEXIS 1044 (N.Y. 1913).

As a general rule payment is an affirmative defense and cannot be proven under a general denial. Acharan v Samuel Bros., 144 A.D. 182, 128 N.Y.S. 943, 1911 N.Y. App. Div. LEXIS 1658 (N.Y. App. Div. 1911).

A partner sued on a partnership obligation does not take the defense of defect of parties by a general denial or thereby put in issue the personnel of the partnership. Alaska Banking & Safe Deposit Co. v Van Wyck, 146 A.D. 5, 130 N.Y.S. 563, 1911 N.Y. App. Div. LEXIS 1816 (N.Y. App. Div. 1911).

In an action for commissions by a firm of real estate brokers, the defense that in selling the property the plaintiffs acted without the written authority of defendant, the owner of the property, cannot be availed of under a general denial. Cox v Hawke, 96 N.Y.S. 433, 49 Misc. 106, 1905 N.Y. Misc. LEXIS 556 (N.Y. App. Term 1905).

In an action to recover upon a written contract providing for compensation for obtaining a mortgage loan, evidence that defendant's signature to the contract was obtained by fraud is inadmissible under a general denial. Scott v Dillon, 109 N.Y.S. 877, 58 Misc. 522, 1908 N.Y. Misc. LEXIS 390 (N.Y. App. Term 1908).

Fox v Turner, 2 N.Y.S. 164, 49 Hun 610, 1888 N.Y. Misc. LEXIS 84 (N.Y. Sup. Ct. 1888).

The general denial allowed permits a defendant to disprove anything the plaintiff alleges, or any fact the plaintiff must establish to show a cause of action, or to mitigate the damages, but not to prove a defense founded on new matter. Wemple v McManus, 15 N.Y.S. 86, 59 N.Y. Super. Ct. 418, 1891 N.Y. Misc. LEXIS 3060 (N.Y. Super. Ct. 1891).

Matters which must be pleaded as affirmative defenses, so-called, are those as to which the defendant has the burden of proof. As to all matters which the plaintiff has the burden of establishing a mere denial raises an issue. Bank of Coney Island v Weinberg, 190 N.Y.S. 203, 1921 N.Y. Misc. LEXIS 1677 (N.Y. Sup. Ct. 1921).

An objection to the validity of a statute upon which the action is founded. Darlington v New York (1865) 25 Super Ct (2 Robt) 274, affd 31 N.Y. 164.

Plaintiff not real party in interest. Savage v Corn Exch. Ins. Co. (1867) 17 Super Ct (4 Bosw) 1, affd 36 N.Y. 655.

In an action to recover possession of real property, the defense of adverse possession cannot be shown under the general issue. 27 Hun 162.

Adverse possession, in an action to recover possession of real property. 27 Hun 162.

An answer in partition setting up a defect of parties, in that other persons not joined had contingent interests under the will, should not be required to be made more definite and certain by setting out the portion of the will giving such interests to such persons, where the complaint does not set forth the will, but merely gives a summary of it. Eisner v Eisner, 35 N.Y.S. 393, 89 Hun 480 (1895).

That goods were purchased by one of the partners sued, without authority of the firm. Sawyer v Thurber, 14 N.Y. St. 236.

148. Sufficiency of particular denials

Defendant's denial of execution of contract sued on was patently false. I. Tanenbaum Son & Co. v Brooklyn Furniture Co., 229 A.D. 469, 242 N.Y.S. 381, 1930 N.Y. App. Div. LEXIS 10424 (N.Y. App. Div.), aff'd, 255 N.Y. 579, 175 N.E. 321, 255 N.Y. (N.Y.S.) 579, 1930 N.Y. LEXIS 787 (N.Y. 1930).

In action for goods sold, defendant's denial of delivery, or that delivery constituted sale, created no triable issue of fact in view of other admissions, particularly in view of schedule annexed to answer, entitling plaintiff to judgment on pleadings. Wilson v Martin, 282 A.D. 804, 122 N.Y.S.2d 758, 1953 N.Y. App. Div. LEXIS 4992 (N.Y. App. Div. 1953).

A denial that plaintiff directed defendant to pay rents to him is not prejudicial to plaintiff and will not be stricken out. Benjamin v White, 105 N.Y.S. 991, 55 Misc. 530, 1907 N.Y. Misc. LEXIS 658 (N.Y. City Ct. 1907).

In action on a contract to secure insurance, denials of answer were insufficient. Travlos v Commercial Union of America, 238 N.Y.S. 692, 135 Misc. 895, 1930 N.Y. Misc. LEXIS 937 (N.Y. Sup. Ct. 1930).

Where a pleading alleges the existence of an agreement, which would be void if not in writing, within the statute of frauds, a complete defense is made by denying the existence of any contract. Berrien v Southack, 7 N.Y.S. 324, 1889 N.Y. Misc. LEXIS 1069 (N.Y. City Ct. 1889).

In an action for breach of contract, an averment that defendant "refused" to deliver certain goods as required by the contract is material, and is not denied by allegation of the answer that nothing is due plaintiff as damages, and that defendant is, and always has been "ready and willing" to deliver the goods. Hand v Belcher Mosaic Glass Co., 9 N.Y.S. 738, 1890 N.Y. Misc. LEXIS 357 (N.Y. City Ct. 1890).

In proceeding by welfare commissioner to seize cash surrender value of life policy, insurer's denial that it has on deposit to credit of insured sum alleged held sufficient. Hodson v Metropolitan Life Ins. Co., 34 N.Y.S.2d 922, 1942 N.Y. Misc. LEXIS 1583 (N.Y. Mun. Ct. 1942).

On an action on a policy of insurance against fire the complaint in which pleads the policy according to its legal effect merely, without setting forth or annexing a copy, an answer by which defendant admits the issue of a policy, “but denies that its terms and provisions are in said amended complaint correctly or fully stated, and defendant leaves it to show its terms by its production and proper proof upon the trial of the issues,” is not a general or specific denial of the material allegations of the complaint such as to require proof of the policy on the part of the plaintiffs. Wallach v Commercial Fire Ins. Co. (N.Y.C.P. Mar. 14, 1884), aff'd, 98 N.Y. 634, 98 N.Y. (N.Y.S.) 634, 1885 N.Y. LEXIS 681 (N.Y. 1885).

ii. Defenses

a. In General

149. Generally

A defendant, in order to avail himself of facts not appearing on the face of a contract, to establish its invalidity, must plead it in his answer. Millbank v Jones, 127 N.Y. 370, 28 N.E. 31, 127 N.Y. (N.Y.S.) 370, 1891 N.Y. LEXIS 1789 (N.Y. 1891).

In a suit on a contract where the defendant’s answer contains no express prayer for a reformation of the contract, evidence that the contract does not express the agreement between the parties is nevertheless admissible as a defense. Susquehanna S.S. Co. v A. O. Andersen & Co., 239 N.Y. 285, 146 N.E. 381, 239 N.Y. (N.Y.S.) 285, 1925 N.Y. LEXIS 966 (N.Y. 1925).

Where escrow agent was sued by prospective purchasers for return of deposit made on house under contract providing for its return if they failed to secure mortgage, fact that he could interplead sellers did not preclude him from raising defense available to sellers. Falk v Goodman, 7 N.Y.2d 87, 195 N.Y.S.2d 645, 163 N.E.2d 871, 1959 N.Y. LEXIS 878 (N.Y. 1959).

It seems that the allegations of all the facts requisite as proof to constitute a defense is sufficient to support an answer. Lindsay v Gager, 11 A.D. 93, 42 N.Y.S. 851, 1896 N.Y. App. Div. LEXIS 3032 (N.Y. App. Div. 1896).

In an action against the officers of a hospital for the wrongful dissection of the body of plaintiff's wife after her death, a separate defense alleging that the plaintiff's wife was brought to the hospital suffering from a tumor and was operated upon by her own request was bad, as such defense does not meet the cause of action set forth in the complaint. Jackson v Savage, 109 A.D. 556, 96 N.Y.S. 366, 17 N.Y. Ann. Cas. 398, 1905 N.Y. App. Div. LEXIS 3602 (N.Y. App. Div. 1905).

Defense examined and held sufficient against motion. Terzi v Savini, 211 A.D. 815, 206 N.Y.S. 967, 1924 N.Y. App. Div. LEXIS 7967 (N.Y. App. Div. 1924).

The assignee of the vendor of an automobile under conditional sale contract who retook it and sold it for failure of the vendee to make due payment, has a right to plead such nonpayment as a defense to the vendee's action for conversion and may show that the contract contained the wrong motor and serial numbers and that it took the automobile actually sold. Seaman v Consolidated Finance Corp., 219 A.D. 410, 219 N.Y.S. 163, 1927 N.Y. App. Div. LEXIS 10926 (N.Y. App. Div. 1927).

Answer set forth no valid defense because of failure to allege performance, or readiness or willingness to perform the contract alleged by defendant. Hoffman v Whitebread, 227 A.D. 733, 236 N.Y.S. 578, 1929 N.Y. App. Div. LEXIS 7732 (N.Y. App. Div. 1929).

Sufficiency of defense, depending upon finding whether extension agreement sued upon was under seal, was not decided as matter of law where there was no recital in instrument evidencing intention to seal. Froggott v Welsh, 262 A.D. 771, 27 N.Y.S.2d 786, 1941 N.Y. App. Div. LEXIS 5802 (N.Y. App. Div. 1941).

Defense of absence of intent to contract must set forth sufficient allegations of material facts. Newman v Perlman, 274 A.D. 641, 86 N.Y.S.2d 567, 1949 N.Y. App. Div. LEXIS 5858 (N.Y. App. Div. 1949).

A defense in an answer, which denies neither specially nor generally nor denies information to form a belief, nor is a statement of new matter, but an attempt to plead a version of facts inconsistent with the complaint, should be stricken. Madison v Neuburger, 224 N.Y.S. 461, 130 Misc. 650, 1927 N.Y. Misc. LEXIS 1145 (N.Y. Sup. Ct. 1927).

Matter relating to defense of another defendant not pertinent to the defense of the pleader will be stricken out. Shea-Lutz Realty Co. v Sperry, 231 N.Y.S. 217, 132 Misc. 879, 1928 N.Y. Misc. LEXIS 1105 (N.Y. Sup. Ct. 1928).

In action by husband against wife, defenses in answer which purported to allege gift of stock and ring were mere conclusions of law and insufficient. Enzler v Enzler, 30 Misc. 2d 600, 145 N.Y.S.2d 173, 1955 N.Y. Misc. LEXIS 2315, 1955 N.Y. Misc. LEXIS 3301 (N.Y. Sup. Ct. 1955).

Motion to strike two of three paragraphs constituting defense should not be decided without considering entire defense. Morse v Syracuse Memorial Hospital, 83 N.Y.S.2d 830, 1948 N.Y. Misc. LEXIS 3452 (N.Y. Sup. Ct. 1948).

150. New matter generally

And unless it is so pleaded no evidence thereof can be given. Kelsey v Western, 2 N.Y. 500, 2 N.Y. (N.Y.S.) 500, 1849 N.Y. LEXIS 52 (N.Y. 1849).

As to new matter in an action on a promissory note. See Van Giesen v Van Giesen, 10 N.Y. 316, 10 N.Y. (N.Y.S.) 316, 1852 N.Y. LEXIS 154 (N.Y. 1852).

New matter which the defendant must prove to defeat a recovery when the cause of action is admitted must be alleged in the answer. Catlin v Gunter, 11 N.Y. 368, 11 N.Y. (N.Y.S.) 368, 10 How. Pr. 315, 1854 N.Y. LEXIS 79, 1854 N.Y. Misc. LEXIS 192 (N.Y. 1854).

New matter is that which admits and avoids the cause of action set up. Brazill v Isham, 12 N.Y. 9, 12 N.Y. (N.Y.S.) 9, 1854 N.Y. LEXIS 106 (N.Y. 1854).

Yet if issue is joined on an answer bad for insufficiency evidence is admissible to constitute a defense. White v Spencer, 14 N.Y. 247, 14 N.Y. (N.Y.S.) 247, 1856 N.Y. LEXIS 19 (N.Y. 1856).

A denial that defendant sued as a corporation, are a corporation as new matter, see Phoenix Bank of New York v Donnell, 40 N.Y. 410, 40 N.Y. (N.Y.S.) 410, 1869 N.Y. LEXIS 38 (N.Y. 1869).

A “defense” in pleading can consist of “new matter constituting a defense,” that is, new matter which, if all the allegations of the complaint be true, will nevertheless defeat the action. A denial may also constitute a defense. Staten I. M. R. Co. v Hinchliffe, 170 N.Y. 473, 63 N.E. 545, 170 N.Y. (N.Y.S.) 473, 1902 N.Y. LEXIS 1082 (N.Y. 1902).

Separate defenses which might be proved under a general denial should be stricken out. Cooley v New York, 85 A.D. 107, 82 N.Y.S. 1067, 1903 N.Y. App. Div. LEXIS 2057 (N.Y. App. Div. 1903).

New matter if not a defense should be stricken, and if a defense should be separately stated. Morron v Bryce, 162 A.D. 466, 147 N.Y.S. 931, 1914 N.Y. App. Div. LEXIS 6078 (N.Y. App. Div. 1914).

In action under contract of employment, defense which contains allegation that defendant “specifically denies that the plaintiff has duly performed all conditions of said contract on plaintiff’s part to be performed” is bad in form where such performance had already been denied by appropriate denials. Johnson v Quayle & Son Corp., 236 A.D. 351, 257 N.Y.S. 874, 1932 N.Y. App. Div. LEXIS 5972 (N.Y. App. Div. 1932).

A defense in pleading can consist only of “new matter,” i. e., matter which cannot be proved under a denial, and if a pleaded defense does not contain such new matter it is “insufficient in

law on the face thereof." George v New York, 86 N.Y.S. 610, 42 Misc. 270, 1903 N.Y. Misc. LEXIS 496 (N.Y. Sup. Ct. 1903).

A defense can consist only of matter which, if the allegations of the complaint are true, defeats the action; a motion for leave to serve an amended answer setting up as a "defense" matter, evidence of which is admissible under a general denial, should not be granted. Schultz v Greenwood Cemetery, 93 N.Y.S. 180, 46 Misc. 299, 1905 N.Y. Misc. LEXIS 56 (N.Y. Sup. Ct. 1905).

Defendant should never plead as a "defense" anything which is embraced within the general issues raised by his general denial, as defenses should consist only of new matter. General Auto. Supply Co. v Rockwell, 162 N.Y.S. 210 (N.Y. City Ct. 1916).

New matter consists of some facts which the plaintiff is not bound to prove to establish his cause of action, and which goes in avoidance or discharge of the cause of action alleged in the complaint. Meisner v Brennan, 39 N.Y. St. 277.

The requirement that new matter must be specially pleaded applies only to defenses arising after the contract was made. Miller v Insurance Co. of N. Am. 1 Abb NC 470.

151. —Matters arising after commencement of action

The rights of parties to a legal action must be determined as they existed at its commencement. Though an equitable defense is allowed, it does not change the character of the action, nor authorize transactions subsequent to its commencement to be shown to affect those rights. Wisner v Ocumpaugh, 71 N.Y. 113, 71 N.Y. (N.Y.S.) 113, 1877 N.Y. LEXIS 475 (N.Y. 1877).

Defendants in an action on an undertaking given by executors on appeal, cannot answer that the judgment could not have been collected. Yates v Burch, 87 N.Y. 409, 87 N.Y. (N.Y.S.) 409, 1882 N.Y. LEXIS 15 (N.Y. 1882).

A bankruptcy happening after the commencement of the action cannot be proved under the general issue. Styles v Fuller, 101 N.Y. 622, 4 N.E. 348, 101 N.Y. (N.Y.S.) 622, 3 How. Pr. (n.s.) 464, 1886 N.Y. LEXIS 683 (N.Y. 1886).

Assuming that a defense be unnecessary, it is not for that reason insufficient. Schottenstein v Ortner, 13 A.D.2d 1001, 216 N.Y.S.2d 779, 1961 N.Y. App. Div. LEXIS 10231 (N.Y. App. Div. 2d Dep't 1961).

But the new defenses occurring after the incurring of the original obligation must be pleaded. Dresler v Hard, 6 N.Y.S. 500, 57 N.Y. Super. Ct. 192, 1889 N.Y. Misc. LEXIS 648 (N.Y. Super. Ct. 1889), rev'd, 127 N.Y. 235, 27 N.E. 823, 127 N.Y. (N.Y.S.) 235, 1891 N.Y. LEXIS 1777 (N.Y. 1891).

New matter may not be alleged in an answer unless it constitutes a defense or a counterclaim. Sado v Marlun Mfg. Co., 196 N.Y.S.2d 32 (N.Y. Sup. Ct. 1959).

Matter of defense occurring between the commencement of the action and the answer may be set up by the latter. 62 How. Pr. 363, 1881 N.Y. Misc. LEXIS 278.

152. Sham

If new matter in an answer is sham, it should be stricken. Smith v Countryman, 30 N.Y. 655, 30 N.Y. (N.Y.S.) 655, 1864 N.Y. LEXIS 113 (N.Y. 1864).

Defense insufficient and denial a sham, plaintiff granted relief. McLaughlin v George Gushue, Inc., 228 A.D. 647, 238 N.Y.S. 874, 1929 N.Y. App. Div. LEXIS 11423 (N.Y. App. Div. 1929).

153. Form of defense

Facts constituting a good defense whether called by the right name or not make a good answer. Springer v Dwyer, 50 N.Y. 19, 50 N.Y. (N.Y.S.) 19, 1872 N.Y. LEXIS 382 (N.Y. 1872).

Facts and not their legal effect need only be stated. Hemmingway v Poucher, 98 N.Y. 281, 98 N.Y. (N.Y.S.) 281, 1885 N.Y. LEXIS 605 (N.Y. 1885).

Where there are several defenses they should be pleaded, “For a defense,” “For a second defense,” etc. Stroock Plush Co. v Talcott, 129 A.D. 14, 113 N.Y.S. 214, 1908 N.Y. App. Div. LEXIS 1232 (N.Y. App. Div. 1908).

Stating merely a conclusion of law is insufficient. Chauvrant v Maillard, 4 N.Y.S. 126, 1889 N.Y. Misc. LEXIS 222 (N.Y. Sup. Ct. 1889).

Where good defense is indicated but it is insufficiently and improperly pleaded, as where matter recited is evidentiary and conclusory, motion to dismiss will be granted with leave to replead. Sheppard v Ridgewood Grove, Inc., 126 N.Y.S.2d 761, 1953 N.Y. Misc. LEXIS 2491 (N.Y. Sup. Ct. 1953).

154. Incorporation by reference

A defense pleaded as a separate and distinct defense must be complete in itself and contain all that is necessary to answer the whole cause of action, or that part thereof which it purports to answer. Such defense cannot be aided by resorting to other parts of the answer to which it contains no reference in terms or by necessary implication. Outcault v Bonheur, 120 A.D. 168, 104 N.Y.S. 1099, 1907 N.Y. App. Div. LEXIS 1136 (N.Y. App. Div. 1907).

Separate defenses stating that the defendant “re-alleges all that he has hereinbefore alleged” incorporate prior affirmative defenses, but not prior denials. Stemmerman v Kelly, 122 A.D. 669, 107 N.Y.S. 379, 1907 N.Y. App. Div. LEXIS 2528 (N.Y. App. Div. 1907), altered, 150 A.D. 735, 135 N.Y.S. 827, 1912 N.Y. App. Div. LEXIS 7205 (N.Y. App. Div. 1912).

Allegation in alleged defenses and counterclaims, “Said defendant repeats all the allegations hereinbefore contained,” did not include prior denials, which are not “allegations.” Dry Milk Co. v Dairy Products Co., 171 A.D. 296, 156 N.Y.S. 869, 1916 N.Y. App. Div. LEXIS 9439 (N.Y. App. Div. 1916).

A separate and distinct defense cannot be aided by denials in another part of the answer unless incorporated therein by reference to them. Singer v Abrams, 94 N.Y.S. 7, 47 Misc. 360, 1905 N.Y. Misc. LEXIS 247 (N.Y. App. Term 1905).

In the statement of separate defenses, each must be complete in itself, either by the restatement of material facts previously stated or by proper reference thereto. Walsh v Lispenard Realty Co., 106 N.Y.S. 570, 55 Misc. 400, 1907 N.Y. Misc. LEXIS 631 (N.Y. Sup. Ct. 1907).

Where, in the statement of a separate defense, the defendant intended to refer to and reiterate the allegations contained in previous paragraphs of his answer, but by mistake referred to them as paragraphs of “this amended complaint,” the answer was insufficient. Aetna Life Ins. Co. v North Star Mines Co., 106 N.Y.S. 545, 55 Misc. 402, 1907 N.Y. Misc. LEXIS 632 (N.Y. Sup. Ct. 1907).

The incorporation in an affirmative defense or in a counterclaim of details and allegations contained in other parts of the answer, by the words “repeats all of the denials and allegations hereinbefore stated,” was not permitted by the former practice and was bad pleading. Tracy Development Co. v Empire Gas & Electric Co., 190 N.Y.S. 172, 1920 N.Y. Misc. LEXIS 2003 (N.Y. Sup. Ct. 1920).

155. Admissions or denials as or in a defense

Matter which would be sufficient under a general denial loses none of its efficacy by being pleaded as a defense. Morgan Munitions Supply Co. v Studebaker Corp. of America, 226 N.Y. 94, 123 N.E. 146, 226 N.Y. (N.Y.S.) 94, 1919 N.Y. LEXIS 839 (N.Y. 1919).

It is unnecessary verbiage to formally admit any allegation of the complaint; a defense can consist only of new matter, and is not negative but affirmative. Stroock Plush Co. v Talcott, 129 A.D. 14, 113 N.Y.S. 214, 1908 N.Y. App. Div. LEXIS 1232 (N.Y. App. Div. 1908).

A specific denial cannot be included in an affirmative defense unless essential to make that defense complete and available, otherwise it will be stricken out on motion. Oishei v New York Taxicab Co., 136 A.D. 683, 121 N.Y.S. 472, 1910 N.Y. App. Div. LEXIS 115 (N.Y. App. Div. 1910).

Denial cannot be put in that part of answer consisting of an affirmative defense, except as to some denial necessary to perfect affirmative defense. Einstein v Einstein, 158 A.D. 498, 143 N.Y.S. 706, 1913 N.Y. App. Div. LEXIS 7382 (N.Y. App. Div. 1913).

A general denial in an affirmative defense is always improper, and a specific denial cannot be included unless essential to make that defense complete and available. Bulova v E. L. Barnett, Inc., 193 A.D. 161, 183 N.Y.S. 495, 1920 N.Y. App. Div. LEXIS 5519 (N.Y. App. Div. 1920).

Denials of facts not alleged in the complaint have no place in an answer, and are not equivalent to allegations to the contrary for the purpose of setting up new matter constituting a defense. Bernhan Chemical & Metal Corp. v Ship-A-Hoy, Ltd., 200 A.D. 399, 193 N.Y.S. 372, 1922 N.Y. App. Div. LEXIS 8188 (N.Y. App. Div.), aff'd in part and rev'd in part, 234 N.Y. 563, 138 N.E. 447, 234 N.Y. (N.Y.S.) 563, 1922 N.Y. LEXIS 745 (N.Y. 1922).

Affirmative defense was held sufficient on motion to dismiss, notwithstanding that the facts therein set up could be established under the denials contained in the answer. Home Ins. Co. v T. A. Gillespie Loading Co., 222 A.D. 67, 225 N.Y.S. 276, 1927 N.Y. App. Div. LEXIS 7800 (N.Y. App. Div. 1927).

Specific denials may not be pleaded as affirmative defenses. They were proper under subdivision 1 of CPA § 261, but not under subdivision 2 (§ 3011 herein) thereof. Johnson v Quayle & Son Corp., 236 A.D. 351, 257 N.Y.S. 874, 1932 N.Y. App. Div. LEXIS 5972 (N.Y. App. Div. 1932).

A defense can only consist of new matter, viz: facts outside of the issue raised by a general or special denial; distinction between denials in an answer and defense considered; the distinction is in a rule that while a defense may be stricken out as sham a denial may not be. Von Hagen v

Waterbury Mfg. Co., 49 N.Y.S. 465, 22 Misc. 580, 1898 N.Y. Misc. LEXIS 104 (N.Y. Sup. Ct. 1898).

A “denial” and a “defense” are distinct and separate parts of an answer; there can be no denial of the complaint or of any part of it in a “defense.” Burkert v Bennett, 71 N.Y.S. 144, 35 Misc. 318, 1901 N.Y. Misc. LEXIS 384 (N.Y. Sup. Ct. 1901).

Facts alleged in a defense, inconsistent with and contradictory of the allegations of a complaint cannot supply a failure to deny such allegations in due form; a denial cannot be a material part of a defense. Pascekwitz v Richards, 75 N.Y.S. 291, 37 Misc. 250, 1902 N.Y. Misc. LEXIS 94 (N.Y. Sup. Ct. 1902).

A denial of allegations in a complaint may be included in an affirmative defense where such denial is necessary or relevant to the issue; but the pleading of facts inconsistent with allegations of the complaint, is not equivalent to a denial. Krauss Engineering Co. v McKinnon, 121 N.Y.S. 396, 66 Misc. 181, 1910 N.Y. Misc. LEXIS 79 (N.Y. App. Term 1910).

A defense consisting of new matter must be based on the theory of a confession and avoidance and be such as cannot be proved under the denials, and a denial has no place in an affirmative defense except when necessary to deny existence of some fact alleged in the complaint in order to perfect the answer as a complete affirmative defense. Mulinos v Walkof, 159 N.Y.S. 16, 95 Misc. 165, 1916 N.Y. Misc. LEXIS 879 (N.Y. App. Term 1916).

A defendant’s plea in avoidance does not necessarily include such an admission of the complainant’s allegations as precludes defendant from denying them on the trial. A. F. Hutchinson Land Co. v Whitehead Bros. Co., 217 N.Y.S. 413, 127 Misc. 558, 1926 N.Y. Misc. LEXIS 667 (N.Y. Sup. Ct.), aff'd, 218 A.D. 682, 219 N.Y.S. 413, 1926 N.Y. App. Div. LEXIS 6003 (N.Y. App. Div. 1926).

An affirmative defense cannot consist of denials; it consists only of new matter constituting a defense. Pallott v Elaborated Ready Roofing Co., 248 N.Y.S. 354, 139 Misc. 319, 1931 N.Y. Misc. LEXIS 1130 (N.Y. Sup. Ct. 1931).

Even if defendants can prove under a general denial that which they plead affirmatively, the so-called defenses need not be stricken out. Brennan v Community Service Soc., 45 N.Y.S.2d 825, 181 Misc. 637, 1943 N.Y. Misc. LEXIS 2934 (N.Y. City Ct. 1943).

In action for personal injuries, allegation in answer referring to injuries "which were caused by negligence of operators of such motor vehicles" defied rules of pleading by joining defense or new matter to denial and by expressing conclusion of law. Wenzel v Duncan, 32 N.Y.S.2d 223, 1941 N.Y. Misc. LEXIS 2523 (N.Y. Sup. Ct. 1941).

Where denial in affirmative defense was stricken out as having been denied by the answer. Kraushaar v Lavin, 39 N.Y.S.2d 880, 1943 N.Y. Misc. LEXIS 1591 (N.Y. Sup. Ct. 1943).

Defenses in a counterclaim which raised no new issues which could not be proved under a general denial were struck out. Sunley v Smetana, 72 N.Y.S.2d 890, 1947 N.Y. Misc. LEXIS 2898 (N.Y. Sup. Ct. 1947).

156. Counterclaim as a defense

Demand for affirmative relief is not proper in an affirmative defense. National Bank of Rochester v Erion-Haines Realty Co., 213 A.D. 54, 209 N.Y.S. 522, 1925 N.Y. App. Div. LEXIS 8432 (N.Y. App. Div. 1925).

Facts constituting a cause of action on contract in defendant's favor which might form a valid counterclaim in an action upon a promissory note, if pleaded as such, but not related to the cause of action alleged in the complaint, when stated only as a separate defense, following a general denial, are bad. Prosser v Maxon, 100 N.Y.S. 815, 52 Misc. 18, 1906 N.Y. Misc. LEXIS 404 (N.Y. Sup. Ct. 1906).

Where defenses are counterclaims pleaded as setoffs, and defendant derived no additional rights or benefit from such form of pleading, they were dismissed. James Talcott, Inc. v Le Bou Slax, Inc., 87 N.Y.S.2d 509, 194 Misc. 620, 1949 N.Y. Misc. LEXIS 1952 (N.Y. Sup. Ct. 1949).

A plea by way of recoupment or setoff can only be pleaded as a counterclaim, and not as a defense or in a reply. Seligmann v Mandel, 19 Misc. 2d 418, 190 N.Y.S.2d 388, 1959 N.Y. Misc. LEXIS 3574 (N.Y. Sup. Ct. 1959).

Plaintiff is entitled to have the defendant set forth separately the facts claimed to constitute a defense and facts claimed to constitute a counterclaim, even though defendant may claim that the same facts constitute both. Walker v James J. Matchett Co., 167 N.Y.S. 600 (N.Y. Sup. Ct. 1917).

While defense and counterclaim may be combined if same facts constitute both, pleader must specify cause of action to which they are directed. Berkley v Berkley, 142 N.Y.S.2d 273, 1955 N.Y. Misc. LEXIS 2790 (N.Y. Sup. Ct. 1955).

b. Particular Defenses

157. Abuse of process

In action for specific performance of contract to sell real property, defense and counterclaim based on allegations that plaintiff brought the action knowing there was no legal justification therefor, and with intent to prevent the defendant from conveying the property to another maliciously filed a lis pendens therein, were insufficient absent allegation that the lis pendens was used for a purpose other than permitted by law. Bronstein v Dayton Peninsula Corp., 11 A.D.2d 1036, 206 N.Y.S.2d 12, 1960 N.Y. App. Div. LEXIS 7853 (N.Y. App. Div. 2d Dep't 1960).

In action to enjoin trespass, defense of malicious use of process was held insufficient. Serxner v Elgart, 94 N.Y.S.2d 731, 196 Misc. 1053, 1949 N.Y. Misc. LEXIS 3127 (N.Y. Sup. Ct. 1949).

158. Accord and satisfaction

Where there is a genuine controversy between the buyer and seller, the acceptance by the latter of a check for a sum less than the amount claimed but for more than the amount admitted to be

due, on the face of which were the words “in full of all accounts to date,” constituted an accord and satisfaction. Schuttinger v Woodruff, 259 N.Y. 212, 181 N.E. 361, 259 N.Y. (N.Y.S.) 212, 1932 N.Y. LEXIS 928 (N.Y. 1932).

Accord and satisfaction is an affirmative defense, and the plaintiff is entitled to recover unless such defense is established. Mitterwallner v Supreme Lodge, K. & L. G. S., 109 A.D. 70, 95 N.Y.S. 1090, 1905 N.Y. App. Div. LEXIS 3495 (N.Y. App. Div. 1905).

In an action on a promissory note it is no defense that on a denial of liability by defendant, an agreement had been entered into for the payment of certain sums, part of which were paid, but plaintiff refused the remainder, because such agreement is merely an accord; an allegation that plaintiff’s cause of action was by agreement compromised and settled is a conclusion of law. Goffe v Jones, 132 A.D. 864, 117 N.Y.S. 407, 1909 N.Y. App. Div. LEXIS 1609 (N.Y. App. Div. 1909).

A defense of accord and satisfaction is not subject to motion for alleging payment which was less than the creditor demanded where, under the circumstances, the debt was not liquidated. Woodbery v New York Life Ins. Co., 223 A.D. 272, 227 N.Y.S. 699, 1928 N.Y. App. Div. LEXIS 6190 (N.Y. App. Div. 1928).

Defendant’s claim, in effect, that payment of a liquidated amount which was concededly due, constituted accord and satisfaction was untenable, since consideration was lacking. Leidy v Procter, 226 A.D. 322, 235 N.Y.S. 101, 1929 N.Y. App. Div. LEXIS 8712 (N.Y. App. Div. 1929).

In pleading accord and satisfaction it is necessary to allege and prove both, claimant having the burden of proof. Canfield v Pulsifer, 226 A.D. 445, 236 N.Y.S. 32, 1929 N.Y. App. Div. LEXIS 8745 (N.Y. App. Div. 1929).

In pleading accord and satisfaction it was necessary for the pleader to allege acceptance of the adverse party’s promise as full satisfaction. Canfield v Pulsifer, 226 A.D. 445, 236 N.Y.S. 32, 1929 N.Y. App. Div. LEXIS 8745 (N.Y. App. Div. 1929).

A defense, setting up accord and satisfaction, which was attacked for duress, was bad. Trenkman v Smith, 226 A.D. 774, 235 N.Y.S. 43, 1929 N.Y. App. Div. LEXIS 9907 (N.Y. App. Div. 1929).

In action to recover for services rendered under a contract where plaintiff simply denied the plea of accord and satisfaction, complaint was dismissed for insufficiency of plaintiff's pleadings. De Levante v MacPherson, 227 A.D. 791, 237 N.Y.S. 754, 1929 N.Y. App. Div. LEXIS 8196 (N.Y. App. Div. 1929), aff'd, 253 N.Y. 599, 171 N.E. 799, 253 N.Y. (N.Y.S.) 599, 1930 N.Y. LEXIS 969 (N.Y. 1930).

In action on promissory note given in payment of stock shares purchased by defendant through plaintiff's assignor, defenses of accord and satisfaction sufficient. Walmor, Inc. v Breger, 237 A.D. 614, 262 N.Y.S. 409, 1933 N.Y. App. Div. LEXIS 10680 (N.Y. App. Div. 1933).

Defense of accord and satisfaction must allege existing controversy between parties as to amount due. Allcock v Cohen, 269 A.D. 1050, 58 N.Y.S.2d 905, 1945 N.Y. App. Div. LEXIS 5223 (N.Y. App. Div. 1945).

In action to recover balance of installments unpaid under separation agreement, wife's acceptance and cashing of checks in lesser amount than provided for in agreement made out only a partial defense of accord and satisfaction as to particular weekly installments covered thereby. Magrill v Magrill, 16 Misc. 2d 896, 184 N.Y.S.2d 516, 1959 N.Y. Misc. LEXIS 4492 (N.Y. App. Term 1959).

In absence of statute requiring protest, acceptance by public officer of an amount less than his salary does not constitute defense of waiver, estoppel or accord and satisfaction. Fiorile v Goldman, 24 Misc. 2d 944, 206 N.Y.S.2d 29, 1960 N.Y. Misc. LEXIS 2661 (N.Y. County Ct. 1960).

See Lipkin v Lester, 29 N.Y.S.2d 966, 1941 N.Y. Misc. LEXIS 2190 (N.Y. Sup. Ct.), aff'd, 263 A.D. 799, 32 N.Y.S.2d 126, 1941 N.Y. App. Div. LEXIS 5004 (N.Y. App. Div. 1941).

In employee's action for amount due under Fair Labor Standards Act, defense of accord and satisfaction alleging dispute in "good faith," without ultimate facts indicating honest dispute as to amount of overtime work by plaintiff and proper compensation, held insufficient. Campbell v Mandel Auto Parts Corp., 31 N.Y.S.2d 656, 1941 N.Y. Misc. LEXIS 2439 (N.Y. Sup. Ct. 1941), aff'd, 264 A.D. 701, 34 N.Y.S.2d 405, 1942 N.Y. App. Div. LEXIS 4231 (N.Y. App. Div. 1942).

In action for unpaid overtime compensation due employees, defense that at time of alleged accord and satisfaction bona fide dispute as to number of hours of overtime work existed held sufficient. Simmons v Rudolph Knitting Mills, Inc., 37 N.Y.S.2d 422, 1942 N.Y. Misc. LEXIS 2040 (N.Y. Sup. Ct. 1942).

Such defense is based on theory of confession and avoidance, and can only consist of matter which conceding complaint to be true in all respects, nevertheless defeats action. Ciufo v Ciufo, 60 N.Y.S.2d 848 (N.Y. Sup. Ct. 1946).

159. Account stated

It is neither a complete nor partial defense to an action by the executrix of a deceased partner for an accounting as to the property held by defendant as surviving partner, to allege that the affairs of the partnership were settled by an account stated some months before the death of the plaintiff's testator; an accounting during the existence of a partnership is not an accounting for the good will; nor is an accounting before the surrogate a bar to the action involving good will but such accounting would be a partial defense to the extent assets were included. Joseph v Herzig, 198 N.Y. 456, 92 N.E. 103, 198 N.Y. (N.Y.S.) 456, 1910 N.Y. LEXIS 820 (N.Y. 1910).

Account stated may constitute defense to action for commissions on orders procured or accepted, despite claim that account stated can only be cause of action. Rosner v Globe Valve Corp., 92 N.Y.S.2d 342, 196 Misc. 408, 1949 N.Y. Misc. LEXIS 2823 (N.Y. Sup. Ct. 1949).

Defense alleging account stated and payment of balance found due was sufficient. King v Edward B. Marks Music Corp., 45 N.Y.S.2d 628, 1943 N.Y. Misc. LEXIS 2677 (N.Y. Sup. Ct. 1943).

160. Accrual of action

It must be set up by the answer, if the action had not accrued when the suit was commenced. Smith v Holmes, 19 N.Y. 271, 19 N.Y. (N.Y.S.) 271, 1859 N.Y. LEXIS 32 (N.Y. 1859).

161. Act of God or the public enemy

In action for breach of warranty in sale of dwelling that basement would keep free from water defense that unprecedented rains were act of God and caused damage held sufficient. Foulke v Craftsmen's Guild, Inc., 259 A.D. 852, 19 N.Y.S.2d 676, 1940 N.Y. App. Div. LEXIS 6976 (N.Y. App. Div. 1940).

Act of God must be pleaded. New Haven & Northampton Co. v Quintard, 31 Super Ct (1 Sweeney) 89.

162. Adequate remedy at law

It would seem that a defendant in an equitable action, in order to avail himself of the defense that an adequate remedy exists at law, must set it up in his answer. Mentz v Cook, 108 N.Y. 504, 15 N.E. 541, 108 N.Y. (N.Y.S.) 504, 13 N.Y. St. 845, 1888 N.Y. LEXIS 609 (N.Y. 1888).

A denial, contained in an answer interposed in an action for specific performance, of an allegation in the complaint to the effect that the plaintiff had no adequate remedy at law is sufficient to enable the defendant to raise the objection that the action could not be maintained. Clements v Sherwood-Dunn, 108 A.D. 327, 95 N.Y.S. 766, 1905 N.Y. App. Div. LEXIS 3180 (N.Y. App. Div. 1905), aff'd, 187 N.Y. 521, 79 N.E. 1102, 187 N.Y. (N.Y.S.) 521, 1907 N.Y. LEXIS 814 (N.Y. 1907).

In an action for specific performance, the defense that the plaintiff has an adequate remedy at law must be pleaded to be available. Urbansky v Shirmer, 111 A.D. 50, 97 N.Y.S. 577, 1906 N.Y. App. Div. LEXIS 99 (N.Y. App. Div. 1906).

Where a complaint seeking equitable relief states that there is no adequate remedy at law and there is no allegation in the answer that there is an adequate remedy at law, defendant will be deemed to have accepted the equitable issue presented, which must be determined upon its merits. Farrington v Steel Co. of America, 200 A.D. 803, 194 N.Y.S. 537, 1922 N.Y. App. Div. LEXIS 8279 (N.Y. App. Div. 1922), aff'd, 235 N.Y. 581, 139 N.E. 743, 235 N.Y. (N.Y.S.) 581, 1923 N.Y. LEXIS 1310 (N.Y. 1923).

Defense interposed in an action in equity that plaintiff has an adequate remedy at law is new matter. McKenzie v Wappler Electric Co., 215 A.D. 336, 213 N.Y.S. 389, 1926 N.Y. App. Div. LEXIS 10963 (N.Y. App. Div. 1926).

The court will strike a defense that the plaintiff should seek his remedy at law on failure to state the facts showing that to be the proper remedy. Levan v American Safety Table Co., 222 A.D. 110, 225 N.Y.S. 583, 1927 N.Y. App. Div. LEXIS 7810 (N.Y. App. Div. 1927).

In action for specific performance, defense that plaintiff has an adequate remedy at law, is good as a complete defense, if sustained by proof. 276 Spring Street Corp. v Forbes, 226 A.D. 354, 235 N.Y.S. 523, 1929 N.Y. App. Div. LEXIS 8721 (N.Y. App. Div. 1929).

In action for reformation, defense of adequate remedy at law was stricken. Sanborn v Amron, 231 A.D. 67, 246 N.Y.S. 296, 1930 N.Y. App. Div. LEXIS 7002 (N.Y. App. Div. 1930).

The denial of plaintiff’s allegation, that his loss is irreparable and that a judgment for damages would not compensate him, scarcely constitutes a plea of legal adequacy, and such plea could, under no circumstances, constitute a counterclaim or partial defense. Goldberg v Kirschstein, 73 N.Y.S. 358, 36 Misc. 249, 1901 N.Y. Misc. LEXIS 737 (N.Y. Sup. Ct. 1901).

Defense to action for accounting that plaintiff had adequate remedy at law was held sufficient. McAuliffe v Henry George School of Social Science, 99 N.Y.S.2d 132, 1950 N.Y. Misc. LEXIS 1898 (N.Y. Sup. Ct. 1950).

In action to declare validity of rules of Smoke Control Board, defense of adequacy of legal remedy was insufficient. Oswald v Christy, 112 N.Y.S.2d 913, 1952 N.Y. Misc. LEXIS 2721 (N.Y. Sup. Ct. 1952).

163. Adverse possession

In action on a forthcoming bond in attachment to recover of the surety the amount of the original judgment, answer that the terms of liability were changed and surety discharged by a subsequent agreement, did not set up sufficient facts. Smith v Columbia Casualty Co., 225 A.D. 223, 232 N.Y.S. 550, 1929 N.Y. App. Div. LEXIS 11605 (N.Y. App. Div. 1929).

A defense based upon and pleaded in the language of Real Property Law, § 260, which voids a conveyance of real property in possession of another claiming title by adverse possession, could not be stricken since it raised an issue which depended upon proofs. Welcher v Murphy, 230 N.Y.S. 729, 132 Misc. 880, 1928 N.Y. Misc. LEXIS 1055 (N.Y. Sup. Ct. 1928).

164. Agency

Agency need not be pleaded. Merritt v Briggs, 57 N.Y. 651, 57 N.Y. (N.Y.S.) 651, 1874 N.Y. LEXIS 342 (N.Y. 1874).

Although the defense that an agent was secretly acting for the other party is affirmative and must be pleaded, the answer will be deemed to have been amended to conform to the facts, where the agent himself testified to the double employment without objection, but upon the ground that the agreement to pay was invalid, for under such circumstances the plaintiff, the agent's assignee, had opportunity to offer additional evidence on the issue. Jacobs v Beyer, 141 A.D. 49, 125 N.Y.S. 597, 1910 N.Y. App. Div. LEXIS 3804 (N.Y. App. Div. 1910).

165. Agreement avoiding contract

Agreement avoiding the contract sued on must be pleaded. St. St. John v Skinner, 44 How. Pr. 198, 1872 N.Y. Misc. LEXIS 189 (N.Y. Super. Ct. Oct. 1, 1872).

166. Alien enemy

Alien enemy must be pleaded. Burnside v Matthews, 54 N.Y. 78, 54 N.Y. (N.Y.S.) 78, 1873 N.Y. LEXIS 11 (N.Y. 1873).

167. Allowance for materials

Allowance for materials claimed must be pleaded. Read v Decker, 5 Hun 646 (N.Y.), aff'd, 67 N.Y. 182, 67 N.Y. (N.Y.S.) 182, 1876 N.Y. LEXIS 368 (N.Y. 1876).

168. Arbitration

Although an award appears from plaintiff’s evidence, the answer must set it forth fully. Brazill v Isham, 12 N.Y. 9, 12 N.Y. (N.Y.S.) 9, 1854 N.Y. LEXIS 106 (N.Y. 1854).

Agreement to arbitrate is not properly pleaded as a defense. Nagy v Arcas Brass & Iron Co., 242 N.Y. 97, 150 N.E. 614, 242 N.Y. (N.Y.S.) 97, 1926 N.Y. LEXIS 963 (N.Y. 1926).

It is no defense to an action brought to recover damages for negligence to allege, that defendant refused to submit to an arbitration unless it alleges a formal agreement to arbitrate and the appointment of an arbitrator. Koewing v Thalmann, 123 A.D. 398, 107 N.Y.S. 1042, 1908 N.Y. App. Div. LEXIS 69 (N.Y. App. Div. 1908).

169. Assumption of risk

In action by the insurance carrier to recover from the third party causing the injury, compensation paid to an injured employee, defense of assumed risk was insufficient because of lack of contractual relation. Liberty Mut. Ins. Co. v White, 233 N.Y.S. 619, 133 Misc. 847, 1929 N.Y. Misc. LEXIS 725 (N.Y. Sup. Ct. 1929).

Assumption of risk is no defense to action for violating Labor L § 202 by failing to provide safety devices. Butterly v Westover, Inc., 67 N.Y.S.2d 634, 1946 N.Y. Misc. LEXIS 3292 (N.Y. Sup. Ct. 1946), aff'd, 274 A.D. 978, 84 N.Y.S.2d 912, 1948 N.Y. App. Div. LEXIS 4313 (N.Y. App. Div. 1948).

170. Attachment

Attachment, under the garnishee process of another state by a resident of that state of a debt due from a citizen of that state to a citizen of New York, by a citizen of that state to whom the citizen of New York is indebted, is a good answer to an action by the citizen of New York for the debt. O'Neil v Nagle, 15 N.Y. St. 358 (N.Y.C.P. Apr. 2, 1888).

171. Bankruptcy

Discharge in bankruptcy, note as to pleading. 10 Abb NC 317; and see McCormick v Pickering, 4 N.Y. 276, 4 N.Y. (N.Y.S.) 276, 1850 N.Y. LEXIS 93 (N.Y. 1850); Philipe v James, 26 Super Ct (3 Robt) 720.

Officer of corporation who pocketed part of proceeds of earmarked check representing trust funds could be held accountable despite his discharge in bankruptcy; defense insufficient. L. C. Loomis, Inc. v Geekie Naughton, Inc., 261 A.D. 809, 24 N.Y.S.2d 742, 1941 N.Y. App. Div. LEXIS 7519 (N.Y. App. Div. 1941).

The recording of an assignment of a mortgage is not constructive notice thereof to the mortgagor; and, where a bankrupt, having no actual notice that the mortgage given by him had been assigned, scheduled the original mortgagee as the creditor, his discharge in bankruptcy is

a defense to an action upon the accompanying bond. Mueller v Goerlitz, 103 N.Y.S. 1037, 53 Misc. 53, 1907 N.Y. Misc. LEXIS 154 (N.Y. Sup. Ct. 1907).

In an action by city upon an official bond, given by its treasurer, to recover for said treasurer's defalcations against the sureties, the discharge in bankruptcy of the principal is no defense to the sureties. Syracuse v Roscoe, 123 N.Y.S. 403, 66 Misc. 317, 1910 N.Y. Misc. LEXIS 114 (N.Y. Sup. Ct. 1910).

In action for rent, defense of bankruptcy was stricken under the rule that rent accruing after petition in bankruptcy was a contingent liability. Charles Goell Const. Co. v Faber, 238 N.Y.S. 524, 135 Misc. 822, 1929 N.Y. Misc. LEXIS 1042 (N.Y. City Ct. 1929).

In action against officers of corporation on guaranty of payment for goods sold to corporation, defenses of breach of contract of delivery and waiver by filing proof of claim in bankruptcy proceeding against corporation and accepting dividend, were insufficient. New Jersey Button Works v Silverstein, 19 N.Y.S.2d 610, 173 Misc. 1072, 1940 N.Y. Misc. LEXIS 1694 (N.Y. Mun. Ct. 1940).

In action by bank for depositor's overdraft paid by bank, defense of depositor's discharge in bankruptcy held invalid where bank's claim arose after filing of involuntary petition in bankruptcy against depositor. Manufacturers Trust Co. v Schwartz, 29 N.Y.S.2d 279, 176 Misc. 814, 1941 N.Y. Misc. LEXIS 2046 (N.Y. App. Term 1941).

In action for balance due for attorney's services to defendant's wife under agreement requiring defendant to pay them, defense of discharge in bankruptcy was insufficient where such agreement was expressly exempted. Doyle v Hollister, 39 N.Y.S.2d 124, 1942 N.Y. Misc. LEXIS 2303 (N.Y. City Ct. 1942).

In action to invalidate chattel mortgage and sale for noncompliance with Lien L § 230-a, defense that plaintiff mortgagor had been adjudicated bankrupt and so could not sue, required summary judgment for defendant. Tchlenoff v Jacobs, 44 N.Y.S.2d 38, 1943 N.Y. Misc. LEXIS 2376 (N.Y.

Sup. Ct. 1943), aff'd, 267 A.D. 908, 46 N.Y.S.2d 875, 1944 N.Y. App. Div. LEXIS 5454 (N.Y. App. Div. 1944).

In action on promissory notes given for alimony payments under divorce decree, defense of discharge in bankruptcy was insufficient. Marte v Marte, 45 N.Y.S.2d 174, 1943 N.Y. Misc. LEXIS 2585 (N.Y. City Ct. 1943).

172. Breach of warranty

After an insurance company has agreed to pay a stipulated sum in consideration of the surrender of a policy after a loss, it cannot set up a breach of warranty or the short statute of limitations in the policy, as the action is upon the agreement. Smith v Glen's Falls Ins. Co., 62 N.Y. 85, 62 N.Y. (N.Y.S.) 85, 1875 N.Y. LEXIS 478 (N.Y. 1875).

In an action on a policy of life insurance, breach of warranty is an affirmative defense which the defendant must both plead and prove. Carmichael v John Hancock Mut. Life Ins. Co., 95 N.Y.S. 587, 48 Misc. 386, 1905 N.Y. Misc. LEXIS 425 (N.Y. App. Term 1905).

In an action on a promissory note, the facts that the note was given for the purchase price of a certain article, with warranty, and that it failed to fulfil the terms of the warranty, are properly pleaded as a defense. American Seeding Mach. Co. v Slocum, 108 N.Y.S. 1042, 58 Misc. 458, 1908 N.Y. Misc. LEXIS 372 (N.Y. Sup. Ct. 1908).

In action on policy, defense of plaintiff’s breach of warranty would have been available, notwithstanding defendant’s agent had knowledge thereof, had not defendant waived the breach. Fisher v United States Casualty Co., 245 N.Y.S. 406, 138 Misc. 307, 1930 N.Y. Misc. LEXIS 1611 (N.Y. Sup. Ct. 1930).

Breach of warranty may not be pleaded as a defense. Cabella v Cabella, 252 N.Y.S. 188, 141 Misc. 69, 1931 N.Y. Misc. LEXIS 1610 (N.Y. Mun. Ct. 1931).

Breach of warranty in insurance policy must be pleaded. Boos v World Mut. Life Ins. Co., 4 Hun 133 (N.Y. 1875), aff'd, 64 N.Y. 236, 64 N.Y. (N.Y.S.) 236, 1876 N.Y. LEXIS 62 (N.Y. 1876).

173. Compromise and settlement

An action on a note given in compromise of claims to which there was a good defense is not subject to a defense on that account in the absence of duress or fraud in affecting the compromise. Feeter v Weber, 78 N.Y. 334, 78 N.Y. (N.Y.S.) 334, 1879 N.Y. LEXIS 917 (N.Y. 1879).

Rule that a voluntary discontinuance constitutes no bar to a subsequent action, applied where the stipulation to discontinue and settle was silent as to the merits of the claim. Herder v Clifford, 252 N.Y. 141, 169 N.E. 118, 252 N.Y. (N.Y.S.) 141, 1929 N.Y. LEXIS 536 (N.Y. 1929).

In action on promissory note, defense of oral settlement agreement held insufficient. Di Roma v Chambers Drug Stores, Inc., 262 A.D. 856, 28 N.Y.S.2d 170, 1941 N.Y. App. Div. LEXIS 6260 (N.Y. App. Div. 1941).

In action for unpaid balance of mortgage interest, defense that mortgagee offered to accept less than amount due on mortgagor’s indebtedness held insufficient, since such offer was revocable before acceptance by performance. M. V. T. Corp. v Mt. Vernon Lodge, & P. O. E., 263 A.D. 849, 31 N.Y.S.2d 705, 1941 N.Y. App. Div. LEXIS 5251 (N.Y. App. Div. 1941).

Defense of compromise and settlement not sufficient. Nordlinger v Libow, 240 N.Y.S. 193, 136 Misc. 438, 1930 N.Y. Misc. LEXIS 1051 (N.Y. City Ct. 1930).

In action for overtime compensation, defense of payment by settlement without alleging dispute was insufficient. Rubin v Meadow Provision Co., 39 N.Y.S.2d 517, 1942 N.Y. Misc. LEXIS 2349 (N.Y. City Ct. 1942).

In action for money due under Fair Labor Standards Act, defense of settlement by paying smaller sum was insufficient. Rubin v Meadow Provision Co., 39 N.Y.S.2d 518, 1942 N.Y. Misc. LEXIS 2350 (N.Y. City Ct. 1942).

In action on note, where settlement agreement was held good, defenses and counterclaims which treated it as rescinded were insufficient. Blanchard Press, Inc. v Aerosphere, Inc., 51 N.Y.S.2d 715, 1944 N.Y. Misc. LEXIS 2603 (N.Y. Sup. Ct. 1944), aff'd, 269 A.D. 826, 56 N.Y.S.2d 415, 1945 N.Y. App. Div. LEXIS 4054 (N.Y. App. Div. 1945).

174. Constructive trust

Affirmative defense of constructive trust was insufficient where defendant failed to set forth all the essential elements necessary to sustain such a defense. Singer v Levine, 15 Misc. 2d 785, 181 N.Y.S.2d 699, 1958 N.Y. Misc. LEXIS 2328 (N.Y. Sup. Ct. 1958).

175. Contributory negligence

It was held proper to set up the defense of contributory negligence in accordance with former CPA § 265. Egan v Julius Tishman & Sons, Inc., 222 A.D. 141, 225 N.Y.S. 631, 1927 N.Y. App. Div. LEXIS 7818 (N.Y. App. Div. 1927).

In action by one bank against another to recover funds paid out on forged instruments and to fictitious persons, defenses of plaintiff’s negligence and knowledge of fictitious payees were insufficient because of failure to plead defendant’s freedom from contributory negligence, and that knowledge of fictitious payees came to plaintiff’s officers while acting within the scope of their employment. Stuyvesant Credit Union v Manufacturers' Trust Co., 245 N.Y.S. 39, 138 Misc. 122, 1930 N.Y. Misc. LEXIS 1565 (N.Y. Sup. Ct. 1930).

In an action for death where proof of facts relied on to establish contributory negligence must necessarily come from defendant’s officers and employees, plaintiff was entitled to a bill of particulars. Kanya v Pennsylvania R. Co., 167 N.Y.S. 765 (N.Y. Sup. Ct. 1917).

Former Code Civil Procedure, § 841-b, from which former § 265 of the Civil Practice Act was taken, construed as to effect of making contributory negligence a defense to be pleaded and proved by the defendant. Lehigh Valley R. Co. v Quereau, 289 F. 767, 1923 U.S. App. LEXIS 2049 (2d Cir. N.Y. 1923).

176. —Burden of proof

It was not incumbent upon plaintiff to prove decedent's freedom from contributory negligence, that being a matter of defense to be alleged and proved by defendant. Bond v Schenectady R. Co., 251 N.Y. 315, 167 N.E. 455, 251 N.Y. (N.Y.S.) 315, 1929 N.Y. LEXIS 722 (N.Y. 1929).

The burden of showing contributory negligence on the part of the decedent was on defendant. Markert v Long I. R. Co., 175 A.D. 467, 161 N.Y.S. 926, 1916 N.Y. App. Div. LEXIS 8329 (N.Y. App. Div. 1916).

Defendant must not only allege contributory negligence, but must prove it as a defense. La Goy v Director General of Railroads, 191 A.D. 680, 181 N.Y.S. 842, 1920 N.Y. App. Div. LEXIS 4784 (N.Y. App. Div. 1920), rev'd, 231 N.Y. 191, 131 N.E. 886, 231 N.Y. (N.Y.S.) 191, 1921 N.Y. LEXIS 624 (N.Y. 1921).

Former CPA § 265 was not limited to actions brought by the personal representative of a decedent, but placed the burden of proof of contributory negligence upon the defendant in "an action to recover damages for causing death," and was applicable to an action by an insurance carrier against a third party under section 29 of the Workmen's Compensation Law. Liberty Mut. Ins. Co. v George Colon & Co., 235 A.D. 117, 256 N.Y.S. 628, 1932 N.Y. App. Div. LEXIS 7902 (N.Y. App. Div.), aff'd, 260 N.Y. 305, 183 N.E. 506, 260 N.Y. (N.Y.S.) 305, 1932 N.Y. LEXIS 694 (N.Y. 1932).

The burden upon the defendant of establishing contributory negligence of plaintiff's intestate may be properly sustained by the testimony of plaintiff's witnesses. Porter v New York C. I. R.

Co., 235 A.D. 525, 257 N.Y.S. 757, 1932 N.Y. App. Div. LEXIS 8008 (N.Y. App. Div. 1932), aff'd, 261 N.Y. 587, 185 N.E. 750, 261 N.Y. (N.Y.S.) 587, 1933 N.Y. LEXIS 1397 (N.Y. 1933).

It was not necessary that the action be one brought by the executor, administrator or other representative of the deceased in order to require the defendant to establish the contributory negligence of deceased. Travelers Ins. Co. v Staten I. R. T. R. Co., 234 N.Y.S. 293, 134 Misc. 6, 1929 N.Y. Misc. LEXIS 770 (N.Y. Mun. Ct. 1929).

Master has burden of pleading and proving contributory negligence. Kanya v Pennsylvania R. Co., 167 N.Y.S. 765 (N.Y. Sup. Ct. 1917).

177. —Evidence

Negligence of railroad and contributory negligence of deceased passenger held for the jury. Brott v Auburn & S. E. R. Co., 220 N.Y. 92, 115 N.E. 273, 220 N.Y. (N.Y.S.) 92, 1917 N.Y. LEXIS 943 (N.Y. 1917).

Error for appellate division to reverse on ground of contributory negligence when there was no basis in the evidence for a finding thereof. Nicholson v Greeley Square Hotel Co., 227 N.Y. 345, 125 N.E. 541, 227 N.Y. (N.Y.S.) 345, 1919 N.Y. LEXIS 685 (N.Y. 1919).

If any possible hypothesis based on the evidence forbids the imputation of fault to the deceased, as matter of law, the question is for the jury. Chamberlain v Lehigh V. R. Co., 238 N.Y. 233, 144 N.E. 512, 238 N.Y. (N.Y.S.) 233, 1924 N.Y. LEXIS 672 (N.Y. 1924), reh'g denied, 239 N.Y. 634, 147 N.E. 227, 239 N.Y. (N.Y.S.) 634, 1925 N.Y. LEXIS 1031 (N.Y. 1925).

Ordinarily, contributory negligence is a question for the jury, one who approaches any railroad crossing, at any time, or under any circumstances, without taking any precautions for his safety, is guilty of contributory negligence as a matter of law. Schrader v New York, C. & S. L. R. Co., 254 N.Y. 148, 172 N.E. 272, 254 N.Y. (N.Y.S.) 148, 1930 N.Y. LEXIS 1019 (N.Y. 1930).

A jury must decide when the evidence presents an issue of fact. Crough v New York C. R. Co., 260 N.Y. 227, 183 N.E. 372, 260 N.Y. (N.Y.S.) 227, 1932 N.Y. LEXIS 680 (N.Y. 1932).

Contributory negligence of deaf mute struck by street car at intersection held for jury. Drusky v Schenectady R. Co., 164 A.D. 406, 149 N.Y.S. 762, 1914 N.Y. App. Div. LEXIS 7776 (N.Y. App. Div. 1914).

Evidence held to warrant finding that decedent was free from contributory negligence. Raleigh v Hines, 194 A.D. 592, 186 N.Y.S. 120, 1921 N.Y. App. Div. LEXIS 9333 (N.Y. App. Div. 1921), aff'd, 232 N.Y. 617, 134 N.E. 595, 232 N.Y. (N.Y.S.) 617, 1922 N.Y. LEXIS 1205 (N.Y. 1922).

Defense of contributory negligence as a matter of law not sustained in action for death of occupant of automobile struck by train at crossing. Wilhelm v Lehigh V. R. Co., 215 A.D. 28, 213 N.Y.S. 58, 1925 N.Y. App. Div. LEXIS 5359 (N.Y. App. Div. 1925).

Question of contributory negligence of plaintiff’s intestate killed at a railroad crossing was for the jury. Crough v New York C. R. Co., 229 A.D. 340, 242 N.Y.S. 54, 1930 N.Y. App. Div. LEXIS 10377 (N.Y. App. Div. 1930).

Plaintiff’s intestate, knowing the dangers, was guilty of contributory negligence as a matter of law in assisting in the operation of a crane, which came in contact with electric wires and caused his death. Buell v Utica Gas & Electric Co., 230 A.D. 328, 243 N.Y.S. 599, 1930 N.Y. App. Div. LEXIS 8608 (N.Y. App. Div. 1930), aff'd, 259 N.Y. 443, 182 N.E. 77, 259 N.Y. (N.Y.S.) 443, 1932 N.Y. LEXIS 965 (N.Y. 1932).

Contributory negligence of deceased, if not established as a matter of law, is question for the jury. In present case it was established by the evidence. Travelers Ins. Co. v Staten I. R. T. R. Co., 234 N.Y.S. 293, 134 Misc. 6, 1929 N.Y. Misc. LEXIS 770 (N.Y. Mun. Ct. 1929).

Lack of reasonable care must appear by the fair preponderance of evidence to warrant plaintiff’s defeat on account of contributory negligence. McCullough v Pennsylvania R. Co., 158 N.Y.S. 4 (N.Y. Sup. Ct. 1916).

178. —Instructions

It was prejudicial error to instruct that burden was on plaintiff to show freedom from contributory negligence. Skelton v Lehigh V. R. Co., 171 A.D. 91, 156 N.Y.S. 835, 1916 N.Y. App. Div. LEXIS 9429 (N.Y. App. Div. 1916).

It was error to instruct the jury that plaintiff was bound to allege and prove absence of contributory negligence requiring reversal of judgment. Zimmerman v Ullmann, 173 A.D. 650, 160 N.Y.S. 81, 1916 N.Y. App. Div. LEXIS 7599 (N.Y. App. Div. 1916).

179. —Foreign law

Where the injury complained of occurred in a foreign country in which, by statute, plaintiff might recover for negligence even though his negligence contributed to the injury, the burden of proving contributory negligence to lessen damages fell upon the defendant. Fitzpatrick v International R. Co., 252 N.Y. 127, 169 N.E. 112, 252 N.Y. (N.Y.S.) 127, 1929 N.Y. LEXIS 535 (N.Y. 1929).

180. —Particular applications

The rule that in a death action contributory negligence is to be pleaded and proved by defendant applied to case of truck driver killed by train at crossing. Chamberlain v Lehigh V. R. Co., 238 N.Y. 233, 144 N.E. 512, 238 N.Y. (N.Y.S.) 233, 1924 N.Y. LEXIS 672 (N.Y. 1924), reh'g denied, 239 N.Y. 634, 147 N.E. 227, 239 N.Y. (N.Y.S.) 634, 1925 N.Y. LEXIS 1031 (N.Y. 1925).

Contributory negligence insufficient defense to action for death of a girl between eleven and twelve years of age, killed by a motor truck while crossing street. Laing v J. P. Duffy Co., 250 N.Y. 608, 166 N.E. 342, 250 N.Y. (N.Y.S.) 608, 1929 N.Y. LEXIS 1005 (N.Y. 1929).

In action for death of window cleaner, burden of proof was on defendant owner of building to prove that cleaner was contributorily negligent in unhooking both ends of safety belt from anchors before attempting to reenter through window. Andross v Trustees of Columbia

University, 287 N.Y. 160, 38 N.E.2d 480, 287 N.Y. (N.Y.S.) 160, 1941 N.Y. LEXIS 1381 (N.Y. 1941).

In action by servant for injuries, defendant must plead and prove contributory negligence, and it cannot be held as matter of law that employee assumed risk from violation of statutory law. Rinando v D. C. Weeks & Son, 172 A.D. 319, 158 N.Y.S. 365, 1916 N.Y. App. Div. LEXIS 10308 (N.Y. App. Div. 1916).

In view of former § 265, CPA, and § 131, Decedent Estate Law, the burden of proof rested upon the defendant in an action to recover damages for the wrongful death of an infant three and one-half years old, to show contributory negligence on the part of the parents of such infant. Ryczko v Klenotich, 204 A.D. 693, 198 N.Y.S. 473, 1923 N.Y. App. Div. LEXIS 9553 (N.Y. App. Div. 1923).

Applied in action to recover damages for death caused by gas explosion in decedent's residence. United States Fire Ins. Co. v Adirondack Power & Light Corp., 206 A.D. 584, 201 N.Y.S. 643, 1923 N.Y. App. Div. LEXIS 7284 (N.Y. App. Div. 1923).

In an action to recover for the death of one killed by an automobile, the burden of establishing the defense of contributory negligence was held to be on defendant. Cooperstein v Eden Brick & Supply Co., 207 A.D. 303, 202 N.Y.S. 63, 1923 N.Y. App. Div. LEXIS 5952 (N.Y. App. Div. 1923), modified, 238 N.Y. 200, 144 N.E. 501, 238 N.Y. (N.Y.S.) 200, 1924 N.Y. LEXIS 668 (N.Y. 1924).

In an action to recover for the death of plaintiff's intestate, who was killed by a train of the defendant while driving over a crossing in a bobsleigh, the burden was upon the defendant to establish where the train first became visible to a traveler on the road. Ticknor v Pennsylvania R. Co., 208 A.D. 461, 203 N.Y.S. 629, 1924 N.Y. App. Div. LEXIS 5063 (N.Y. App. Div. 1924).

Former CPA § 265 was applicable in an action for death where plaintiff's decedent threw an axe for the purpose of disentangling electric wires and one of them fell upon him. Shindler v Sullivan County Light & Power Corp., 213 A.D. 71, 209 N.Y.S. 562, 1925 N.Y. App. Div. LEXIS 8437

(N.Y. App. Div.), aff'd, 241 N.Y. 571, 150 N.E. 559, 241 N.Y. (N.Y.S.) 571, 1925 N.Y. LEXIS 653 (N.Y. 1925).

The burden was held to be upon the owner of an automobile to show that an invited guest who was killed therein during a railroad crossing collision with a train, was guilty of contributory negligence, even though said owner was not present but the car was being driven by one to whom she had loaned it. Roche v New York C. R. Co., 221 A.D. 497, 224 N.Y.S. 656, 1927 N.Y. App. Div. LEXIS 6480 (N.Y. App. Div. 1927).

A longshoreman disregarded a safe means provided to reach the hold of the vessel in which he was working and followed a route he knew to be dangerous; fell and received fatal injuries; judgment for administratrix reversed. Colandria v China Mut. Steam Nav. Co., 226 A.D. 681, 233 N.Y.S. 584, 1929 N.Y. App. Div. LEXIS 9126 (N.Y. App. Div. 1929).

On a claim against the state to recover for the death of claimant's intestate, alleged to have been caused by negligence in not guarding a state highway, the burden of proving negligence on the part of the intestate was held to be on the state. Wolf v State, 202 N.Y.S. 754, 122 Misc. 381, 1924 N.Y. Misc. LEXIS 649 (N.Y. Ct. Cl.), aff'd, 210 A.D. 827, 206 N.Y.S. 974, 1924 N.Y. App. Div. LEXIS 7171 (N.Y. App. Div. 1924).

In proceeding against state for death of motorist in automobile collision caused by negligent maintenance of highway intersection signals, state must plead and prove contributory negligence. Dulinak v State, 30 N.Y.S.2d 799, 177 Misc. 372, 1941 N.Y. Misc. LEXIS 2330 (N.Y. Ct. Cl.), aff'd, 262 A.D. 1064, 30 N.Y.S.2d 838, 1941 N.Y. App. Div. LEXIS 7223 (N.Y. App. Div. 1941).

In an action for death of a sandblaster from silicosis, it was a question of fact for the jury as to whether the deceased was guilty of contributory negligence in failing to wear a mask. Pieczonka v Pullman Co., 102 F.2d 432, 1939 U.S. App. LEXIS 3868 (2d Cir. N.Y. 1939).

181. —As defense to willful wrong

Negligence, by which the injured party exposed himself to a positive wilful wrong and fraud for which he sues, will not bar relief. Albany City Sav. Institution v Burdick, 87 N.Y. 40, 87 N.Y. (N.Y.S.) 40, 1881 N.Y. LEXIS 313 (N.Y. 1881).

Contributory negligence is no defense, though it may mitigate damages in an action for injury from the bite of a ferocious dog. Lynch v McNally (N.Y.C.P. Apr. 2, 1877), aff'd, 73 N.Y. 347, 73 N.Y. (N.Y.S.) 347, 1878 N.Y. LEXIS 621 (N.Y. 1878).

182. Damages not shown

In action for amount of check deposited with collecting bank which was credited therefor by drawee bank but debited week later on discovery that drawer had stopped payment, defense by collecting bank that payment was mistake and that plaintiff depositor suffered no damages from failure to notify him of stoppage of payment, was sufficient. Turetsky v Morris Plan Industrial Bank, 22 N.Y.S.2d 514, 1936 N.Y. Misc. LEXIS 872 (N.Y. App. Term 1936).

183. Diplomatic immunity

Ambassador from Chile could not be sued in New York court for personal injuries due to negligent operation of automobile owned by him and driven by his wife, despite general appearance by pleading to merits. Friedberg v Santa Cruz, 274 A.D. 1072, 86 N.Y.S.2d 369, 1949 N.Y. App. Div. LEXIS 6116 (N.Y. App. Div. 1949).

An answer is frivolous which sets up simply that the defendant has been appointed a foreign minister by the United States government before action commenced. Mechanics' Bank of the N.Y. v Webb, 21 How. Pr. 450, 1861 N.Y. Misc. LEXIS 109 (N.Y. Sup. Ct. July 1, 1861).

184. Duress

Where defense of duress seemed improbable, the improbability being a question for the trial court, order refusing to strike out was affirmed. Trenkman v Smith, 226 A.D. 774, 235 N.Y.S. 43, 1929 N.Y. App. Div. LEXIS 9907 (N.Y. App. Div. 1929).

In an action on a note defenses of duress and holding in due course raised triable issues. Jules E. Brulatour, Inc. v Garsson, 229 A.D. 466, 242 N.Y.S. 583, 1930 N.Y. App. Div. LEXIS 10423 (N.Y. App. Div. 1930).

In action for unpaid balance of original or predecessor note after 77 renewals with payments on account, defense of duress consisting of threatened exercise by creditor of legal right held insufficient. Tarrytown Nat'l Bank & Trust Co. v Clark, 261 A.D. 937, 25 N.Y.S.2d 418, 1941 N.Y. App. Div. LEXIS 8167 (N.Y. App. Div. 1941).

In action for goods sold and services rendered, affirmative defense in reply, to defendant’s defense of accord and satisfaction, that latter had been effected by duress of goods and lacked consideration, was sufficient. Weiner v Tele King Corp., 123 N.Y.S.2d 101, 1953 N.Y. Misc. LEXIS 1920 (N.Y. Sup. Ct. 1953).

185. Equitable defenses generally

They include all matters which would have authorized an application to chancery for relief against a legal liability, but which could not have been pleaded in bar. Dobson v Pearce, 12 N.Y. 156, 12 N.Y. (N.Y.S.) 156, 1854 N.Y. LEXIS 118 (N.Y. 1854).

Equities between defendants cannot defeat the claim of a plaintiff not connected with them. Kay v Whittaker, 44 N.Y. 565, 44 N.Y. (N.Y.S.) 565, 1871 N.Y. LEXIS 76 (N.Y. 1871).

An independent counter equity in favor of defendant which is insufficient to found an action or counterclaim upon, cannot defeat a recovery in an equitable action. Canaday v Stiger, 55 N.Y. 452, 55 N.Y. (N.Y.S.) 452, 1874 N.Y. LEXIS 32 (N.Y. 1874).

Equitable defenses could be interposed in a strictly legal cause of action. Day v Hammond, 57 N.Y. 479, 57 N.Y. (N.Y.S.) 479, 1874 N.Y. LEXIS 307 (N.Y. 1874).

As to equitable defenses in ejectment, See Hoppough v Struble, 60 N.Y. 430, 60 N.Y. (N.Y.S.) 430, 1875 N.Y. LEXIS 199 (N.Y. 1875).

That a foreclosure was brought from motives of malice is not an equitable defense. Morris v Tuthill, 72 N.Y. 575, 72 N.Y. (N.Y.S.) 575, 1878 N.Y. LEXIS 548 (N.Y. 1878).

Where a defense can be sustained only on the ground that the person asserting it is an innocent purchaser, he must positively deny notice of the equitable rights of another, although they be not charged. Seymour v McKinstry, 106 N.Y. 230, 12 N.E. 348, 106 N.Y. (N.Y.S.) 230, 1887 N.Y. LEXIS 878 (N.Y.), reh'g denied, 14 N.E. 94 (N.Y. 1887).

Consent anti-trust decree, to which plaintiff was not party, was insufficient defense of impossibility of performance. General Aniline & Film Corp. v Bayer, 305 N.Y. 479, 113 N.E.2d 844, 305 N.Y. (N.Y.S.) 479, 1953 N.Y. LEXIS 790 (N.Y. 1953).

In action to foreclose a mortgage, where the facts disclosed by the answer warranted some equitable relief, the answer was sufficient. Rosenberg v General Realty Service, Inc., 231 A.D. 259, 247 N.Y.S. 461, 1931 N.Y. App. Div. LEXIS 16029 (N.Y. App. Div. 1931).

In an action for a deficiency upon the foreclosure of a chattel mortgage of saloon fixtures, the defense that defendant assumed the apparent relation of mortgagor and conducted the saloon solely for the benefit of plaintiff, and that it was understood the writing was to have no efficacy as a contract, is not of an equitable nature. H. Koehler & Co. v Duggan, 96 N.Y.S. 1025, 49 Misc. 100, 1905 N.Y. Misc. LEXIS 553 (N.Y. App. Term 1905).

186. Estoppel and waiver

A defendant, as a general rule, who has knowledge of a defense which he fails to plead cannot avail himself of it upon the trial. One who, with knowledge of the facts, has a full defense may

waive that defense by causing the other party to incur trouble and expense. Burmester v De Lucia, 263 N.Y. 315, 189 N.E. 231, 263 N.Y. (N.Y.S.) 315, 1934 N.Y. LEXIS 1277 (N.Y. 1934).

Waiver must be expressly pleaded in answer as partial defense. Rehill v Rehill, 306 N.Y. 126, 116 N.E.2d 281, 306 N.Y. (N.Y.S.) 126, 1953 N.Y. LEXIS 770 (N.Y. 1953).

In action by corporation as assignee of stock purchase contract against seller for breach of warranty as to amount of taxes owed by corporation, representation as to amount of government assessment for taxes, based on information furnished by buyer to seller, was insufficient as defense by way of estoppel or otherwise. Vincent Christina & Co. v Gates, 284 A.D. 686, 134 N.Y.S.2d 500, 1954 N.Y. App. Div. LEXIS 3469 (N.Y. App. Div. 1954).

To support a defense of estoppel, facts should be alleged showing in what manner and to what extent defendant relied on plaintiff's inconsistent conduct and was prejudiced thereby. Chester v Kantod Park Asso., 13 A.D.2d 709, 214 N.Y.S.2d 194, 1961 N.Y. App. Div. LEXIS 11307 (N.Y. App. Div. 2d Dep't 1961).

In an action founded upon the breach of a contract by the defendants, it is not enough for the defendants to allege generally, as a defense that the plaintiff waived performance; but should set forth the facts constituting such waiver. Ward v Brady, 116 N.Y.S. 456, 63 Misc. 435, 1909 N.Y. Misc. LEXIS 150 (N.Y. Sup. Ct. 1909).

In action for overtime compensation, defense of equitable estoppel in that, in reliance on collective bargaining agreement between parties and failure of plaintiffs to claim additional wages, defendants fixed their rentals unchangeable during existing tenancy, was insufficient. Rienzo v City Bank Farmers Trust Co., 42 N.Y.S.2d 337, 180 Misc. 333, 1943 N.Y. Misc. LEXIS 1997 (N.Y. Sup. Ct. 1943), aff'd, 267 A.D. 890, 47 N.Y.S.2d 589, 1944 N.Y. App. Div. LEXIS 5359 (N.Y. App. Div. 1944).

In action for overtime compensation, defense of equitable estoppel on part of plaintiffs, building service employees, arising from their acceptance of compensation fixed by collective bargaining agreements and defendants' reliance thereon in fixing rents, was insufficient. Walsh v 515

Madison Ave. Corp., 42 N.Y.S.2d 262, 181 Misc. 219, 1943 N.Y. Misc. LEXIS 1980 (N.Y. Sup. Ct.), aff'd, 267 A.D. 756, 45 N.Y.S.2d 927, 1943 N.Y. App. Div. LEXIS 6067 (N.Y. App. Div. 1943).

Where answer to petition to probate destroyed will alleged no material change in position by deceased administrator, by destruction and delaying in offering it for probate, defense of waiver and estoppel was struck out. In re Dalton's Estate, 57 N.Y.S.2d 107, 185 Misc. 785, 1945 N.Y. Misc. LEXIS 2175 (N.Y. Sur. Ct. 1945).

In absence of statute requiring protest, acceptance by public officer of an amount less than his salary does not constitute defense of waiver, estoppel or accord and satisfaction. Fiorile v Goldman, 24 Misc. 2d 944, 206 N.Y.S.2d 29, 1960 N.Y. Misc. LEXIS 2661 (N.Y. County Ct. 1960).

Where the matters which are relied on by a defendant to constitute an estoppel do not affect the issues as made by the pleadings as to the original obligation, they must be pleaded in order to give the defendant a right to offer testimony in support of them. Dresler v Hard, 6 N.Y.S. 500, 57 N.Y. Super. Ct. 192, 1889 N.Y. Misc. LEXIS 648 (N.Y. Super. Ct. 1889), rev'd, 127 N.Y. 235, 27 N.E. 823, 127 N.Y. (N.Y.S.) 235, 1891 N.Y. LEXIS 1777 (N.Y. 1891).

In mortgage foreclosure, defense of estoppel and other defenses by subordinate lienors held insufficient. Reconstruction Finance Corp. v Metropolitan Steel Products Corp., 31 N.Y.S.2d 85, 1941 N.Y. Misc. LEXIS 2365 (N.Y. Sup. Ct.), aff'd, 262 A.D. 1034, 31 N.Y.S.2d 659, 1941 N.Y. App. Div. LEXIS 7126 (N.Y. App. Div. 1941).

In action by lessee against former lessee for conversion of wheat, defense that plaintiff was estopped to deny defendant’s right to reap wheat need not allege that plaintiffs leased with notice of facts on which estoppel is based. Benson v Morse, 109 N.Y.S.2d 57, 1951 N.Y. Misc. LEXIS 2627 (N.Y. Sup. Ct. 1951).

187. Failure to state cause of action

Answer alleging that complaint fails to state cause of action is insufficient as defense. Cochran v Wyer, 117 N.Y.S.2d 910, 203 Misc. 890, 1952 N.Y. Misc. LEXIS 2098 (N.Y. Sup. Ct. 1952).

Answer alleging that plaintiff's complaint did not state sufficient facts to constitute cause of action was not new matter within CPA § 261. Kayser v Railway Express Agency, Inc., 54 N.Y.S.2d 623, 1945 N.Y. Misc. LEXIS 1741 (N.Y. Sup. Ct. 1945).

Defense that complaint does not state facts sufficient to constitute cause of action is mere conclusion, and does not constitute defense. Strudwick v Strudwick, 110 N.Y.S.2d 839, 1952 N.Y. Misc. LEXIS 2465 (N.Y. Sup. Ct. 1952).

188. Failure or lack of consideration

Failure of consideration of a deed must be pleaded. Dubois v Hermance, 56 N.Y. 673, 56 N.Y. (N.Y.S.) 673, 1874 N.Y. LEXIS 251 (N.Y. 1874).

An answer that an assignee of a mortgage took, and the assignor gave, title solely from malice, and without consideration, to enable an action to be brought is insufficient. Morris v Tuthill, 72 N.Y. 575, 72 N.Y. (N.Y.S.) 575, 1878 N.Y. LEXIS 548 (N.Y. 1878).

Defense of total failure of consideration for a note given in part payment under a contract for operation of a bus line, was inapplicable, since under the contract, as construed, there was a partial failure of consideration. United Transp. Co. v Glenn, 225 A.D. 171, 232 N.Y.S. 373, 1929 N.Y. App. Div. LEXIS 11588 (N.Y. App. Div. 1929).

Where a publication set up in the complaint in a libel suit charged a street car conductor to have been in complicity with pickpockets upon the occasion of a certain theft, the conductor is sufficiently indicated to permit him to offer evidence that he was the conductor of the particular car which was the scene of the theft and the complaint is sufficient. Lyons v New York Herald Co., 106 N.Y.S. 874, 55 Misc. 570, 1907 N.Y. Misc. LEXIS 668 (N.Y. Sup. Ct. 1907).

Defendant must plead lack of consideration for note sued on, yet plaintiff has burden of proof. H. Rubenstein Co. v Tucker, 255 N.Y.S. 211, 142 Misc. 626, 1932 N.Y. Misc. LEXIS 1339 (N.Y. App. Term 1932).

In bank's action on note of former vice-president, defense that defendant was "donee beneficiary" of agreement between plaintiff and another bank for his benefit held not to bar summary judgment for plaintiff. First Trust Co. v Arnold, 39 N.Y.S.2d 175, 179 Misc. 349, 1942 N.Y. Misc. LEXIS 2309 (N.Y. Sup. Ct. 1942).

In action on note against corporate maker and individual indorser, indorser's defense that he indorsed without consideration and on representation that plaintiff would not look to him personally were sufficient. Neptune Meter Co. v Long Island Water Meter Repair Co., 39 N.Y.S.2d 325, 179 Misc. 445, 1942 N.Y. Misc. LEXIS 2329 (N.Y. Sup. Ct. 1942).

189. Foreign corporation

The defense of failure to pay a license fee as required by § 181 of the Tax Law must be pleaded in an action by the assignee of a foreign corporation. Halsey v Henry Jewett Dramatic Co., 190 N.Y. 231, 83 N.E. 25, 190 N.Y. (N.Y.S.) 231, 1907 N.Y. LEXIS 1370 (N.Y. 1907).

As § 15 of the General Corporation Law is in derogation of the general right of the foreign corporation to do business in this State and to bring action on contracts made here, it is incumbent on the party taking the defense to bring the case within the express prohibition of the statute. Portland Co. v Hall & Grant Const. Co., 121 A.D. 779, 106 N.Y.S. 649, 1907 N.Y. App. Div. LEXIS 1904 (N.Y. App. Div. 1907).

In an action on an indemnity bond fact defendant is a foreign corporation not registered in this state is no defense. Harvard College v Kempner, 131 A.D. 848, 116 N.Y.S. 437, 1909 N.Y. App. Div. LEXIS 909 (N.Y. App. Div. 1909).

In an action by assignee of a trade acceptance, drawn on and accepted by defendant, by a foreign corporation, and discounted by plaintiff, defense that the drawer was not licensed to do

business in this state was not available. Allison Hill Trust Co. v Sarandrea, 236 N.Y.S. 265, 134 Misc. 566, 1929 N.Y. Misc. LEXIS 1200 (N.Y. Sup. Ct. 1929), aff'd, 236 A.D. 189, 258 N.Y.S. 299, 1932 N.Y. App. Div. LEXIS 5928 (N.Y. App. Div. 1932).

An affirmative defense based on incapacity of foreign corporation doing business here without certificate of authority to maintain action on contract made here, must either allege the contract in haec verba or the substance thereof. Gindy Mfg. Corp. v Fishman, 189 N.Y.S.2d 56 (N.Y. Sup. Ct. 1959).

190. Foreign or international law

Defense that plaintiff's corporate existence was terminated by the Soviet government are its property confiscated and that defendant was entitled to retain money in his hands, to recover which the action was brought, as an offset to his claim against said government for property seized in Russia, was insufficient. Moscow Machine Tool & Engine Co. v Richard, 240 N.Y. 707, 148 N.E. 768, 240 N.Y. (N.Y.S.) 707, 1925 N.Y. LEXIS 954 (N.Y. 1925).

Law of France, enacted after commencement of World war, voiding contracts between French and German citizens, was no defense to an action on such a contract, assignment of which plaintiff took after war was declared. Frenkel & Co. v L'Urbaine Fire Ins. Co., 251 N.Y. 243, 167 N.E. 430, 251 N.Y. (N.Y.S.) 243, 1929 N.Y. LEXIS 712 (N.Y. 1929).

An affirmative defense that under the law of the land where the transaction sued on took place the defendant is not liable, was held a sufficient answer if amended to state that such was the law of the country at the date of the transaction. Weissman v Banque de Bruxelles, 221 A.D. 595, 224 N.Y.S. 555, 1927 N.Y. App. Div. LEXIS 6512 (N.Y. App. Div. 1927).

The court struck as insufficient defenses to an action for insurance commissions that the plaintiff had been dissolved and its interests confiscated, as an alien enemy by the French government, on the ground that the defenses did not plead the French law or state facts showing the

application of such law to the plaintiff's claim. Frenkel & Co. v L'Urbaine Fire Ins. Co., 222 A.D. 299, 226 N.Y.S. 322, 1928 N.Y. App. Div. LEXIS 8058 (N.Y. App. Div. 1928).

In an action on a common-law bond for protection of subcontractors, defense of failure of plaintiff to comply with New Jersey statute insufficient. Clark Plastering Co. v Seaboard Surety Co., 237 A.D. 274, 260 N.Y.S. 468, 1932 N.Y. App. Div. LEXIS 5328 (N.Y. App. Div.), reh'g denied, 237 A.D. 807, 260 N.Y.S. 973, 1932 N.Y. App. Div. LEXIS 5400 (N.Y. App. Div. 1932).

In action for conversion of securities by French corporation doing business in New York, defenses that both parties were French nationals and subject to decree of French government confiscating such securities and to U. S. Executive order requiring license to transfer such securities and that such license had never been obtained, held insufficient. Bollack v Societe Generale Pour Favoriser le Developpement du Commerce et de L'Industrie, 263 A.D. 601, 33 N.Y.S.2d 986, 1942 N.Y. App. Div. LEXIS 6957 (N.Y. App. Div.), app. denied, 264 A.D. 767, 35 N.Y.S.2d 717, 1942 N.Y. App. Div. LEXIS 4622 (N.Y. App. Div. 1942).

Where complaint alleged that plaintiff and defendant had rented a car and agreed to split expenses of trip, and that plaintiffs were injured in accident in California as result of defendant's negligence, motion to strike as insufficient in law affirmative defense pleading California Guest Statute was denied, since applicability of statute required trial. Krantz v Garmise, 13 A.D.2d 426, 215 N.Y.S.2d 327, 1961 N.Y. App. Div. LEXIS 10609 (N.Y. App. Div. 1st Dep't 1961).

In action for seller's breach of contract to deliver 50,000 pounds of frozen Quebec eels, defense that catch was small and was apportioned by Canadian source of supply and that defendant was unable to purchase such quantity, held insufficient, where contract was not limited to special source of supply. Hauswirth v Rosenberg, 43 N.Y.S.2d 206, 180 Misc. 945, 1943 N.Y. Misc. LEXIS 2154 (N.Y. City Ct. 1943).

In action by French citizen to recover securities in custody of French branch of trust company, repatriated after French decree prohibiting their exportation, defense that securities of French national must await post-war disposition required summary judgment for defendant. Bercholz v

Guaranty Trust Co., 44 N.Y.S.2d 148, 180 Misc. 1043, 1943 N.Y. Misc. LEXIS 2403 (N.Y. Sup. Ct. 1943).

In action by resident to recover amount paid to defendant for transportation from Germany to New York where sailing was canceled by outbreak of war, defense that "Devisen" laws of Germany, which merely forbid voluntary payment of marks by residents of Germany to outsiders, held not to be sufficient. Branderbit v Hamburg-American Line, 29 N.Y.S.2d 488, 1941 N.Y. Misc. LEXIS 2107 (N.Y. Mun. Ct.), rev'd, 31 N.Y.S.2d 588, 1941 N.Y. Misc. LEXIS 2424 (N.Y. App. Term 1941).

191. Foreign sovereignty

In action for damages against former bondholders for inducing foreign government to break contract with plaintiff, defendant may defend that merits of plaintiff's claim will entail passing on validity of action of foreign sovereign acting within scope of its sovereign competency. Frazier v Foreign Bondholders Protective Council, Inc., 283 A.D. 44, 125 N.Y.S.2d 900, 1953 N.Y. App. Div. LEXIS 2976 (N.Y. App. Div. 1953).

192. Fraud

In an action on a judgment the defendant may answer that it was obtained by fraud, and attack the record without need of a separate action to avoid the same. Dobson v Pearce, 12 N.Y. 156, 12 N.Y. (N.Y.S.) 156, 1854 N.Y. LEXIS 118 (N.Y. 1854).

An allegation that the representation was false to plaintiff's knowledge and that defendant's agent relied upon it, is not enough. Lefler v Field, 52 N.Y. 621, 52 N.Y. (N.Y.S.) 621, 1873 N.Y. LEXIS 309 (N.Y. 1873).

In an action to recover the price of goods, the answer to raise an issue of fraud must allege false representation was made with intent to defraud, and that defendant was deceived. Lefler v Field, 52 N.Y. 621, 52 N.Y. (N.Y.S.) 621, 1873 N.Y. LEXIS 309 (N.Y. 1873).

It must be alleged that the false representations were made with fraudulent intent. Dubois v Hermance, 56 N.Y. 673, 56 N.Y. (N.Y.S.) 673, 1874 N.Y. LEXIS 251 (N.Y. 1874).

In an action by a creditor of B. against B. and his partner, to recover upon a stipulation in the partnership agreement, that the firm would pay the debts of B., the partner set up in his answer that he was induced to enter into the agreement by the fraud of B. Held, that the answer was insufficient to let in evidence of the fraud, because it failed to aver that he had rescinded the agreement on account of the fraud, or had sustained damage by reason thereof. Arnold v Nichols, 64 N.Y. 117, 64 N.Y. (N.Y.S.) 117, 1876 N.Y. LEXIS 39 (N.Y. 1876).

Fraud can only be pleaded by alleging specifically the facts constituting it; a bill of particulars will be granted stating the facts constituting such fraud. Douthitt v Nassau Fire Ins. Co., 115 A.D. 902, 101 N.Y.S. 94, 1906 N.Y. App. Div. LEXIS 3431 (N.Y. App. Div. 1906).

Allegations that the execution of a contract was wrongfully procured by means of various fraudulent misrepresentations and other fraudulent and unlawful practices are mere conclusions stating no defense. Ellis v Keeler, 126 A.D. 343, 110 N.Y.S. 542, 1908 N.Y. App. Div. LEXIS 3345 (N.Y. App. Div. 1908).

That part of an answer which alleged that the plaintiff was guilty of fraud against her creditors in taking her interest in property under the defendants' names was stricken as not a good defense to a complaint for the recovery of such interest alleged to have been fraudulently obtained and held by the defendants. Wittner v Burr Ave. Development Corp., 222 A.D. 285, 226 N.Y.S. 124, 1927 N.Y. App. Div. LEXIS 7850 (N.Y. App. Div. 1927).

Defense that contract did not express true agreement of parties, due to mistake and fraud and seeking reformation, was sufficient. Winthrop Products Corp. v Damsky, 275 A.D. 755, 87 N.Y.S.2d 640, 1949 N.Y. App. Div. LEXIS 4326 (N.Y. App. Div. 1949).

In action by shoe manufacturer for damages for breach of warranty of fitness of shoelining material, defense that plaintiff was barred from recovery for breach of warranty because plaintiff misbranded his shoes and misrepresented materials used was insufficient. Sterling Shoe Corp.

v Weiss & Klau Co., 135 N.Y.S.2d 39, 206 Misc. 763, 1954 N.Y. Misc. LEXIS 2868 (N.Y. Sup. Ct. 1954).

In action for rent and costs of repairing boiler allegedly damaged by defendant's negligence, defense of fraud inducing lease held to raise issues requiring trial. Yonkers Sav. Bank v Donovan, 32 N.Y.S.2d 593, 1942 N.Y. Misc. LEXIS 1277 (N.Y. County Ct. 1942).

In proceeding to settle trustee's account, affirmative matter in answer of objectant, charging trustee with fraud, was struck out, since it did not involve or relate to trust fund in question. In re Burton's Trust, 132 N.Y.S.2d 563, 1954 N.Y. Misc. LEXIS 2644 (N.Y. Sup. Ct. 1954).

Where plaintiff sought to recover the value of certain goods by virtue of certain mortgage, and defendant defended on the ground that the property was that of a defendant in execution in another action, it was not necessary to allege that the mortgages were fraudulent. Carter v Bowe, 41 Hun 516, 5 N.Y. St. 15 (N.Y.).

193. —Corporate stock

It is no defense in an action against a corporation for fraud, in inducing plaintiff to buy stock, to allege that all moneys received on the sale of its stock have been expended, and it cannot pay, but will, on certain conditions, borrow from a codefendant and repay him. Gaylor v Brown, 128 A.D. 340, 112 N.Y.S. 745, 1908 N.Y. App. Div. LEXIS 471 (N.Y. App. Div. 1908).

Allegations in a defense amounting to a statement that plaintiff, with full knowledge of the deceit practiced upon him ratified the purchase of certain stock, mean that he affirmed the contract, but not that he waived damages from the fraud charged in the complaint, and the answer was insufficient. Potts v Lambie, 138 A.D. 144, 122 N.Y.S. 935, 1910 N.Y. App. Div. LEXIS 1482 (N.Y. App. Div. 1910).

In action to recover money loaned by plaintiff to defendant and paid to plaintiff as purchase price of stock, allegations of fraudulent representations inducing purchase were sufficient to constitute

defense. First Nat'l Bank v Frankel, 235 A.D. 96, 256 N.Y.S. 223, 1932 N.Y. App. Div. LEXIS 7891 (N.Y. App. Div. 1932).

In action by alleged infant to recover margins paid brokers, answer putting in issue plaintiff's age and his false representations respecting same, inducing execution of contract, proper. Chasser v Hutton, 248 N.Y.S. 136, 139 Misc. 623, 1931 N.Y. Misc. LEXIS 1091 (N.Y. City Ct. 1931).

194. —Insurance

It is a sufficient defense to an action on a life policy that the company was fraudulently induced to revive it, and offered to allow judgment for the back premiums and costs. Harris v Equitable Life Assurance Soc., 64 N.Y. 196, 64 N.Y. (N.Y.S.) 196, 1876 N.Y. LEXIS 53 (N.Y. 1876).

It is no answer to a defense of fraud in action on a policy of life insurance that defendant has not returned premiums paid. Flynn v Equitable Life Ins. Co., 78 N.Y. 568, 78 N.Y. (N.Y.S.) 568, 1879 N.Y. LEXIS 951 (N.Y. 1879).

It is a good defense to an action on a policy insuring the fidelity of bank employees to allege that the policy was issued on the faith of a false statement signed by the bank or its agent, one G., who was authorized by the bank to sign the same, and that his authority to sign was obtained as part of the duties imposed upon him as cashier; the defense is not based on the theory that the false statement is alleged to have been made by the cashier individually, rather than by the bank through his agency. Stapleton Nat'l Bank v United States Fidelity & Guaranty Co., 131 A.D. 157, 115 N.Y.S. 372, 1909 N.Y. App. Div. LEXIS 760 (N.Y. App. Div. 1909).

In an action on a life insurance policy, defense that it had been issued pursuant to a conspiracy between insured and beneficiary to defraud the insurer by having it made to appear that insured had been drowned, when, in fact, he had been murdered by the beneficiary, was sufficient. Goldstein v New York Life Ins. Co., 225 A.D. 642, 234 N.Y.S. 250, 1929 N.Y. App. Div. LEXIS 11717 (N.Y. App. Div. 1929).

In action on policy, the loss under which had been adjusted, defenses that adjustment was procured by material misrepresentations and concealments and that policy was void for want of consideration because premiums had not been paid, were insufficient; defense that policy was void because chattel insured was mortgaged and defense of breach of warranty as to purchase price and time of purchase of insured chattel, were sufficient. Englander v Springfield Fire & Marine Ins. Co., 232 A.D. 463, 251 N.Y.S. 298, 1931 N.Y. App. Div. LEXIS 13846 (N.Y. App. Div. 1931).

In an action against the insurer under section 109 of the Insurance Law, on failure of the insured to pay judgment a defense and counterclaim alleging conspiracy to enforce payment against the defendant is insufficient. Rhodes v Ocean Acci. & Guarantee Corp., 235 A.D. 340, 257 N.Y.S. 214, 1932 N.Y. App. Div. LEXIS 7960 (N.Y. App. Div. 1932).

195. —Promissory notes

An answer on a note is frivolous which sets up without stating facts that it was obtained by fraud. See Seeley v Engell, 13 N.Y. 542, 13 N.Y. (N.Y.S.) 542, 1856 N.Y. LEXIS 67 (N.Y. 1856).

An answer to an action on a note for personal property, setting up fraud in the sale and claiming damages, is sufficient with out rescission or an offer thereof. Litchhult v Treadwell, 74 N.Y. 603, 74 N.Y. (N.Y.S.) 603, 1878 N.Y. LEXIS 789 (N.Y. 1878).

Fraud as defense by accommodation indorser of note. Wiesenthal v Krane, 226 A.D. 82, 234 N.Y.S. 392, 1929 N.Y. App. Div. LEXIS 8652 (N.Y. App. Div. 1929).

In action on notes against makers who delivered them in consideration of contract by plaintiff to manufacture and sell tires for defendants, defense of fraud relating to future acts of promissory nature held insufficient. Pennsylvania Rubber Co. v Miller, 260 A.D. 485, 23 N.Y.S.2d 513, 1940 N.Y. App. Div. LEXIS 4634 (N.Y. App. Div. 1940).

In action on notes, defense alleging that plaintiff was enabled to sell to defendants shares of stock for which notes were given by a fraud practiced upon stranger with whom defendants had

no connection, without alleging that they relied upon alleged misrepresentation or that notes were procured by said fraud, was legally insufficient. Butler v Di Gennaro, 285 A.D. 1008, 139 N.Y.S.2d 85, 1955 N.Y. App. Div. LEXIS 6481 (N.Y. App. Div. 4th Dep't), app. denied, 285 A.D. 1216, 141 N.Y.S.2d 844, 1955 N.Y. App. Div. LEXIS 7195 (N.Y. App. Div. 1955).

196. —Undertakings

A sheriff and his indemnitors, sued for trespass in levying upon personal property, the legal title to which is in plaintiffs under an execution against the person from whom plaintiff acquired title, may not attack the transfer for fraud without proving a judgment against the transferrer. McKinley v Bowe, 97 N.Y. 93, 97 N.Y. (N.Y.S.) 93, 1884 N.Y. LEXIS 144 (N.Y. 1884).

In an action against a guardian and her sureties upon her bond to recover money alleged to have been lost through improper investments, it is no defense to the sureties that they were induced to sign the bond by the false and fraudulent representation of the guardian as to the investment of the ward’s money, made at or prior to the execution of the bond. Rouse v Whitney, 102 N.Y.S. 899, 53 Misc. 56, 1907 N.Y. Misc. LEXIS 155 (N.Y. Sup. Ct.), rev'd, 120 A.D. 667, 105 N.Y.S. 549, 1907 N.Y. App. Div. LEXIS 1284 (N.Y. App. Div. 1907).

In an action on an undertaking to procure an order of arrest, it is no defense that it was signed under a misapprehension as to its contents, that the judgment recovered by plaintiff in the action in which he was arrested was brought about by amicable means, and the defendant cannot unite the defenses that he never executed the instrument, and that he did execute it, but by means of fraud. McINTIRE v WIEGAND, 24 Abb. N. Cas. 312, 1890 N.Y. Misc. LEXIS 3616 (N.Y. City Ct. Feb. 1, 1890).

To action on an undertaking to pay rents which should accrue during the appeal from a judgment for the recovery of premises, the defendant cannot set up that the original lease was obtained by fraud. Kent v Sibley, 5 N.Y.S. 447, 1889 N.Y. Misc. LEXIS 3036 (N.Y.C.P. 1889).

197. Illegality of contract or consideration

Illegality, as a defense, see note 13, Abb NC 388, must be pleaded where it is of the consideration of a contract. Honegger v Wettstein, 94 N.Y. 252, 94 N.Y. (N.Y.S.) 252, 1883 N.Y. LEXIS 422 (N.Y. 1883).

Illegality not appearing on the face of an agreement cannot be shown under a general denial but must be alleged as a defense. Millbank v Jones, 127 N.Y. 370, 28 N.E. 31, 127 N.Y. (N.Y.S.) 370, 1891 N.Y. LEXIS 1789 (N.Y. 1891).

In an action by a physician for breach of employment contract, a proposed defense, without more, of “illegality of contract” is meaningless as a factual pleading. Schorr v Bernarr MacFadden Foundation, Inc., 5 A.D.2d 151, 170 N.Y.S.2d 199, 1958 N.Y. App. Div. LEXIS 7014 (N.Y. App. Div. 1st Dep't), reh'g denied, 5 A.D.2d 861, 172 N.Y.S.2d 532, 1958 N.Y. App. Div. LEXIS 6672 (N.Y. App. Div. 1st Dep't 1958), app. denied, 4 N.Y.2d 677, 1958 N.Y. LEXIS 1457 (N.Y. 1958), app. denied, 5 N.Y.2d 706, 1958 N.Y. LEXIS 1578 (N.Y. 1958).

Illegality of an alleged cause of action should be set up as a separate defense, unless the fact of illegality unequivocally appears on the face of the complaint. Hoff v Daily Graphic, Inc., 230 N.Y.S. 360, 132 Misc. 597, 1928 N.Y. Misc. LEXIS 987 (N.Y. Sup. Ct. 1928).

Defendant claiming that a provision in a contract to convey is void must so plead, unless invalidity appears on its face or from the complaint. Norris v McMechen, 236 N.Y.S. 486, 134 Misc. 866, 1929 N.Y. Misc. LEXIS 1241 (N.Y. Sup. Ct. 1929).

In action for breach of contract to deliver parcels to department store customers, answer pleading that plaintiff’s employees were on strike and that breach of peace was likely if defendant crossed picket lines required judgment for plaintiff. Bonwit Teller, Inc. v United Parcel Service, 36 N.Y.S.2d 304, 1942 N.Y. Misc. LEXIS 1787 (N.Y. Sup. Ct. 1942), rev'd, 265 A.D. 1046, 40 N.Y.S.2d 333, 1943 N.Y. App. Div. LEXIS 6820 (N.Y. App. Div. 1943).

In action to foreclose mortgage, defense and counterclaim that public administrator illegally evicted defendant from mortgaged premises and sold same illegally was struck out as insufficient where public administrator obtained court order authorizing such sale and that defendant was evicted pursuant to judgment legally obtained. Contessa v Haink's Heirs at Law, 142 N.Y.S.2d 653, 1955 N.Y. Misc. LEXIS 3512 (N.Y. Sup. Ct. 1955).

198. —Unconstitutionality

An affirmative defense alleging a statute, under which a bond on which the action was brought was given, unconstitutional and any bond given thereunder void, is insufficient in law. Patti v United Surety Co., 115 N.Y.S. 844, 61 Misc. 445, 1908 N.Y. Misc. LEXIS 129 (N.Y. City Ct. 1908).

Defense challenging constitutionality of EPC Act and its regulation is insufficient as being no longer open to question. Sanders v Kibrick Realty Corp., 99 N.Y.S.2d 62, 1947 N.Y. Misc. LEXIS 3855 (N.Y. City Ct. 1947).

In action by tenant against landlord tenant may not collaterally attack determination of State Rent Administrator displacing order of local Rent Administrator. Levy v 1165 Park Ave. Corp., 138 N.Y.S.2d 24, 1952 N.Y. Misc. LEXIS 2986 (N.Y. Sup. Ct.), aff'd, 280 A.D. 912, 115 N.Y.S.2d 819, 1952 N.Y. App. Div. LEXIS 4150 (N.Y. App. Div. 1952).

199. —Violation of statute

Service of notice to pay the premium required by the Insurance Law, chap. 690 of 1892, § 92, is a defense growing out of new matter and as such must be pleaded. Fischer v Metropolitan Life Ins. Co., 167 N.Y. 178, 60 N.E. 431, 167 N.Y. (N.Y.S.) 178, 1901 N.Y. LEXIS 1056 (N.Y. 1901).

It is unnecessary in a pleading to recite or to refer to a public statute of our own state, as the court takes judicial notice of its existence; all that is required to bring the case within such statute is to set out the necessary facts. Shattuck v Guardian Trust Co., 145 A.D. 734, 130

N.Y.S. 658, 1911 N.Y. App. Div. LEXIS 4828 (N.Y. App. Div. 1911), rev'd, 204 N.Y. 200, 97 N.E. 517, 204 N.Y. (N.Y.S.) 200, 1912 N.Y. LEXIS 754 (N.Y. 1912).

In action by federal savings and loan association to foreclose mortgages, defense that its mortgages violate federal statutes and regulations are insufficient. Century Federal Sav. & Loan Ass'n v Sullivan, 281 A.D. 830, 118 N.Y.S.2d 479, 1953 N.Y. App. Div. LEXIS 3465 (N.Y. App. Div. 1953).

In action to cancel taxes and tax liens on church property allegedly exempt under Tax L. § 4, defense of noncompliance with city charter relating to taxes for local improvements was insufficient, since such taxes were not involved. Autokefalos Orthodox Spiritual Church v Mt. Vernon, 285 A.D. 1175, 141 N.Y.S.2d 21, 1955 N.Y. App. Div. LEXIS 7059 (N.Y. App. Div. 1955).

200. — —Gambling

Wager policy must be alleged. Goodwin v Massachusetts Mut. Life Ins. Co., 73 N.Y. 480, 73 N.Y. (N.Y.S.) 480, 1878 N.Y. LEXIS 641 (N.Y. 1878).

To defeat a purchase of oil by the statute against gaming, the intention that there should be no delivery, but that only the difference in market price should be settled, must be shown. Lugar v Carey, 12 N.Y. St. 171.

That the check sued on was given for a gambling debt cannot be proved under an answer of want of consideration. May v Burras, 13 Abb NC 384.

201. — —Monopolies

In action to recover price of goods sold, purchaser’s defense that seller was engaged in interstate commerce and its sale violated Robinson-Patman act was insufficient to defeat payment of price. American Woolen Co. v Miller-Schulman Corp., 135 N.Y.S.2d 595, 206 Misc. 1005, 1954 N.Y. Misc. LEXIS 3038 (N.Y. Sup. Ct. 1954).

In actions for goods sold and delivered, defense that plaintiff violated Sherman Anti-Trust Law by reducing price of goods sold to defendant's competitors by paying for their advertising, was insufficient, where defendant's contract of sale was not inherently or intrinsically illegal or in restraint of trade or commerce. Jamaica Sash & Door, Inc. v Prudential Improv. Service, Inc., 137 N.Y.S.2d 593, 1954 N.Y. Misc. LEXIS 2573 (N.Y. Sup. Ct. 1954).

A defense based on violations of the federal anti-trust laws (Sherman Anti-Trust Act, Clayton Anti-Trust Act and Robinson-Patman Act) is not favored by the courts. Carvel Dari-Freeze Stores, Inc. v Lukon, 206 N.Y.S.2d 20 (N.Y. Sup. Ct. 1960).

202. — —Requirement as to trade names

If a wife is a partner the defense that the words "& Co." represent no real party is not good. Zimmerman v Erhard, 83 N.Y. 74, 83 N.Y. (N.Y.S.) 74, 60 How. Pr. 163, 1880 N.Y. LEXIS 453 (N.Y. 1880).

To constitute a violation of the act, such designation must be used in the transaction of such business. Gay v Seibold, 97 N.Y. 472, 97 N.Y. (N.Y.S.) 472, 1884 N.Y. LEXIS 191 (N.Y. 1884).

It is no defense to an action on a bond given to a firm to secure a credit given it that it uses this designation unlawfully. Gay v Seibold, 97 N.Y. 472, 97 N.Y. (N.Y.S.) 472, 1884 N.Y. LEXIS 191 (N.Y. 1884).

"And Company" or "& Co.," used when no partner existed, was prohibited by Laws 1883, ch 281. And a defense based thereon must be set up in the answer. O'Toole v Garvin, 1 Hun 92 (N.Y.).

203. —Public policy

In action on a note given the wife by husband for procuring a divorce, defense that the consideration was illegal as against public policy, was good. McDonald v McDonald, 228 A.D. 341, 239 N.Y.S. 533, 1930 N.Y. App. Div. LEXIS 12168 (N.Y. App. Div. 1930).

It is not necessary to plead the illegality of a contract which is contrary to public policy. Attridge v Pembroke, 235 A.D. 101, 256 N.Y.S. 257, 1932 N.Y. App. Div. LEXIS 7894 (N.Y. App. Div. 1932).

204. —Lack of license

In action for balance due for alcoholic beverages sold to defendant, defense of lack of license held to bar summary judgment for seller. Carmine v Murphy, 285 N.Y. 413, 35 N.E.2d 19, 285 N.Y. (N.Y.S.) 413, 1941 N.Y. LEXIS 1479 (N.Y. 1941).

In action to recover for services, defenses that plaintiff's contingent fee agreement was invalid under United States Treasury Department regulations, and that plaintiff, not an attorney, was engaged in practice of law in rendering his services to defendant should not have been stricken. Emden v Martin Automatic Fishing Reel Co., 10 A.D.2d 603, 195 N.Y.S.2d 749, 1960 N.Y. App. Div. LEXIS 12195 (N.Y. App. Div. 4th Dep't 1960).

In action on automobile policy, defense that car was operated contrary to law, was good, where, at the time of injury to plaintiff, the driver's license prohibited his operating a car within city limits or between certain hours. Jones v American Employers' Ins. Co., 252 N.Y.S. 250, 141 Misc. 88, 1931 N.Y. Misc. LEXIS 1624 (N.Y. Sup. Ct. 1931).

In assignee's action for balance due on note given for correspondence school course, defense that Education L. § 80-a requiring contract for instruction or education to be approved by department of education held invalid as inapplicable to contract made before statute was enacted. Goldsmith v Brown, 26 N.Y.S.2d 991, 176 Misc. 257, 1941 N.Y. Misc. LEXIS 1673 (N.Y. Sup. Ct. 1941).

In action for breach of contract between theatrical manager and infant singer and her guarantor defense that contract was unenforceable because plaintiff was not licensed as theatrical employment agency was insufficient, since plaintiff was primarily a manager. Gervis v Knapp, 43 N.Y.S.2d 849, 182 Misc. 311, 1943 N.Y. Misc. LEXIS 2340 (N.Y. Sup. Ct. 1943).

205. —Restraint by federal, state or local government or agency

In action for severance pay under labor union agreement providing therefor in case employees were laid off by employer then operating under federal license under Trading with Enemy Act, defense that defendant's business was terminated by federal government did not permit summary judgment for defendant where there were issues of fact as to the severance pay. Giorno v Banco Di Napoli Trust Co., 268 A.D. 1035, 52 N.Y.S.2d 659, 1945 N.Y. App. Div. LEXIS 5368 (N.Y. App. Div. 1st Dep't 1945).

In action by seamen for one month's wages pursuant to federal statute, defense that plaintiffs signed for voyage to Norway and that three days thereafter President of United States issued proclamation putting Norway in combat area, justifying return of ship to New York where they were discharged before earning month's wages and that such discharge was not breach of contract, was sufficient. Hopkins v Moore-McCormack Lines, Inc., 22 N.Y.S.2d 72, 175 Misc. 109, 1940 N.Y. Misc. LEXIS 2068 (N.Y. City Ct. 1940), aff'd, 262 A.D. 722, 28 N.Y.S.2d 710, 1941 N.Y. App. Div. LEXIS 5558 (N.Y. App. Div. 1941).

In action by driver's helper employed by defendant motor carrier engaged in interstate commerce, defense that plaintiff was not employee under Fair Labor Standards Act and so could not sue thereunder was sufficient. Neuwirth v Kafer, 29 N.Y.S.2d 178, 176 Misc. 864, 1941 N.Y. Misc. LEXIS 2007 (N.Y. City Ct. 1941).

In action for lease, tenant's defense of election to terminate lease because Federal government prohibited sale of articles for which premises were leased held insufficient. Schantz v American Auto Supply Co., 36 N.Y.S.2d 747, 178 Misc. 909, 1942 N.Y. Misc. LEXIS 1881 (N.Y. Sup. Ct. 1942).

WPB regulation, depriving property of its income producing character, held insufficient defense to foreclosure for nonpayment of interest. Pink v Ginsberg, 37 N.Y.S.2d 919, 179 Misc. 126, 1942 N.Y. Misc. LEXIS 2113 (N.Y. Sup. Ct. 1942).

Breach of employment contract by government war order limiting sales of laundry equipment and making performance of contract impossible operates as defense to salesman's action for breach. Freund v Zephyr Laundry Machinery Co., 39 N.Y.S.2d 250, 180 Misc. 249, 1942 N.Y. Misc. LEXIS 2319 (N.Y. Sup. Ct. 1942), aff'd, 266 A.D. 734, 41 N.Y.S.2d 909, 1943 N.Y. App. Div. LEXIS 4180 (N.Y. App. Div. 1943).

In action for rent, defense that governmental restrictions frustrated very purposes of lease was sufficient. Port Chester Central Corp. v Leibert, 39 N.Y.S.2d 41, 179 Misc. 839, 1943 N.Y. Misc. LEXIS 1508 (N.Y. County Ct. 1943).

In action for rent under lease of premises for sale and display of piano, defense that WPB order restricted manufacture of pianos but not their sale was insufficient to defeat summary judgment. Mutual Life Ins. Co. v Lester Pianos, Inc., 42 N.Y.S.2d 350, 180 Misc. 669, 1943 N.Y. Misc. LEXIS 2000 (N.Y. Sup. Ct. 1943).

In action for personal injuries in collision between automobiles, defense that defendant was driving at night with dimmed lights, in compliance with New York War Emergency Act § 40, and was immune from liability, was struck out. Lofaro v Bee Cab Corp., 43 N.Y.S.2d 737, 180 Misc. 756, 1943 N.Y. Misc. LEXIS 2314 (N.Y. Sup. Ct. 1943).

In action by servant for injuries due to inadequate lighting of entrance way to building, defense that lighting facilities maintained were required under military authority in wartime in dim-out area, was sufficient. Fellman v Lebanon Hospital Ass'n, 44 N.Y.S.2d 352, 180 Misc. 838, 1943 N.Y. Misc. LEXIS 2440 (N.Y. City Ct. 1943).

In action for brokerage commission in obtaining war contract, defense that executive order of President requiring every contract to contain warranty that contractor had not promised to pay fee or commission therefor was insufficient. Singer v Bruner--Ritter, Inc., 42 N.Y.S.2d 881, 180 Misc. 928, 1943 N.Y. Misc. LEXIS 2084 (N.Y. Sup. Ct.), aff'd, 266 A.D. 953, 44 N.Y.S.2d 589, 1943 N.Y. App. Div. LEXIS 5424 (N.Y. App. Div. 1st Dep't 1943).

In action for breach of contract to buy coal, defense that OPM restrictions made it impossible for defendant buyer to obtain metal necessary in manufacture of its product and thus made coal useless to defendant, held insufficient. Popper v Centre Brass Works, Inc., 43 N.Y.S.2d 107, 180 Misc. 1028, 1943 N.Y. Misc. LEXIS 2125 (N.Y. City Ct. 1943).

In action for commissions for obtaining government orders for supplies, defense that Executive order of President forbade payment of commissions was insufficient to defeat action. Bradford v Durkee Marine Products Corp., 40 N.Y.S.2d 448, 180 Misc. 1049, 1943 N.Y. Misc. LEXIS 1679 (N.Y. Sup. Ct. 1943).

In rationing food, gasoline and rubber, depriving tenant of beneficial use of rented premises, raised no factual issue, summary judgment for rent of roadside restaurant was granted to plaintiff. Fisher v Lohse, 42 N.Y.S.2d 121, 181 Misc. 149, 1943 N.Y. Misc. LEXIS 1957 (N.Y. Sup. Ct. 1943).

In action for breach of contract of employment between employee and employer foreign nationals, defense that contract was broken by Secretary of Treasury required summary judgment for defendant. Alexewicz v General Aniline & Film Corp., 43 N.Y.S.2d 713, 181 Misc. 181, 1943 N.Y. Misc. LEXIS 2309 (N.Y. Sup. Ct. 1943).

In proceeding for rent increase, tenant’s defense that rent law limited rent increase to 15% during twelve-month period was sufficient. Brunswick Site Co. v M. H. Fishman Co., 118 N.Y.S.2d 819, 203 Misc. 314, 1953 N.Y. Misc. LEXIS 1480 (N.Y. Sup. Ct. 1953).

In action for sale of Czechoslovakia kronen for dollars in that country, defense that such sale was illegal and criminal was sufficient. Hesslein v Matzner, 19 N.Y.S.2d 462, 1940 N.Y. Misc. LEXIS 1677 (N.Y. City Ct. 1940).

In action for nondelivery of sodium bichromate defense of inability to obtain it from usual sources of supply because all such supply had been allocated to orders for national defense held insufficient for not alleging inability to obtain it from nonusual sources. James Pels Co. v Republic Chemical Corp., 31 N.Y.S.2d 857, 1941 N.Y. Misc. LEXIS 2462 (N.Y. Sup. Ct. 1941).

In action for specific performance of lease, defense of illegality based on alleged violations of Sherman Anti-Trust Act is insufficient where the lease although connected with the franchise agreement attacked as illegal, is a separate, intelligible, economic transaction which if enforced would not of itself violate the Act. Carvel Dari-Freeze Stores, Inc. v Lukon, 206 N.Y.S.2d 20 (N.Y. Sup. Ct. 1960).

206. Infancy and incompetency

Infancy may not be set up for their own benefit by others, for it is a defense for protection and benefit of infants only. Beardsley v Hotchkiss, 96 N.Y. 201, 96 N.Y. (N.Y.S.) 201, 1884 N.Y. LEXIS 484 (N.Y. 1884).

Persons executing a bond to a college guaranteeing payment of sums due from a student for rooms assigned to him in accordance with his application before entrance, are liable though the principal, having engaged a room for the last year, does not occupy it, if the college authorities used due diligence to reduce the damage by renting the room; the infancy of the principal is no defense. Harvard College v Kempner, 131 A.D. 848, 116 N.Y.S. 437, 1909 N.Y. App. Div. LEXIS 909 (N.Y. App. Div. 1909).

Defense of minority to mother’s complaint alleging negligence was sufficient, since it raised the question of defendant’s emancipation. Crosby v Crosby, 230 A.D. 651, 246 N.Y.S. 384, 1930 N.Y. App. Div. LEXIS 8710 (N.Y. App. Div. 1930).

Plea of infancy was election to rescind agreement sued on. H. L. Braham & Co. v Zittel, 232 A.D. 406, 250 N.Y.S. 44, 1931 N.Y. App. Div. LEXIS 13827 (N.Y. App. Div. 1931).

Incompetency of intestate, alleged when defendant induced former to transfer bank account to self and defendant as joint tenants; sufficient. Henry v Keator, 271 A.D. 1047, 68 N.Y.S.2d 536, 1947 N.Y. App. Div. LEXIS 5782 (N.Y. App. Div. 1947).

207. Joint venture

In action against executor to recover for legal services rendered to his testator, defense that services had been rendered to a joint venture composed of testator and three named residents of this state, is sufficient where complaint fails to allege exhaustion of remedies against survivors. Friedman v Gettner, 6 A.D.2d 647, 180 N.Y.S.2d 446, 1958 N.Y. App. Div. LEXIS 3922 (N.Y. App. Div. 1st Dep't 1958), aff'd, 7 N.Y.2d 764, 194 N.Y.S.2d 35, 163 N.E.2d 141, 1959 N.Y. LEXIS 987 (N.Y. 1959).

208. Jurisdictional defect

The defendant may raise by answer the question of loss of jurisdiction by the state court, by reason of proceedings for the removal of the cause to the United States court; and upon proof of such proceedings regularly taken according to the United States laws, he is entitled to a judgment declaring all subsequent proceedings in the state court void. Ayres v Western R. Corp., 45 N.Y. 260, 45 N.Y. (N.Y.S.) 260, 1871 N.Y. LEXIS 133 (N.Y. 1871).

Lack of jurisdiction depending upon a question of fact, such as the nonresidence of the plaintiff, must be pleaded as a defense, or else evidence thereof may be excluded. Ubart v Baltimore & O. R. Co., 117 A.D. 831, 102 N.Y.S. 1000, 1907 N.Y. App. Div. LEXIS 356 (N.Y. App. Div. 1907).

If lack of jurisdiction does not appear in the complaint, the objection may be taken by answer; the jurisdiction of the court is not ordinarily determined on affidavits but by the pleadings or proof taken at trial. Manning, Maxwell & Moore v Canadian Locomotive Co., 120 A.D. 735, 105 N.Y.S. 662, 1907 N.Y. App. Div. LEXIS 1298 (N.Y. App. Div. 1907).

In view of CPA §§ 261 and 262 (Rule 3014 herein) a defendant was not precluded from setting up the defense that the court was without jurisdiction of the action because the defendant was a department of a foreign government, by reason of the fact that in the same answer it undertook to plead to the merits of the action. De Simone v Transportes Maritimos De Estado, 199 A.D. 602, 191 N.Y.S. 864, 1922 N.Y. App. Div. LEXIS 8058 (N.Y. App. Div.), reh'g denied, 200 A.D. 82, 192 N.Y.S. 815, 1922 N.Y. App. Div. LEXIS 8127 (N.Y. App. Div. 1922).

Defense of want of jurisdiction sufficiently pleaded the ultimate facts. Keon v Saxton & Co., 227 A.D. 733, 236 N.Y.S. 503, 1929 N.Y. App. Div. LEXIS 7736 (N.Y. App. Div. 1929).

The question of legality and sufficiency of service by publication, when raised by answer, is to be decided at the trial. Apfelberg v Lax, 227 A.D. 750, 237 N.Y.S. 33, 1929 N.Y. App. Div. LEXIS 7824 (N.Y. App. Div. 1929).

In action for partition of realty, affirmative defense that institution of administration proceedings in Surrogate's Court, after issuance of letters of administration of estate of decedent who had owned such realty, conferred complete jurisdiction on Surrogate to exclusion of Supreme Court, did not raise issued. Maslanka v Maslanka, 286 A.D. 874, 142 N.Y.S.2d 375, 1955 N.Y. App. Div. LEXIS 4402 (N.Y. App. Div. 1955).

In action for attorney's services rendered to special committee of City Council in investigating civil service commission, defense that City Council had no power to incur liability without prior appropriation by board of estimate was insufficient. Gruss v New York, 40 N.Y.S.2d 816, 179 Misc. 1053, 1943 N.Y. Misc. LEXIS 1751 (N.Y. Sup. Ct. 1943).

Objection to court's jurisdiction over defendant trade union may be taken by answer. Hartman Realty Co. v United Mechanics I. F. L. W. C. I. O., 42 N.Y.S.2d 113, 180 Misc. 524, 1943 N.Y. Misc. LEXIS 1954 (N.Y. App. Term 1943).

Where the facts showing that the court had no jurisdiction, as that the defendant was not a resident, had no property in the state and had not been served with a summons therein, do not appear on the face of the complaint, the defendant properly sets them up in his answer, and the service of such answer subscribed by his attorney cannot be regarded as a general appearance rendering him amenable to the jurisdiction of the court. Hamburger v Baker, 35 Hun 455 (N.Y.).

209. Leave to sue not obtained

In action by holder of overdue corporate bonds payable semiannually with specified interest, defense that reference in bonds authorized bondholders to sue only on refusal of trustee to sue

held insufficient. Medwin v 11 West Forty-Second Street, Inc., 261 A.D. 721, 27 N.Y.S.2d 551, 1941 N.Y. App. Div. LEXIS 7420 (N.Y. App. Div.), app. denied, 262 A.D. 921, 29 N.Y.S.2d 910, 1941 N.Y. App. Div. LEXIS 6483 (N.Y. App. Div. 1941).

Leave to prosecute not obtained must be alleged. German Sav. Bank v Carrington, 27 Hun 51 (N.Y.), aff'd, 89 N.Y. 632, 89 N.Y. (N.Y.S.) 632, 1882 N.Y. LEXIS 313 (N.Y. 1882).

210. License or leave to do act complained of

An answer of leave and license need not state any consideration. Pierrepont v Barnard, 6 N.Y. 279, 6 N.Y. (N.Y.S.) 279, 1852 N.Y. LEXIS 64 (N.Y. 1852).

License as a defense must be pleaded. Clifford v Dam, 81 N.Y. 52, 81 N.Y. (N.Y.S.) 52, 1880 N.Y. LEXIS 196 (N.Y. 1880).

The sufficiency of matter pleaded as a defense cannot be tested in the motion under said action. Tierney v Helvetia Swiss Fire Ins. Co., 129 A.D. 694, 114 N.Y.S. 139, 1908 N.Y. App. Div. LEXIS 1404 (N.Y. App. Div. 1908).

Leave and license, is no defense to an action for breach of bond by the neglect of a deputy sheriff to return a writ. Thomas v Hubbell, 18 Barb. 9, 1852 N.Y. App. Div. LEXIS 199 (N.Y. Sup. Ct. Sept. 28, 1852), aff'd, DEMEYER v LEGG, 18 Barb. 14, 1853 N.Y. App. Div. LEXIS 219 (N.Y. Sup. Ct. May 2, 1853), rev'd, 15 N.Y. 405, 15 N.Y. (N.Y.S.) 405, 1857 N.Y. LEXIS 17 (N.Y. 1857).

211. Limitation of liability

Plea of limited liability is unavailable to defendants in action for conversion. Thomas v Murphy, 285 A.D. 1135, 141 N.Y.S.2d 925, 1955 N.Y. App. Div. LEXIS 6891 (N.Y. App. Div. 1955).

In action against interstate motor carrier for loss of shipment of goods, defense of limitation of liability without showing notification to consignee in bill of lading or otherwise held insufficient.

Mickey Finn Clothes, Inc. v Yale Transp. Corp., 23 N.Y.S.2d 84, 175 Misc. 242, 1940 N.Y. Misc. LEXIS 2285 (N.Y. Mun. Ct. 1940).

In action against common carrier by motor truck for goods damaged in transit, partial defense based upon limitation of liability embodied in shipping receipt was valid. Cy Ruchman, Inc. v Saland, 102 N.Y.S.2d 407, 1949 N.Y. Misc. LEXIS 3245 (N.Y. City Ct. 1949), aff'd, 102 N.Y.S.2d 409, 1950 N.Y. Misc. LEXIS 2407 (N.Y. App. Term 1950).

In action for pawnbroker's negligence in releasing diamond ring without plaintiff's authority, affirmative defense, as part of contract between parties limiting defendant's liability to twice amount of loan, was sufficient. Zackby v Kopell, 144 N.Y.S.2d 243, 1955 N.Y. Misc. LEXIS 3714 (N.Y. Sup. Ct. 1955).

212. Limitations and laches

An answer is sufficient which alleges that the plaintiff ought not to have his action against defendant, because the cause of action mentioned in the complaint did not accrue to plaintiff at any time within six years next before the commencement of the action. See 9 N.Y. 291.

An answer averring that more time has elapsed than that limited for the bringing of the suit, refers to the commencement of the action. De Grove v Metropolitan Ins. Co., 61 N.Y. 594, 61 N.Y. (N.Y.S.) 594, 1875 N.Y. LEXIS 446 (N.Y. 1875).

Where suit against heirs at law on a judgment must be brought within a stated time it must be affirmatively shown and need not be pleaded in defense. Selover v Coe, 63 N.Y. 438, 63 N.Y. (N.Y.S.) 438, 1875 N.Y. LEXIS 67 (N.Y. 1875).

Appeal record must contain pleading of statute of limitations or motion to dismiss on such ground, in order to make such defense available. Dunning v Dunning, 300 N.Y. 341, 90 N.E.2d 884, 300 N.Y. (N.Y.S.) 341, 1950 N.Y. LEXIS 852 (N.Y. 1950).

In an action to charge a joint debtor not personally served in a prior action, the defendant was entitled to plead the statute of limitations as a defense, the period of limitations being ten years, as provided by CPA § 53 (§ 213(1) herein); the ten years given to run from the date the former judgment was recovered. Hofferberth v Nash, 117 A.D. 284, 102 N.Y.S. 317, 1907 N.Y. App. Div. LEXIS 236 (N.Y. App. Div. 1907), aff'd, 191 N.Y. 446, 84 N.E. 400, 191 N.Y. (N.Y.S.) 446, 1908 N.Y. LEXIS 1080 (N.Y. 1908).

The defense of adverse possession or the statute of limitations must be pleaded to be available. Udell v Stearns, 125 A.D. 196, 109 N.Y.S. 407, 1908 N.Y. App. Div. LEXIS 2744 (N.Y. App. Div. 1908).

Where after service of a defective summons defendant served a notice of general appearance, he may not withdraw the same, in order to move to set aside the service, in order to avail himself of the statute of limitations, where such defense was not available at the time of his appearance. Bohnhoff v Kennedy, 129 A.D. 32, 113 N.Y.S. 133, 1908 N.Y. App. Div. LEXIS 1241 (N.Y. App. Div. 1908).

Where a husband gives his wife all his earnings to apply the same to household expenses, and keep the remainder for him, a trust is created, which may be terminated at any time; and in action by said husband against the wife’s executor to recover said trust fund, a plea of the statute of limitations is new matter constituting a defense, and must be specifically set forth. Devoe v Lutz, 133 A.D. 356, 117 N.Y.S. 339, 1909 N.Y. App. Div. LEXIS 2174 (N.Y. App. Div. 1909).

Where the statute of limitations is asserted as a defense to an action of ejectment, the plaintiff must give some evidence showing that the cause is not barred. Baker v Duff, 136 A.D. 13, 120 N.Y.S. 184, 1909 N.Y. App. Div. LEXIS 4255 (N.Y. App. Div. 1909), aff'd, 202 N.Y. 570, 96 N.E. 1109, 202 N.Y. (N.Y.S.) 570, 1911 N.Y. LEXIS 1138 (N.Y. 1911).

Stockholders’ derivative action for accounting by trust company for unlawfully profiting from its fiduciary control of the affairs of a corporation is an action in equity, and is, therefore, governed

by the ten-year statute of limitations. Chance v Guaranty Trust Co., 260 A.D. 216, 21 N.Y.S.2d 356, 1940 N.Y. App. Div. LEXIS 4563 (N.Y. App. Div. 1940).

In action by corporation to recover money paid to its manager as his share of profits under mutual mistake of fact, defense of 6-year limitations held sufficient. West Washington Cut Meat Center, Inc. v Solomon, 260 A.D. 741, 24 N.Y.S.2d 209, 1940 N.Y. App. Div. LEXIS 4705 (N.Y. App. Div. 1940).

In action for money received, based on executed rescission of sale of mortgage, defense that cause of action was barred by limitations held valid. Hamill v Title Guarantee & Trust Co., 260 A.D. 873, 23 N.Y.S.2d 244, 1940 N.Y. App. Div. LEXIS 5169 (N.Y. App. Div. 1940).

A defense of the statute of limitations is a separate affirmative defense not to be assisted by other denials of the complaint unless repeated in the defense. Gray Lithograph Co. v American Watchman's Time Detector Co., 88 N.Y.S. 857, 44 Misc. 206, 1904 N.Y. Misc. LEXIS 284 (N.Y. App. Term 1904).

The plaintiff is not required to plead in his complaint facts to take the case out of the statute of limitations either as a part of his cause of action or in anticipation of the setting up of that statute as a defense. Such defense must be set up by answer. Willis v Wileman, 102 N.Y.S. 1004, 53 Misc. 462, 19 N.Y. Ann. Cas. 415, 1907 N.Y. Misc. LEXIS 263 (N.Y. Sup. Ct. 1907).

To avail himself of the defense of the Statute of Limitations the defendant must set it out in the answer. Rodger v Bliss, 223 N.Y.S. 401, 130 Misc. 168, 1927 N.Y. Misc. LEXIS 957 (N.Y. Sup. Ct. 1927).

In action for specific performance of an oral contract to convey, defense of laches was sustained; complaint did not allege part performance and laches were inexcusable; complaint dismissed. Zelzer v Yorkville Park Co., 252 N.Y.S. 626, 141 Misc. 190, 1931 N.Y. Misc. LEXIS 1705 (N.Y. Sup. Ct. 1931).

Defense that trade acceptance in suit was not timely presented for payment and that no notice of presentment or nonpayment was given, not sustained, such paper not being within the rule. Dubler v Toscana Straw Goods Corp., 254 N.Y.S. 464, 142 Misc. 369, 1932 N.Y. Misc. LEXIS 913 (N.Y. City Ct. 1932).

In action by attorney-general to annul charter of corporation, defense that acts of forfeiture occurred over two years before action was commenced as required by CPA § 50 subd. 2 (§ 214(6) herein) held sufficient despite allegation in complaint of continued violation by continuing use of prohibited articles purchased. People v Society of St. Joseph Palo Del Colle, Inc., 30 N.Y.S.2d 551, 177 Misc. 419, 1941 N.Y. Misc. LEXIS 2303 (N.Y. Sup. Ct. 1941).

In action for unpaid balance on sealed bond given to secure second mortgage, defense that time of payment was extended by unsealed instrument and that action on modified agreement was outlawed by CPA § 48 (§§ 206, 211, 213, 214 herein) was sufficient. Fogarty v Ross, 41 N.Y.S.2d 109, 180 Misc. 506, 1943 N.Y. Misc. LEXIS 1795 (N.Y. Sup. Ct. 1943).

An objection that the suit is barred by the statute of limitations, is a matter of defense to be pleaded in the answer. The complaint need not allege that the action was brought within the time limited. Woodard v Holland Medicine Co., 15 N.Y.S. 128, 1891 N.Y. Misc. LEXIS 3079 (N.Y. Super. Ct. 1891).

Statute of limitations is affirmative defense and must be pleaded, and such rule applies to executor or administrator. In re Saxe's Estate, 82 N.Y.S.2d 738, 1948 N.Y. Misc. LEXIS 3209 (N.Y. Sur. Ct. 1948).

Where plaintiff sued for services as broker in selling realty and defendant asserted that 8 of 9 sales of realty occurred over 6 years ago, court held that defense based on statutory limitations might be available and was sufficient. McAuliffe v Henry George School of Social Science, 99 N.Y.S.2d 132, 1950 N.Y. Misc. LEXIS 1898 (N.Y. Sup. Ct. 1950).

Where allegations of defense of limitations were sufficient on their face, plaintiff's motion under RCP 109 (Rule 3211(a) herein) which was limited to facts alleged in pleadings, would be denied. Collins v Davis, 108 N.Y.S.2d 394, 1951 N.Y. Misc. LEXIS 2513 (N.Y. Sup. Ct. 1951).

Where it is not readily seen from complaint whether three-year or six-year statute of limitations should apply to action by minority stockholder for corporation against officers for accounting for waste, justice will best be served by permitting determination of such issue to be reserved for trial. Gross v Price, 127 N.Y.S.2d 729, 1953 N.Y. Misc. LEXIS 2596 (N.Y. Sup. Ct. 1953).

The person alleging statute of limitations, whether as defense or as basis for affirmative action, need not allege that statute has not been tolled. Portnoy v McFarland, 130 N.Y.S.2d 448, 1954 N.Y. Misc. LEXIS 2051 (N.Y. Sup. Ct. 1954).

The statute of limitations must be pleaded or the defendant cannot avail himself of it. Baldwin v Martin, 35 Super Ct (3 Jones & S) 85.

213. —Limitations in special statutes

A charter provision that an action for personal injuries against a city must be commenced within a year is not a statutory limitation which must be pleaded in the answer. Yablonsky v New York, 219 N.Y.S. 121, 128 Misc. 469, 1927 N.Y. Misc. LEXIS 671 (N.Y. Mun. Ct. 1927).

In action for personal injuries, defense that action was not commenced within 6 months after award of compensation was countered by claim of commencement within 6 months after plaintiff attained majority, barring summary judgment. Inakay v Sun Laundry Corp., 42 N.Y.S.2d 344, 180 Misc. 550, 1943 N.Y. Misc. LEXIS 1998 (N.Y. Sup. Ct. 1943).

214. —Foreign statute of limitation

Striking answer of a resident pleading the 6-year statute of limitations to a cause of action arising in a foreign state, on the ground that the statute of limitations of the foreign state applied,

was error. Kahn v Commercial Union of America, Inc., 227 A.D. 82, 237 N.Y.S. 94, 1929 N.Y. App. Div. LEXIS 6368 (N.Y. App. Div. 1929).

In action by guests injured in automobile accident in Ontario, Canada, defense that Ontario statute barred such action was sufficient. Carlin v Carlin, 29 N.Y.S.2d 925, 1941 N.Y. Misc. LEXIS 2180 (N.Y. Sup. Ct. 1941).

That the statute of limitations has barred action on a note, is a partial defense tending to reduce the damages in an action for the conversion of a note. Thompson v Halbert, 40 Hun 536, 2 N.Y. St. 116 (N.Y.), rev'd, 109 N.Y. 329, 16 N.E. 675, 109 N.Y. (N.Y.S.) 329, 15 N.Y. St. 513, 1888 N.Y. LEXIS 733 (N.Y. 1888).

The statute of limitations of another state is good as a partial if not a complete defense to an action for converting the note to which it applies. Thompson v Halbert, 40 Hun 536, 2 N.Y. St. 116 (N.Y.), rev'd, 109 N.Y. 329, 16 N.E. 675, 109 N.Y. (N.Y.S.) 329, 15 N.Y. St. 513, 1888 N.Y. LEXIS 733 (N.Y. 1888).

215. —Contractual limitations

Contractor’s action against city for breach of paving contract requiring action to be brought within year after breach was timely brought within year and thirty days, where there was statutory stay of action for thirty days after presentation of claim. Amex Asphalt Corp. v New York, 263 A.D. 968, 33 N.Y.S.2d 182, 1942 N.Y. App. Div. LEXIS 7653 (N.Y. App. Div.), aff'd, 288 N.Y. 721, 43 N.E.2d 97, 288 N.Y. (N.Y.S.) 721, 1942 N.Y. LEXIS 1555 (N.Y. 1942).

Complaint for nondelivery of telegram held insufficient for failure to allege presentation of claim for damages within 60 days as required by telegram. Zbyszko v Western Union Tel. Co., 30 N.Y.S.2d 788, 177 Misc. 360, 1941 N.Y. Misc. LEXIS 2329 (N.Y. Sup. Ct.), aff'd, 262 A.D. 1062, 30 N.Y.S.2d 837, 1941 N.Y. App. Div. LEXIS 7211 (N.Y. App. Div. 1941).

In action against final carrier for delay in delivery of Christmas trees shipped from Canada, defense that Canadian bill of lading limited time for filing claim to 4 months was insufficient as

violating Interstate Commerce Act forbidding shorter period than 9 months. Goldberg v Delaware, L. & W. R. Co., 40 N.Y.S.2d 44, 180 Misc. 176, 1943 N.Y. Misc. LEXIS 1617 (N.Y. Mun. Ct. 1943).

Defense of one-year limitations contained in bill of lading, requiring action within one year after delivery of goods by steamship company, held sufficient. Scala v Italia Societa Anonima Di Navigazione, 26 N.Y.S.2d 667, 1941 N.Y. Misc. LEXIS 1614 (N.Y. App. Term 1941).

216. —Laches

Mere delay for a period short of the statute does not necessarily bar an action for specific performance. There must be facts from which it would be inequitable to enforce the performance. Deen v Milne, 113 N.Y. 303, 20 N.E. 861, 113 N.Y. (N.Y.S.) 303, 1889 N.Y. LEXIS 947 (N.Y. 1889).

Defense of laches is not available in an equitable action brought within the time limited by the statute of limitations, by a stockholder suing on behalf of the corporation against a director for an accounting of corporate moneys. Coghlan v Coghlan & Shuttleworth, Inc., 226 A.D. 764, 234 N.Y.S. 273, 1929 N.Y. App. Div. LEXIS 9843 (N.Y. App. Div. 1929).

Defenses of election and laches properly pleaded to a complaint to reform a contract. Sanborn v Amron, 231 A.D. 67, 246 N.Y.S. 296, 1930 N.Y. App. Div. LEXIS 7002 (N.Y. App. Div. 1930).

Defense of laches not available where action was brought within limitation period. Goldberg v Berry, 231 A.D. 165, 247 N.Y.S. 69, 1930 N.Y. App. Div. LEXIS 7029 (N.Y. App. Div. 1930).

In action for finder’s commissions for securing refinancing, defense that delay of two years between time broker introduced underwriter who refused to underwrite defendant and time when same underwriter, through different source, consummated underwriting, was unreasonable under agreement providing time was of essence, was sufficient. Sternberg v Bellanca Aircraft Corp., 259 A.D. 538, 19 N.Y.S.2d 820, 1940 N.Y. App. Div. LEXIS 6197 (N.Y. App. Div. 1940).

In action to cancel taxes and tax liens on church property allegedly exempt under Tax L. § 4, issue of jurisdiction of assessors to tax exempt church property may be raised at any time, and alleged laches is no defense. Autokefalos Orthodox Spiritual Church v Mt. Vernon, 285 A.D. 1175, 141 N.Y.S.2d 21, 1955 N.Y. App. Div. LEXIS 7059 (N.Y. App. Div. 1955).

In action on a note against an accommodation maker, defense that payee did not proceed timely against the other maker and that latter became wholly insolvent, was held insufficient for failure to allege where note was executed, and NY law, including statutes, and not common law, was applied. Stricks v Siegel, 245 N.Y.S. 372, 138 Misc. 266, 1930 N.Y. Misc. LEXIS 1606 (N.Y. App. Term 1930).

In action to rescind a contract for fraud laches and failure to show reasonable diligence to discover the fraud are good defenses. Peters v United Holding Corp., 253 N.Y.S. 223, 141 Misc. 762, 1931 N.Y. Misc. LEXIS 1485 (N.Y. Sup. Ct. 1931).

In wife’s action to declare that she was wife of defendant, despite invalid foreign divorce procured by her, his defense of his remarriage was insufficient without allegation of laches by her. Wynn v Wynn, 68 N.Y.S.2d 754, 189 Misc. 96, 1947 N.Y. Misc. LEXIS 2143 (N.Y. Sup. Ct. 1947).

Laches was held insufficient in stockholders’ derivative action, where equitable relief sought is only incidental to basic legal right plaintiff seeks to enforce. Pfeiffer v Berke, 4 Misc. 2d 918, 121 N.Y.S.2d 774, 1953 N.Y. Misc. LEXIS 1431 (N.Y. Sup. Ct. 1953).

Mere delay in bringing action, when right of plaintiff so to do is absolute, is not a defense. Fiorile v Goldman, 24 Misc. 2d 944, 206 N.Y.S.2d 29, 1960 N.Y. Misc. LEXIS 2661 (N.Y. County Ct. 1960).

In wife’s action to declare husband’s Nevada divorce void and that she is lawful wife of defendant, allegation in his answer that since his subsequent marriage two children were born to defendants was insufficient to spell out defense of wife’s laches where answer did not allege factually that plaintiff had actual knowledge of his divorce and remarriage and date when she

acquired such knowledge. Berkley v Berkley, 142 N.Y.S.2d 273, 1955 N.Y. Misc. LEXIS 2790 (N.Y. Sup. Ct. 1955).

217. Liquidated damages

A municipal corporation to avail itself of the right to liquidated damages provided for in a contract for delays in the work, must allege the same in its answer either expressly as a partial defense or as a counterclaim. Toop v Mayor, etc., of New York, 13 N.Y.S. 280, 1891 N.Y. Misc. LEXIS 1069 (N.Y.C.P. 1891).

218. Military service

Lapse of policy, see In re White's Estate, 261 A.D. 974, 27 N.Y.S.2d 998 (N.Y. App. Div. 1941).

In action by wife against husband to enforce separation agreement, defense of enlistment in army and defense that defendant pleaded “Soldiers and Sailors Relief Act of 1940,” were insufficient. Grodsky v Grodsky, 42 N.Y.S.2d 352, 180 Misc. 534, 1943 N.Y. Misc. LEXIS 2002 (N.Y. Sup. Ct. 1943).

In action by three lessees for return of deposit to secure rent, where one lessee was inducted into army, such lessee alone was released, but city court had no equity jurisdiction to determine respective rights of partners in joint fund as between themselves and so complaint was dismissed. Patrikes v J. C. H. Service Stations, Inc., 41 N.Y.S.2d 158, 180 Misc. 917, 1943 N.Y. Misc. LEXIS 1808 (N.Y. City Ct.), aff'd, 46 N.Y.S.2d 233, 180 Misc. 927, 1943 N.Y. Misc. LEXIS 2758 (N.Y. App. Term 1943).

219. Partial defenses

An answer is sufficient if it constitutes a defense or counterclaim as to so much as it professes to answer, though not to the whole of the complaint or any single cause of action. Bush v Prosser, 11 N.Y. 347, 11 N.Y. (N.Y.S.) 347, 1854 N.Y. LEXIS 78 (N.Y. 1854).

Contributory negligence as mitigating damages from bite of ferocious dog. Lynch v McNally, 73 N.Y. 347, 73 N.Y. (N.Y.S.) 347, 1878 N.Y. LEXIS 621 (N.Y. 1878).

For partial defenses in actions for false arrest, false imprisonment or malicious prosecution, see Bradner v Faulkner, 93 N.Y. 515, 93 N.Y. (N.Y.S.) 515, 1883 N.Y. LEXIS 312 (N.Y. 1883).

For foreign statute limiting carrier's liability as partial defense to action against carrier, see Martin v Central R. Co., 121 A.D. 552, 106 N.Y.S. 226, 200, 1907 N.Y. App. Div. LEXIS 1835 (N.Y. App. Div. 1907).

For partial defense in action for inducing breach of contract of employment, improperly pleaded as complete defense, see De Jong v B. G. Behrman Co., 148 A.D. 37, 131 N.Y.S. 1083, 1911 N.Y. App. Div. LEXIS 134 (N.Y. App. Div. 1911).

For partial defenses in specific performance, see276 Spring Street Corp. v Forbes, 226 A.D. 354, 235 N.Y.S. 523, 1929 N.Y. App. Div. LEXIS 8721 (N.Y. App. Div. 1929).

For partial defenses in action against bank for money paid on forged checks, see W. A. McLaughlin, Inc. v National City Bank, 228 A.D. 337, 239 N.Y.S. 598, 1930 N.Y. App. Div. LEXIS 12167 (N.Y. App. Div. 1930).

The defense pleaded must be to the cause of action sued upon, not a different one. Goldberg v Berry, 231 A.D. 165, 247 N.Y.S. 69, 1930 N.Y. App. Div. LEXIS 7029 (N.Y. App. Div. 1930).

A partial defense is insufficient in law where it alleges no ultimate facts to sustain the conclusion of the pleader. Lynde v Curtis, 238 A.D. 795, 262 N.Y.S. 910, 1933 N.Y. App. Div. LEXIS 10003 (N.Y. App. Div. 1933).

For untenantable condition as partial defense in action for rent, see Einstein v Tutelman, 110 N.Y.S. 1025, 59 Misc. 462, 1908 N.Y. Misc. LEXIS 553 (N.Y. App. Term 1908).

For partial defense to wife's action for necessaries, that alimony fixed measure of recovery, see Dorfman v Dorfman, 77 N.Y.S.2d 267, 191 Misc. 227, 1947 N.Y. Misc. LEXIS 3685 (N.Y. Sup. Ct. 1947).

Where a woman brought cause of action for fraud against the estate of a married man who fraudulently induced her to marry him, defense that plaintiff, after learning of the alleged fraud had continued to live with him was stricken as legally insufficient. But defendant was granted leave to plead the same facts as a partial defense in mitigation of damages. Friedman v Libin, 4 Misc. 2d 248, 157 N.Y.S.2d 474, 1956 N.Y. Misc. LEXIS 1383 (N.Y. Sup. Ct. 1956), aff'd, 3 A.D.2d 827, 161 N.Y.S.2d 826, 1957 N.Y. App. Div. LEXIS 5844 (N.Y. App. Div. 1st Dep't 1957).

Facts showing compliance with a decree of divorce may be alleged as a partial defense where action brought by a wife to recover necessaries furnished by her both before and after a foreign divorce decree. Sitowsky v Sitowsky, 9 Misc. 2d 528, 173 N.Y.S.2d 626, 1957 N.Y. Misc. LEXIS 2807 (N.Y. App. Term 1957).

In libel action, defense that use of plaintiff's name as author's pen name was accidental or coincidental was insufficient as a complete defense but could be pleaded as a partial defense negativing malice. MacIver v George Braziller, Inc., 32 Misc. 2d 477, 224 N.Y.S.2d 364, 1961 N.Y. Misc. LEXIS 2029 (N.Y. Sup. Ct. 1961).

For conclusory allegation in answer of village in action for injuries from traffic light stanchion allegedly a nuisance, see Wenzel v Duncan, 32 N.Y.S.2d 223, 1941 N.Y. Misc. LEXIS 2523 (N.Y. Sup. Ct. 1941).

Inducing breach of contract as partial defense in trespass, see Adler v Pilot Industries, Inc., 57 N.Y.S.2d 539, 1945 N.Y. Misc. LEXIS 2291 (N.Y. Sup. Ct.), modified, 269 A.D. 981, 59 N.Y.S.2d 301, 1945 N.Y. App. Div. LEXIS 4886 (N.Y. App. Div. 1945).

For payment as partial defense, see Prygocki v Prydatko, 105 N.Y.S.2d 205, 1951 N.Y. Misc. LEXIS 1897 (N.Y. Sup. Ct. 1951).

For partial defense to wife's action for alimony, that wife interfered with husband's right of visitation as to his child, see Blumberg v Blumberg, 117 N.Y.S.2d 906, 1952 N.Y. Misc. LEXIS 2097 (N.Y. County Ct.), aff'd, 280 A.D. 986, 117 N.Y.S.2d 473, 1952 N.Y. App. Div. LEXIS 4503 (N.Y. App. Div. 1952).

In action for damages for loss of customers resulting from sale to plaintiff of wrapping paper for surgical cotton, which "bled" and gave blue tinge to cotton, partial defense that plaintiff pleaded guilty to misbranding adulterated goods and that newspaper accounts thereof were distributed to plaintiff's customers, was valid. American White Cross Laboratories, Inc. v Thilmany Pulp & Paper Co., 145 N.Y.S.2d 279, 1955 N.Y. Misc. LEXIS 3326 (N.Y. Sup. Ct. 1955).

For partial defense of statute of limitations on a note, in an action for the conversion of the note, see Thompson v Halbert, 40 Hun 536, 2 N.Y. St. 116 (N.Y.), rev'd, 109 N.Y. 329, 16 N.E. 675, 109 N.Y. (N.Y.S.) 329, 15 N.Y. St. 513, 1888 N.Y. LEXIS 733 (N.Y. 1888).

220. Misjoinder or nonjoinder of parties

The objection that there is a misjoinder of parties defendant is not a defense which may be raised by answer. Adams v Slingerland, 87 A.D. 312, 84 N.Y.S. 323, 14 N.Y. Ann. Cas. 38, 1903 N.Y. App. Div. LEXIS 2643 (N.Y. App. Div. 1903).

221. Misnomer of parties

When a defendant answers without pleading a misnomer or questioning the correctness of a corporate name, it is estopped thereafter from denying that it was sued by its correct name; when a party is known by different names he may be sued under either without an alias, which rule applies to corporations as well as individuals. McNeal v Hayes Mach. Co., 118 A.D. 130, 103 N.Y.S. 312, 1907 N.Y. App. Div. LEXIS 629 (N.Y. App. Div. 1907).

Where a defendant named Edgar L. Laing, was served and appeared without objection, and signed the notes on which the original judgment was recovered as Edward L. Laing, the court

should direct judgment for the plaintiff, where there is no defense except that of misnomer. Morison v Laing, 132 A.D. 689, 117 N.Y.S. 416, 1909 N.Y. App. Div. LEXIS 1576 (N.Y. App. Div. 1909).

222. Mistake

An answer setting up that a note was given for too large an amount by mistake leaves the affirmative with the plaintiff to prove it good for the excess and such an answer allows proof that it was given in settlement of account and was for too large an amount. Seeley v Engell, 13 N.Y. 542, 13 N.Y. (N.Y.S.) 542, 1856 N.Y. LEXIS 67 (N.Y. 1856).

A mutual mistake cannot be proved under answer alleging that the written contract omitted a provision offered upon asking to have it reformed. Pitcher v Hennessey, 48 N.Y. 415, 48 N.Y. (N.Y.S.) 415, 1872 N.Y. LEXIS 303 (N.Y. 1872).

A creditor has no interest in a contract containing the promise of a third party to the debtor to pay the debt, which will enable him to contest an action to have such contract reformed by leaving out such promise on account of mutual mistake, the creditor not having accepted the promise. Wheat v Rice, 97 N.Y. 296, 97 N.Y. (N.Y.S.) 296, 1884 N.Y. LEXIS 174 (N.Y. 1884).

Mutual mistake of fact and law was held insufficient defense in action for overtime, damages and attorney’s fees. Garrity v Bagold Corp., 267 A.D. 353, 46 N.Y.S.2d 637, 1944 N.Y. App. Div. LEXIS 4723 (N.Y. App. Div. 1944).

An answer alleging that defendant made a mistake in the contract of sale while the complaint alleges a mistake in the description of a conveyance, is irrelevant, not alleging a mutual mistake. Kreitz v Frost, 5 Abb. Pr. (n.s.) 277, 1868 N.Y. Misc. LEXIS 204 (N.Y. Sup. Ct. June 1, 1868).

223. Nonperformance of conditions

A casualty insurer, required by the policy to defend actions against insured who, with knowledge of violation by insured of a condition subsequent, undertakes such defense, waives the benefit

of the condition, was not applicable, the showing of the knowledge being insufficient. S. & E. Motor Hire Corp. v New York Indem. Co., 255 N.Y. 69, 174 N.E. 65, 255 N.Y. (N.Y.S.) 69, 1930 N.Y. LEXIS 710 (N.Y. 1930).

In action on contract of guaranty, failure of plaintiff to perform a condition precedent was sufficiently pleaded. Clipper v Goldstein, 234 A.D. 85, 254 N.Y.S. 60, 1931 N.Y. App. Div. LEXIS 8297 (N.Y. App. Div. 1931).

In action on a fire insurance policy, defense that the building was not “in course of construction” according to the terms of the policy, was sufficient. Goldstein v National Liberty Ins. Co., 234 N.Y.S. 40, 134 Misc. 90, 1928 N.Y. Misc. LEXIS 1238 (N.Y. Sup. Ct. 1928), rev'd, 228 A.D. 833, 240 N.Y.S. 883, 1930 N.Y. App. Div. LEXIS 13602 (N.Y. App. Div. 1930).

224. Novation

Defense alleging that agreement to pay for support of children sued on had been orally modified, and as so modified had been fully executed, was good. Leidy v Procter, 226 A.D. 322, 235 N.Y.S. 101, 1929 N.Y. App. Div. LEXIS 8712 (N.Y. App. Div. 1929).

Defense that the written contract between the parties had been terminated by parol and a new parol contract substituted, was sufficient. Spirit v Black Diamond Furniture Works, 241 N.Y.S. 194, 137 Misc. 398, 1930 N.Y. Misc. LEXIS 1177 (N.Y. City Ct. 1930).

In action on written guaranty, defense that original corporate guarantor had gone out of existence and that plaintiff had accepted renewal by resulting corporation was sufficient. Gross v Lawyers Title & Trust Co., 27 N.Y.S.2d 358, 176 Misc. 152, 1941 N.Y. Misc. LEXIS 1745 (N.Y. Sup. Ct. 1941).

225. Official duty

In action for false arrest, defense that arrest was made in course of public duty held sufficient. Breland v Gray, 264 A.D. 782, 35 N.Y.S.2d 728, 1942 N.Y. App. Div. LEXIS 4715 (N.Y. App. Div. 1942).

In action for wrongful discharge of WPA stenographer for failure to sign statement that she was not Communist, defense of defendant administrator that he acted in performance of official duty held sufficient. Long v Somervell, 22 N.Y.S.2d 931, 175 Misc. 119, 1940 N.Y. Misc. LEXIS 2251 (N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 946, 27 N.Y.S.2d 445, 1941 N.Y. App. Div. LEXIS 8228 (N.Y. App. Div. 1941).

In action against court clerk and surety for clerk's negligence in filing unsworn paper as affidavit, clerk's defense that he acted in ministerial capacity was sufficient. D'Anna v Goldburg, 65 N.Y.S.2d 578, 1946 N.Y. Misc. LEXIS 2887 (N.Y. Sup. Ct. 1946), aff'd, 272 A.D. 825, 72 N.Y.S.2d 267, 1947 N.Y. App. Div. LEXIS 3809 (N.Y. App. Div. 1947).

226. Patent infringement

In action for damages for failure to make and deliver glass globes, defense that it would infringe patents was insufficient. Planetlite Co. v Gleason-Tiebout Glass Co., 234 A.D. 304, 255 N.Y.S. 109, 1932 N.Y. App. Div. LEXIS 10417 (N.Y. App. Div. 1932).

227. Payment

A plea of payment is the proper way to avail of the presumption of payment by lapse of time. Morey v Farmers' Loan & Trust Co., 14 N.Y. 302, 14 N.Y. (N.Y.S.) 302, 1856 N.Y. LEXIS 25 (N.Y. 1856).

The defense of payment being new matter must be set up by the answer, and being an affirmative defense must be proved by the evidence. McKyring v Bull, 16 N.Y. 297, 16 N.Y. (N.Y.S.) 297, 1857 N.Y. LEXIS 73 (N.Y. 1857).

An answer alleging payment by the party accommodated by the making of the note allows evidence of any facts amounting to actual payment by him. Farmers' & Citizens' Bank v Sherman, 33 N.Y. 69, 33 N.Y. (N.Y.S.) 69, 1865 N.Y. LEXIS 82 (N.Y. 1865).

Payment by check must be alleged to have been completed by payment of the check or the allegation that plaintiff has parted with the check. Bradford v Fox, 38 N.Y. 289, 38 N.Y. (N.Y.S.) 289, 1868 N.Y. LEXIS 93 (N.Y. 1868).

Although payments either as an entire defense or in mitigation of damages must be pleaded, yet if the complaint sets up a balance due, and the answer is a general denial, defendant can prove payments without setting them up in his answer. Quin v Lloyd, 41 N.Y. 349, 41 N.Y. (N.Y.S.) 349, 1869 N.Y. LEXIS 248 (N.Y. 1869).

The plaintiff must prove the amount due as on a judgment for default of an answer, if the defendant does not prove his plea of payment. See Quin v Lloyd, 41 N.Y. 349, 41 N.Y. (N.Y.S.) 349, 1869 N.Y. LEXIS 248 (N.Y. 1869).

In an action on a bond, a defense that said bond was secured by a mortgage which defendant’s grantees paid when due, is good, although there be no allegation as to whom payment was made; where a defendant repeats by specific reference all the allegations of a good defense in four other separate defenses the new matter alleged is sufficient. Wiener v Boehm, 126 A.D. 703, 111 N.Y.S. 126, 1908 N.Y. App. Div. LEXIS 3431 (N.Y. App. Div. 1908).

Payment is an affirmative defense with the burden on defendant to allege and prove same. Lion Brewery of New York City v Loughran, 223 A.D. 623, 229 N.Y.S. 216, 1928 N.Y. App. Div. LEXIS 6282 (N.Y. App. Div. 1928).

Statement that plaintiff’s claim has been paid and satisfied is sufficient without pleading facts showing payment. Clipper v Goldstein, 234 A.D. 85, 254 N.Y.S. 60, 1931 N.Y. App. Div. LEXIS 8297 (N.Y. App. Div. 1931).

In an action to recover certain sum due under contract of employment, defense to effect that defendant had paid to plaintiff all sums claimed is good as defense of payment. Johnson v Quayle & Son Corp., 236 A.D. 351, 257 N.Y.S. 874, 1932 N.Y. App. Div. LEXIS 5972 (N.Y. App. Div. 1932).

In action to recover amount of bank account opened in name of plaintiff and named defendant in predecessor bank, defense of successor bank that plaintiff was not owner of account and that it had paid amount of account to others held sufficient. Schaffer v City Bank Farmers Trust Co., 262 A.D. 1054, 30 N.Y.S.2d 228, 1941 N.Y. App. Div. LEXIS 7193 (N.Y. App. Div. 1941).

In action on note by assignee of payee, defense that payee had been divested of title by appointment of receiver in supplementary proceedings held sufficient. Newgold v Bon Ray Hotel Corp., 263 A.D. 899, 32 N.Y.S.2d 589, 1942 N.Y. App. Div. LEXIS 7272 (N.Y. App. Div. 1942).

Although there was no enforceable settlement of infant’s personal injury claim because of lack of court approval thereof, defendant could plead actual payments made to infant as affirmative defense of partial payment. Valdimer v Mt. Vernon Hebrew Camps, Inc., 9 A.D.2d 900, 195 N.Y.S.2d 24, 1959 N.Y. App. Div. LEXIS 5726 (N.Y. App. Div. 2d Dep't 1959), aff'd, 9 N.Y.2d 21, 210 N.Y.S.2d 520, 172 N.E.2d 283, 1961 N.Y. LEXIS 1565 (N.Y. 1961).

Payment must be pleaded and proved; general denial insufficient. Fry v Williams, 254 N.Y.S. 43, 141 Misc. 815, 1931 N.Y. Misc. LEXIS 1557 (N.Y. County Ct. 1931).

In action for earned premium on insurance policy after cancellation for nonpayment, defense of payment was good, same having been made to plaintiff’s authorized agent. New Amsterdam Casualty Co. v Beren, 253 N.Y.S. 515, 142 Misc. 297, 1931 N.Y. Misc. LEXIS 1511 (N.Y. Mun. Ct. 1931).

In an action for goods sold if the defense sought to be interposed is that the defendants had the right, by agreement, to return some of the goods and have their value deducted, that defense must be affirmatively pleaded in the nature of a plea of payment by return. Sam Bercowitz, Inc. v Dronzin, 194 N.Y.S. 448, 1922 N.Y. Misc. LEXIS 1249 (N.Y. App. Term 1922).

Denial of nonpayment is ineffective, as payment is affirmative defense. Spiegel, Inc. v Fashion Play Togs, Inc., 83 N.Y.S.2d 762, 1948 N.Y. Misc. LEXIS 3432 (N.Y. Sup. Ct. 1948).

Payment is affirmative defense and should be so pleaded; if it is only partial defense, it should be so labeled. Prygocki v Prydatko, 105 N.Y.S.2d 205, 1951 N.Y. Misc. LEXIS 1897 (N.Y. Sup. Ct. 1951).

A payment of a note to plaintiff, the indorsee, by the indorser subsequent to the beginning of the action against the maker is no defense to the action, although it might entitle the endorser to be substituted as plaintiff. Concord Granite Co. v French, 65 How. Pr. 317, 1883 N.Y. Misc. LEXIS 110 (N.Y.C.P. June 1, 1883).

228. Pendency of another action

The discontinuance of the first action defeats this defense. 10 N.Y. 500.

It is a question whether the pendency of an action by the original owner of a claim is a good defense to an action by an assignee thereof subsequent to the commencement of the former action. Gardner v Clark, 21 N.Y. 399, 21 N.Y. (N.Y.S.) 399, 1860 N.Y. LEXIS 108 (N.Y. 1860).

It must appear by the answer that the two actions are for the same identical cause of action. Kelsey v Ward (1868) 16 Abb Pr 98, affd (1868) 38 NY 83; .

The court may compel all creditors to come into the action first brought against the assignee. Travis v Myers, 67 N.Y. 542, 67 N.Y. (N.Y.S.) 542, 1876 N.Y. LEXIS 432 (N.Y. 1876).

An action against trustees brought under the general manufacturing act (Laws 1848, ch 40, § 12), is not a bar to an action against one or more of them for the same debts under § 10. Douglass v Ireland, 73 N.Y. 100, 73 N.Y. (N.Y.S.) 100, 1878 N.Y. LEXIS 584 (N.Y. 1878).

A plea of prior action pending cannot be supported by proof of an unsatisfied judgment against plaintiff in a prior unsuccessful action upon the claim which is the subject of the second action. Porter v Kingsbury, 77 N.Y. 164, 77 N.Y. (N.Y.S.) 164, 1879 N.Y. LEXIS 753 (N.Y. 1879).

It is not enough that the property in controversy is the same. Dawley v Brown, 79 N.Y. 390, 79 N.Y. (N.Y.S.) 390, 1880 N.Y. LEXIS 8 (N.Y. 1880).

Former suit pending must be pleaded. Hollister v Stewart, 111 N.Y. 644, 19 N.E. 782, 111 N.Y. (N.Y.S.) 644, 20 N.Y. St. 941, 1889 N.Y. LEXIS 795 (N.Y. 1889).

A pendency of action upon a fire insurance policy is not a bar to an equitable action to reform the policy so as to conform to contract of insurance. National Fire Ins. Co. v Hughes, 189 N.Y. 84, 81 N.E. 562, 189 N.Y. (N.Y.S.) 84, 1907 N.Y. LEXIS 917 (N.Y. 1907).

The defense that an action is pending is not a bar to subsequent action, unless judgment is entered thereon prior to the second action. Wilson v Locke, 116 A.D. 421, 101 N.Y.S. 831, 1906 N.Y. App. Div. LEXIS 2685 (N.Y. App. Div. 1906).

There can be but one action at law for a single breach of contract, and if several actions be brought for different parts of the claim, the pendency of the first may be pleaded in abatement of the other, and a judgment upon the merits in either is a bar to the other. Dickinson v Tyson, 125 A.D. 735, 110 N.Y.S. 269, 1908 N.Y. App. Div. LEXIS 2880 (N.Y. App. Div. 1908).

Where the prior of two actions to recover upon the same cause of action is dismissed for failure to prosecute, the defense of another action pending is no longer available. Conlon v National Fireproofing Co., 128 A.D. 270, 112 N.Y.S. 652, 1908 N.Y. App. Div. LEXIS 451 (N.Y. App. Div. 1908).

The defense of another action pending between the same parties for the same cause is not available where the judgment in the prior action has been reversed because of jurisdictional defects. Naylor v Lorimer-Scholes Co., 131 A.D. 85, 115 N.Y.S. 159, 1909 N.Y. App. Div. LEXIS 737 (N.Y. App. Div. 1909).

The efficacy of the defense of another action pending is tested by the rule that the same evidence is necessary to establish both, and, therefore, an action on contract cannot be pleaded as a bar to an action for fraud; in an action for fraud a defense of an adjudication in bankruptcy

subsequent to the accrual of the action, and that plaintiff's claim is not one of those excepted, is not good. Standard Sewing Mach. Co. v Kattell, 132 A.D. 539, 117 N.Y.S. 32, 1909 N.Y. App. Div. LEXIS 1538 (N.Y. App. Div. 1909).

In an action by an architect to recover the balance alleged to be due him for services in drawing plans and specifications for improvements to defendant's buildings, the pendency of an action by defendant against plaintiff to recover a sum paid him on account of such services as an advance payment, on the ground of plaintiff's failure to perform his contract, cannot be pleaded in abatement, as it is not for the same cause of action. Tyler v Standard Wine Co., 102 N.Y.S. 65, 52 Misc. 374, 1907 N.Y. Misc. LEXIS 28 (N.Y. Sup. Ct.), aff'd, 121 A.D. 928, 106 N.Y.S. 1148, 1907 N.Y. App. Div. LEXIS 2324 (N.Y. App. Div. 1907).

That the cause of action is the same as involved in a pending suit is not shown by proof of the commencement of one by summons served, no complaint having been filed or served. Hoag v Weston, 1 N.Y. St. 584.

Where the defense is the pendency of another action for the same cause, the answer must allege and the defendant must prove that the other action was pending when the present one was commenced. Blauvelt v Powell, 13 N.Y.S. 439, 59 Hun 179, 1891 N.Y. Misc. LEXIS 1163 (N.Y. Sup. Ct. 1891).

The pendency of another action for the same cause must be set up by the answer. Briggs v Gardner, 15 N.Y.S. 335, 60 Hun 543, 1891 N.Y. Misc. LEXIS 3216 (N.Y. Sup. Ct. 1891).

Where a party brings two suits upon the same cause of action he may be compelled to elect which one he will continue. White, Stokes & Allen v Caxton Book-Binding Co..

An answer is sufficient, which alleges that another action is pending between the same parties for the same cause of action mentioned in the complaint in this action. Ratzer v Ratzer, 2 Abb NC 461.

The second action should be stayed when the parties and subject of action are the same, and the first continued, although the second action was commenced without notice of the pendency of the first. Ratzer v Ratzer, 2 Abb NC 461.

An action by a director against officers of a corporation for an accounting will not prevent an action by the attorney general for the removal of the officers and directors and an accounting. Keeler v Brooklyn E. R. Co. 9 Abb NC 166.

229. Ratification

For defense of ratification in stockholder's representative action for accounting, see Goldberg v Berry, 231 A.D. 165, 247 N.Y.S. 69, 1930 N.Y. App. Div. LEXIS 7029 (N.Y. App. Div. 1930).

In an action by the State Superintendent of Insurance as liquidator of a casualty and surety company against a director of said company for malfeasance, an allegation that the said surety company did "duly ratify, approve and confirm" the matters in transactions alleged in the complaint, states a good defense. A denial by the defendant director of every charge of wrongdoing alleged in the complaint must be read in connection with each of his affirmative defenses. Van Schaick v Cronin, 237 A.D. 7, 260 N.Y.S. 685, 1932 N.Y. App. Div. LEXIS 5251 (N.Y. App. Div. 1932).

Defenses of ratification, oral modification and laches held insufficient. Girschowitch v De Long, 51 N.Y.S.2d 499, 1944 N.Y. Misc. LEXIS 2560 (N.Y. Sup. Ct. 1944).

230. Real party in interest not plaintiff

Where an answer sets up that a person is a proper party, it is sufficient to present the question whether he is a proper party, either individually or in a representative capacity. Miller v Hall, 70 N.Y. 250, 70 N.Y. (N.Y.S.) 250, 1877 N.Y. LEXIS 617 (N.Y. 1877).

An answer denying that the plaintiff was the holder and owner of the note in suit and alleging that the note was transferred to another who was the real party in interest may be proved,

although the plaintiff produces the note indorsed in blank by the payee. Hays v Hathorn, 74 N.Y. 486, 74 N.Y. (N.Y.S.) 486, 1878 N.Y. LEXIS 770 (N.Y. 1878).

It is no answer to allege that the transferee of a bank is not a bona fide owner and holder of a note, and that the note, after maturity and payment, was delivered by the bank for no value, and that the plaintiff is maintaining the action for the benefit of the original payee, and is not the real party in interest; such allegations are mere conclusions of law, and the answer did not comply with CPA § 261 which required new matter to be stated in ordinary and concise language. Ludlow v Woodward, 117 A.D. 525, 102 N.Y.S. 647, 1907 N.Y. App. Div. LEXIS 294 (N.Y. App. Div. 1907).

The defense that the plaintiff is not the real party in interest must be affirmatively set up by the defendants to be availed of by them. Wittner v Burr Ave. Development Corp., 222 A.D. 285, 226 N.Y.S. 124, 1927 N.Y. App. Div. LEXIS 7850 (N.Y. App. Div. 1927).

General averment that plaintiff is not the real party in interest, insufficient; stricken for want of facts. Keon v Saxton & Co., 227 A.D. 733, 236 N.Y.S. 503, 1929 N.Y. App. Div. LEXIS 7736 (N.Y. App. Div. 1929).

In action by an infant by his guardian ad litem, seeking recovery of money paid by him on a contract, defenses that plaintiff and his father signed the contract, and the plaintiff was not the real party in interest, were not subject to a motion to strike. Schonberger v Culbertson, 231 A.D. 257, 247 N.Y.S. 180, 1931 N.Y. App. Div. LEXIS 16028 (N.Y. App. Div. 1931).

In an action to compel an accounting, compromise of disputed rights or new agreement in writing and fact that plaintiff is not real party in interest may be pleaded as defenses. Katz v Bernstein, 236 A.D. 456, 260 N.Y.S. 13, 1932 N.Y. App. Div. LEXIS 5994 (N.Y. App. Div. 1932).

In action on interest coupon detached from bond, payable to bearer, defense that plaintiff was not real party in interest but was acting as collecting agent held insufficient. Gellens v 11 West 42nd Street, Inc., 259 A.D. 435, 19 N.Y.S.2d 525, 1940 N.Y. App. Div. LEXIS 6166 (N.Y. App.

Div.), reh'g denied, 259 A.D. 1002, 20 N.Y.S.2d 985, 1940 N.Y. App. Div. LEXIS 7688 (N.Y. App. Div. 1940).

The defendant may not avail himself of the defense that the plaintiff is not the real party in interest unless he has pleaded it. Straight v Shaw, 107 N.Y.S. 1036, 56 Misc. 426, 1907 N.Y. Misc. LEXIS 791 (N.Y. County Ct. 1907).

Motion to dismiss defense that plaintiff not real party in interest, granted, it appearing from face of answer that the interest relied upon by defendant was not such as would support the defense. Borgos v Price, 250 N.Y.S. 457, 140 Misc. 287, 1931 N.Y. Misc. LEXIS 1343 (N.Y. Sup. Ct. 1931).

In action by insured against garage for negligent damage to automobile, defense that plaintiff is not real party in interest was sufficient, where insurer paid $130 for repairs to car and thereby became subrogated to plaintiff’s rights. Arnold v Kensington Plaza Garages, Inc., 42 N.Y.S.2d 118, 179 Misc. 697, 1943 N.Y. Misc. LEXIS 1956 (N.Y. County Ct. 1943).

In action on attachment bond under CPA §§ 819 (Rule 6112(b), 6212(b), 6312(b) herein) 907 (Rule 6212(b) herein) for counsel fees and disbursement incurred in vacating attachment of personalty of plaintiffs allegedly property of Netherlands government, defenses that attached property did not belong to plaintiffs and that plaintiffs were not real party in interest were insufficient. N. V. Transandine Handelmaatschappij v Massachusetts Bonding & Ins. Co., 40 N.Y.S.2d 499, 181 Misc. 202, 1943 N.Y. Misc. LEXIS 1692 (N.Y. Sup. Ct. 1943).

Generally defendant’s allegation that plaintiff is not real party in interest must be set forth as affirmative defense in answer. Kingdom of Sweden v New York Trust Co., 96 N.Y.S.2d 779, 197 Misc. 431, 1949 N.Y. Misc. LEXIS 3209 (N.Y. Sup. Ct. 1949).

Where plaintiff has retained legal ownership of part of indivisible claim, he is only person who can sue. Van Romapaye Trucking Corp. v Heebner, 85 N.Y.S.2d 347, 1948 N.Y. Misc. LEXIS 3771 (N.Y. Sup. Ct. 1948).

Where guest sued hotel for stolen coat, and defendant defended that insurer who paid plaintiff for coat and took loan receipt, made insurer real party in interest, motion to strike such defense was denied. Zabar v 870 Seventh Ave. Corp., 86 N.Y.S.2d 595, 1949 N.Y. Misc. LEXIS 1805 (N.Y. App. Term), aff'd, 275 A.D. 909, 90 N.Y.S.2d 274, 1949 N.Y. App. Div. LEXIS 4999 (N.Y. App. Div. 1949).

Defense that insurer, who had paid plaintiff's claim and not plaintiff, was real party in interest, was not struck out. Charles Miller Coat Co. v Myron Herbert, Inc., 86 N.Y.S.2d 736, 1949 N.Y. Misc. LEXIS 1825 (N.Y. App. Term), aff'd, 275 A.D. 821, 89 N.Y.S.2d 703, 1949 N.Y. App. Div. LEXIS 4633 (N.Y. App. Div. 1949).

An answer denying that the plaintiff is the real party in interest and alleging that a certain party is, is not frivolous. See Horton v Shipherd, 24 Hun 343 (N.Y. 1881).

An answer is bad which states that plaintiff is not the real party in interest nor the proper plaintiff. Gleason v Youmans, 25 Hun 193 (N.Y. 1881).

For circumstances alleged in an answer showing that a plaintiff is not the real party in interest. See Thompson v Kearney, 12 N.Y. St. 682 (N.Y.C.P. Dec. 5, 1887).

But a defense merely alleging that the plaintiff is not the real party in interest is bad. White v Drake, 3 Abb NC 133.

231. Release

One of two makers may interpose a defense that he was discharged by an extension given by the principal and show by parol that he signed as surety. Hubbard v Gurney, 64 N.Y. 457, 64 N.Y. (N.Y.S.) 457, 1876 N.Y. LEXIS 91 (N.Y. 1876).

Where a prisoner arrested on execution was offered his discharge by the sheriff, if he would sign a stipulation not to sue for false imprisonment, and was told that if he did not he would have to

stay in jail a long time, the stipulation is no defense to his action for false imprisonment. Guilleaume v Rowe, 94 N.Y. 268, 94 N.Y. (N.Y.S.) 268, 1883 N.Y. LEXIS 424 (N.Y. 1883).

A partial satisfaction by one tortfeasor may be shown by the other in mitigation of damages, and satisfaction by one bars action by the other. Knapp v Roche, 94 N.Y. 329, 94 N.Y. (N.Y.S.) 329, 1884 N.Y. LEXIS 274 (N.Y. 1884).

Where the complaint alleged infancy of plaintiff, affirmative defense of release, without denying the allegation, was insufficient. Pollack v Court Taxi Service, 227 A.D. 805, 237 N.Y.S. 229, 1929 N.Y. App. Div. LEXIS 8294 (N.Y. App. Div. 2d Dep't 1929).

In action against notary public for taking acknowledgment of a forged mortgage, release of joint tortfeasor property pleaded. Kainz v Goldsmith, 231 A.D. 171, 246 N.Y.S. 582, 1930 N.Y. App. Div. LEXIS 7030 (N.Y. App. Div. 1930).

In death action against railroad, defense that deceased was killed in accident while using pass releasing railroad from damages due to negligence held sufficient. See v New York C. R. Co., 260 A.D. 976, 23 N.Y.S.2d 238, 1940 N.Y. App. Div. LEXIS 5669 (N.Y. App. Div. 1940).

In action for personal injuries against motor coach company, defense that pass, issued by defendant to plaintiff, contained covenant not to sue, held insufficient, where complaint alleged no relationship of carrier and passenger between parties. Grady v Madison Ave. Coach Co., 263 A.D. 719, 30 N.Y.S.2d 664, 1941 N.Y. App. Div. LEXIS 4704 (N.Y. App. Div. 1941).

Answer alleging agreement to refrain from foreclosure under circumstances pleaded was sufficient. Potter v Thomashow, 271 A.D. 878, 66 N.Y.S.2d 172, 1946 N.Y. App. Div. LEXIS 3552 (N.Y. App. Div. 1946).

In action for personal injuries and damage to automobile, caused by defendant’s negligent operation of his car, answer alleging that plaintiff’s insurer had released all claims, was irrelevant, sham, frivolous and insufficient. Emery v Litchard, 245 N.Y.S. 209, 137 Misc. 885, 1930 N.Y. Misc. LEXIS 1586 (N.Y. Sup. Ct. 1930).

In action for overtime compensation, defense that plaintiff was hired as manager and as executive was sufficient; defense of release held insufficient. Engel v Justrite Handkerchief Co., 43 N.Y.S.2d 688, 180 Misc. 974, 1943 N.Y. Misc. LEXIS 2303 (N.Y. Sup. Ct. 1943).

Releases, reciting “payment in full for wages due under Act,” were not struck out, since issue was raised as to overtime work. Brennan v Community Service Soc., 45 N.Y.S.2d 825, 181 Misc. 637, 1943 N.Y. Misc. LEXIS 2934 (N.Y. City Ct. 1943).

In employee’s action for amount due under Fair Labor Standards Act, defense of release must allege that consideration paid for release consisted of full amount due plaintiff pursuant to statute. Campbell v Mandel Auto Parts Corp., 31 N.Y.S.2d 656, 1941 N.Y. Misc. LEXIS 2439 (N.Y. Sup. Ct. 1941), aff'd, 264 A.D. 701, 34 N.Y.S.2d 405, 1942 N.Y. App. Div. LEXIS 4231 (N.Y. App. Div. 1942).

In action on note against comakers, comaker’s defense that time of payment was extended without her consent was insufficient where she was primarily liable and did not stand in position of surety, despite claim of being accommodation maker. Haskell v Lason, 31 N.Y.S.2d 729, 1941 N.Y. Misc. LEXIS 2446 (N.Y. Sup. Ct. 1941).

In action against city for personal injuries from assault by police officer, city’s defense of release to police by reserving rights against city, was insufficient. Wilson v New York, 131 N.Y.S.2d 47, 1954 N.Y. Misc. LEXIS 2107 (N.Y. Sup. Ct. 1954).

Where wife was injured by fall in food market and physician treated her for arthritis whereas her femur was fractured, and she executed general release to market in reliance on his misstatements, such release did not bar her independent action against him based on his wrong diagnosis. Kropp v De Angelis, 138 N.Y.S.2d 188, 1955 N.Y. Misc. LEXIS 2601 (N.Y. Sup. Ct. 1955).

Affirmative defense that pawn ticket exempted defendant from negligence was insufficient in action for pawnbroker’s negligence in releasing diamond ring. Zackby v Kopell, 144 N.Y.S.2d 243, 1955 N.Y. Misc. LEXIS 3714 (N.Y. Sup. Ct. 1955).

In action against hospital and home for chronic sick for breach of contract for care and treatment, pain and suffering and for wrongful death in negligently permitting plaintiff to leave hospital home, defense of release which specifically referred to claims for money and property and nothing else was insufficient. Straubing v Hebrew Home & Hospital for Chronic Sick, 154 N.Y.S.2d 411 (N.Y. Sup. Ct. 1956).

232. Representative capacity

Defense that agreement on which action was brought was executed by defendant in his capacity as receiver was sufficient, though facts could be established under denials in answer. Public Operating Corp. v Weingart, 266 A.D. 723, 40 N.Y.S.2d 931, 1943 N.Y. App. Div. LEXIS 4088 (N.Y. App. Div. 1943).

An answer by a defendant sued as trustee, setting up another action which he is bringing individually, is no defense. White v Gibson, 113 N.Y.S. 983, 61 Misc. 436, 1908 N.Y. Misc. LEXIS 124 (N.Y. Sup. Ct. 1908).

233. Res judicata

The answer should show the identity of the cause of action and that the parties are the same or privies. Secor v Sturgis, 16 N.Y. 548, 16 N.Y. (N.Y.S.) 548, 1858 N.Y. LEXIS 11 (N.Y. 1858).

It was held that a judgment by confession or otherwise in a justice's court for professional services, is a bar to an action for malpractice in performing such services. Gates v Preston, 41 N.Y. 113, 41 N.Y. (N.Y.S.) 113, 1869 N.Y. LEXIS 230 (N.Y. 1869).

When the issues have been adjudicated in a former action the former judgment is proper, as evidence of the facts established thereby, though not pleaded. Stowell v Chamberlain, 60 N.Y. 272, 60 N.Y. (N.Y.S.) 272, 1875 N.Y. LEXIS 179 (N.Y. 1875).

A judgment in favor of a physician and surgeon rendered in justice's court having jurisdiction, in an action in which defendant appeared and put in answer, but afterwards withdrew it, and did

not contest plaintiff's claim, is a bar to a subsequent action by defendant against plaintiff for malpractice in rendering the services. Blair v Bartlett, 75 N.Y. 150, 75 N.Y. (N.Y.S.) 150, 1878 N.Y. LEXIS 838 (N.Y. 1878).

An action cannot be maintained against a corporation for fraud in obtaining a credit for goods after a judgment has been obtained against it for the price of the goods sold. Caylus v New York, K. & S. R. Co., 76 N.Y. 609, 76 N.Y. (N.Y.S.) 609, 1879 N.Y. LEXIS 570 (N.Y. 1879).

An action based on alleged errors and irregularities brought and decided on one instalment of an assessment for street improvement, is a final adjudication as to the subsequent instalments. Guest v Brooklyn, 79 N.Y. 624, 79 N.Y. (N.Y.S.) 624, 1880 N.Y. LEXIS 40 (N.Y. 1880).

To sustain the plea of a former judgment it must appear that the cause of action in both suits is the same, or that some fact essential to the maintenance of the second action was in issue, and determined in the first action adversely to plaintiff. Perry v Dickerson, 85 N.Y. 345, 85 N.Y. (N.Y.S.) 345, 1881 N.Y. LEXIS 92 (N.Y. 1881).

An action for damages for wrongful dismissal from employment does not bar an action for the wages due while actually employed. Perry v Dickerson, 85 N.Y. 345, 85 N.Y. (N.Y.S.) 345, 1881 N.Y. LEXIS 92 (N.Y. 1881).

Held that a defense of res judicata in an action for fraud or misrepresentation should be stricken where the two actions had previously been determined by the Court of Appeals to be different. Erbe v Lincoln Rochester Trust Co., 5 N.Y.2d 886, 182 N.Y.S.2d 832, 156 N.E.2d 460, 1959 N.Y. LEXIS 1642 (N.Y. 1959).

The defense of prior adjudication must be set up as a separate defense connected by proper allegations with the subject matter of the action; it cannot be alleged as a part of another defense. De Ajuria v Berwind, 127 A.D. 528, 111 N.Y.S. 1029, 1908 N.Y. App. Div. LEXIS 4046 (N.Y. App. Div. 1908).

Where a defendant pleads a prior judgment on another account as a bar, because the matters involved in the present action were therein set up as a counterclaim, the burden is on the defendant to show that it was litigated, as no presumption arises from the fact that it was pleaded. Barber v Ellingwood, 137 A.D. 704, 122 N.Y.S. 369, 1910 N.Y. App. Div. LEXIS 763 (N.Y. App. Div. 1910).

Prior decision that complaint stated no cause of action must be pleaded in second action for same cause. Bolivar v Monnat, 232 A.D. 33, 248 N.Y.S. 722, 1931 N.Y. App. Div. LEXIS 13723 (N.Y. App. Div. 1931).

In action to recover brokerage for land contract which defendant refused to perform, plea that fraud was adjudicated in action to recover down payment, was not pertinent. Fulton v Viane, 232 A.D. 680, 247 N.Y.S. 254, 1931 N.Y. App. Div. LEXIS 14237 (N.Y. App. Div. 1931).

Defense alleging that same issues were or could have been adjudicated in prior action between parties was sufficient. Public Operating Corp. v Weingart, 266 A.D. 723, 40 N.Y.S.2d 931, 1943 N.Y. App. Div. LEXIS 4088 (N.Y. App. Div. 1943).

Consent anti-trust decree, to which plaintiff was not party, is not defense to plaintiff’s cause of action for breach of contract. General Aniline & Film Corp. v Bayer Co., 281 A.D. 668, 117 N.Y.S.2d 497, 1952 N.Y. App. Div. LEXIS 3171 (N.Y. App. Div. 1952), aff'd, 305 N.Y. 479, 113 N.E.2d 844, 305 N.Y. (N.Y.S.) 479, 1953 N.Y. LEXIS 790 (N.Y. 1953).

A judgment in favor of a saleswoman for salary and expenses to the date of her discharge is not a bar to an action in her favor against her employer for wrongfully discharging her. La Haye v Borated Specialty Co., 115 N.Y.S. 843, 61 Misc. 509, 1908 N.Y. Misc. LEXIS 140 (N.Y. City Ct. 1908).

Defense of res judicata stricken, it not appearing that the parties to the former and present action, the issues and causes of action or the subject matter, were the same, nor that the proceedings were taken for the same purpose. Borgos v Price, 250 N.Y.S. 457, 140 Misc. 287, 1931 N.Y. Misc. LEXIS 1343 (N.Y. Sup. Ct. 1931).

In action for overtime compensation, defense that consent judgment of federal court, restraining future violation of FYS Act and requiring restitution of overtime compensation, to which suing employee was not party, was insufficient. Slavin v Trachtenberg, 41 N.Y.S.2d 86, 180 Misc. 324, 1943 N.Y. Misc. LEXIS 1788 (N.Y. County Ct. 1943).

Summary judgment rendered here in favor of wife for arrears due under foreign divorce decree was not res judicata in her action to recover arrears due under prior separation agreement where after the granting of summary judgment the foreign court had vacated its divorce decree on ground that it was void as a fraud on the court. Hartigan v Hartigan, 30 Misc. 2d 949, 219 N.Y.S.2d 92, 1961 N.Y. Misc. LEXIS 2478 (N.Y. Sup. Ct. 1961), aff'd, 16 A.D.2d 145, 226 N.Y.S.2d 31, 1962 N.Y. App. Div. LEXIS 10556 (N.Y. App. Div. 1st Dep't 1962).

In action for costs and attorneys' fees incurred in prosecuting actions against defendant for breach of contract, defense that such claim was merged into prior judgment for plaintiff and against defendants, and so res adjudicata, required summary judgment for defendants. David S. Stern Corp. v Richard Nathan Corp., 42 N.Y.S.2d 249, 1943 N.Y. Misc. LEXIS 1974 (N.Y. Sup. Ct. 1943).

Since the former Code a former recovery in ejectment had to be specially pleaded, although it was otherwise before the Code. Henderson v Scott, 32 Hun 412 (N.Y.).

234. —Negligence

Defense that driver of truck which collided with another truck was bound by prior judgment in action wherein he was not party held invalid. Purpora v Coney Island Dairy Products Corp., 262 A.D. 908, 28 N.Y.S.2d 1008, 1941 N.Y. App. Div. LEXIS 6447 (N.Y. App. Div. 1941).

Judgment of no negligence of either party in action by one motorist against another motorist held not res judicata in action by latter against former. Levine v Polsey, 264 A.D. 775, 34 N.Y.S.2d 726, 1942 N.Y. App. Div. LEXIS 4674 (N.Y. App. Div. 1942).

In action for personal and property injury in automobile collision, judgment in municipal court action involving same parties and issues, that present defendants were guilty of contributory negligence and present plaintiff was guilty of negligence, was res adjudicata, requiring dismissal of complaint. Jensen v Brandmaier, 265 A.D. 1055, 39 N.Y.S.2d 368, 1943 N.Y. App. Div. LEXIS 6894 (N.Y. App. Div. 1943).

In action for personal injuries in collision between truck driven by plaintiff and truck owned by defendant, judgment in municipal court action in favor of defendant against owner of other truck, held not res judicata in action by truck driver, who was not party to such action. Hirschberg v Meadow Brook Farms, Inc., 34 N.Y.S.2d 378, 178 Misc. 531, 1942 N.Y. Misc. LEXIS 1520 (N.Y. Sup. Ct. 1942).

Where plaintiff sued executors as such for their negligence in maintaining testator's realty without questioning their claiming their liability as individuals, plaintiff was estopped to sue them later as individuals. Heller v Schwarz, 40 N.Y.S.2d 314, 179 Misc. 911, 1943 N.Y. Misc. LEXIS 1653 (N.Y. City Ct. 1943).

Judgment for automobile guest and against host and for other motorist in collision of two automobiles was not res adjudicata in subsequent action by host against other motorist for property damage. Israel v Krupa, 43 N.Y.S.2d 113, 180 Misc. 995, 1943 N.Y. Misc. LEXIS 2128 (N.Y. App. Term 1943).

235. Rescission and cancellation

In an action upon a check, answer admitting execution and delivery but setting up want of consideration and separate defense of violation of, and inability to perform, a land contract and rescission of same, was insufficient. Antillo Realty Co. v Porte, 249 N.Y. 542, 164 N.E. 576, 249 N.Y. (N.Y.S.) 542, 1928 N.Y. LEXIS 880 (N.Y. 1928).

In action for fraud in inducing contract where plaintiff sold his stock in defendant corporation, canceled his employment, received $20,000, payment of his $8,000 note and exchanged

releases with defendant, defense of rescission and restitution was insufficient. Goldsmith v National Container Corp., 287 N.Y. 438, 40 N.E.2d 242, 287 N.Y. (N.Y.S.) 438, 1942 N.Y. LEXIS 1078 (N.Y. 1942).

In action on an insurance policy, defense of rescission was sufficient. Tully v New York Life Ins. Co., 228 A.D. 449, 240 N.Y.S. 118, 1930 N.Y. App. Div. LEXIS 12192 (N.Y. App. Div. 1930).

Defendant was barred from pleading rescission of contract and in the same alleged cause of action affirming the contract and suing for damages. Denials stricken; counterclaim dismissed. Rosebrit Realty Corp. v Macceber Corp., 229 A.D. 791, 241 N.Y.S. 726, 1930 N.Y. App. Div. LEXIS 11328 (N.Y. App. Div. 1930).

In action on contract by assignee, defense that assignment operated as rescission of contract involving no personal relationship or exercise of skill or science held invalid. City Maintenance Corp. v McDonald, 19 N.Y.S.2d 692, 1940 N.Y. Misc. LEXIS 1714 (N.Y. App. Term 1940).

In action to rescind contract for lease on ground that sign posted in front of property misrepresented frontage, defense that contract clearly stated dimensions and that plaintiff had lost right to rescind by accepting extensions of time and by laches, required summary judgment dismissing complaint. Wangrow v New York, 41 N.Y.S.2d 814, 1943 N.Y. Misc. LEXIS 1903 (N.Y. Sup. Ct. 1943), aff'd, 268 A.D. 973, 52 N.Y.S.2d 575, 1944 N.Y. App. Div. LEXIS 4487 (N.Y. App. Div. 1944).

236. Set-off

Defense of set-off, of unliquidated damages unavailable. Keon v Saxton & Co., 227 A.D. 733, 236 N.Y.S. 503, 1929 N.Y. App. Div. LEXIS 7736 (N.Y. App. Div. 1929).

In action against bank on certain instruments signed by defendant, set-off alleging agreement by bank superintendent, while in possession of bank, to accept payment pro tanto on defendant’s instruments in consideration of his signing worthless corporate note, held insufficient as alleging

agreement against public policy. Federation Bank & Trust Co. v Hammons, 26 N.Y.S.2d 56, 176 Misc. 447, 1941 N.Y. Misc. LEXIS 1532 (N.Y. Sup. Ct. 1941).

237. Statute of frauds

Where it appears on the face of the complaint that the contract sued upon is void under the statute of frauds, the question may be raised by an answer pleading the statute, and at the opening of the trial a motion for judgment on the pleadings should be made. Seamans v Barentsen, 180 N.Y. 333, 73 N.E. 42, 180 N.Y. (N.Y.S.) 333, 1905 N.Y. LEXIS 1085 (N.Y. 1905).

Defense of statute of frauds was good as to such items of an account stated as were unenforceable because of the bar. Parsons v Batchelor, 233 A.D. 517, 253 N.Y.S. 728, 1931 N.Y. App. Div. LEXIS 11351 (N.Y. App. Div. 1931).

In stockbrokers' action to recover balance due for stock purchased for defendant, defense of statute of frauds (Personal Property Law, § 85), was insufficient. Bogert v Herzog, 234 A.D. 735, 254 N.Y.S. 7, 1931 N.Y. App. Div. LEXIS 9636 (N.Y. App. Div. 1931).

Memorandum confirming sale of 10,000 pounds of yarn but leaving undetermined price of 15,000 to be sold, held unenforceable under statute of frauds. Leonard C. Pratt Co. v Roseman, 259 A.D. 534, 20 N.Y.S.2d 10, 1940 N.Y. App. Div. LEXIS 6196 (N.Y. App. Div. 1940).

In action for wages for fifth year under contract of employment for five years, on theory of wrongful discharge at end of fourth year, employer's defense of statute of frauds was sufficient. Remant v Kelly Dry Ginger Ale Co., 260 A.D. 1037, 24 N.Y.S.2d 356, 1940 N.Y. App. Div. LEXIS 5968 (N.Y. App. Div. 1940).

In action to recover commissions on sales under oral agreement, defense that contract, requiring defendant for unlimited period of time to pay commissions on orders accepted, held impossible of performance within year. Cohen v Bartgis Bros. Co., 264 A.D. 260, 35 N.Y.S.2d

206, 1942 N.Y. App. Div. LEXIS 4125 (N.Y. App. Div. 1942), aff'd, 289 N.Y. 846, 47 N.E.2d 443, 289 N.Y. (N.Y.S.) 846, 1943 N.Y. LEXIS 1233 (N.Y. 1943).

In an action by a real estate broker for commissions in procuring a tenant, motion to strike out defense of the statute of frauds was denied, under the rule that a bad defense is good to a bad complaint. Brown, Wheelock, Harris, Vought & Co. v One Park Ave. Corp., 235 N.Y.S. 297, 134 Misc. 313, 1929 N.Y. Misc. LEXIS 863 (N.Y. Mun. Ct. 1929).

In action on oral agreement to bequeath residual personalty, defense that contract was void under New York statute of frauds, coupled with denial of allegation of complaint that contract was made in New Jersey and enforceable there, held sufficient. Regan v Nelden, 33 N.Y.S.2d 138, 178 Misc. 86, 1942 N.Y. Misc. LEXIS 1336 (N.Y. Sup. Ct. 1942).

Defense that claim for broker’s commissions on sale of business was based on oral employment was sufficient, though agreement of sale was fully executed. Schwartz v Mayer, 97 N.Y.S.2d 773, 198 Misc. 210, 1950 N.Y. Misc. LEXIS 1703 (N.Y. Mun. Ct. 1950).

In action for partnership accounting after termination of partnership, defense of statute of frauds is not defense to action on executed or partially executed oral agreement. Zuckerman v Linden, 139 N.Y.S.2d 737, 207 Misc. 702, 1955 N.Y. Misc. LEXIS 3486 (N.Y. Sup. Ct. 1955).

An oral agreement evidenced by a memorandum, otherwise sufficient, is not subject to the defense of the statute of frauds because the memorandum was made after the oral agreement, and not contemporaneously with it, and was not delivered to plaintiff suing thereon. Schiff v Kirby, 22 Misc. 2d 786, 194 N.Y.S.2d 695, 1959 N.Y. Misc. LEXIS 2504 (N.Y. Sup. Ct. 1959).

A complete defense is made by denying the contract, where as stated in the complaint it is one which is not binding unless in writing and is not stated to be so. Berrien v Southack, 7 N.Y.S. 324, 1889 N.Y. Misc. LEXIS 1069 (N.Y. City Ct. 1889).

Contract to sell mortgage, not signed by grantor or agent having written authority, held void under Real PL § 259. Rowland v Fleitman, 24 N.Y.S.2d 251, 1940 N.Y. Misc. LEXIS 2469 (N.Y. App. Term 1940).

To avail of defense of statute of frauds party must plead it by stating facts relied upon as defense, and mere conclusion of law that transactions are subject to defense of statute is manifestly insufficient. Wagner v Smith, 136 N.Y.S.2d 765, 1954 N.Y. Misc. LEXIS 3518 (N.Y. App. Term 1954).

In action for commissions upon oral agreement of employment as sales agent, where complaint alleged that during term of employment plaintiff procured three contracts for sale of newsprint calling for delivery over five years, such oral contract, though terminable at will, was within statute of frauds. Beaver Pulp & Paper Co. v St. Raymond Sales, Ltd., 139 N.Y.S.2d 717, 1955 N.Y. Misc. LEXIS 3483 (N.Y. Sup. Ct. 1955).

In action by realty broker for commissions, where his claim was based upon relationship continuing beyond year, statute of frauds was complete defense. Mosberg v Judson Enterprises, Inc., 139 N.Y.S.2d 780, 1955 N.Y. Misc. LEXIS 3045 (N.Y. Sup. Ct. 1955).

It is only necessary to plead the statute of frauds when the complaint sets forth a contract and the answer admits the allegation. Quinlin v Raymond, 3 N.Y. St. 573 (N.Y.C.P. Dec. 7, 1886), aff'd, Board of Comm'rs v Rouse, 121 Ind. 263, 22 N.E. 1136, 1889 Ind. LEXIS 52 (N.Y. 1889), aff'd, 118 N.Y. 670, 22 N.E. 1136, 118 N.Y. (N.Y.S.) 670, 1889 N.Y. LEXIS 1574 (N.Y. 1889).

238. —Constructive trust

Where a cause of action was based on a constructive trust arising out of a breach of a confidential relation, and for a reconveyance of the property, the statute of frauds was not pleadable. Irving Trust Co. v Reikes, 228 A.D. 510, 240 N.Y.S. 232, 1930 N.Y. App. Div. LEXIS 12208 (N.Y. App. Div. 1930).

Defenses of statute of frauds and estoppel are insufficient defenses to action to impress constructive trust on realty on ground that plaintiff deed it without consideration to defendant on his promise to convey. Costa v Pratt, 277 A.D. 806, 96 N.Y.S.2d 868, 1950 N.Y. App. Div. LEXIS 3382 (N.Y. App. Div. 1950).

In wife's action against husband to enforce constructive trust, his defense of statute of frauds was sufficient. Powell v Powell, 126 N.Y.S.2d 182, 205 Misc. 14, 1953 N.Y. Misc. LEXIS 2421 (N.Y. Sup. Ct. 1953).

239. —Real property generally

Where a mortgagee agreed, on a good consideration, to purchase the mortgaged property on foreclosure sale in its own name, and reconvey it on consideration of a new mortgage, it cannot repudiate its agreement to reconvey because it was not in writing, for equity will not allow the statute of frauds to be made a means of fraud. Congregation Kehal Adath Jeshurun M'Yassy v Universal Bldg. & Const. Co., 134 A.D. 368, 119 N.Y.S. 72, 1909 N.Y. App. Div. LEXIS 2863 (N.Y. App. Div. 1909).

Where plaintiff sought reimbursement for money expended in accordance with a contract to purchase land for defendants, defense of statute of frauds was insufficient, since the action was based on the promise to reimburse which could have been performed within a year. Reeve v Cromwell, 227 A.D. 32, 237 N.Y.S. 20, 1929 N.Y. App. Div. LEXIS 6350 (N.Y. App. Div. 1929).

The statute of frauds is not available as a defense to an action to recover an interest in real property obtained by fraud. Isquith v Isquith, 229 A.D. 555, 242 N.Y.S. 383, 1930 N.Y. App. Div. LEXIS 10441 (N.Y. App. Div. 1930).

In action for damages for breach of oral agreement to sever building from land immediately and remove it, defense of statute of frauds was insufficient, as parties treated building as personalty. Cervadoro v First Nat'l Bank & Trust Co., 267 A.D. 314, 45 N.Y.S.2d 738, 1944 N.Y. App. Div. LEXIS 4717 (N.Y. App. Div. 1944).

Statute of frauds cannot be used as defense against fraud or abuse of confidential relationship in acquiring and retaining realty. McGowan v McGowan, 4 Misc. 2d 165, 99 N.Y.S.2d 25, 1950 N.Y. Misc. LEXIS 1324 (N.Y. Sup. Ct.), aff'd, 277 A.D. 897, 98 N.Y.S.2d 390, 1950 N.Y. App. Div. LEXIS 3766 (N.Y. App. Div. 1950).

In action on contract for sale of interest in realty, defense of no note or memorandum subscribed by grantor or agent was sufficient. Hoffman v R. H. Marwin Co., 23 N.Y.S.2d 26, 1940 N.Y. Misc. LEXIS 2272 (N.Y. App. Term 1940).

240. —Specific performance

To an action for specific performance of a land contract, the defense of statute of frauds was adequate because of insufficiency of the memorandum. Irvmor Corp. v Rodewald, 253 N.Y. 472, 171 N.E. 747, 253 N.Y. (N.Y.S.) 472, 1930 N.Y. LEXIS 858 (N.Y. 1930).

In action for specific performance of agreement by grandmother to bequeath son’s share of her estate to his children, plaintiffs, defense that such agreement was to convey realty and was oral held sufficient despite claim of part performance alleged by plaintiffs. Hammond v Hammond, 264 A.D. 322, 35 N.Y.S.2d 237, 1942 N.Y. App. Div. LEXIS 4140 (N.Y. App. Div. 1942).

In action for specific performance of an oral contract to convey, defense of statute of frauds was sustained. Zelzer v Yorkville Park Co., 252 N.Y.S. 626, 141 Misc. 190, 1931 N.Y. Misc. LEXIS 1705 (N.Y. Sup. Ct. 1931).

In action for reconveyance of realty by husband to wife pursuant to oral agreement, husband’s defense of statute of frauds was not sufficient where wife did not allege fraud or confidential relationship. Mayer v Mayer, 67 N.Y.S.2d 898, 1946 N.Y. Misc. LEXIS 3326 (N.Y. Sup. Ct. 1946).

In action for specific performance of agreement by defendant to purchase realty and to convey it to plaintiff, Statute of Frauds held defense. White v White, 119 N.Y.S.2d 306, 1952 N.Y. Misc. LEXIS 2244 (N.Y. Sup. Ct. 1952).

241. Subrogation

The answer of a surety sued for the default in his principal may demand subrogation to the place of plaintiffs. Lewis v Palmer, 28 N.Y. 271, 28 N.Y. (N.Y.S.) 271, 1863 N.Y. LEXIS 68 (N.Y. 1863).

In action by longshoreman for personal injury against third person, allegation that plaintiff has accepted compensation voluntarily paid by his employer is insufficient to divest plaintiff of his cause of action against defendant either by statutory assignment or by force of employer's equity of subrogation or his right of indemnification. Jakuboski v Matson Nav. Co., 264 A.D. 735, 34 N.Y.S.2d 352, 1942 N.Y. App. Div. LEXIS 4430 (N.Y. App. Div. 1942), modified, 265 A.D. 859, 37 N.Y.S.2d 667, 1942 N.Y. App. Div. LEXIS 6202 (N.Y. App. Div. 1942), modified, 269 A.D. 849, 56 N.Y.S.2d 927, 1945 N.Y. App. Div. LEXIS 4219 (N.Y. App. Div. 2d Dep't 1945), overruled, Ricciardi v American Export Lines, Inc., 268 A.D. 606, 52 N.Y.S.2d 269, 1945 N.Y. App. Div. LEXIS 5278 (N.Y. App. Div. 1945).

A widow who, prior to her appointment as administratrix, pays a note of the intestate from her own funds, is entitled to be subrogated to the rights of the holder of such note and to be reimbursed from the estate. In re Plopper's Estate, 37 N.Y.S. 33, 15 Misc. 202, 1895 N.Y. Misc. LEXIS 1087 (N.Y. Sur. Ct. 1895).

242. Tender

Waiver of a tender proved supports an averment of tender. 9 N.Y. 525.

The deposit of a sufficient amount to pay a note in the bank where it is payable in the last day of grace is a tender but not payment. Hills v Place, 48 N.Y. 520, 48 N.Y. (N.Y.S.) 520, 1872 N.Y. LEXIS 317 (N.Y. 1872).

Defendant must pay the money into court to make a tender of payment before action available. Becker v Boon, 61 N.Y. 317, 61 N.Y. (N.Y.S.) 317, 1874 N.Y. LEXIS 642 (N.Y. 1874).

The effect of a plea of tender is to admit the cause of action to the amount tendered. Eaton v Wells, 82 N.Y. 576, 82 N.Y. (N.Y.S.) 576, 1880 N.Y. LEXIS 406 (N.Y. 1880).

To make out this defense there must be proved an unconditional tender of money or its equivalent, or that the party waived the offer of money. Cass v Higenbotam, 100 N.Y. 248, 3 N.E. 189, 100 N.Y. (N.Y.S.) 248, 1885 N.Y. LEXIS 975 (N.Y. 1885).

A plaintiff does not waive his right to insist that a tender is not good by not returning the answer setting it up with other defenses. Wilson v Doran, 110 N.Y. 101, 17 N.E. 688, 110 N.Y. (N.Y.S.) 101, 16 N.Y. St. 852, 1888 N.Y. LEXIS 857 (N.Y. 1888).

It is no defense to an action for the purchase price of lands for the vendee in possession to allege a tender and refusal by the vendor to give a proper deed, where the tender was on condition that the vendor give proof of title, and a full covenant deed was not called for by the contract. Palmer v Hudson V. R. Co., 134 A.D. 42, 118 N.Y.S. 710, 1909 N.Y. App. Div. LEXIS 2774 (N.Y. App. Div. 1909).

Where, in an action upon a contract, the defendant sets up as a defense a composition agreement and tender of performance under it, such tender need not be kept good where it was refused at the time it was made. Rosenzweig v Kalichman, 106 N.Y.S. 860, 56 Misc. 345, 1907 N.Y. Misc. LEXIS 766 (N.Y. City Ct. 1907).

243. Unclean hands

Answer of a female claiming full marital rights, stricken out, she having married in another state to avoid the law of this state denouncing incestuous marriages. Cohen v Cohen, 227 A.D. 630, 235 N.Y.S. 786, 1929 N.Y. App. Div. LEXIS 6693 (N.Y. App. Div. 1929).

In action for accounting, affirmative defense of “unclean hands” insufficient, since the misconduct complained of did not occur in the particular transaction involved. Mindlin v Grissman, 243 N.Y.S. 736, 137 Misc. 838, 1930 N.Y. Misc. LEXIS 1397 (N.Y. Sup. Ct. 1930).

In wife's action to cancel transfer of stocks to husband on ground of fraud, answer alleging that she had forfeited equitable relief because of adultery, for which another action was pending between them, was insufficient, since the doctrine of clean hands did not apply because not relating to the transaction involved. Mandel v Mandel, 250 N.Y.S. 473, 140 Misc. 848, 1931 N.Y. Misc. LEXIS 1348 (N.Y. Sup. Ct. 1931).

In action to enjoin labor union from picketing defense that plaintiff employer was guilty of unfair labor practices making unclean hands barred summary judgment for plaintiff. Devon Knitwear Co. v Levinson, 19 N.Y.S.2d 102, 173 Misc. 779, 1940 N.Y. Misc. LEXIS 1623 (N.Y. Sup. Ct. 1940).

244. Usury

A second mortgagee has a defense against a prior usurious mortgage; but those who accept a lien on an interest in premises expressly subject to a prior mortgage cannot set up usury upon its foreclosure. Sands v Church, 6 N.Y. 347, 6 N.Y. (N.Y.S.) 347, 1852 N.Y. LEXIS 71 (N.Y. 1852).

The answer should state the amount of the usurious interest and the terms of the contract. Manning v Tyler, 21 N.Y. 567, 21 N.Y. (N.Y.S.) 567, 1860 N.Y. LEXIS 126 (N.Y. 1860).

If relying upon the usury laws of another state, the laws of that state must be set out as well as the facts which render the transaction usurious under them. Cutler v Wright, 22 N.Y. 472, 22 N.Y. (N.Y.S.) 472, 1860 N.Y. LEXIS 50 (N.Y. 1860).

An answer which alleges that about enough to buy a barrel of flour more than legal interest is sufficient. Dagal v Simmons, 23 N.Y. 491, 23 N.Y. (N.Y.S.) 491, 1861 N.Y. LEXIS 44 (N.Y. 1861).

An answer of usury is improper where the complaint alleged partnership and an accounting, though there was no partnership, but a loan to be repaid by an interest in profits. Arnold v Angell, 62 N.Y. 508, 62 N.Y. (N.Y.S.) 508, 1875 N.Y. LEXIS 535 (N.Y. 1875).

It is a substantive defense and not a counterclaim. Equitable Life Assurance Soc. v Cuyler, 75 N.Y. 511, 75 N.Y. (N.Y.S.) 511, 1878 N.Y. LEXIS 897 (N.Y. 1878).

It is a question whether one who gives a usurious bond and mortgage to a plaintiff in foreclosure at his request, is a borrower, and may set up that defense and have it declared void. Equitable Life Assurance Soc. v Cuyler, 75 N.Y. 511, 75 N.Y. (N.Y.S.) 511, 1878 N.Y. LEXIS 897 (N.Y. 1878).

The proof of the usurious contract must be proved substantially as alleged. Western Transp. & Coal Co. v Kilderhouse, 87 N.Y. 430, 87 N.Y. (N.Y.S.) 430, 1882 N.Y. LEXIS 18 (N.Y. 1882).

In the absence of evidence that the contract was originally usurious, payment of usury under a subsequent contract is simply deducted from the amount due. In re Accounting of Consalus, 95 N.Y. 340, 95 N.Y. (N.Y.S.) 340, 1884 N.Y. LEXIS 656 (N.Y. 1884).

Usury is to be treated as any other defense. Lewis v Barton, 106 N.Y. 70, 12 N.E. 437, 106 N.Y. (N.Y.S.) 70, 8 N.Y. St. 546, 1887 N.Y. LEXIS 859 (N.Y. 1887).

Defense of usury should be pleaded in ordinary and concise language without repetition. Maas v Malevinsky, 197 A.D. 99, 188 N.Y.S. 532, 1921 N.Y. App. Div. LEXIS 7407 (N.Y. App. Div. 1921).

In an action upon an assigned claim for wages, the defendant may not plead that the assignment was made to secure a usurious loan. Union Credit & Inv. Co. v Union Stockyard & Market Co., 92 N.Y.S. 269, 46 Misc. 431, 1905 N.Y. Misc. LEXIS 88 (N.Y. App. Term 1905).

Defense of usury by taking sixty-seven and one-half cents was too trifling to be considered. Businessmen's Mortg. & Credit Corp. v Dobjinsky, 238 N.Y.S. 158, 135 Misc. 628, 1928 N.Y. Misc. LEXIS 1249 (N.Y. Mun. Ct. 1928).

Merely pleading usury as a defense in general terms is insufficient; the facts showing the usurious transaction must be alleged. Besler v Eldorado Cleaners, 261 N.Y.S. 673, 146 Misc. 579, 1932 N.Y. Misc. LEXIS 1730 (N.Y. Sup. Ct. 1932).

Not in any sense regarded with disfavor, although being in its nature penal, it should be established by convincing proofs. Curtis v Hart, 2 N.Y.S. 462, 50 Hun 600, 1888 N.Y. Misc. LEXIS 792 (N.Y. Sup. Ct. 1888), aff'd, 127 N.Y. 648, 27 N.E. 856, 127 N.Y. (N.Y.S.) 648, 1891 N.Y. LEXIS 1830 (N.Y. 1891).

Usury is a personal defense and cannot be raised by creditors of the debtor. East River Nat'l Bank v Adams, 4 N.Y.S. 366, 51 Hun 641, 1889 N.Y. Misc. LEXIS 328 (N.Y. Sup. Ct. 1889).

In action to recover excessive interest as usury, where plaintiff as an individual was using trade name in sale of used cars, his acts in buying cars from himself and selling instalment contracts at discount to loan company, were not acts of two separate legal entities, and defense based thereon was struck out. Coll v Associated Discount Corp., 136 N.Y.S.2d 279, 1954 N.Y. Misc. LEXIS 3120 (N.Y. Sup. Ct. 1954).

245. —Usury of corporation

The statute preventing the pleading of usury by corporations is retrospective and applies to foreign corporations. Southern Life Ins. & Trust Co. v Packer, 17 N.Y. 51, 17 N.Y. (N.Y.S.) 51, 1858 N.Y. LEXIS 32 (N.Y. 1858).

Where loan was made to defendant corporation and guaranteed by the individual defendants, the defense of usury cannot be interposed. Shapiro v Weissman, 19 Misc. 2d 407, 187 N.Y.S.2d 233, 1959 N.Y. Misc. LEXIS 3724 (N.Y. Sup. Ct. 1959).

In an action against individual guarantor to foreclose mortgage he had given as security for loan made to corporation, whose principal asset was not a one- or two-family dwelling, he could not interpose defense of usury since such defense could not have been interposed by corporation. Margulis v Messinger, 34 Misc. 2d 699, 210 N.Y.S.2d 855, 1960 N.Y. Misc. LEXIS 1966 (N.Y. Sup. Ct. 1960).

Individual guarantors of loan to corporate defendant may not invoke defense of usury. Metz v Taglieri, 29 Misc. 2d 841, 215 N.Y.S.2d 263, 1961 N.Y. Misc. LEXIS 2975 (N.Y. Sup. Ct. 1961).

The answer of a mortgagor corporation setting up usury is frivolous. Smith v Isle of Wight Co., 3 N.Y.S. 300, 50 Hun 605, 1888 N.Y. Misc. LEXIS 599 (N.Y. Sup. Ct. 1888).

246. —Negotiable instruments

An answer alleging usury in the transfer of a note should show that it had no valid existence when discounted. See Miller v Schuyler, 20 N.Y. 522, 20 N.Y. (N.Y.S.) 522, 1859 N.Y. LEXIS 224 (N.Y. 1859).

The agreement to take usury must be set forth. National Bank of Auburn v Lewis, 75 N.Y. 516, 75 N.Y. (N.Y.S.) 516, 1878 N.Y. LEXIS 898 (N.Y. 1878).

In an action upon an assigned claim for wages due, the defendant may not defend upon the ground that certain notes, to secure which the assignment was made, were usurious. Thompson v Interborough Rapid Transit Co., 96 N.Y.S. 416, 49 Misc. 102, 1905 N.Y. Misc. LEXIS 554 (N.Y. App. Term 1905).

The defense of usury between the original parties to commercial paper is no longer available against a subsequent bona fide holder in due course, under the provisions of § 96 of the Negotiable Instruments Law. Klar v Kostiuk, 119 N.Y.S. 683, 65 Misc. 199, 1909 N.Y. Misc. LEXIS 399 (N.Y. App. Term 1909).

247. Workmen's compensation

The court held not good in law a defense that the plaintiff had already under the Workmen's Compensation Act recovered compensation for the injury for which defendant was being sued on the ground of malpractice. White v Matthews, 221 A.D. 551, 224 N.Y.S. 559, 1927 N.Y. App. Div. LEXIS 6494 (N.Y. App. Div. 1927).

In action against third person for personal injuries by employee covered by compensation law, defense that plaintiff's cause of action was divested by compensation award was insufficient for failure to allege acceptance thereof. Gillette v Allen, 264 A.D. 599, 36 N.Y.S.2d 306, 1942 N.Y.

App. Div. LEXIS 4213 (N.Y. App. Div.), app. dismissed, 289 N.Y. 754, 46 N.E.2d 355, 289 N.Y. (N.Y.S.) 754, 1942 N.Y. LEXIS 1319 (N.Y. 1942).

In action for injuries by rape and stabbing by fellow employee of plaintiff, defense that defendant had obtained workmen's compensation and that plaintiff had received workmen's compensation, was sufficient. Wolfson v Gershunoff, 277 A.D. 1149, 101 N.Y.S.2d 411, 1950 N.Y. App. Div. LEXIS 4788 (N.Y. App. Div. 1950).

In action for personal injuries, defense that action had been assigned to compensation carrier by operation of statute, as provided by Workmen's Compensation L § 29, was sufficient. Juba v General Builders Supply Corp., 284 A.D. 891, 134 N.Y.S.2d 592, 1954 N.Y. App. Div. LEXIS 3970 (N.Y. App. Div. 1954), rev'd, 7 N.Y.2d 48, 194 N.Y.S.2d 503, 163 N.E.2d 328, 1959 N.Y. LEXIS 965 (N.Y. 1959).

Defense that accident arose out of and in course of plaintiff's employment and that his exclusive remedy was a proceeding under the Workmen's Compensation Law was not insufficient in law on its face and was not, therefore, subject to attack via RCP Rule 109 (Rule 3211(a) herein). Baker v Matthews, 8 A.D.2d 585, 183 N.Y.S.2d 569, 1959 N.Y. App. Div. LEXIS 9521 (N.Y. App. Div. 4th Dep't 1959).

On motion of a stevedore who is suing his employer for injuries sustained in his work, the defense that the employer had complied with the Workmen's Compensation Law but that plaintiff by his failure to give written notice had elected to take under said law, will be stricken out on the ground that said work deals with interstate commerce and is beyond the power of a state statute. Argentino v F. Jarka Co., 214 N.Y.S. 218, 126 Misc. 816, 1925 N.Y. Misc. LEXIS 1065 (N.Y. Sup. Ct. 1925).

Defenses in automobile negligence action that plaintiff and defendant were coemployees of the employer who had complied with Workmen's Compensation Law, and that plaintiff's remedy under statute is exclusive are not available to a coemployee sued as defendant. Shelter v Grobsmith, 257 N.Y.S. 353, 143 Misc. 380, 1932 N.Y. Misc. LEXIS 1086 (N.Y. Sup. Ct. 1932).

In third-party action for personal injuries to injured workman, defense of insurance carrier, which had elected to claim lien on employee's recovery, that it had paid his medical expenses was insufficient. Calhoun v West End Brewing Co., 43 N.Y.S.2d 830, 182 Misc. 423, 1943 N.Y. Misc. LEXIS 2333 (N.Y. Sup. Ct. 1943), aff'd, 269 A.D. 398, 56 N.Y.S.2d 105, 1945 N.Y. App. Div. LEXIS 2996 (N.Y. App. Div. 1945).

In action by an employee against a stranger to recover for personal injuries, wherein the stranger served a third party complaint against plaintiff's employer for contribution, the defense to the third party complaint of Workmen's Compensation as being the employee's sole remedy, is insufficient, even though there is a possibility that there may be a recovery over against the employer by the stranger for more than the compensation benefits. Tuffarella v Erie R. Co., 27 Misc. 2d 638, 211 N.Y.S.2d 351, 1961 N.Y. Misc. LEXIS 3566 (N.Y. Sup. Ct. 1961).

In action by injured employee against injuring third-party, defense of assignment by employee to employer by acceptance of compensation award need not allege that payment was made by way of award. Cocasso v Erie R. Co., 44 N.Y.S.2d 373, 1943 N.Y. Misc. LEXIS 2447 (N.Y. Sup. Ct. 1943).

In action for negligent death by widow of employee injured in foreign country while working for defendant, defense that said employee had agreed under his contract that his right to compensation was to be governed by N. Y. Compensation Law was insufficient, where it did not allege all necessary facts showing that widow was compensable solely under such law. Conway v Hamilton Overseas Contr. Corp, 120 N.Y.S.2d 672, 1953 N.Y. Misc. LEXIS 1665 (N.Y. Sup. Ct. 1953), aff'd, 283 A.D. 1011, 131 N.Y.S.2d 443, 1954 N.Y. App. Div. LEXIS 6113 (N.Y. App. Div. 1954).

In action by employee against corporate employer for physical assault, defense of fellow servant and contributory negligence combined as one defense, and defense of workmen's compensation, were held valid. Camacho v Innersprings, Inc., 142 N.Y.S.2d 886 (N.Y. Sup. Ct. 1955).

c. Defenses in Particular Actions

248. Accounting actions

In action by the holder of a certificate of participation in a bond and mortgage for an accounting, no defense was furnished by the answer. Perillo v Zunino, 259 N.Y. 21, 180 N.E. 882, 259 N.Y. (N.Y.S.) 21, 1932 N.Y. LEXIS 895 (N.Y. 1932).

In an action for an accounting the defendant is entitled to an affirmative judgment, though his answer makes no demand therefor. Consolidated Fruit Jar Co. v Wisner, 110 A.D. 99, 97 N.Y.S. 52, 1905 N.Y. App. Div. LEXIS 3875 (N.Y. App. Div. 1905), aff'd, 188 N.Y. 624, 81 N.E. 1162, 188 N.Y. (N.Y.S.) 624, 1907 N.Y. LEXIS 1304 (N.Y. 1907).

When the defendant’s answer pleads an account without setting forth the items, the plaintiff is entitled to a copy of the account; the court may in its discretion preclude the defendant giving evidence of the account unless copies are furnished within the time specified. Smith v Irvin, 116 A.D. 359, 101 N.Y.S. 904, 1906 N.Y. App. Div. LEXIS 2672 (N.Y. App. Div. 1906).

In an action against selling agents for an accounting as to goods sold, a credit admitted in the complaint but denied by answer cannot be claimed by the agent to have been admitted by the principal. Oneida Steel Pulley Co. v New York Leather Belting Co., 120 A.D. 625, 105 N.Y.S. 534, 1907 N.Y. App. Div. LEXIS 1270 (N.Y. App. Div. 1907).

In action for accounting, partial defenses and counterclaims for reformation, alleging discrepancy between terms as settled by preliminary draft and final written contract attached to complaint held sufficient without alleging mutual mistake. In re Hoffmann's Will, 264 A.D. 881, 35 N.Y.S.2d 856 (N.Y. App. Div. 1942).

In accounting for profits under contract requiring cartoonist to furnish defendant comic strips and entitling him to royalties of 75% of moneys “actually derived” from licensees, defense that death of cartoonist terminated right to royalties where no money was received before his death was insufficient. Segar v King Features Syndicate, Inc., 19 N.Y.S.2d 527, 173 Misc. 1036, 1940 N.Y.

Misc. LEXIS 1683 (N.Y. Sup. Ct.), aff'd, 259 A.D. 871, 20 N.Y.S.2d 401, 1940 N.Y. App. Div. LEXIS 7057 (N.Y. App. Div. 1940).

In an action for an accounting where the matter pleaded as a defense seeks judgment of separation which cannot be granted in this action for accounting before the court and has no substantial relation to the action such defenses must be stricken. Grillo v Grillo, 12 Misc. 2d 552, 175 N.Y.S.2d 245, 1957 N.Y. Misc. LEXIS 2349 (N.Y. Sup. Ct. 1957).

249. Action on account stated

In an action to recover a sum of money upon an account stated, it is necessary for the plaintiff to allege nonpayment; but as this is a mere rule of pleading and because payment must be pleaded as a defense, a denial of the plaintiff’s allegation does not make payment an issue. Bremer v Ring, 146 A.D. 724, 131 N.Y.S. 487, 1911 N.Y. App. Div. LEXIS 3351 (N.Y. App. Div. 1911).

A judgment for the defendant, in an action upon an account stated, is not a bar to a subsequent action against him for goods sold and delivered, in which the plaintiff seeks to recover for the same goods specified in the account. Mincer v Green, 94 N.Y.S. 15, 47 Misc. 374, 1905 N.Y. Misc. LEXIS 253 (N.Y. App. Term 1905).

In an action upon an account stated where the defense was a general denial, the defendant should not be permitted to introduce evidence showing that the plaintiff was indebted to him for matters altogether outside the matter embraced in the account. Uhlhorn v Hovey, 97 N.Y.S. 1040, 49 Misc. 638, 1906 N.Y. Misc. LEXIS 656 (N.Y. App. Term 1906).

The whole of an account is opened for investigation by an answer setting out equally the dealings between the parties to an account stated and a balance due. Sichel v Davies, 15 N.Y. St. 317.

250. Action by or against attorney

In action against attorney for breach of duty in foreclosure of mortgage in which plaintiff and defendant were interested, wherein complaint charged that defendant represented a defendant in foreclosure in other transactions, defendant's defenses considered and some struck out. Frembd v Marx, 263 A.D. 266, 32 N.Y.S.2d 516, 1942 N.Y. App. Div. LEXIS 6862 (N.Y. App. Div. 1942).

In action to foreclose attorney's lien against money paid into court in favor of defendant, such lien held superior to mechanic's lien which attached only from filing notice thereof. Travis v Nansen, 26 N.Y.S.2d 590, 176 Misc. 44, 1941 N.Y. Misc. LEXIS 1601 (N.Y. Sup. Ct. 1941).

Where a lawyer, sued upon his agreement to pay plaintiff a percentage of fees received from persons recommended by him, answered that plaintiff stood in fiduciary relation to the person recommended, it was sufficient. Reilly v Beekman, 24 F.2d 791, 1928 U.S. App. LEXIS 2166 (2d Cir. N.Y. 1928).

251. Action to recover a chattel

Where, in an action to recover a chattel, the answer set forth that the defendant was entitled to possession of the chattels named in the complaint under and by virtue of a certain lease made and entered into by and between the plaintiff and defendant herein, whereby "certain premises therein described were leased to the defendant together with certain machinery therein," this was sufficiently definite and certain. Durant v East River Electric Light Co., 2 N.Y.S. 389, 1888 N.Y. Misc. LEXIS 196 (N.Y. City Ct. 1888).

252. Assault and battery

In assault and battery action, defense that plaintiff had persisted in provocative, offensive and insulting course of conduct toward defendant was insufficient as defense of justification in absence of allegation of an overt act of hostility; however, it was permitted to stand as partial defense in mitigation of damages. Albiccocco v Nicoletto, 11 A.D.2d 690, 204 N.Y.S.2d 566,

1960 N.Y. App. Div. LEXIS 9451 (N.Y. App. Div. 2d Dep't 1960), aff'd, 9 N.Y.2d 920, 217 N.Y.S.2d 91, 176 N.E.2d 100, 1961 N.Y. LEXIS 1234 (N.Y. 1961).

In an action for assault, the defendant may plead facts showing the lawfulness of his acts in defense as justification for the assault. Versosa v New York, 22 Misc. 2d 597, 194 N.Y.S.2d 5, 1959 N.Y. Misc. LEXIS 2474 (N.Y. Sup. Ct. 1959).

Absence of malice may be pleaded in mitigation to avoid the imposition of punitive damages in an action for assault. Versosa v New York, 22 Misc. 2d 597, 194 N.Y.S.2d 5, 1959 N.Y. Misc. LEXIS 2474 (N.Y. Sup. Ct. 1959).

253. Bailment or pledge

And in general, one who has received personal property in pledge has no right to set up the claim of a third person as against his pledge. Godfrey v Pell, 95 N.Y. 649, 95 N.Y. (N.Y.S.) 649, 1884 N.Y. LEXIS 692 (N.Y. 1884).

In action for pawnbroker’s negligence in releasing diamond ring without plaintiff’s authority, affirmative defense that defendant acted reasonably and with due care was upheld as raising triable issue; affirmative defense that pawn ticket exempted defendant from negligence was insufficient; and affirmative defense, as part of contract between parties limiting defendant’s liability to twice amount of loan, was sufficient. Zackby v Kopell, 144 N.Y.S.2d 243, 1955 N.Y. Misc. LEXIS 3714 (N.Y. Sup. Ct. 1955).

An answer to an action for merchandise claimed as deposited with defendant, which set up that the property was not owned by the plaintiff but by a third person who took it without fault of defendant, is good. Taber v Gardner, 6 Abb Pr NS 147. But an answer that a third person has given notice of a claim to money deposited with defendant, is irrelevant. Carpenter v Bell, 24 Super Ct (1 Robt) 711.

254. Banks and banking

An answer admitting the making and delivery of the note and denying all the other allegations of the complaint is a sufficient denial of the transfer to plaintiff to entitle defendant to prove payment to the payee when the note belonged to him. Allis v Leonard, 46 N.Y. 688, 46 N.Y. (N.Y.S.) 688, 1871 N.Y. LEXIS 332 (N.Y. 1871).

Where one, depositing moneys in a bank, by mistake makes out a deposit slip in another's name, but the deposit is entered in his own book, which he delivers to the teller with the moneys for the purpose of making such entry, such error constitutes a defense to an action by the depositor to recover the deposit. Schwartz v State Bank, 135 A.D. 42, 119 N.Y.S. 763, 1909 N.Y. App. Div. LEXIS 3904 (N.Y. App. Div. 1909).

In action to recover sum paid for the purpose of having credits established at foreign banks and for breach of contract to establish same, defenses setting up performance of the contract and acceptance thereof by plaintiff, were insufficient. Richard v American Union Bank, 225 A.D. 634, 234 N.Y.S. 177, 1929 N.Y. App. Div. LEXIS 11716 (N.Y. App. Div. 1929), aff'd, 253 N.Y. 166, 170 N.E. 532, 253 N.Y. (N.Y.S.) 166, 1930 N.Y. LEXIS 812 (N.Y. 1930).

In action against a bank to recover moneys paid out on forged checks, defenses pleaded were good as partial defenses. W. A. McLaughlin, Inc. v National City Bank, 228 A.D. 337, 239 N.Y.S. 598, 1930 N.Y. App. Div. LEXIS 12167 (N.Y. App. Div. 1930).

In action by bankruptcy trustee for conversion against bank which cashed checks of debtor after knowledge that he had filed petition for bankruptcy arrangement, bank's defense that checks were receipts for after-acquired property held invalid. Weiss v Fleetwood Bank, 261 A.D. 572, 26 N.Y.S.2d 583, 1941 N.Y. App. Div. LEXIS 7384 (N.Y. App. Div.), app. denied, 262 A.D. 747, 28 N.Y.S.2d 156, 1941 N.Y. App. Div. LEXIS 5720 (N.Y. App. Div. 1941).

In action against bank which permitted bankruptcy estate funds to be withdrawn on forged checks, by surety as subrogee of bankruptcy trustee, defenses of failure to discover forgery and delay in reporting forgery held sufficient. Maryland Casualty Co. v Central Trust Co., 265 A.D. 416, 39 N.Y.S.2d 293, 1943 N.Y. App. Div. LEXIS 6313 (N.Y. App. Div.), app. denied, 266 A.D.

821, 42 N.Y.S.2d 913, 1943 N.Y. App. Div. LEXIS 4616 (N.Y. App. Div. 1943), app. dismissed, 291 N.Y. 641, 50 N.E.2d 1022, 291 N.Y. (N.Y.S.) 641, 1943 N.Y. LEXIS 1740 (N.Y. 1943).

255. Bills and notes

An answer setting up that the defendant indorsed as surety on the agreement of plaintiff to discontinue a suit, but that in violation of the agreement plaintiff levied on the maker's goods and destroyed his credit, shows a good defense. Bookstaver v Jayne, 60 N.Y. 146, 60 N.Y. (N.Y.S.) 146, 1875 N.Y. LEXIS 155 (N.Y. 1875).

An answer averring that, for a valuable consideration, an agreement was made between the parties for the renewal and extension of the note sued upon, is sufficient, though it does not allege that it was in writing. New York State Loan & Trust Co. v Helmer, 77 N.Y. 64, 77 N.Y. (N.Y.S.) 64, 1879 N.Y. LEXIS 739 (N.Y. 1879).

An alleged alteration of one year in the date of a note is material, but the court cannot decide the question by mere inspection. Rogers v Vosburgh, 87 N.Y. 228, 87 N.Y. (N.Y.S.) 228, 1881 N.Y. LEXIS 343 (N.Y. 1881).

If the answer to action on a promissory note alleged to have been given for cash loaned sets up want of consideration, neither party can show the true consideration. Miller v McKenzie, 95 N.Y. 575, 95 N.Y. (N.Y.S.) 575, 1884 N.Y. LEXIS 682 (N.Y. 1884).

The pledgees of notes of an estate to the sureties upon the official bond of the administrator on account of their liability and as security for advances made to the estate have a title that the debtor cannot question in his answer. Rogers v Squires, 98 N.Y. 49, 98 N.Y. (N.Y.S.) 49, 1885 N.Y. LEXIS 578 (N.Y. 1885).

A valid consideration is an essential element of an agreement after maturity, to extend the time of payment of a promissory note, such as will discharge a surety thereon; and in an action upon a note, if such an agreement is relied upon as a defense, the consideration therefor must be

pleaded and proved. National Citizens' Bank v Toplitz, 178 N.Y. 464, 71 N.E. 1, 178 N.Y. (N.Y.S.) 464, 1904 N.Y. LEXIS 734 (N.Y. 1904).

In an action upon a demand note, the defense that the note was not presented within a reasonable time after its issue need not be specially pleaded by an indorser. Commercial Nat'l Bank v Zimmerman, 185 N.Y. 210, 77 N.E. 1020, 185 N.Y. (N.Y.S.) 210, 18 N.Y. Ann. Cas. 388, 1906 N.Y. LEXIS 891 (N.Y. 1906).

Defenses in action on promissory note made by defendant to his own order and indorsed and delivered to the president of a bank for value considered. Empire Trust Co. v Magee, 117 A.D. 34, 102 N.Y.S. 9, 1907 N.Y. App. Div. LEXIS 185 (N.Y. App. Div. 1907).

A judgment should not be opened where an action was brought upon a promissory note secured by collateral; it is no defense to allege that the holder of the note converted the collateral, if it be not set out as a set-off or counterclaim that the collateral was of value or that the defendants have sustained damages. Wills v James Rowland & Co., 117 A.D. 122, 102 N.Y.S. 386, 1907 N.Y. App. Div. LEXIS 204 (N.Y. App. Div.), aff'd, 119 A.D. 866, 103 N.Y.S. 1151, 1907 N.Y. App. Div. LEXIS 3312 (N.Y. App. Div. 1907).

An answer in an action against the indorsers of a promissory note containing a general denial and alleging in a second subdivision that any indorsement by defendants, if made, was without consideration cannot be stricken out as sham; though the second subdivision is hypothetical and may be stricken out, the first subdivision is not thereby vitiated; and even if the second subdivision be considered good pleading it does not admit all allegations of the complaint which plaintiff is bound to establish. Duke v Grant, 126 A.D. 383, 110 N.Y.S. 563, 1908 N.Y. App. Div. LEXIS 3360 (N.Y. App. Div. 1908).

Action upon a promissory note; the defendant, an indorser, alleged payment at maturity by giving other notes to the plaintiff; evidence examined and held insufficient to sustain the defense. Plaut v Straub, 131 A.D. 154, 115 N.Y.S. 148, 1909 N.Y. App. Div. LEXIS 758 (N.Y. App. Div. 1909).

Although the indorser of a promissory note set up lack of consideration and gave evidence tending to prove that defense, he waived the same by failing to request a charge on that issue and by failing to except on the court's failure to submit it to the jury. Uvalde Asphalt Paving Co. v National Trading Co., 135 A.D. 391, 120 N.Y.S. 11, 1909 N.Y. App. Div. LEXIS 3980 (N.Y. App. Div. 1909).

In action on a note, defense alleging a condition that it should be discharged when another was substituted, was insufficient and was stricken, counterclaim being the proper practice. Kelly v Eggers, 225 A.D. 511, 233 N.Y.S. 638, 1929 N.Y. App. Div. LEXIS 11683 (N.Y. App. Div. 1929).

Answer denying execution of the note in suit and alleging that the person signing the note as president of defendant corporation executed the instrument after he ceased to be president, cast upon the plaintiff the burden of proving execution. Ginsberg v Oakhurst Gardens, 228 A.D. 556, 240 N.Y.S. 273, 1930 N.Y. App. Div. LEXIS 12218 (N.Y. App. Div. 1930).

In action on note by assignee of payee, defense resting upon mere conclusory allegation of conspiracy held insufficient. Newgold v Bon Ray Hotel Corp., 263 A.D. 899, 32 N.Y.S.2d 589, 1942 N.Y. App. Div. LEXIS 7272 (N.Y. App. Div. 1942).

In an action by assignee of a negotiable instrument, drawn on and accepted by defendant, by a foreign corporation, and discounted by plaintiff, defense that plaintiff was not a holder in due course, was not available. Allison Hill Trust Co. v Sarandrea, 236 N.Y.S. 265, 134 Misc. 566, 1929 N.Y. Misc. LEXIS 1200 (N.Y. Sup. Ct. 1929), aff'd, 236 A.D. 189, 258 N.Y.S. 299, 1932 N.Y. App. Div. LEXIS 5928 (N.Y. App. Div. 1932).

In action on a note the answer was insufficient, since it set up a condition subsequent which varied the terms of the written instrument. Armstrong Cork & Insulation Co. v Pirone, 238 N.Y.S. 522, 135 Misc. 819, 1930 N.Y. Misc. LEXIS 930 (N.Y. City Ct. 1930).

In action on promissory note, defense of breach of warranty, without a prayer for affirmative judgment, merely asking dismissal of the complaint, was insufficient. Cabella v Cabella, 252 N.Y.S. 188, 141 Misc. 69, 1931 N.Y. Misc. LEXIS 1610 (N.Y. Mun. Ct. 1931).

Defenses to action on a note of want of consideration, accommodation, and agreement that it would not be resorted to until co-defendant's resources had been exhausted, insufficient because of no allegation that said resources had not been exhausted. State Bank of Newfane v Lautz, 252 N.Y.S. 461, 141 Misc. 276, 1931 N.Y. Misc. LEXIS 1667 (N.Y. Sup. Ct. 1931).

In action on mortgage bond to recover taxes paid by mortgagee, defense that action was premature because prior to its inception plaintiff made no demand for repayment of taxes paid by it held insufficient. Buffalo Sav. Bank v Threeinwon Realty Corp., 26 N.Y.S.2d 324, 175 Misc. 807, 1940 N.Y. Misc. LEXIS 2611 (N.Y. Sup. Ct. 1940).

In an answer upon two promissory notes, the answer averred as a defense the execution of two agreements, the first providing for the making of promissory notes in consideration of a loan made by the plaintiff, and the second for a renewal of the notes from time to time for the space of two years, except in case of unusual disaster. The plaintiff subsequently declined to renew the notes, and insisted upon a general assignment being made, which defendant averred they were induced to make by the acts of the plaintiff. Held, that there were no averments in the answer by which it appeared that plaintiffs were bound to renew the notes after the making of the assignments. Arnold v Trowbridge, 4 N.Y.S. 549, 56 N.Y. Super. Ct. 284, 1889 N.Y. Misc. LEXIS 1589 (N.Y. Super. Ct. 1889).

In an action on a promissory note by the payee against the maker, an answer alleging "that there was an entire failure of consideration for the promissory note in the complaint set forth," and denying "that the amount or any part thereof is due to plaintiff" is not frivolous as stating mere conclusions of law. Churchill v Witbeck, 10 N.Y.S. 263, 1890 N.Y. Misc. LEXIS 2068 (N.Y. Sup. Ct. 1890).

Where in an action on negotiable paper the plaintiff's allegation that on the date of maturity it was the owner and legal holder thereof, but nowhere alleged how it acquired title thereto, and defendant denied having information sufficient to form a belief as to such ownership, the rule of evidence that possession of negotiable paper is prima facie evidence of title thereto has no

application to a motion to strike the answer for insufficiency. General Inv. Co. v Interborough Rapid Transit Co., 193 N.Y.S. 881, 1921 N.Y. Misc. LEXIS 2006 (N.Y. Sup. Ct. 1921).

Anticipatory breach of bond see Van Wezel v McCord Radiator & Mfg. Co., 20 N.Y.S.2d 91, 1939 N.Y. Misc. LEXIS 2779 (N.Y. City Ct. 1939).

In action on matured note, defense of extension agreement based on valuable consideration was sufficient. Nester v Nester, 19 N.Y.S.2d 426, 1940 N.Y. Misc. LEXIS 1671 (N.Y. Sup. Ct.), rev'd, 259 A.D. 1065, 22 N.Y.S.2d 119, 1940 N.Y. App. Div. LEXIS 7983 (N.Y. App. Div. 1940).

In action on promissory note by bona fide holder for value, defense of note given as purchase price of generator to be installed by payee of note, defense of payee’s default in performance held insufficient. Petroleum Acceptance Corp. v Queen Anne Laundry Service, Inc., 38 N.Y.S.2d 675, 1942 N.Y. Misc. LEXIS 2229 (N.Y. Sup. Ct. 1942), aff'd, 265 A.D. 692, 40 N.Y.S.2d 495, 1943 N.Y. App. Div. LEXIS 6387 (N.Y. App. Div. 1943).

In action on promissory note by holder against maker, defenses that note was incomplete when made and executed and that it had been completed contrary to intent and authority of defendants were invalid against holder in due course. Gramatan Nat'l Bank & Trust Co. v Mikolajczak, 142 N.Y.S.2d 564, 1955 N.Y. Misc. LEXIS 2831 (N.Y. Sup. Ct. 1955).

An answer which alleges that a note was delivered without value, and on promises and considerations which have failed, is a contradiction in terms and not permitted. Herman v Bencke, 8 N.Y. St. 345.

An admission in the answer of every allegation in the complaint except that of ownership does not preclude the defendant proving that the note had no legal inception for want of consideration, there being no allegation of consideration in the complaint. Barry v Lewis, 11 N.Y. St. 307.

256. —Checks, drafts and bills of exchange

Drawee’s defense of negligence of drawer in issuing the check involved, was not good, although drawer’s employee forged the indorsement and converted the proceeds. National Surety Co. v Manhattan Co., 252 N.Y. 247, 169 N.E. 372, 252 N.Y. (N.Y.S.) 247, 1929 N.Y. LEXIS 555 (N.Y. 1929), reh'g denied, 252 N.Y. 616, 170 N.E. 164, 252 N.Y. (N.Y.S.) 616, 1930 N.Y. LEXIS 681 (N.Y. 1930).

In an action by the assignee of a draft, the debtor cannot offset a note of the assignor, which, though made and delivered before the assignment, did not mature until after such assignment. Michigan Sav. Bank v Miller, 110 A.D. 670, 96 N.Y.S. 568, 1906 N.Y. App. Div. LEXIS 45 (N.Y. App. Div.), aff'd, 186 N.Y. 606, 79 N.E. 1111, 186 N.Y. (N.Y.S.) 606, 1906 N.Y. LEXIS 1314 (N.Y. 1906).

It is a good defense to an action brought by the assignee of the payee against the drawer of a bill of exchange to allege that the only consideration upon which the bill was issued was the payment of money by the payee to the drawer, and that with intent to deceive the drawer the payee falsely represented that the money was his own, whereas in reality it belonged to a third person to whom the defendant had paid it upon demand. Strauss v St. Louis County Bank, 126 A.D. 647, 111 N.Y.S. 130, 1908 N.Y. App. Div. LEXIS 3420 (N.Y. App. Div. 1908).

Plaintiff’s deposit of uncertified check accepted by defendant-carrier contrary to plaintiff’s instructions constituted ratification of acceptance of check and a waiver of plaintiff’s rights against defendant for breach of agreement. Freedman & Slater, Inc. v Great Lakes Forwarding Corp., 7 A.D.2d 978, 183 N.Y.S.2d 684, 1959 N.Y. App. Div. LEXIS 9467 (N.Y. App. Div. 1st Dep't 1959).

In an action on a trade acceptance, the complaint in which contains the usual counts upon a negotiable instrument, an answer simply denying that plaintiffs are holders in due course and for value and that there is anything due on the note, raises no issue, is immaterial and a nullity. Kopp v Nichthauser, 193 N.Y.S. 51, 118 Misc. 258, 1922 N.Y. Misc. LEXIS 1056 (N.Y. App. Term 1922).

Where check was drawn by defendant bank upon itself, plaintiff is entitled to treat it as promissory note, and it is subject to defenses of lack or failure of consideration; and as check, it is subject to defense of discharge by reason of loss caused by delay in presentment for payment. In re Pascal's Estate, 3 Misc. 2d 136, 146 N.Y.S.2d 364, 1955 N.Y. Misc. LEXIS 2272 (N.Y. Sup. Ct. 1955).

In action on negotiable check, failure to plead failure or lack of consideration precludes proof thereof under general denial. Ensign v Klekosky, 25 Misc. 2d 536, 208 N.Y.S.2d 490, 1959 N.Y. Misc. LEXIS 2586 (N.Y. Sup. Ct. 1959), aff'd, 12 A.D.2d 680, 210 N.Y.S.2d 501, 1960 N.Y. App. Div. LEXIS 6752 (N.Y. App. Div. 3d Dep't 1960).

In action on negotiable check, failure to plead as defense conditional delivery precludes proof thereof under general denial. Ensign v Klekosky, 25 Misc. 2d 536, 208 N.Y.S.2d 490, 1959 N.Y. Misc. LEXIS 2586 (N.Y. Sup. Ct. 1959), aff'd, 12 A.D.2d 680, 210 N.Y.S.2d 501, 1960 N.Y. App. Div. LEXIS 6752 (N.Y. App. Div. 3d Dep't 1960).

In action on negotiable check, failure to plead compliance with requirement of Real Property Law (§ 442-d) governing actions to recover brokerage precludes proof thereof under general denial. Ensign v Klekosky, 25 Misc. 2d 536, 208 N.Y.S.2d 490, 1959 N.Y. Misc. LEXIS 2586 (N.Y. Sup. Ct. 1959), aff'd, 12 A.D.2d 680, 210 N.Y.S.2d 501, 1960 N.Y. App. Div. LEXIS 6752 (N.Y. App. Div. 3d Dep't 1960).

An answer is not frivolous which alleges that the acceptance of a draft by a corporation was made by its vice president at his private office on his own account as an accommodation solely to the drawer and without any consideration to the corporation. Mather v Union Loan & Trust Co., 7 N.Y.S. 213, 1889 N.Y. Misc. LEXIS 1014 (N.Y. City Ct. 1889).

In action by bank on trade acceptance negotiated against accepting corporation, defense of ultra vires was not valid where corporation’s acceptance was to enable drawer to stay in business and fulfil defendant’s order for merchandise. National State Bank v Metal Products Co., 137 N.Y.S.2d 202, 1954 N.Y. Misc. LEXIS 3612 (N.Y. Sup. Ct. 1954).

257. Bonds and undertakings

It is a good defense that the principal for whose appearance recognizance is made, has enlisted as a soldier and is in actual service at the time of the court. People v Tubbs, 37 N.Y. 586, 37 N.Y. (N.Y.S.) 586, 1868 N.Y. LEXIS 24 (N.Y. 1868).

To an action on an undertaking given by executors, an appeal from judgment against them is such to stay execution, it is no answer that sufficient assets to pay the judgment did not come to the hands of the executors. Yates v Burch, 87 N.Y. 409, 87 N.Y. (N.Y.S.) 409, 1882 N.Y. LEXIS 15 (N.Y. 1882).

In an action on a guardian's bond, the guardian's surety cannot assail the proceedings under which his principal received the moneys he refuses to pay over. The order of the court measures the surety's liability. Dodge v St. John, 96 N.Y. 260, 96 N.Y. (N.Y.S.) 260, 1884 N.Y. LEXIS 489 (N.Y. 1884).

It seems that a defense to an undertaking to a sheriff that it was within the statute prohibiting him to take any bond except as provided by law, is not met by showing that the instrument was taken at the instance of defendants. Haberstro v Bedford, 118 N.Y. 187, 23 N.E. 459, 118 N.Y. (N.Y.S.) 187, 1890 N.Y. LEXIS 957 (N.Y. 1890).

Denials in answer in action on bond held sufficient. Burr v Union Surety & Guaranty Co., 86 A.D. 545, 83 N.Y.S. 756, 1903 N.Y. App. Div. LEXIS 2413 (N.Y. App. Div. 1903).

The complaint in an action against the surety on an appeal bond, providing that if the principal shall pay any judgment recovered against him the obligation shall be void, need not allege that the judgment recovered is unpaid, for payment is a matter of defense. Sweeney v Metropolitan Surety Co., 129 A.D. 22, 113 N.Y.S. 126, 1908 N.Y. App. Div. LEXIS 1235 (N.Y. App. Div. 1908).

An allegation in an answer of a surety company, in an action by the bank to recover for losses sustained during the period of a renewal of the original bond, that the bank warranted the truth

of a statement, is sufficient. Stapleton Nat'l Bank v United States Fidelity & Guaranty Co., 131 A.D. 157, 115 N.Y.S. 372, 1909 N.Y. App. Div. LEXIS 760 (N.Y. App. Div. 1909).

In action by claimants under bond issued by defendant indemnity company for benefit of claimants supplying material or labor under construction contract, provision in bond requiring action thereon to be commenced in county where project is situated affects remedy and is not defense to action commenced in another county. Graziano v Indemnity Ins. Co., 286 A.D. 867, 142 N.Y.S.2d 44, 1955 N.Y. App. Div. LEXIS 4387 (N.Y. App. Div. 1955), aff'd, 1 N.Y.2d 817, 153 N.Y.S.2d 74, 135 N.E.2d 604, 1956 N.Y. LEXIS 857 (N.Y. 1956).

Where a surety, for the performance by the owner of premises of a contract to alter them, alleges that he is discharged from liability to the contractor by virtue of variations from the contract, which occurred during its performance, and by a failure to complete the contract within the time fixed by it, he must plead the defenses in order to make them available, as they constitute new matter and relate to things which happened, if at all, after he had become liable as surety. Kunzweiler v Lehman, 70 N.Y.S. 290, 34 Misc. 466, 1901 N.Y. Misc. LEXIS 971 (N.Y. Sup. Ct. 1901).

It is no answer to an action upon an undertaking given in procuring an attachment which was vacated, that at the time of the assignment of the claim to plaintiff the assignor was insolvent, that the assignment was in fraud of creditors, that the order was appealed from, that the appeal is undetermined; that upon service of the attachment the goods were attached by a third party whose claim was admitted by plaintiff. Feiber v Smith, 6 N.Y.S. 446, 53 Hun 635, 1889 N.Y. Misc. LEXIS 627 (N.Y. Sup. Ct. 1889).

Goods having been replevied in an action therefor against the assignors and assignee in a general assignment for the benefit of creditors, they to procure the return of the goods to them gave the requisite undertaking for the delivery of the property to the plaintiff in replevin. In an action upon the undertaking against the sureties therein, they are not entitled to show that the property when replevied was in the sole possession of the assignee, and that they executed the

undertaking only in his behalf and to procure a return of the property to him. Auerbach v Marks (N.Y.C.P. Apr. 4, 1881).

258. Brokers

In broker's action for commissions "when and if consummated," issue that title did not close because vendor refused to discharge liens barred summary judgment for defendant. Stern v Gepo Realty Corp., 289 N.Y. 274, 45 N.E.2d 440, 289 N.Y. (N.Y.S.) 274, 1942 N.Y. LEXIS 941 (N.Y. 1942).

In action for broker's commissions for selling realty, specifying no time for performance, defense of agreement to perform within specific time was sufficient. Finnerty v Frenchman, 283 A.D. 970, 130 N.Y.S.2d 601, 1954 N.Y. App. Div. LEXIS 5950 (N.Y. App. Div. 1954).

It is not a defense to an action by a broker for commissions for effecting an exchange of real estate that he received commissions from both sides. Marks v O'Donnell, 121 N.Y.S. 214, 66 Misc. 147, 1910 N.Y. Misc. LEXIS 62 (N.Y. App. Term 1910).

In wife's action to recover percentage of commissions of realty salesman assigned to cover alimony payments, employer's defense that he discharged salesman in November 1938 and reemployed him in June 1940 and that plaintiff served notice of assignment in April 1940, summary judgment for defendant. Denny v Brown, Wheelock, Harris, Stevens, Inc., 30 N.Y.S.2d 45, 177 Misc. 236, 1941 N.Y. Misc. LEXIS 2217 (N.Y. Sup. Ct. 1941), rev'd, 263 A.D. 943, 33 N.Y.S.2d 816, 1942 N.Y. App. Div. LEXIS 7497 (N.Y. App. Div. 1942).

In action for commissions in selling realty, defendant was to be paid only if purchaser took title and paid price was a sufficient defense, where purchase price had not been made although judgment for specific performance had been obtained. Handel v Dumbra, 29 N.Y.S.2d 347, 1941 N.Y. Misc. LEXIS 2070 (N.Y. App. Term 1941).

259. Carriers

A provision in bill of lading requiring notice of loss or damage within a fixed time after the delivery of property by the carrier must be pleaded as a defense. Hoye v Pennsylvania R. Co., 191 N.Y. 101, 83 N.E. 586, 191 N.Y. (N.Y.S.) 101, 1908 N.Y. LEXIS 1041 (N.Y. 1908).

It is not a partial defense to allege the statute of a foreign state limiting the liability of a carrier to a certain sum unless the person offering the baggage pay by way of insurance for an additional amount of responsibility, when such statute does not limit liability for negligence and there is no allegation that the defendant was not negligent. Martin v Central R. Co., 121 A.D. 552, 106 N.Y.S. 226, 200, 1907 N.Y. App. Div. LEXIS 1835 (N.Y. App. Div. 1907).

In an action for breach of a contract by a common carrier to transport goods a defense is not available that plaintiff failed to present his claim in writing within thirty days unless the same is pleaded and is not available on appeal if not embodied in the motion for a nonsuit. Richardson v New York C. & H. R. R. Co., 122 A.D. 120, 106 N.Y.S. 702, 1907 N.Y. App. Div. LEXIS 2390 (N.Y. App. Div. 1907), reh'g denied, 123 A.D. 916, 108 N.Y.S. 1146, 1908 N.Y. App. Div. LEXIS 279 (N.Y. App. Div. 1908).

A pleading did not meet the requirements of CPA § 261 subd. 2 (§ 3011 herein) which required a clear, precise and unequivocal statement of any new matter constituting a defense or counterclaim, which merely had annexed and referred to in the answer a bill of lading that the goods were consigned to the order of a person but there was no allegation that the consignees had indorsed the bill of lading to another person and that he was entitled to receive the goods. Ullmann v Southern R. Co., 93 N.Y.S. 480, 47 Misc. 107, 1905 N.Y. Misc. LEXIS 181 (N.Y. App. Term 1905).

260. Civil Damage Act

A license to sell is admissible in mitigation of damages but is no bar under this act. Quain v Russell, 12 Hun 376 (N.Y.).

261. Charities

In action for negligent death against hospital, defense that hospital was charitable membership corporation and that deceased was beneficiary of its undertaking and that plaintiff cannot maintain action, held insufficient. Goldman v Winkelstein, 263 A.D. 958, 32 N.Y.S.2d 949, 1942 N.Y. App. Div. LEXIS 7605 (N.Y. App. Div. 1942).

In student's action against university for personal injuries from defective equipment, defense that defendant was charitable institution was insufficient. Weltman v New York University, 264 A.D. 907, 35 N.Y.S.2d 892, 1942 N.Y. App. Div. LEXIS 5324 (N.Y. App. Div. 1942).

In student's action against university for personal injuries from defective equipment, defense that defendant had furnished equipment in good condition and that any negligence was that of professor in charge of instruction held insufficient. Weltman v New York University, 264 A.D. 907, 35 N.Y.S.2d 892, 1942 N.Y. App. Div. LEXIS 5324 (N.Y. App. Div. 1942).

262. Chattel mortgages

In action by assignee of chattel mortgagee to replevin airplane defense by defendant purchaser at execution sale that such airplane was used exclusively in intrastate commerce and that chattel mortgage was not filed in office of clerk of town where plane was located, was a sufficient defense. Aviation Credit Corp. v Gardner, 22 N.Y.S.2d 37, 174 Misc. 798, 1940 N.Y. Misc. LEXIS 2062 (N.Y. Sup. Ct. 1940).

263. Contracts generally

A defendant cannot give evidence in excuse of nonperformance after he has set up performance. Oakley v Morton, 11 N.Y. 25, 11 N.Y. (N.Y.S.) 25, 1854 N.Y. LEXIS 45 (N.Y. 1854).

where the answer admitted that plaintiff performed the work and furnished the materials for him as alleged in the complaint, but denied that they were of the value specified, he cannot show

that the work was not done nor the materials furnished. Van Dyke v Maguire, 57 N.Y. 429, 57 N.Y. (N.Y.S.) 429, 1874 N.Y. LEXIS 302 (N.Y. 1874).

Only the specified breaches of the conditions of the agreement sued on can be proved. Reed v Hayt, 109 N.Y. 659, 17 N.E. 418, 109 N.Y. (N.Y.S.) 659, 17 N.Y. St. 137, 1888 N.Y. LEXIS 826 (N.Y. 1888).

In an action to recover on contract, a defense that it was in violation of terms of contract plaintiff had entered into with others and in fraud of their rights and of another, is sufficient in law. Reiner v North American Newspaper Alliance, 259 N.Y. 250, 181 N.E. 561, 259 N.Y. (N.Y.S.) 250, 1932 N.Y. LEXIS 934 (N.Y. 1932).

When, in an action for the breach of a contract, the answer, as a counterclaim, alleges a breach of the contract by the plaintiff's assignor after said contract was modified in particulars set forth, a reply which alleges that the defendant "has at all times had knowledge of the manner" in which the plaintiff's assignor carried out the provisions of the contract, "and fully assented to the carrying out of the same" in that manner, does not state a defense to the counterclaim. Pope Mfg. Co. v Rubber Goods Mfg. Co., 110 A.D. 341, 97 N.Y.S. 73, 1905 N.Y. App. Div. LEXIS 3916 (N.Y. App. Div. 1905).

When a plaintiff sues a former copartner to restrain him from using the firm name, and bases his complaint on a breach by defendant of a contract made on dissolution, it is a good defense to allege that the contract was executed by the defendant's attorney in fact contrary to express instructions which were known to the plaintiff. When the plaintiff sues on a contract the defendant may plead that the contract was never executed and is not binding upon him. Bastable v Carroll, 116 A.D. 205, 101 N.Y.S. 637, 1906 N.Y. App. Div. LEXIS 2637 (N.Y. App. Div. 1906).

Where an answer in an action for damages, inducing employees of plaintiff to break their alleged contracts of employment, sets up a separate defense as to one of such employees, and pleads

the same as a complete, and not a partial defense, it is insufficient. De Jong v B. G. Behrman Co., 148 A.D. 37, 131 N.Y.S. 1083, 1911 N.Y. App. Div. LEXIS 134 (N.Y. App. Div. 1911).

Defense, that intent was lacking, should set forth sufficient allegations of material facts tending to support alleged lack of any intent by parties to enter into contract. Newman v Perlman, 274 A.D. 641, 86 N.Y.S.2d 567, 1949 N.Y. App. Div. LEXIS 5858 (N.Y. App. Div. 1949).

In action for breach of employment, where defense stated no facts showing plaintiff's fitness to perform his duties, defense was insufficient. Miller v Burlington Mills Ribbon Corp., 276 A.D. 1087, 95 N.Y.S.2d 821, 1950 N.Y. App. Div. LEXIS 5884 (N.Y. App. Div. 1950).

In action for money received, where plaintiff alleges that it has made payment pursuant to contract, apparently voluntarily, without alleging that payment was induced by fraud, coercion or mistake of either law or fact, and where defendant alleges in answer that plaintiff has received exactly what it contracted for, judgment on pleadings against defendant was improper. Rothrock Syosset, Inc. v Kreutzer, 2 A.D.2d 777, 154 N.Y.S.2d 816, 1956 N.Y. App. Div. LEXIS 4583 (N.Y. App. Div. 2d Dep't), app. denied, 2 A.D.2d 814, 154 N.Y.S.2d 847, 1956 N.Y. App. Div. LEXIS 4493 (N.Y. App. Div. 2d Dep't 1956).

Where, in an action for breach of contract, the pleadings are oral and the answer is a general denial, a refusal to dismiss the complaint for failure to prove plaintiff's capacity to sue is not error. Independent Trembowler Young Men's Benevolent Ass'n v Somach, 102 N.Y.S. 495, 52 Misc. 538, 1907 N.Y. Misc. LEXIS 76 (N.Y. App. Term 1907).

In action by owner against contractor and subcontractor for breach of contract to erect factory, defense that building contract excluded any contractual relation between owner and subcontractor constituted a sufficient defense for subcontractor. Majestic Mfg. Corp. v L. Riso & Sons Bldg. Co., 27 N.Y.S.2d 845, 1940 N.Y. Misc. LEXIS 2627 (N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 1099, 27 N.Y.S.2d 846, 1941 N.Y. App. Div. LEXIS 8961 (N.Y. App. Div. 1941).

In an action for declaratory judgment, counterclaim to enforce contract, alleging that third party must approve such renewal, was insufficient for failure to allege such approval. Williams v McCarthy, 70 N.Y.S.2d 67, 1947 N.Y. Misc. LEXIS 2344 (N.Y. Sup. Ct. 1947).

In action for breach of contract, answer alleging honest mistake in computing cost of labor was sufficient. Union Free School Dist. v Gumbs, 133 N.Y.S.2d 499, 1954 N.Y. Misc. LEXIS 2241 (N.Y. Sup. Ct. 1954).

Under an answer in indebitatus assumpsit for work done but denying value, the defendant may prove nonperformance. Farley v Browning, 1 How. Pr. (n.s.) 307 (N.Y.C.P. Mar. 13, 1885).

264. Conversion

In conversion, delivery to one apparently authorized to receive. Ontario Bank v New Jersey S.B. Co., 59 N.Y. 510, 59 N.Y. (N.Y.S.) 510, 1875 N.Y. LEXIS 290 (N.Y. 1875).

In an action for the conversion of bonds where the answer set up an authority to sell them, it was held that evidence that the plaintiff did not own the claim in suit was not admissible in the absence of an averment of title in a third person with which defendant connected himself, or that plaintiff was not the real party in interest. Smith v Hall, 67 N.Y. 48, 67 N.Y. (N.Y.S.) 48, 1876 N.Y. LEXIS 344 (N.Y. 1876).

In answering a complaint that defendants had frauduently converted assets of their corporation to the detriment of creditors, the defense that they acted in good faith adds nothing to the general denial and such defense should be stricken out. Small v Sullivan, 245 N.Y. 343, 157 N.E. 261, 245 N.Y. (N.Y.S.) 343, 1927 N.Y. LEXIS 633 (N.Y.), reh'g denied, 245 N.Y. 621, 157 N.E. 883, 245 N.Y. (N.Y.S.) 621, 1927 N.Y. LEXIS 799 (N.Y. 1927).

In an action in conversion for detention of an automobile, defendant is entitled to plead and prove as a defense that title thereto is in a third party. Kaufman v Simons Motor Sales Co., 261 N.Y. 146, 184 N.E. 739, 261 N.Y. (N.Y.S.) 146, 1933 N.Y. LEXIS 1268 (N.Y. 1933).

In action by a corporation against its general manager, wherein the complaint alleged that the proceeds of a sale of cattle were deposited by the defendant in a bank to plaintiff's credit, but part of the money was subsequently withdrawn by defendant and converted to his own use, held that valid claims of the defendant for past due salary, for money loaned to plaintiff, and for board and lodging of farm laborers furnished at plaintiff's request, were proper as defenses and counterclaims under this section and subd 1 of § 266, infra. McNell-Randolph Holstein Farms v McNell, 209 A.D. 177, 204 N.Y.S. 597, 1924 N.Y. App. Div. LEXIS 8579 (N.Y. App. Div. 1924).

In action against a bailee for conversion, defenses setting up special contract limiting the value of goods, were insufficient, since defendant could not take advantage of his own wrong. Glinsky v Dunham & Reid, Inc., 230 A.D. 470, 245 N.Y.S. 359, 1930 N.Y. App. Div. LEXIS 8643 (N.Y. App. Div. 1930).

In action for conversion of personalty mortgaged to plaintiff, defense that mortgage was not renewed after commencement of bankruptcy proceedings was insufficient, as being unnecessary. Weissglass Gold Seal Dairy Corp. v First Nat'l Bank, 263 A.D. 744, 31 N.Y.S.2d 58, 1941 N.Y. App. Div. LEXIS 4798 (N.Y. App. Div. 1941).

Plea of limited liability is unavailable to defendants in action for conversion. Thomas v Murphy, 285 A.D. 1135, 141 N.Y.S.2d 925, 1955 N.Y. App. Div. LEXIS 6891 (N.Y. App. Div. 1955).

For partial defense of statute of limitations on note in action for conversion of note, see Thompson v Halbert, 40 Hun 536, 2 N.Y. St. 116 (N.Y.), rev'd, 109 N.Y. 329, 16 N.E. 675, 109 N.Y. (N.Y.S.) 329, 15 N.Y. St. 513, 1888 N.Y. LEXIS 733 (N.Y. 1888).

265. Corporation matters

In an action for the purchase price, under a contract whereby defendant agreed to purchase all the stocks and assets of a corporation owning railroad franchises, an allegation in the answer that the franchises agreed to be sold "were invalid and worthless," and, an allegation that they were fictitious, invalid and illegal, were conclusions of fact and sufficient to permit submission of

evidence. Eppley v Kennedy, 198 N.Y. 348, 91 N.E. 797, 198 N.Y. (N.Y.S.) 348, 1910 N.Y. LEXIS 806 (N.Y. 1910).

Where the answer of a corporation sued for breach of contract of employment admits that the resolution employing the plaintiff was “duly adopted,” it cannot contend that the contract was invalid upon the ground that the vote of the plaintiff, a director, was necessary to its adoption. Maune v Unity Press, 143 A.D. 94, 127 N.Y.S. 1002, 1911 N.Y. App. Div. LEXIS 765 (N.Y. App. Div. 1911).

In order to join issue with an allegation of the complaint that the plaintiff is a domestic corporation the defendant must affirmatively plead that it is not a corporation, in view of former RCP 93, subd. 2. Commercial Exch. Bank v Woodward, 198 A.D. 769, 191 N.Y.S. 51, 1921 N.Y. App. Div. LEXIS 8176 (N.Y. App. Div. 1921).

In an action against a corporation for the breach of its contract, the mere fact that the plaintiff, with whom the contract is alleged to have been made, was at the time one of the defendant’s directors is not a defense; an allegation “that therefore the said contract was illegal and cannot be enforced by the plaintiff” is a conclusion of law and not a statement of fact. Vonnoh v Sixty-Seventh Street Atelier Bldg., 105 N.Y.S. 155, 55 Misc. 222, 1907 N.Y. Misc. LEXIS 575 (N.Y. App. Term 1907).

In action against foreign corporation doing business in state without license, seeking recovery of tax and penalties, defendant, not having exhausted remedy before tax commission was precluded from urging, in defense, matters within the jurisdiction of commission and reviewable on certiorari. People v Afia Finance Corp., 245 N.Y.S. 267, 138 Misc. 32, 1930 N.Y. Misc. LEXIS 1588 (N.Y. Sup. Ct. 1930).

266. —Ultra vires

One who has borrowed money of a foreign corporation, cannot set up that it was precluded by its charter from making such loan. So one who has subscribed to the stock of a de facto

corporation cannot answer to a suit on his subscription that the articles of incorporation are defective. Cayuga L. R. Co. v Kyle, 64 N.Y. 185, 64 N.Y. (N.Y.S.) 185, 1876 N.Y. LEXIS 51 (N.Y. 1876).

Those who have contracted with a corporation de facto cannot deny its legal existence. Rider Life Raft Co. v Roach, 97 N.Y. 378, 97 N.Y. (N.Y.S.) 378, 1884 N.Y. LEXIS 184 (N.Y. 1884).

The defense of ultra vires is an affirmative defense and is not available unless pleaded. Keating v American Brewing Co., 62 A.D. 501, 71 N.Y.S. 95, 1901 N.Y. App. Div. LEXIS 1282 (N.Y. App. Div. 1901).

Where corporation's ultra vires contract had been executed by both parties, invalidity was no defense to action on it. Quintal v Fidelity & Deposit Co., 255 N.Y.S. 259, 142 Misc. 657, 1932 N.Y. Misc. LEXIS 1347 (N.Y. Sup. Ct. 1932), aff'd, 238 A.D. 820, 262 N.Y.S. 924, 1933 N.Y. App. Div. LEXIS 10119 (N.Y. App. Div. 1933).

In action by membership corporation against member for fine for violating schedule of minimum fixed prices, defense that such schedule was prohibited by Business L. § 340 was sufficient. Pleaters, Stitchers & Embroiderers Ass'n v Jaffe Pleating Co., 27 N.Y.S.2d 615, 176 Misc. 411, 1941 N.Y. Misc. LEXIS 1777 (N.Y. Mun. Ct. 1941).

In action by membership corporation for $5 annual dues and $95 "assessment," member's defense that such assessment was unauthorized and ultra vires held not to bar summary judgment for plaintiff. Rainbow Falls Fish & Game Club, Inc. v Clute, 29 N.Y.S.2d 948, 177 Misc. 71, 1941 N.Y. Misc. LEXIS 2188 (N.Y. Sup. Ct. 1941).

267. —Stocks and stockholders

To an action on a subscription by a receiver, abandonment of business by the corporation is no defense, when it owes more than the claims. Phoenix Warehousing Co. v Badger, 67 N.Y. 294, 67 N.Y. (N.Y.S.) 294, 1876 N.Y. LEXIS 388 (N.Y. 1876).

A defendant sued on his statutory liability as a stockholder in a corporation whose capital has not been paid, has no defense in an alleged indebtedness of the corporation to him. Wheeler v Millar, 90 N.Y. 353, 90 N.Y. (N.Y.S.) 353, 1882 N.Y. LEXIS 390 (N.Y. 1882).

A complaint in an action to recover unpaid assessments is not bad for failing to allege that all the stock has been subscribed for; a defense that the subscriptions had not been completed, if available to a subscriber, must be taken by answer. Myers v Sturges, 123 A.D. 470, 108 N.Y.S. 528, 1908 N.Y. App. Div. LEXIS 88 (N.Y. App. Div. 1908), aff'd, 197 N.Y. 526, 90 N.E. 1162, 197 N.Y. (N.Y.S.) 526, 1909 N.Y. LEXIS 784 (N.Y. 1909).

Failure to plead damages because of laches is ground for striking out defense to an action to recover stock subscription. Houston v Coombs, 224 A.D. 396, 231 N.Y.S. 176, 1928 N.Y. App. Div. LEXIS 10019 (N.Y. App. Div. 1928).

In a suit to recover subscription for stock, defense that the corporations assigning the cause of action were not authorized to do business in the state was insufficient. Houston v Coombs, 224 A.D. 396, 231 N.Y.S. 176, 1928 N.Y. App. Div. LEXIS 10019 (N.Y. App. Div. 1928).

Acts of mismanagement or other wrongful acts of syndicate managers constitute no defense to action to recover subscription for stock. Houston v Coombs, 224 A.D. 396, 231 N.Y.S. 176, 1928 N.Y. App. Div. LEXIS 10019 (N.Y. App. Div. 1928).

In action on contract of sale of corporate stock in form of offer and acceptance, answers raised issues of fact, necessitating trial. Sanborn v Amron, 225 A.D. 616, 234 N.Y.S. 129, 1929 N.Y. App. Div. LEXIS 11713 (N.Y. App. Div. 1929).

In stockholder’s representative action for accounting, defense of ratification was sufficient. Goldberg v Berry, 231 A.D. 165, 247 N.Y.S. 69, 1930 N.Y. App. Div. LEXIS 7029 (N.Y. App. Div. 1930).

In action by executor to compel corporation to transfer shares of stock allegedly sold to executor’s law partners, defense challenging validity of sale as not made for “value received”

held sufficient. Harris v General Motors Corp., 263 A.D. 261, 32 N.Y.S.2d 556, 1942 N.Y. App. Div. LEXIS 6860 (N.Y. App. Div.), aff'd, 288 N.Y. 691, 43 N.E.2d 84, 288 N.Y. (N.Y.S.) 691, 1942 N.Y. LEXIS 1533 (N.Y. 1942).

In action in equity for partition of stock certificate owned by plaintiffs and defendant in common, defendant's defense that action has been instituted in pursuit of deliberate plan to ruin corporate business, to deprive defendant of his career and to prevent perpetuation of family name, all of which gift of stock had been intended to secure, was insufficient. Mann v Schuman, 1 A.D.2d 678, 146 N.Y.S.2d 716, 1955 N.Y. App. Div. LEXIS 3914 (N.Y. App. Div. 2d Dep't 1955).

In stockholder's derivative action, defense was insufficient where it attacked the motives of the plaintiff with verbose recitations of personal differences with reference to other litigations, charging perjury and fraud in unrelated matters not directly concerned with the merits of the current action. Manacher v Central Coal Co., 5 A.D.2d 820, 170 N.Y.S.2d 663, 1958 N.Y. App. Div. LEXIS 6915 (N.Y. App. Div. 1st Dep't 1958).

In an action to rescind subscription contracts to capital stock of defendant corporation on ground of fraud perpetrated by the individual defendants, motion to strike out certain defenses and dismiss counterclaim was granted to the extent of striking one defense. Levan v American Safety Table Co., 227 N.Y.S. 412, 131 Misc. 779, 1928 N.Y. Misc. LEXIS 737 (N.Y. Sup. Ct. 1928).

In action for balance due from joint venture in purchase of stock, affirmative defense that plaintiff violated rules of stock exchange in such purchase held insufficient. Lipkin v Lester, 29 N.Y.S.2d 966, 1941 N.Y. Misc. LEXIS 2190 (N.Y. Sup. Ct.), aff'd, 263 A.D. 799, 32 N.Y.S.2d 126, 1941 N.Y. App. Div. LEXIS 5004 (N.Y. App. Div. 1941).

A stockholder sued by a creditor, on his liability for his stock subscription, may defend that he is himself a creditor. Richards v Kinsley, 12 N.Y. St. 125, 14 N.Y. St. 701 (N.Y.C.P. Dec. 5, 1887).

It is a defense to an action against a stockholder for the liability imposed by Laws 1875, ch. 644, § 7, that she had paid her full liability to another creditor. Richards v Brice, 3 N.Y.S. 941, 1889 N.Y. Misc. LEXIS 151 (N.Y.C.P. 1889).

In suit for damages for refusal of a corporation to convert preferred into common stock, any act of plaintiff waiving right of action, releasing defendant, or ceasing to be a party in interest should have been pleaded as an affirmative defense. Marony v Wheeling & L. E. R. Co., 33 F.2d 916, 1929 U.S. Dist. LEXIS 1359 (D.N.Y. 1929).

In suit for damages for refusal of a corporation to convert preferred into common stock, answer that defendant had not been authorized to make the exchange by the interstate commerce commission, was insufficient. Marony v Wheeling & L. E. R. Co., 33 F.2d 916, 1929 U.S. Dist. LEXIS 1359 (D.N.Y. 1929).

268. —Actions against corporate officers

Trustees sued for the debt of the corporation cannot avail themselves of a defense thereto not personal to themselves and which would not be available in favor of the corporation. Whitney Arms Co. v Barlow, 63 N.Y. 62, 63 N.Y. (N.Y.S.) 62, 1875 N.Y. LEXIS 11 (N.Y. 1875).

Trustees sued to enforce their liability for a failure to file an annual report, pleading the statute of limitations stating their failure to make reports prior to the one sued for, must allege that they constituted a majority of the trustees at the time. Cornell v Roach, 101 N.Y. 373, 5 N.E. 52, 101 N.Y. (N.Y.S.) 373, 1886 N.Y. LEXIS 642 (N.Y. 1886).

In action by corporation’s trustee in bankruptcy against directors to recover a dividend declared out of capital, defenses that there remained sufficient assets to satisfy the creditors and that loss, if any, was due to plaintiff’s mismanagement of the corporate affairs, were insufficient. Irving Trust Co. v Gunder, 234 A.D. 252, 254 N.Y.S. 630, 1932 N.Y. App. Div. LEXIS 10403 (N.Y. App. Div. 1932).

In action on corporate officers' agreement to repurchase stock, defense that liability was corporate, not individual, insufficient. Strasburger v Rosenheim, 234 A.D. 544, 255 N.Y.S. 316, 1932 N.Y. App. Div. LEXIS 10484 (N.Y. App. Div. 1932).

Former president of dissolved corporation, sued for goods ordered after its dissolution for its account, cannot defend by showing that corporation was reinstated thereafter. Poritzky v Wachtel, 27 N.Y.S.2d 316, 176 Misc. 633, 1941 N.Y. Misc. LEXIS 1737 (N.Y. Sup. Ct. 1941).

In action against directors for declaring illegal dividends, defense that directors declared dividends in good faith, after determining that there was surplus, and primarily because RFC so advised as prerequisite to loan, was insufficient. Cowin v Jonas, 43 N.Y.S.2d 468, 1943 N.Y. Misc. LEXIS 2249 (N.Y. Sup. Ct. 1943), aff'd, 267 A.D. 947, 48 N.Y.S.2d 460, 1944 N.Y. App. Div. LEXIS 5647 (N.Y. App. Div. 1944).

The indebtedness of the company to a trustee was no defense to an action founded upon the liability for debts of the company for failure to file an annual report under Laws 1848, ch. 40, § 12. Morey v Ford, 32 Hun 446 (N.Y.).

That a director and stockholder of a corporation, under the limited liability act of 1875, is a creditor of the company is a defense to an action to charge him with a debt of the corporation on account of an unpaid subscription, but not on the ground of his having signed a false annual report. Richards v Kinsley, 12 N.Y. St. 125, 14 N.Y. St. 701 (N.Y.C.P. Dec. 5, 1887).

269. Creditor's action

In action to set aside conveyance as fraudulent, defense that confession of judgment given to plaintiff creditor was invalid was not available to transferee, as it was not available to judgment debtor. Leahy v Lachterman, 265 A.D. 995, 39 N.Y.S.2d 353, 1943 N.Y. App. Div. LEXIS 6500 (N.Y. App. Div.), reh'g denied, 265 A.D. 1041, 39 N.Y.S.2d 1005, 1943 N.Y. App. Div. LEXIS 6775 (N.Y. App. Div. 1943).

It is not a defense to an action brought by a judgment creditor to reach property of the debtor, that the judgment was obtained by perjury, as the judgment involves the determination of the truth of the testimony. Gitler v Russian Co., 106 N.Y.S. 886, 55 Misc. 553, 1907 N.Y. Misc. LEXIS 664 (N.Y. Sup. Ct. 1907), modified, 124 A.D. 273, 108 N.Y.S. 793, 1908 N.Y. App. Div. LEXIS 2082 (N.Y. App. Div. 1908).

270. Dangerous animals

It is not an affirmative defense to a complaint against the defendant for knowingly keeping a vicious dog which, when at large, bit the plaintiff, for the defendant to answer that the plaintiff was a trespasser upon the defendant's premises at the time when the plaintiff was bitten; denials of allegations of the complaint being no part of a defense, it cannot be held bad for not containing denials. Leonorovitz v Ott, 82 N.Y.S. 880, 40 Misc. 551, 1903 N.Y. Misc. LEXIS 218 (N.Y. Sup. Ct. 1903).

271. Death action

In action for death in automobile accident in New Jersey, brought by administratrix appointed by New York court, defense that only proper plaintiff was administratrix ad prosequendum appointed by New Jersey court was insufficient. O'Brien v Thellusson, 39 N.Y.S.2d 849, 180 Misc. 189, 1943 N.Y. Misc. LEXIS 1584 (N.Y. Sup. Ct. 1943).

In action for death of window cleaner, complaint alleged violation of Labor L § 202 and of rules of State Board of Standards and Appeals; defense of contributory negligence in answer was proper. Meierdiercks v Blauner, 42 N.Y.S.2d 590, 181 Misc. 152, 1943 N.Y. Misc. LEXIS 2039 (N.Y. Sup. Ct. 1943).

In wrongful death action, defendant city cannot interpose pension payments which it is legally required to pay as defense to bar the action, neither can it plead either the amount of pension contribution made by decedent himself to pension fund or pension payments to decedent's

mother in mitigation of damages. Lehr v New York, 30 Misc. 2d 953, 219 N.Y.S.2d 308, 1961 N.Y. Misc. LEXIS 2506 (N.Y. Sup. Ct. 1961), aff'd, 16 A.D.2d 702, 227 N.Y.S.2d 705, 1962 N.Y. App. Div. LEXIS 10088 (N.Y. App. Div. 2d Dep't 1962).

272. Debt

An order in supplementary proceedings made after the filing of the petition in bankruptcy is no defense to an action by the assignee in bankruptcy. Morris v First Nat'l Bank, 68 N.Y. 362, 68 N.Y. (N.Y.S.) 362, 1877 N.Y. LEXIS 729 (N.Y. 1877).

In an action on a debt, it is no defense that defendant paid the amount thereof to a sheriff in Connecticut under a judgment garnisheeing the debt in an action in that state against this plaintiff where it appears that the courts of Connecticut have held that a statute similar to the one under which the debt in question was garnisheed applied only to debts due from residents of Connecticut, and not to debts owed by nonresidents. Drake v De Silva, 124 A.D. 95, 108 N.Y.S. 1039, 1908 N.Y. App. Div. LEXIS 2043 (N.Y. App. Div. 1908).

273. Duress action

Sufficiency of defenses to an action seeking to set aside a settlement of a previous action on the ground of duress. Trenkman v Smith, 226 A.D. 774, 235 N.Y.S. 43, 1929 N.Y. App. Div. LEXIS 9907 (N.Y. App. Div. 1929).

274. Ejectment

In an action of ejectment, the defense that the conveyance to plaintiff was champertous under § 225 of the Real Property Law, providing that a grant of land is void if, at the time of the delivery thereof, the property is in the actual possession of one claiming under a title adverse to that of the grantor is unavailable to one who makes no claim of title, but is simply in possession, without

claiming right thereto. Belcher v Belcher, 134 A.D. 726, 119 N.Y.S. 144, 1909 N.Y. App. Div. LEXIS 2964 (N.Y. App. Div. 1909).

In ejectment action, defense that conveyance to plaintiff was fraudulent was insufficient where defendant failed to establish that grantor was insolvent at time of conveyance, or was rendered insolvent thereby, and that defendant was a creditor at time of conveyance. Eccles v Hutchinson, 28 Misc. 2d 412, 213 N.Y.S.2d 122, 1961 N.Y. Misc. LEXIS 3319 (N.Y. Sup. Ct. 1961).

In an action to recover possession of real property a simple denial of plaintiff's title is the proper mode of raising an issue thereto, and it is neither necessary nor proper to set out in addition that the plaintiff's title was acquired by tax sale, and that such sale was void. Terrell v Wheeler, 12 N.Y. St. 597.

275. Electricity

When a plaintiff sues to recover sums paid to a defendant electric lighting company under a contract which unjustly discriminated against the plaintiff by requiring higher rates than those given to other customers, it is no defense to allege that such payments were made under a specific contract, and that prior to the action the plaintiff settled and adjusted all accounts with the defendant and paid the same in full. Armour & Co. v Edison Electric Illuminating Co., 115 A.D. 57, 100 N.Y.S. 609, 1906 N.Y. App. Div. LEXIS 3616 (N.Y. App. Div. 1906).

276. Executors and administrators

An undertaking on appeal given by executors is an admission of assets, and in an action thereon the defendants cannot answer that the judgment could not have been collected. Yates v Burch, 87 N.Y. 409, 87 N.Y. (N.Y.S.) 409, 1882 N.Y. LEXIS 15 (N.Y. 1882).

The validity of letters of administration cannot be questioned collaterally. Martin v Dry Dock, E. B. & B. R. Co., 92 N.Y. 70, 92 N.Y. (N.Y.S.) 70, 1883 N.Y. LEXIS 118 (N.Y. 1883).

That an executor in his individual capacity acted in collusion with defendant in despoiling the estate is no answer to his action to recover assets of the estate in defendant's hands or for the conversion thereof. Wetmore v Porter, 92 N.Y. 76, 92 N.Y. (N.Y.S.) 76, 1883 N.Y. LEXIS 119 (N.Y. 1883).

In an administrator's action for goods sold by the intestate to defendant the answer alleged that defendant was not indebted to the intestate, as alleged, by reason of the facts set up in a separate defense to the effect that defendant had sold certain goods to the intestate, for which no payment had been made, and that there was pending an action by defendant to set aside a certain conveyance by the intestate as in fraud of his creditors. It was held that such answer, demanding that the plaintiffs' claim be offset against the amount found due in the defendant's action, pending determination of which plaintiffs' action should be stayed, was not a sufficient answer, in view of CPA §§ 260 (§ 3011 herein) and 261, because stating neither a defense nor a counterclaim. Lewis v Wheeler, 201 A.D. 165, 194 N.Y.S. 735, 1922 N.Y. App. Div. LEXIS 6277 (N.Y. App. Div. 1922).

That the executor who sues is a foreigner is no defense to the claim, but a mere personal disability. Carpenter v Butler, 29 Hun 251 (N.Y.).

277. False arrest and imprisonment

In action for false arrest and imprisonment on charge of being common gambler defense that arresting officer had found policy slips in desk, wastebasket, and in pocket of jacket used by plaintiff was sufficient as defense of justification since possession could be inferred from plaintiff's control of desk, wastebasket, and jacket, and from his control it could be inferred that the offense was committed in officer's presence justifying arrest without warrant. Millea v New York, 25 Misc. 2d 369, 204 N.Y.S.2d 260, 1960 N.Y. Misc. LEXIS 3309 (N.Y. Sup. Ct. 1960).

278. Fraud and deceit

In an action for fraud inducing purchase of stock, a defense that plaintiff ratified the transaction with full knowledge of the financial condition of the company was insufficient as alleging merely an election to affirm the purchase. Potts v Lambie, 138 A.D. 144, 122 N.Y.S. 935, 1910 N.Y. App. Div. LEXIS 1482 (N.Y. App. Div. 1910).

In an action for deceit, an answer admitting plaintiff's claim, to defeat the cause by way of confession and avoidance, is insufficient, and should be stricken out. Atlantic Gulf & Pacific Co. v McIntosh & Seymour Corp., 218 A.D. 653, 219 N.Y.S. 112, 1926 N.Y. App. Div. LEXIS 5995 (N.Y. App. Div. 1926).

In action on notes, defense alleging that plaintiff was enabled to sell to defendants shares of stock for which notes were given by a fraud practiced upon stranger with whom defendants had no connection, without alleging that they relied upon alleged misrepresentation or that notes were procured by said fraud, was legally insufficient. Butler v Di Gennaro, 285 A.D. 1008, 139 N.Y.S.2d 85, 1955 N.Y. App. Div. LEXIS 6481 (N.Y. App. Div. 4th Dep't), app. denied, 285 A.D. 1216, 141 N.Y.S.2d 844, 1955 N.Y. App. Div. LEXIS 7195 (N.Y. App. Div. 1955).

Where a woman brought fraud action against estate of married man for fraudulently inducing her to marry him, defense that plaintiff, after learning of the alleged fraud had continued to live with him was stricken as legally insufficient. But defendant was granted leave to plead the same facts as a partial defense in mitigation of damages. Friedman v Libin, 4 Misc. 2d 248, 157 N.Y.S.2d 474, 1956 N.Y. Misc. LEXIS 1383 (N.Y. Sup. Ct. 1956), aff'd, 3 A.D.2d 827, 161 N.Y.S.2d 826, 1957 N.Y. App. Div. LEXIS 5844 (N.Y. App. Div. 1st Dep't 1957).

279. —Fraudulent representations

Where complaint alleged fraudulent representations in connection with entering into contract, diversion of funds and nondelivery of shares of stock, defense that defendant performed contract and delivered shares of stock to plaintiff was no defense, since any issue as to performance of contract does not avoid claim based on fraud. Baraban v Tichenor, 285 A.D. 975, 139 N.Y.S.2d 59, 1955 N.Y. App. Div. LEXIS 6348 (N.Y. App. Div. 1955).

280. Guaranty

In an action on a guaranty to take a loss in case the customers fail to pay, it is a good defense to allege that the plaintiffs had neglected to collect the claims against the debtors and had not exhausted their remedy against them; the complaint was defective as it did not show that the plaintiff had been and will be unable to realize the advances made by them. Nachod v Hindley, 118 A.D. 658, 103 N.Y.S. 801, 1907 N.Y. App. Div. LEXIS 733 (N.Y. App. Div. 1907).

Guaranty of mortgage, see Brener v Title Guarantee & Trust Co., 259 A.D. 734, 19 N.Y.S.2d 649, 1940 N.Y. App. Div. LEXIS 6465 (N.Y. App. Div. 1940).

In action against guarantor on negotiable note secured by trust indenture, defense that plaintiff failed to comply with its provisions defining remedy for default was sufficient. Levine v Lehigh V. R. Co., 19 N.Y.S.2d 440, 1940 N.Y. Misc. LEXIS 1674 (N.Y. App. Term 1940).

In action on absolute guaranty of payment, defense that plaintiff guarantor has not exhausted his remedies against principal obligor held not to be sufficient. Swift & Co. v Novotny, 28 N.Y.S.2d 562, 1941 N.Y. Misc. LEXIS 1922 (N.Y. County Ct. 1941).

In action on parent's alleged guaranty of payment of son's note given for correspondence course, parent's pledge to cooperate in assisting son to maintain regular schedule, in school studies and in correspondence course held not guaranty. Sackman v Venter, 43 N.Y.S.2d 111, 1943 N.Y. Misc. LEXIS 2126 (N.Y. Sup. Ct. 1943).

281. —Indemnity

In action against village which had agreed to indemnify plaintiff for damage caused by construction work, defense that any damage to plaintiff's property was caused by acts of named third person was insufficient. New York Water Service Corp. v Marcellus, 133 N.Y.S.2d 72, 1953 N.Y. Misc. LEXIS 2713 (N.Y. Sup. Ct. 1953).

282. Insurance generally

Service of an answer in an action upon a policy of insurance is good without an order directing trial of the issues raised. New York Life Ins. Co. v Universal Life Ins. Co., 88 N.Y. 424, 88 N.Y. (N.Y.S.) 424, 1882 N.Y. LEXIS 120 (N.Y. 1882).

Where, in an action to recover the amount of insurance policies, the answer alleges that prior to the assignment of the policies to the plaintiff they had been assigned to the defendants, the defendants are entitled to show that their assignment was made as collateral security for a loan which had not been paid; under such allegation the defendants are not required to prove an absolute assignment, but any assignment to them which will defeat plaintiff’s claim. Howe v Hagan, 110 A.D. 392, 97 N.Y.S. 86, 1905 N.Y. App. Div. LEXIS 3927 (N.Y. App. Div. 1905).

In action between insurance companies to recover proportionate share of loss paid by plaintiff, defense which might defeat the cause of action or diminish the amount of recovery was not subject to a motion to strike. Fidelity & Casualty Co. v Employers' Liability Assurance Corp., 229 A.D. 470, 242 N.Y.S. 405, 1930 N.Y. App. Div. LEXIS 10425 (N.Y. App. Div. 1930).

In action on policy insuring excavating shovel against damage during transportation, defense that shovel slid from platform trailer carrying shovel did not constitute “overturning of conveyance” within policy required summary judgment for insurer. Orlando v Manhattan Fire & Marine Ins. Co., 266 A.D. 319, 42 N.Y.S.2d 228, 1943 N.Y. App. Div. LEXIS 3552 (N.Y. App. Div. 1943), reh'g denied, 266 A.D. 955, 44 N.Y.S.2d 676, 1943 N.Y. App. Div. LEXIS 5446 (N.Y. App. Div. 1943), aff'd, 293 N.Y. 907, 60 N.E.2d 34, 293 N.Y. (N.Y.S.) 907, 1944 N.Y. LEXIS 2318 (N.Y. 1944).

In an action to recover on insurance policy, the defense of extinguishment of insurable interest should be pleaded in the answer. Federowicz v Potomac Ins. Co., 7 A.D.2d 330, 183 N.Y.S.2d 115, 1959 N.Y. App. Div. LEXIS 9618 (N.Y. App. Div. 4th Dep't 1959).

Retainer, reading “I agree to pay,” attorneys one-third of all benefits recovered, held not assignment, or war risk insurance but was valid and enforceable agreement. In re Mason's Estate, 20 N.Y.S.2d 501, 174 Misc. 218, 1940 N.Y. Misc. LEXIS 1812 (N.Y. Sur. Ct. 1940).

Defense that insured plaintiff had been paid amount of its claim by insurer in form of “loan” was not insufficient. American News Co. v Helm's New York-Pittsburgh Motor Express, Inc., 81 N.Y.S.2d 907, 192 Misc. 12, 1948 N.Y. Misc. LEXIS 2998 (N.Y. Sup. Ct. 1948).

In action by insurer for declaratory judgment that it may disclaim liability under its policy because of late notice, waiver is an affirmative defense which must be pleaded to be available. Safeguard Ins. Co. v Baldauf, 20 Misc. 2d 667, 188 N.Y.S.2d 762, 1959 N.Y. Misc. LEXIS 3550 (N.Y. Sup. Ct. 1959).

In action by insured’s wife against insured and insurer based on separation agreement designating her as beneficiary of group insurance contract, defense that such contract barred assignment of benefits was insufficient. Hasselberger v Hasselberger, 102 N.Y.S.2d 520, 1951 N.Y. Misc. LEXIS 1523 (N.Y. Sup. Ct. 1951).

283. —Life insurance

In action by insured’s administrator for return of premiums paid because insurer had elected to rescind for misrepresentations, defense that premiums should be paid to beneficiary who had unsuccessfully sued on policy held insufficient. La Rocca v John Hancock Mut. Life Ins. Co., 286 N.Y. 233, 36 N.E.2d 126, 286 N.Y. (N.Y.S.) 233, 1941 N.Y. LEXIS 1433 (N.Y. 1941).

An objection that an action was brought upon an original policy of life insurance which had become forfeited, rather than upon a nonparticipating paid-up term policy, issued in lieu thereof, is waived where the answer of the insurer alleges that the paid-up term policy was issued. Perry v Prudential Ins. Co., 144 A.D. 780, 129 N.Y.S. 751, 1911 N.Y. App. Div. LEXIS 4239 (N.Y. App. Div. 1911).

In action by nonrevocable beneficiary of ten-year life policies issued by defendant on another's life, insurer's defense that beneficiary was not entitled to renew policies in own behalf in absence of application by insured, was sufficient. Flannery v Metropolitan Life Ins. Co., 262 A.D. 898, 28 N.Y.S.2d 875, 1941 N.Y. App. Div. LEXIS 6427 (N.Y. App. Div. 1941), aff'd, 287 N.Y. 811, 41 N.E.2d 92, 287 N.Y. (N.Y.S.) 811, 1942 N.Y. LEXIS 1820 (N.Y. 1942).

In action by insured's widow for proceeds of life policies, defense that insured and insurer changed policies to create trust giving wife-widow monthly payments for life and remainder to children, and that after insured's death plaintiff accepted monthly payments for three years, required summary judgment for insurer. Gould v Travelers Ins. Co., 266 A.D. 545, 42 N.Y.S.2d 817, 1943 N.Y. App. Div. LEXIS 3617 (N.Y. App. Div. 1943).

In action on life policy twice reinstated for lapse of premiums, where application for second reinstatement contained true statements but application for first reinstatement contained misrepresentations as to health, such misrepresentations required dismissal of complaint. In re Kear's Will, 2 A.D.2d 71, 153 N.Y.S.2d 106, 1956 N.Y. App. Div. LEXIS 4748 (N.Y. App. Div. 1st Dep't 1956), aff'd, 3 N.Y.2d 959, 169 N.Y.S.2d 31, 146 N.E.2d 789, 1957 N.Y. LEXIS 738 (N.Y. 1957).

In action involving validity of loan on life policy, defense that loan was valid and that policy had lapsed under extended term was sufficient. Blumenthal v Equitable Life Assurance Soc., 19 N.Y.S.2d 156, 173 Misc. 964, 1940 N.Y. Misc. LEXIS 1631 (N.Y. Sup. Ct. 1940), aff'd, 262 A.D. 836, 29 N.Y.S.2d 507, 1941 N.Y. App. Div. LEXIS 6130 (N.Y. App. Div. 1941).

In action on life policy, defense that cash surrender value of policy did not exceed amount of loan, note for which authorized cancellation of policy on nonpayment of loan, was sufficient. Webster v Mutual Life Ins. Co., 20 N.Y.S.2d 608, 174 Misc. 262, 1940 N.Y. Misc. LEXIS 1828 (N.Y. App. Term), app. denied, 260 A.D. 811, 22 N.Y.S.2d 824, 1940 N.Y. App. Div. LEXIS 4776 (N.Y. App. Div. 1940).

In action by widow beneficiary on life policy to recover difference between policy indebtedness and face value of policy, defense that failure to pay interest on loan on paid-up policy operated to surrender policy and to permit application of cash surrender value to repayment of loan and interest in accord with loan note, held valid. Webster v Mutual Life Ins. Co., 20 N.Y.S.2d 608, 174 Misc. 262, 1940 N.Y. Misc. LEXIS 1828 (N.Y. App. Term), app. denied, 260 A.D. 811, 22 N.Y.S.2d 824, 1940 N.Y. App. Div. LEXIS 4776 (N.Y. App. Div. 1940).

In action on life policy by assignee, defense that policy lapsed because of nonpayment of premiums two years before disability commenced was sufficient. Kaplan v Equitable Life Assurance Soc., 31 N.Y.S.2d 972, 177 Misc. 792, 1940 N.Y. Misc. LEXIS 2656 (N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 1067, 27 N.Y.S.2d 780, 1941 N.Y. App. Div. LEXIS 8770 (N.Y. App. Div. 1941).

In action on life policy by assignee, defense that insurer duly notified insured of nonpayment of premium because assignee’s notice of assignment was received too late to give notice as required by Insurance L. 92, and that policy had lapsed after one year, was sufficient. Kaplan v Equitable Life Assurance Soc., 31 N.Y.S.2d 972, 177 Misc. 792, 1940 N.Y. Misc. LEXIS 2656 (N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 1067, 27 N.Y.S.2d 780, 1941 N.Y. App. Div. LEXIS 8770 (N.Y. App. Div. 1941).

In action for disability benefits “occurring” after issuance of policy, defense that “occurring” imported “happening,” and not “existing,” required summary judgment for insurer. Creighton v Metropolitan Life Ins. Co., 42 N.Y.S.2d 213, 181 Misc. 847, 1943 N.Y. Misc. LEXIS 1967 (N.Y. Sup. Ct. 1943).

Wife’s action against husband’s insurer is forbidden by Insurance L. 109 subd. 3-a. Lynch v Empire Mut. Casualty Co., 21 N.Y.S.2d 199, 1940 N.Y. Misc. LEXIS 1903 (N.Y. App. Term 1940).

Beneficiary named in policy giving insured right to change beneficiary has no rights in policy during insured's lifetime. Aitken v Mutual Life Ins. Co., 22 N.Y.S.2d 29, 1940 N.Y. Misc. LEXIS 2059 (N.Y. Sup. Ct. 1940).

In action on life policy for original amount instead of reduced amount as for paid-up policy, defense that policy required reserve to be used for payment of premiums and that insured consistently demanded that policy should become "paid-up" was sufficient. Wolsohn v John Hancock Mut. Life Ins. Co., 22 N.Y.S.2d 260, 1940 N.Y. Misc. LEXIS 2113 (N.Y. Sup. Ct. 1940).

Payment under facility clause to one who had incurred expense for burial of insured discharged insurer. Dixon v Metropolitan Life Ins. Co., 23 N.Y.S.2d 236 (N.Y. App. Term 1940).

In action for benefits under life policies not covering temporary total disability, defense that no proof of existing total disability was furnished, except mere notice, was sufficient. Schoenholtz v Travelers Ins. Co., 30 N.Y.S.2d 642, 1940 N.Y. Misc. LEXIS 2648 (N.Y. App. Term 1940).

284. —Liability insurance

An insurer against liability for personal injuries or death may avail itself of any defense which it could have urged in defense of an action by insured. Gerka v Fidelity & Casualty Co., 251 N.Y. 51, 167 N.E. 169, 251 N.Y. (N.Y.S.) 51, 1929 N.Y. LEXIS 685 (N.Y. 1929).

In action on physician's liability policy against "malpractice, error or mistake," judgment for patient in action against physician for breach of contract to remove facial blemishes held not within policy and a sufficient defense. Safian v Aetna Life Ins. Co., 260 A.D. 765, 24 N.Y.S.2d 92, 1940 N.Y. App. Div. LEXIS 4712 (N.Y. App. Div. 1940), aff'd, 286 N.Y. 649, 36 N.E.2d 692, 286 N.Y. (N.Y.S.) 649, 1941 N.Y. LEXIS 2195 (N.Y. 1941).

In action on indemnity policy covering a motor vehicle, answer alleging that death did not occur under circumstances within the contract was a combined conclusion of law and fact, and it is proper to allege a conclusion of fact rather than evidence supporting it. Lavine v Indemnity Ins.

Co., 254 N.Y.S. 804, 142 Misc. 422, 1931 N.Y. Misc. LEXIS 990 (N.Y. Sup. Ct.), aff'd, 234 A.D. 906, 254 N.Y.S. 1000, 1931 N.Y. App. Div. LEXIS 11176 (N.Y. App. Div. 1931).

In action by husband and wife on public liability policy insuring wife's mother who owned premises where injuries occurred, defense that policy excluded injury to child of insured barred action by adult daughter and her husband's action for loss of services. Mindlin v Consolidated Taxpayers Mut. Ins. Co., 19 N.Y.S.2d 340, 173 Misc. 961, 1940 N.Y. Misc. LEXIS 1656 (N.Y. Sup. Ct. 1940).

In action against mutual insurance company to recover dividend, defense that cancellation of liability policy for nonpayment of advance premium forfeited insured's right to dividend was insufficient. Garofano Const. Co. v Lumber Mut. Casualty Ins. Co., 26 N.Y.S.2d 780, 176 Misc. 159, 1941 N.Y. Misc. LEXIS 1641 (N.Y. City Ct. 1941).

In action against insurer on automobile liability policy pursuant to Insurance L § 167 to recover amount of judgment for injured plaintiff against insured injuring plaintiff, defense that injury did not occur while insured truck was used in unloading held insufficient where plaintiff was struck by jigger propelled by insured's employees while carting cartons from truck to consignee. B & D Motor Lines, Inc. v Citizens Casualty Co., 43 N.Y.S.2d 486, 181 Misc. 985, 1943 N.Y. Misc. LEXIS 2255 (N.Y. City Ct. 1943), aff'd, 267 A.D. 955, 48 N.Y.S.2d 472, 1944 N.Y. App. Div. LEXIS 5717 (N.Y. App. Div. 1944).

Where employer of plaintiff's husband was sued for injuries received while plaintiff was passenger in automobile driven by her husband, and defendant impleaded husband as third-party defendant and husband impleaded insurer whose policy insured both defendant employer and husband, insurer's defense that its policy excluded liability for injuries to spouse of injured, though latter be brought into action as third-party defendant rather than as original defendant. Feinman v Bernard Rice Sons, Inc., 2 Misc. 2d 86, 133 N.Y.S.2d 639, 1954 N.Y. Misc. LEXIS 1888 (N.Y. Sup. Ct. 1954), aff'd, 285 A.D. 926, 139 N.Y.S.2d 884, 1955 N.Y. App. Div. LEXIS 6125 (N.Y. App. Div. 1955).

In action on policy issued to motor carrier and not limiting defendant's liability to physical damage to merchandise, defense that policy did not cover plaintiff's loss of profits occasioned by unexplained delay in delivery held invalid. Johnson Fish Co. v Springfield Fire & Marine Ins. Co., 29 N.Y.S.2d 497, 1941 N.Y. Misc. LEXIS 2110 (N.Y. App. Term 1941).

In action against insurer on motor truck cargo liability policy to recover amount of judgment for plaintiff consignor against insured, defense that insurer would still be liable to suit by insured was insufficient, since insured is estopped by plaintiff's judgment. Cicero Const. Corp. v United States Fire Ins. Co., 41 N.Y.S.2d 719, 1943 N.Y. Misc. LEXIS 1887 (N.Y. City Ct. 1943).

In action on motor carrier insurance policy, insurer's defense that its liability ended with safe delivery to consignee and did not cover failure of carrier to transmit COD charges collected from consignee required summary judgment for insurer. Ontra v Automobile Ins. Co., 44 N.Y.S.2d 838, 1943 N.Y. Misc. LEXIS 2530 (N.Y. Mun. Ct. 1943).

285. —Fire insurance

In action on standard fire policy insuring plaintiff mortgagee as his interest may appear, defense of appraisal of differences between mortgagor and insurer and of award of damage was sufficient. Syracuse Sav. Bank v Yorkshire Ins. Co., 268 A.D. 818, 49 N.Y.S.2d 247, 1944 N.Y. App. Div. LEXIS 3606 (N.Y. App. Div. 1944).

In action by mortgagee to recover proceeds of fire policy with mortgage clause, defense of insured owner that mortgagee had assigned proceeds to him raised no triable issue. Krauss v Central Ins. Co., 40 N.Y.S.2d 736, 1943 N.Y. Misc. LEXIS 1739 (N.Y. Sup. Ct. 1943).

In action on fire policy, insurer's defense that insured conveyed property after issuance of policy was invalid where insured held mortgage on such property and had insurable interest to extent of mortgage. Brewer v North River Ins. Co., 137 N.Y.S.2d 909, 1950 N.Y. Misc. LEXIS 2588 (N.Y. Sup. Ct. 1950).

286. Interest, action to recover

In action to recover interest instalments on bonded indebtedness, defense that interest could be recovered only with principal held insufficient. Crawford Associates, Inc. v Sgammato, 263 A.D. 739, 31 N.Y.S.2d 47, 1941 N.Y. App. Div. LEXIS 4781 (N.Y. App. Div. 1941).

In action to recover interest instalments under bond, mortgage and assumption agreement, defense that in assumption agreement defendant contracted to pay principal sums on specified date with interest as specified in mortgage, but that after such date interest was to be computed as damages in accord with rate prescribed by law was insufficient as moratorium laws automatically extend time of payment. Levinson v Rosovsky, 263 A.D. 793, 31 N.Y.S.2d 485, 1941 N.Y. App. Div. LEXIS 4959 (N.Y. App. Div. 1941), aff'd, 288 N.Y. 559, 42 N.E.2d 18, 288 N.Y. (N.Y.S.) 559, 1942 N.Y. LEXIS 1412 (N.Y. 1942).

In action to cancel note and chattel mortgage securing it and to recover payments of principal and interest as excessive, defense that interest charges were based on 30-day month or 360-day year held valid. Swistak v Personal Finance Co., 24 N.Y.S.2d 80, 175 Misc. 791, 1940 N.Y. Misc. LEXIS 2434 (N.Y. Sup. Ct. 1940).

In action for interest on bond secured by mortgage, defense that market value of mortgaged premises exceeded original principal of bond held invalid. Union Trust Co. v Toal, 28 N.Y.S.2d 956, 1941 N.Y. Misc. LEXIS 1962 (N.Y. Sup. Ct. 1941).

287. Judgment, action on

In action on judgment, defense that attorney lacked authority to confess judgment as limitations had run held to bar summary judgment. Arnold v Bussmann, 29 N.Y.S.2d 155, 1941 N.Y. Misc. LEXIS 1996 (N.Y. App. Term 1941), aff'd, 264 A.D. 713, 34 N.Y.S.2d 829, 1942 N.Y. App. Div. LEXIS 4285 (N.Y. App. Div. 1942).

Defense that California judgment fixing arrears of alimony was not conclusive, was insufficient. Strudwick v Strudwick, 110 N.Y.S.2d 839, 1952 N.Y. Misc. LEXIS 2465 (N.Y. Sup. Ct. 1952).

288. Landlord and tenant actions

In an action for rent, the answer of eviction must set up expulsion from the premises and keeping the tenant out until after the rent became due. Vernam v Smith, 15 N.Y. 327, 15 N.Y. (N.Y.S.) 327, 1857 N.Y. LEXIS 6 (N.Y. 1857).

In action by loft tenant for water damage to merchandise from landlord's failure to repair, defense that lease exempted defendant from liability for damage for water leakage held invalid as in violation of Real Prop L § 234. International Underwear Corp. v Brooklyn Trust Co., 287 N.Y. 589, 38 N.E.2d 386, 287 N.Y. (N.Y.S.) 589, 1941 N.Y. LEXIS 2472 (N.Y. 1941).

It is no defense to summary proceedings brought to dispossess a tenant for failure to pay a month's rent to allege that the landlord's predecessor in title has leased the premises to the tenant for a year. Frank v Miller, 116 A.D. 855, 102 N.Y.S. 277, 1907 N.Y. App. Div. LEXIS 46 (N.Y. App. Div. 1907).

It is a good defense to an action for the reasonable worth of the use and occupation of a building to show that the plaintiff's assignor, who was originally tenant of the premises, on selling his business to the defendant, when the landlord refused to accept the defendant as tenant, agreed to pay the rent. James Butler, Inc. v Deegan, 130 A.D. 544, 115 N.Y.S. 60, 1909 N.Y. App. Div. LEXIS 250 (N.Y. App. Div. 1909).

It is no defense to an action for rent of premises leased as a private apartment that another tenant was guilty of an alleged nuisance by using the basement as a restaurant and annoyed the defendant by the odor of cooking, if no affirmative act was committed by the landlord, and he had no control over the acts of the other tenant. Martens v Sloane, 132 A.D. 114, 116 N.Y.S. 512, 1909 N.Y. App. Div. LEXIS 1446 (N.Y. App. Div. 1909).

It is a good defense to an action for rent under a lease providing that the tenant could cancel the lease "if a racing bill is passed so as to change the present condition of racing at Saratoga Springs," to allege that the defendant canceled the lease because "a racing bill was passed so

as to change the said condition of racing at Saratoga Springs"; such allegation is not a conclusion of law, but one of fact. Farnham v Le Bolt & Co., 133 A.D. 520, 117 N.Y.S. 730, 1909 N.Y. App. Div. LEXIS 2221 (N.Y. App. Div. 1909).

It seems that a defendant in summary proceedings who claims a right to renewal should sue for equitable relief and procure a stay of the summary proceedings until the determination of the action. Simon v Schmitt, 137 A.D. 625, 122 N.Y.S. 421, 1910 N.Y. App. Div. LEXIS 745 (N.Y. App. Div. 1910).

A tenant sued for rent may set up title in himself, acquired after the execution of the lease. Kibbe v Crossman, 139 A.D. 338, 124 N.Y.S. 3, 1910 N.Y. App. Div. LEXIS 2192 (N.Y. App. Div. 1910).

In lessor's action for damages for breach of covenants of lease, defense that reletting by lessor was in fact on behalf of defendant in that it tended to reduce damages, did not suffice. Morris v Cohen, 261 A.D. 1000, 26 N.Y.S.2d 641, 1941 N.Y. App. Div. LEXIS 8499 (N.Y. App. Div. 1941).

An alleged violation of a landlord's agreement to keep a liquor license in force for the tenant is no defense in a proceeding to dispossess the tenant for nonpayment of rent; nor is the landlord estopped from asserting the tenancy to be in one other than the person in whose name the license was issued. S. Liebmann's Sons Brewing Co. v De Nicolo, 91 N.Y.S. 791, 46 Misc. 268, 1905 N.Y. Misc. LEXIS 46 (N.Y. App. Term 1905).

In an action to recover rent, due before a fire, a claim for the untenantable condition while repairs were being made can be pleaded only as a counterclaim and not as a partial defense. Einstein v Tutelman, 110 N.Y.S. 1025, 59 Misc. 462, 1908 N.Y. Misc. LEXIS 553 (N.Y. App. Term 1908).

In proceeding by landlord against State as tenant, where plaintiff's pleading makes plain that tenant is statutory tenant, provisions of Emergency Business Space Rent Law that it is inapplicable to any business space in which State has status as landlord is expression by

exclusion that statute applies to State as tenant. Pennbild Realty Co. v People, 145 N.Y.S.2d 129, 208 Misc. 825, 1955 N.Y. Misc. LEXIS 3293 (N.Y. Sup. Ct. 1955).

In action against landlord, who sold premises instead of occupying them, defenses of landlord's good faith in bringing summary judgment and of release of landlord by tenant's continued occupancy of premises, raised fact issues. Ribak v Manufacturers Trust Co., 83 N.Y.S.2d 267, 1948 N.Y. Misc. LEXIS 3327 (N.Y. Sup. Ct. 1948).

In tenant's action against landlord who agreed in lease to pay tenant certain sum as damages if premises were condemned for public use, defense that tenant had not been deprived of possession nor suffered damages, was sufficient. Kammerer v Selover, 88 N.Y.S.2d 100, 1949 N.Y. Misc. LEXIS 2054 (N.Y. Sup. Ct. 1949).

In action by tenant for breach of landlord's covenant of quiet enjoyment, defense that lease exempted landlord from liability for alteration work in lobby of building did not exonerate landlord from negligent performance of alterations, barring summary judgment for landlord. Parsons School of Design v 21-10 49th Ave. Corp., 136 N.Y.S.2d 919 (N.Y. Sup. Ct. 1954).

It cannot be answered in abatement of rent that the premises are unfit for habitation or for the purposes intended. Townsend v Read (N.Y.C.P. May 15, 1885).

289. Legacy, action to recover

It is not a good defense to an action for the balance of a legacy, that a surrogate has dismissed a petition praying for the payment of such balance, but a denial that it had been demanded raises an issue to be tried. Kennagh v McColgan, 4 N.Y.S. 230, 51 Hun 641, 1889 N.Y. Misc. LEXIS 259 (N.Y. Sup. Ct. 1889).

290. Libel and slander generally

A satisfaction for libel in an action against one person is a satisfaction pro tanto, in an action brought against other persons for the same libel and another, the two being set forth in different

counts. Woods v Pangburn, 75 N.Y. 495, 75 N.Y. (N.Y.S.) 495, 1878 N.Y. LEXIS 894 (N.Y. 1878).

Where neither of two defenses to an action for libel is pleaded as a partial defense, each defense must be treated as a complete defense to the entire complaint. Bingham v Gaynor, 141 A.D. 301, 126 N.Y.S. 353, 1910 N.Y. App. Div. LEXIS 3860 (N.Y. App. Div. 1910), aff'd, 203 N.Y. 27, 96 N.E. 84, 203 N.Y. (N.Y.S.) 27, 1911 N.Y. LEXIS 757 (N.Y. 1911).

Defense that brother of plaintiff was known by same pseudonym as that used to describe plaintiff presented the question of the identity of the person defamed for determination by the jury. Bridgwood v Newspaper PM, Inc., 276 A.D. 858, 93 N.Y.S.2d 613, 1949 N.Y. App. Div. LEXIS 3609 (N.Y. App. Div. 1949).

Repetition in a final defense against a complaint for libel of facts appearing in each preceding defense is prejudicial, allegations of the intent of the publisher are immaterial, and it is the duty of the court to strike such matter from the pleadings. Burnham v Hornaday, 223 N.Y.S. 750, 130 Misc. 207, 1927 N.Y. Misc. LEXIS 1029 (N.Y. Sup. Ct. 1927), modified, 223 A.D. 218, 228 N.Y.S. 246, 1928 N.Y. App. Div. LEXIS 6173 (N.Y. App. Div. 1928).

Defenses to action for libel sufficiently conformed with former CPA § 241. Flynn v New York World-Telegram Corp., 268 N.Y.S. 753, 150 Misc. 241, 1934 N.Y. Misc. LEXIS 1048 (N.Y. Sup. Ct. 1934).

291. —Truth and justification

A general allegation, charging a person with something that is libelous per se, cannot be successfully answered by a general allegation in the answer that the charge is true. Bingham v Gaynor, 203 N.Y. 27, 96 N.E. 84, 203 N.Y. (N.Y.S.) 27, 1911 N.Y. LEXIS 757 (N.Y. 1911).

To constitute complete defense justification was bound to be as broad as actionable significance of words; workable test is whether libel as published would have different effect on mind of reader from that which pleaded truth would have produced. White v Barry, 288 N.Y. 37, 41

N.E.2d 448, 288 N.Y. (N.Y.S.) 37, 1942 N.Y. LEXIS 1050 (N.Y.), reh'g denied, 288 N.Y. 669, 43 N.E.2d 71, 288 N.Y. (N.Y.S.) 669, 1942 N.Y. LEXIS 1507 (N.Y. 1942).

In action for libel, complete defense pleading justification, in that plaintiff is “now under indictment,” is insufficient, since words, read in context, mean no more than he had been indicted by grand jury. Crane v New York World Tel. Corp., 308 N.Y. 470, 126 N.E.2d 753, 308 N.Y. (N.Y.S.) 470, 1955 N.Y. LEXIS 987 (N.Y. 1955).

In an action of slander allegations by way of justification or by way of mitigation should be pleaded separately. Doyle v Fritz, 86 A.D. 515, 83 N.Y.S. 762, 1903 N.Y. App. Div. LEXIS 2404 (N.Y. App. Div. 1903).

A defense in an action for libel which alleges that the matter complained of is substantially true, but was never published by the defendant is bad, because, being a plea in confession and avoidance, it must admit the publication, and also because a justification must be as broad as the libel. Jacoby v James, 136 A.D. 431, 120 N.Y.S. 981, 1910 N.Y. App. Div. LEXIS 45 (N.Y. App. Div. 1910).

A plea of justification, interposed as a defense in an action for libel, where not expressly pleaded as a partial defense, will be tested as to sufficiency as if pleaded as a complete defense, and if insufficient in law when so tested will be stricken on motion. Schieffelin v Hylan, 205 A.D. 360, 199 N.Y.S. 691, 1923 N.Y. App. Div. LEXIS 5026 (N.Y. App. Div. 1923).

Where there are several distinct charges in a libel, the defendant may justify some of them and it is for the jury to say that some are justified and some not. Foley v Press Pub. Co., 226 A.D. 535, 235 N.Y.S. 340, 1929 N.Y. App. Div. LEXIS 8770 (N.Y. App. Div. 1929).

In an action for libel arising out of newspaper articles concerning the loss of the airship Shenandoah, defenses setting up the truth of the statements in justification, were sufficient. Foley v Press Pub. Co., 226 A.D. 535, 235 N.Y.S. 340, 1929 N.Y. App. Div. LEXIS 8770 (N.Y. App. Div. 1929).

In libel action defense, pleading justification of each part of charge, is as broad as charge and so is sufficient. Hoffmann v Coffin, 263 A.D. 896, 32 N.Y.S.2d 613, 1942 N.Y. App. Div. LEXIS 7260 (N.Y. App. Div. 1942).

In libel action where for purposes of motion to strike from answer defense of truth and justification plaintiff admits that he committed income tax frauds, and defendant's reference to him as "this thief" qualified and explained, question of fact was raised as to meaning to be given to those words in circumstances. Hoffmann v Coffin, 263 A.D. 896, 32 N.Y.S.2d 613, 1942 N.Y. App. Div. LEXIS 7260 (N.Y. App. Div. 1942).

Where allegation of truth in pleaded defenses to libel relating to investigation carried on by district attorney was broad enough to meet interpretation by jury, but not by plaintiff, such defenses were sufficient. Baumann v Newspaper Enterprises, Inc., 270 A.D. 825, 60 N.Y.S.2d 185, 1946 N.Y. App. Div. LEXIS 4125 (N.Y. App. Div. 1946).

Defendant who pleads justification in libel must particularly inform plaintiff of what he must expect to meet on trial. Levy v Annenberg, 250 N.Y.S. 526, 140 Misc. 317, 1931 N.Y. Misc. LEXIS 1367 (N.Y. Sup. Ct. 1931).

In libel action, defense alleging merely that facts published were believed by defendant to be true and that he had reasonable grounds for such belief, was insufficient as complete defense. La Rocco v Freedom of Press Co., 43 N.Y.S.2d 66, 181 Misc. 677, 1943 N.Y. Misc. LEXIS 2116 (N.Y. Sup. Ct. 1943).

In action for libel charging that plaintiff was fascist speaker but not leader, defendant was not obliged to justify anything published in article except as it concerned plaintiff. La Rocco v Freedom of Press Co., 43 N.Y.S.2d 66, 181 Misc. 677, 1943 N.Y. Misc. LEXIS 2116 (N.Y. Sup. Ct. 1943).

A defense of justification in a libel action must be as broad as the charge contained in the article allegedly libelous, and so must contain a statement of all material facts claimed to establish the truth of the charges made in the article complained of and is sufficient under this section where it

goes no further than to plead the ultimate facts necessary to establish that the defamatory statements were true. Hornyak v Hearst Corp., 66 N.Y.S.2d 848, 1946 N.Y. Misc. LEXIS 3153 (N.Y. Sup. Ct. 1946), aff'd, 272 A.D. 866, 71 N.Y.S.2d 713, 1947 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div. 1947).

Immaterial and negligible variations between the pleading of the charge made by the allegedly libelous article, and the article itself, do not defeat a defense of justification. Hornyak v Hearst Corp., 66 N.Y.S.2d 848, 1946 N.Y. Misc. LEXIS 3153 (N.Y. Sup. Ct. 1946), aff'd, 272 A.D. 866, 71 N.Y.S.2d 713, 1947 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div. 1947).

In action for libel, facts claimed to be true must meet charges contained in alleged libel or be deemed legally insufficient, but truth need not be pleaded in exact form as charged; it is only necessary to allege facts substantially as broad as alleged libel. Greenberg v Winchell, 136 N.Y.S.2d 877, 1954 N.Y. Misc. LEXIS 3541 (N.Y. Sup. Ct. 1954), app. dismissed, 1 A.D.2d 1008, 154 N.Y.S.2d 835, 1956 N.Y. App. Div. LEXIS 5148 (N.Y. App. Div. 1st Dep't 1956).

In action for libel charging that plaintiff “backed local Ku Klux Klan outfit in 1934,” facts alleged in defense of justification that plaintiff was at one time officer of organization called American Vigilant Alliance and editor of its publication, was sufficient. Bissell v Winchell, 139 N.Y.S.2d 862, 1955 N.Y. Misc. LEXIS 3053 (N.Y. Sup. Ct. 1955).

292. —Privilege and fair comment

In libel where plaintiff charges malice, privilege is a defense to be pleaded and proved. Ostrowe v Lee, 256 N.Y. 36, 175 N.E. 505, 256 N.Y. (N.Y.S.) 36, 1931 N.Y. LEXIS 1022 (N.Y. 1931).

In an action for publication of alleged libelous articles commenting upon the fact that plaintiff had failed to pay a water bill, a defense that the article was fair and an honest report and comment on official proceedings of village authorities and was published without malice is sufficient. Briarcliff Lodge Hotel, Inc. v Citizen-Sentinel Publishers, Inc., 260 N.Y. 106, 183 N.E. 193, 260

N.Y. (N.Y.S.) 106, 1932 N.Y. LEXIS 664 (N.Y. 1932), reh'g denied, 261 N.Y. 537, 185 N.E. 728, 261 N.Y. (N.Y.S.) 537, 1933 N.Y. LEXIS 1351 (N.Y. 1933).

Mere investigation of a detective's character, conducted by members of the coroner's office and the municipal police, were not judicial and official proceedings within the meaning of CPA § 337 (now Civ. Rights Law 74 herein), and an answer which claimed a privilege for the report thereof was bad. Nunnally v Press Pub. Co., 110 A.D. 10, 96 N.Y.S. 1042, 1905 N.Y. App. Div. LEXIS 3851 (N.Y. App. Div. 1905).

If the truth of the publication be pleaded as a defense the burden is on the defendant to make it out; if the defense of truth be pleaded and proved the defense of qualified privilege is unnecessary; but if the defense of truth be not made out or not pleaded, but merely a defense of privilege, the burden is on the plaintiff to defeat the privilege when the occasion therefor is shown. Ashcroft v Hammond, 132 A.D. 3, 116 N.Y.S. 362, 1909 N.Y. App. Div. LEXIS 1410 (N.Y. App. Div. 1909), rev'd, 197 N.Y. 488, 90 N.E. 1117, 197 N.Y. (N.Y.S.) 488, 1910 N.Y. LEXIS 1093 (N.Y. 1910).

Defense of fair comment held sufficient. Bridgwood v Newspaper PM, Inc., 276 A.D. 858, 93 N.Y.S.2d 613, 1949 N.Y. App. Div. LEXIS 3609 (N.Y. App. Div. 1949).

In libel action defense was stricken where it alleges in substance that publication was privileged as a communication made by one as a party in interest where there was no common interest in the debt among the defendant, her principal and the person to whom the letter containing the defamatory matter was sent. Gompers v Weil, 5 A.D.2d 861, 171 N.Y.S.2d 277, 1958 N.Y. App. Div. LEXIS 6599 (N.Y. App. Div. 1st Dep't 1958).

A defendant to a libel action should not combine in one affirmative defense the plea of fair comment and the plea of qualified privilege, but should separately state and number those defenses. Burnham v Hornaday, 223 N.Y.S. 750, 130 Misc. 207, 1927 N.Y. Misc. LEXIS 1029 (N.Y. Sup. Ct. 1927), modified, 223 A.D. 218, 228 N.Y.S. 246, 1928 N.Y. App. Div. LEXIS 6173 (N.Y. App. Div. 1928).

Defense of privilege in libel does not protect slanderous publications plainly irrelevant and impertinent voluntarily made in a judicial proceeding, and which the party making them could not reasonably have supposed to be relevant. Smith v Lichterman, 234 N.Y.S. 676, 134 Misc. 150, 1929 N.Y. Misc. LEXIS 808 (N.Y. Sup. Ct. 1929).

Answer in libel action must plead complete defense of truth and partial defense of fair report, in accord with former CPA § 241. Rathkopf v Walker, 73 N.Y.S.2d 111, 190 Misc. 168, 1947 N.Y. Misc. LEXIS 2950 (N.Y. Sup. Ct. 1947).

Striking from complaint in prior action particular allegations as scandalous and irrelevant did not establish that such allegations were irrelevant to defense of privilege in later action. McCartney v Schierenbeck, 107 N.Y.S.2d 973, 200 Misc. 549, 1951 N.Y. Misc. LEXIS 2457 (N.Y. Sup. Ct. 1951).

Absolute privilege rule was not extended to apply to unsolicited communications made to the clerk of the court by persons not directly involved in the litigation. Di Tullio v Deacy, 16 Misc. 2d 565, 183 N.Y.S.2d 585, 1958 N.Y. Misc. LEXIS 2758 (N.Y. Sup. Ct. 1958).

A defense in an action for libel is sufficient under this section where it alleges that insofar as the allegedly libelous article was other than a true account of the facts, it was a fair and true report of various judicial and other public and official proceedings, viz., the arrest, charge, commitment, indictment, parole and discharge of the plaintiffs. Hornyak v Hearst Corp., 66 N.Y.S.2d 848, 1946 N.Y. Misc. LEXIS 3153 (N.Y. Sup. Ct. 1946), aff'd, 272 A.D. 866, 71 N.Y.S.2d 713, 1947 N.Y. App. Div. LEXIS 3975 (N.Y. App. Div. 1947).

In action for libel charging that plaintiff “backed local Ku Klux Klan outfit in 1934” such published charge does not purport to be of any judicial proceeding, nor is it fair comment but pure statement of fact as to which no privilege exists, and was insufficient to constitute defense of fair comment. Bissell v Winchell, 139 N.Y.S.2d 862, 1955 N.Y. Misc. LEXIS 3053 (N.Y. Sup. Ct. 1955).

293. —Partial defenses in action for defamation

In action for libel, partial defense, repeating allegation of complete defense that plaintiff was under "indictment," and stating that such facts were widely published and known to defendants and relied on by them, and alleging that plaintiff's general reputation was bad, was insufficient, as not pleading facts in mitigation. Crane v New York World Tel. Corp., 308 N.Y. 470, 126 N.E.2d 753, 308 N.Y. (N.Y.S.) 470, 1955 N.Y. LEXIS 987 (N.Y. 1955).

An answer interposed in a libel action, which alleges, as a separate defense and in mitigation, "that the matters and things stated in the complaint were reported and believed in and about the village of Granville prior to the time of said publication. That as defendant is informed and believes said publication is made in good faith, as a matter of news, without malice," is insufficient, both as a separate defense and in mitigation, because of the defendant's failure to allege that he heard the reports and believed them to be true and published them in that belief. Brown v McArthur, 106 A.D. 366, 94 N.Y.S. 537, 1905 N.Y. App. Div. LEXIS 2585 (N.Y. App. Div. 1905).

A separate and partial defense to libel, in mitigation of punitive damages, was held good. Foley v Press Pub. Co., 226 A.D. 535, 235 N.Y.S. 340, 1929 N.Y. App. Div. LEXIS 8770 (N.Y. App. Div. 1929).

Answer in libel was sufficient when pleading facts as partial defense and in mitigation of damages. Goodrow v Press Co., 233 A.D. 41, 251 N.Y.S. 364, 1931 N.Y. App. Div. LEXIS 11194 (N.Y. App. Div. 1931).

In libel action against insurance company, partial defense that matter published by defendant in performance of duty to protect self and stockholders against plaintiff's attacks, without malice and upon reliable information and in belief of its truth, held sufficient. Siegel v Metropolitan Life Ins. Co., 263 A.D. 299, 32 N.Y.S.2d 658, 1942 N.Y. App. Div. LEXIS 6873 (N.Y. App. Div. 1942).

Partial defenses, which do not set forth specific facts showing defendant's good faith, his honest and justified belief and his lack of malice, should be stricken. Weisberger v Condon, 285 A.D. 827, 137 N.Y.S.2d 838, 1955 N.Y. App. Div. LEXIS 5712 (N.Y. App. Div.), app. denied, 285 A.D. 894, 139 N.Y.S.2d 252, 1955 N.Y. App. Div. LEXIS 6037 (N.Y. App. Div. 1955).

Denials of each and every allegation of the complaint are not a proper part of a defense in mitigation and reduction of damages in an action for libel. Dinkelspiel v New York Evening Journal Pub. Co., 85 N.Y.S. 570, 42 Misc. 74, 1903 N.Y. Misc. LEXIS 446 (N.Y. Sup. Ct. 1903), modified, 91 A.D. 96, 86 N.Y.S. 375, 1904 N.Y. App. Div. LEXIS 340 (N.Y. App. Div. 1904).

In libel, defenses of justification, in whole or in part, privilege, fair comment and in mitigation of damages, sufficiently complied with former § 241. Davis v News Syndicate Co., 253 N.Y.S. 25, 141 Misc. 673, 1931 N.Y. Misc. LEXIS 1753 (N.Y. Sup. Ct. 1931).

Defense that matters contained in publication complained of were commonly believed to be true and that publication was made relying on common belief and without malice, was sufficient. Annenberg v Doubleday, Doran & Co., 84 N.Y.S.2d 294, 1938 N.Y. Misc. LEXIS 2401 (N.Y. Sup. Ct. 1938).

Where complaint charged that defendant printed in its newspaper picture of plaintiff's home and that it was used by Nazi group as quarters for criminal operations, defendant could show by way of partial defense and to defeat accusation of malice that it was incited to publish article with picture of plaintiff's home because of Federal official inquiry at time. Kilroy v News Syndicate Co., 32 N.Y.S.2d 210, 1941 N.Y. Misc. LEXIS 2519 (N.Y. Sup. Ct. 1941), aff'd, 263 A.D. 961, 33 N.Y.S.2d 386, 1942 N.Y. App. Div. LEXIS 7610 (N.Y. App. Div. 1942).

In action for libel charging that plaintiff "backed local Ku Klux Klan outfit in 1934," allegation that such charge was based on information which defendant believed to be true and obtained from sources believed to be reliable, would, if sustained, serve to mitigate any claim for punitive damages, and as such is proper as partial defense. Bissell v Winchell, 139 N.Y.S.2d 862, 1955 N.Y. Misc. LEXIS 3053 (N.Y. Sup. Ct. 1955).

The answer in an action for libel, after admitting the publication of the alleged libelous matter and denying “that the same was maliciously done, as in said complaint alleged,” denied “each and every other allegation in said complaint contained, not hereinbefore admitted or specifically denied,” and then pleaded matter in mitigation, admitted the whole complaint, and the only question for consideration was that of damages. Rosenwald v Hammerstein (N.Y.C.P. Mar. 14, 1884).

294. Malicious prosecution, false arrest and imprisonment

In false imprisonment, facts showing that defendant acted without malice and with a reasonable supposition that there was a cause for his action may be alleged in mitigation. Bradner v Faulkner, 93 N.Y. 515, 93 N.Y. (N.Y.S.) 515, 1883 N.Y. LEXIS 312 (N.Y. 1883).

It is a good defense to an action for malicious prosecution that the dismissal of the proceedings on which the action is based was due to the fact that before the warrant could be served the plaintiff to avoid trial left the country. Halberstadt v New York Life Ins. Co., 125 A.D. 830, 110 N.Y.S. 188, 1908 N.Y. App. Div. LEXIS 2907 (N.Y. App. Div. 1908), aff'd, 194 N.Y. 1, 86 N.E. 801, 194 N.Y. (N.Y.S.) 1, 1909 N.Y. LEXIS 1249 (N.Y. 1909).

Probable cause may be pleaded as partial defense to false arrest and malicious prosecution, in mitigation of punitive damages. Jones v Freeman's Dairy, Inc., 283 A.D. 667, 127 N.Y.S.2d 200, 1954 N.Y. App. Div. LEXIS 4834 (N.Y. App. Div. 1954).

In action for malicious prosecution by saleswoman against employer, who had detained her until she had signed statement that she had taken purse, good faith of employer was required to be pleaded. Gill v Montgomery Ward & Co., 284 A.D. 36, 129 N.Y.S.2d 288, 1954 N.Y. App. Div. LEXIS 3334 (N.Y. App. Div. 1954).

In action by train passenger for false imprisonment when removed from train by trainmen charging him with intoxication in public place, defense of good faith and lack of malice was insufficient where railroad failed to set forth law defining right to make arrest for intoxication and

facts showing arrest in compliance therewith. Marks v Balt. & Ohio R.R. Co., 284 A.D. 251, 131 N.Y.S.2d 325, 1954 N.Y. App. Div. LEXIS 3378 (N.Y. App. Div. 1954).

In action for specific performance of contract to sell real property, defense and counterclaim based on allegations that plaintiff brought the action knowing there was no legal justification therefor were insufficient; since if the action was malicious and without probable cause, defendant was not entitled to recover therefor until the action had terminated favorably to him. Bronstein v Dayton Peninsula Corp., 11 A.D.2d 1036, 206 N.Y.S.2d 12, 1960 N.Y. App. Div. LEXIS 7853 (N.Y. App. Div. 2d Dep't 1960).

In action for false arrest without a warrant mitigating circumstances, to avoid punitive damages, must be separately set up in answer. Sanders v Rolnick, 67 N.Y.S.2d 652, 188 Misc. 627, 1947 N.Y. Misc. LEXIS 1995 (N.Y. App. Term), aff'd, 272 A.D. 803, 71 N.Y.S.2d 896, 1947 N.Y. App. Div. LEXIS 3692 (N.Y. App. Div. 1947).

In action for false arrest and malicious prosecution good motives and probable cause cannot be pleaded as affirmative defense. Versosa v New York, 22 Misc. 2d 597, 194 N.Y.S.2d 5, 1959 N.Y. Misc. LEXIS 2474 (N.Y. Sup. Ct. 1959).

Absence of malice may be pleaded in mitigation to avoid imposition of punitive damages in action for false arrest. Versosa v New York, 22 Misc. 2d 597, 194 N.Y.S.2d 5, 1959 N.Y. Misc. LEXIS 2474 (N.Y. Sup. Ct. 1959).

295. Malpractice

In action for wrongful discharge, defense that plaintiff had stolen from employer during entire period of hire was sufficient. Sundland v Korfund Co., 260 A.D. 80, 20 N.Y.S.2d 819, 1940 N.Y. App. Div. LEXIS 4531 (N.Y. App. Div. 1940).

In action on written contract of employment, plea of justification for termination of “oral understanding” as bar to cause of action held insufficient. Frank v Papa, 264 A.D. 896, 35 N.Y.S.2d 849, 1942 N.Y. App. Div. LEXIS 5291 (N.Y. App. Div. 1942).

Fellow servant, corporation as, see Nielsen v H. Nelson Flanagan & Co., 266 A.D. 800, 42 N.Y.S.2d 38, 1943 N.Y. App. Div. LEXIS 4536 (N.Y. App. Div. 1943), aff'd, 292 N.Y. 516, 54 N.E.2d 204, 292 N.Y. (N.Y.S.) 516, 1944 N.Y. LEXIS 1679 (N.Y. 1944).

In action for unpaid arrears of retirement annutiy, employer's defense that it had discretion to grant separation allowance or retirement annuity on termination of employee's service for non-physical disability sufficed against employee who contributed nothing toward retirement plan. MacCabe v Consolidated Edison Co., 30 N.Y.S.2d 445, 1941 N.Y. Misc. LEXIS 2290 (N.Y. City Ct. 1941).

In patient's action against chiropractor for malpractice where complaint alleged that defendant was not licensed to practice medicine but that he undertook to treat plaintiff's illness contrary to New York laws, defense that defendant used his best judgment in accord with approved chiropractic methods held insufficient. Epstein v Hirschon, 33 N.Y.S.2d 83, 1942 N.Y. Misc. LEXIS 1326 (N.Y. Sup. Ct. 1942).

In action against employer for payments due under garnishee execution, defense of second assignment by beneficial owners of basic claim to judgment-debtor's son and his assignment in turn to defendant-employer was insufficient against plaintiff first assignee. Heitzmann v Fred Astaire Dance Studios Corp., 136 N.Y.S.2d 543, 1954 N.Y. Misc. LEXIS 3461 (N.Y. App. Term 1954).

296. Marital rights generally

Abandonment by wife of separation agreement was not shown as matter of law by her applying for temporary alimony in husband's action for annulment; dismissal of wife's complaint for amount due under separation agreement was improper. Woods v Bard, 285 N.Y. 11, 32 N.E.2d 772, 285 N.Y. (N.Y.S.) 11, 1941 N.Y. LEXIS 1520 (N.Y. 1941).

In action for alimony accrued under Indiana divorce, defense that divorced husband refrained from seeking modification of decree because of wife's acquiescence therein and that she

thereby waived her right to alimony under Indiana law, held sufficient. Ogle v Ogle, 264 A.D. 412, 35 N.Y.S.2d 491, 1942 N.Y. App. Div. LEXIS 4169 (N.Y. App. Div. 1942).

In action on separation agreement to become void if wife committed any act entitling husband to divorce in New York, her adultery was not defense. Malamat v Malamat, 264 A.D. 795, 35 N.Y.S.2d 199, 1942 N.Y. App. Div. LEXIS 4761 (N.Y. App. Div. 1942).

In action to set aside agreement for fraud, defense of ratification, estoppel and laches were insufficient in not alleging knowledge by plaintiff. Costa v Jelline, 274 A.D. 790, 79 N.Y.S.2d 593, 1948 N.Y. App. Div. LEXIS 3362 (N.Y. App. Div. 1948).

In action for amounts unpaid under separation agreement, defense that it was executed as part of illegal agreement to procure divorce and as consideration therefor, was sufficient. Inerfield v Inerfield, 278 A.D. 850, 104 N.Y.S.2d 544, 1951 N.Y. App. Div. LEXIS 4970 (N.Y. App. Div. 1951).

Allegations that a wife acquiesced in a foreign divorce decree, thus inducing her husband to act upon its assumed validity during the seven and a half years after remarriage, constitutes a good defense of equitable estoppel to her action for declaratory judgment that the foreign divorce was void. Weiner v Weiner, 13 A.D.2d 937, 216 N.Y.S.2d 788, 1961 N.Y. App. Div. LEXIS 10027 (N.Y. App. Div. 1st Dep't), app. denied, 219 N.Y.S.2d 944 (N.Y. App. Div. 1st Dep't 1961).

In wife’s action for arrears under separation agreement, defense that parties cohabited together as husband and wife held insufficient without alleging facts showing reconciliation; other defenses considered. Dubin v Dubin, 22 N.Y.S.2d 246, 174 Misc. 952, 1940 N.Y. Misc. LEXIS 2108 (N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 945, 27 N.Y.S.2d 445, 1941 N.Y. App. Div. LEXIS 8217 (N.Y. App. Div. 1st Dep't 1941), aff'd, 261 A.D. 945, 27 N.Y.S.2d 446, 1941 N.Y. App. Div. LEXIS 8218 (N.Y. App. Div. 1st Dep't 1941), aff'd, 262 A.D. 721, 28 N.Y.S.2d 703, 1941 N.Y. App. Div. LEXIS 5555 (N.Y. App. Div. 1941).

In wife's action to compel husband to comply with reformed separation agreement, defense that wife failed to demand compliance was insufficient, since action was sufficient demand. Feinberg v Feinberg, 41 N.Y.S.2d 869, 180 Misc. 305, 1943 N.Y. Misc. LEXIS 1924 (N.Y. Sup. Ct. 1943).

In wife's action for necessaries, partial defense that alimony award fixed measure of her right to support was insufficient as to necessaries prior to effective date of alimony awarded. Dorfman v Dorfman, 77 N.Y.S.2d 267, 191 Misc. 227, 1947 N.Y. Misc. LEXIS 3685 (N.Y. Sup. Ct. 1947).

In wife's action for reimbursement for moneys spent for marital household, her refusal to have sexual intercourse is not such misconduct as to relieve husband of his marital obligation by way of defense or of affirmative relief. Yanoff v Yanoff, 114 N.Y.S.2d 769, 202 Misc. 926, 1952 N.Y. Misc. LEXIS 1566 (N.Y. Sup. Ct. 1952).

In action to recover support payments under foreign divorce decree, defense that separation agreement was a bar to the action was insufficient since it was a legal conclusion. Falagario v Noonan, 20 Misc. 2d 30, 194 N.Y.S.2d 173, 1959 N.Y. Misc. LEXIS 2767 (N.Y. Sup. Ct. 1959).

In action to recover support payments under a foreign divorce decree, defense that amount of support had been reduced by Children's Court was insufficient since that court had no power to do so. Falagario v Noonan, 20 Misc. 2d 30, 194 N.Y.S.2d 173, 1959 N.Y. Misc. LEXIS 2767 (N.Y. Sup. Ct. 1959).

In action to declare foreign divorce void, defense that divorce was not subject to attack here was stricken as insufficient, since a foreign divorce obtained without jurisdiction is always subject to attack. Weiner v Weiner, 27 Misc. 2d 647, 211 N.Y.S.2d 125, 1961 N.Y. Misc. LEXIS 3509 (N.Y. Sup. Ct.), modified, 13 A.D.2d 937, 216 N.Y.S.2d 788, 1961 N.Y. App. Div. LEXIS 10027 (N.Y. App. Div. 1st Dep't 1961).

Wife's adultery is no defense to her action on separation agreement which contained no provision to that effect. Snelwar v Snelwar, 27 Misc. 2d 933, 212 N.Y.S.2d 882, 1961 N.Y. Misc. LEXIS 3188 (N.Y. Sup. Ct. 1961).

In action for back alimony decreed in Massachusetts divorce decree, defense of plaintiff's remarriage and of full and complete support by second husband and provision by him for her in future held sufficient for period since such remarriage. Bogert v Watts, 32 N.Y.S.2d 750, 1942 N.Y. Misc. LEXIS 1287 (N.Y. Sup. Ct. 1942).

In wife's action for payments due under separation agreement, defense of Nevada divorce, being decree in rem, did not bar wife's rights in personam, and summary judgment was granted to her. Russo v Russo, 62 N.Y.S.2d 514, 1946 N.Y. Misc. LEXIS 2276 (N.Y. City Ct. 1946).

In action to declare Mexican divorce invalid and plaintiff to be defendant's lawful wife, her affirmative defense that he is estopped by his acts to question validity of Mexican divorce and also by laches, was sufficient. Untermeyer v Untermeyer, 87 N.Y.S.2d 774, 1949 N.Y. Misc. LEXIS 1997 (N.Y. Sup. Ct. 1949).

In wife's action for unpaid alimony instalments under separation agreement incorporated in divorce decree, requiring husband to pay wife $60 per week for support of wife and child, he may plead, in partial defense, that she deprived him of visitation to his child, assuming that allocation can be found in agreement. Blumberg v Blumberg, 117 N.Y.S.2d 906, 1952 N.Y. Misc. LEXIS 2097 (N.Y. County Ct.), aff'd, 280 A.D. 986, 117 N.Y.S.2d 473, 1952 N.Y. App. Div. LEXIS 4503 (N.Y. App. Div. 1952).

297. —Divorce

The adultery of the defendant in an action for divorce cannot be established by admission in the answer; otherwise there would be a way open to litigants to avoid the rule that the offense must be clearly proved. Taylor v Taylor, 123 A.D. 220, 108 N.Y.S. 428, 1908 N.Y. App. Div. LEXIS 31 (N.Y. App. Div. 1908).

In husband's New York action for divorce, wife's defense that she had obtained Nevada divorce after claiming abandonment, entitling her to choose her own domicile, and establishing bona fide domicile in Nevada, thereby giving Nevada court jurisdiction of res and making adequate service

of summons on husband outside Nevada, held sufficient as pleaded, raising triable issues as to jurisdiction of Nevada court. McCarthy v McCarthy, 263 A.D. 848, 31 N.Y.S.2d 752, 1941 N.Y. App. Div. LEXIS 5249 (N.Y. App. Div. 1941), app. dismissed, 287 N.Y. 845, 41 N.E.2d 171, 287 N.Y. (N.Y.S.) 845, 1942 N.Y. LEXIS 1853 (N.Y. 1942).

In an action for divorce, allegations of cruel and inhuman treatment on the part of the plaintiff and his failure to support defendant may not be stricken from the answer as irrelevant, and the fact that the answer did not define such allegations as a counterclaim is not fatal. Mason v Mason, 94 N.Y.S. 868, 46 Misc. 361, 1905 N.Y. Misc. LEXIS 71 (N.Y. Sup. Ct. 1905).

Facts showing compliance with a decree of divorce may be alleged as a partial defense where action brought by a wife to recover necessaries furnished by her both before and after a foreign divorce decree. Sitowsky v Sitowsky, 9 Misc. 2d 528, 173 N.Y.S.2d 626, 1957 N.Y. Misc. LEXIS 2807 (N.Y. App. Term 1957).

In husband’s action for divorce for wife’s adultery in 1940, defense of husband’s adultery committed to wife’s knowledge more than five years since her discovery of offense held insufficient. Mays v Mays, 22 N.Y.S.2d 702, 1940 N.Y. Misc. LEXIS 2200 (N.Y. Sup. Ct. 1940), aff'd, 261 A.D. 984, 27 N.Y.S.2d 436, 1941 N.Y. App. Div. LEXIS 8429 (N.Y. App. Div. 1941).

In wife’s action for divorce, husband’s defense that she knew that he was openly cohabitating with another woman for more than five years prior to commencement of her action for divorce, is valid, since wife is barred from obtaining divorce, though such cohabitation continued down to time of commencement of her action. Berkley v Berkley, 142 N.Y.S.2d 273, 1955 N.Y. Misc. LEXIS 2790 (N.Y. Sup. Ct. 1955).

298. —Annulment

The circumstances stated in the Domestic Relations Law, § 3, under which a marriage by a person whose husband or wife is living is not absolutely void need not be specifically negatived in pleading capacity to marry, and a reply to the defendant’s allegation that the plaintiff was

incompetent to enter into a contract of marriage by reason of the fact that another husband was living, is sufficient when it alleges that at the time of her former marriage the other party was married to another woman now living and that no divorce or annulment of that marriage had been obtained. Stein v Dunne, 119 A.D. 1, 103 N.Y.S. 894, 1907 N.Y. App. Div. LEXIS 3838 (N.Y. App. Div.), aff'd, 190 N.Y. 524, 83 N.E. 1132, 190 N.Y. (N.Y.S.) 524, 1907 N.Y. LEXIS 1436 (N.Y. 1907).

Annulment cannot be granted in action for separation where defendant's separate defense, not pleaded as a counterclaim, was that at the date of marriage plaintiff had a husband living and plaintiff's marriage with him was then in force. Johannessen v Johannessen, 128 N.Y.S. 892, 70 Misc. 361, 1911 N.Y. Misc. LEXIS 95 (N.Y. Sup. Ct. 1911).

Defense to annulment of marriage that plaintiff acted as defendant's attorney in securing divorce and represented that she was free to remarry, was sufficient. Bonney v Bonney, 13 Misc. 2d 866, 65 N.Y.S.2d 488, 1946 N.Y. Misc. LEXIS 1749, 1946 N.Y. Misc. LEXIS 2862 (N.Y. Sup. Ct. 1946), aff'd, 271 A.D. 1060, 70 N.Y.S.2d 133, 1947 N.Y. App. Div. LEXIS 5826 (N.Y. App. Div. 4th Dep't 1947).

299. —Separation

In wife's action for husband's breach of separation agreement voided for her adultery, committee of insane husband improperly pleaded her adultery as affirmative defense. Mohrmann v Kob, 291 N.Y. 181, 51 N.E.2d 921, 291 N.Y. (N.Y.S.) 181, 1943 N.Y. LEXIS 1041 (N.Y. 1943).

Wife's adultery is no defense to her action for a sum of money due under a separation agreement. Davis v Davis, 8 A.D.2d 566, 183 N.Y.S.2d 532, 1959 N.Y. App. Div. LEXIS 9652 (N.Y. App. Div. 3d Dep't 1959).

In an action for a separation, where defendant sets up as a separate defense but not as a counterclaim that at the time of the marriage of the parties the plaintiff had a husband living and

that her marriage with him was then in force, the court cannot grant judgment annulling the marriage of the parties. Johannessen v Johannessen, 128 N.Y.S. 892, 70 Misc. 361, 1911 N.Y. Misc. LEXIS 95 (N.Y. Sup. Ct. 1911).

In wife's separation action, husband's defense that wife's prior divorce from first husband was collusively made to relieve him from paying alimony was insufficient, where he charged neither lack of jurisdiction to grant divorce nor fraudulent representations inducing his marriage to plaintiff. Conklin v Conklin, 39 N.Y.S.2d 825, 179 Misc. 766, 1943 N.Y. Misc. LEXIS 1578 (N.Y. Sup. Ct. 1943), aff'd, 267 A.D. 919, 48 N.Y.S.2d 333, 1944 N.Y. App. Div. LEXIS 6197 (N.Y. App. Div. 1944).

Defenses of statute of limitations and full payment raised issues precluding summary judgment in an action for payments due under a separation agreement. Falagario v Noonan, 20 Misc. 2d 30, 194 N.Y.S.2d 173, 1959 N.Y. Misc. LEXIS 2767 (N.Y. Sup. Ct. 1959).

In wife's action for separation for cruelty, defense that prior to commencement of action plaintiff forgave defendant and freely condoned acts of misconduct set forth in complaint, was broad enough to embrace all allegations of complaint for separation and so sufficient. Goldstein v Goldstein, 128 N.Y.S.2d 811 (N.Y. Sup. Ct.), aff'd, 283 A.D. 1012, 131 N.Y.S.2d 444, 1954 N.Y. App. Div. LEXIS 6119 (N.Y. App. Div. 1954).

300. Mechanic's lien

An allegation contained in an answer interposed in an action brought to foreclose a mortgage to the effect "that there never was any valuable or other legal consideration" for the mortgage, is equivalent to an allegation that there was no consideration for the mortgage, and is an allegation of fact and not a conclusion of law. First Nat'l Bank v Robinson, 105 A.D. 193, 94 N.Y.S. 767, 1905 N.Y. App. Div. LEXIS 2038 (N.Y. App. Div. 1905), aff'd, 188 N.Y. 45, 80 N.E. 567, 188 N.Y. (N.Y.S.) 45, 1907 N.Y. LEXIS 1104 (N.Y. 1907).

Owner's placing of sum in escrow to await performance of additional corrective work or to secure satisfaction of other liens does not constitute payment of contractor and, therefore, is no defense to subcontractor's action. Kinematics, Ltd. v Sprayview Constr. Corp., 27 Misc. 2d 332, 209 N.Y.S.2d 352, 1960 N.Y. Misc. LEXIS 2034 (N.Y. Sup. Ct. 1960).

In action to impress trust on moneys deposited by building contractor in defendant bank, defense that plaintiff was not proper party plaintiff because he had not filed a mechanic's lien against owner or contractor on job held sufficient. Putnam Valley Lumber & Supply Corp. v Mahopac Nat. Bank, 34 N.Y.S.2d 68, 1942 N.Y. Misc. LEXIS 1466 (N.Y. Sup. Ct. 1942).

301. Mortgage foreclosure

Although a wife who has not joined in her husband's mortgage is made a party defendant on foreclosure, it is not necessary for her to set up her dower rights by answer; such answer is frivolous and will be stricken out. Anderson v McNeely, 120 A.D. 676, 105 N.Y.S. 278, 1907 N.Y. App. Div. LEXIS 1288 (N.Y. App. Div. 1907).

In an action of foreclosure by the assignee of a mortgage, the answer of a defendant claiming under a prior assignment, alleging that at the time the plaintiff took his assignment he had knowledge of the prior assignment, states a good defense. Biedler v Malcolm, 121 A.D. 145, 105 N.Y.S. 642, 1907 N.Y. App. Div. LEXIS 1728 (N.Y. App. Div. 1907).

In action to foreclose, on motion to strike the answer setting up an agreement not to foreclose, was not insufficient because of the statute of frauds, since proofs might show estoppel to rely upon the statute, but defense of conspiracy to cut off a subsequent mortgage was insufficient. Monica Realty Corp. v Bleecker, 229 A.D. 184, 241 N.Y.S. 290, 1930 N.Y. App. Div. LEXIS 10334 (N.Y. App. Div. 1930).

On foreclosure of mortgage, agreement to delay action was insufficient defense, being without consideration. Central Hanover Bank & Trust Co. v Romer Holding Co., 234 A.D. 419, 255 N.Y.S. 254, 1932 N.Y. App. Div. LEXIS 10454 (N.Y. App. Div. 1932).

Foreclosure, see Platt v Lengel, 259 A.D. 920, 20 N.Y.S.2d 1010, 1940 N.Y. App. Div. LEXIS 7299 (N.Y. App. Div. 1940).

An answer in foreclosure, setting up a subsequent mortgage owned by defendant and an action pending based on such junior lien, is no defense. White v Gibson, 113 N.Y.S. 983, 61 Misc. 436, 1908 N.Y. Misc. LEXIS 124 (N.Y. Sup. Ct. 1908).

It is no defense to an action for foreclosure, that the plaintiff orally agreed to act as agent for defendant to secure an assignment of the mortgage, but took the mortgage in his own name at less than half the amount due thereon, and refused to transfer it to defendant, for such an agreement is absolutely void under the statute of frauds. Jenkins v Bishop, 115 N.Y.S. 1011, 62 Misc. 87, 1909 N.Y. Misc. LEXIS 493 (N.Y. Sup. Ct. 1909), rev'd, 133 A.D. 517, 117 N.Y.S. 630, 1909 N.Y. App. Div. LEXIS 2220 (N.Y. App. Div. 1909), modified, 207 N.Y. 697, 101 N.E. 1106, 207 N.Y. (N.Y.S.) 697, 1913 N.Y. LEXIS 1345 (N.Y. 1913).

Defense of violation of covenant of quiet enjoyment stricken because of insufficiency of allegations. Ferraro v Marrillard Builders, 239 N.Y.S. 337, 136 Misc. 160, 1930 N.Y. Misc. LEXIS 984 (N.Y. County Ct.), aff'd, 229 A.D. 802, 243 N.Y.S. 871, 1930 N.Y. App. Div. LEXIS 11421 (N.Y. App. Div. 1930).

In action to foreclose realty mortgage, city’s defense that its lien of judgment obtained in proceeding to demolish unsafe building was superior to existing mortgage was sufficient. Thornton v Chase, 23 N.Y.S.2d 735, 175 Misc. 748, 1940 N.Y. Misc. LEXIS 2364 (N.Y. Sup. Ct. 1940).

In action to foreclose mortgage against testamentary trustee of deceased mortgagor, its contention that its liability for deficiency should not be determined except in separate action held not to be sufficient. National Sav. Bank v National Commercial Bank & Trust Co., 29 N.Y.S.2d 840, 176 Misc. 1057, 1941 N.Y. Misc. LEXIS 2159 (N.Y. Sup. Ct. 1941).

In action on mortgage bond, demand to foreclose, by mortgagor who sold mortgaged premises to another who assumed mortgage, made on default by latter, when property was worth amount

of mortgage, held insufficient in that mortgagee was not bound to sue until maturity of mortgage. Marks v Follo, 29 N.Y.S.2d 1019, 177 Misc. 108, 1941 N.Y. Misc. LEXIS 2204 (N.Y. Sup. Ct. 1941).

In action to foreclose mortgage for violations filed by Department of Housing, defense that such violations existed several years before mortgagor acquired premises but that mortgagee had done nothing to remove same and that mortgagee did not bring foreclosure until mortgagor had completed work of removal of violations, required summary judgment for mortgagor. Rockaway Park Series Corp. v Hollis Automotive Corp., 135 N.Y.S.2d 588, 206 Misc. 955, 1954 N.Y. Misc. LEXIS 3035 (N.Y. Sup. Ct. 1954), aff'd, 285 A.D. 1140, 142 N.Y.S.2d 364, 1955 N.Y. App. Div. LEXIS 6929 (N.Y. App. Div. 1955).

Fact that mortgagor might be entitled to tax exemptions was no defense to mortgagee's foreclosure action for nonpayment of taxes since mortgagor could pay taxes levied and redeem the tax sale lien without loss to itself if it ultimately succeeded in action to void them. Shaker Cent. Trust Fund v Crusade for Christ, Inc., 26 Misc. 2d 825, 215 N.Y.S.2d 13, 1960 N.Y. Misc. LEXIS 2040 (N.Y. Sup. Ct. 1960).

In mortgage foreclosure to clear chain of title, defense that power of attorney, given by wife to husband, did not authorize him to divest her of all her interest as tenant by entirety in realty involved was insufficient. Prudential Ins. Co. v Bickford, 40 N.Y.S.2d 376, 1943 N.Y. Misc. LEXIS 1664 (N.Y. County Ct. 1943).

In action to foreclose mortgage on realty owned by mortgagor's wife, her husband could legally mortgage his interest in property held by entirety without consent of wife, barring any defense on such issue. Steinlauf v Camporese, 142 N.Y.S.2d 166, 1955 N.Y. Misc. LEXIS 2775 (N.Y. Sup. Ct. 1955).

In action to foreclose mortgage, defense and counterclaim that public administrator illegally evicted defendant from mortgaged premises and sold same illegally was struck out as insufficient where public administrator obtained court order authorizing such sale and defendant

was evicted pursuant to judgment legally obtained. Contessa v Haink's Heirs at Law, 142 N.Y.S.2d 653, 1955 N.Y. Misc. LEXIS 3512 (N.Y. Sup. Ct. 1955).

302. Municipal corporations

It is no defense to an action for injuries occasioned by the omission of a municipal corporation to act with reasonable diligence after notice of an unlawful street obstruction, that the obstruction was not in fact dangerous and not known to the corporation. Rehberg v New York, 91 N.Y. 137, 91 N.Y. (N.Y.S.) 137, 1883 N.Y. LEXIS 16 (N.Y. 1883).

The defense, that an appropriation for street cleaning purposes was exhausted and that payment of claims for extra work would be a violation of the Consolidation Act, must be pleaded if relied on. McNulty v New York, 168 N.Y. 117, 61 N.E. 111, 168 N.Y. (N.Y.S.) 117, 1901 N.Y. LEXIS 863 (N.Y. 1901).

In action for stenographic services rendered to committee of city council making investigations, defense of no appropriation therefor held invalid. Chambers v New York, 286 N.Y. 308, 36 N.E.2d 313, 286 N.Y. (N.Y.S.) 308, 1941 N.Y. LEXIS 1442 (N.Y. 1941).

In action by instructor in City College against Board of Higher Education for salary increments, defense that plaintiff was annually appointed as temporary instructor and so was not entitled to increments was insufficient. Dexter v Board of Higher Education, 293 N.Y. 39, 55 N.E.2d 857, 293 N.Y. (N.Y.S.) 39, 1944 N.Y. LEXIS 1345 (N.Y. 1944).

When the plaintiff who was hired by the defendant’s brother to work in a livery stable and was endeavoring to start a gas engine, alleges that the brother was the defendant’s manager and superintendent, which the defendant admits by answer, it is established so far as the management of the business is concerned that the brother was the alter ego of the defendant. Tivnan v Keahon, 117 A.D. 50, 101 N.Y.S. 1076, 1907 N.Y. App. Div. LEXIS 188 (N.Y. App. Div. 1907), aff'd, 191 N.Y. 543, 85 N.E. 1116, 191 N.Y. (N.Y.S.) 543, 1908 N.Y. LEXIS 1167 (N.Y. 1908).

A city sued on a contract obligation cannot interpose the defense of ultra vires unless pleaded, where it is sued for tort so that the plaintiff is under the burden of showing an authorized act by its agent, the defense of ultra vires is available, although not taken by answer. Brennan v Albany, 143 A.D. 752, 128 N.Y.S. 334, 1911 N.Y. App. Div. LEXIS 921 (N.Y. App. Div. 1911).

In action for negligent death, answer setting up “Guest Statute” of Connecticut was insufficient, since statute was not retrospective. Leone v Tricario, 245 N.Y.S. 81, 138 Misc. 81, 1930 N.Y. Misc. LEXIS 1568 (N.Y. Sup. Ct. 1930).

In action against city and physician for negligent treatment of child at city health station, their defense that action was not commenced within 6 months after accrual of cause of action and physician’s defense that he was improper party to action, held insufficient. Grimaldi v New York, 30 N.Y.S.2d 366, 177 Misc. 492, 1941 N.Y. Misc. LEXIS 2272 (N.Y. Sup. Ct. 1941).

In action for full salary for 30-day period covering requested leave of absence without pay, granted by police commissioner to patrolman for medical treatment for wound received in line of duty, defense that latter’s acceptance of requested leave without pay was waiver of right to full statutory salary held insufficient, where commissioner originally withheld no pay. Dubins v New York, 31 N.Y.S.2d 390, 177 Misc. 675, 1941 N.Y. Misc. LEXIS 2394 (N.Y. Mun. Ct. 1941).

Action for difference between salary paid and salary to which he was entitled, defense that he was employed as “probationary fireman” was insufficient. Allen v New York, 39 N.Y.S.2d 962, 179 Misc. 539, 1943 N.Y. Misc. LEXIS 1605 (N.Y. Sup. Ct.), aff'd, 266 A.D. 987, 44 N.Y.S.2d 958, 1943 N.Y. App. Div. LEXIS 5623 (N.Y. App. Div. 1943).

For conclusory allegation in answer of village in action for injuries from traffic light stanchion allegedly a nuisance, see Wenzel v Duncan, 32 N.Y.S.2d 223, 1941 N.Y. Misc. LEXIS 2523 (N.Y. Sup. Ct. 1941).

303. Negligence

In action by owner-occupant for injuries received while riding in automobile driven by plaintiff's husband in Vermont on defendant's business, defenses of common-law attribution of operator's negligence to owner-occupant of automobile and of Vermont guest statute held sufficient. Willis v Fitzgerald Bros. Brewing Co., 261 A.D. 357, 25 N.Y.S.2d 647, 1941 N.Y. App. Div. LEXIS 7328 (N.Y. App. Div. 1941).

In action by son, who borrowed his father's car and who permitted another to drive it, and there was a collision, against such driver for injuries sustained in collision defense that driver's negligence was imputable to plaintiff riding in car when injured was insufficient. Smalt v Rider, 126 N.Y.S.2d 868, 1950 N.Y. Misc. LEXIS 2551 (N.Y. Sup. Ct. 1950).

Where automobile accident occurred in Virginia while defendant was riding in her car driven by plaintiff's husband, defense that under common law of Virginia automobile owner was not liable for negligence of driver unless driver was servant or agent of owner, was sufficient. Sternback v Horowitz, 119 N.Y.S.2d 543, 1952 N.Y. Misc. LEXIS 2253 (N.Y. Sup. Ct. 1952).

In action for personal injuries resulting from collision of plaintiff's and fire department motor vehicles, defense of volunteer fire department and its individual members that none of them was liable except for wilful negligence or malfeasance, was sufficient. Heifetz v Rockaway Point Volunteer Fire Dep't, 124 N.Y.S.2d 257, 1953 N.Y. Misc. LEXIS 2150 (N.Y. Sup. Ct.), aff'd, 282 A.D. 1062, 126 N.Y.S.2d 604, 1953 N.Y. App. Div. LEXIS 5825 (N.Y. App. Div. 1953).

Real cause of injury, in negligence need not be pleaded. Schaus v Manhattan Gaslight Co. 36 Super Ct (4 Jones & S) 262.

304. Nuisance

In action by adjoining landowners to enjoin use of premises as nuisance, defense that such use could not disturb because of distance between properties was sufficient. Troller v Michel, 275 A.D. 721, 87 N.Y.S.2d 380, 1949 N.Y. App. Div. LEXIS 4204 (N.Y. App. Div. 1949).

In action to enjoin ice cream company from polluting plaintiff's pond with waste water, defense of prescriptive right was sufficient, so long as pollution amounted only to private nuisance. Jones v Breyer Ice Cream Co., 1 A.D.2d 253, 149 N.Y.S.2d 426, 1956 N.Y. App. Div. LEXIS 6054 (N.Y. App. Div. 4th Dep't 1956).

Unemancipated child, though born out of wedlock, but whose natural father had supported her from time of birth and had sole charge of her, so as to stand in loco parentis, cannot sue father for negligence. Caringe v Rubin, 13 A.D.2d 593, 212 N.Y.S.2d 455, 1961 N.Y. App. Div. LEXIS 11958 (N.Y. App. Div. 3d Dep't 1961).

In action against village for injuries from traffic light stanchion erected on state highway within village and allegedly nuisance, allegation in answer "which were caused by negligence of operators of such motor vehicles" defined rules of pleading by joining defense or new matter to denial and by expressing conclusion of law. Wenzel v Duncan, 32 N.Y.S.2d 223, 1941 N.Y. Misc. LEXIS 2523 (N.Y. Sup. Ct. 1941).

305. Parent and child

Adopted child may sue adopting parent for tort where child was injured prior to adoption, and so defense to contrary is insufficient in law. Adams v Nadel, 124 N.Y.S.2d 427, 1953 N.Y. Misc. LEXIS 2182 (N.Y. Sup. Ct. 1953).

306. Partition

In action for partition of realty, affirmative defense that institution of administration proceedings in Surrogate's Court, after issuance of letters of administration of estate of decedent who had owned such realty, conferred complete jurisdiction on Surrogate to exclusion of Supreme Court, did not raise issue. Maslanka v Maslanka, 286 A.D. 874, 142 N.Y.S.2d 375, 1955 N.Y. App. Div. LEXIS 4402 (N.Y. App. Div. 1955).

In action in equity for partition of stock certificate owned by plaintiffs and defendant in common, defendant's defense that action has been instituted in pursuit of deliberate plan to ruin corporate business, to deprive defendant of his career and to prevent perpetuation of family name, all of which gift of stock had been intended to secure, was insufficient. Mann v Schuman, 1 A.D.2d 678, 146 N.Y.S.2d 716, 1955 N.Y. App. Div. LEXIS 3914 (N.Y. App. Div. 2d Dep't 1955).

In action for partition against defendant in his individual capacity and as coexecutor of deceased testator, based on probated will devising testator's property to plaintiff and defendant in equal parts, Surrogate, in admitting will to probate, necessarily determined that will was duly executed by competent testator, barring collateral attack by defendant's defense that testator was incompetent to make will. Callegari v Guatelli, 154 N.Y.S.2d 148 (N.Y. Sup. Ct. 1956).

307. Partnership actions

The averment of indorsement by defendants as partners, and a denial of indorsement does not put the partnership in issue. Anable v Conklin, 25 N.Y. 470, 25 N.Y. (N.Y.S.) 470, 1862 N.Y. LEXIS 155 (N.Y. 1862).

Where a complaint alleges a general partnership and the answer sets up a limited one, the plaintiff may prove failure to comply with an evasion of the provisions of the statute relative to limited partnerships in order to charge defendants as general partners. Sharp v Hutchinson, 100 N.Y. 533, 3 N.E. 500, 100 N.Y. (N.Y.S.) 533, 1885 N.Y. LEXIS 1006 (N.Y. 1885).

A suit for a partnership accounting is in equity, and if it be shown that the defendant is accountable for a single item, it is no answer to say that there are other matters for which he is not accountable. Joseph v Herzig, 135 A.D. 141, 120 N.Y.S. 34, 1909 N.Y. App. Div. LEXIS 3928 (N.Y. App. Div. 1909), modified, 198 N.Y. 456, 92 N.E. 103, 198 N.Y. (N.Y.S.) 456, 1910 N.Y. LEXIS 820 (N.Y. 1910).

Where plaintiff claimed that he was entitled to share brokerage received by defendants as Group Management, defense that plaintiff had been officially rejected as group member was

sufficient. Buonora v Price, 277 A.D. 1007, 100 N.Y.S.2d 288, 1950 N.Y. App. Div. LEXIS 4253 (N.Y. App. Div. 1950).

In action for partnership accounting after termination of partnership, defense of statute of frauds is not defense to action on executed or partially executed oral agreement. Zuckerman v Linden, 139 N.Y.S.2d 737, 207 Misc. 702, 1955 N.Y. Misc. LEXIS 3486 (N.Y. Sup. Ct. 1955).

In action by executrix of deceased partner, who transferred his interest to remaining partners, against corporation as successor to partnership, defense that such partnership was insolvent as its liabilities exceeded fair value of its assets, was insufficient for failure to allege that value of separate assets of each general partner did not exceed amount probably sufficient to meet claims of his separate creditors, under Debtor and Creditor L. § 271. Aiken v Herman Wolz Textile Corp., 4 Misc. 2d 40, 152 N.Y.S.2d 664, 1956 N.Y. Misc. LEXIS 1856 (N.Y. Sup. Ct. 1956).

It forms an issue where one sued with others as partner denies that he ever was a copartner with defendants. Corning v Haight, 1 NY Code R 72.

Where three of four defendants sued as copartners for goods sold and delivered to them, answer denying a sale to the above named defendants, it is frivolous. .

308. Patent, copyright and trademark litigation

In action by patentee against its licensee for minimum royalties, defense of invalidity of patent is not available to patent licensee. Elgin Nat'l Watch Co. v Bulova Watch Co., 281 A.D. 219, 118 N.Y.S.2d 197, 1953 N.Y. App. Div. LEXIS 3013 (N.Y. App. Div.), reh'g denied, 281 A.D. 820, 118 N.Y.S.2d 915, 1953 N.Y. App. Div. LEXIS 3431 (N.Y. App. Div. 1953).

In action for damages for unauthorized disclosure of invention to corporation and for its unauthorized use thereof, defenses that plaintiff’s invention was not original and that corporation had acquired from other inventors rights to their invention which were similar to plaintiff’s

claimed discovery, were insufficient. Lakoff v Lionel Corp., 137 N.Y.S.2d 806, 207 Misc. 319, 1955 N.Y. Misc. LEXIS 2579 (N.Y. Sup. Ct. 1955).

In action for trade-mark infringement, where complaint alleged prior use but did not allege time of commencement of such use nor date of registration of trade-mark in New York, answer alleging continuous use in interstate commerce since 1942 and its registration in New York in 1948, stated sufficient defense. Herbert Products, Inc. v Oxy-Dry Sprayer Corp., 1 Misc. 2d 71, 145 N.Y.S.2d 168, 1955 N.Y. Misc. LEXIS 2294 (N.Y. Sup. Ct. 1955).

Invalidity of copyright cannot be asserted by licensee who has availed himself of benefits of license. King v Edward B. Marks Music Corp., 45 N.Y.S.2d 628, 1943 N.Y. Misc. LEXIS 2677 (N.Y. Sup. Ct. 1943).

Defense by patent licensee, questioning validity of patent is insufficient. Elgin Nat. Watch Co. v Bulova Watch Co., 113 N.Y.S.2d 707, 1952 N.Y. Misc. LEXIS 2805 (N.Y. Sup. Ct. 1952).

309. Penalties and fines

In action to recover fee paid to defendant to procure its commitment to lend money, defense that fee was penalty and one which was given and accepted under mutual mistake and that action was premature, was struck out. West Merrick Road Realty Corp. v Dry Dock Sav. Bank, 286 A.D. 1035, 145 N.Y.S.2d 306, 1955 N.Y. App. Div. LEXIS 5082 (N.Y. App. Div. 1955).

In action against bank for penalty under Banking L. § 108, defense that plaintiff did not make loan from bank but purchased automobile under conditional sales contract and that latter was sold to bank by vendor was sufficient. Lamula v Morris Plan Industrial Bank, 19 N.Y.S.2d 357, 173 Misc. 874, 1940 N.Y. Misc. LEXIS 1659 (N.Y. Mun. Ct. 1940).

In action by People to recover fines imposed and collected by city and claimed by state, defense that such fines resulted from informations for violations of General Highway Traffic Law, repealed by Highway Law, and no other statute or ordinance and so would have constituted violations of ordinances held insufficient, since such violations were valid only as charging

violations of state statutes. People v Yonkers, 30 N.Y.S.2d 678, 177 Misc. 406, 1941 N.Y. Misc. LEXIS 2317 (N.Y. Sup. Ct. 1941), aff'd, 267 A.D. 959, 48 N.Y.S.2d 336, 1944 N.Y. App. Div. LEXIS 5743 (N.Y. App. Div. 1944).

310. Quo warranto

The bringing of an action of quo warranto against a person who usurps or unlawfully holds a public office is in the discretion of the attorney general. A decision by a prior incumbent of the office that the action should not be brought is not res adjudicata or binding upon his successor; when the attorney general has served a summons and complaint in an action of quo warranto, the questions as to whether the action was barred by the decision of his predecessor and whether service should be set aside should be raised by motion and not by answer or plea to bar. People v McClellan, 118 A.D. 177, 103 N.Y.S. 146, 1907 N.Y. App. Div. LEXIS 638 (N.Y. App. Div.), aff'd, 188 N.Y. 618, 81 N.E. 1171, 188 N.Y. (N.Y.S.) 618, 1907 N.Y. LEXIS 1293 (N.Y. 1907).

311. Real property actions generally

A defendant in an action to recover damages for negligence in the performance of his contract to search for taxes and assessments, assumes the burden of proving that a remedy exists which is available to the plaintiff, and to which he should resort. Morange v Mix, 44 N.Y. 315, 44 N.Y. (N.Y.S.) 315, 1871 N.Y. LEXIS 45 (N.Y. 1871).

A defendant may contest the validity of a title by constructive possession in an action to recover for unlawful taking of timber therefrom. People v Hagadorn, 104 N.Y. 516, 10 N.E. 891, 104 N.Y. (N.Y.S.) 516, 5 N.Y. St. 782, 1887 N.Y. LEXIS 617 (N.Y. 1887).

When, in an action to determine the title to real property, both the plaintiffs and defendants admit that a deed absolute upon its face was given as security only and ask that the property be sold to pay the debt due the grantee, the court is without power to render judgment that the deed was

void as champertous and because given while the property was in the adverse possession of another. Bradt v McClenahan, 118 A.D. 768, 103 N.Y.S. 884, 1907 N.Y. App. Div. LEXIS 748 (N.Y. App. Div. 1907).

In an action by a grantee in possession of real estate, to have his deed reformed in relation to the description so as to make it conform to the intention of the parties, CPA § 53 (§ 213(1) herein) was no defense. Brennan v Thompson, 94 N.Y.S. 684, 46 Misc. 317, 1905 N.Y. Misc. LEXIS 61 (N.Y. Sup. Ct. 1905).

In an action against several grantors upon the covenants of warranty and for quiet enjoyment contained in a deed of real property in which all joined, based upon an alleged eviction as to one-eighth of the property, it is not a complete defense that a mortgage, given by plaintiff to the particular grantor of such one-eighth interest for the entire purchase price thereof, was, after the death of such grantor, purchased for less than its face by the plaintiff from his administrator who subsequently misapplied the purchase price; and an answer setting up such facts as a complete defense is bad. Gordon v Illensworth, 107 N.Y.S. 650, 56 Misc. 366, 1907 N.Y. Misc. LEXIS 775 (N.Y. Sup. Ct. 1907).

It is not necessary or proper to set out that plaintiff’s title was acquired by tax sale and that one sale was void, in ejectment, for the simple denial of plaintiff’s title is the proper mode of raising the issue. Terrell v Wheeler, 12 N.Y. St. 597.

In an action to recover earnest money paid on a contract to sell land, on the ground of unmarketable title because the wall of the building encroaches on the street, it is a good defense that the water table projection alone encroaches, which is not necessary and easily removable, and has been there thirty-five years, and the same is customary with similar buildings in the city. 556 & 558 Fifth Ave. Co. v Lotus Club, 129 A.D. 339, 113 N.Y.S. 886, 1908 N.Y. App. Div. LEXIS 1294 (N.Y. App. Div. 1908).

312. Replevin

In action to replevin property sold under conditional sales agreement, defendant who was not party to contract must plead lack of knowledge of title in plaintiff, although such agreement was never filed. S. S. Silver & Co. v Cafe Charing, Inc., 264 A.D. 790, 34 N.Y.S.2d 960, 1942 N.Y. App. Div. LEXIS 4746 (N.Y. App. Div. 1942).

A livery stable keeper could properly set up in defense to an action of replevin to recover possession of a horse, harness and trap, a claim for the sum due him as liveryman, but could not plead as a counterclaim the amount of certain assigned claims arising on contract. Campbell v Abbott, 111 N.Y.S. 782, 60 Misc. 93, 1908 N.Y. Misc. LEXIS 627 (N.Y. App. Term 1908).

In action to replevy mortgaged automobile seized by mortgagee for mortgagor's failure to pay cost of insurance including premiums authorized by mortgage but forbidden by statute allowing lenders to charge only official fees, defense that plaintiff must sue in equity to cancel mortgage held invalid. Wessler v Jefferson Personal Finance Corp., 26 N.Y.S.2d 132, 1941 N.Y. Misc. LEXIS 1539 (N.Y. Mun. Ct. 1941).

In replevin for piano, defenses of nonownership by plaintiff and artisan's lien held insufficient. Bush v Springall, 36 N.Y.S.2d 708 (N.Y. Sup. Ct. 1942).

313. Sales

An answer which alleges that the goods sold and services sued upon were worth less than the amount sued for, raises an issue. Moffet v Sackett, 18 N.Y. 522, 18 N.Y. (N.Y.S.) 522, 1859 N.Y. LEXIS 237 (N.Y. 1859).

Under an answer denying indebtedness and that some of the goods were sold to others, evidence that some of them were unsound and worthless is inadmissible. Fetherly v Burke, 54 N.Y. 646, 1873 N.Y. LEXIS 90 (N.Y. 1873).

In the absence of fraud the vendee of personal property cannot set up a defect in the title of his vendor, unless he has returned the property. McGiffin v Baird, 62 N.Y. 329, 62 N.Y. (N.Y.S.) 329, 1875 N.Y. LEXIS 510 (N.Y. 1875).

In an action to recover the value of merchandise sold and delivered to defendant and received and used by it, the defendant can defend, for reasons of public policy, upon the ground that the plaintiff paid a gratuity to the defendant's purchasing agent in contravention of the Penal Code. Sirkin v Fourteenth Street Store, 124 A.D. 384, 108 N.Y.S. 830, 1908 N.Y. App. Div. LEXIS 2108 (N.Y. App. Div. 1908).

Where a contract for sale of goods was broken by reason of refusal to allow an inspection by the vendee before paying the remainder of the purchase price, it is no defense to an action to recover the sum deposited by the vendee that, after being notified that the goods would be sold on his account, he bid them in; in such action plaintiff may show his agent the inspected goods before purchasing, and their quality. Plumb v Bridge, 128 A.D. 651, 113 N.Y.S. 92, 1908 N.Y. App. Div. LEXIS 548 (N.Y. App. Div. 1908).

An answer in an action for price of goods alleging that goods were purchased at a price less than that sued for held to raise an issue. Hall & Lyon Furniture Co. v Torrey, 196 A.D. 804, 188 N.Y.S. 486, 1921 N.Y. App. Div. LEXIS 5611 (N.Y. App. Div. 1921).

In action for damages for failure to make and deliver glass globes, order denying motion to strike defense that making globes would infringe patents, was reversed. Planetlite Co. v Gleason-Tiebout Glass Co., 234 A.D. 304, 255 N.Y.S. 109, 1932 N.Y. App. Div. LEXIS 10417 (N.Y. App. Div. 1932).

In buyer's action for treble damages for violating Emergency Price Control Act, defense that buyer sought to defraud defendant, who in ignorance of law was innocent of wrongdoing, and to enrich buyer, was insufficient. Lightbody v Russell, 267 A.D. 603, 47 N.Y.S.2d 711, 1944 N.Y. App. Div. LEXIS 4785 (N.Y. App. Div.), rev'd, 293 N.Y. 492, 58 N.E.2d 508, 293 N.Y. (N.Y.S.) 492, 1944 N.Y. LEXIS 1278 (N.Y. 1944).

In action on trade acceptance, defense that plaintiff's assignor was organized by and is an arm and instrumentality of an unrecognized foreign government is insufficient absent any allegation that the sale upon which the trade acceptance was based violated public or national policy.

Upright v Mercury Business Machines Co., 13 A.D.2d 36, 213 N.Y.S.2d 417, 1961 N.Y. App. Div. LEXIS 11469 (N.Y. App. Div. 1st Dep't 1961).

Defendant's answer to complaint seeking recovery of price of goods sold raised no issue and was stricken out on motion, and judgment for plaintiff. Columbia Weighing Mach. Co. v Hansen, 227 N.Y.S. 324, 131 Misc. 770, 1928 N.Y. Misc. LEXIS 731 (N.Y. Sup. Ct. 1928).

An allegation that plaintiffs had agreed that goods sold should be considered a consignment does not admit of evidence of such a change in case of other goods sued upon as sold. Wallace v Blake, 8 N.Y.S. 862, 58 N.Y. Super. Ct. 13, 1890 N.Y. Misc. LEXIS 1822 (N.Y. Super. Ct. 1890), aff'd, 128 N.Y. 676, 28 N.E. 603, 128 N.Y. (N.Y.S.) 676, 1891 N.Y. LEXIS 1119 (N.Y. 1891).

In action by seller's assignee against buyer for purchase price of trailers, defense that agreements for excessive interest cannot be enforced except as to principal, required summary judgment for plaintiff. James Talcott, Inc. v Jackson, 137 N.Y.S.2d 416, 1954 N.Y. Misc. LEXIS 2552 (N.Y. Sup. Ct. 1954).

An agreement that a balance due upon goods sold was to remain unpaid until a certain judgment affecting the title of the goods was paid, is a good defense to action for such balance. Terry v Haitz, 9 N.Y. St. 649.

As to the defense of breach of warranty, see Gillespie v Torrance, 17 Super Ct (4 Bosw) 36, affd (26 NY 306.).

An answer which in effect denies that defendants had promised to pay for the goods at a time prior to the commencement of the action, does not set up a substantial defense. Claflin v Baere, 28 Hun 204 (N.Y.).

An answer setting up that the purchaser of whiskey intended to sell it contrary to the excise law and that the seller knew it, is no defense to an action for its price. Ross-Lewin v Johnson, 32 Hun 408 (N.Y.).

In action for breach of contract of sale, defendant's answer that plaintiff was not the seller, was insufficient under a reply that plaintiff had been bound to, and had, paid the actual seller. Farish Co. v Madison Distributing Co., 37 F.2d 455, 1930 U.S. App. LEXIS 2568 (2d Cir. N.Y. 1930).

314. —Fair Trade Law

In action for violation of Fair Trade Law, defense that sales were made in conformity to such law held insufficient as conclusion of law, and defense that sales were made in conformity to "paid employees and/or representatives and/or agents of plaintiff" held insufficient. Bissell Carpet Sweeper Co. v Berg, 43 N.Y.S.2d 30, 180 Misc. 131, 1943 N.Y. Misc. LEXIS 2103 (N.Y. Sup. Ct. 1943).

315. Sheriffs

It is not a defense that a sheriff discharged prisoners, if on the order of a court made without jurisdiction. Bullymore v Cooper, 46 N.Y. 236, 46 N.Y. (N.Y.S.) 236, 1871 N.Y. LEXIS 248 (N.Y. 1871).

In collection of part of sum, fact that sureties of sheriff are sued for need not be pleaded. O'Brien v McCann, 58 N.Y. 373, 58 N.Y. (N.Y.S.) 373, 1874 N.Y. LEXIS 511 (N.Y. 1874).

Where property has been seized by virtue of a void attachment a subsequent levy thereon without a return to and acceptance by the owner or without his consent while in the hands of the officer, by virtue of a valid attachment against him, is not a defense, nor does it go in mitigation of damages in an action for the unlawful taking. Tiffany v Lord, 65 N.Y. 310, 65 N.Y. (N.Y.S.) 310, 1875 N.Y. LEXIS 347 (N.Y. 1875).

On an action against a sheriff on his liability as bail a return of not found by the deputy sheriff, at the request and direction of plaintiff's attorney, is a defense. Douglas v Haberstro, 88 N.Y. 611, 88 N.Y. (N.Y.S.) 611, 1882 N.Y. LEXIS 146 (N.Y. 1882).

In an action against a sheriff for false imprisonment, invalid order of commitment is no protection to the sheriff. Politano v Jacoby, 240 A.D. 733, 265 N.Y.S. 653, 1933 N.Y. App. Div. LEXIS 5753 (N.Y. App. Div.), aff'd, 263 N.Y. 573, 189 N.E. 703, 263 N.Y. (N.Y.S.) 573, 1933 N.Y. LEXIS 868 (N.Y. 1933).

In an action against a sheriff to recover for an escape, an order paroling an individual held by defendant under body execution, otherwise void, is nevertheless a defense to the sheriff where the plaintiff has accepted benefits under the order and therefore has acquiesced in its terms and conditions. Land Finance Corp. v Jacoby, 243 A.D. 530, 275 N.Y.S. 890, 1934 N.Y. App. Div. LEXIS 5745 (N.Y. App. Div. 1934), aff'd, 267 N.Y. 600, 196 N.E. 600, 267 N.Y. (N.Y.S.) 600, 1935 N.Y. LEXIS 1325 (N.Y. 1935).

In action for damages for wrongfully returning execution partially satisfied, it was valid defense that at time of delivery of execution to defendant judgment debtor was insolvent, that within four months thereafter petition was filed for arrangement in bankruptcy, and that lien was lost as result of bankruptcy proceeding and not as result of any act of defendant. Miracle Paint & Chemical Corp. v McCollom, 2 A.D.2d 712, 153 N.Y.S.2d 606, 1956 N.Y. App. Div. LEXIS 4873 (N.Y. App. Div. 2d Dep't), reh'g denied, 2 A.D.2d 782, 154 N.Y.S.2d 842, 1956 N.Y. App. Div. LEXIS 4561 (N.Y. App. Div. 2d Dep't 1956), app. dismissed, 2 N.Y.2d 706, 1956 N.Y. LEXIS 1232 (N.Y. 1956).

In action by conditional seller of automobile against sheriff for sale of automobile under attachment against buyer, defense of failure to comply with the uniform conditional sales act with respect to refiling the contract in the district to which the car was removed was held insufficient for failure to notify the conditional seller of the removal, and because the removal was temporary; however, a second defense that the automobile was attached by duly qualified officer under a valid legal process regular on its face issued by a court of competent jurisdiction and that no claim, demand or notice was given sheriff of the interest of the conditional seller, was held to constitute complete justification. Universal Credit Co. v Knights, 261 N.Y.S. 252, 145 Misc. 876, 1932 N.Y. Misc. LEXIS 1695 (N.Y. Sup. Ct. 1932).

In action to hold a sheriff liable as bail for release of prisoner, court order directing sheriff to release and discharge the prisoner, plaintiff's husband, arrested for failure to pay alimony, is a sufficient defense. Lang v Dreyer, 9 N.Y.S.2d 970, 170 Misc. 207, 1939 N.Y. Misc. LEXIS 1537 (N.Y. Sup. Ct. 1939).

The sheriff may defend an action of trespass for taking property under an attachment of a creditor at large, upon the ground that the property had been transferred by the defendants in the attachment suit in fraud of their creditors. Webster v Lawrence, 47 Hun 565, 15 N.Y. St. 140 (N.Y.).

To an action for a false return, it is sufficient to show a reversal of the judgment on which the execution was issued. Inman v McNeil, 57 How Pr 151; or to show a payment in conformity with other process and orders of the court, whether properly made or not. American Hosiery Co. v Riley, 12 Abb NC 329; but the mere issue of a prior execution is no defense, nor can the sheriff justify under another execution which he has returned unsatisfied. Johnson Bros. & Co. v Reilly, 59 How. Pr. 354, 1880 N.Y. Misc. LEXIS 146 (N.Y. Sup. Ct. July 1, 1880).

316. Specific performance

A vendor's complaint in an action for specific performance of a contract to convey lands need not allege that the plaintiff was "able" to convey. It is sufficient that he is ready and willing to perform the agreement on his part, and that he did tender to the defendant a deed of the premises pursuant to the terms of the agreement, etc. Inability of the vendor to perform is a matter of defense. Clexton v Tunnard, 119 A.D. 709, 104 N.Y.S. 665, 1907 N.Y. App. Div. LEXIS 3230 (N.Y. App. Div. 1907).

It is no defense to an action for specific performance against a husband that his wife did not join in the contract, for, if she refuse to join in the conveyance, the vendee may elect to take the premises subject to her dower, with an equivalent deduction. Maas v Morgenthaler, 136 A.D. 359, 120 N.Y.S. 1004, 1910 N.Y. App. Div. LEXIS 27 (N.Y. App. Div. 1910).

In action for specific performance, defense to plaintiff's claim for damages because of having to remove from the premises, was good as a partial defense. 276 Spring Street Corp. v Forbes, 226 A.D. 354, 235 N.Y.S. 523, 1929 N.Y. App. Div. LEXIS 8721 (N.Y. App. Div. 1929).

In specific performance where a contract, made in good faith, calls for conveyance of a good title, defense of breach because of inability to so convey, is good only as a partial defense to a prayer for damages, and must be so pleaded. In such case defendant is liable only for nominal damages in addition to return of initial payment with reasonable costs of examination of title. 276 Spring Street Corp. v Forbes, 226 A.D. 354, 235 N.Y.S. 523, 1929 N.Y. App. Div. LEXIS 8721 (N.Y. App. Div. 1929).

Where the assignee of vendee in a land contract sought to compel vendor to convey, answer claiming that he was not compelled to accept assignee's purchase money mortgage in lieu of one executed by the original vendee, was good. Lojo Realty Co. v Estate of Johnson, 227 A.D. 292, 237 N.Y.S. 460, 1929 N.Y. App. Div. LEXIS 6420 (N.Y. App. Div. 1929), aff'd, 253 N.Y. 579, 171 N.E. 791, 253 N.Y. (N.Y.S.) 579, 1930 N.Y. LEXIS 950 (N.Y. 1930).

In action for specific performance of contract to sell real property, defense and counterclaim based on allegations that plaintiff brought the action knowing there was no legal justification therefor, and with intent to prevent the defendant from conveying the property to another maliciously filed a lis pendens therein, were insufficient absent allegation that the lis pendens was used for a purpose other than permitted by law. Bronstein v Dayton Peninsula Corp., 11 A.D.2d 1036, 206 N.Y.S.2d 12, 1960 N.Y. App. Div. LEXIS 7853 (N.Y. App. Div. 2d Dep't 1960).

In action for specific performance of contract to sell real property, defense and counterclaim based on allegations that plaintiff brought the action knowing there was no legal justification therefor were insufficient; since if the action was malicious and without probable cause, defendant was not entitled to recover therefor until the action had terminated favorably to him. Bronstein v Dayton Peninsula Corp., 11 A.D.2d 1036, 206 N.Y.S.2d 12, 1960 N.Y. App. Div. LEXIS 7853 (N.Y. App. Div. 2d Dep't 1960).

In action for specific performance of lease, defense of illegality based on alleged violations of Sherman Anti-Trust Act is insufficient where the lease although connected with the franchise agreement attacked as illegal, is a separate, intelligible, economic transaction which if enforced would not of itself violate the Act. Carvel Dari-Freeze Stores, Inc. v Lukon, 206 N.Y.S.2d 20 (N.Y. Sup. Ct. 1960).

317. Supplementary proceedings

A bank which pays over a deposit of a wife upon an order in supplementary proceedings against the husband to which the wife was not a party, cannot answer such payment to the suit of the wife for the deposit. Schrauth v Dry Dock Sav. Bank, 86 N.Y. 390, 86 N.Y. (N.Y.S.) 390, 1881 N.Y. LEXIS 225 (N.Y. 1881).

318. Taxation

In action to cancel taxes and tax liens on church property allegedly exempt under Tax L § 4, issue of jurisdiction of assessors to tax exempt church property may be raised at any time, and alleged laches is no defense. Autokefalos Orthodox Spiritual Church v Mt. Vernon, 285 A.D. 1175, 141 N.Y.S.2d 21, 1955 N.Y. App. Div. LEXIS 7059 (N.Y. App. Div. 1955).

In action to cancel taxes and tax liens on church property allegedly exempt under Tax L § 4, defense of noncompliance with city charter relating to taxes for local improvements was insufficient, since such taxes were not involved. Autokefalos Orthodox Spiritual Church v Mt. Vernon, 285 A.D. 1175, 141 N.Y.S.2d 21, 1955 N.Y. App. Div. LEXIS 7059 (N.Y. App. Div. 1955).

In action for judgment declaring that franchise tax on plaintiff’s business after dissolution of corporation for nonpayment of taxes was illegal, state’s defense that plaintiff ran their business in name and manner of corporation held invalid. Brady v State Tax Com., 29 N.Y.S.2d 88, 176

Misc. 1053, 1941 N.Y. Misc. LEXIS 1984 (N.Y. Sup. Ct. 1941), aff'd, 263 A.D. 955, 33 N.Y.S.2d 384, 1942 N.Y. App. Div. LEXIS 7581 (N.Y. App. Div. 1942).

In action in rem for summary foreclosure of tax liens by city, realty owner's defense that there was no allegation in record showing adoption of resolution required by Tax L § 162 held insufficient in view of presumption of validity. In re New Rochelle, 36 N.Y.S.2d 886, 1942 N.Y. Misc. LEXIS 1909 (N.Y. County Ct. 1942).

319. Trespass

That all of tenants in common are not made parties in a complaint for trespass cannot be objected to by answer but by demurrer. De Puy v Strong, 37 N.Y. 372, 37 N.Y. (N.Y.S.) 372, 1867 N.Y. LEXIS 154 (N.Y. 1867).

It is no defense to an action for an original seizure that the one who wrongfully seized it afterwards procured it to be seized and sold on process in his favor. Wehle v Butler, 61 N.Y. 245, 61 N.Y. (N.Y.S.) 245, 1874 N.Y. LEXIS 633 (N.Y. 1874).

A defendant in trespass for the unlawful taking of personal property must in some way connect himself with the owner, and if plaintiff was in actual possession the answer alleging title in a third party is insufficient. Wheeler v Lawson, 103 N.Y. 40, 8 N.E. 360, 103 N.Y. (N.Y.S.) 40, 2 N.Y. St. 791, 1886 N.Y. LEXIS 1032 (N.Y. 1886).

In trespass partial defenses, resulting from inducing breach of contract and tending to affect plaintiff's prayer for punitive damages, were proper. Adler v Pilot Industries, Inc., 57 N.Y.S.2d 539, 1945 N.Y. Misc. LEXIS 2291 (N.Y. Sup. Ct.), modified, 269 A.D. 981, 59 N.Y.S.2d 301, 1945 N.Y. App. Div. LEXIS 4886 (N.Y. App. Div. 1945).

320. Unfair competition

In action to restrain competing liquor dealer from cutting prices, defense that plaintiff also cut prices held sufficient. Weisstein v Peter Corbyon Liquor Store, Inc., 22 N.Y.S.2d 510, 174 Misc. 1075, 1940 N.Y. Misc. LEXIS 2163 (N.Y. Sup. Ct. 1940).

In fair trade action to restrain price cutting it is no defense that plaintiff is barred on “unclean hands” theory because Federal Trade Commission had compelled it to delete word from title of product on ground that that word constituted illegal advertising since deception practiced had been practiced on public not defendant, and defendant by selling product participated in whatever wrong was committed. Carter Products, Inc. v Riteprice Merchandise, Inc., 23 Misc. 2d 230, 199 N.Y.S.2d 191, 1960 N.Y. Misc. LEXIS 3654 (N.Y. Sup. Ct. 1960).

In fair trade action to restrain price cutting it is no defense that plaintiff violated Robinson-Patman Act by selling its products to certain other customers, who were in competition with it, at prices lower than defendant could purchase them, since that act provides its own penalties which are exclusive, and it cannot be collaterally enforced. Carter Products, Inc. v Riteprice Merchandise, Inc., 23 Misc. 2d 230, 199 N.Y.S.2d 191, 1960 N.Y. Misc. LEXIS 3654 (N.Y. Sup. Ct. 1960).

321. Vendor and purchaser

That a deed has not been tendered is no defense to an action to enforce an equitable lien for unpaid purchase money. Freeson v Bissell, 63 N.Y. 168, 63 N.Y. (N.Y.S.) 168, 1875 N.Y. LEXIS 25 (N.Y. 1875).

Under an agreement to convey lands subject to a mortgage then due, the vendee may refuse title if prior to the contract the mortgagor has brought an action of foreclosure, and filed a lis pendens. He may recover the earnest money and expenses of examining the title; the defense that the vendor offered to pay the costs of the foreclosure is not available unless set up in the answer. Wacht v Hart, 120 A.D. 189, 105 N.Y.S. 78, 1907 N.Y. App. Div. LEXIS 1141 (N.Y. App. Div. 1907), aff'd, 198 N.Y. 629, 92 N.E. 1105, 198 N.Y. (N.Y.S.) 629, 1910 N.Y. LEXIS 1032 (N.Y. 1910).

Defendant cannot retain property purchased and, without pleading an election to rescind, at the same time set up the facts relied on as a defense to an action for the agreed price. New York Trust Co. v American Realty Co., 213 A.D. 272, 210 N.Y.S. 64, 1925 N.Y. App. Div. LEXIS 8474 (N.Y. App. Div. 1925).

In action to recover down payment on purchase price of realty because telephone poles and wires used by United States Coast Guard were located on premises, defense that plaintiff knew of poles and wires held sufficient. Clark v Riverhead Sav. Bank, 260 A.D. 1022, 23 N.Y.S.2d 808, 1940 N.Y. App. Div. LEXIS 5904 (N.Y. App. Div. 1940), aff'd, 286 N.Y. 588, 35 N.E.2d 933, 286 N.Y. (N.Y.S.) 588, 1941 N.Y. LEXIS 2133 (N.Y. 1941).

Defenses to action to recover money paid on a land contract on ground of fraudulent representations of vendor’s agent stricken out on motion. Schechner-Wittner, Inc. v E. A. White Organization, Inc., 247 N.Y.S. 246, 138 Misc. 768, 1931 N.Y. Misc. LEXIS 1035 (N.Y. City Ct. 1931).

In action by purchaser under contract to purchase house to recover deposit, defense based on printed delay clause, conflicting with typewritten clause, was insufficient. Goodman v Valley View Estates, Inc., 144 N.Y.S.2d 805, 1955 N.Y. Misc. LEXIS 3251 (N.Y. Sup. Ct. 1955).

322. Violation of privacy

In action by famous musicians for violation of Civil Rights Law and of commonlaw right of privacy in connection with use of their names and pictures for advertising purposes, defense pleading matter indicating lack of malice or intent to injure plaintiff may be asserted in mitigation of exemplary damages sought by plaintiffs. Wilk v Andrea Radio Corp., 13 A.D.2d 745, 216 N.Y.S.2d 662, 1961 N.Y. App. Div. LEXIS 10841 (N.Y. App. Div. 1st Dep't 1961).

In action by famous musicians for violation of Civil Rights Law and of commonlaw right of privacy, defense that they had waived their right of privacy by becoming celebrities was insufficient where their names and pictures had been used purely for advertising purposes and

not in connection with any newsworthy item. Wilk v Andrea Radio Corp., 200 N.Y.S.2d 522, 1960 N.Y. Misc. LEXIS 3920 (N.Y. Sup. Ct. 1960), modified, 13 A.D.2d 745, 216 N.Y.S.2d 662, 1961 N.Y. App. Div. LEXIS 10841 (N.Y. App. Div. 1st Dep't 1961).

In action by famous musicians for violation of Civil Rights Law in use of their names and photographs for advertising purposes, allegation that their agent had supplied photographs on request without indicating that further consent was necessary and in reliance thereon defendant’s published photographs was insufficient to spell out defense of estoppel in the absence of any allegation that plaintiffs had participated in the transaction, and was also insufficient to spell out defense of consent in absence of a writing by either plaintiffs or their authorized agent. Wilk v Andrea Radio Corp., 200 N.Y.S.2d 522, 1960 N.Y. Misc. LEXIS 3920 (N.Y. Sup. Ct. 1960), modified, 13 A.D.2d 745, 216 N.Y.S.2d 662, 1961 N.Y. App. Div. LEXIS 10841 (N.Y. App. Div. 1st Dep't 1961).

In action by famous musicians for violation of Civil Rights Law and of commonlaw right of privacy in connection with use of their names and pictures for advertising purposes, defense that plaintiff’s ratified publication by notifying defendants through their attorneys that they would be satisfied if defendants republished their pictures with credit line was insufficient since ratification was conditioned upon republication as requested and defendant alleged that there had been but one publication. Wilk v Andrea Radio Corp., 200 N.Y.S.2d 522, 1960 N.Y. Misc. LEXIS 3920 (N.Y. Sup. Ct. 1960), modified, 13 A.D.2d 745, 216 N.Y.S.2d 662, 1961 N.Y. App. Div. LEXIS 10841 (N.Y. App. Div. 1st Dep't 1961).

In action by famous musicians for violation of Civil Rights Law and of commonlaw right of privacy in connection with use of their names and pictures for advertising purposes, defense that they had sustained no damages was insufficient as being conclusory; claim could be asserted under defendant’s denial of allegation of damages. Wilk v Andrea Radio Corp., 200 N.Y.S.2d 522, 1960 N.Y. Misc. LEXIS 3920 (N.Y. Sup. Ct. 1960), modified, 13 A.D.2d 745, 216 N.Y.S.2d 662, 1961 N.Y. App. Div. LEXIS 10841 (N.Y. App. Div. 1st Dep't 1961).

323. Waters

Answer in action to enjoin unlawful discharge of waters on plaintiff's land, that plaintiff caused damage, was sufficient. Sbarra v Erie R. Co., 68 N.Y.S.2d 478, 1947 N.Y. Misc. LEXIS 2082 (N.Y. Sup. Ct. 1947).

324. Work, labor and services

An answer denying all of a complaint for professional services except testator's evidence, that defendants are his executors and that plaintiff presented a bill which they declined to pay, and alleging upon information and belief, payment and indebtedness of plaintiff to testator, is insufficient to put plaintiff upon proof of the unadmitted allegations of the complaint. Moissen v Kloster, 114 N.Y. 638, 21 N.E. 1050, 114 N.Y. (N.Y.S.) 638, 1889 N.Y. LEXIS 1170 (N.Y. 1889).

Although not alleged in the answer, the defendant in an action to foreclose the lien of a subcontractor or materialman, may show in defense incomplete work, cost to complete it and the payments made on account. Frazier v McGuckin, 9 N.Y.S. 435, 58 N.Y. Super. Ct. 71, 1890 N.Y. Misc. LEXIS 204 (N.Y. Super. Ct. 1890).

In action on written contract for services in burying relative of defendants who signed contract, defense of defendant husband that he was not to be personally liable unless wife's estate lacked sufficient funds to pay for such services, and defense of defendant daughter that she agreed to pay only if defendant husband failed to pay, were insufficient, as varying written contract, requiring summary judgment against them. Kearns v Ceretta, 139 N.Y.S.2d 3, 1955 N.Y. Misc. LEXIS 3409 (N.Y. Sup. Ct. 1955).

325. Workmen's compensation

Employee's third-party action brought more than one year (Workmen's Compensation Law § 29), but within three years (CPA § 49 (§§ 213, 214, 215 herein)), after the accident was not barred by an award of compensation which had never been paid because employer was

uninsured and insolvent. Juba v General Builders Supply Corp., 7 N.Y.2d 48, 194 N.Y.S.2d 503, 163 N.E.2d 328, 1959 N.Y. LEXIS 965 (N.Y. 1959).

In action by state insurance commissioners to recover from third party, whose negligence caused death of assured's employee, special payments into special funds for vocational rehabilitation and reopened cases, defense of satisfaction of lien by commissioners for compensation payments and medical expenses was insufficient. Commissioners of State Ins. Fund v Consolidated Edison Co., 2 Misc. 2d 410, 151 N.Y.S.2d 215, 1956 N.Y. Misc. LEXIS 2204 (N.Y. App. Term 1956).

In action against both automobile owner and driver for injuries sustained, defense of owner that defendant driver and plaintiff were in employ of common employer and that at time of collision they were acting in course of their common employment, was insufficient. Goldwasser v Ranieri, 2 Misc. 2d 606, 151 N.Y.S.2d 170, 1956 N.Y. Misc. LEXIS 2037 (N.Y. App. Term 1956).

In action by an employee against a stranger to recover for personal injuries, wherein the stranger served a third party complaint against plaintiff's employer for contribution, the defense to the third party complaint of Workmen's Compensation as being the employee's sole remedy, is insufficient, even though there is a possibility that there may be a recovery over against the employer by the stranger for more than the compensation benefits. Tuffarella v Erie R. Co., 27 Misc. 2d 638, 211 N.Y.S.2d 351, 1961 N.Y. Misc. LEXIS 3566 (N.Y. Sup. Ct. 1961).

In action by employee against corporate employer for physical assault, defense of fellow servant and contributory negligence combined as one defense, and defense of workmen's compensation, were held valid. Camacho v Innersprings, Inc., 142 N.Y.S.2d 886 (N.Y. Sup. Ct. 1955).

Research References & Practice Aids

§ 3018. Responsive pleadings.

End of Document