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The Covenant of Seisin

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General's department of the United States³⁸ in support of the Act difficult to distinguish. There are *dicta* in these very cases which the Court may rely upon to declare the Act unconstitutional. For example, in the case of *Magnano v. Hamilton*³⁷ the Court said:

"That clause (the Fourteenth Amendment)³⁸ is applicable to a taxing statute such as the one assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power; but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property."

The carriers will undoubtedly cite the *Child Labor Tax Case*³⁹ as authority for the proposition that this Act exceeds the taxing power of Congress. Such application by the Court would be unfortunate, since the Child Labor Tax⁴⁰ was held to be unconstitutional on the express grounds that the tax sought to exercise a forbidden power through the use of a penalty, and has since been distinguished by *Magnano v. Hamilton*.⁴¹ It is clear that the tax in Railroad Retirement Act⁴² is not designed to act as a penalty. Whether or not the Supreme Court will declare the new Act unconstitutional depends, it would seem, on the willingness of the Court to employ the objectivity exemplified by the late Justice Oliver Wendell Holmes.

WILLIAM H. QUASHA.

THE COVENANT OF SEISIN.

I

Since no covenant is to be implied in a conveyance of real estate in New York,¹ a purchaser in the absence of fraud, accident or mutual mistake, must look to whatever covenants his deed actually contains for indemnity should the title prove defective or fail.² Consequently, among many things, the usual warranty deed embraces an undertaking on the part of the grantor that he is seised as owner, at

³⁸ PRENTICE-HALL, LABOR AND UNEMPLOYMENT INSURANCE SERVICE, Fed. 26,125 (1935).

³⁷ 292 U. S. 40, 54 Sup. Ct. 599 (1934).

³⁸ The constitutionality of a state tax was in issue.

³⁹ (*Bailey v. Drexel Furniture Co.*) 259 U. S. 20, 42 Sup. Ct. 449 (1922).

⁴⁰ TAX ON EMPLOYMENT OF CHILD LABOR, c. 18, 40 STAT. 1138, 26 U. S. C. A. §702 (1919).

⁴¹ *Supra* note 37; see Note (1934) 47 HARV. L. REV. 1229.

⁴² *Supra* note 8.

¹ N. Y. REAL PROP. LAW §251.

² *Whitbeck v. Waive*, 16 N. Y. 532, 535 (1858).

the time of the grant, of the land which the deed purports to convey. This assurance to the purchaser that the covenantor is possessed of the very estate in quantity and quality which his conveyance intends to transfer is called the "covenant of or for seisin."

The covenant need be couched in no particular terms; it need merely be but a stipulation or declaration that the grantor is seised of an estate of the *quantum* which he undertakes to convey. The New York short form of deed, culled mainly from the fuller language of former deeds, simply words this covenant for title as follows: "That the party of the first part is seised of said premises in fee simple * * *."³ The construction to be given to such words, however, is prescribed by statute as follows: "A covenant that the grantor 'is seised of the said premises (described) in fee simple, * * *,' must be construed as meaning that such grantor, at the time of the execution and delivery of the conveyance, is lawfully seised of a good, absolute and indefeasible estate of inheritance in fee simple, of and in all and singular the premises thereby conveyed, with the tenements, hereditaments and appurtenances thereto belonging, * * *."⁴ Thus it may be seen that in New York as in most American jurisdictions⁵ and in England,⁶ the covenant of seisin is construed in compliance with the meaning "seised" and "seisin" acquired after the Statute of Uses; the covenant is not satisfied by a tortious possession.⁷

The covenant of or for seisin applies not only to the land itself but extends as well to all buildings,⁸ fences,⁹ fixtures,¹⁰ and such other things as are properly appurtenant to the land¹¹ and which would pass by a conveyance of the freehold.

³ N. Y. REAL PROP. LAW §258.

⁴ *Id.* §253, subd. 1.

⁵ *Lockwood v. Sturdevant*, 6 Conn. 373 (1827); *Comstock v. Comstock*, 23 Conn. 349 (1854); *Allen v. Allen*, 48 Minn. 462, 51 N. W. 473 (1892); *Parker v. Brown*, 15 N. H. 177 (1844); *Pringle v. Witten's Ex'rs*, 1 Bay 256 (S. C. 1792); *Catlin v. Hurlburt*, 3 Vt. 403 (1831); *Mills v. Catlin*, 22 Vt. 106 (1849).

⁶ *Young v. Raincock*, 7 C. B. 310 (1849).

⁷ In some jurisdictions, among which Maine and Massachusetts are prominent, by reason of a survival of the feudal definition of seisin, the covenant is not considered broken if the grantor be actually in possession of the land claiming such title as he undertakes to convey though seised only as a wrongdoer in adverse possession. *Watts v. Parker*, 27 Ill. 223 (1862); *Marston v. Hobbs*, 2 Mass. 433 (1807); *Bearce v. Jackson*, 4 Mass. 408 (1808); *Raymond v. Raymond*, 10 Cush. 134 (Mass. 1852); *Cushman v. Blanchard*, 2 Greenl. 266 (Me. 1823); *Fairbrother v. Griffin*, 10 Me. 91 (1833); *Wilson v. Widenham*, 51 Me. 566 (1863); *Montgomery v. Reed*, 69 Me. 510 (1879); *Stambaugh v. Smith*, 23 Ohio St. 584 (1873); *Wetzell v. Richcreek*, 53 Ohio St. 62, 40 N. E. 1004 (1895).

⁸ *Burke v. Nichols*, 2 Keyes 671 (N. Y. 1866); *Stearn v. Hesdorfer*, 9 Misc. 134, 29 N. Y. Supp. 281 (1894).

⁹ *Mott v. Palmer*, 1 N. Y. 564 (1848).

¹⁰ *Herzog v. Marx*, 202 N. Y. 1, 94 N. E. 1063 (1911).

¹¹ *Adams v. Conover*, 87 N. Y. 422 (1880) (Right of flowage); *Sweet v. Howell*, 96 App. Div. 45, 89 N. Y. Supp. 21 (3d Dept. 1904) (Right to take water from a spring on adjacent land).

II

The covenant of seisin is a covenant *de praesenti*; it is worded in the present tense and relates to something being or existing at the time it is made. If this covenant is ever violated, its breach will be simultaneous with its making. Thus, if the grantor be not seised, the covenant is broken the moment the deed is delivered.¹² Thereafter, the covenant cannot be affected or broken, no matter what might occur to defeat the title.¹³ Immediately the covenant of seisin is breached the grantee has a right of action to recover damages and to sustain such an action it is not essential that an eviction be shown.¹⁴

The covenant of seisin is broken when the grantor does not actually possess, at the time of the conveyance, that very title, to the entire premises he purports to convey, which his covenant in express terms or by construction declares him to have. So, the covenant is breached if the grantor, purporting to convey an estate in fee simple, is not seised of the freehold¹⁵ or holds title to a part of the land only¹⁶ or has but a life estate.¹⁷ This covenant is also regarded as violated by the fact that things annexed to the premises such as fences,¹⁸ plumbing fixtures¹⁹ and so forth, belong to others and are subject to a right of removal. Likewise, it is broken if the covenantor has no rightful title to interests which should pass under the deed as appurtenances as in the case of a right to take water from a spring situate on adjoining land²⁰ or a right to overflow neighboring fields.²¹ However, no breach of the covenant of seisin occurs if the statement of quantity of land is merely descriptive when the land conveyed

¹² See *Greenby v. Wilcocks*, 2 Johns. 1, 4 (N. Y. 1806); *Hamilton v. Wilson*, 4 Johns. 72, 72 (N. Y. 1809); *Abbott v. Allen*, 14 Johns. 248, 253 (N. Y. 1817); *McCarty v. Leggett*, 3 Hill 134, 135 (N. Y. 1842); *Bingham v. Weiderwax*, 1 N. Y. 509, 513 (1848); *Nichols v. Nichols*, 5 Hun 108, 108 (N. Y. 1875); *Mygatt v. Coe*, 124 N. Y. 212, 218, 26 N. E. 611 (1891); *Werner v. Wheeler*, 124 App. Div. 358, 365, 127 N. Y. Supp. 158, 165 (1st Dept. 1911); *Hilliker v. Rueger*, 228 N. Y. 11, 15, 126 N. E. 266, 267 (1920); *Havens v. Howell*, 243 App. Div. 206, 207, 278 N. Y. Supp. 223, 224 (2d Dept. 1935).

¹³ *Coit v. McRenolds*, 2 Robt. 655 (N. Y. 1864).

¹⁴ See *Pitcher v. Livingston*, 4 Johns. 1, 9 (N. Y. 1809); *Kent v. Welch*, 7 Johns. 258, 260 (N. Y. 1810); *Abbott v. Allen*, 14 Johns. 248, 254 (N. Y. 1817); *Rickert v. Snyder*, 9 Wend. 416, 421 (N. Y. 1832); *Veit v. McClauslan*, 157 App. Div. 335, 337, 142 N. Y. Supp. 281, 283 (2d Dept. 1913); *Murphy v. United States Title Guaranty Co.*, 104 Misc. 607, 610, 172 N. Y. Supp. 243, 245 (1918); *Hilliker v. Rueger*, 228 N. Y. 11, 15, 126 N. E. 266, 267 (1920).

¹⁵ *Staats v. The Executors of Ten Eyck*, 3 Caines 111 (N. Y. 1805); *In re Boylan's Estate*, 119 Misc. 545, 197 N. Y. Supp. 710 (1922).

¹⁶ *Morris v. Phelps*, 5 Johns. 49 (N. Y. 1809); *Roak v. Sullivan*, 69 Misc. 429, 125 N. Y. Supp. 835 (1910).

¹⁷ *Tanner v. Livingston*, 12 Wend. 83 (N. Y. 1834).

¹⁸ *Mott v. Palmer*, 1 N. Y. 564 (1848).

¹⁹ *Herzog v. Marx*, 202 N. Y. 1, 94 N. E. 1063 (1911).

²⁰ *Sweet v. Howell*, 96 App. Div. 45, 89 N. Y. Supp. 21 (3d Dept. 1904).

²¹ *Adams v. Conover*, 22 Hun 424 (N. Y. 1880).

contains a less amount than that specified in such statement.²² The grantor's covenant is not necessarily broken by the fact that the land is in the possession of a third party at the time of the conveyance unless such possession is adverse so as to render the deed void for champerty.²³ An encroachment upon the street or adjoining property of structures erected upon the land conveyed does not create a breach of this covenant.²⁴ The presence of a judgment against the granted property²⁵ or the existence of a mortgage thereon²⁶ does not constitute a breach of the covenant. Nor is it transgressed in the circumstances that part of the land is subject to a highway easement in the public.²⁷

The usual remedy for a breach of the covenant of seisin is an action at law to recover damages. The action may be brought at any time after the breach; the grantee need not wait until he has been evicted²⁸ and in his action for damages it is sufficient to allege the breach by negating the words of the covenant.²⁹ But for the purpose of the running of the Statute of Limitations, a cause of action on this covenant is not deemed to have accrued until eviction.³⁰ Such an action is denied, however, to a grantee asserting a violation of the grantor's undertaking by reason of the fact that the title was, at the time of the conveyance, in himself and not in the covenantor. This is so because the covenant of seisin is a guaranty only against any title existing in a third person, which might defeat the estate granted.³¹

In the action brought by the vendee for a breach of this covenant, evidence that the grantor, since the conveyance and before suit was brought, acquired a good title is not admissible in bar of the cause of action.³² But if the action is not brought until the grantor has obtained a deed of the property and actually vested title in the grantee, the grantee cannot recover substantial damages.³³ Thus in an action to foreclose a purchase money mortgage on land situate in New York, a counterclaim for breach of the covenant of seisin, alleging plaintiffs' title to be defective at the time of sale because

²² Mann v. Pearson, 2 Johns. 37 (N. Y. 1806).

²³ Nichols v. Nichols, 5 Hun 424 (N. Y. 1875).

²⁴ Burke v. Nichols, 2 Keyes 671 (N. Y. 1866); Stearn v. Hesdorfer, 9 Misc. 134, 29 N. Y. Supp. 281 (1894); see Fehlhaber v. Fehlhaber, 8 Misc. 149, 150, 140 N. Y. Supp. 973, 974 (1913).

²⁵ Sedgwick v. Hollenback, 7 Johns. 376 (N. Y. 1811).

²⁶ Stanard v. Eldridge, 16 Johns. 254 (N. Y. 1819).

²⁷ Whitbeck v. Cook, 15 Johns. 483 (N. Y. 1818).

²⁸ *Supra* note 14.

²⁹ Abbott v. Allen, 14 Johns. 248 (N. Y. 1817); Rickert v. Snyder, 9 Wend. 416 (N. Y. 1832); Veit v. McCauslan, 157 App. Div. 335, 142 N. Y. Supp. 281 (2d Dept. 1913).

³⁰ N. Y. C. P. A. §47.

³¹ Fitch v. Baldwin, 17 Johns. 161 (N. Y. 1819).

³² See McCarty v. Leggett, 3 Hill 134, 135 (N. Y. 1842).

³³ See Murphy v. United States Title Guaranty Co., 104 Misc. 607, 610, 172 N. Y. Supp. 243, 245 (1918); Havens v. Howell, 243 App. Div. 206, 207, 278 N. Y. Supp. 223, 224 (2d Dept. 1935).

derived from liquidators of a foreign corporation appointed by a foreign court, was not upheld when it appeared that plaintiffs obtained a confirmatory deed from the corporation itself before the counterclaim was served and before demand was made for repayment of the purchase price. It was said that if the confirmatory deed did not destroy the cause of action on the covenant of seisin it made the damages but nominal.³⁴ Nevertheless, in an action for breach of the covenant of seisin the grantor is not allowed to give in evidence a title acquired by him subsequent to the bringing of the action; but the rights of the parties must be determined according to their existence and extent, at the time when the action was commenced.³⁵ And in a suit for specific performance, where a grantor, who at the time was being sued on the covenant of seisin, attempted to foist a conveyance of such subsequently acquired title upon the grantee it was held that the court had no power to compel the grantee to receive the deed, or to interfere with his action on the covenant.³⁶

III

The older cases enunciate the principle that covenants of title run with the land until they are breached. And the covenants of seisin, of power to convey and against incumbrances, being covenants *de praesenti*, if broken at all were deemed to be broken as soon as made and so were regarded as covenants which did not run with the land. The real reason for such a doctrine appears to be that the covenants being breached upon delivery of the deed, the grantee became possessed of an immediate right of action, purely personal in himself, because *at that time choses in action were incapable of assignment*. Consequently no one but the covenantee or his personal representatives could take advantage of these covenants.³⁷ Thus, some of the covenants for title, intended by the parties to assure, strengthen and support the title in exactly the same way as the other covenants which were held to run with the land, could not benefit subsequent grantees of the land who derived the same title from the original covenantee. Today, however, choses in action are assignable³⁸ and if the covenant of seisin is intended not merely for the benefit of the covenantee but for the protection of all who derive their title through him, it should be given effect accordingly. The benefit of the covenant of seisin should be held to be assigned by the mere delivery of each subsequent deed unless it is expressly reserved or has already been extinguished. According to the letter, there is

³⁴ *Deschenes v. Tallman*, 248 N. Y. 33, 161 N. E. 321 (1928).

³⁵ See *Morris v. Phelps*, 5 Johns. 49, 54 (N. Y. 1809).

³⁶ *Tucker v. Clarke*, 2 Sandf. Ch. 96 (N. Y. 1844).

³⁷ *Greenby v. Wilcocks*, 2 Johns. 1 (N. Y. 1806); *Hamilton v. Wilson*, 4 Johns. 72 (N. Y. 1809); see *Blyden v. Cotheal*, 1 Duer 176, 197 (N. Y. 1852).

³⁸ N. Y. PERS. PROP. LAW §41.

a breach of the covenant of seisin at the delivery of the deed containing it, but according to the spirit a subsequent grantee making title through that deed should be allowed to proceed directly against the original covenantor for damages because of the defective title. This theory has been utilized by the courts in dealing with the covenant against incumbrances³⁹ and by analogy it is equally adaptable to the covenant of seisin. So that today it would seem that if ever a covenantee did not exercise his right of action on the covenant of seisin but conveyed the premises to another, that other could sue upon the covenant although a remote grantee and notwithstanding the absence of an express assignment. The measure of damages to be recovered in such an action should be exactly the same amount as the original covenantee himself would have been entitled to had he sued, the theory being that the remote grantee stands in the position of an assignee of a chose in action.

IV

When a total breach of the covenant of seisin occurs, the measure of damages recoverable is the value of the land at the time of the conveyance; the best estimate of such value being the agreed purchase price expressed in the deed.⁴⁰ However, the consideration expressed in the conveyance is only *prima facie* evidence of the amount to be recovered. The true consideration for the grant, and any deficit in the payment thereof, may be established by parol, although a different consideration is stated in the deed, and notwithstanding an acknowledgment on the part of the grantor in the deed that it has been paid.⁴¹ At

³⁹ *Boyd v. Belmont*, 58 How. Pr. 513 (N. Y. 1880); *Andrews v. Appel*, 22 Hun 429 (N. Y. 1880); *Coleman v. Bresnaham*, 54 Hun 619, 8 N. Y. Supp. 158 (1889); *Clarke v. Priest*, 21 App. Div. 174, 47 N. Y. Supp. 489 (2d Dept. 1897); *General Underwriting Co. of New York v. Stilwell*, 139 App. Div. 189, 123 N. Y. Supp. 653 (1910); *Feldman v. Six Eleven Realty Co., Inc.*, 125 Misc. 821, 211 N. Y. Supp. 585 (1925); see *Geiszler v. De Graaf*, 166 N. Y. 339, 59 N. E. 993 (1901); *Mandigo v. Conway*, 45 Misc. 389, 391, 90 N. Y. Supp. 324, 325 (1904); *Gamorsil Realty Corporation v. Graef*, 128 Misc. 596, 599, 220 N. Y. Supp. 221, 223 (1926).

⁴⁰ *Staats v. Ten Eyck's Ex'rs*, 3 Caines 111 (N. Y. 1805); *Pitcher v. Livingston*, 4 Johns. 1 (N. Y. 1809); *Caulkins v. Harris*, 9 Johns. 324 (N. Y. 1812); *Bennet v. Jenkins*, 13 Johns. 50 (N. Y. 1816); *Kinney v. Watts*, 14 Wend. 38 (N. Y. 1835) (covenant of quiet enjoyment—rule of damages same); *In re Boylan's Estate*, 119 Misc. 545, 197 N. Y. Supp. 710 (1922); see *Sweet v. Howell*, 96 App. Div. 45, 47, 89 N. Y. Supp. 21, 22 (3d Dept. 1904); *Murphy v. United States Title Guaranty Co.*, 104 Misc. 607, 610, 172 N. Y. Supp. 243, 245 (1918).

⁴¹ *Shephard v. Little*, 14 Johns. 210 (N. Y. 1817); *M'Crea v. Purmort*, 16 Wend. 460 (N. Y. 1836); *Greenvault v. Davis*, 4 Hill 643 (N. Y. 1843) (upholding general rule but restricting its use to the immediate parties to the deed); *Bingham v. Weiderwax*, 1 N. Y. 509 (1848). *Contra*: *Schemerhorn v. Vanderheyden*, 1 Johns. 139 (N. Y. 1806); *Maugley v. Hauer*, 7 Johns. 341 (N. Y. 1811).

any rate it is the actual purchase price which should be recovered when there has been a total breach of the covenant of seisin. Interest will be allowed on this amount for so long a time as the grantee is liable to the true owner for the *mesne* profits, *i. e.* for no more than six years.⁴² If perchance the possession of the purchaser has continued for such a length of time that, under the Statute of Limitations, it has ripened into a valid title, it would seem that only nominal damages could be recovered.⁴³

When the covenant of seisin is breached, the grantee may elect to recover the purchase money and interest or he may purchase the outstanding title at the expense of the covenantor. Whether there is a total or partial breach of the covenant, the amount necessarily paid by the grantee in acquiring the outstanding title, is usually the measure of the recovery. The money so expended is not to exceed the amount of the consideration paid to the original grantor. And money disbursed in extinguishing a void title or in procuring mere evidence of existing title in the covenantee is not recoverable.⁴⁴ Costs and expenses, including counsel fees, incurred by the grantee in defending his title when a direct attack is made upon it, may be recovered.⁴⁵ As the theory of damages in relation to this covenant is that the estimate of loss must be taken as of the date of delivery of the deed, the vendee cannot recover from the vendor for any enhancement in the value of the premises, whether such acceleration was due to the expenditure of effort and money by the vendee in improvements thereon or to a natural appreciation in its value.⁴⁶ Of course if the grantee, as part of the consideration for the conveyance, engages to make certain improvements upon the land and does perform his agreement the value of such improvements should be included in the assessment of damages.⁴⁷

As was said before, the covenant of seisin is broken if the grantor was not seised of the very estate in quantity and quality which his deed purported to convey. But, however, if any title whatsoever passes by his deed to the grantee, the covenant of seisin is

⁴² *Caulkins v. Harris*, 9 Johns. 324 (N. Y. 1812).

⁴³ *Supra* notes 33 and 34.

⁴⁴ *Werner v. Wheeler*, 142 App. Div. 358, 127 N. Y. Supp. 158 (1st Dept. 1911); *Havens v. Howell*, 243 App. Div. 206, 278 N. Y. Supp. 223 (2d Dept. 1935); *cf.* *Roak v. Sullivan*, 96 Misc. 429, 125 N. Y. Supp. 835 (1910); see *Delavergne v. Norris*, 7 Johns. 358, 359 (N. Y. 1811); *Hilliker v. Rueger*, 228 N. Y. 11, 15, 126 N. E. 266, 267 (1920).

⁴⁵ *Staats v. Ten Eyck's Ex'rs*, 3 Caines 111 (N. Y. 1805); *Hilliker v. Rueger*, 228 N. Y. 11, 126 N. E. 266 (1920); see *Bennet v. Jenkins*, 13 Johns. 50, 51 (N. Y. 1816); *Grantier v. Austin*, 66 Hun 157, 159 (N. Y. 1892); *Olmstead v. Rawson*, 188 N. Y. 517, 522, 81 N. E. 456, 458 (1907).

⁴⁶ *Pitcher v. Livingston*, 4 Johns. 1 (N. Y. 1809); *In re Boylan's Estate*, 119 Misc. 545, 197 N. Y. Supp. 710 (1922); see *Bennet v. Jenkins*, 13 Johns. 50, 51 (N. Y. 1816); *Dimmick v. Lockwood*, 10 Wend. 142, 149 (N. Y. 1833); *Kinney v. Watts*, 14 Wend. 38, 41 (N. Y. 1835); *Kelly v. Dutch Church of Schenectady*, 2 Hill 105, 115 (N. Y. 1841); *Hunt v. Raplee*, 44 Hun 149, 155 (N. Y. 1887).

⁴⁷ See *Gilbert v. Peteler*, 38 N. Y. 165, 170 (1868).

considered as only partially breached. And when there is only a partial breach of the covenant, it would seem that the entire consideration money may not be recovered but the vendee may only recover *pro tanto*.⁴⁸ Thus where grantors covenanted that they were seised of an absolute estate of inheritance in fee simple in the premises, while they only possessed a life estate, the covenant was held to be partially breached and the grantee could only recover a proportional part of the consideration, the value of such life estate being deducted as his title to that extent was good.⁴⁹ In such actions to recover for the partial breach of the covenant, the usual measure of damages allowed is such part of the original price as bears the same ratio to the whole consideration that the value of the land to which title has failed bears to the value of the whole premises.⁵⁰ The same general principles concerning interest, costs, improvements, *etc.*, mentioned above and which govern the final recovery when there is a total breach, apply likewise in these actions.

EDWARD T. REILLY.

THE SELF-INCRIMINATION CLAUSE—COMMENT ON THE ACCUSED'S
FAILURE TO TESTIFY—PROPOSED AMENDMENT TO THE
CODE OF CRIMINAL PROCEDURE.

At a meeting held September 12, 1935, the Judicial Council of the State of New York publicly announced through its chairman, Chief Justice Crane, the drafting of a bill to be submitted to the next session of the state legislature, amending the New York Code of Criminal Procedure so as to permit comment by the prosecuting attorney on the failure of the defendant in a criminal trial to testify in his own behalf.¹ A similar bill, sponsored by the Attorney-General, was introduced to the recent session of the New York legislature

⁴⁸ *Morris v. Phelps*, 5 Johns. 49 (N. Y. 1809).

⁴⁹ *Tanner v. Livingston*, 12 Wend. 83 (N. Y. 1834).

⁵⁰ *Morris v. Phelps*, 5 Johns. 49 (N. Y. 1809); *Guthrie v. Pugsley*, 12 Johns. 126 (N. Y. 1815); *Kane v. Sanger*, 14 Johns. 89 (N. Y. 1816); *Wager v. Schuyler*, 1 Wend. 553 (N. Y. 1828); *Tanner v. Livingston*, 12 Wend. 83 (N. Y. 1834); *Giles v. Dugro*, 1 Duer 331 (N. Y. 1852); *Furniss v. Ferguson*, 15 N. Y. 443 (1857); *Hunt v. Raplee*, 44 Hun 149 (N. Y. 1887); *Grantier v. Austin*, 66 Hun 157 (N. Y. 1892); *Brown v. Allen*, 73 Hun 291 (N. Y. 1893); *Sweet v. Howell*, 96 App. Div. 45, 89 N. Y. Supp. 21 (3d Dept. 1904); *Roak v. Sullivan*, 96 Misc. 429, 125 N. Y. Supp. 835 (1910); *Hilliker v. Rueger*, 228 N. Y. 11, 126 N. E. 266 (1920).

¹ N. Y. L. J., Sept. 17, 1935. See also REPORT OF THE SPECIAL COMMITTEE ON THE REVISION OF THE N. Y. CODE OF CRIMINAL PROCEDURE, tentative draft of chapter on Preliminary Examination, tit. III, c. 3, §198, in N. Y. L. J., Sept. 23, 1935.