

12754

No. _____

Supreme Court of Illinois

Chickering

vs.

Davis

40 = 149

John W. Davis

vs

John W. Chichester

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1859

12754

1859

Prepared

United States of America

State of Illinois

County of Cook

S.S.

Pleas before the Honorable John M Wilson
Judge of the Cook County Court of Common Pleas
within and for the County of Cook and State of
Illinois, at a regular Term of said Cook County
Court of Common Pleas, begun and holden at the
Court House in the City of Chicago in said County
on the ^{being the fourth day} first Monday of January, in the year of our
Lord One Thousand Eight Hundred and fifty
eight and of the Independence of the United
States of America the Eighty second. —

Present The Hon^{ble} John M Wilson Judge

Carlos Heaven Pros^r Atty.

John L Wilson Sheriff

Attest.

Walter Kimball Clerk

Be it Remembered that heretofore
to wit on the fourteenth day of November in the year
of our Lord One Thousand Eight Hundred and
fifty seven John W. Chickering Plaintiff filed
in the Office of the Clerk of the said Court a
certain Precepe for Summons which said
precepe is as follows. To wit—

Issue Summons to Dupage

County.

John W. Cheekering

per se

Afterwards to wit on the same day the said John W. Cheekering filed in the Office of the Clerk of the said Court, his Declaration and copy of note, which said Declaration and Note follow in the words and figures, to wit-

State of Illinois

County of Cook. ss.

The Cook County Court of Common Pleas to wit of January Term to wit in the year of our Lord One thousand Eight hundred and fifty eight John W. Cheekering by himself Attorney complains of John W. Davis Defendant in this suit being Summon'd to of a plea of Trespass on the case upon promises:

For that whereas the said Defendant on the twenty second day of September in the year One thousand Eight hundred and fifty seven at Chicago to wit at the County aforesaid made a certain note in writing commonly called a promissory note bearing date the day and year last aforesaid and then and there delivered the said note to Philander Eddy By which said note the said Defendant

promised to pay to the said Philander Eddy or
bearer thirty days after the date thereof Two
Hundred and Seventeen Dollars and twenty four
Cents at the Banking Office of R K Swift
Brother and Johnston with interest at ten per
Cent (per annum meaning) (and the said promiss-
sory note is specifically made payable in the
said County of Cook by the terms thereof) for
value received.

And the said Philander Eddy
afterwards and before the said promissory note
became due and payable to wit on the same
day and year aforesaid and at the County
aforesaid by an endorsement or assignment on
the back thereof under his hand, assigned the
said promissory note to the said Plaintiff and
ordered and appointed the said Sum of money
therein mentioned to be paid to the said Plaintiff

By reason whereof and by force of the Statute
in such case made and provided the said
Defendant became liable to pay to the said
Plaintiff the said Sum of money in the said
Note specified according to the tenor and effect of the
said Note, and being so liable the said Defendant
in consideration ^{thereof} afterwards to wit on the same day
and year and at the place aforesaid undertook
and then and there faithfully promised the said
Plaintiff well and truly to pay to the said Plaintiff

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the said sum of money in the said note specified according to the tenor and effect of the said note. And whereas also the said Defendant afterwards, to-wit on the first day of November in the year of our Lord One Thousand Eight Hundred and fifty seven at the place aforesaid was indebted to the said plaintiff in the sum of five hundred Dollars lawful money of the United States of America for money before that time lent and advanced by the said plaintiff to the said Defendant and at the special instance and request of the said Defendant. And for other money by the said plaintiff before that time paid laid out and expended for the said Defendant and at the like request of the said Defendant. And for other money by the said Defendant before that time had and received to and for the use of the said plaintiff. And being so indebted the said Defendant in consideration thereof afterwards to-wit on the same day and year last aforesaid and at the place aforesaid undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in this Count mentioned when the said Defendant should be thereto afterwards requested.

And whereas the said Defendant afterwards to-wit on the same day and year last aforesaid and at the place aforesaid accounted together

with the said Plaintiff of and concerning divers
other Sums of Money before that time due and
owing from the said Defendant to the said
Plaintiff and then and there being in arrear and
unpaid, and upon such accounting the said
Defendant then and there was found to be in
arrear and indebted to the said Plaintiff in the
further Sum of Five Hundred Dollars of like lawful
Money as aforesaid. And being so found in arrear
and indebted to the said Plaintiff the said
Defendant in consideration thereof afterwards took
on the same day and year last aforesaid and at
the place aforesaid undertook and then and there
faithfully promised the said Plaintiff well and
truly to pay unto the said Plaintiff the said Sum
of Money last mentioned when the said Defendant
should be thereto afterwards requested.

Nevertheless the said Defendant (although
often requested to do so on the day when the said
Note became due and payable according to the tenor
and effect thereof and oftentimes since to wit at
the place aforesaid) has not yet paid the said
Several Sums of Money above mentioned or any
or either of them or any part thereof to the said
Plaintiff but to pay the same or any part thereof
to the said Plaintiff the said Defendant has
hitherto ^{altogether} ~~wholly~~ refused and still does refuse, to the
damage of the said Plaintiff of five hundred

Dollars and therefore the said plaintiff brings suit &c.
J W. Checkering per se

Copy of Note sued on and declared upon
in this suit.

Chicago Sept 22^d 1857.

Thirty days after date for value received I
promise to pay to Philander Eddy or Bearer Two
Hundred and Seventeen ²⁴/₁₀₀ Dollars at the
Banking Office of R R Swift Brother and Johnson
with interest at 10 per cent.

John W Davis

endorsed -

Pay to J W. Checkering
P Eddy.

And afterwards to wit on the tenth day of
December in the year aforesaid there issued out of the
Office of the Clerk of the said Court a Writ of
Summons which said writ and the ^{sheriff's} return thereof
is in words and figures following to wit

State of Illinois }
County of Cook } ss.

The people of the State of
Illinois

To the Sheriff of DeKalb County Greeting

We command you that you summon John W. Davis if he shall be found in your County, (personally) to be and appear before the Cook County Court of Common Pleas of said County on the first day of the next term thereof to be holden at the Court House in the City of Chicago in said County on the first Monday of January next to answer unto John W. Chickering in a plea of trespass on the case on premises to the Damage of the said Plaintiff as he says in the Sum of Five Thousand Dollars. And have you then and there this writ with an endorsement thereon, in what manner you shall have executed the same

Witness Walter Kimball Clerk of our said Court and the Seal thereof at the City of Chicago in said County this 10th day of December AD 1857.
Walter Kimball Clerk.

Served by reading to the within named John W. Davis this 16th day of Decr. 1857.

S. Tapper

Sheriff of DeKalb Co. Ill.

Afterwards writ on the fifth day of January in the year of our Lord One Thousand Eight Hundred and fifty eight the said John W. Davis by Mr R M Wallace his Attorney filed in the Office of the Clerk of the said Court, his plea and

affidavit which said plea and Affidavit follow in these words to wit:

State of Illinois

Cook County

In the Cook County Court of
Common Pleas of January Term A.D. 1858

John W. Checkering

vs

John W. Davis

Affidavit Damages \$500⁰⁰

And now comes the said Defendant
by Mr R M Wallace his Attorney and defends the
wrong and injury when &c and says that he did
not undertake or promise in manner and form
as the said plaintiff hath above thereof complained
against him and of this he puts himself upon
the Country &c

Mr R M Wallace

Defdt Atty.

State of Illinois

Cook County

John W. Checkering

vs

John W. Davis

In the Cook County Court of
Common Pleas of the January
Term 1858 - Affidavit
Damages \$500⁰⁰

John W. Davis being duly sworn
according to law on oath says that he is defen-
dant in the above entitled cause - and that he
believes that he has a good defense upon the
merits to a part of the amount of damages claimed
by said plaintiff in said action.

Subscribed and sworn to
before me this 4th day

John W. Davis

of January A D 1858

L.S.

To C Henry
Notary Public

And afterwards to wit on the thirteenth day of January in the year aforesaid the said day being one of the days of the January vacation Term of the ^{Court} County Court of Common Pleas, the following among other proceedings were had ^{in said Court} and entered of Record - to wit.

John W. Checkering

vs

Assumpsit.

John W. Davis

And now at this day comes the said Plaintiff in his own proper person and said Defendant by M R M Wallace his Attorney also comes and on motion of said Plaintiff it is ordered by the Court that the plea of said Defendant be stricken from the files of this cause for want of a sufficient Affidavit of merits to which ruling of the Court the Defendant enters his exceptions - And said Defendant being thereupon three times solemnly called comes not but makes default which is on motion of said Plaintiff Ordered to be taken and entered of Record wherefore the said Plaintiff ought to have and recover of the said Defendant

his damages herein sustained by occasion of the premises And the Court now here after hearing the allegations and proofs submitted by said Plaintiff being now fully advised in the premises assesses said Plaintiff's damages to the sum of Two Hundred and twenty three dollars and Eighty eight Cents.

Therefore it is considered that the said Plaintiff do have and recover of the said Defendant his damages of two hundred and twenty three dollars and eighty eight Cents in form aforesaid by the Court here ordered and also his Costs and Charges by him about his Suit in this behalf expended - and have execution thereof -

And afterwards to wit on the twenty second day of January in the year aforesaid the said John W Davis filed in the Office of the Clerk of the said Court his Bill of Exceptions - which said Bill of Exceptions follows in these words to wit.

State of Illinois }
Cook County fs } Cook County Court of
Common Pleas January Term 1858
John W Pickering }
vs } Assumpsit.
John W Davis }

Be it Remembered that the motion of Plaintiff made at said Term to strike Defendants plea from the files, was, resisted by the Defendant by his Counsel, and on hearing of said motion, it was made to appear to the Court that Defendant on the 5th day of January 1858 filed with his plea in the Office of the Clerk of this Court his own Affidavit in the words and figures following

State of Illinois } In the Cook County Court
Cook County fs } of Common Pleas - Of
John W Chickering } the January Term 1858 -
vs } Assumpsit Damages \$ 500 -
John W Davis }

John W Davis, being duly sworn according to Law on Oath says that he is Defendant in the above entitled Cause and

that he believes that he has a good defense upon
the merits to a part of the amount of damages
claimed by said Plaintiff in said action
Subscribed & sworn to before
me this 4th day of January
A.D. 1858.

John W Davis

L.S. 3

26 Gallery
Notary public

The Court sustained said
motion & ordered said plea to be stricken from the
files and judgment to be entered against Defendant
as appears of Record - to which decision of the
Court in striking said pleas from the files & entering
said judgment Defendant then & there excepted
& prayed that this his bill of exceptions should be
allowed and made part of the Record.

John M Wilson
Judge

Seal

And afterwards to wit on the twenty third day
of January in the year aforesaid the said day
being one of the days of the January term of the
Cook County Court of Common pleas the following
among other proceedings were had in said Court
and entered of Record to wit.

John W Chickering

John W Davis

And now at this day comes the said Defendant by his Attorney Aforesaid and prays an appeal in this Case to the Supreme Court of the State of Illinois which is allowed him by the Court on his filing his appeal Bond in the Sum of four hundred Dollars with Security to be approved by the Judge of this Court in ten days from this day.

And afterwards to wit on the thirtieth day of January in the year aforesaid the said John W Davis filed in the Office of the Clerk of the said Court his appeal Bond and Affidavit thereto annexed which said Appeal Bond and Affidavit follows in the words and figures to wit.

Know all men by these presents that We John W. Davis Horace S Champlin and Benjamin Champlin of the County of DeKalb and State of Illinois are held and firmly bound unto John W Chickering also of the same County and State in the penal sum of four hundred Dollars lawful money of the United States for the payment of which well and truly to be made we bind ourselves, our heirs executors and Administrators jointly severally and firmly by these presents.

Witness our hands and seals this twenty ninth day of January A D 1858.

The Condition of the above Obligation is such that Whereas the said John W Chickering did on the thirtieth day of January A D 1858 in the Cook County Court of Common Pleas in and for the County and State aforesaid and of the January term thereof A D 1858 recover a judgment against the above Complainant John W Davis for the sum of two hundred and twenty three Dollars and eighty eight Cents besides Costs of Suit from which said Judgment of the said Court the said John W Davis has prayed for and obtained an appeal to the Supreme Court of said State.

Now therefore if the said John W. Davis shall duly prosecute his said appeal with effect and moreover pay the amount of the Judgment Costs interest and damages undischarged and to be undischarged against him in case the said Judgment shall be affirmed in the said Supreme Court then the above Obligation to be void, otherwise to remain in full force and virtue

Taken and entered ^{into} Before
^{at my office} me in Chicago this
 day of A D 185
 Clerk

John W Davis

(L.S.)

H S Champlin

(L.S.)

Benjamin Champlin

(L.S.)

State of Illinois,
 DeKalb County

We Horace S Champlin
 and Benjamin Champlin of said County being
 duly sworn doth depose and say each for himself

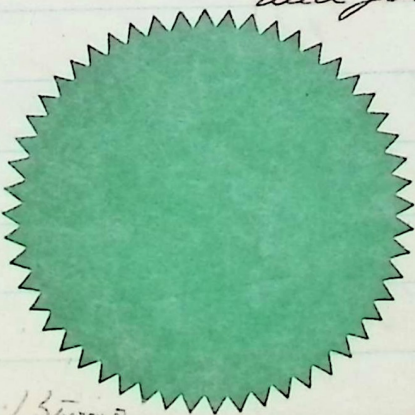
that they and each of them are worth One
Thousand Dollars over and above the payment
of all just debts and liabilities against
them or either of them And that their property
is situate and being in this State
Subscribed & sworn to before me this

day of January A D 1858 - And } H S Champlin
I certify that I am personally } Benjamin Champlin
acquainted with said parties &
consider the facts set forth in the
above affidavit to be true, Witness
my hand & official seal this 29th day of January A D 1858.
John H. Bampton
(L.S.) Notary public

State of Illinois }
Cook County } S. S.

I Walter Kimball Clerk of the Cook
County Court of Common Pleas in and for said
County Do hereby Certify that the above and
foregoing is a full and true transcript of all the
papers on file in my Office and of the proceedings
entered of Record in said Court in the Case
wherein John W. Chickering is Plaintiff
and John W. Davis is Defendant.

In testimony whereof I
have hereunto set my hand and Seal
of the said Court at the City of Chicago
in said County this 20th day of March
A.D. 1858. Walter Kimball Clerk



John W Davis plff. in error

^{vs}
John W. Chickering deft in error

Error to Cook County Court of
Common Pleas

Assignment of Errors

And now comes the said plaintiff in error, by M. R. M. Wallace, his attorney and says, there is manifest error in the judgment and proceedings aforesaid, upon the face of the Record thereof, on account of which, the same ought to be reversed and for naught held; and for a specification of said Errors shows the Court the following -

1st The court below erred in sustaining said motion of plaintiff to strike defendants plea from the files

2nd The court below erred in ordering defendants plea to be stricken from the files

3rd The court below erred in rendering judgment against defendant and in favor of plaintiff -

and for these and other manifest errors, the said plaintiff in error asks that said judgment & proceedings may be set-aside, reversed and for naught held, and that he may have judgment for his costs &c

M. R. M. Wallace

Atty. for plff. in error

And now comes the defendant in error and says there is no error in the records and proceedings as alleged, and that he prays that a judgment be affirmed with costs &c

~~William~~ ²Watts & Son
Defendants in error
Atty

Cook. Co. Ct of Com. Rec
180

John W. Chickering

my
John W. Hays

Manicraft

Filed April. 21. 1858
S. Leland
Clerk

Wm. W.
Secy. L. Hays

Supreme Court -
40. Davis vs Chickering -

J. L. Dickey for plaintiff in
error - suggests - that -

The Special legislation for
the Courts of Cook County the
better to enable their people through
their Courts to worry their debtors
real or supposed - and the
sharp practice of those courts
have well nigh rendered the
the said Courts & the Collecting
agencies & ^{the} detective police organ-
- izations in combination
little else than the likeness of
a batch of rat-teniers - whose
eyes glisten & their bristles stand on
end at the slightest noise among
old barrels - which might indicate
rats - So the Community in
an intense Commercial point &
especially the Courts - detectives
and Collecting agencies - contri-
bute the machinery for the

Collection of debts real or supposed
- at the cry of "debtor", "debtor"
"debtor" - are all alive - ready to
pounce upon the designated victim
at the bidding of the alleged creditor
& from the very inception assume
him guilty & don't allow him
~~edit~~ a chance ^{even} to prove himself
innocent unless he will repel the
suggestion under oath & the
question in this case is whether
this Court will add to the burden
of the alleged debtor by requiring
of ~~him~~ what the statute in all
its particularity does not require

Whether the Court will require
that affidavit to be special and
minute instead of general -
& that too when his adversary
is not required to swear at all
and is not required unless he
so chooses to be special & minute
in setting up his claim -

The supposed necessity for
requiring this of defendants does
not exist - The object of the Statute
will be fully attained - if plaintiff
wishing to profit by this legislation

will be special & minute in stating distinctly in their declarations what & what alone their claim is - The statute is in derogation of Common law & must not be extended by construction -

It a great injustice & oppression to have the law of one country differing from the law of another & the Court should not enlarge this difference by implication

Better far better that the purpose of the Legislature should for a time fail to be effected by reason of their imperfect legislation than that this Court which is the citizens last resort should join ~~that~~ ~~the~~ in the measures of oppression & partiality manifest in the act - by adding thereto by construction

J. Doyle Dickey

No 40-149
Supreme Court
Davis vs Chickering
Dickey's argument
for plffs in error

T. Lyle Dickey

SUPREME COURT.

STATE OF ILLINOIS.

THIRD GRAND DIVISION, APRIL TERM, A. D. 1859.

JOHN W. CHICKERING, Defendant in Error,

ads.

JOHN W. DAVIS, Plaintiff in Error.

Error to Cook County

Court of

Common Pleas.

BRIEF OF DEFENDANT IN ERROR.

The only point raised by the assignment of errors in this case is—the order of the Court below in striking from the records the defendant's plea.

This Court will presume this order of the Court correct until the contrary is shown.

This is not done in this case as the only manner the plea can be brought before the Court, is by incorporating it into the bill of exceptions, which is not done.

These principles have been too often decided in this Court, and are too familiar to it to require or even justify a citing of authorities thereon,

Still if the Court is desirous of again reviving them, it is respectfully referred to those upon the brief, in case before the Court this term. Whiting et al vs Fuller.

Again, the affidavit of merits in this case, is clearly insufficient and not in accordance with the requirements of the Statute.

This is expressly decided in case McDonald vs. Murphy, 20 Ill. Reports, p. 346.

J. W. CHICKERING,
A. F. WAITE, for defendant.

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Davis

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Chickering

Depts. Point

SUPREME COURT.

STATE OF ILLINOIS.

THIRD GRAND DIVISION, APRIL TERM, A. D. 1859.

JOHN W. CHICKERING, Defendant in Error,

ads.

JOHN W. DAVIS, Plaintiff in Error.

Error to Cook County

Court of

Common Pleas.

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This is expressly decided in case McDonald vs. Murphy, 20 Ill. Reports, p. 346.

J. W. CHICKERING,
A. F. WAITE, for defendant.

40 149

Davis
²⁷
Chickering
Deft. Points

IN THE
Supreme Court, State of Illinois.

THIRD GRAND DIVISION.
OF THE APRIL TERM, A. D. 1858.

JOHN W. DAVIS, Plaintiff in Error,	}	<i>Error to Cook County Court of Common Pleas.</i>
<i>vs.</i> JOHN W. CHICKERING, Defendant in Error.		

ASSIGNMENT OF ERRORS.

And now comes the said plaintiff in error, by M. R. M. Wallace, his attorney, and says, that there is manifest error in the judgment and proceedings aforesaid, upon the face of the record thereof, on account of which the same ought to be reversed and for naught held; and, for a specification of said errors, shows to the court the following:

1st. The court below erred in sustaining said motion of plaintiff, to strike defendant's plea from the files.

2nd. The court below erred in ordering defendant's plea to be stricken from the files.

3rd. The court below erred in rendering judgment against defendant, and in favor of plaintiff.

And for these and other manifest errors, the said plaintiff in error asks that said judgment and proceedings may be set aside, reversed, and for naught held, and that he may have judgment for his costs, etc.

M. R. M. WALLACE,
Attorney for Plaintiff in Error.

ABSTRACT OF RECORD.

This was an action of assumpsit, brought by John W. Chickering, defendant in error, against John W. Davis, plaintiff in error, in the Cook County Court of Common Pleas, to the January term, A. D. 1858.

- 1 Precipe and declaration, with copy of note sued on, filed November 14, 1857.
- 6 Summons issued December 10, 1857, served on defendant December 16, 1857.
- 7 Plea, general issue, and defendant's affidavit of merits filed January 5th, 1858.
- 9 Motion by plaintiff to strike defendant's plea from the files, for want of a sufficient affidavit of merits.

Motion allowed by the court; and it was ordered by the court, that defendant's plea be stricken from the files, for want of a sufficient affidavit of merits; to which ruling of the court defendant then and there excepted. Defendant's default was thereupon taken, and judgment entered against defendant.

11 *Defendant's Bill of Exceptions.*

Be it remembered, that the said motion of plaintiff, to strike defendant's plea from the files, was resisted by defendant, by his counsel; and, on the hearing of said motion, it was made to appear to the court that defendant, on the 5th day of January, 1858, filed, with his plea, in the office of the clerk of this court, his own affidavit of merits, in the words and figures following:

STATE OF ILLINOIS,	} <i>In the Cook County Court of Common Pleas,</i>	
COOK COUNTY,		JANUARY TERM, A. D. 1858.
JOHN W. CHICKERING,	}	ASSUMPSIT.
vs.		
JOHN W. DAVIS.		Damages, \$500.

John W. Davis, being duly sworn, according to law, on oath says, that he is defendant in the above entitled cause, and that he believes he has a good defence, upon the merits, to a part of the amount of damages claimed by said plaintiff in said action.

JOHN W. DAVIS.

Subscribed and sworn to before me, this 4th day }
of January, A. D. 1858. }

[SEAL.] H. C. MOREY, *Notary Public.*

The court sustained said motion, and ordered said plea to be stricken from the files, and judgment to be entered against defendant, as appears of record. To which decision of the court, in striking said plea from the files and entering said judgment, defendant, by his counsel, then and there excepted, and prayed that this bill of exceptions should be allowed and made part of the record; which is done.

JOHN M. WILSON, [SEAL.]
Judge.

12 Defendant, by his counsel, prayed an appeal in said cause to the Supreme Court, which was allowed by the court.

13 Appeal bond.

Points and Authorities.

The only question to be considered in this case is, was the affidavit of merits, filed by defendant below, a sufficient compliance with the statute? If it was, then each assignment of error is made good, and the judgment of the court below must be reversed. *Practice Act, Cook county, Purple's Statutes*, page 323, sec. 3, and p. 324, sec. 14; also, *Olwell v. McDonnell*, 17 Ill. R. 374.

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Davis
vs
Chickering

Filed Apr 26, 1838

B. Beland

Clerk

IN THE SUPREME COURT.

STATE OF ILLINOIS.

THIRD GRAND DIVISION OF THE APRIL TERM, A. D. 1859.

CHARLES McDONALD, Appellant,	}	Appealed from Cook Circuit Court.
vs.		
WM. HORTER, for use &c., Appellee.		

BRIEF OF APPELLEE.

In this case the Court below properly struck from the files the defendants' plea, for want of a sufficient affidavit of merit. McDonald vs Murphey et al. 20 Illinois Reports, p. 346.

The statement in the affidavit shows a clear admission of indebtedness for \$458, and for this amount alone the plaintiff took judgment and dismissed his claim for the balance.

The point raised in this case is analogous to those arising at common law, in regard to pleas to a part of the declaration, in which judgment must be taken for the amount not covered by the plea as replication to the plea, without this being done is a discontinuance. Warren vs Nexsen et al. 3 Scammon's Reps. p. 40

J. W. CHICKERING, and
H. F. WAITE, for Appellee.

40 = 149

John W Davis

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Depts. Brief

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Tel.

STATE OF NEW YORK
SUPREME COURT

STATE OF NEW YORK