

22. That any creditor may exhibit not only any debt due, but those Debts not due to grow due, making in such case a reasonable rebate when interest is allowed. not accruing on the same.

IV. General provisions.

23. That the said court may, from time to time if necessary, by citation Assignees, how and attachment, compel said assignee or assignees to proceed to the compelled to execution of the duties required by this act, until a final settlement and proceed. distribution as aforesaid. (a)

of the debtor, such lien is not lost by his applying, *Moses v. Thomas, 2 Dutch. 125.* Nor will a mortgage be considered as abandoned, *Bell v Fleming, 1 Beas. 14, 490.* *Van Vliet v. Jones, Spen. 340.* The design of this section is to relieve the debtor from all personal liability for debts upon which the creditor demands or accepts a dividend, *Ibid.* See *Owen v. Arvis, 2 Dutch. 23.* A widow, whose provision in lieu of

dower by a marriage settlement had failed, elected to come in as a creditor under the covenant contained in the settlement, she is thereby barred from claiming dower, *Camden Ins. Co. v. Jones, 8 C. E. Gr. 171.*

(a) The orphans' court can not grant relief in case of a fraud by the assignee in the sale of the debtor's property, *Hays v. Doane, 3 Stock. 84.*

Attachment.

I. WHEN AND AGAINST WHOM ISSUED.

1. Attachment against absconding debtors.
2. Agent may make oath.
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37. Upon filing bond in clerk's office to plaintiff and creditors attachment may be set aside.
38. Appearance of defendant without bond.
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51. Sale of defendant's property. In what time. When goods and chattels may be sold.
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54. Debts not due admitted.
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R. S. 48.

An act for the relief of creditors against absconding and absent debtors.

Revision—Approved March 27, 1874.

P. L. 1852, p. 62.
 " 1854, p. 331.
 " 1859, p. 640.
 " 1862, p. 194.
 " 1866, p. 770.
 " 1867, p. 911.
 " 1869, p. 33.
 " 1871, p. 22.
 " 1873, p. 164.

Attachment
against abscond-
ing debtors.

Amended

Agent may make
oath.Attachment
against non-resi-
dent debtors.**I. Attachment—When, and against whom issued.**

1. That if any creditor shall make oath or affirmation (*a*) that he verily believes that his debtor (*b*) absconds from his creditors, and is not, to his knowledge or belief, resident in this state (*c*) at the time, then it shall be the duty of the clerk of the supreme court, or of any circuit court (*d*) or court of common pleas, to issue a writ of attachment, to be directed to the sheriff or coroner, as the case may require, commanding him to attach the rights and credits, (*e*) moneys and effects, (*g*) goods and chattels, (*h*) lands and tenements (*k*) of such debtor, wheresoever they may found; which oath or affirmation shall, prior to the sealing of the said writ, be delivered to the said clerk, to be by him filed in his office.

2. That if the said creditor be absent or reside out of this state, then his agent or attorney (*m*) may make oath or affirmation to the above effect, and deliver the same to the said clerk to be filed, who shall thereupon issue such writ of attachment. (*n*)

3. *And whereas*, Debtors who reside out of this state may have property sufficient within the same to pay their debts, or some part thereof; *be it therefore enacted*, that the rights and credits, moneys and effects, goods and chattels, lands and tenements, of every debtor who may reside out of this state, shall be liable to be attached, taken, proceeded against, sold, assigned, transferred, and conveyed for the payment of his debts, in the like manner, as nearly as may be, as the rights and credits, moneys and effects, goods and chattels, lands and tenements of other debtors are made liable by this act; *provided*, that instead of the oath or affirmation hereinbefore mentioned, the applicant for such writ of attach-

(*a*) The affidavit is not conclusive, and the attachment will be quashed if it appear that the defendant was at the time a resident of this state, *City Bank v. Merritt*, 1 Gr. 131. *Branson v. Shinn*, 1 Gr. 250. *Brundred ads. Del Hoyo, Spen*, 328. *Clark ads. Likens*, 2 Dutch. 207. *Phillipsburg Bank v. Lackawanna Railroad Co.*, 3 Dutch. 208. *Lummis v. Boon, Pen.* *737. But see *Walker v. Anderson*, 3 Harr. 217. The affidavit of defendant as to residence is not sufficient to sustain a motion to quash, but a rule to show cause may be obtained on it, *Shaddock v. Marsh*, 1 Zab. 434. Although the proceedings may be irregular they can not be impeached collaterally. *Diehl v. Page*, 2 Gr. Ch. 143. *Weber v. Weilling*, 3 C. E. Gr. 441. *Brantingham v. Brantingham*, 1 Beas. 161.

(*b*) An attachment can only issue for a cause of action founded on contract, *Jeffery v. Wooley*, 5 Hal. 123. *Boyd v. King*, 7 Vr. 134. Or a fixed and certain sum whether it accrued by covenant in a deed or bond, note or simple contract, *Barber v. Robeson*, 3 Gr. 17. If in covenant, it must appear by the affidavit that the sum is fixed, *Jeffery v. Wooley*, 5 Hal. 123. And not for a penalty, *Brown ads. Hoy*, 1 Harr. 157. Nor for unliquidated damages, *Dickerson v. Simms, Coze* 199. Nor for a penalty to secure unliquidated damages, *Cheddick v. Marsh*, 1 Zab. 468. The affidavit must state that defendant is indebted to the plaintiff, *Frisby v. Williamson*, 1 Harr. 61. The cause of action must be such as to entitle plaintiff, as of course, to require special bail, *Jeffery v. Wooley*, 5 Hal. 123. *Boyd v. King*, 7 Vr. 134. See *Pullinger ads. Van Emburgh*, 1 Harr. 457. *Walker v. Anderson*, 3 Harr. 220. The affidavit need not set out the cause of action, *Day v. Bennett*, 3 Harr. 287. *Shaddock v. Marsh*, 1 Zab. 434. But in case of sufficient doubt the court may require plaintiff to deliver a statement, or a copy of the instrument upon which the writ has been issued, *Ibid.* See *Kennedy v. Chumar*, 2 Dutch. 305.

(*c*) "Not resident in this state," means that the debtor is not actually present in person within the state, *Brundred v. Del Hoyo, Spen* 328. But mere presence in the state is not a residence, *Perrine ads. Evans*, 6 Vr. 221. The actual domicile of the wife can not be considered the legal residence of the husband, *McPherson v. Housel*, 2 Beas. 35. An attachment will not lie against one, who with his family and goods, is about to go out of the state, *Kugler v. Svere*, 4 Dutch. 129. See *Bonnell v. Dunn*, 4 Dutch. 153. That defendant absents himself, is bad, *Conard v. Conard*, 2 Harr. 154. Or that he absconds, *Croxall v. Hutchings*, 7 Hal. 84. It must also state that he is not resident, *Ibid.*

(*d*) The circuit courts have jurisdiction, *Morrell v. Buckley, Spen* 667. *Brown v. Bissett*, 1 Zab. 46.

(*e*) The equity of redemption in chattels that have been mortgaged, may be attached, *Long Dock Co. v. Mallery*, 1 Beas. 94. And a debt due defendant on negotiable paper before maturity, *Briant v. Reed*, 1 McCart. 272; and proceeds of execution in a constable's hands, *Davis v. Mahany*, 9 Vr. *Crane v. Freese*, 1 Harr. 305. Surplus money in sheriff's hands after a foreclosure, *Hill v. Beach*, 1 Beas. 32. See *Brantingham v. Brantingham*, 1 Beas. 160. The nature of the property attached must be set out, the words "rights and

credits," are not specific enough, *Neal v. Cook*, 5 Hal. 337. The liability of an officer for negligence, does not create a right or credit liable to be seized, *Lomerson v. Huffman*, 1 Dutch. 625.

(*g*) Money in defendant's possession may be attached, *Crane v. Freese*, 1 Harr. 305. But not if the money be in the sheriff's hands although belonging to the defendant, *Ibid.* See *Conover v. Conover*, 2 Harr. 1-7. The execution will not be affected, nor the title of the purchaser at a sheriff's sale impaired, by attaching money in defendant's hands after the levy and before the sale, *Simmons v. Vandegriff, Sax*, 55. An heir's share of the proceeds of an executor's sale of real estate, *Egbert v. Hawk*, 1 Beas. 80. But not the husband's interest in his wife's personal property, in the executor's hands, *Lozier v. Van Saun*, 2 Gr. Ch. 325. Wages may be attached, *Leonard v. Lawrence*, 3 Vr. 355. See *Delaware, Lackawanna and Western R. R. Co. v. Dilton*, 7 Vr. 361. Money due on a judgment cannot be attached, *Shinn v. Zimmerman*, 3 Zab. 150.

(*h*) Goods *in transitu*, may be attached, *Morrell v. Buckley, Spen* 667. See § 12. Shares of stock in an incorporated company can not be attached if the certificate has been delivered or the stock transferred on the books of the company before the attachment issued, *State, Bush v. Warren Foundry Co.*, 3 Vr. 439. See *Broadway Bank v. McElvath*, 2 Beas. 24. Where the return shows that the shares of stock attached stand in the name of the defendant's wife and that of a third person, the court will not, on motion, set aside the attachment, where it is alleged that the transfer was fraudulent, *Curtis v. Steever*, 7 Vr. 304.

(*k*) The interest of a vendee, who under a written contract had entered into the possession of lands, may be attached, *Williams v. Michenor*, 3 Stock. 520. But see *Boyd v. King*, 7 Vr. 135. The interest of a vendee who under a parol agreement entered into the possession of lands, and, before the attachment issued, entered into a written agreement for the sale of said lands, can not be attached, *Garr v. Hill*, 1 Stock. 210. Husband's interest in his wife's lands sold by commissioners under proceedings in partition, can not be attached, *Osborne v. Edwards*, 3 Stock. 74. See *Matter of Sarah Lippincott*, 3 Hal. 88. The proceeds of sale of a house and lot, "which the debtor held in trust for his wife," was held to be the property of the husband, the defendant, *Yardley v. Yardley*, 3 Vr. 215.

(*m*) An affidavit by an agent, stating that he is such agent, is sufficient, *Morrell v. Fearng, Spen* 670. See *Frisby ads. Williamson*, 1 Harr. 62. An affidavit made by the attorney of a corporation is sufficient, *Trenton Bank v. Haverstick*, 6 Hal. 171. See *Steamboat Co. v. Baldwin*, 2 Gr. 440. *Youngblood v. Schamp*, 2 McCart. 42.

(*n*) A second attachment at the suit of other plaintiffs and for another cause of action, may issue while the first is pending, *Brown v. Bissett*, 1 Zab. 46. *Duffy v. Wolf*, 1 Zab. 476. But not between the same parties, *Harris v. Linnard*, 4 Hal. 58. A *capias* and an attachment for the same cause of action and between the same parties, cannot be issued, *Peltier v. Washington Bank*, 2 Gr. 391.

ment, or his agent, if said applicant be absent, shall, before the sealing thereof, make oath or affirmation (which shall be filed in the office of the clerk of the court out of which the same shall be issued), that the person against whose estate such attachment is to be issued is not, to his knowledge or belief, resident^(a) at that time in this state, and that he owes to the plaintiff a certain sum of money, specifying, as nearly, as he can, the amount of the debt or balance.

4. That if any clerk shall seal such writ of attachment, before such oath or affirmation shall be delivered to him, he shall forfeit and pay twenty dollars to the party injured, to be recovered, with costs, by action of debt, in any court of record of this state having cognizance of that sum.^(b) Penalty if writ issue without affidavit.

5. That it shall be the duty of the clerk who shall issue or seal any writ of attachment under or by virtue of this act, forthwith to enter in a book, to be by him provided and kept for that purpose, the names of the plaintiff and defendant in the said writ, the sum or amount therein specified, and the time of issuing or sealing the same; to which book every person desiring to inspect the same, shall have access at all proper seasons.^(c) Clerk's entry.

6. That where two or more are jointly bound or indebted, either as joint obligors, partners, or otherwise, the writ of attachment may be issued against the separate or joint estate, or both, of such joint debtors, or any of them,^(d) either by his or their proper name or names, or by the name or style of the partnership, or by whatever other name or names such joint debtors shall be generally known and distinguished in this state, or against the heirs, executors or administrators of them or any of them; and the estate so attached, whether it be separate or joint, shall be liable to be sold or assigned for the payment of such joint debt. Joint debtors and partners.

7. That the writ of attachment may be issued against any absconding or absent female,^(e) or against any corporation or body politic not created or recognized by the laws of this state,^(g) in all cases in which such writ may lawfully issue against an absconding or absent male. Females and corporations.

8. That the writ of attachment may be issued against the heir or devisee of any deceased debtor, in all cases in which the writ might lawfully have been issued against such debtor in his lifetime;^(h) and all lands, tenements, hereditaments, and real estate, descended from or devised by such deceased debtor to the heir or devisee against whom the attachment is issued, may be attached and taken by virtue of the said writ. Heirs and devisees.

9. That any legacy or distributive share^(k) of an estate in the hands of the executor or administrator, may be attached and taken by virtue of an attachment issued in pursuance of this act against the legatee or next of kin. Legacies, etc.

10. That in cases where the lands, tenements, hereditaments, or real estate, or the goods and chattels, rights and credits, moneys and effects, of any absconding or absent debtor or debtors, shall be situate or found in two or more counties in this state, it shall be lawful to issue a Property in two counties.

(a) If the residence of the debtor is here, although his business may be carried on in another state, attachment will not lie, *City Bank v. Merrit*, 1 Gr. 131. *Brundred* ads. *Del Hoye*, *Spen*, 328. *Conard v. Conard*, 2 Harr. 158. *Leonard v. Stout*, 7 Vr. 370. Overruled, 8 Vr. 492. Although defendant may have removed temporarily to another state, *Clark* ads. *Likens*, 2 Dutch. 207. See *Cadwalader v. Howell*, 3 Harr. 138. *Cooper v. Galbraith*, 3 Wash. C. C. 546. If the residence is abroad, although debtor carries on business in this state, foreign attachment will lie, *Perrine* ads. *Evans*, 6 Vr. 221. See *State*, *Potter v. Ross*, 3 Zab. 517. So, for a debt of the wife contracted before her marriage, where the wife lives in this, and the husband in another state, *Hackettstown Bank v. Mitchell*, 4 Dutch. 516. Because service on the wife away from the husband's residence, is bad, *McPherson v. Housel*, 2 Beas. 35. Even if the right to be affected is vested in her, *Hess v. Cole*, 3 Zab. 116.

(b) The law will intend that the writ was sealed and issued after the affidavit filed, until the contrary appears, *Morrel v. Buckley*, *Spen*, 667.

(c) The provisions of this section are merely directory and a substantial compliance with them will be sufficient, *Thompson v. Eastburn*, 1 Harr. 100. *Morrel v. Buckley*, *Spen*, 667.

(d) It will not lie if any of the partners reside in this

state, *Curtis v. Hollingshead*, 2 Gr. 402. *Barber v. Robeson*, 3 Gr. 17. See *Benedict v. Benedict*, 2 *McCart*, 150. Judgment must be rendered against all, *Bright v. Hand*, 1 Harr. 273. A creditor of one partner can attach such partner's interest in the partnership property, *Hill v. Beach*, 1 Beas. 31. But such attachment is made subject to partnership debts, *Brown v. Bissett*, 1 Zab. 46.

(e) An attachment may issue against a female debtor, *Davis v. Mahany*, 9 Vr.

(g) It will not lie against a foreign corporation owning property in this state and transacting business here under legislative authority, *Phillipsburg Bank v. Lackawanna R. R. Co.*, 3 Dutch. 206. See *State v. Delaware, Lackawanna and Western R. R. Co.*, 1 Vr. 473.

(h) But not against the executors of such debtor, *Haight v. Bergh*, 3 Gr. 183.

(k) It will lie, where executors are authorized to sell lands and divide the proceeds, for a child's share, *Egbert v. Hawk*, 1 Beas. 80. But a debt due to the testator from such child would be paramount, *Smith v. Smith*, 2 Beas. 164. Where a husband's interest in his wife's share was attached in the executors' hands, and a scire facias issued against them as garnishees, held they were entitled to a bill of interpleader in equity, *Lozier v. Van Saun*, 2 Gr. Ch. 325.

writ of attachment out of the supreme court into each county in which such real and personal property shall be situate or found; in which case the auditor to be appointed as hereinafter mentioned shall have the same power and authority over the said real and personal property of such absconding or absent debtor or debtors in securing, selling and disposing thereof, as though the same should be situate or found in one county only, and the said auditor shall be governed as to the same, in all respects as is directed in other cases by this act.

Non-resident creditors.

11. That any creditor residing out of this state shall be entitled to all the privileges and benefits of this act.(a)

Property exempt. Act March 27, 1866, P. L. p. 770.

12. That the personal property of a non-resident of this state, being in this state, shall not be liable to attachment at the suit of a non-resident creditor, when the said property is exempt by law of the state of which the said debtor and creditor are residents.(b)

Writs returnable in vacation, and in thirty days. Act Mar. 9, 1854, P. L. p. 331.

13. That writs of attachment may be made returnable in vacation, and all writs of attachment hereafter issued shall be made returnable within thirty days from the time of filing the affidavit upon which such writ of attachment may be issued.

Creditors admitted by rule.

14. That it shall be lawful for any creditor or creditors of any defendant in attachment, upon filing with the clerk an affidavit that the defendant or defendants in attachment owes unto him or them a certain sum, to be therein specified, which affidavit shall be made by such creditor or his agent, to enter at any time a rule in the minutes of the court out of which a writ of attachment may have been issued, admitting such creditor or creditors as creditor or creditors under such attachment, and which said rule shall have the same force and effect as though the same had been entered in open court.(c)

Ib.

II. The effect of the writ and the mode of its execution.

How writ executed.

15. That the said writ of attachment shall be executed in the following manner, that is to say: the officer to whom it is directed shall go to the house or lands of the defendant, or to the person or house of the person in whose custody or possession the defendant's property and estate may be, and then and there declare, in the presence of one credible person at the least, that he attaches the rights and credits, moneys and effects, goods and chattels, lands and tenements, of such defendant, at the suit of the plaintiff in the said writ named.(d)

Inventory and appraisement.

16. That the said officer shall, with the assistance of one discreet and impartial freeholder, make a just and true inventory and appraisement(e) of all the property and estate of the defendant, so by him attached, and such inventory and appraisement, dated and signed by himself and the said freeholder,(g) shall annex to and return with the said writ; and the said officer shall endorse on the said writ the true time of executing the same, and sign his name thereto.

Writ when executed a lien on goods, &c.

17. That the said writ shall bind the rights and credits, moneys and

(a) An affidavit that plaintiffs live out of the state, is sufficient, *prima facie*, to show that they are non-resident creditors, but the contrary may be shown by affidavit, on a motion to quash the writ, *Morrel v. Fearing*, *Spn.* 670.

(b) Applies only to personal property, as goods and chattels, and not to rights and credits, as wages, *Leonard v. Lawrence*, 3 *Vr.* 355.

(c) A creditor applying is not bound to file his claim when he applies; if he does file a claim, he is not thereby restricted from proving beyond the amount specified. *Hanness v. Smith*, 1 *Zab.* 495. If the auditors report at the third term, and their report is referred back to them for correction, a creditor may apply at any time before their final report is made. *Taylor v. Woodward*, 5 *Hal.* 1.

(d) This section so far as relates to the formal execution of the writ, is directory. *Tomlinson v. Stiles*, 4 *Dutch.* 204. A sheriff may execute the writ by special deputy, *Morrel v. Gardner*, *Spn.* 673. A substantial compliance in regard to the service of the writ, is sufficient, *Thompson v. Eastburn*, 1 *Harr.* 101. When the sheriff attaches land, he must go to the owner, or such other person as may be in possession, and there make the attachment; and if there is no one in possession, then he must go to the premises, and there execute the writ; and if there are several tracts of land lying in different places, he must do the same in regard to each. In attaching personal property he must seize them and take them into possession; and in attaching rights and

credits, he must go to the garnishee, and give him notice of the attachment. *Tomlinson v. Stiles*, 5 *Dutch.* 426. If the sheriff return that he has attached "property," instead of "goods and chattels," it will be sufficient, if otherwise correct. *Morrel v. Buckley*, *Spn.* 667. The lien only attaches to property levied on, *Ibid.* *Miller v. Dungan*, 7 *Vr.* 21. See § 19. The sheriff may seize the goods of the debtor, although they may be of less value than \$200, and retain them until the appraisement and inventory are made, and the defendant, or in his absence, the head of the family, makes the selection of goods claimed to be exempted, *Bonnel v. Dunn*, 5 *Dutch.* 435.

(e) All the property, rights and credits attached must be inventoried and appraised, *Tomlinson v. Stiles*, 4 *Dutch.* 201, 5 *Dutch.* 426. If the sheriff certify that he has duly served the writ and returns therewith an inventory and appraisement, it is a good service, *Boyd v. King*, 7 *Vr.* 134. A return, that "by virtue of the writ of attachment, he attached a certain debt due to the said A. in the hands of the said B., appraised at \$500," is a valid return, *Castner v. Styer*, 3 *Zab.* 236. See *Hunt v. Field*, 1 *Stock.* 42. An inventory would be defective if it simply stated that the sheriff had attached "rights and credits." The nature or kind of property attached, must be specified, *Neal v. Cook*, 5 *Hal.* 337.

(g) Judgment in attachment was reversed because the inventory was not signed by the freeholder, *Youman v. Byron*, *Hal. Dig.* 93.

effects, goods and chattels, of the defendant, so as aforesaid attached, from the time of executing the same.(a)

18. That it shall not be lawful for any person, against whom any attachment shall issue, after issuing the same, to give, grant, bargain, sell, alien, or in anywise convey any lands, tenements, hereditaments, or real estate, lying in any county into which such writ shall have been issued or any interest therein, of which he may be seized, possessed of, or entitled unto, at the time of issuing such writ; which said writ shall, immediately on the issuing thereof, become and remain a lien on the said lands, tenements, hereditaments and real estate,(b) as against the defendant, and all persons claiming from or under him, by virtue of any such conveyance, until the plaintiff and such of the creditors of the defendant as shall apply under the attachment shall be satisfied their just debts, or until judgment shall be rendered against the plaintiff and creditors under the attachment, or the said attachment be discontinued; and all conveyances made by the defendant, pending the said attachment, shall be void against the plaintiff in attachment, and the creditors that shall become parties thereto.(c)

Writ when issued a lien on land.

Amended.

19. That if for any cause the officer to whom such writ is directed shall fail, neglect, or refuse to attach, under said writ, any lands of the defendant in his county, or if the defendant shall become seized or entitled to any lands in such county after the return of such writ, and before final judgment shall be entered in the suit, such writ shall be a lien thereon from the time of issuing the same, or from the time when the defendant becomes seized or entitled to such lands, as the case may be; and the court whence such writ shall issue, or a judge or justice thereof at chambers, may order the clerk to amend the return to such writ, by annexing thereto a short description of such lands, and may make all necessary rules and orders for the disposal and sale of such lands, as if the same had been attached by the proper officer under said writ.

Writ a lien on lands although not levied. Act Feb 10, 1869, P. L. p. 33.

20. That the word lands in this act shall be construed to include tenements, hereditaments, and real estate, and any interest therein.(d)

Meaning of the word lands.

21. That the goods, chattels; and personal estate so attached shall remain in the safe keeping and care of the said officer, in order to answer and abide the judgment of the court, unless the garnishee, after inventory and appraisal thereof, shall enter into bond to such officer, with two sureties, being freeholders in the county, in double the sum at which they were appraised, with condition that the said goods, chattels, and personal estate, or the full value thereof, to be estimated by such appraisal, shall be forthcoming to answer the judgment of the said court.(e)

Ib.

Goods to remain in safe keeping of officer.

22. That to enable the said officer fully to execute such writ of attachment, he is hereby authorized and required (having first made demand and being refused) to break open any house, chamber, room,

Officer may break open houses. &c.

(a) An attachment supersedes a judgment on a bond and warrant entered after the attachment was levied, although the bond and warrant were given before. *Lummis v. Boon*, Pen. *734. A judgment regularly entered does not lose its priority by an attachment being afterwards levied on the lands of defendant, and the sheriff may sell said lands upon a *fi. fa.* issued after the levy of the attachment, *Reeves v. Johnson*, 7 Hal. 29. The lien of the attachment was held to be paramount to a judgment obtained after the attachment was issued, although the judgment creditor paid the claim of the plaintiff in attachment and issued execution and levied on defendant's lands before any other creditor applied, *Cummins v. Blair*, 3 Harr. 151. The omission to record a deed within fifteen days after it is executed, does not render it invalid against an attachment creditor having notice thereof before the judgment in attachment is obtained, *Garwood v. Garwood*, 4 Hal. 193. The lien of the writ of attachment before judgment does not take priority over a previous unregistered mortgage, *Campion v. Kille*, 1 McCart. 230, 2 McCart. 476. If, pending an attachment against real and personal property, the defendant applies for and obtains his discharge as a bankrupt, then dissolves the attachment by giving bond, appearing and accepting a declaration, and to it pleads his discharge, his personal liability and personal property will be discharged, but a special judgment will be given for plaintiff to be satisfied out of the real estate attached only, *Vreeland v. Bruen*, 1 Zab. 215. The lien on the real estate remains although appearance be entered and bond given, *Anonymous*, 5 Hal. 60. *Aliter* as to personal property, *Schwylter v. Sylvester*, 4 Dutch. 487. See § 37.

(b) The attachment law creates a lien upon the property attached, both real and personal, from the service of the attachment, *Vreeland v. Bruen*, 1 Zab. 214. *Smith v. Warden*, 6 Vr. 346.

(c) An attaching creditor may file a bill in chancery to set aside a fraudulent conveyance or judgment of defendant in attachment, *Hunt v. Field*, 1 Stock. 36. *Williams v. Michenor*, 3 Stock. 520. *Robert v. Hodges*, 1 C. E. Gr. 300. *Miller v. Jamison*, 9 C. E. Gr. 41. *Curry v. Glass*, 10 C. E. Gr. 108. *Semble*, he cannot do so *at law*, *Melville v. Brown*, 1 Harr. 268, 364. How far an innocent purchaser may be affected, see *Depeyster v. Gould*, 2 Gr. Ch. 474. *Johnson v. Garrett*, 1 C. E. Gr. 31. But if he have knowledge the conveyance is void. *Miller v. Jamison*, 9 C. E. Gr. 41. As to who are necessary parties and what allegations are essential in the bill, see *Hunt v. Field*, 1 Stock. 36. *Williams v. Michenor*, 3 Stock. 521. *Miller v. Jamison*, 9 C. E. Gr. 41.

(d) See note (k) page 42.

(e) The goods attached are in the possession of the law, *Austin v. Wade*, Pen. *997. *Melville v. Brown*, 1 Harr. 364. *Cummins v. Blair*, 3 Harr. 152. And the lien remains for the benefit of all creditors who apply before the rule for discontinuance is actually entered, *Smith v. Warden*, 6 Vr. 346. After defendant gives bond, the plaintiff and creditors can look to the bond only, *Vreeland v. Bruen*, 1 Zab. 214. The necessary expenses of the sheriff in taking care of the property attached, are to be assessed by the court and paid to him, above the ordinary caption fees, *Hanness v. Smith*, 1 Zab. 496. But see *Curtis v. Hulsizer*, 2 South. *496. *Anonymous*, *Spencer*, 112. If perishable, as a horse and carriage, they may be sold by order of the court, *Anonymous*, 3 Harr. 26.

shop, door, chest, trunk, or other place or thing, where he shall be informed or have reason to believe any money, goods, books of account, bonds, bills, notes, papers, or writings of the said defendant may be deposited, secreted, had, or found.

Right and property tried. 23. That if the sheriff or other officer^(a) shall, by virtue of any writ of attachment, issued in pursuance of this act, attach and take through ignorance or want of proper information, any goods, chattels or effects, which shall be claimed by any person as his property, it shall and may be lawful for such sheriff or officer thereupon to summon and swear a jury to inquire into and try the right and property thereof; and if the jury, on such inquest, shall find the right and property of such goods, chattels, or effects to be in the claimant or in any other than the defendant in attachment, such sheriff or officer shall forthwith deliver the said goods, chattels, or effects to the person in whom the property is so found by the inquisition, or to his agent or attorney; and in such case, such sheriff or officer shall not be liable to any prosecution for having attached and taken the said goods, chattels, or effects through ignorance or want of proper information.^(b)

Claim of property must be made in writing. 24. That the sheriff or other officer serving any attachment shall not in any case summon a jury to try the right and property of any goods, chattels, or effects, seized or taken in attachment, unless the person claiming right and title thereto shall exhibit and deliver to such sheriff or officer such claim in writing, specifying the articles and property claimed, requesting a jury to be summoned to try the right, and agreeing to be bound by and submit to the finding of such jury in the premises; *provided always*, that the sheriff or other officer may, notwithstanding such claim, if directed so to do, and sufficiently indemnified by the plaintiff in attachment for so doing, refuse to summon such jury; but the sheriff or officer in such case may retain the goods, chattels and effects so attached, in his hands, to answer and abide the judgment of the court.

Sheriff if indemnified may refuse to try right.

Proceedings on such claim.

25. That when upon such claim of right and title to the property attached the sheriff or other officer shall proceed to summon a jury, he shall appoint the time and place of trial; and shall give notice thereof to the plaintiff in attachment and to the claimant of the property, which time shall not be less than ten days from the time such claim shall be put in; and the sheriff or other officer shall have power to administer the usual oath or affirmation to the jurors and witnesses;^(c) and it shall be the duty of the sheriff or officer before whom such inquest shall be taken, to keep a correct minute of all the proceedings before him had in the premises, and to file the same, together with the inquest found by the jury, and the claim so as aforesaid put in to the property attached, in the office of the clerk of the court out of which the writ of attachment issued, there to remain of record.

Powerto adjourn. 26. That the sheriff or other officer, upon reasonable cause shown by either party, and upon such terms as he may judge proper, may adjourn such trial and hearing from time to time, as occasion may require.

Process for witnesses.

27. That the sheriff or other officer shall have power to issue subpoenas under his hand and seal for such witnesses as either party may require; which subpoenas may be served as subpoenas for witnesses in other cases are required by law to be served; and the witnesses shall be entitled to the same fees, and be subject to the same penalties as are provided by law in causes depending in the supreme court.

Jury and verdict.

28. That the jury to be summoned in pursuance of the twenty-third section of this act, shall consist of twelve men qualified to be jurors in other cases, all of whom must agree to the verdict, which shall be reduced to writing, and signed by the jurors and the sheriff or officer before whom the same shall be taken.

29. That in case the jury shall find that none of the property claimed

(a) Means coroners or such officers other than sheriffs to whom it appertains to execute process out of the superior courts, and does not include constables, *Stryker v. Skillman*, 2 Gr. 189.

(b) The officer cannot recover of the plaintiff in attachment the costs of a suit brought against him for improperly executing the writ, *Curtis v. Hulsizer*, 2 South. *496.

(c) If the sheriff reject lawful evidence, the inquisition

will be set aside. *Obart v. Letson*, 2 Harr. 78. Or if he admits illegal evidence, *Snowden v. Johnson*, Pen. *469. The creditor may file a bill in chancery against the defendant to set aside a fraudulent conveyance, because the defendant cannot compel the creditor to try the right of property at law, *Cox v. Dunham*, 4 Hal. Ch. 594. (Overruled in court of appeals for insufficient allegations in the bill), *Dunham v. Cox*, 2 Stock. 437.

by the person putting in a claim thereto, belongs to such claimant, then such claimant shall pay the costs of such inquiry, which shall be taxed by the sheriff or other officer holding such inquest, and on neglect or refusal of such claimant to pay the same, it shall be lawful for the said sheriff or officer to issue his warrant therefor, to any constable of the county in which such inquest shall have been held, commanding him to make the amount of such costs, and the costs of such warrant, and of executing the same by a levy upon and sale of the goods and chattels of such claimant; *provided*, that if the claimant reside out of the county in which such attachment was served, the sheriff or officer may require him or them to give security for costs before such sheriff or officer shall proceed to hold such inquest as aforesaid.

When claimant
to pay costs.

30. That if the jury shall find the property claimed, or any part thereof, to belong to the claimant, then the costs of such inquiry shall be paid by the plaintiff in attachment; and in case of his or their neglect or refusal to pay such costs, the same may be recovered of him in the same manner as is provided for the recovery of costs from the claimant in the last preceding section; *provided always*, that the plaintiff in attachment, in case he has to pay such costs, shall be entitled to be repaid the same out of the estate of the defendant in attachment, before any division or distribution shall be made thereof to or among the creditors.

When plaintiff to
pay costs.

Proviso.

31. That the following fees shall be allowed and taxed for the services required by this act, on such trial of right and property, and no more, that is to say:

Fees allowed.

To the sheriff for summoning a jury, one dollar;
For swearing the jury, twenty-five cents;
For swearing each witness, five cents;
For drawing the inquest, one dollar;
For keeping a minute of the proceedings, fifty cents;
For every subpoena issued by him, ten cents;
For a warrant for costs when actually issued, twenty-five cents;
To the constable for executing the warrant, fifty cents;
To the jurors each, twenty-five cents;
To the clerk of the county for filing the claim, sheriff's minutes, and inquest, twenty-five cents; and for a copy thereof when required, at the rate of eight cents a folio.

III. Appearance by defendant.

32. That if the defendant appear at any time before final judgment, and accept of a declaration at the suit of every or any one of the said creditors, and enter into bond as directed in the next section of this act, then the said writ of attachment, report, and all the proceedings thereon, shall, as to the suit wherein such appearance is entered, be set aside; (a) and if such appearance be entered to the suit of the plaintiff in attachment, then the costs which shall have accrued on such attachment shall abide the event of such suit. (b)

Defendant may
appear before
final judgment.

33. That if the defendant appear to any attachment, he shall enter into bond with one or more sufficient sureties, being resident in this state, in case the attachment shall have been issued out of the supreme court, and in case the attachment shall have been issued out of the circuit court or court of common pleas, then in the county in which such court shall be held; which bond shall be approved of by the court, or a judge thereof, and shall be given to the sheriff of the county, in case the attachment shall issue out of any circuit court or court of common pleas, and to such sheriff as the court or judge shall direct, in case the attachment shall issue out of the supreme court; which bond the sheriff is hereby required to take in his own name in double the amount of the personal property attached, conditioned for the return of the goods and chattels, rights and credits, moneys and effects, seized and taken by virtue of such writ of attachment, in case judgment shall be rendered for the plaintiff; and said

Defendant ap-
pearing to give
bond.

(a) An attachment is dissolved by entering bail to the action. *Dickerson v. Simms*, Coxe 199. The ordinary rule with a clause "saving all liens created by the statute," is sufficient, *Anonymous*, 5 Hal. 60.

(b) All the creditors who have applied, are entitled to costs without regard to the amount claimed, *Reed v. Chergary*, Spen. 616. *Hanness v. Smith*, 1 Zab. 496.

sheriff shall, in case of a breach of such condition, on application of the plaintiff or any applying creditor of the said debtor, assign the said bond without fee or reward to such person as the court shall direct, to be prosecuted for the benefit of the plaintiff and such creditors as shall have applied to the court or auditors under such attachment, in conformity to this act. (a)

On appearance by defendant writ may be set aside in vacation. Act Mar 23, 1859, P. L. p. 640.

34. That a judge of the court out of which any attachment has issued or may issue, may in term or vacation, upon five days' notice to the plaintiff, or to any creditor admitted by rule under such attachment, or by the report of auditors on file, order the attachment and all proceedings therein to be set aside as against such plaintiff or creditor upon the defendant entering his appearance at the suit of such plaintiff or creditor, and in case any personal property, money or rights in action shall have been attached upon the defendant entering into such bond with like surety, to be approved by said judge, as is directed in the next preceding section of this act, or upon the defendant entering into bond with like surety, and approved by said judge, to such creditor or plaintiff, in double the sum sworn to in the affidavit filed by him, conditioned for the return of such goods and chattels, rights and credits, moneys and effects attached if judgment be rendered for such obligee.

Creditors must consent to discontinuance.

35. That the plaintiff in such attachment shall not be permitted to discontinue the same, without the consent of, or satisfaction made to, each of the said creditors who shall have applied to the court or auditors as aforesaid. (b)

Goods released and no other creditors admitted.

36. That when said attachment shall be set aside as against the plaintiff and all creditors admitted by rule entered on affidavit or by report of auditors on file, all property attached, except real estate, shall be free from the lien thereof, and no creditor shall be admitted under any attachment after the same shall have been set aside as to the plaintiff therein.

Bond to each creditor to pay sum recovered.

37. That if the said defendant, instead of giving any of the bonds before mentioned, shall make, execute and file in the office of the clerk of the court out of which any attachment shall have issued, a bond, with two or more sureties, to be approved of by said court or a judge thereof, to the plaintiff in attachment, and a like bond to each of the creditors, who shall have applied as aforesaid, in double the sums respectively sworn to by them, conditioned for the payment of such moneys as may be adjudged to be due to them severally; and shall also enter his appearance to the suit of the said plaintiff and each of said creditors; then it shall be lawful for the said court or a judge thereof, either in term time or vacation, if it shall appear just so to do, to order the said attachment to be set aside, and that both the real and personal estate of the defendant be released and discharged from the lien thereof.

Revision.

Real and personal estate released.

Appearance of defendant without bond. Act Mar. 1, 1871, P. L. p. 22.

38. That it shall be lawful for any defendant or defendants, in any suit commenced by attachment, to enter his, her or their appearance to the suit of the plaintiff or plaintiffs therein, or of any creditor or creditors under said attachment, without giving bond for the return of the personal property attached by virtue thereof; which appearance shall be entered in the clerk's book, and notice thereof given to such plaintiff or plaintiffs, creditor or creditors, or his, her or their attorney or attorneys within twenty days thereafter; and after such appearance and notice, the suit or suits of such plaintiff or plaintiffs, creditor or creditors, shall proceed in all respects as if commenced by summons, and no other or further claim shall be put in under such attachment after the entry of such appearance.

39. That in any case of an appearance by virtue of the foregoing section, the lien of the attachment shall continue, and proceedings by

(a) The bond is for the benefit of, and can be prosecuted by, any creditor applying, as well as the plaintiff in attachment; the amount recovered is for the benefit of all applying creditors, *Hanness v. Smith*, 2 Zab. 332. If there be an attachment against A. and another against A. and B., and A's goods are attached on both writs, he must give a separate bond in each suit, *Ibid.* If judgment be recovered by the plaintiff, the property surrendered in discharge of the bond, must be delivered in the same condition as to title and encumbrance, as it was when the bond was executed, *Schuyler v. Sylvester*, 4 Dutch. 487. Or the value of the goods must be paid, *Hanness v. Bonnell*, 3 Zab. 159. See *Vree-*

land v. Bruen, 1 Zab. 214. The court of chancery will not restrain an attachment suit because the amount of security required is so large as to make it inconvenient or impracticable for the defendant in such suit to dissolve the attachment, *Dungan v. Miller*, 4 C. E. Gr. 218.

(b) After service of the writ the attachment cannot be settled by the parties out of court, *Cummins v. Blair*, 3 Harr. 151. If the discontinuance be entered by fraud, or in bad faith, it will be set aside, *Duffin v. Wolf*, 1 Zab. 475. The lien continues until the rule is actually entered, *Smith v. Warden*, 6 Vr. 346.

scire facias may be had against any garnishee, and the movable property attached shall remain in the custody of the sheriff or his bailee, and be subject to the order and control of the court or the judge thereof, and the court or judge may, if occasion require, order the property sold as perishable, and appoint an auditor with like powers in all respects as if no appearance had been entered, but a judge of the court may discharge the lien of such attachment as to all or any part of the personal property attached, upon four days' notice to all parties interested, and upon the defendant or defendants giving bond, with securities, in such amount and in such condition as said judge may direct.

In case of appearance of defendant without bond lien continues.

Property, how disposed of.

Judge may discharge lien.

40. That the plaintiff in attachment, by and with the consent of all of the creditors who may have entered a rule to be admitted as creditors under any attachment as aforesaid, may enter a discontinuance of such attachment in vacation; and in case no creditor or creditors shall have entered a rule to be made creditor or creditors as aforesaid, the plaintiff in attachment shall discontinue all proceedings in attachment, upon settlement of his debt.

Plaintiff may discontinue in vacation with consent of creditors who have entered rule.

41. That it shall be the duty of the officer by whom any writ of attachment shall be executed, to deliver any property attached by virtue of such writ to the person in whose possession the same is found, upon the execution, in the presence of the officer, of a bond to the plaintiff, by such person, with one or more sufficient sureties, in double the value of the property, conditioned that the defendant shall perform the judgment of the court in the action, or that the property or its value, shall be forthcoming and subject to the order of the court for the satisfaction of such judgment.

Property to be left with person in possession if bond given.

IV. Proceedings on return of writ.—Auditor and his duties.

42. That it shall be the duty of the court, out of which any attachment may issue, or of a judge thereof, to order the clerk of such court to cause notice of the issuing of such attachment, and at whose suit, against whose estate, for what sum, and when returned, to be published in such one or more of the newspapers in this state as said court or said judge shall direct, for a space not less than two and not more than three months; and judgment shall not be entered until proof, to the satisfaction of said court or said judge, shall be made of such publication.(a)

Court or judge to order advertisement.

43. That the plaintiff shall set up, in the office of the clerk of said court, a copy of the notice required to be published by the next preceding section, and for the same space of time as the same is therein directed to be published, and shall also file with said clerk proof of the setting up of the same, and thereupon the court may order the defendant's defaults to be recorded.

Copy of which to be set up in clerk's office.

44. That the court, on the return of such writ of attachment, is hereby required to appoint a fit person(b) to audit and adjust the demands of the plaintiff, and of so many of the defendant's creditors as shall have applied to the court for that purpose, or to the auditor before he shall have made his report; and it shall be the duty of the said auditor to ascertain the sum due to the plaintiff and to each of the creditors aforesaid,(c) and to make his report thereof in writing, under his hand, at the expiration of six months after the return of said writ, which report shall be filed with the clerk of said court.(d)

Auditor to be appointed.

Act Feb. 10, 1869, P. L. p. 33.

Who shall audit accounts.

Amended.

(a) If the clerk neglect to advertise the attachment until the second term, the writ will not be quashed where the other proceedings have been regular, *Cory v. Lewis*, 2 *South*. *846. See *Gaddis* ads. *Howell*, 2 *Vr.* 313. *Conover v. Conover*, 2 *Harr.* 187.

(b) If it appear that the auditor appointed is interested, the court may substitute another person, *Anonymous*, 1 *Harr.* 355. So where an auditor had moved out of the county, *Cory v. Lewis*, 2 *South*. *846.

(c) A creditor is not bound to file his claim when he applies, and if he does so he is not thereby restricted from proving beyond the amount claimed, *Hanness v. Smith*, 1 *Zab.* 495. If the plaintiff imposes a fictitious claim upon the auditors, or one which has been satisfied, he commits a fraud against which equity will grant relief, either by enjoining the enforcement of the claim or ordering restitution, *Tomkins v. Tomkins*, 3 *Stock.* 512. See *Reeves v. Cooper*,

1 *Beas.* 223. Where a judgment creditor claims the surplus money in a foreclosure suit, it must be paid to the auditors, *Brantingham v. Brantingham*, 1 *Beas.* 160. Money raised on execution, which had been attached, was ordered to be paid into court by the sheriff, *Crane v. F. esse*, 1 *Harr.* 305. Interference refused by chancery although an applying creditor was a preferred creditor to the amount of his claim under an assignment in another state and held other collateral securities, *Benedict v. Benedict*, 2 *McCart.* 150.

(d) The court may refuse to enter judgment on the report and may refer the matter back to the auditors if they think they have made a mistake in law, *Berry v. Callet*, 1 *Hal.* 179. Or they may extend the time for making the report, *Taylor v. Woodward*, 5 *Hal.* 1. Or if they do not proceed according to law, or if they disregard the evidence before them, *Phenix Iron Co. v. N. Y. Wrought Iron Railroad Chair Co.*, 3 *Dutch.* 485.

- Final judgment to be entered after six months. Act March 23, 1859, P. L. p. 640. Amended.
45. That final judgment may be entered as of course, in term time or vacation, upon the report of the auditor, at any time after the expiration of six months from the return of the attachment; *provided*, the said report shall have been on file in the office of the clerk of said court for at least ten days, and the said report shall have been first approved by the said court, or a judge thereof, and an order made that such judgment be entered thereon; *and provided further*, that the defendant's defaults shall have been ordered to be recorded at each regular term between the return of the attachment and judgment.
- Powers of auditor.
46. That for the better discovery of property and detection of fraudulent practices, it shall and may be lawful for the said auditor to issue his warrant, under his hand and seal, commanding the sheriff of the proper county, or any constable in the same, to bring before him, at a certain time and place therein specified, the wife of such defendant, or any other person, and him or her, by word of mouth or interrogatories in writing, to examine, on oath or affirmation, which the said auditor is hereby authorized to administer, touching all matters relating to the trade, dealings, moneys, debts, effects, rights, credits, lands, tenements, property, and estate of the said defendant, and his secret grants, or fraudulent transfer or conveyance of the same; and if any person shall refuse to be sworn or examined by or before the said auditor, touching any matter herein directed, then such person, so offending, is hereby declared to be guilty of a contempt of the authority of the court which appointed the said auditor, and shall, by the said court, be proceeded against accordingly.
- To examine persons.
- Person refusing to be sworn guilty of a contempt of court.
47. That the said auditor is hereby empowered to issue his warrant, under his hand and seal, commanding the sheriff of the proper county, or any constable in the same, to break open, (having first made demand and been refused) any house, chamber, room, shop, door, trunk, chest, or other place or thing, where he shall have reason to believe any moneys, goods, chattels, books of account, bonds, bills, notes, papers, or writings of the said defendant may be deposited, secreted, had or found, and to seize and inventory the same, and make report thereof to the court at the then next term; and if any person resist the execution of the said warrant, he shall be guilty of a contempt of the authority of the court which appointed the said auditor, and shall be proceeded against accordingly by the said court.
- To authorize search.
48. That the said auditor shall have power to administer oaths or affirmations to all witnesses that may be produced before him in support of or in opposition to any claims or demands that may be put in by the plaintiff in attachment or by any other person or persons claiming to be creditors of the defendant in attachment.
- To administer oaths.
49. That whenever the said auditor shall have reason to believe that any person or persons are indebted to the defendant in attachment, in any sum of money, not exceeding one hundred dollars on book account, promissory note, or otherwise, it shall and may be lawful for such auditor to institute a suit, by summons, before any justice of the peace, in the name of the defendant in attachment, but for his use as such auditor, against the person or persons so by him believed to be indebted as aforesaid, to the defendant in attachment, for the recovery thereof; which suit so commenced, shall not be discontinued or dismissed without the consent of the said auditor, but shall proceed to trial and judgment, in the same manner as if the plaintiff named therein was personally present conducting the same; *provided always*, that the defendant in such suit shall be entitled to all just set-offs, in the same manner as he would be if the plaintiff in such suit was prosecuting the same in person, for his own use.
- To institute suits for sums not exceeding \$100.
50. That if judgment shall be given in any such suit as aforesaid, for the plaintiff therein, the money thereby recovered, whether collected by execution or otherwise, shall be paid to the said auditor in attachment, to be by him disposed of according to law; and if judgment shall pass against the plaintiff in such suit, the said auditor shall pay the costs of such suit, and shall be allowed to retain the same out of any moneys or effects that may come to his hands as such auditor.
- Proviso.
51. That where judgment, on the report of the said auditor, shall
- Proceeds of suit to be paid to auditor and applied according to law.
- Sale of defendant's property.

be entered against the said defendant by default, the said auditor may, by virtue of an order of court for that purpose, make sale and assurance of the goods and chattels, (a) lands and tenements, of the said defendant, which were attached and taken as aforesaid, and upon which the attachment remains a lien, or such part thereof as shall be necessary to satisfy the debts of the plaintiff, and the creditors who may have applied agreeably to the directions of this act; (b) but notice of the sale of such goods and chattels shall be set up at five of the most public places in the county, and be advertised in some one of the newspapers circulating in this state, for the space of thirty days prior to such sale; nor shall any sale of such lands or tenements be made in less than twelve months from the time of executing the writ of attachment, nor of any goods or chattels, till judgment be obtained against the defendant as aforesaid, unless the court in its discretion or a judge thereof shall, on the return of the said writ, or at any other time before judgment, order the said sheriff or the auditor to sell such goods and chattels; in which case advertisements set up for the space of five days prior to the time of sale, in four of the most public places in the township, precinct, or ward, shall be sufficient.

Amended.

In what time.

When chattels sold.

Act April 4, 1873,
P. L. p. 164.

Meeting of creditors.

52. That when the goods and chattels, lands and tenements of the said defendant shall be sold as aforesaid, then it shall be the duty of the said auditor to serve a written notice on each of the creditors whose claim shall have been admitted, or to cause public notice to be given in one or more of the newspapers circulating in this state, requiring a meeting of the plaintiff and creditors, who may have applied, agreeably to the directions of this act, at a certain time and place in the said notice to be specified, which time shall not be less than six nor more than ten weeks after such notice given, for the purpose of making distribution of the moneys arising from such sale; at which meeting, or other subsequent meeting, to be continued by adjournment, if necessary, the said auditor shall distribute among the said plaintiff and creditors equally, and in a ratable proportion, according to the quantum or amount of their respective debts, as ascertained by the said report and the judgment thereon, all the moneys arising from the sale of the said goods and chattels, lands and tenements, and all other moneys in his hands as auditor, first deducting legal costs and charges; and if the said moneys be not sufficient to satisfy the said debts, then the said auditor shall assign to the said plaintiff and creditors the choses in action, rights and credits of the said defendant, in proportion to their respective debts, so as aforesaid ascertained; which assignment shall vest the property and interest of the said defendant in such assignee, so as he may sue for and recover the same in his own name and for his own use; and in the said distribution and assignment, no preference shall be allowed to debts due on specialties; and further, that the moneys so distributed, as also the moneys which may be received by virtue of such assignment, shall operate as payment of such debt, in whole or in part, as the case may be; and the said auditor is hereby directed to make report of such distribution, assignment and other proceedings under this section, to the court at the next term, in order that the same may be filed in the clerk's office.

Distribution of moneys and choses in action.

Report.

53. That every grant, bargain, sale, assignment, transfer, assurance, alienation, and conveyance, made by the said auditor, under or by virtue of this act, shall be as good and effectual in law as if executed by the said defendant, at and before the time when such attachment became a lien upon the estate, real or personal, so sold, assigned or conveyed.

Purchaser's title valid.

54. That any creditor, whose debt is not due, may apply to the court or auditor in the same manner as if it were due, and thereupon shall be admitted and considered as a creditor under this act, and shall receive a dividend of the defendant's estate in proportion with the other creditors,

Debts not due admitted.

(a) The sale can only be made by order of the court. *Tomlinson v. Siles*, 4 *Dutch*. 204. Stock of an incorporated company may be sold, *Castle v. Carr*, 1 *Harr*. 394. But not if the stock has been regularly transferred before the attachment issued, *State, Bush v. Warren Foundry Co.*, 3 *Vr*. 439.

(b) A sale by auditors of several tracts of land, that should have been sold separately, and where a sale of part would have been sufficient to satisfy the claims of the plaintiff and the applying creditors, is a clear breach of trust and will be set aside as void, *Johnson v. Garrett*, 1 *C. E.*

Gr. 31. So where the description of the premises to be sold was imperfect and the price realized grossly inadequate, *Hodgson v. Farrell*, 2 *McCart*. 88. But inadequacy of price and the fact that the debtor being a non-resident, was not aware of the sale, and that he has a good defence, are not enough to justify the interference of a court of equity, *Eberhart v. Gilchrist*, 3 *Stock*. 137. See *Reeves v. Cooper*, 1 *Beas*. 223. The title of a *bona fide* purchaser can not be defeated by parol proof of the payment of the debt before the sale, *Nichols v. Dissler*, 2 *Vr*. 461.

deducting only a rebate of legal interest for what he shall receive on such debt, to be computed from the actual payment thereof to the time such debt would have become due.

Applying creditors only, paid.

55. That if any creditor, whether his debt be due or not, shall neglect or refuse to apply to the court or auditor in the manner prescribed by this act, he shall not be entitled to any dividend or distributive share; but all the moneys arising from the sale of the defendant's goods and chattels, lands and tenements, or which may be collected under this act, shall be distributed among, and his choses in action, rights and credits, shall be assigned to such of the creditors as shall have duly applied to the said court or auditor.^(a)

Creditor, before receiving dividend, must give bond.

56. That no plaintiff or other creditor shall receive any dividend or assignment as aforesaid by virtue of this act, until he shall have entered into bond to the defendant, with one or more sureties, being freeholders and residents in this state, to be approved by the court or by the auditor in double the sum, so to be received or assigned, with condition that he shall appear to any suit that may be brought against him by the said defendant within one year^(b) next after the date of the said bond, and shall pay unto such defendant any sum of money which, by the judgment or decree of the court, shall appear to have been received by him, and not due or owing, with costs of suit, which bond shall be filed with the clerk for the benefit of the defendant.

Death of defendant not to abate suit.

57. That if any defendant shall die after the return day of the writ of attachment, the said action shall not be thereby abated or discontinued but the same shall be carried on to judgment, sale, transfer, distribution, and final determination, as if such death had not intervened and the defendant had been alive;^(c) and all proceedings and deeds which shall be had and made in such case are hereby declared to be as valid and effectual in law as if they were had and made in the lifetime of such defendant; and the bond entered into in pursuance of the preceding section may, notwithstanding the death of such defendant, be prosecuted in his name to judgment and effect in the same manner as if he were living.

V. Proceedings against garnishee.

Suit by plaintiff against the garnishee.

58. That the plaintiff, notwithstanding the garnishee's denial of his having any moneys, goods, chattels, or effects of the defendant in his custody or possession, or of his being indebted to him, may, if he really believes that the said garnishee hath such moneys, goods, chattels, or effects in his custody or possession, or that he is indebted to the defendant, and is in fear of the said garnishee's absconding before judgment and execution can be had against such garnishee, and shall make oath or affirmation thereof, and deliver the same to the clerk as aforesaid, institute a suit against the said garnishee by summons, or, in case of fraud duly proved according to the statute in such case made and provided, by *capias ad respondendum*; in which suit the plaintiff may declare against the said garnishee for the moneys, goods, chattels, or effects so as aforesaid in his custody or possession, in trover and conversion, as of such plaintiff's own proper moneys, goods, chattels, and effects, or if the said garnishee be indebted to the defendant in attachment, then the plaintiff may declare for so much money had and received by such garnishee to the use of the plaintiff, and, on the trial, may give the special matter in evidence, and thereupon the jury shall find for the said plaintiff, and assess damages to the full value of the moneys, goods, chattels, or effects so proved to be in the custody or possession of such garnishee, or to the full value of the debt so due from such garnishee to the defendant in attachment; on which verdict, judgment shall be given, with costs of suit, and execution issued thereon against the goods and chattels, lands and tenements, and the body of the said garnishee, as is or shall be by law allowed in actions of trespass on the case.^(d)

Amended.

^(a) Creditors not exhibiting their accounts to the auditors until after judgment, can derive no benefit from the attachment, but may take out a new attachment against the surplus of defendant's property, if any, *Mount v. Ely*, 2 Hal. 83.
^(b) It is too late, after the lapse of a year, to apply to a court to open a judgment on an attachment, *Walker v. Anderson*, 3 Harr. 217.

^(c) Where the debtor dies after the return day, the action is not thereby abated or discontinued, and a creditor may apply or enter his rule to be admitted, as if the defendant were alive, *Smith v. Warden*, 6 Vr. 346.

^(d) A municipal corporation is subject to garnishment, but the *scire facias* can not issue out of a justice's court, *The Mayor &c. of Jersey City v. Horton*, 9 Vr.

59. That the suit so instituted against the said garnishee, shall be continued by the court, without trial or decision, until the action against the defendant in attachment shall be adjudicated upon and determined; and if in such action nothing shall be found due from the defendant to the plaintiff, then the garnishee shall recover costs against the plaintiff, notwithstanding he may be indebted to the defendant, or have the moneys, goods, chattels, or effects of such defendant in his custody or possession.

Suit to be continued until judgment in attachment suit.

60. That if, in the suit so instituted against the garnishee, the plaintiff shall be non-suited, or shall discontinue, or verdict and judgment shall be given against him, then the said garnishee shall recover costs.

Garnishee to have costs on discontinuance or non-suit.

61. That where judgment on the report of the auditor shall be entered against the defendant by default, a *scire facias* shall (except only as is hereinbefore mentioned) issue against the garnishee, to appear at the next term(a) after entry of such judgment, and show cause why the plaintiff should not have execution of the money so as aforesaid due by him to the defendant, and in his hands, or the value of the goods and chattels of the defendant, which were in the custody or possession of such garnishee at the time of executing the writ of attachment(b); and if the garnishee shall appear at the return of the said *scire facias*, and on oath or otherwise, to the satisfaction of the auditor, confess the amount of the debt due from him to the defendant, or the true value of the defendant's goods and chattels, which were as aforesaid in his custody or possession, and tender the same to the auditor, and he accept thereof, then he, the said garnishee, shall, by the judgment of the court, be acquitted and discharged from the debt, or goods and chattels aforesaid, with costs; and if the said *scire facias*, having been returned served, or in case no service thereof can be made, having been published as prescribed by law, the garnishee shall not appear, confess, and tender as aforesaid, then judgment shall be entered against such garnishee by default, and a writ of inquiry shall be awarded to the sheriff or other officer, to inquire and certify to the court, by the oath or affirmation of twelve good and lawful men of his bailiwick, the amount of the debt due from such garnishee, or the value of the goods and chattels so as aforesaid in his custody or possession, and on the return of such inquisition, judgment shall be entered against the said garnishee for the sum so found and certified, with costs(c); and if the garnishee shall appear at the return of the said *scire facias*, and plead thereto(d) that he had no goods or chattels of the defendant in his custody or possession, either at the time of executing the writ of attachment, or at any time since, or that he was not indebted to the defendant, and the plaintiff, on trial, shall prove that he was indebted,(e) then the jury shall find for the plaintiff, and assess damages to the amount or value of such debt, goods, or chattels, with costs, and judgment shall be entered accordingly, and execution awarded against the goods and chattels, lands and tenements, and also the person of the said garnishee(g); but if the jury find for the garnishee, then he shall recover costs against the plaintiff, and have execution for the same, and the said auditor shall pay the same out of any moneys in his hands; the moneys realized by such proceedings shall go to the auditor for distribution under this act.

Scire facias may issue against garnishee.

Amended.

Moneys recovered to go to auditor.

VI. Proceedings before justice of peace.

62. That any justice of the peace within this state, on application made and affidavit filed before him to the purpose aforesaid, shall, and he is hereby required to issue out of the court for the trial of small causes an attachment, under his hand and seal, for any sum not exceeding one hun-

Proceedings before justice.

(a) It is not necessary that the *scire facias* be returned at the next term; that part of the statute is directory. *Lomerson v. Huffman*, 4 Zab. 674. But it must be served or published, *Castner v. Styer*, 3 Zab. 236.

(b) The *scire facias* must set out with precision and certainty the nature of the property attached. *Neal v. Cook*, 5 Hal. 337; and the court will not permit judgment to be entered against a garnishee, unless it appears on the *scire facias*, in whose hands the property was attached and what that property consisted of, *Welsh v. Blackwell*, 2 Gr. 344. A bill in equity is not the proper remedy to compel the payment by a garnishee of the moneys attached, *Egbert v. Hawk*, 1 Beas. 80.

(c) Where no writ of inquiry had issued, and a *fi. fa.* subsequently issued against goods and lands of the garnishee on a judgment obtained against his administrator, the *fi. fa.* was set aside for irregularity, *Canan v. Caryell*, Coze 3.

(d) The garnishee can not demur. *Welsh v. Blackwell*, 2 Gr. 344. Although he is confined to this plea, yet he may show or insist upon any matter of law or fact which would and ought to protect him. *Welsh v. Blackwell*, 3 Gr. 55. But he can not call in question the regularity of the proceedings, or that the writ of attachment was duly served, *Castner v. Styer*, 3 Zab. 236.

(e) To entitle the plaintiff to recover, he must prove that the garnishee is indebted to the defendant in attachment, *Lomerson v. Huffman*, 1 Dutch. 625. Or that the right of the defendant in attachment to the chattels in dispute is superior to the garnishee's, *Outcalt v. Durling*, 1 Dutch. 443.

(g) It is no error that the verdict rendered is for an amount greater than the plaintiff's claim; the recovery is for the benefit of all applying creditors, *Lomerson v. Huffman*, 4 Zab. 674.

Act Feb. 19, 1852,
P. L. p. 62.

dred dollars, directed to a constable, who shall execute the same in manner aforesaid, on the effects, rights, and credits of the defendant(a); and upon the return of such attachment, the said justice shall appoint a day for hearing of the said cause, not less than twenty days from the issuing of the said writ(b); on or before which day so appointed, the plaintiff in the said attachment shall file a copy of his account or state of demand; and if the creditor shall make sufficient proof of the debt due to him, the said justice shall give judgment therein for the plaintiff, and award his execution thereof to the constable against the effects of the defendant, as in other cases cognizable before a justice, but the effects of the defendant thereon taken shall not be sold in less than three months (unless the same are perishable), to the end that the debtor or his friend may redeem the same; and in the meantime the same shall be inventoried and safely kept in such manner as the justice shall direct.(c)

Advertisement
required.

63. That it shall be the duty of the plaintiff forthwith, after the issuing of such attachment, to advertise(d) in three of the most public places in the county, that an attachment has been taken out from such justice against such absconding or absent debtor, in order that any person having a greater demand against such debtor than is cognizable before a justice of the peace, may have an opportunity to take out an attachment for the recovery of the same.

Proceedings
against gar-
nishee.

64. That the plaintiff in such attachment may proceed against the garnishee, as hereinbefore provided; and if he shall make sufficient proof of the debt due to him, and also of the effects, rights, or credits in the hands of the garnishee, the said justice shall give judgment therein for the plaintiff, and award and issue his execution thereof to the constable, against the garnishee, as in other cases cognizable before a justice; and if the plaintiff shall not make sufficient proof of the effects, rights, or credits, in the hands of the garnishee, he shall pay the garnishee his costs, and if need be, the justice shall issue his execution against the plaintiff for the same.(e)

Defendant's ap-
pearance and
bond.

65. That it shall be lawful for the defendant in any attachment issued by a justice of the peace, on or before the day appointed for the hearing of the said cause, to cause his appearance to be entered, by filing with the said justice a bond(g) to the plaintiff, executed by one or more sufficient sureties, being freeholders and resident in the county in which such attachment shall issue, in double the value of the property attached, conditioned for the due and safe return of the goods and chattels, rights and credits, moneys and effects seized and taken by virtue of such writ of attachment, in case judgment shall be rendered for the plaintiff; which said bond shall be approved by the said justice, and filed by him for the use and benefit of the plaintiff; and thereupon the property attached shall be restored to the defendant and released from the lien of the said attachment.

Plea, trial and
appeal.

66. That after filing the said bond, the said defendant shall file his plea, copy of account or set-off, if any he have; and the said cause shall and may be adjourned and conducted in all things in like manner, as if the same had been commenced by summons, under the act entitled "An act constituting courts for the trial of small causes;" and either party may appeal from the said judgment in like manner, in every respect, as if the said suit had been commenced by summons under the said last mentioned act.

Appeal in gar-
nishee's case.

67. That from any judgment rendered by a justice of the peace for or against a garnishee in attachment, under and by virtue of this act, either party may appeal in like manner in all things as from the judgment of a

(a) It must clearly appear by the constable's return that some property was attached, or the justice cannot proceed. *Lentz v. Callin*, 2 *Dutch*, 218. That he served the writ "according to the statute in such case made and provided," is insufficient. He should return the way in which he executes the writ, so that the court can judge whether it is according to law. *Crisman v. Swisher*, 4 *Dutch*, 149.

(b) It must appear that on the return of the attachment the justice fixed a day for the hearing, *Ibid.* *Conover v. Conover*, 2 *Harr*, 187.

(c) The plaintiff in attachment cannot maintain trespass against the sheriff who levies on the goods attached, by virtue of an execution, before they are sold under the attachment. *Austin v. Wade*, *Pen.* *997.

(d) The advertisement must be proved to have been made

and entered on the docket, *Lentz v. Callin*, 2 *Dutch*, 218. Being "satisfied with putting up the advertisements," is not a sufficient entry, *Conover v. Conover*, 2 *Harr*, 187.

(e) A *scire facias* cannot be served on a corporation unless it can be served in the same way that a summons could, *Del., Lack. and Western R. R. Co. v. Ditton*, 7 *Vr.* 361. Nor issue against a municipal corporation, *The Mayor &c. of Jersey City v. Horton*, 9 *Vr.* Judgment must be given against the defendant in attachment before the justice issues a *scire facias* against the garnishee. *Brackon v. Ballentine*, 1 *Harr*, 484. When the title to property is disputed between the defendant in attachment and the garnishee, the defendant's right must be proved, *Outcalt v. Durking*, 1 *Dutch*, 413.

(g) If the defendant appear he must file a bond, *Davis v. Mahany*, 9 *Vr.*

justice under the act entitled "An act constituting courts for the trial of small causes."

68. That any writ of attachment against any absconding or absent debtor, which may be issued out of the supreme court or any circuit court or court of common pleas, shall be a supersedeas to all attachments issued by a justice of the peace, undetermined at the time of serving the said writ; (a) and it shall and may be lawful for the sheriff or his deputy, to take into his possession all goods and chattels attached by the constable, as fully to all intents and purposes, as if the attachment issued by the justice had not been served, and the plaintiffs in said attachments shall be entitled to their several debts, with the costs that may have accrued, in proportion with the other creditors, as is before in this act mentioned and directed; *provided always*, that no constable shall be obliged to remove any goods taken into his custody by virtue of any attachment, after the same shall have been seized and attached by the sheriff.

Justice's attachment, when superseded.

69. That in all cases of an attachment hereafter issued by a justice of the peace, when an affidavit shall be filed by or in behalf of the defendant, setting forth facts which would render said attachment illegal or void, it shall be the duty of said justice, upon a motion to quash the writ of attachment, to try said facts, without requiring the defendant to file a bond according to the requisition of this act, and to give judgment on said motion.

Motion to quash without filing bond.

Act Mar. 13, 1862, P. L. p. 194.

70. That when an attachment issued by a justice of the peace shall be superseded by an attachment out of a higher court, the plaintiff in the attachment so superseded shall be entitled to be first paid out of the property attached the full amount of the legal costs and expenses which may have accrued on the attachment so superseded.

Costs of superseded attachment to be first paid.

Ib.

71. That upon the expiration of the term of office of any justice of the peace before whom a judgment shall have been obtained against a defendant in attachment, as provided for by this act, all the proceedings against the garnishee authorized herein may be had before any other justice of the peace.

Death of justice after judgment.

Act April 9, 1867, P. L. p. 911.

VII. Fees.

72. That the auditor shall be allowed a reasonable compensation for his services, to be taxed by one of the judges of the court, and paid out of the defendant's estate.

Fees of auditor.

73. That the freeholder who may be employed by any sheriff to make an inventory and appraisal of the property attached, pursuant to the sixteenth section of this act, shall be entitled for such service, to the sum of one dollar; and if employed more than one day in such service, then at the rate of one dollar a day; and the freeholder employed by any constable to perform a like service under an attachment issued by a justice of the peace, shall be entitled to fifty cents therefor, and no more; which compensation shall be paid by the said officers to the freeholders employed by them respectively, for the purpose aforesaid, and shall be allowed to the said officers, in addition to their other fees, for serving the said writs.

Freeholder in making appraisal.

74. That there shall be allowed to the justice, for issuing an attachment and recording the return thereof, thirty-five cents; for a summons against a garnishee, twenty cents; and to the constable, for serving a writ of attachment, sixty cents; there shall also be allowed to the justice and constable, for all other services performed under this act, the same fees as are allowed by law for the like services in other cases in the court for the trial of small causes.

Of the justice and constable.

VIII. General provisions.

75. That this act shall be construed in all courts of judicature in the most liberal manner for the detection of fraud, the advancement of justice, and the benefit of creditors.

Construction to be liberal.

(a) Quashing the writ in the superior court does not revive the jurisdiction of the justice, *Brown v. Abbott*, 1 *Harr.* 319. Nor can the justice proceed, after his judgment has been removed to the circuit or supreme court, reversed and

remitted, *Flanagan v. Jerome*, 5 *Dutch.* 391. On a *certiorari* to the common pleas and reversal, the proceedings were continued in the supreme court, *Cory v. Lewis*, 2 *South.* *846.

Orders may be made at chambers.

Act Mar. 23, 1859,
P. L. p. 640.

Proceedings if not pursued for twenty years, cease to have effect.

Act Mar. 17, 1870,
P. L. p. 53.

76. That all orders for the appointment of auditors, for the sale of perishable property, for advertising the attachment, for the sale of the defendant's property, and all other orders not specifically required by this act to be made in open court may be made out of court by a judge of the court in which the action is pending, in term time or vacation.

77. That in all cases where writs of attachment have heretofore been issued, or may hereafter be issued, and no proceedings have been or shall be had thereon for the period of twenty years, the same shall cease to bind the property and estate of the defendant so attached at the expiration of the said twenty years.

[For preferences on attachment given to wages, see *post*, title OPERATIVES].

Attorney General.

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| 1. Duties of Attorney General. | 4. Appointment of prosecutors of pleas. |
| 2. Salary of. | 5. Oath of prosecutors. |
| 3. All criminal business to be prosecuted by prosecutors of pleas. When attorney general to prosecute. | 6. Powers of prosecutors. |
| | 7. When court to appoint prosecutor. |

An act to define the duties and fix the salary of the attorney-general.

P. L. 1854, p. 131.

Approved February 24, 1854.

Duties of attorney-general.

1. It shall be the duty of the attorney-general, when not incompatible with his other public duties, to be present at the seat of government during the session of the legislature, to give to the members of the senate and assembly, and to the executive, and all the officers of the state government, such legal information as they may from time to time request, examine and decide all cases submitted for his opinion by the state superintendent of common schools, attend in any county of the state for the trial of homicide cases, or other high crimes, on the written request of a justice of the supreme court, or of the board of chosen freeholders of any county, upon all applications for loans of the school fund to inspect the title papers, and determine the security offered, and attend generally to all matters in which the state is a party, or in which its rights and interests are involved.

Salary.

2. The attorney-general shall receive an annual salary of fifteen hundred dollars, to be paid to him by the treasurer of this state, in quarterly payments.

Prosecutors of pleas to prosecute criminal business. When attorney-general to prosecute.

3. After the passage of this act, the criminal business of the state shall be prosecuted exclusively by the prosecutors of the pleas, except in counties where, for the time being, there may be no prosecutor, or where the prosecutor desires the aid of the attorney-general; and when the attorney-general prosecutes in a county having no prosecutor, he shall be entitled to the fees now fixed by law; and where he aids in the prosecution at the request of the prosecutor, he shall be entitled to one-half of the fees; and when the attorney-general attends the trial of any case at the request of a justice of the supreme court, or of the board of freeholders, as provided in the first section of this act, he shall be paid such sum for that special service as the justice of the supreme court of that judicial district shall certify and fix, to be paid by the collector of the county in which the cause is tried.

Harr. 49.

An act respecting prosecutors of the pleas of the state.

R. S. 832.

Approved April 16, 1846.

Appointment of prosecutors of the pleas.

4. SEC. 1. There shall be appointed for each county some fit person, who shall be an attorney and counsellor at law,⁽¹⁾ whose duty it shall be to prosecute the pleas of the state in such county, in the absence of the attorney-general; and further, to do and perform such acts and things in

(1) By supplement of April 1, 1869, (P. L. p. 1161), an attorney-at-law may be appointed prosecutor of the pleas in Bergen county.