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P. L. 1847, p. 56.
" 1849, p. 129.
" 1851, p. 317.
" 1853, p. 402.
" 1854, p. 259.
" 1855, p. 288, 668.
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" 1867, p. 26, 486, 959.
" 1869, p. 1152, 1230, 1296.
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An act to regulate the practice of courts of law.

Revision—Approved March 27, 1874.

I. Attorneys.

Attorneys, partners, may appear as such

P. L. 1855, p. 288, § 2.

1. That attorneys at law and solicitors in chancery, partners in their business as attorneys and solicitors, may, in their partnership name, appear and prosecute or defend any action in any court of this state.

May be sued as other persons. Revision.

2. Attorneys at law shall, for any debt, demand or damages, be liable to be sued before any of the courts of this state in like manner, and by the same process and form of action as other persons not being attorneys are liable to be sued, any plea of privilege or exemption to the contrary notwithstanding.

Warrant of attorney, when to be filed.

P. L. 1855, p. 288, § 8.

3. No warrant of attorney, or copy thereof, need be filed in any action, except in cases of judgment by confession in actions not commenced by process.

Attorney to declare residence of plaintiff, &c. Ib. § 4.

4. Any attorney whose name shall be endorsed on any summons or *capias ad respondendum*, shall, on demand in writing, made by or on behalf of any defendant, declare forthwith in writing, whether such writ has been issued by him or by his authority, and also the place of abode of the plaintiff; and if such attorney shall declare that the writ was not issued by him, or by his authority, or shall refuse to declare the place of abode of the plaintiff, then no further proceedings shall be taken in the action without leave of the court.(*a*)

Penalty for malpractice.

R. S. 929.

5. If any counsellor, solicitor or attorney at law shall be guilty of malpractice in any of the courts, he shall be put out of the roll, and never after be permitted to practice as a counsellor, solicitor, or attorney at law, unless he shall obtain a new license, and be again enrolled in due form of law.

Where solicitor or attorney ceases to act. Ib. § 4. Amended.

6. When any solicitor or attorney shall die or remove out of this state, or be put out of the roll, the person for whom he was solicitor or attorney shall be warned to appoint another in his stead, and if he fail to do so the adverse party may proceed in the action.

Attorneys liable for neglect, etc. Ib. § 6.

7. If any solicitor or attorney at law shall neglect or mismanage any cause in which he shall be employed, he shall be liable for all damages sustained by his client, to be recovered by action of trespass on the case, with costs.

Taxed costs to be filed before execution. Ib. § 7.

8. Every attorney at law, before he issues execution, shall file the taxed bill of costs, or a copy thereof, in the office of the clerk of the court out of which the same is to issue; and if he fail so to do, he shall forfeit ten dollars to the party aggrieved, to be recovered by action of debt, with costs.

Particulars of costs to be delivered. Ib. § 8.

9. When any solicitor or attorney at law shall receive the costs accruing on any suit, he shall, if required by the party at the time of payment or at any time within six months afterwards, draw up and deliver the bill of particulars, with a receipt to the party paying or who shall have paid the same; and if he fail so to do, he shall forfeit ten dollars to the party aggrieved, to be recovered by action of debt, with costs.

(*a*) For method of proceeding where the attorney of record denies that he is the attorney, see *Anonymous*, 1 *Harr.* 396. *Martinis* v. *Johnston*, 1 *Zab.* 239. *Harwood* v. *Smethurst*, 1 *Vr.* 230. If the attorney of record neglects or refuses to state his client's place of residence, the other party may have a rule to show cause why security for costs should not be filed, *Mulford* v. *Geschchiat*, 1 *Harr.* 272.

Penalty for illegal charges. Ib. § 9.

10. If any solicitor or attorney at law shall charge in his bill of costs for services not actually done, or for services not allowed by law, or shall take any greater fee or reward for any service by him done than is or shall be allowed by law, he shall pay to the party aggrieved thirty dollars, to be recovered by action of debt, with costs.(*a*)

Limitation of suits for penalties Ib. § 10.

11. The penalties mentioned in the three preceding sections of this act shall be sued for within one year after the offence committed, and not after.

Taxed bill of costs furnished before suit. Ib § 11.

12. No solicitor or attorney shall commence or maintain any suit for the recovery of any fees, charges or disbursements, in equity or at law, against his client or legal representative, until after such solicitor or attorney shall have delivered to such client or his representative, or left for him at his dwelling house or last place of abode a copy of the taxed bill of such fees, charges and disbursements.

Attorney cannot become surety on certain bonds. Revision.

13. No practising attorney of the courts of the state shall be permitted to become surety, on any bond given as security for costs, nor upon any replevin bond, nor any bond given to obtain a *certiorari* to a justice of the peace, or any court of common pleas; and any such bond signed by any practising attorney as surety, shall be held to be insufficient.

Agreements out of court to be in writing. Revision.

14. No admissions, consents or agreements, made out of court by the parties, or their attorneys or counsellors, with respect to the conducting of any suit, shall be taken notice of by the court, unless the same shall have been reduced to writing, and subscribed by the persons making the same.(*b*)

II. How to prosecute and defend.

Who may sue and defend in person or by attorney. R. S. 929, § 1.

15. Every person of full age and sound memory(*c*) may appear and prosecute or defend any action in any of the courts of this state, in person or by his solicitor in chancery or attorney at law.

For other persons, only solicitors and attorneys. Ib § 2

16. No person, except in his own case or in the case of an infant, shall be permitted to appear and prosecute or defend any action in any of the said courts, but such as is a licensed solicitor or attorney at law, who shall be under the direction of the court in which he acts.

Endorsement on writ, if plaintiff sues in person. P. L. 1855, p. 288, § 3.

17. If the action be prosecuted by the plaintiff in person, then the summons, or *capias ad respondendum*, shall be endorsed with a memorandum, expressing that the same has been sued out by the plaintiff in person, and mentioning the place of his abode.

Infants, how to prosecute and defend. R. S. 929, § 5. Amended.

18. If an infant be entitled to any action, or if an action be brought against him, his guardian duly appointed by competent authority, or specially admitted for that purpose, shall be permitted to prosecute or defend for him; but in no case shall the proceedings be deferred or stayed until the infant arrives at full age.

III. Parties.

Assignee of bill bond, contract, &c. R. S. 801, § 2. P. L. 1863, p. 267, § 1.

19. All bills, bonds and other writings, whether sealed or not, containing any agreement for the payment of money, and all contracts for the sale and conveyance of real estate, shall be assignable at law; and the assignee may sue thereon in his own name; but in such suit there shall be allowed all just set-offs, discounts and defences, not only against the plain-

(*a*) This penalty is for all the overcharges included in one bill of costs, and not thirty dollars for each excessive item, *Tanner* v. *Croxall*, 2 *Harr.* 332.

(*b*) See *Welsh* v. *Blackwell*, 2 *Gr.* 344. 345. *Caldwell* v. *Estell*, *Spen.* 326. *Union Locomotive Co.* v. *Erie R. R. Co.*, 8 *Vr.* 23, 27. *Wilson* v. *King*, 8 *C. E. Gr.* 150.

(*c*) Idiots and lunatics must sue by their guardians, *Dorsheimer* v. *Roorback*, 3 *C. E. Gr.* 438. A bill filed in the name of an idiot by a volunteer, styling himself her next friend, not appointed her guardian upon inquisition found, nor authorized by the court to file the bill as her next friend, will be dismissed on motion of the defendant, *Ibid.* A lunatic having an interest in the cause, must be made a party, *Harrison* v. *Rowan*, 4 *Wash. C. C.* 202, 207. An idiot must appear before the court in person—a lunatic may appear by attorney, *Covenhoven's Case*, *Sax.* 19 A lunatic can sue only by his committee or guardian, who is responsible for the conduct of the suit, or by the attorney-general or next friend, where the interests of the guardian clash with those of the lunatic, *Norcom* v. *Rogers*, 1 *C. E. Gr.* 484. If a complainant appear upon the face of the bill to be a lunatic, and no next friend or committee named in the bill, the objection may be raised by demurrer, or by motion to take the bill from the files, *Ibid.* A bill exhibited by a person of unsound mind should be taken from the files, *Ibid* The bill in this cause having been filed by a lunatic, and the defendant having demurred, leave was given to withdraw the demurrer, and bill ordered to be taken from the files. *Ibid.* The guardian of a party defendant, declared a lunatic after the bill was filed, should be made a party to the suit, *Search* v. *Search*, 11 *C. E. Gr.* 110. A mere stranger to an alleged idiot cannot appeal for her, *Rorback* v. *Van Blarcom*, 5 *C. E. Gr.* 461. The common law rule that lunatics should defend in the same manner as other persons, has been adopted in this state, *Van Horn* v. *Hann*, 10 *Vr.* 207. The proper practice is by rule of court for the appointment of an attorney, after notifying the guardian of such application. In such case the court will appoint the attorney. *Ibid.* In attachment against the estate of a lunatic, he need not appear and be defended by his next friend, *Weber* v. *Weitling*, 3 *C. E. Gr.* 441. Where the attorney of a lunatic ceases to act, the notice to substitute another attorney must be served upon his committee, *Den* v. *Folger*, *Spen.* 115.

tiff, but also against the assignor, before notice of such assignment shall be given to the defendant.(*a*)

Assignment in writing sufficient.

20. The assignment of any sealed instrument by writing not under seal, shall be as valid and effectual, both at law and in equity, as if made by writing under seal.(*b*)

P. L. 1867, p. 486.

In case of death of assignor.

21. The assignee for a valuable consideration of any chose in action, heretofore or hereafter assigned, if the assignor be dead, may sue for and recover the same in his own name; and the defendant in any such action may set up and avail himself of any defence thereto, arising before he shall have received due notice of such assignment, in the same manner, and with the like effect, as if the assignor had been living, and the action had been brought in his name.(*c*)

P. L. 1855, p. 288, § 22.

Actions by husband and wife.

22. In any action by a husband and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right arising *ex delicto*, and separate actions brought in respect to such claims may, by order of the court, or a judge, be consolidated; *provided*, that in case of the death of either plaintiff, such suit shall abate only so far as relates to the cause or causes of action, if any, which do not survive.(*d*)

Ib. § 13.

Proviso.

Action not to abate by reason of marriage of female.

23. No action now pending or hereafter to be brought in any court of record in this state, wherein a female is or may be a party, shall abate, by reason of the marriage of such female after suit brought; but the action shall proceed to final judgment in the name of such female as plaintiff or complainant, or as defendant, as the case may be, notwithstanding such marriage.

P. L. 1869, p. 1152.

Married woman living separate may sue for injury to her person or reputation.

24. Any married woman, living separate from her husband, may bring suit in her own name for the recovery of damages for any injury done to her person or reputation; and it shall not be lawful for the husband of such married woman to control, discontinue, release or in any way interfere with such action, but the same shall proceed and be under the control and direction of said married woman, as if she were a *feme sole*.

P. L. 1867, p. 959. Amended.

Executors or administrators considered as one person.

25. In actions against several executors or administrators, all the same executors or administrators shall be considered as one person, representing the testator or intestate, and such of the executors or administrators as the sheriff shall return summoned, shall answer to the plaintiff; and in case judgment shall pass for the plaintiff he shall have his judgment and execution against such of the executors or administrators as the sheriff shall have returned summoned, and against all others named in the writ, of the goods and chattels of the deceased, the same as if they had all been summoned or had appeared.(*e*)

R. S. 350, § 6. Amended.

(*a*) A bond with a warrant to confess judgment may be assigned, *Reed* v. *Bainbridge*, 1 *South.* *351. The statute formerly included only obligations by which one party binds himself to pay money to another, and did not apply to contracts of indemity cases and other agreements where either party was bound to perform other distinct and independent acts, or where the payment of money by one party, depended upon the performance of some act by the other, *Ruckman* v *Outwater*, 4 *Dutch.* 572. *Richardson* v. *Beaumont*, *Spen.* 578. Bond for prison limits cannot be assigned before breach, *Tunison* v. *Cramer*, 2 *South.* *498. One of several obligees in a bond, may not assign it, nor may he do so, in the names of himself and co-obligees, unless specially authorized to do so. *Stevens* v. *Bowers*, 1 *Harr.* 16. *Terril* v. *Craig*, *April*, 1825. One partner may assign a bond given to the partnership, *Galway* v. *Fullerton*, 2 *C. E. Gr.* 389.

(*b*) The form of the assignment is immaterial; it may be by writing under seal, by writing without seal, or by mere delivery for value, *Winfield* v. *Hudson*, 4 *Dutch.* 255, 264, *Green*, *C. J.* An assignment of a bond or other specialty need not be by deed or in writing, in order to enable the assignee to sue in his own name, *Allen* v. *Pancoast*, *Spen.* 68. Where an instrument is made assignable by statute, but not in any specified mode, and by the terms of the contract it is made assignable by endorsement, the holder may in that mode acquire title to the instrument, and a right to maintain an action thereon in his own name, *Winfield* v. *Hudson*, 4 *Dutch.* 255. An assignment does not necessarily imply or require writing, *Hutchings* v. *Low*, 1 *Gr.* 247, *Drake*, *J.* Securities may be transferred under the provisions of a trust deed, by delivery, *Vreeland* v. *Van Horn*, 2 *C. E. Gr.* 137. It is not necessary that the assignment of a bond, when made under seal, should show any consideration, *Gregory* v. *Freeman*, 2 *Zab.* 405. An assignment of a bond and mortgage duly executed is *prima facie* evidence that the consideration was paid, *Westervelt* v. *Scott*, 3 *Stock.* 80. If the holder of a bond assign it for more than is due upon it, he is liable to the assignee for the deficiency, *Decker* v. *Adams*, 4 *Dutch.* 511. Assignment of a bond implies no guarantee, *Garretsie* v. *Van Ness*, *Pen.* *20. *Davenport* v. *Barnes*, *Id.* *211. *Dilts* v. *Trimmer*, *Id.* *951. An agreement by an assignee of a bond and mortgage, that he would call at the office of the obligor for the interest, does not make that office ever after the only legal place for payment, and is not, in form or legal effect, an agreement so as to affect the bond, *McCotter* v. *DeGroot*, 4 *C. E. Gr.* 72; reversed, *Id.* 531. The assignee takes it subject to all the equities which existed at the time of the assignment, between the original parties, *Barrow* v. *Bispham*, 6 *Hal.* 110. *Shannon* v. *Marselis*, *Sax.* 413. *Van Hook* v. *Somerville Co.*, 1 *Hal. Ch.* 137, 633. *Cornish* v. *Bryan*, 2 *Stock.* 146.

(*c*) On an express covenant as to the quantity of land conveyed, an assignee may sue after the death of the assignor, by showing that she is an assignee for a valuable consideration, *Andrews* v. *Rue*, 5 *Vr.* 402. It seems, that the assignment must be in writing, and also that the assignor be dead, or the suit must be in the name of the original promisee, *Morrow* v. *Vernon*, 6 *Vr.* 490, 492.

(*d*) A married woman can recover damages only for her personal injury and suffering. The loss of income from her incapacity, and the expenses of her cure, must be recovered by her husband. *Klein* v. *Jewett*, 11 *C. E. Gr.* 474. 12 *C. E. Gr.* 550. Before March 25th, 1852, an action brought by a husband against an administrator to recover his wife's share, would not be abated by the death of the husband after verdict and before judgment, *Teneick* ads. *Flagg*, 5 *Dutch.* 95.

(*e*) When executors have all taken out letters, they are co-executors of the will, and must sue and be sued jointly, in the same manner as if they had all proved the will at the same time and before the same officer, *Coursen's Case*, 3 *Gr. Ch.* 408. In actions against executors, only those who have proved the will need be joined, *Cole* v. *Smalley*, 1 *Dutch.* 374, 380.

Executor renouncing need not join.

P. L. 1871, p. 59.

26. In case any executor or executors have refused, or shall refuse, in writing, to prove the last will and testament of any testator, and shall file such refusal in the surrogate's office of the proper county, the executor or executors who have proved, or shall prove said last will and testament, may maintain a suit at law, without joining in such suit, such executor or executors so refusing as aforesaid.

Substitution of assignee in bankruptcy, etc.

27. If any plaintiff after suit commenced shall become a bankrupt, or make an assignment for the equal benefit of his creditors, the assignee in bankruptcy or under the deed of assignment, may, by order of the court or a judge, be substituted as plaintiff, and the suit shall thereafter be continued in his name; *provided*, that the defendant in such action shall be entitled to the same defences and set off as if the suit had been continued in the name of the original plaintiff.

Parties may be designated by the initial letter or contraction of christian name.

P. L. 1870, p. 59.

28. In all actions upon bills of exchange, promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters or some contraction of the christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such party by the same initial letter or letters or contraction of the christian or first name or names, instead of stating the christian or first name or names in full.

1. TO ACTIONS ON BILLS AND NOTES.

Actions on bills of exchange or promissory notes.

P. L. 1855, p. 288, § 14.

29. The holder of any bill of exchange or promissory note, instead of bringing separate actions against the parties separately liable thereon, may include all or any of them in one action, and proceed to judgment and execution, in the same manner as though all the defendants were joint contractors, subject, however, to the qualifications hereinafter provided.(*a*)

Declarations on bills of exchange or promissory notes.

Ib. § 15.

30. In every such action the plaintiff may declare on the money counts alone, annexing to the declaration a notice containing a copy of the bill or note, with the endorsements, and stating that the action is brought to recover the amount due thereon; but he shall not declare against any several drawer, maker, endorser, or acceptor, not served with process, or a copy of the declaration; and any joint drawer, maker, endorser, or acceptor may plead in abatement the non-joinder of any other joint drawer, maker, endorser, or acceptor; and no judgment shall be rendered, or record made up against any several drawer, maker, endorser, or acceptor, not served with process, or a copy of the declaration, which copy shall be served on or before the filing of the same, and an affidavit of such service shall be annexed to and filed with the declaration; but judgment may be obtained against joint contractors, some only of whom have been served with process, and such judgment shall have the same effect against the joint contractors as heretofore.

Judgment may be rendered for or against one or more of defendants.

Ib. § 16.

Any of defendants may set off demands against plaintiff.

31. In any such action, judgment may be rendered for the plaintiff against some one or more of the defendants, and also in favor of some one or more of the defendants against the plaintiff, according as the rights and liabilities of the respective parties shall appear, either upon confession, default in pleading, or on a trial; and any person sued shall be entitled to set off his demands against the plaintiff in the same manner as though such defendant had been sued in the form heretofore used; and when judgment shall be rendered in favor of any defendant, he shall recover his costs against the plaintiff in the same manner as though judgment had been rendered for all the defendants.

Proceedings in case of set off.

Ib. § 17.

32. If, upon the trial of any such action, the whole amount of the set-off allowed shall equal or exceed the amount allowed to the plaintiff, then, in the first case, the verdict or report shall be in favor of the defendants generally, and in the last case for the excess, and in all cases the verdict or report shall certify the amount allowed to each defendant as a set-off.

Defendants entitled to testimony of co-defendants, &c.

Ib. § 18.

33. The rights and responsibilities of the several parties to any such bill or note, as between each other, shall remain as heretofore, saving only the rights of the plaintiff so far as they may have been determined by the judgment, and any one or more of the defendants shall be entitled to the testimony of any co-defendant as a witness in all cases where he or they

(*a*) This section does not extend to suits in justices' courts, *Craft* v. *Smith*, 6 *Vr.* 302.

would be entitled to his testimony had the suit been brought in the form heretofore used; and the plaintiff shall be entitled to the testimony of any defendant as a witness in all cases where he would be entitled to his testimony against the other parties to the bill or note had the suit been brought in the form heretofore used.

Judgment may be entered against any of the parties to bill or note. Ib. § 19.

34. It shall not be necessary for the plaintiff to include in the same record a judgment against all the parties to said bill or note, but judgment may be entered against any of them whenever the plaintiff would have been entitled to the same had the suit been commenced against such party only; and if the trial or hearing of such cause be put off by any of the parties to said bill or note, or if a judgment by default shall have been obtained against part of the defendants, the plaintiff may proceed to the trial or hearing against the other parties in the same manner as if the suit had been commenced against the other parties only.

Parties sued may apply for relief. Ib. § 20.

35. Any party to any promissory note or bill of exchange, who shall be sued jointly with any other party thereto, may apply to the court, or a judge thereof, for any order or relief to which he would be entitled if he had been separately sued, and the court or judge may, in their discretion, grant to him such order or relief as would be granted to such party if separately sued.

Proceedings in case of execution issued. Ib. § 21.

36. Whenever an execution against goods, or against goods or lands, shall issue in any such action upon a bill or note, as is hereinbefore provided for, it shall be the duty of the sheriff, or other officer, after making a levy upon the property liable to the execution, to make the money out of the property of the defendant or defendants primarily liable, as between themselves, for its payment, according to the terms of the bill or note, if it can be done before selling the property of the person or persons secondarily liable; and for the information of such officer, it shall be the duty of the plaintiff or his attorney to endorse on the execution the order in which the defendants, according to the terms of the bill or note, are liable, as between themselves, for its payment; and if such endorsement be omitted, or be untruly made, it shall be the duty of the court to set aside the execution as irregular; and if the judgment be paid by a defendant or defendants secondarily liable, as between themselves, it shall not be considered satisfied as against the defendant or defendants liable over on the bill or note to the defendant making such payment, but he shall have, on application to the court or a judge, giving notice thereof to the other parties to the judgment, and subject to such regulations as may be imposed, the full benefit and control of such judgment for the purpose of compelling repayment from the defendant or defendants liable to him for such repayment, and on this application the court or judge may order an issue to try the question in controversy.

Endorsement in order of liability.

If omitted or untruly made court shall set aside.

Payment by defendant secondarily liable not a satisfaction but may have benefit of execution.

2. OBJECTIONS FOR NON-JOINDER OR MIS-JOINDER.

In case of non-joinder or mis-joinder of a plaintiff notice of objection.

P. L. 1855, p. 288, § 9.

37. The non-joinder or mis-joinder of a plaintiff shall not be objected to by the defendant, unless he give written notice of such objection to the plaintiff, within five days after filing his plea or demurrer, and state in such notice the name of the person alleged to have been omitted or improperly joined; and it shall be lawful for the court or a judge, at any time before the trial of the issue, whether of law or of fact, to order, upon such terms as they or he shall think proper, that any person not joined as plaintiff in such cause shall be so joined, or that any person originally joined as plaintiff shall be struck out from such cause, if it shall appear that injustice will not be done by such amendment, and that the person to be added as aforesaid, either in person or by writing under his hand, consent to be so joined, or that the person to be struck out, as aforesaid, was originally made a party without his consent, or that such person consent, in manner aforesaid, to be struck out; and upon making and filing such order and written consent, the previous proceedings in the cause on the part of the plaintiff shall be amended in conformity thereto, and when any such amendment shall be made, the liability of any person who shall be added as co-plaintiff shall, subject to any terms imposed as aforesaid, be the same as if such person had been originally joined as

Amendment ordered.

plaintiff; and the defendant shall plead to such amended declaration in thirty days after a service of a copy thereof on him.(*a*)

In case of joinder of too many defendants, notice of objection. Ib. § 10.

38. The joinder of too many defendants in any action upon contract shall not be objected to on the trial of the cause, unless the defendant, within five days after filing his plea or demurrer, give written notice to the plaintiff of such intended objection; and upon such notice being given, it shall be lawful for the court, or a judge, at any time before the trial of the cause, to order, upon such terms as they or he shall think proper, that the name of one or more of such defendants be struck out, if it shall appear that injustice will not be done by such amendment; and upon making and filing such order, the previous proceedings in the cause, on the part of the plaintiff, shall be amended in conformity thereto, and the defendant shall plead *de novo* in thirty days after service of a copy of the amended declaration (*b*)

Amendment.

Writ and declaration in actions on contract may be amended on plea in abatement. Ib. § 11.

39. In any action on contract, commenced by summons, where the non-joinder of any person as a co-defendant shall be pleaded in abatement, the plaintiff shall be at liberty, without any order, to amend the writ and declaration, by adding the name of the person named in such plea in abatement as a joint contractor, and to serve the amended writ upon the person so named in such plea in abatement, and to proceed against him and the original defendant; and they shall plead to the amended declaration in thirty days after service of a copy thereof, but the date of such amendment shall, as between the person so added and the plaintiff, be considered for all purposes as the commencement of the action; *provided*, that if the person so added do not reside within the jurisdiction of the court, then the amended writ and declaration need not be served upon him; *and provided further*, that all pleas in abatement of the non-joinder of any other defendant shall state the place of residence of the person whose non-joinder is pleaded.

Proviso in case of non-residence.

Pleas in abatement for non-joinder of defendant to state residence.

Proceedings in case of plea in abatement. Ib. § 12.

40. In all cases after such plea in abatement and amendment, as is provided for in the next preceding section, if it shall appear upon the trial of the action that the person so named in such plea in abatement was jointly liable with the original defendant, the original defendant shall be entitled, as against the plaintiff, to the costs of such plea in abatement; but if, at such trial, it shall appear that the original defendant is liable, but that one or more of the persons named in such plea in abatement is or are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, with his costs, as against the plaintiff, who shall be allowed the same, together with his costs, on the plea in abatement and amendment, as costs in the cause against the original defendant, who shall have so pleaded in abatement the non-joinder of such person; *provided*, that any defendant so pleading in abatement shall be at liberty, on the trial, to prove the liability of the defendant or defendants named by him in such plea in abatement.

Proviso.

IV. Process.

Courts always open for return of writs.

41. Courts of law shall always be open (except on Sunday) for the return of all writs and process in civil actions, except writs of error,(*c*) *certiorari*, *mandamus* and *quo warranto*.

Presenting, &c. writs of error, &c. P. L. 1854, p. 259.

42. The circuit court and court of common pleas shall be open at all times (except on Sunday) for the presenting and return of writs of error and *certiorari*.

(*a*) The non-joinder of defendants is not a ground for non-suit; formerly it could be taken advantage of only by plea in abatement, *Mershon* v. *Hobensack*, 3 *Zab.* 580. Objections founded on the non-joinder of parties cannot be received by the court, at the trial, except on certain conditions, *Ball* v. *The Consolidated Franklinite Co.*, 3 *Vr.* 102. If B. and C. sue in trespass for taking goods in which C. had no property and B. owned one-half, and no notice is given of a misjoinder, B. is entitled to recover as damages half the value of the property, *Farrel* v. *Colwell*, 1 *Vr.* 123. When an action is brought in the name of one of several joint contractors, and no notice is given of the non-joinder, the defendant cannot at the trial question the right of the plaintiff to sue alone, but he may insist that the contract was joint, *Brown* v. *Fitch*, 4 *Vr.* 418. In an attachment issued against one of several joint debtors, when all of such debtors are non-residents, if the defendant appears and pleads the non-joinder of the omitted parties, such plea will not be sustained; but the plaintiff cannot amend and join the omitted defendants, *Thayer* v. *Treat*, 10 *Vr.* 150.

(*b*) Where too many defendants are joined in an action on contract, the proceedings can only be amended in the manner pointed out by this section. If not so amended, the court has no power to amend the pleadings, upon the trial, by striking from the record the name of the defendant improperly joined, *Fleming* v. *Bellis*, 2 *Dutch.* 263.

(*c*) See *ante*, COURTS, § 11, ERRORS, § 9.

Process shall bear date on day issued.

P. L. 1855, p. 288, § 1.

43. All writs and process shall bear date on the day on which the same shall be issued, and may be on paper or parchment, and the date shall be *prima facie* evidence that they were issued on that day, but such date may be disproved whenever the same shall come in question; and if any person shall antedate any original process, he shall forfeit one hundred dollars to the party aggrieved, to be recovered by action of debt, with costs, and also be liable to him for all damages which he may sustain thereby, to be recovered in an action of trespass on the case, with costs.(*a*)

Ante dating prohibited.

Process into different counties.

Ib. § 6.

44. If the defendants in any action in the supreme court reside in different counties, original process may issue at the same time to each county in which any of the defendants reside; the names of all the defendants shall be inserted in each process, and it shall be the duty of the proper officer to serve the same upon such defendants as he can find in his county, and make return thereto in the manner provided by law.

How endorsed.

R. S. 929, § 18.

45. Every summons, *capias ad respondendum* and writ of execution shall, before the service or execution thereof, be subscribed or endorsed with the name of the attorney, or party, and clerk by whom such summons, *capias ad respondendum* or execution shall be sued forth and sealed.

Omission in writ or endorsement, will not make writ void.

P. L. 1855, p. 288, § 7.

May be amended.

46. If the plaintiff, or his attorney, shall omit to insert in, or endorse on, any writ or process, any of the matters required to be inserted or endorsed, such writ or process shall not on that account be held void, but it may be set aside as irregular or amended, on such terms as to the court may seem fit; and such amendment may be made upon an application to set aside the writ.

Return made, or sheriff amerced.

R. S. 929, § 19.

47. It shall be the duty of the sheriff or officer to whom any summons, *capias ad respondendum* or other process is directed, to return the same at the time and place therein mentioned, which shall be filed by the clerk of the court; and if the said sheriff or officer fail to make such return, he shall be amerced by the court in any sum not exceeding the plaintiff's debt or demand, to and for the use of the said plaintiff.(*b*)

Return, untrue.

P. L. 1855, p. 289, § 5.

48. The return of the officer serving any writ or process may, in the same action, be shown to be untrue by either of the parties.

Summons, how served.

R. S. 929, § 17 & § 20.

Amended.

49. The first process to be made use of in personal actions in any of the courts of law in this state, in cases where the plaintiff is not entitled to bail, shall be a summons,(*c*) a copy whereof shall be served on the defendant in person, at least two days before its return, or left at his dwelling house or usual place of abode at least six days before its return;(*d*) and when the sheriff or other officer to whom such summons shall be directed shall return the same "served" or "summoned," the party shall be considered as being in court, and may be proceeded against accordingly.

(*a*) The act requiring that all writs and process shall bear date on the day on which the same shall issue, seems to be directory. They may not be antedated, but if postdated, it is not fatal, *Morris Canal Co.* v. *Mitchell*, 2 *Vr.* 99. A writ dated in February, and returnable the second Tuesday of May, without expressing the year, would be void, *Pullen* v. *Boney*, 1 *South.* *125. *129. "Witness, &c., at Trenton, the Tuesday of, &c.," without designating which Tuesday, is bad, *Sayres* v. *Ridgway*, 3 *Hal.* 369. The sheriff may alter the return day, to suit his convenience in making service, *Kloepping* ads. *Stellmacher*, 7 *Vr.* 176, 178, *Depue, J.* The teste of a writ is not conclusive evidence of the time of commencing a suit, *Wambaugh* v. *Schenck, Pen.* *229. *Crosby* v. *Stone, Pen.* *988. The mere production of a writ bearing *teste* prior to the cause of action, does not prove that it was actually issued before the cause of action arose, *Allen* v. *Smith*, 7 *Hal.* 159. As a general rule, it is well settled that the official return of process, by an officer charged with its service, is conclusive upon the parties to the process and upon their privies, and cannot be impeached collaterally, *Caldwell* v. *West*, 1 *Zab.* 411. *Castner* v. *Styer*, 3 *Zab.* 236. See *Den, State* v. *Heimes, Pen.* *1050. *Vigers* v. *Mooney, Pen.* *909. The return of a writ, endorsed upon it must be proved by the person in whose handwriting it appears to be, *Den, Lee* v. *Evaul, Coxe* 283. *Browning* v. *Flanigin*, 2 *Zab.* 567. The sheriff's return of a writ "served," is not conclusive as to the time and place of service, which may by affidavit be shown to be illegal, *Chapman* v. *Cumming*, 2 *Harr.* 11. The sheriff's return is conclusive evidence of an escape, and the defendant may be punished for contempt without the usual examination on interrogatories, as no denial on such interrogatories will excuse him. If the sheriff's return is false, the defendant's remedy is against him for a false return, *State* v. *Clerk of Bergen*, 1 *Dutch.* 209. A return of *non est inventus* to a *ca. sa.*, will not conclude a plaintiff in an action against a sheriff for an escape; he can still recover on proof of the arrest and escape, *Browning* v. *Flanigin*, 2 *Zab.* 567. A judgment, execution and return *nulla bona* against A. are sufficient evidence of the liability of B. who agreed to pay, provided A. failed to do so, *Sutton* v. *Petty*, 2 *South.* *504. A copy of the execution and return, certified by the clerk, is competent evidence. The return is an answer to the writ, and whatever the sheriff has so answered, whether in a statement annexed to the writ, or upon it, is a return as far as it goes The admissibility of the copy of the execution and levy, does not depend on the sufficiency of the return, *Dean* v. *Thatcher*, 3 *Vr.* 470. The return of a marshal that he had levied on lands by virtue of his warrant, is *prima facie* evidence that the levy was not irregular by reason of the existence of goods and chattels of defendant subject to levy, *Murray* v. *Hoboken Land Co.*, 18 *How.* 272. A recital in a *scire facias* that the writ was duly served on the garnishee, and the judgment by default, are conclusive against him. *Young* v. *D. L. and W. R. R. Co.*, 9 *Vr.* 502. The plaintiff's attorney may prove the time of issuing the original declaration in ejectment, without producing the paper, the question in dispute being merely as to time, and not involving the contents of the paper, *Den.* v. *Hamilton*, 7 *Hal.* 109.

(*b*) See *ante*, p. 327, (*d*).

(*c*) In cases where the plaintiff is not entitled to bail, the plaintiff must proceed by summons, and not by *capias*, *Beatty* v. *Irvins, Pen.* *628. *Addis* v. *Evans, Pen.* *630, *note. Brookfield* v. *Jones*, 3 *Hal.* 311, 312. See *Att'y Gen.* v. *D. and B. B. R. R. Co.*, 9 *Vr.* 282, 328, *ante*, p. 43, (*a*).

(*d*) If a party upon whom a summons is served is induced to come into this state by a deception practiced upon him by the plaintiff for the purpose of serving the summons, such service is not good, and the court will set aside the writ on the application of the defendant. *Williams* ads. *Reed*, 5 *Dutch.* 385. A writ is void if not executed before its return day, *State* v. *Kennedy*, 3 *Harr.* 22. If the first arrest of the defendant be unlawful, he cannot be served with other bailable process, at the suit of the same plaintiff, while in custody upon that illegal arrest, *Peltier* v. *Washington Bank*. 2 *Gr.* 391. For mode of service where a township is defendant, See *Phillipsburg* ads. *Raub*, 8 *Vr.* 48, *ante*, p. 327, (*c*), p. 500, (*b*), p. 541, (*d*).

Service on Sunday void.

[The service of civil process on Sunday is void. See VICE AND IMMORALITY, *Sec.* 5]. (For mode of service on corporation, see that title).

On defective service, court may order a new summons.

P. L. 1867, p. 26. Amended.

50. When the service of the summons in any civil action is defective or insufficient, by reason of any mistake on the part of the plaintiff or of the officer, as to the place where, or the person with whom the summons or copy of the summons ought to have been left, the court, or a judge thereof, may in their discretion order the summons to be amended and re-issued and served in such manner as they or he shall direct; and the service so made and returned shall be as valid and effectual to all intents and purposes, as if duly made and returned on the summons as originally issued.(*a*)

How capias executed.

R. S. 929, § 21.

51. The sheriff or other officer shall execute the writ of *capias ad respondendum*, by taking the body of the defendant, and in such case shall return thereon, that he hath taken the body, or that he hath taken the body into custody; the first usually abbreviated and expressed thus, C. C., and the second thus, C. C. C.

Names of bail endorsed; copy of bail bond returned.

Ib. § 22.

52. The sheriff or other officer shall endorse on the *capias ad respondendum* the names of the bail by him taken, and shall deliver a copy of the bail bond to the clerk of the court, at or before the return day of the writ; which copy shall be safely kept by the said clerk in his office.

Effect of return of C. C. C.

Ib. § 46.

53. Where a sheriff or officer returns on a *capias ad respondendum*, that he hath taken the body into custody or C. C. C., such return shall have the same effect as if the sheriff, on a rule for that purpose, had brought the body of the defendant into court, and the court had thereon committed such defendant to the custody of the sheriff; upon which the plaintiff shall declare against the said defendant as a prisoner or in custody.

V. Arrest.

Female not liable to arrest.

R. S. 323, § 1.

54. It shall not be lawful to arrest or imprison the person of any female by virtue of any mesne process or process of execution in any civil action.(*b*)

Affidavit of the cause of action.

R. S. 950, § 1 & § 4. Amended.

55. Where bail shall be required in any civil action, an affidavit shall be made and filed of the cause of such action, which affidavit may be made before any officer authorized by the laws of this state to administer an oath or affirmation;(*c*) or, if the plaintiff be out of this state, before any judge of any court of judicature or notary public of the state, kingdom or nation in which he resides or happens to be;(*d*) and the sum specified in such affidavit shall be endorsed on the writ or process; *provided*, that nothing in this section shall prevent any court, or any judge thereof, from ordering, as heretofore, the defendant in any action to be held to special bail, in such sum as the said court or judge, under all the circumstances of the case, shall think proper to direct, which sum shall be endorsed on the process.(*e*)

Proviso, that any court or judge may order bail.

(*a*) Where the service of summons on a lien claim was defective, and a new summons was issued more than a year after the furnishing of the labor and materials. *Held*, the service of the new summons was valid and effectual, and the claim good, *Mutual Ins. Co.* v. *Rowand*, 11 *C. E. Gr.* 389.

(*b*) A female cannot be arrested, *Blight* v. *Meeker*, 2 *Hal.* 97. See *Van Emburgh* v. *Pullenger*, 1 *Harr.* 352, 457. But this privilege does not exempt her from an attachment for contempt for non-payment of costs. *Clark* ads. *Grant*, 9 *Vr.* 257.

(*c*) A *capias* cannot be issued without an affidavit, although the plaintiff waive bail. *Beatty* v. *Ivins*, *Pen.* *628. *Addis* v. *Evans*, *Pen.* *630, *note*. The affidavit is necessary where, in a penal action, an arrest is authorized by the statute, *Champion* v. *Pierce*, 6 *Hal.* 196. Supplemental affidavits cannot be taken to cure defects in the originals, *Parker* v. *Ogden*, *Pen.* *146, *151. Affidavits for bail need not be entitled of the court in which they are filed, *Peltier* v. *Washington Bank*, 2 *Gr.* 257. *Parker* v. *Ogden*, *Pen.* *146. If sufficient facts to constitute a good cause of action are stated in the affidavit, it is no objection that the statement commences with the words "for that," but if commenced with the words "for that whereas," it will be by way of recital, and will not be sufficient, *Benson* ads. *Bennett*, 1 *Dutch.* 166. To obtain an order, the plaintiff's oath or affirmation is admissible, and is sufficient of itself to prove as well the facts constituting the fraud as the indebtedness, *Painter* v. *Houston*, 4 *Dutch.* 121. See *Hill* ads. *Hunt*, *Spen.* 476. *Query*. Whether it may be made by the attorney of the plaintiff, *Stevens* v. *Meguire*, 1 *Hal.* 152. As to stating the place of taking it, see *Provost* v. *Bank of North America*, *July*, 1828. *Peltier* v. *Washington Bank*, 2 *Gr.* 257. It is not necessary to the validity of an affidavit for bail that the residence or place of abode of the deponent should be stated in it, or that it should show the town or county where it was taken. The rule applies to actions of *tort* as well as upon contract, *Benson* v. *Bennett*, 1 *Dutch.* 166. *Peltier* v. *Washington Bank*, 2 *Gr.* 257. Where there are several suits against a defendant, and an affidavit made in each, the court will not look beyond one affidavit, and supply its defects by statements made in another; each affidavit must stand by itself. *Benson* v. *Bennett*, 1 *Dutch.* 166.

(*d*) It may be taken before any person authorized to administer an oath, as, in a foreign country, before a consul of the United States, *Seidel* v. *Peschkaw*, 3 *Dutch.* 427. It is not necessary that the affidavit be made before the commissioner who grants the order, *Ibid.* *McKernan* v. *McDonald*, 3 *Dutch.* 542.

(*e*) The affidavit must disclose the true cause of action, *Kinney* v. *Muloch*, 2 *Harr.* 334, 337. There must be a positive affidavit of the debt and the amount due, *Van Kirk* ads. *Staats*, 4 *Zab.* 121. The statement that the plaintiff believes he will be unable to make the defendant answer for the alleged injury and damage unless he be held to bail, without showing any reason for that belief, is insufficient, *Benson* ads. *Bennett*, 1 *Dutch.* 166. See *Kennedy* v. *Chumar*, 2 *Dutch.* 305. It must be shown that the debt is actually due at the time of making the affidavit, *Parker* v. *Ogden*, *Pen.* *146. The affidavit for bail need not be as specific and particular as a declaration, but it must contain such facts as show, if true, that the plaintiff has a present, subsisting cause of action; it must show how indebted, and for what; it should disclose the character in which the defendant is a party to the instrument, so that his liability may appear to the court; it should be express, certain, explicit and intelligible. An affidavit for bail, set-

To take bail for sum endorsed.

R. S. 950, § 1.

56. The sheriff or other officer to whom any *capias ad respondendum* is directed, shall take bail for the sum endorsed on the writ, and no more.

Supreme court commissioner may order bail in tort.

P. L. 1866, p. 419.

57. Every supreme court commissioner shall have the same power and authority as a justice of the supreme court, to make an order to hold the defendant to bail in any action of *tort*.

Arrest in actions on contract.

R. S. 321, § 1-7.

58. The writ of *capias ad respondendum* shall not henceforth be awarded, issued or served in any action founded upon contract, express or implied, except upon proof made on oath or affirmation, before a justice of the supreme court, or a supreme court commissioner, that there is a debt or demand founded upon contract, express or implied, due to the plaintiff from the defendant, specifying the nature and particulars of said debt or demand, and establishing, by the oath or affirmation of the plaintiff or some other person or persons, to the satisfaction of such justice or commissioner, one or more of the following particulars:

First. That the defendant is about to remove any of his property out of the jurisdiction of the court in which an action is about to be commenced, with intent to defraud his creditors; or,

Second. That the defendant has property or rights in action which he fraudulently conceals; or,

Third. That he has assigned, removed or disposed of, or is about to assign, remove or dispose of any of his property with the intent to defraud his creditors; or,(*a*)

Fourth. That the defendant fraudulently contracted the debt or incurred the obligation respecting which such suit is brought;(*b*)

And upon such proof being made, it shall be the duty of the justice or commissioner, before whom such proof of all or any of the said particulars shall have been made, to make an order(*c*) to hold the defendant to bail in such sum as shall be sworn to by the plaintiff or his agent, to be due to the plaintiff from the defendant; and upon such order being made, and upon filing such affidavits in the office of the clerk of the court wherein the action is about to be commenced, a *capias ad respondendum* may be issued according to law as heretofore; *provided*, that nothing in this section shall apply to proceedings as for contempt to enforce civil remedies; *and provided further*, that in actions on promises to marry, and actions for the

Proviso excepting contempts, actions on promises to marry or for misconduct in office.

ting forth that the defendant is "indebted in a certain amount on his promissory note, and on a balance of account against him, on the books of the banking company," is insufficient, and the defendant will be discharged on common bail, *Peltier* v. *Washington Bank*, 2 *Gr.* 257. The affidavit to hold to bail for money due on articles of agreement must state the breach of the articles of agreement, or the defendant will be discharged on common bail, *Stevens* v. *Meguire*, 1 *Hal.* 152. The facts must be sworn to; that a debtor has "unlawfully and unjustly" refused to apply the money in his hands to the satisfaction of a debt due by him, is a legal proposition to be deduced from the evidence. *Ex parte Clark*, *Spen.* 648. An affidavit to hold an agent to bail for misappropriating the avails of acceptances, stated the number of bills, by whom drawn, to whose order and how endorsed, by whom accepted, the amount of each, and when they matured, respectively, but did not state the precise date of the bills. *Held*, that the description was sufficient, *Seidel* v. *Peschkaw*, 3 *Dutch.* 427.

(*a*) Unjustly and unlawfully refusing to apply money or property in the hands of the defendant or of another, for defendant's use and under his control, to the satisfaction of a judgment or execution, is a fraud within the meaning of the constitution, *Ex parte Clark*, *Spen.* 648. The witnesses must swear to the facts or circumstances which constitute the fraud, and they must amount to such evidence as would justify a jury in finding a verdict against the defendant for fraud, *Kipp* v. *Chamberlin*. *Spen.* 656

(*b*) In order to warrant an order to hold to bail for the fraudulent contracting of a debt, there must be some proof of such fraudulent intention at the time of contracting. A subsequent refusal to pay an account will not warrant an inference of fraud in contracting. *Van Kirk* ads. *Staats*, 4 *Zab.* 121. A statement that defendant made certain representations to plaintiff, and that he had discovered recently that they were false, is not sufficient evidence that the debt was fraudulently contracted, *Bowne* ads. *Titus*, 1 *Vr.* 340. If a man promises to marry a woman, and at the same time, or afterwards, seduces her by the influence of such promise, and then seeks to avoid performance by attempting to run away, with intent to abandon her, and refuses to marry her, his original promise was a fraud for which he can be held to bail. *Perry* v. *Orr*, 6 *Vr.* 295. Fraudulently inducing his creditors to accept a worthless security for a former debt, is such fraud in contracting the last debt as will authorize an arrest, *Van Wagenen* v. *Coe*, 2 *Zab.* 531. An allegation from mere hearsay, that the endorsement on a note given for goods sold is a forgery, without averring or proving that the defendant knew it or committed it, is not sufficient, *McKernan* v. *McDonald*, 3 *Dutch.* 541. False and deceitful representations, made by way of inducement to contract or surrender one's rights, are evidence of fraud, *Painter* v. *Houston*, 4 *Dutch.* 121. Proof by subsequent affidavits, showing fraudulent transactions since the service of the writ, is incompetent. *Ibid.*

(*c*) Commissioners to take bail and affidavits are authorized to make an order for the award of a *capias* under the act of the 9th of March, 1842, *Wire* v. *Browning*. *Spen.* 364. Under the English statutes respecting bail, it is held that the power of arrest emanates not from the affidavit, but from the *capias*. But the statute of this state abolishing imprisonment for debt in certain cases, makes the judge's order the foundation of the *capias*. Without the order, the proceeding is not only irregular, but the writ itself is illegal, *State* v. *Dunn*, 1 *Dutch.* 214. There must be a special order, formally adjudging that there is fraud, shown to the satisfaction of the court or officer ordering the arrest, *Perry* v. *Orr*, 6 *Vr.* 295. The proof of the circumstances necessary to authorize the award of a *ca. sa.* is to be to the satisfaction of the judge or commissioner. The legality of the evidence received by him, and its applicability, may be reviewed; but its weight and credibility rest with the commissioner, *Wire* v. *Browning*, *Spen.* 364. The officer who makes the order to hold a debtor to bail on the ground of fraud, is the exclusive judge of the weight of the evidence, and this court will not review or set aside his order upon the weight of evidence; but when there was no evidence before him of any legal fraud, they will review it, *Van Wagenen* v. *Coe*, 2 *Zab.* 531. It is not sufficient for the commissioner to decide that there was proof, to his satisfaction, that the defendant had rights or credits, moneys or effects, either in his own possession or in the possession of some other persons; in the words of the act, he should specify by means of which of the several things mentioned, the fraud was committed, *Bowne* v. *Titus*, 1 *Vr.* 340. The order made by the justice or commissioner must show, upon its face, that he has considered and decided upon the evidence of fraud submitted to him, and that the proof was to his satisfaction, *Hill* ads. *Hunt*, *Spen.* 476. In a penal action, the plaintiff must obtain an order, unless the statute expressly provides otherwise, *Brookfield* v. *Jones*, 3 *Hal.* 311. *Champion* v. *Pierce*, 6 *Hal.* 196. *Infra*, § 63.

recovery of moneys collected by public officers, or damages for misconduct or neglect in office, the justice of the supreme court or commissioner may order the defendant to be held to bail in such sum as the said justice or commissioner, under all the circumstances of the case, shall think proper to direct.

Order for arrest of one of several defendants in actions on contract.

59. In actions on contract against two or more defendants, where in the affidavit for bail sufficient cause is shown for ordering a *capias ad respondendum* against one or more of the defendants, but not against all the defendants, the justice of the supreme court or commissioner may make an order in such action for the holding to bail of such of the defendants against whom sufficient cause for arrest is shown; and in such case process shall issue against all the defendants in the action, but in form shall command the sheriff or other officer to whom it is directed to take the bodies of such of the defendants against whom the order for bail may be made, and to summon the other defendants to answer; and the justice or commissioner shall endorse on such process an order that the defendant against whom such order for bail may be made only, shall be arrested and held to bail, and that the writ shall be served on the other defendants as writs of summons are served, and the same shall be executed and served accordingly; and the bail bond to the sheriff or other officer shall be for the appearance of the defendant against whom such order for bail has been made, and if special bail be not put in and perfected by such defendant according to law and the practice of the court, an assignment of the bail bond may be taken and such proceedings be had thereon as if such defendant were solely liable in the action.

Form of process.

Endorsement thereon.

How served.

Bail bond and proceedings thereon.

How defendants to appear in such cases.

How described in declaration.

Pleading and practice.

Form and effect of the execution.

60. In cases provided for in the last preceding section, the defendant summoned, may appear as in actions commenced by summons, and the appearance of the other defendants shall be by putting in and perfecting special bail, as in actions commenced by *capias;* and the plaintiff in the declaration shall describe the former as served and the latter as being in custody, and the pleadings, practice and proceedings thereafter to final judgment shall be the same as if all the defendants were brought into court in the same manner; and if judgment be recovered in the action by the plaintiff against the defendants, the execution thereon shall be special to the effect that the sheriff, or other officer to whom the same is directed, shall make the debt or damages and costs of the goods and chattels, lands and tenements of the defendants, and for want of sufficient goods and chattels, whereof to make the same, to take the bodies of such of the defendants against whom such order for bail has been made.

Proceedings on the execution.

61. The sheriff or other officer under and by virtue of any execution, issued in the manner provided in the last section, may seize and levy on the goods and chattels, lands and tenements of all the defendants in his county, and also take the bodies of such of them as he is commanded in and by said writ, in satisfaction of such judgment; or the sheriff or other officer, after such levy, may, by the direction of the plaintiff, return the execution *non est inventus*, in order to fix the bail, and thereupon the plaintiff may proceed against the bail as in other cases; but the bail shall only be liable for what may remain unpaid on the judgment after applying thereon the amount made of the goods and chattels, lands and tenements levied on, and shall be entitled, on satisfying such deficiency, to an assignment of the judgment, whereby to obtain indemnity for such payment, by execution thereon, out of the property of any of the defendants which may not have been levied on, or of which any of the defendants may become seized or possessed; and the bail may surrender the defendants for whom they are bail as in other cases, and the proceedings for, and effect of, such surrender shall in all respects be the same as if such action had been prosecuted against such defendants only.

Proceedings against bail.

Bail liable only for balance after applying proceeds of levy.

And entitled to an assignment of the judgment.

Bail may surrender as in other cases.

Judge may determine legally of order for bail.

P. L. 1853, p. 402.

62. Any judge of the court, out of which a *capias ad respondendum* shall issue, at chambers, upon four days' notice to the plaintiff or plaintiffs, or to his or their attorney, upon motion, may examine and determine upon the legality of orders made for bail, and discharge parties illegally arrested in civil actions.

On motion to set aside order, sufficiency of affida-

63. Whenever application shall be made to set aside the writ upon which any defendant shall be arrested, or to discharge him from arrest,

the court or judge hearing the application shall consider and determine the sufficiency, in fact, as well as in law, of the proof upon which the order for issuing such writ was founded.

vits considered.
P. L. 1855, p. 288, § 83.
Amended.

64. In actions of law commenced by writ of *capias ad respondendum*, it shall be lawful at any time within thirty days after any defendant shall be arrested by virtue of such writ, for a judge of the court out of which said writ shall issue, upon the application of such defendant, and upon two days' notice in writing to the plaintiff or his attorney of such application, to make an order for the taking of testimony concerning the truth of the affidavit or affidavits, and proofs upon which the order for said writ was made and said writ issued, which testimony shall be taken orally before said judge, or in writing before any supreme court commissioner, or master in chancery, that the said judge shall nominate and appoint, which testimony, when taken before such commissioner or master, shall be filed in the clerk's office of the court out of which said writ issued; and if from the testimony so taken, the said judge shall be of opinion that the said writ was improperly or improvidently issued, or should not have been issued against the defendant or defendants therein, the said judge shall order the said defendant or defendants discharged upon common bail, or take such order for his or their discharge from arrest or imprisonment, and discharge of his or her bail, as the nature of the case may require, and upon such terms as he shall deem equitable and just.(*a*)

Testimony to disprove the affidavits.
P. L. 1861, p. 312, § 1.
Amended.
If writ improvidently issued defendant may be discharged.

65. Filing special bail shall be no waiver of the right to apply for an order to take testimony concerning the truth of the affidavits upon which the order for bail was made.

Filing special bail no waiver of right to disprove

VI. Bail.

1. COMMISSIONERS.

66. The justices of the supreme court, or any two of them, of whom the chief justice shall be one, shall and may commission, under the seal of the said court, from time to time, such and so many persons as they shall think fit and necessary in the several counties of this state, to take such recognizance or recognizances of bail, as any person or persons shall be willing to acknowledge or make in any action or suit in said court, in such manner and form as the justices of the supreme court have used to take the same; which said recognizance or recognizances of bail and bailpiece shall be transmitted to the office of the clerk of the said court within the time allowed by law for putting in special bail; and the said clerk shall file and docket the same; which recognizance or recognizances of bail and bailpiece so taken and transmitted, shall be of like effect as if the same were taken *de bene esse* before any of the justices of said court; and for the taking of every such recognizance of bail and bailpiece, the said commissioners shall be entitled to the same fees as are now allowed by law to said justices in like cases.

Commissioners appointed.
R. S. 856, § 1.
Amended.
Duty.
Recognizance, etc., sent to clerk.
Amended.
Effect of.
Fees.

67. The commissioners in the last section provided for, shall be styled supreme court commissioners, and hereafter shall be commissioned as such; and every such commissioner heretofore or hereafter appointed shall have power to take recognizances of bail, and authority to administer an oath or affirmation to any person who may desire to make such oath or affirmation before him, in any cause in any of the courts of this state; and any recognizance of bail or affidavit taken or made before such commissioner, shall be good and effectual.

Styled supreme court commissioners.
R. S. 856.
P. L. 1861, p 313.
Amended.
Power.

2. SPECIAL BAIL.

68. Neither the plaintiff nor any other person shall be permitted to declare by-the-bye against the defendant in any action.

Declaration by-the-bye not allowed.
R. S. 929, § 58.

(*a*) A party in custody upon a *capias ad respondendum* issued by a justice of the supreme court under the "act respecting imprisonment for debt in cases of fraud," will not be discharged, where, upon his own application, an order was made to take testimony, under which witnesses were examined concerning the truth of the affidavits and proofs upon which the *fiat* for the writ was made, unless it clearly be shown, by the evidence, that the writ should not have been issued, *Tyler* v. *Allen*, 2 *Vr.* 441. Counter affidavits to show no indebtedness, or to show a rectitude of dealing, and a total absence of any fraud on the part of defendant, or to contradict the facts as sworn to in the original affidavits, cannot be admitted at the hearing. But the facts, as sworn to in the original affidavits, must be taken as true, and upon these, and these only, the question of discharge is to be determined. *Painter* v. *Houston*, 4 *Dutch.* 121. Where an order of a commissioner or judge to hold to bail, regular on its face, is set aside, and there is no evidence of abuse of the process of the court, the practice is to discharge on common bail, not to quash the writ, *Van Kirk* ads. *Staats*, 4 *Zab.* 122.

Process against defendant in custody.
Ib. § 60.

69. If the defendant on a *capias ad respondendum* be returned in custody, or, when produced in court, be committed by order of the court, the plaintiff, if he have other cause of action, or any other person having cause of action against the said defendant, shall issue process against such defendant, in the same manner as if he was at large, and not in custody or in prison; and on such process, when served, the like proceedings shall be had as in other cases.

When plaintiff not to declare on capias without waiver.
Ib. § 49.
Amended.

70. The plaintiff shall not, in any action commenced by *capias ad respondendum*, be permitted to declare until special bail be filed and perfected, if required, or the defendant be returned in custody or brought into court, on a rule for that purpose, or be surrendered by his bail, and a *committitur* entered, unless the said plaintiff will waive his right, and enter such waiver on the minutes of the court;(a) and then if the sheriff or other officer hath returned on the said *capias ad respondendum*, that he hath taken the body, or that he hath taken the body into custody, the defendant shall be considered as in court, and may be proceeded against accordingly.

Amount for which bail liable.
Ib. § 47.

71. Where the plaintiff in any action shall declare for or recover a greater sum than is expressed in the *capias ad respondendum* upon which he declares, the bail shall not be discharged, but be liable for so much as is sworn to, or ordered by the court or a judge, and endorsed on the said process, or for any less sum which the plaintiff in such action shall recover, together with the costs of the original action.

Special bail when to be filed.
Ib. § 23.
Amended.

72. Special bail shall be filed on the return day of the *capias ad respondendum*, or on the day after, unless the court or a judge thereof shall by a rule or order allow further time for filing special bail; and in such case the bail shall be filed within the time limited by such rule or order.

Who may be special bail.

R. S. 950, § 2.

73. No person shall be permitted to be special bail in any such action, unless he be a freeholder and resident in this state, and of sufficient property, if the writ or process issue out of the supreme court, or if it issue out of the circuit court or court of common pleas, unless he be a freeholder of sufficient property and resident in the county where such court is held.

Who shall not be bail.

74. No attorney at law, under sheriff, sheriff's deputy, bailiff, or other person concerned in the execution of process, shall be permitted to be special bail in any action, except as hereinafter provided.

Form of recognizance.

R. S. 929, § 32.

75. The recognizance of special bail shall be to the effect following:

A. B.
against } In debt or case, or as the action may be.
C. D.

New Jersey, ——— county, to wit:

Be it remembered, that on the —— day of ——— in the year of our Lord one thousand ———, C. D., E. F. and G. H., of the said county of ———; personally appeared before me, J. K., one of the justices of the supreme court of the state of New Jersey (or one of the judges of the circuit court or court of common pleas in and for the said county of ———, or one of the supreme court commissioners, as the case may be), and severally acknowledged themselves to owe unto A. B. the sum of ——— (double the sum endorsed on the writ) each, to be levied upon their several goods and chattels, lands, tenements, hereditaments and real estate, upon condition that if the defendant C. D. shall be condemned in this action at the suit of A. B. the plaintiff, he shall pay the costs and condemnation of the court, or render himself into the custody of the sheriff of said county for the same, or if he fail so to do, that the said E. F. and G. H. will pay the costs and condemnation for him.

Taken and acknowledged the day and year above written, before me, J. K.

And on acknowledging the aforesaid recognizance, the bailpiece shall be to the effect following, to wit:

Bailpiece.

New Jersey supreme court (or ——— circuit court or court of common pleas). Of the term of ——— in the year of our Lord one thousand ———, C. D., of the county of ———, is delivered to bail on a *cepi corpus*,

(a) That the waiver must be entered on the minutes, see *Beatty* v. *Ivins*, *Pen.* *628. A waiver may be entered upon the sheriff's return, that the defendant, after arrest, gave bond to apply for the benefit of the insolvent law, *Chester* v. *Chester*, 1 *Harr.* 270.

unto E. F., of the township of ———, in the said county, and G. H., of the township of ———, in the said county, at the suit of A. B. in a plea of debt (or of trespass on the case, or as the action may be).

L. M., attorney for the defendant.

Remedy, if special bail be not perfected in time.

76. If special bail be not put in and perfected in due time, the plaintiff may proceed on the bail bond, or rule the sheriff to bring in the body of the defendant. Ib. § 24.

Defective return or unsatisfactory bail, etc.

77. If on a return that he hath taken the body, or C. C., the sheriff or other officer shall not return bail and a copy of the bail bond, or if the plaintiff be dissatisfied with the bail taken by such sheriff or officer, and the defendant shall fail to appear and give special bail within the time above prescribed, the court or a judge shall order by a rule of court such sheriff or officer to bring in the body of the defendant at a certain time in said rule specified; and if the said sheriff or officer fail to do so, he shall be amerced by the court at the next term, in any sum not exceeding the plaintiff's debt or demand, with costs; which amercement shall have the force and effect of a judgment, whereupon an execution, in the name and for the use of the said plaintiff, may instantly, on motion in open court, and without any further proceedings, be awarded and issued against the goods and chattels, lands, tenements, hereditaments and real estate of the said sheriff or officer so amerced as aforesaid; *provided, nevertheless*, if such sheriff or other officer shall cause special bail to be put in and justified, if justification be required, during the same term, he shall be excused from bringing in the body, and no amercement shall be entered against him on the said rule; *and provided further*, that this section shall extend to persons whose office is expired, as well as to sheriffs and officers for the time being. Ib. § 25. Amended. Sheriff ruled to bring in the body, or amerced. Proceedings thereupon. Sheriff may put in special bail.

Limitation of former sheriff's liability.

78. No sheriff or officer shall be liable to be called upon to produce the body of any defendant on a *capias ad respondendum*, returned *cepi corpus*, unless he be required so to do within six months after the expiration of his office; and if, on such rule, he shall not bring in the body, he may be proceeded against by amercement, in the manner hereinbefore mentioned. Ib. § 48.

Body brought in, committitur, etc.

79. If the sheriff or officer, when ruled to do so, shall, on a *cepi corpus*, bring in the body of the defendant, such defendant shall be committed, and upon the entry of such *committitur*, the plaintiff may proceed in the action, and declare against the defendant as a prisoner, or being in custody. Ib. § 26.

Sheriff may put special bail.

80. The sheriff or other officer in order to save himself, may put in special bail for the defendant, against his consent; and the bail to such sheriff or officer may do the same for their indemnity. Ib. § 27.

3. EXCEPTIONS.

When to be taken.

81. Exceptions to special bail shall be taken and entered in the clerk's book within twenty days after bail filed; and in such case the defendant shall procure his bail, to justify in eight days, exclusive, after notice of such exception, or shall add other bail, who shall justify within the said eight days; and an exception entered after the expiration of the said time shall be of no validity. Ib. § 28. Amended. Justification to be made.

Notice of justification required.

82. Two days' notice of justification of bail, or of new or additional bail, and justification thereof, shall be given by the defendant or his attorney, to the plaintiff or his attorney, exclusive of the day it is given, and if Sunday intervene, three days' notice shall be given.(*a*) Ib. § 29.

When bail out of court.

83. If the bail do not justify at the time appointed, they shall be out of court; and when they do justify, and are allowed, an order of such allowance shall be drawn, and a copy thereof served on the plaintiff or his attorney. Ib. § 30.

When justification not permitted without consent.

84. Without the consent of the plaintiff or his attorney, in cases where the sheriff or other officer shall be ruled to bring in the body, justification of bail shall not be permitted after the expiration of twenty days from the time when the said rule is entered and served. Ib. § 31. Amended.

4. JUSTIFICATION.

85. The supreme court shall make such rules and orders for justifying bail, and making the same absolute, as to the said court shall seem meet,

(*a*) Where the object of the defendant is to add new bail as well as to justify, a notice that he merely intends to perfect bail is not sufficient, *Brown* v. *Williamson*, 3 *Hal.* 363.

Court to make rules for justifying bail.

R. S. 856, ¿ 2. Amended.

so as the cognizor or cognizors of such bail be not compelled to appear in person in the court to justify; but the same may be determined by affidavit or affidavits duly taken before supreme court commissioners, who are hereby respectively empowered and required to take the same, and also to examine the sureties on oath or affirmation touching the value of their respective estates, and to certify such justification to the court.

Bail, how to justify.

R. S. 929, ¿¿ 33, 34.

86. Special bail may justify by affidavit in the court out of which the writ issued, or before one of the judges thereof, either in term time or vacation, or before a supreme court commissioner; which affidavit shall set forth that the bail are freeholders and residents in the state of New Jersey, if the writ issued out of the supreme court, or if the writ issued out of any of the circuit courts or courts of common pleas, then that they are freeholders and residents in the county in which such court is held, and also shall set forth that they are respectively worth so much (mentioning the sum they are bailed for) after all their debts are paid.

5. RENDER IN DISCHARGE.

When to be made if proceedings by scire facias.

P. L. 1857, p. 295, ¿ 9.

R. S. 929, ¿ 42. Amended.

87. Subsequent to the return of the *capias ad respondendum*, the defendant may render himself, or be rendered in discharge of his bail, either before or after judgment; *provided*, that such render be made within twenty days after the return day of the *scire facias* against the bail, or of the process in the action on the recognizance of bail, and not after; but in either case the special bail shall pay the costs of the *scire facias* or action, and judgment for the same shall be entered against them accordingly.(*a*)

Minute of render and commitment.

R. S. 929, ¿ 44.

88. The court or judge before whom the render is made, shall make an entry or minute of such render and commitment; and thereupon the defendant shall be committed to the custody of the sheriff or jailer attending the said court or judge.

Exoneretur to be entered.

Ib. ¿ 45.

Notice of.

89. On such render and commitment duly certified to the clerk of the court, if in vacation, or not done in open court, it shall be the duty of the said clerk to enter an *exoneretur* on the bailpiece, and thereupon the bail shall be discharged, and the said bail shall give immediate notice of such render to the plaintiff or his attorney.

6. PROCEEDINGS AGAINST.

After ca sa. returned non est, &c.

R. S. 929, ¿ 81.

90. After a *capias ad satisfaciendum* shall have been returned *non est inventus*, the plaintiff may proceed against the special bail upon their recognizance.(*b*)

When stayed when writ of error brought.

Ib. ¿ 82.

91. On a *scire facias* or in an action of debt against the special bail, on their recognizance, when a writ of error is brought by the principal, and allowed, and the said bail apply within the time limited for surrendering the principal, the court may stay the proceedings against such special bail, if they enter into recognizance to the party for whom judgment is given, in double the sum recovered, to pay the condemnation money, or surrender the principal to the custody of the sheriff, within twenty days next after the determination of the said writ of error, if it be in favor of the defendant in error.

When application must be made.

Ib. ¿ 83.

92. The court shall not stay proceedings against the special bail pending the writ of error, by their principal, if they do not make application for that purpose until their time to surrender the principal be expired.

Payment of judgment by bail not a satisfaction.

Court may order judgment to remain in force for benefit of bail.

93. Where special bail in any action are compelled to pay the judgment recovered against their principal, such payment shall not be a satisfaction of such judgment as in favor of the bail; but after such payment the court wherein the judgment was recovered on proof of payment thereof by the bail, and upon notice to the plaintiff and the defendant in the judgment, may make an order that such judgment remain in force for the benefit of

(*a*) Courts in England as well as in this country have gone further to protect and relieve bail than they formerly did, *Van Winkle* v. *Alling*, 2 *Harr.* 446. *Habeas corpus* allowed to enable bail to surrender his principal, already in custody on a *ca. sa.* in another suit, *Anonymous*, *Pen.* *391. A defendant may be rendered in discharge of his bail, notwithstanding exceptions to them have been entered, *Anonymous*, 4 *Hal* 25.

(*b*) The supreme court follows the rules of the king's bench in regard to matters of bail, *Armstrong* v *Davis*, *Coxe* 110. *Parker* v. *Ogden*, *Pen.* *151. *Kinney* v. *Muloch*, 2 *Harr.* 335, *Hornblower*, *C. J.* *Van Winkle* v. *Alling*, 2 *Harr.* 446. *Peltier* v. *Washington Bank*, 2 *Gr.* 259, 394. In order to fix the bail on a recognizance, the sheriff may be instructed to return a *ca. sa. non est inventus*, (although he might have served it on the defendant), unless he be in his custody, in which case he cannot make such return, *Van Winkle* v. *Alling*, 2 *Harr.* 446. The bail as well as his principal are bound to take notice where the venue is laid, and should search for a *ca. sa.* in the office of the sheriff of that county, to know whether the plaintiff intends to proceed by execution against the defendant's body, *Cockran* v. *Drake*, 3 *Harr.* 9.

the bail so far as to enable them to recover the money paid by them as bail out of the property of the defendant in the judgment, and thereafter execution may issue on such judgment, against the property of the defendant, notwithstanding such payment, in the name of the plaintiff, but for the benefit of the bail; and after the entry of such order in the minutes of the court, satisfaction of such judgment shall not be entered of record without the consent in writing of such bail or a special order of the court.

And execution may issue for their benefit.

7. BAIL BOND.

94. If any person shall be arrested by any writ, or process issued out of any court of record, at the suit of any person or persons, and the sheriff or other officer shall take bail from such person against whom such writ or process shall be taken out, the sheriff or other officer shall (if requested by the plaintiff in such action or suit, or his attorney) assign to the plaintiff in such action the bail bond or other security taken from such bail, by endorsing on the same, an assignment under his hand and seal, in the words or to the effect following:(*a*) I, the within named A. B., do hereby assign and set over the within bond to the within named C. D., the plaintiff, pursuant to the statute.

Witness my hand and seal, this —— day of ——— in the year of our Lord one thousand ———.

A. B. [L. S.]

Assignment of bail bond.

R. S. 833, § 16, 929, § 35.

Amended.

Form of.

And if special bail be not put in and perfected in due time, the plaintiff, after such assignment, may bring an action on the said bail bond, or other security taken for bail in his own name; and the court in which the action is brought, may, by rule of court, give such relief to the plaintiff and defendant in the original action, and to the bail upon the bail bond, or other security taken from such bail, as is agreeable to justice and reason; and such rule shall have the nature and effect of a defeasance of such bail bond or other security for bail.(*b*)

Plaintiff may sue in his own name.

Court may grant equitable relief.

95. The proceedings on the bail bond may be set aside, if irregular, or stayed, if regular, upon terms, in order that a trial may be had in the original action.(*c*)

Proceedings set aside or stayed.

R. S. 929, § 36.

96. Where the plaintiff has not lost a trial in the original action, by reason of special bail not being filed in due time, the court or a judge may stay the proceedings on the bail bond, upon putting in and perfecting special bail, paying the costs incurred by the assignment and prosecution of the bail bond, receiving a declaration in the original action, pleading issuably, and taking short notice of trial, so that the cause may, if the

Where plaintiff has not lost trial.

Ib. § 37.

Amended.

(*a*) An assignment of a bail bond by a sheriff, under his hand and seal, in the presence of two persons, who actually witnessed the transaction, is a compliance with the statute, although only one of such persons subscribes his name as a witness. *Bleibdrey* v. *Keppler*, 4 *Vr.* 140.

(*b*) A plaintiff having obtained an assignment of the bail bond given to the sheriff by the defendant on his arrest, must bring his action on the bond in the same court in which the original action was pending, unless some special circumstances exist to warrant a departure from this rule. *Florence* v. *Shumar*, 5 *Vr.* 455. See *Hughes* v. *Hughes, Pen.* *577, *Pennington, J.* A suit on recognizance of bail, may be instituted in a court other than that in which the recognizance was taken. In such suit, the process must be to answer to a plea of debt "upon recognizance," in order to apprise them of their situation, and protect them from surprise, otherwise the defendant will not be bound to accept a declaration upon a recognizance of bail. *Van Winkle* v. *Alling*, 2 *Harr.* 446. The assignee of the sheriff may bring suit on the bail bond in his own name; it is not necessary that he should be styled assignee in the writ. *Hunt* v. *Allen*, 2 *Zab.* 533. In an action on a bail bond, it is not necessary to aver in the declaration that an affidavit of the cause of action had been made and filed before issuing the *capias* in the suit in which the bond was given. And if the declaration contains no such averment, a plea that no such affidavit had been made and filed, is bad. *Hunt* v. *Allen*, 2 *Zab.* 533, 3 *Id.* 616 The sheriff having arrested the defendant by virtue of a *capias ad respondendum*, and taken a bond for his appearance to the action, may refuse to accept a surrender of the body of the defendant; but if the defendant voluntarily surrenders himself to the sheriff before the return day of the writ, the sheriff may accept such surrender. By such surrender and acceptance the bail are discharged; and if the plaintiff obtains an assignment of the bail bond, and brings an action on it, the court will stay proceedings and order the bond to be cancelled, *Florence* v. *Shumar*, 5 *Vr.* 455. Judgment must be entered for the penalty of the bond, *Hunt* v. *Allen*, 2 *Zab.* 533. Upon a bail bond for an amount greater than the sum sworn to, the debt, interest and costs may be collected, although they exceed the sum sworn to. *Allen* v. *Hunt*, 3 *Zab.* 376. If suit on a bail bond is instituted in another court and no objection is interposed by the sureties, they cannot obtain relief from paying the full amount of the penalty, *Simmons* ads. *Kelly, June*, 1877.

(*c*) Such irregularity may be taken advantage of by a summary application to the court to set aside the proceedings, *Florence* v. *Shumar*, 5 *Vr.* 455. If a surrender, *after* the return day, be accepted by the sheriff, the court will stay any proceedings on the bail bond, and order it to be cancelled, *Ibid.*, p 460. The want of a *ca. sa.* against the principal, cannot be taken advantage of by the bail, on motion; it is matter of substance and must be pleaded. *Cockran* v. *Drake*, 3 *Harr.* 9. Bail can take advantage of an irregularity in issuing a *ca. sa.* against the original defendants, as it is in the nature of notice to them It is the settled practice in this state, that the *ca sa.* should be in the hands of the officer four days before the return thereof, *Boggs* v. *Chichester*, 1 *Gr.* 209 *Armstrong* v. *Davis, Coxe* 110. Where the court was satisfied that the defendant and his bail were all insolvent, they refused to order a *scire facias*, *State* v. *Anonymous*, 1 *Harr.* 437. This court may, by virtue of the incidental powers appertaining to its constitution and jurisdiction, grant relief to bail, on petition, when not restrained by public justice, where the default of the principal was occasioned by sickness or death. The death of the principal after forfeiture of his recognizance, cannot be pleaded to a *scire facias*. The remedy is by petition to the court for relief, *State* v. *McNeal*, 3 *Harr.* 333. *Armstrong* v. *Davis, Coxe* 110. If the principal died before the recognizance was forfeited, it must be so pleaded. *State* v. *Crane*, 2 *Harr.* 191. The court may interfere in a summary way to prevent an improper use of its own records, or to protect bail, *Solomon* ads. *Gregory*, 4 *Harr.* 112, 115, *Whitehead, J.*

plaintiff desires it, be tried the same term at which it might have been tried if special bail had been filed in season.

Where plaintiff has lost trial. Ib. § 38. Amended.

97. Where the plaintiff has lost a trial in the original action, for the want of special bail being filed in due time, it shall be the duty of the court or a judge before proceedings be stayed on the bail bond, further to require that the bail consent that judgment be entered against them on the bail bond, for the plaintiff's security; and in such case, if the defendant fail in the original action, the bail shall be liable to immediate execution, and shall not discharge themselves by a render of the principal.

When not stayed. Ib. § 39

98. If the plaintiff might have had judgment in the original action, if bail had been filed in due time, then the proceedings shall not be stayed on the bail bond.

How special bail put in etc., after laches. Ib. § 40. Amended.

99. Whenever the defendant is guilty of a neglect in not putting in special bail whereby the bail bond becomes forfeited, the notice, in case the party means to put in special bail in order to stay proceedings upon the bail bond, shall be, that he will put in and perfect special bail, in open court, or before a judge thereof, on such a day, specifying the day; and in that case the plaintiff may oppose the bail without its being a waiver of the bail bond.

8. DEPOSIT IN LIEU OF BAIL.

Defendant may make deposit with the sheriff in lieu of bail.

100. Any defendant, who may be arrested by virtue of a writ of *capias ad respondendum*, shall be allowed, in lieu of giving bail to the sheriff, to deposit in the hands of the sheriff or other officer making the arrest, the sum endorsed on the writ by virtue of the affidavit, to hold to bail together with thirty dollars to answer for costs, and thereupon he shall be discharged from arrest; and the sheriff or other officer shall, at the return of the said writ, pay into court the money so deposited with him, which shall remain in court subject to the order of the court; and in such case the defendant shall be permitted to appear to the action without filing special bail, or his appearance may be entered by the plaintiff without a waiver of his right to bail; *provided*, that the making of such deposit shall not prevent the defendant making application to set aside the writ or order for arrest, the same as may be done where bail is given to the sheriff.

Deposit repaid if defendant put in special bail.

101. If the defendant, who shall have made a deposit in lieu of bail to the sheriff as is provided for in the last section, shall, at the return of the writ, duly put in and perfect bail to the action according to the practice of the court, or if the writ or order for arrest shall be set aside, the money so deposited and paid into the court, shall, by order of the court, be repaid to the defendant; but otherwise shall remain subject to the order of the court, and if the plaintiff recover in the action, shall be applied in satisfaction in the whole or in part, as the case may be, of the judgment recovered; and if the plaintiff shall recover for debt or damages together with costs a sum exceeding the amount of such deposit, he shall be entitled to issue a writ of *capias ad satisfaciendum*, and to collect thereon the balance remaining due on the judgment; but if the defendant recover judgment in the action the sum deposited and paid into court shall be repaid to him.

Defendant who has given bail to sheriff or been surrendered, may make deposit.

102. Any defendant who may have given bail to the sheriff, or who shall have been surrendered by his bail before judgment in the original action, may, in lieu of filing special bail or renewing bail, make deposit into court of the sum for which bail was ordered, together with thirty dollars, to answer for costs, which moneys shall be held and applied as is mentioned in the last preceding section.

VII. Pleading.

Declaration, when to be filed.

R. S. 929, § 50.

103. The plaintiff shall file his declaration against the defendant within thirty days after being returned summoned, or after entering of special bail, and perfecting the same, or his being returned in custody, or the entering of a *committitur* or waiver of bail, or on failure thereof, shall become *nonprossed*, unless the court, under special circumstances, shall grant the

plaintiff further time; and in such case, the plaintiff shall declare within the time so granted, or become *nonprossed*.(a)

Plea, when to be filed.
Ib. § 51.

104. The defendant shall file his plea within thirty days after the expiration of the time limited or granted for filing the declaration, or on failure thereof, judgment shall be entered against him, unless the court under special circumstances shall grant the defendant further time; and in such case the defendant shall plead within the time so granted, or judgment be entered against him.(b)

If plaintiff files declaration before time and serves copy.
P. L. 1855, p. 288, 35.
Amended.

105. If the plaintiff, after the defendant is in court, files his declaration sooner than is required by law, and serves a copy thereof on the defendant, he shall file his plea or demurrer in thirty days after such service, or on failure thereof judgment shall be entered against him; *provided*, that there shall be endorsed on such copy served, a notice that unless the defendant shall appear and file a plea or demurrer, within thirty days after the date of such service, judgment will be entered against him, and the plaintiff, before entering the judgment, shall file an affidavit of such service.(c)

Copy, how served.
P. L. 1872, p. 37.

106. The service of a copy of the declaration in the last preceding section mentioned may be made by delivering the same to the defendant personally, or by leaving it at his dwelling-house or last place of abode; and where the defendant is a corporation, service may be made by delivering the same to the president or other head officer, or to the secretary or clerk thereof, personally, or by leaving the same at his dwelling-house or place of abode; and the plaintiff, if he shall be entitled to costs in the cause, shall be allowed for such service the sum of two dollars for each defendant so served, not exceeding three, and the same to be included in the taxed bill of costs.(d)

Fees for, how collected.

Further pleadings when filed.
R. S. 929, § 51.

107. If further pleadings shall be necessary, they shall be filed within thirty days, each after the other, or on failure thereof, the like judgment as aforesaid shall be entered against the party so failing, unless the court under special circumstances shall grant further time as aforesaid.

To amend pleadings.
Ib. § 61.
Amended.

108. If the plaintiff amend his declaration, the defendant shall have twenty days to alter his plea or to plead anew; and if the defendant amend his plea the plaintiff shall have twenty days to alter his replication or to reply anew; and the like time shall be allowed if any of the subsequent pleadings be amended; but all amendments shall be made on such equitable terms as the court shall direct.

(a) It is irregular to file a declaration before the return day of the summons, and a judgment entered in vacation on such declaration will be set aside, *Brown* v. *Daws*, 3 *Zab.* 483. The time allowed by law for filing a plea is given for the benefit of the defendant, and he may waive it, and consent that a judgment be entered against him before the time for pleading has expired, *Hoguet* v. *Wallace*, 4 *Dutch.* 523. The provisions of the law and the course of practice require the defendant to look to the files of the court, not only to see when the declaration was filed, but what it contains; and a party is entitled to no redress for a variance in a copy of a pleading furnished by the attorney of the opposite party, or any one else beside the clerk, *Ogden* v. *Gibbons*, 2 *South.* *518, *532. A notice to plead cannot be served until after a declaration has been duly filed, *Brown* v. *Daws*, 3 *Zab.* 483. When the practice as to filing pleadings established by the practice act, is once broken in upon, the English practice, of ruling your adversary to plead, must be pursued, *Berry* ads. *Cahanan*. 2 *Hal.* 135. Where a defendant files a set-off, if the plaintiff does not file a replication in due time, and put the cause at issue, the court will grant a rule on the plaintiff to reply, and in case of failure to comply with the rule, will allow the defendant to put the cause at issue, and after such issue joined, if the plaintiff do not bring the cause to trial, the defendant may have a trial by proviso, *Estell* ads. *Franklin*, 5 *Dutch.* 264. A motion for time to plead, is a special motion requiring two days' notice, *Trenton Ins. Co.* ads. *Hodges*, 4 *Zab.* 673. And the grounds of the motion ought to be verified by affidavit, *Ibid.* Rules to plead should be renewed from term to term, until they are served, *Sassenburgh* ads. *Shaver*, 2 *Hal* 170. Where a notice of trial was served on an attorney in whose name a plea had been filed, and he denied that he was defendant's attorney, on motion of attorney of the plaintiff, it was ordered that, on filing affidavit of defendant's non-residence, and putting up in the clerk's office a notice that he file a plea &c., on his failing to do so, the plaintiff may proceed in the cause, *Anonymous*, 1 *Harr.* 396. A copy of the rule must be served on the defendant, *Hunter* v. *Budd*, 2 *South* *718. And the copy must be under the signature of the clerk, *Snediker* v. *Quick*. 1 *Gr.* 245. See *Harwood* v. *Smethurst*, 2 *Vr.* 502. Rule to plead must be served on defendant's attorney, though he was in court when the rule was taken, —— ads. *Dill*, 1 *Hal.* 168. Rules to plead on or before a specified day, or within so many days after service thereof, expire, if not served before the ensuing term; and a new rule must be taken before the party can go on with his suit. On defendant's neglect to plead within the time specified in the rule, judgment by default must be entered at the first term after the service of the rule, or a new rule must be taken, and pursued, *Halsey* ads. *Miller*, 1 *Harr.* 63. A defendant having notice of such rule, must take timely advantage of its not being pursued, and not suffer it to sleep several terms, or he will be denied his motion to dismiss the bill of privilege. *Ibid.* Where the defendant stipulated "to plead in ten days," and filed a special demurrer within that time, the court held, that he had not complied with his stipulation, *Welsh* v. *Blackwell*, 2 *Gr.* 344. A judgment overruling a demurrer having been rendered in the absence of demurrant's counsel, he was allowed to plead anew at the next term, *Johnson* ads. *Rowan*, 1 *Harr.* 266. See *ante* p. 477, (*b*), p. 327, (*c*), p. 500, *b*).

(b) A false plea, although it be the general issue and verified by affidavit, may be disregarded and treated as a nullity by the plaintiff, and judgment entered by default, either interlocutory or final, in term time or vacation, *Walter* v. *Walker*, 6 *Vr.* 262. [Rule, § 108]. Where the plea filed is, on its face, a good plea to the action, the party who treats it as a nullity must do so at his peril, *Ibid.*

(c) If, after the defendant is in court, the plaintiff files his declaration sooner than is required by law, and serves a copy on the defendant, he shall file his plea in thirty days after such service. *Held*, that where defendant is an individual, service of a copy of the declaration must be made upon him personally, if he has not appeared by attorney, *Dock* v. *Elizabethtown Co.*, 5 *Vr.* 312. Where one of two joint debtors is served with process, and the other returned "not found," judgment cannot be entered by default within sixty days from the return of process by serving notice of filing the declaration on the defendant who was served with process, without also serving it upon the other, *McMurtrie* ads. *Doughten*, 4 *Zab.* 252.

(d) See *Dock* v. *Elizabethtown Manuf. Co.*, 5 *Vr.* 312.

Parties to take notice of pleadings filed in time.

109. Parties shall take notice of the filing of the pleadings in the cause, which shall have been filed within the time prescribed, without service of a copy or notice of the filing thereof.

If filed out of time, rule to plead thereto required.
Ib. § 54.
Amended.

110. If any party shall not file his pleading in the cause within the time required by law, and shall file the same after the expiration of such time, he shall give the adverse party notice, in writing, of the time of filing such pleading, and the adverse party shall not be required to plead or reply thereto until ruled so to do.(*a*)

Subsequent pleading not required in shorter time than 30 days.

111. In cases where any declaration, plea, or other pleading shall be filed after the time allowed by law, no subsequent pleading shall in any case be required in a shorter time than thirty days from the time of the service of a rule to plead or reply thereto.

Filed together.

R. S. 940, § 76.

112. The declaration, pleadings, and other papers relative to every cause shall be all filed together in the office of the clerk of the court.

Advantage of failure to file pleading to be taken at next term.
Revision.

113. If any party would take advantage of the failure of the adverse party in not filing his declaration, plea or other pleading, within the time prescribed by law, he shall take such advantage at the term next after such failure, by moving the court for the judgment to which he is thereupon by law entitled; and if he fail so to do, it shall be considered as a waiver of his right, and he shall not afterwards have such judgment, unless he shall rule the party to plead; which rule may be granted by the court or by a judge in vacation.(*b*)

Defendant to file affidavit with plea or demurrer.

P. L. 1855, p. 288, § 35.

114. The defendant in every action at law shall file with his plea or demurrer an affidavit that the same is not intended for the purpose of delay, and that the affiant verily believes that the defendant hath a just and legal defence to said action on the merits of the case, which affidavit shall be made by the defendant, or in his absence may be made by his attorney or agent in the action, and for want of such affidavit the plea or demurrer shall be treated as a nullity; *provided, however*, that the court, or a judge, may give the defendant leave to plead or demur without filing any affidavit therewith.(*c*)

Dilatory plea to be verified.

115. No dilatory plea, or plea of another judgment, shall be received, unless the party offering such plea, do offer therewith to be filed, an affidavit proving the truth thereof; or do show some probable cause to the court to induce them to believe that the matter therein set forth is true.(*d*)

Specification of defence under the general issue.
Revision.

116. Where a defendant in an action of assumpsit pleads the general issue alone, or in connection with other pleas, the plaintiff shall be at liberty, by a demand in writing, to require a specification of the defences intended to be made under such plea of the general issue, and the defendant shall thereupon, within twenty days after such demand, furnish the plaintiff's attorney with a specification in writing of the defences intended to be made under such plea; and at the trial the defendant shall, under such plea, be confined to the subject matters of defence contained in such specification; and in case of the neglect or refusal of the defendant to furnish such specification within the time limited, he shall not be permitted under such plea to give in evidence any defence except a denial of the making of the contract sued on; *provided*, that where the ends of justice require it, the court, or any judge thereof, may at, or at any time before, the trial, and upon such terms as shall be equitable, permit the defendant to serve such specification when the time above limited has expired, or to amend the specification which shall have been served.

Defence under such plea confined to matters specified.

Proviso, that court or judge may permit amendment.

Defendant may plead general issue and give notice.

R. S. 951, § 2.

117. The defendant in any action, except in cases of mutual dealings, may plead the general issue, and give any special matter in evidence, which, if pleaded, would be a bar to such action upon giving notice, with such plea, of the matter so intended to be given in evidence.(*e*)

(*a*) If pleadings are filed after the thirty days allowed by the practice act have expired (although notice is given of the time of filing same), they may be treated as nullities. *Anonymous*, 2 *Hal.* 39. See *ante*, p. 327, (*c*); p. 500, (*b*).

(*b*) If a plaintiff, who becomes entitled to a judgment by default in vacation, omits to enter the same until after the term next after such default, he cannot have such judgment until he has given thirty days' notice to the defendant, *Slack* v. *Reeder*, 1 *Vr.* 348.

(*c*) In actions upon contracts, the affidavit to a joint plea or demurrer made by one or more of several defendants, is a substantial compliance with the statute, and it cannot be treated as a nullity, *Mattix* ads. *Steelman*, 6 *Vr.* 467.

(*d*) In a justices court if a plea of a former action pending is not verified by affidavit, there must be offered other satisfactory proof of the truth of the plea, *Hixon* v. *Schooley*, 2 *Dutch.* 461, 462. A plea in abatement of another action pending, for the same cause, in another state, must be verified by an affidavit, or accompanied by a record of the proceedings in such action, under the seal of the court, and properly authenticated under the act of Congress; otherwise the plea may be treated as a nullity, or taken advantage of either by general or special demurrer, *Trenton Bank* v. *Wallace*, 4 *Hal.* 83.

(*e*) Our statute to facilitate pleadings was not intended to authorize or permit the defendant to give notice of special matter when the general issue is the apt and only plea; but to enable him, instead of using a special plea, to introduce,

Defendant may plead several pleas.

R. S. 951, § 1.

118. The plaintiff in replevin, and the defendant in every other action, may plead, in any court of record, with leave of the court, as many several matters as he shall think necessary for his defence; but if on demurrer any such matter be adjudged to be insufficient, or if a verdict be found on any issue in such action for the plaintiff, costs shall thereupon be awarded by the court.(*a*)

Where defendant pleads general issue with notice of special matter, plaintiff to give notice of special matter in avoidance, &c.

P. L. 1855, p. 288, § 36.

119. Where the defendant pleads the general issue, and gives notice with it of special matter which he intends to give in evidence in bar of the action, the plaintiff shall, within thirty days after filing such plea, or within such further time as he may be granted by the court or a judge, file a written notice to the defendant of any special matter which he intends to give in evidence in denial or avoidance of such special matter so given notice of by the defendant, and which it would have been necessary to reply specially had the defendant's defence been specially pleaded, or else be precluded from giving the same in evidence; and such notice, both of plaintiff and defendant, shall be copied as a part of the circuit record, and recorded with the pleadings.

Plaintiff may reply double.

P. L. 1857, p. 296, § 2.

120. The plaintiff in any action may, by leave of the court, or a judge, plead in answer to the plea or subsequent pleading of the defendant as many several matters as he shall think necessary to sustain his action; *provided*, that the costs of any issue either in fact or law shall follow the finding or judgment upon such issue, and be adjudged to the successful party whatever may be the result of the other issue or issues.(*b*)

Actions consolidated.

R. S. 929, § 59.

121. The defendant at any time before issue joined may move the court to consolidate unnecessary actions, or to strike out superflous counts in the declaration.(*c*)

Issue joined, etc.

P. L. 1857, p. 288, § 37.

122. Whenever any pleading concludes to the country, issue shall be considered as joined thereon, unless a demurrer be filed thereto, and a *similiter*, when necessary, may be added at any time.(*d*)

Copy of writing annexed to declaration cures defect in setting it out.

P. L. 1857, p. 296, § 6.

123. If any writing, whereof a copy is annexed to the declaration, plea, or notice of set-off, or other notice, be referred to in the body of the pleading as so annexed, the said copy shall cure any defect by reason of not setting forth the same, or the insufficient setting forth of the same in the body of the declaration, plea, notice of set-off, or other notice; and in

by way of notice subjoined to the general issue, matters proper for such plea, with more simplicity and less regard to technicality and form, *Little* v. *Bolles*, 7 *Hal.* 171. Such notice should not amount to the general issue, *Ibid.* Where a defendant, together with the general issue, gives notice of special matter under the statute, the notice should contain only such matter, as if pleaded, would be a bar to the action, *Ackerman* v. *Shelp*, 3 *Hal* 125. A notice which alleges a custom in the inhabitants of a town, for all persons to do certain acts by prescription in a *que* estate, is bad, for that part of the common law relating to rights accruing by custom and prescription has not been practiced or adopted in this state, *Ibid* Nothing which would be matter of substance, in a plea, must be omitted in a notice, *Tillou* v. *Britton*, 4 *Hal.* 120. A notice may present as many independent defences as could be set up by way of special pleading. But each defence must stand by itself as much as in a plea, so that it may plainly appear where one defence ends and another begins, *Ibid.* Fraud may be given in evidence by a defendant under the general issue, without giving previous notice; or where facts are intermixed with matter of law, may be pleaded specially, or notice be given under the statute. If no notice be given, the particulars must be opened to the court at the time of the trial, that it may be seen whether they amount to fraud, *Ibid.* If previous written notice of particulars be given, it stands in the place of an opening, and the court must adjudicate on its sufficiency, *Ibid.* The particulars must be shown in a notice as fully as in an opening, *Ibid.* Nothing can be good in a notice that would not form a good plea in bar, *Miller* v. *Halsey*, 2 *Gr.* 48. Notice of special matter with plea of general issue, is no part of the record, *Stevenson* v. *Schenck*, *Pen.* *434 In a suit on a foreign judgment it is regular to plead *nil debet*, and to give notice that no summons was served on defendant in the suit in which such judgment was recovered, *Beale* v. *Berryman*, 1 *Vr.* 216. A notice to a plea, stating only the coverture of the plaintiff before, and at the time of making the note mentioned in the declaration, without showing that there had been a purchase by settlement, a receipt of the money by the husband in his life time, an assignment by him for a valuable consideration, a release of the debt, or any other special matter to defeat the plaintiff's title by survivorship, will be overruled with costs, *Story* v. *Baird*, 2 *Gr.* 262.

(*a*) A defendant cannot plead specially and give notice of the same subject matter, but the court will put him to his election either to abide by his plea or notice, *Broeaw* v. *Marlatt*, 3 *Hal.* 89. *State Bank* v. *Chetwood*, 3 *Hal.* 1. *Camp* v. *Allen*, 7 *Hal.* 1. The pleader ought to state that the additional pleas are filed "by leave of the court," although such leave is never, in fact, asked, *Copperthwait* v. *Dummer*, 3 *Harr.* 258, 260. It is not necessary to add, "according to the form of the statute in such case made and provided," *Conover* v. *Tindall*, *Spen.* 513; case affirmed, 1 *Zab.* 651. To an information in the nature of a quo warranto, the defendant can plead but one plea, *State* v. *Roe*. 2 *Dutch.* 215. Where upon a general and special plea pleaded, and issue joined on both, a verdict is found generally for the plaintiff, and the special plea is such that if it were true a verdict ought not to be found for the plaintiff, the omission to find upon the special issue is matter of form only, *Browning* v. *Skillman*, 4 *Zab.* 352. In an action of trespass *q. c. f.*, the defendants pleaded (1) not guilty, and (2) *lib. ten.* with a justification, the jury found the defendants guilty under the first plea, and not guilty under the second. *Held*, that the findings were inconsistent; that no judgment could be rendered thereon, and a new trial was awarded, *Turner* v *Beatty*, 4 *Zab.* 644. See *Supra*, p. 544, (*c*).

(*b*) The act does not authorize a defendant to rejoin several matters to the replication, *Van Voorst* v. *Morris Canal Co.*, *Spen.* 167, 169, *Hornblower*, *C. J.*

(*c*) The court will order a consolidation of several actions of ejectment where there is the same question and defence involved in all of them, *Den* v. *Kimble*, 4 *Hal.* 335. The court will not consolidate two actions brought against the same person, by the same plaintiffs, upon promissory notes drawn at different dates and payable at different times, where it does not appear that the defence is the same in both, *Worley* ads. *Glentworth*, 5 *Hal.* 241. Two several writs of *scire facias* to revive two several executions by the same plaintiff against the same defendant, cannot be consolidated, *Mickle* v. *Brewer*, 3 *Hal.* 85. Form of rule, *Den* v. *Kimble*, 4 *Hal.* 335, 338. The court will not relieve a party from the consequences of a rule to consolidate, although he denies that the rule was entered by his authority; he must seek redress, if any, from his attorney, *Den*, *Hendrickson* v. *Hendrickson*, 3 *Gr* 102.

(*d*) In point of fact there is no issue joined without a *similiter*—though the want of a *similiter* is amendable after verdict, *Dickerson* v. *Stoll*, 4 *Zab* 550. The addition of "&c" after a tender of issue, will not be taken to mean "and the plaintiff," or defendant "doth likewise." At most its office in pleading is to supply matter that ought to be expressed in the pleading of which it is a part, *Ibid.*

all cases where any copy of a writing signed by a party to the same shall be so annexed and referred to, the same shall be recorded with the pleadings, and form part of the record.(*a*)

Pleading in libel and slander.

P. L. 1855, p. 288, § 26.

124. In actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient.(*b*)

Breaches of condition to be assigned.

Ib. § 28.

125. In actions upon bonds with a condition the plaintiff shall state the condition and assign breaches thereof in his declaration; and no evidence shall be given of any breach not so assigned.(*c*)

Performance of conditions precedent.

Ib. § 25.

126. The plaintiff or defendant in any action may aver performance of conditions precedent generally; and the opposite party shall not deny such averment generally, but shall specify in his pleading the condition precedent, the performance of which he intends to contest.(*d*)

Express color, &c.

Ib. § 29.

127. Express color and special traverses shall not be necessary in any pleading.(*e*)

Pleading, etc.

Ib. § 30.

128. A right by virtue of a private way may be pleaded generally in the same manner as in pleading a public way.

Defect in or partial failure of consideration, recoupment.

129. In actions on contracts not under seal the defendant may set up as a defence in abatement of the damages to be recovered by the plaintiff, a defect in, or partial failure of, the consideration of the contract sued on, and may also recoup any damages which he may have sustained by reason of the non-performance or defective performance of any part of the same contract by the plaintiff; *provided*, that a notice of the particulars of such defence be annexed to the plea and filed therewith.(*g*)

Usury or illegality under a foreign statute to be pleaded.

130. In actions on contracts made in another state it shall not be lawful for a defendant to set up as a defence usury or illegality in the consideration under the provisions of any statute of such state, unless the defendant shall plead such statute specially and annex to such plea a note of the time when the same was passed.

Pleas puis darrein continuance.

131. Pleas *puis darrein continuance* shall be pleadable only by permission of the court or a judge; and the court or a judge, in allowing any such plea, may direct that the pleading thereof shall not be a waiver of former pleas.(*h*)

Pleading defective, &c., may be struck out.

P. L. 1855, p. 288, § 24.

Amended.

P. L 1857, p. 296, § 1.

Amended.

132. The court or a judge in vacation shall have power on four days' notice, to strike out any pleading which is irregular or defective, or is so framed as to prejudice, embarrass or delay a fair trial of the action, and the order striking out such pleading shall be entered on the record, if required by the party against whom the same is made, and error may be assigned thereon.

Frivolous plea or demurrer or sham plea struck out.

133. Any frivolous plea or demurrer, or sham plea, may be struck out by the court or by a judge thereof, in term time or vacation; and upon an application to strike any plea as a sham plea, the court or judge may by an order direct the taking of testimony, to be read on the hearing of a motion.(*k*)

(*a*) Although a copy of the bond, on which the suit is brought, is annexed to the declaration, the court cannot take notice of it, because in the body of the pleading it is not referred to as so annexed, *Harrison* v. *Vreeland*, 9 *Vr.* 366. If the copy of a note annexed to the declaration be erroneous, it may be corrected, *Tillou* v. *Hutchinson*, 3 *Gr.* 178.

(*b*) The pleader may aver that the words set forth were used in any defamatory sense he may see fit to attribute to them, it being left to the jury to say whether they were used in such sense, *Hand* v. *Winton*, 9 *Vr.* 122 In an action for slander an inuendo cannot be used to enlarge or extend the meaning of the words spoken; it can only explain them, by connecting them with the inducement or *colloquium* previously averred, *Joralemon* v. *Pomeroy*, 2 *Zab.* 271. The slander must appear substantially from the *colloquium* or inducement and the words alleged, and, unless it can be collected from them, it cannot be created by an allegation in the inuendo; it must appear by the natural meaning of the words in the conversation and circumstances in which their use is alleged, *Ibid.* The plaintiff must so state his complaint, that supposing all the allegations to be true, it will appear from the declaration that he has been charged with a crime, *Cole* v. *Grant*, 3 *Harr.* 327, 330, *Elmer, J.*

(*c*) This section, it seems, applies to official bonds, as that of a constable, *Jersey City* v. *Chase*, 1 *Vr.* 233, 234. See *Ante*, p. 742, (*e*).

(*d*) A general averment of performance by the plaintiff, is sufficient, *Vreeland* v. *Beekman*, 7 *Vr.* 13. See also, *Ridgway* v. *Forsyth*, 2 *Hal.* 98. *Rice* v. *Porter*, 1 *Harr.* 440. *Patten* v. *Heustis*, 2 *Dutch.* 293. Where the performance of a condition precedent is alleged in the declaration, the defendant instead of pleading the general issue, may deny the alleged performance, and put himself on the country; but where the condition and its performance are not alleged in the declaration, the defendant may set up non-compliance with the condition, and conclude with a verification, *Dewees* v. *Manhattan Ins. Co.*, 5 *Vr.* 244.

(*e*) The use of a special traverse approved in this instance, *McWilliams* v. *King*, 3 *Vr.* 21.

(*g*) There can be no recoupment in a suit on a sealed instrument, *Price* v. *Reynolds*, 10 *Vr.* 171.

(*h*) Without such direction, it is a waiver of all former pleas. *Den, Price* v. *Sanderson*, 3 *Harr.* 426.

(*k*) The proper mode of proceeding in case of a bad plea is by motion to set it aside, *Baracliff* v. *Griscom*, *Coxe* 165. *Dunlap* v. *Kinney*, *Ibid. note.* *Query* Whether, when by different counts in a declaration money is alleged to be due to the plaintiff in different capacities, one may be stricken out, *Dickinson* v. *Brick*, *Pen.* *694, *696, *Pennington, J.* Plea

134. A notice of set-off shall, with respect to the rights and liabilities of the parties to the suit, be considered as a cross action brought by the defendant; the plaintiff may at the trial make any defence to the subject matter of the set-off, without any counter notice which he would be entitled to make under the general issue if the defendant had brought an action for the same; but any defence which in an action would be required to be specially pleaded, shall not be available to the plaintiff in answer to such set-off, unless he shall file a notice of such special matter, as a pleading in the cause.

Set-off considered as a cross action.

What defences thereto shall not be made without notice.

VIII. Amendment and variance.

135. Any pleading may be amended by the party, of course, without application to the court, without costs, and without prejudice to the proceedings already had, at any time before a pleading in answer thereto has been filed; and in such case a copy of the amended pleading shall be served on the adverse party within five days after filing the same, who shall plead thereto in thirty days after such service.

Pleadings may be amended of course.

P. L. 1855, p. 288, § 45.

136. No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence upon the merits; whenever it shall be alleged that a party has been so misled, that fact shall be established to the satisfaction of the court trying the cause, and thereupon the court may order the pleading to be amended upon such terms as shall be just.(*a*)

Variance between allegation and proof when material.

Ib. § 43.

137. When the variance is not established to be material, as provided in the last section, the court may order an immediate amendment of the pleading, without costs; but where the allegation of the cause of action, or defence, to which the proof is directed, is untrue, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof.

When variance is not material.

Ib. § 44.

138. In order to prevent the failure of justice by reason of mistakes and objections of form, it shall be lawful for the court, or any judge thereof, at all times, to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made.(*b*)

Court may amend defects in pleadings.

Ib. § 46.

All amendments necessary to determine real controversy shall be made.

and notice of payment of a note payable without defalcation, &c., after it was due, were stricken out, *Coryell* v. *Croxall*, 2 *South.* *764. In case a frivolous plea or demurrer is filed, the proper practice is to move to strike it out, and for the judgment to which the party would be entitled for want of it; and not, it seems, without such motion, to move for judgment for want of it, *Allen* v. *Wheeler*, 1 *Zab.* 93. But they must clearly appear to be frivolous, *Hogencamp* v *Ackerman*, 4 *Zab.* 133. The motion to strike out a plea may be made after a demurrer to it, provided the motion be made at the first opportunity, *Ibid.* A frivolous plea will be stricken out although the declaration be insufficient. The rule upon demurrer, that judgment shall be rendered against the party whose pleadings are first defective in substance, does not prevail on motion to strike out pleas, *Ibid.* This court will order superfluous counts in a declaration to be stricken out. *Hill* v. *Craig*, 2 *Gr.* 577. A demurrer plainly frivolous will be struck out on motion, and the plaintiff allowed to enter judgment for want of a plea. *Allen* v. *Wheeler*, 1 *Zab* 93. The motion to strike out a frivolous demurrer may be made after joinder in demurrer; *semble*, even after it is set down for argument, *Ibid.* Courts of justice have always exercised the power of preventing pleadings from being used for the evident purpose of chicanery and delay, *Ibid.* It has been the immemorial practice of courts, to order frivolous counts and false pleas to be struck from the record, *North Brunswick* v. *Booracm*, 2 *Hal.* 160. It is a general principle, that if matter set up in bar is obviously and grossly insufficient, idle and frivolous, the court in its discretion may strike it out, without putting the adverse party to the inconvenience of a demurrer, *Coxe* v. *Higbee*, 6 *Hal.* 395. A motion to strike out notices subjoined to the general issue, is not too late, though the cause has been carried to trial at the circuit and not tried, *Little* v. *Bolles*, 7 *Hal.* 171. See *State Bank* v. *Chetwood*, 3 *Hal.* 1. *Tillou* v. *Britton*, 4 *Hal.* 120. If the plaintiff declares upon a bond, and alleges it to have been "assigned to him," by the obligee, without saying how assigned, a plea that the assignment is not the deed of the assignor, will, on motion, be stricken out, as being no answer to any part of the declaration, *Richards* v. *Morris Canal Co.*, 3 *Harr.* 250. A plea which ought to conclude to the country, but which concludes with a verification, will be stricken out, on motion, *Copperthwait* v. *Dummer*, 3 *Harr.* 258. A plea alleging that a party insured "caused the said insurance to be effected at a lower premium than ought to have been," was struck out, because it did not aver that the plaintiff obtained the insurance at such lower premium by his false or fraudulent representations, *Dewees* v. *Manhattan Ins Co.*, 5 *Vr.* 244, 251. A plea if argumentative, is bad only in form, and cannot be taken advantage of by demurrer. If it may be replied to under the statute, it should not be stricken out. *Hawk* v. *Segraves*, 5 *Vr.* 355. But see *State* v. *Covenhoven*, 1 *Hal.* 396, 403. After a case had been tried on grounds not raised in the replication, and the verdict set aside, the plea being good, the replication was orderered stricken out, *Shuff* v. *Stillwell*, 6 *Hal.* 282, 284. An argumentative plea will be stricken out on motion, see *Riggs* v. *Quick*, 1 *Harr.* 160. A justice of the supreme court has power to strike out the general issue accompanied by the statutory affidavit, on the ground that it is a sham plea, *Coykendall* v. *Robinson*, 10 *Vr.* 98.

(*a*) A variance between the pleading and proof is immaterial, unless the party is misled and prejudiced by it. *Hallock* v. *Commercial Ins. Co.*, 2 *Dutch.* 268. *Ashmore* v. *Evans*, 3 *Stock.* 151. If the variance between a particular and the evidence offered under it, is such as would naturally mislead the party, the evidence ought to be rejected; otherwise the party objecting ought to satisfy the court by affidavit, that he has been misled by the particular, *Bunting* ads. *Allen*, 3 *Harr.* 299. *Stothoff* v. *Dunham*, 4 *Harr.* 181.

(*b*) The power to amend pleadings extends to the introduction of matters which the parties hoped and intended to try in the cause, and is not limited to matters within the issue upon the record, *The Mayor of Hoboken* v. *Gear*, 3 *Dutch.* 265. The effect of the statutory provisions authorizing amendments is, that every error in form, no matter how radical, can be corrected at any stage of the suit, in all civil

[For amendments with respect to parties, see *Supra*, *Sec.* 34 to 37; see also Title AMENDMENT].

IX. Demurrer.

Special demurrers abolished.

P. L. 1855, p. 288, § 23.

139. No pleading shall be deemed insufficient for any defect which could heretofore be objected to only by special demurrer; and where issue is joined on a demurrer, the court shall give judgment according as the very right of the cause and matter in law shall appear, without regarding any imperfection, omission, defect in, or lack of form; and no judgment shall be arrested, stayed, or reversed, for any such imperfection, omission, defect in, or lack of form.(*a*)

Joinder in demurrer when filed.

R. S. 929, § 62.

140. If the plaintiff or defendant shall not join in demurrer, in thirty days after the filing thereof, such plaintiff shall be *nonprossed*, and such defendant shall have judgment awarded against him.

Issue of law first determined.

Ib. § 64.

141. Where there are several issues in law and in fact, the issue in law shall be first determined before the issue in fact shall be tried.

Notice of argument.

142. Either party may give notice of the argument of a demurrer, which notice shall be served at least ten days before the time for hearing.

Argument of demurrer before judge.

Revision.

143. In actions in the circuit court, the demurrer may be brought on for argument before the justice of the supreme court, assigned to hold such circuit, either in term time or vacation.

X. Judgment by default and assessment of damages.

Judgment in default of a plea entered in term or vacation.

P. L. 1851, p. 317, § 2.

144. The plaintiff, in any action of law, when the defendant shall have omitted to file a plea or demurrer to the declaration, or any subsequent pleading within the time required by law, may enter as of course, either in term or vacation, in the minutes of the court, such rule for judgment by default, either interlocutory or final, as he would by law have been

causes, whenever such correction becomes necessary to enable the parties to try the matters which they contemplated to try, or to sustain the decision resulting from such trial, *Price* v. *New Jersey R. R. Co.*, 2 *Vr.* 229. If an objection was technically valid, the plaintiff would have been permitted to amend his declaration by adding a special count upon the written agreement; and what the court below might have done to prevent the failure of justice, this court will, under the statute, consider as done—the case having been tried on both sides with special reference to the agreement, *Willis* v. *Fernald*, 4 *Vr.* 206. Amendments are now entirely in the sound discretion of the court, and will be allowed whenever the advancement of justice requires it. Each case must depend upon its own particular circumstances, *Ten Eyck* v *Delaware and Raritan Canal Co.*, 4 *Harr.* 5. That a writ of inquiry was executed after its return day is a nullity by the statute, but a want of such writ is aided on error, *Young* v. *D. L. and W. R. R. Co.*, 9 *Vr.* 502. A motion for amendment may be heard at any time, and at almost any stage in the cause, *Den. Hoover* v. *Franklin*, 2 *South.* *851. *Reed* v. *Barker*, 1 *Vr.* 379, *Haines, J.* The application ought to be made within a reasonable time, *Van Dyke* v. *Van Dyke*, 4 *Harr.* 1. An amendment was allowed, after an argument traversing the fact of an appearance having been entered, *Harrison* v. *Rowan*, *Pet. C. C.* 489. After the testimony was closed, *Joslin* v. *New Jersey Car Spring Co.*, 7 *Vr.* 146. After a non-suit, *Den. Hoover* v *Franklin*, 2 *South.* *850. After a trial and verdict, *Price* v. *New Jersey R. R. Co.*, 2 *Vr.* 229. After plea filed, rule of reference, award of referees and rule for judgment *nisi*, and reasons filed against the report, *Smith* v. *Minor*, *Coxe* 416. After argument of a general demurrer to several special pleas in bar and judgment for the plaintiff on that demurrer, overruling the special pleas, *Ten Eyck* v. *Delaware and Raritan Canal Co*, 4 *Harr.* 5. *Hale* v. *Lawrence*, 2 *Zab.* 72. After argument in the court of errors, *Apgar* v. *Hiler*, 4 *Zab.* 808. After verdict and judgment in supreme court and affirmance in the court of errors, *Den.* v. *Snowhill*, 1 *Gr.* 23. After the cause had been removed to the court of errors, judgment reversed, a new trial ordered, and the record remitted, *Rogers* v. *Phinney*, 1 *Gr.* 1. Amendment refused after a non-suit, where the motion to amend included a motion to set aside the non-suit, *Den. Van Arsdalen* v. *Hull*, 4 *Hal.* 390. Where judgment has passed in favor of the defendant on a plea of *nul tiel record*, this court will not allow the plaintiffs so to amend their declaration, as to make it conform to the record produced, *Gulick* v. *Loder*, 3 *Gr.* 416. It is too late to move for an amendment by the court below, two terms after the return of the writ, when the cause has been set down for argument and the plaintiff in error has been in no *laches*, *Apgar* v. *Hiler*, 4 *Zab.* 808. An amendment of an execution will not be allowed to carry the date of its issue back four terms, to a period when the plaintiff was alive, *Morgan* v. *Taylor*, 9 *Vr.* 317. If a *remittitur* is filed in the supreme court on the last day of their term, concurrent with that of the court of errors in which the judgment is given, without the knowledge of the attorney of the defendant in error, he will not be in *laches* in not applying at that term for leave to amend, *Hale* v. *Lawrence*, 2 *Zab.* 73. After the death of a party, the pleadings will not be amended to meet the exigency of the case and bring it within the act, *Dickerson* v. *Stoll*, 4 *Zab.* 550. Where an amendment is allowed by the court, at the trial, on motion to set aside the verdict, both surprise and substantial merits should be shown, *Joslin* v. *New Jersey Car Spring Co.*, 7 *Vr.* 142. When judgment on demurrer is reviewed in a court of error, the judgment given should be the same as they decide ought to have been given by the court below, that is, a judgment in the cause for the plaintiff or defendant; but the court of error, after reversing a judgment, may grant leave to amend, instead of ordering such a judgment as ought to be given, *Hale* v. *Lawrence*, 2 *Zab.* 73. The party applying to amend must pay costs. *Condit* v. *Neighbor*, 7 *Hal.* 3 0. *Den.* v. *Seagrave*, 1 *Harr.* 357. *Den.* v. *Ganoe*, 1 *Harr.* 439. *Hall* v. *Snowhill*, 2 *Gr.* 9. *Mayor of Newark* v. *Davis*, 3 *Harr.* 22. *Condit* v. *Gregory*, 1 *Zab.* 431. *Weart* v. *Hoagland*, 2 *Zab.* 521. *Lanning* v. *Shute*, 2 *South.* *778. *Rogers* v. *Phinney*, 1 *Gr.* 1. *Wood* v. *Leslie*, 6 *Vr.* 474. A plaintiff will be allowed to amend his writ and declaration, without the payment of costs, when the practice and law have been unsettled. *Williamson* v. *Updike*, 2 *Gr.* 270. *Somers* ads. *Sloan*, 3 *Harr.* 49. See *Perrine* v. *Applegate*, 1 *McCart.* 532. Where both parties are wrong each should pay his own costs. *Cox* v. *Bennet*, 1 *Gr.* 172. Where the defendant has pleaded *nul tiel record*, the plaintiff been put to two demurrers and subjected to much delay by the pleas overruled (a former amendment having been permitted), the defendant will not be permitted to amend, except upon the payment of costs, affidavit of a meritorious defence under the plea or pleas sought to be amended, election to abide by the amended pleas, a withdrawal of the plea *nul tiel record*, and a filing of the amended pleas during the present term, *Moulin* v. *Ins. Co*, 4 *Zab.* 252, *Green, C. J.* After a judgment by default the party applying to amend must give the other party time to plead, *Boudinot* v. *Lewis*, *Pen.* *512. The judgment and execution, although stayed, were ordered to stand as security for the plaintiff's claim, *Halsey* ads. *Van Wagenen*, 1 *Harr.* 351. Where the amendment is in the form of the verdict only, and not in its substance, it may be made by the court *in banc* without the *postea* being amended by the circuit judge, *Phillips* v. *Kent*, 3 *Zab.* 155. The allowance of an amendment to a declaration does not preclude the defendant from objecting to its sufficiency, *Morris Canal Co.* v. *Van Vorst*, 4 *Harr.* 9. The amendment will be considered as made whenever the objection is taken, *Den. Inskeep* v. *Lecony*, *Coxe* 111. *Coxe* v. *Field*, 1 *Gr.* 216. *Price* v. *New Jersey R. R. Co.*, 2 *Vr.* 229. *Willis* v. *Fernald*, 4 *Vr.* 207. A judge at the circuit court cannot order an amendment in the circuit record, *Den. Vanarsdalen* v. *Hull*, 4 *Hal.* 277. See *Potts* v. *Clarke*, *Spen.* 36 *Ante pp* 8–12, *notes*.

(*a*) This section relates to matters of form, and only authorizes amendments in cases which were previously the subject of examination by means of a special demurrer, *Crawford* v. *New Jersey R. R. Co.*, 4 *Dutch.* 480.

entitled to if such rule were applied for in open court, expressing in such rule the true date of the actual entry thereof; and such rule, when lawfully entered, shall have the same force and effect as if entered by order of the court, and if unlawfully entered shall be utterly void; and for the purposes of this section, any frivolous plea or demurrer, or sham plea, or plea irregularly pleaded, may be treated and regarded as if the same had not been filed.

Sham or frivolous plea or demurrer disregarded.

145. Any judge of the court, in which the action is pending, may, upon application made before the entry of a rule for judgment by default, upon affidavit made by the defendant, or his attorney in the suit, or agent in the matter in controversy, that the defendant hath a defence to said action, which such affiant believes to be just and legal, that he hath in good faith endeavored to prepare his plea, and setting forth a sufficient excuse why he has not been able so to do, or upon affidavit made by any person on behalf of the defendant, that he believes that the defendant has a real defence to said action, and has been absent from the state ever since the service of process, or upon affidavit showing that the ends of justice require that further time be given, grant, by order, under his hand, further time to plead, not exceeding thirty days; which order, if filed with the clerk before the entry of judgment by default, shall during the time therein granted stay the entry of such judgment, except upon application in open court.(*a*)

Judge may grant further time to plead.
Ib. § 3.

Affidavit required.

146. Where the declaration contains only common counts, or common counts on which a recovery is sought, in addition to any matter or thing mentioned in any special count and the plaintiff shall desire to file and serve his declaration, as is mentioned in the one hundred and fifth section of this act, he shall not take judgment at the end of the thirty days in said section mentioned, unless he shall have annexed to his declaration, and served therewith a statement of the particulars of his demand or of the amount for which judgment will be claimed.

Where declaration contains common counts.

P. L. 1857, p. 296, § 7.

Amended.

147. If judgment by default be entered for want of a plea, it shall be lawful for the court, or any judge thereof in term time or vacation, on four days' notice, upon satisfactory proof that such judgment was improvidently or fraudulently entered, or that the defendant has a real defence to the action, to make an order that such judgment be set aside or opened to let the defendant in to plead; *provided*, that if such judgment shall have been regularly obtained and without fraud, the order shall be that the defendant be permitted to plead on such terms as may be equitable, and the lien acquired by such judgment and by the execution thereon shall remain as security for the satisfaction of any judgment the plaintiff may recover in the action.(*b*)

Judgment may be set aside or opened to let in defence

P. L. 1851, p. 317, § 5.
" 1853, p. 402, § 1.

Amended.

(*a*) On judgment by default in an action upon a bond given under the act to abolish imprisonment for debt, damages will be assessed by the court, the declaration reciting the condition of the bond in which the precise amount due to the plaintiffs is set forth, *Rogers* v. *Brundred*, 1 *Harr.* 159. But not on judgment by default on a bond for the prison limits. *Beatty* v. *Ivins*, *Pen.* *628. On a constable's bond, *Jersey City* v. *Chase*, 1 *Vr.* 233. Where neither party applies for a writ of inquiry, *Rogers* v. *Brundred*, 1 *Harr.* 159. The damages may be assessed before a justice at circuit, in cases of difficulty. *Jersey City* v. *Chase*, 1 *Vr.* 233. But such order is discretionary in the court, and will not be made unless special grounds are shown, as some legal intricacy, or objection to the sheriff, *White* v. *Hunt*, 1 *Hal.* 330, *Smith*, *J.*; dissenting Not on an administration bond, *Williamson* v. *Snook*, 5 *Hal.* 65. Nor an executors' bond, *Ordinary* v. *Barcalow*, 7 *Vr.* 15, see *Infra*, § 150.

(*b*) A judgment obtained by fraud or surprise will be set aside. *Binsse* v. *Barker*, 1 *Gr.* 263. *Alderman* v. *Diament*, 1 *Hal.* 197, 199, *note*. An affidavit of the defendant showing that he had expected to compromise the suit before the entry of the judgment, is sufficient. *Crane* v. *Condit*, 1 *Harr.* 349. So, where the defendant, after filing a plea and subpœnaing his witnesses, was prevented from attending the trial, by his confinement for contempt of another court, *Trua x* v. *Roberts*, 1 *South.* *288. (*b*). So, where by accident, defendant was prevented from retaining an attorney to defend, *Abrams* v. *Wood*, 1 *South.* *30, (*a*). A judgment may be opened, where rendered against two joint debtors, on the confession of one, the other having had no opportunity to plead an insolvent discharge. *Mills* v. *Sleght*, 2 *South.* *565. So, where the grantor of a defendant in ejectment (who intended to defend) was prevented by the illness and death of a daughter, *Den*, *Riker* v. *Ball*, *Pen.* *974. A judgment by default cannot be set aside because the assessment of damages was wrong, *Creamer* v. *Dikeman*, 10 *Vr.* 195. Nor on the ground of surprise, where no merits are shown, *Hendrickson* ads. *Herbert*, 9 *Vr.* 296. 299. Judgment opened after the lapse of a year, on affidavit of defendant, that he believes the endorsement of his name on the note, upon which judgment was entered, to be a forgery; that his information inducing such belief, was obtained since the last term of court; and that he has been refused an inspection of said endorsement by plaintiff's attorney. *Bell* ads. *Kelly*, 2 *Harr.* 270. If founded on merits, a motion to open a judgment may be made at any time while the cause is within the power and under the control of the court, provided the party embraces the first opportunity of presenting his case; and provided the plaintiff's rights are not thereby endangered. *Ibid.* After execution issues the court will open a judgment and let in a real defence *Den. Lee* v. *Evaul*, *Coxe* 201. If a trial has not been lost, regular judgments by default are set aside in all cases, on affidavit of defence, *Ibid.* This court will not open a judgment, at the instance of a plaintiff in attachment against the same defendant. He is not a creditor in legal contemplation, but may or may not turn out to be such. None but a judgment creditor, or one whose claim is judicially established, is entitled to the aid of the court in opening a judgment or ordering an issue on the fairness of it, between other parties. Even a judgment creditor must have tried all other legal means of obtaining satisfaction of his judgment, and failed therein, before he can ask of the court their aid in such a proceeding, *Melville* v. *Brown*, 1 *Harr.* 363. This court will not set aside a judgment rendered at a former term, after solemn argument, on a legal objection, which might have been raised against said judgment on the former argument, but was omitted by counsel, *Fox* v. *Lambson*, 3 *Hal.* 368. If a defendant suffers a term to elapse after a judgment regularly obtained against him, the court will not interfere summarily to set aside the judgment, unless such delay is very satisfactorily accounted for, *Cooper* ads. *Galbraith*, 4 *Zab.* 219.

Judgment improperly entered on the ground that plea is frivolous or a sham plea vacated.

148. Where a judgment shall be entered as for want of a plea, on the ground that the plea or demurrer filed by the defendant is frivolous, or that the plea is a sham plea, application may be made to any judge of the court in which such judgment shall be entered for the vacation of such judgment; and if it shall appear that the judgment was illegally or improperly entered, it shall be lawful for such judge in term time or vacation, to make an order that the same be vacated and set aside; and upon the making and filing of such order, such judgment shall become utterly void and of no effect, and the plaintiff shall be compelled to pay the costs of such application.

Assessment of damages on judgment by default.
R. S 929, § 71.
P. L. 1851, p. 317, § 4.
" 1871, p. 123.

149. Where interlocutory judgment in actions of assumpsit shall be entered by default against the defendant, the plaintiff may have his damages assessed by the court, or when the court is not actually in session by any judge thereof, or by the clerk, unless a rule shall be entered for a writ of inquiry or assessment of damages in open court.(*a*).

Damages in actions ex contractu assessed.

150. In all actions *ex contractu*, where the damages or sum recoverable are a mere matter of calculation, or can readily be ascertained, the same may be assessed or ascertained, on judgment by default, by the court or clerk as in actions of assumpsit.

Plaintiff may enter rule for writ of inquiry, of course.

But defendant shall not, except on affidavit.

P. L. 1858, p. 106. Amended.

151. The plaintiff may enter a rule for a writ of inquiry in term time or vacation as of course; but the defendant shall not enter a rule that the damages shall be assessed by a writ of inquiry in cases where the plaintiff is entitled to have his damages assessed by the court, or a judge, or the clerk thereof, unless he shall enter a rule therefor before the expiration of the time for pleading, and shall, at the time of entering such rule, file with the clerk of the court an affidavit, that the amount claimed to be due to the plaintiff in the bill of particulars, or some part thereof, is not due from the defendant to the plaintiff, specifying what amount, if anything is due to the plaintiff, and that the rule for the assessment of damages by a writ of inquiry is not intended for the purpose of delay, but only to have the amount due to the plaintiff correctly ascertained; which affidavit shall be made by the defendant, or in his absence by his attorney or agent in such action; and in case such affidavit shall specify any sum to be due to the plaintiff, the plaintiff shall be at liberty forthwith to enter final judgment therefor, which shall operate as a waiver of the residue of his claim, as set forth in his bill of particulars; *provided, nevertheless*, that the court, or a judge thereof, may, upon application by the defendant before final judgment is entered, order that the damages be assessed in open court.

Writ of inquiry.
R. S. 929, § 72.

152. The same notice shall be given of executing writs of inquiry and of countermand as is required for the trial of issues in fact.

Costs of not proceeding with.
Ib. § 73.

153. If the plaintiff shall not proceed to execute the writ of inquiry according to notice, or countermand such notice in due time, the defendant shall be entitled to costs.

Final judgment where to be entered.

154. Where the damages are assessed by a writ of inquiry, no rule for final judgment shall be entered, except by order of the court, or a judge thereof, on two days' notice to the defendant or his attorney; but where the damages are assessed by the court, or a judge, or the clerk, a rule for final judgment may be entered upon filing such assessment, as of course, which judgment shall be signed and take effect as of the day when such rule is actually entered.

XI. Discovery before trial.

1. UPON INTERROGATORIES.

Written interrogatories may be served on opposite party.

P. L. 1855, p. 668, § 5. Amended.

155. After an action at law is at issue, either party may serve upon the opposite party written interrogatories upon any matter material to the issue, and the same shall be answered in writing, under oath, and the answer served upon the party proposing the interrogatories, in fifteen days after their service, and the answer shall be strictly responsive to the

Miller v. *Alexander*, *Coxe* 400. After judgment, execution, and money paid over to the plaintiff thereon, the court will hardly interfere to set aside the judgment. *Query*. Could the defendant have any remedy for the return of his money, if the court did not set aside the judgment in such case, *Ibid.* The court requires an affidavit that there is a real defence, detailing the circumstances, before it will open a regular judgment by default, *Miller* ads. *Alexander*, *Coxe* 400. The lien of the judgment is retained. *Richards* v. *Morris Canal Co.*, *Spen.* 36. *Crane* ads. *Condit*, 1 *Harr.* 349 *Halsey* ads *Van Wagonen*, 1 *Harr.* 350.

(*a*) Only applies to actions of *assumpsit*, *Peacock* v. *Haney*, 8 *Vr.* 179. The court may assess the damages in *assumpsit*, debt and covenant, independently of the statute. *Ibid.*

interrogatories proposed; and the court may, by an attachment for contempt or otherwise, compel an answer thereto; and such answer shall be evidence in the action, if offered as such by the parties proposing the interrogatories, but not otherwise; *provided, however*, that the court, or a judge out of court, may, upon good cause shown, and upon two days' notice to the other party, order any of said interrogatories to be stricken out, or amended, or new ones to be added, or give further time for answering the same, or order the answer to be amended.(*a*)

2. ADMISSION OF EXECUTION OF PAPERS.

Execution of writings.

156. Either party may, by written notice, served at least fifteen days before the trial, call on the other party to admit, in writing, the execution of any document, saving all just exceptions; and in case of refusal or neglect to admit for ten days after such service, the costs of proving the document shall be paid by the party so refusing or neglecting, whatever the result of the cause may be, unless at the trial the judge shall certify that the refusal or neglect to admit was reasonable; and an affidavit of the attorney in the cause of the due signature of any admissions made in pursuance of such notice, and annexed to the affidavit, shall be in all cases sufficient evidence of such admission.

P. L. 1855, p. 288, § 38.

3. INSPECTION OF BOOKS, ETC.

Court may order either party to give copies of books, papers, &c.

157. The court, other than the court for the trial of small causes, before which a civil action or proceeding, whether of a legal or equitable nature, is pending, or a judge thereof, in term time or vacation, may, in their discretion, and upon five days' notice of the application, order either party to give to the other, within a specified time, and under such terms as may be imposed, an inspection and copy, or permission to take a copy, of any books, papers, or documents in his possession or under his control, containing evidence relating to the merits of the action or proceeding, or of the defence thereto, and if compliance with the order be refused, such books, papers, or documents shall not be given in evidence in such action or proceeding, and the court may punish the party so refusing as for a contempt of the court.

P. L. 1855, p. 668, § 6.

Application to be by petition.

158. Any application, in pursuance of the next preceding section, shall be by petition, stating the grounds of such application, and verified by the oath of the party, or of his attorney, solicitor, or agent in the matter; and the affidavit of the opposite party, or of his attorney, solicitor, or agent in the matter, may be read in opposition to such application, without notice of the taking of such affidavit, or either party, or any other witness, may, on such application, be examined in relation thereto.(*b*)

Ib. § 7.

4. EXAMINATION OF ADVERSE PARTY BEFORE TRIAL.

Party to an action examined as a witness before trial at the instance of an adverse party.

159. Any party to an action in the supreme or circuit court may be examined as a witness at the instance of any adverse party or parties, or of any one of the several adverse parties, after issue joined in said action and before the trial of said action; said examination may be before any justice of the supreme court, or before any supreme court commissioner, on a previous notice to the party to be examined of at least five days, unless a shorter time is for good cause shown, prescribed by a justice of the supreme court; the party shall only be examined upon an order made by a justice of the supreme court to whom application therefor is made,

P. L. 1869, p. 1229, § 1.

(*a*) Where interrogatories served by a party are not answered within the time required by law, the party serving them is not bound to receive the answer; but if he receives the answer without objection after the time has expired, and permits the case to proceed to trial, he cannot afterwards object on that ground, *Voorhees* v. *Jones*, 5 *Dutch.* 271. If a party fails to answer interrogatories served on him within the time required by law, it does not prevent him from being a witness in his own behalf, *Ibid.*

(*b*) On an application for an order granting permission to take a copy of books, papers, or documents, in possession of the opposite party, under the sixth and seventh sections of the act concerning evidence, approved April 5, 1855, the petition should state that the book, paper, or document, of which a discovery is sought, contains evidence relating to the merits of the action or proceeding, or of the defence, and should also state some facts or circumstances from which the court can judge of the materiality of the evidence and the propriety of ordering a discovery. *Condict* v. *Wood*, 1 *Dutch.* 319. *Anonymous. Pen.* *513. Costs will be allowed the applicant, provided he had, before making such application, requested copies of the documents, and was refused, *Ibid.* At common law, and independent of recent statutes, courts of law had the power to order inspection of papers, which, by the pleadings or by being used in evidence, came within the control of the court. *Hilyard* v *Harrison*, 8 *Vr.* 170. See *Bell* ads *Kelly*, 2 *Harr.* 270. But the court, in exercising this control over papers, will merely grant inspection and examination by the party and his witnesses, either in open court, or before an officer of the court, or in the presence of the party producing them, or his attorney, and will not take them from the latter and deliver them into the possession of the other side, *Ibid.*

and the granting of said order shall be discretionary with the justice to whom such application is made; the service of said order shall be sufficient summons and notice to the party or parties named therein to attend before said justice or supreme court commissioner therein named.(*a*)

Party residing in this state not compellable to attend in another county. Ib. § 2.

160. No party to be examined who shall reside in the state of New Jersey, shall be compelled to attend in any other county than that where he resides, but any party residing out of this state may be compelled to attend in any county named in the order of the said justice of the supreme court; and a non-resident plaintiff may be served out of this state, with personal notice to attend such examination, and if he does not appear, in compliance with said notice, all proceedings shall be stayed on his part until his appearance, of which appearance he shall give the same notice to the defendant as required by the next preceding section of this act.

Manner in which attendance may be compelled. Ib. § 3.

161. Any party to be examined, named in said order of said justice of the supreme court, may be compelled to attend before the justice of the supreme court or supreme court commissioner, named in said order, in the same manner as any witness may be compelled to attend upon the trial of a civil action where he has been duly subpœnaed to attend.

Manner of conducting examination. Ib. § 4.

162. The said examination of said party or parties shall be taken by said justice or commissioner orally, the same as on the trial of a cause, with the right of examination and cross-examination; and said examination shall be reduced to writing, and shall be signed by the party or parties so examined as aforesaid, and certified by said justice or commissioner, and filed with the clerk of the county where the cause is to be tried; and said examination may be read by either party at the trial; where the examination is made before a justice of the supreme court, he may authorize the same to be reduced to writing, by any clerk of any circuit court or by any attorney or counsellor of said court; any question may be objected to, and the answer taken subject to the objection, or if the party refuse to answer, any justice of the supreme court shall compel the party to answer the same, if the party examining is legally entitled to have the same answered.

Examination not conclusive on opposite party.

163. The examination of the party thus taken, shall not be conclusive on the opposite party, but may be rebutted at the trial by adverse testimony.

Penalty for refusing to attend and testify. Ib. § 6.

164. If a party refuse to attend and testify as herein above provided, he may be punished as for a contempt, and all or any of the pleadings in the case upon his part, stricken out by order of any justice of the supreme court, in his discretion.

Fees. Ib. § 7.

165. The party examined shall receive the same fees as if subpœnaed and attending as a witness on the trial of a cause, and the justice or commissioner taking the testimony shall receive the same fees for his services as are now allowed by law to a master in chancery for taking testimony in a cause.

How paid. Ib. § 8.

166. The party examining shall in the first instance pay the witness fees and all the costs and expenses of said examination, unless a justice of the supreme court otherwise order, and shall tax therefor in his bill of costs only such sum as a justice of the supreme court shall certify to be reasonable and proper.

XII. Trial.

1. WHEN CAUSE TO BE TRIED. NOTICE OF TRIAL.

When cause tried. R. S. 929, § 65. Amended.

167. Every cause shall be tried at the next term after issue joined.

For what day noticed.

168. Notice of trial may be given for a day, in term, if the cause be not at issue in season to be noticed for the first day of the term.

Plaintiff to be non-suit for neglect to bring cause to trial. P. L. 1865, p. 832, § 2.

169. If the plaintiff, in any action at law, shall neglect to bring his cause to trial at any term of the court, after the cause is at issue, and after sufficient time has elapsed to enable him to give the requisite notice of trial for the first day of the term, judgment shall be awarded for the defendant as in case of a non-suit with costs, unless the court, upon just and reasonable terms, allow further time.(*b*)

(*a*) Where a corporation is a party to the record, neither the president, secretary, the individual directors nor stockholders are parties to the action, and cannot be examined after issue joined, and before the trial of said action, under section one hundred and fifty-nine of the practice act, *Apperson* v. *The Mutual Ins. Co.*, 9 *Vr.* 272.

(*b*) Advantage must be taken of an adversary's first failure, *Bacon* ads. *Den, Shepherd*, 3 *Hal.* 84. A commission to take depositions, is not a suspension of a cause, so as to prevent a notice of trial thereof, before the return of the commission, or without leave of the court, *Stokes* v. *Garr*, 2 *Harr.* 451. The plaintiff who fails to bring his cause to trial

Defendant may have trial by proviso.

R. S. 929, § 69.

170. If the plaintiff do not bring on the trial of the cause in due time after issue joined, the defendant, instead of taking judgment as in case of a non-suit, may move the court for a trial by proviso; and of such trial the defendant shall give the like notice to the plaintiff as the plaintiff would have been obliged to give to the defendant; and if the defendant do not proceed to trial according to notice, or countermand the same in due time, the plaintiff shall be entitled to costs.(*a*)

Notice of trial by proviso.

Of notice of trial. Ib. § 66.

171. Notice of trial shall be in writing, and given to the defendant, if he appear in person, or to his attorney, or to the sheriff or keeper of the jail if the defendant be in custody or in prison, at least twenty days before such intended trial; and it shall be the duty of the said sheriff or jailor to deliver without delay, the said notice to the defendant therein named, and in default thereof, the said sheriff or jailor shall be liable to the said defendant for all damages occasioned thereby.(*b*)

[For notice of trial in case a struck jury is ordered, see Title Juries, § 15].

When cause has slept four terms.

172. When any cause shall have slept four terms after issue joined, thirty days' notice of trial shall be given; after which, if the cause shall not then be tried, the usual notice shall be sufficient, unless the same shall again sleep four terms.

Countermand. Ib. § 67.

173. Every countermand of notice of trial shall be in writing, and given at least seven days before such intended trial, and on failure thereof, costs shall be awarded in like manner as if notice of trial had not been countermanded.

Short notice. Ib. § 68.

174. Short notice of trial, when directed by the court, shall be given five days before such trial.

Notice to be filed. Ib. § 70. Amended.

175. All notices of trial shall be filed with the clerk at least six days before the term, whose duty it shall be to furnish the court, on the first day of every term, with a list of the causes to be tried and argued, in their course and order.(*c*)

2. PROCEEDINGS AT THE TRIAL.

Issues of fact may, by consent, be tried by court.

R. S. 1855, p. 288, § 80.

176. All issues in fact may, by consent of the parties, be tried by the court, or if the action be pending in the supreme court, then by a justice thereof, at the circuit court, in the proper county; and the report or determination of the court of justice upon such issue shall be entered in the minutes of the court, or annexed to the circuit record as a postea, and judgment given thereon in like manner as in case of a verdict, and either party may allege an exception, and have the same sealed, or move for a new trial, as in case of a trial by jury.(*d*)

Reference where accounts in controversy. Ib. § 81. Amended.

177. All actions in which matters of account are in controversy, may by rule of the court, be referred to some competent person or persons as a referee or referees, to state and report an account between the parties, and the amount that may be due from either party to the other, which report, when confirmed by the court, shall be final and conclusive between the parties, and judgment entered thereon, and execution issued, in the manner provided by law in cases of reference; but either party may, at the time of ordering such reference, enter in the minutes of the court his dissent therefrom, and, at the same term in which the report is filed, may demand a trial by jury, in which case the action shall be tried by jury, the costs of the reference to abide the result; and upon such trial, the report of the referee or referees shall be *prima facie* evidence of all the facts therein found and reported; and the party demanding a trial by jury

Dissent to be entered.

at any circuit court after it is at issue, is liable to a judgment against him, as in case of a non-suit; but unless the motion for such judgment is made at the term next after the first failure, there must be two days notice of the intention to make it. *Shaw* ads. *Rar. and Del. Bay R. R. Co.*, 3 *Vr.* 293. See *Lawrence* v. *Hale*, 4 *Zab.* 43. Does not apply to the action of replevin, *Broderick* ads. *Ames*, 3 *Harr.* 297. *Harwood* ads. *Smethurst*, 1 *Vr.* 230.

(*a*) Where defendant files a set-off, he may have a trial by proviso, in the event of the plaintiff's laches, *Estell* ads. *Franklin*, 5 *Dutch.* 264. See *Anonymous*, *Pet C. C.*, 1. The plaintiff may move to change the venue after defendant has obtained a rule for a trial by proviso, *Den, Lee* v. *Evaul*, *Coxe* 283.

(*b*) Proof of service of notice of trial may be made either at the circuit or at bar, *Boqua* v. *Ware*, 1 *Hal.* 151. See *McCourry* v. *Suydam*, 5 *Hal.* 245. Service on the plaintiff in replevin and at the office of his attorney, who was beyond seas. *Held*, good. *Ha wood* ads. *Smethurst*, 1 *Vr.* 230. After a lapse of several years, notice of trial was given by the plaintiff's counsel in the name of the attorney on record, to the attorney of the defendant, the latter having become, and then being the clerk of the county. After objection made at the trial, *Held*, no cause for new trial, it not appearing that the defendant had been misled or suprised by such notice *Martinis* v. *Johnston*, 1 *Zab* 239. See *Anonymous*, 1 *Harr.* 396.

(*c*) This regulation is for the convenience of the clerk alone, *Kennedy* v *Kennedy*, 3 *Harr.* 51.

(*d*) The court is substituted for the jury, and its findings on questions of fact cannot be reviewed by writ of error, *Columbia Del. Bridge Co* v. *Geisse*, 9 *Vr.* 39, 580.

Exceptions to report.

shall file his exceptions to the report in twenty days after the same shall be filed, and no other exceptions shall be considered on the trial.(a)

Report signed by majority of referees sufficient.

178. Where more than one referee is appointed by an order of reference, a report signed by a majority of the referees shall be considered as the report of the referees.

Justice at circuit may refer.

P. L. 1862, p. 58, § 1.

179. Any justice of the supreme court may refer all actions in which matters of account are in controversy, pending in said court, and coming on for trial before such justice at the circuit court, in the proper county, and also confirm the report of the referee or referees in such cases, and order judgment to be entered thereon, subject, however, to all the provisions of the preceding section; and the postea shall be framed accordingly; but no such confirmation and order shall be made in vacation, except upon two days' notice to the opposite party or his attorney, nor where either party shall have demanded a trial by jury, pursuant to the preceding section.

Postea and confirmation.

Allowance to referee.

Ib. § 2.

180. The court or justice referring such action shall make just allowance to the referee or referees for his or their services, to be paid in the manner and by the party which said court or justice shall by order direct.

Notice of filing report.

181. In all cases in which matters of account shall be referred by the court, or judge, to a referee or referees, the party moving for a confirmation of the report shall give notice in writing of the filing thereof; and the opposite party shall have the time limited in the statute to put in exceptions thereto after the receipt of such notice.

Papers in evidence.

R. S. 965, § 37.

182. Papers read in evidence, though not under seal, may be carried from the bar by the jury.(b)

Jurors witnesses.

Ib. § 36.

183. Jurors who know anything relative to the point in issue, shall, during trial, disclose the same in open court, when called as witnesses.(c)

Jury may give general verdict.

Ib. § 35.

184. No jury shall in any case be compelled to give a general verdict, so that they find a special verdict and show the truth of the fact, and require the aid of the court; but if of their own will they give a general verdict, the same shall be received.(d)

Plaintiff shall not submit to non suit after jury retired.

185. It shall not be necessary to call the plaintiff when the jury returns to the bar to deliver their verdict; and the plaintiff shall have no right to submit to a non-suit after the jury have gone from the bar to consider of their verdict.

Of bad counts.

Ib. § 38.

186. Where there are in a declaration several counts, some of which are faulty or bad, and others not, and entire damages are given, the verdict

(a) Where a reference is intended to be made of distinct actions which are pending, there must be separate rules of reference, and separate reports; or they must be first united, and then referred; or in one of them a rule of reference must be entered, with a submission of all matters in dispute between the parties. *Craig* v. *Craig*, 4 *Hal.* 198. Where there is a statutory provision for reference to one referee, the action cannot be referred to three referees, by consent of parties, *Paulison* ads. *Halsey*, 8 *Vr.* 205, 9 *Vr.* 488. The language of this section is comprehensive, giving power to refer "all actions in which matters of account are in controversy," *Gopsill* v. *Hervey*, 5 *Vr.* 435. It is the character of the plaintiff's claim, and not the issue made upon it, that is to determine whether the case is within the act. If the finding of such issue in favor of the plaintiff will involve the necessity of settling matters of account, a reference is proper, *Ibid.* When a case is taken to the circuit, and a reference there ordered, the proper place to enter a dissent is in the circuit minutes. After that the fact of the reference and the dissent, together with the findings of the referee, should be embodied in the *postea*, and it, together with the original report, returned to this court. *Halsey* v. *Paulison*, 7 *Vr.* 406. A confirmation can be moved for at bar, subject to a demand for a trial by jury at the same term in which the report is filed; or such motion can be made before the circuit justice, if no demand for a trial by jury has been made, *Ibid.* The demand for a trial by jury must be actually made of the court and not by a mere entry in the minutes, *Ibid.* The report of the referee is not to be treated as filed, until the *postea* is also filed, *Ibid.* After a reference and exceptions to the report of the referee, the issues to be tried by the jury, are those raised by the pleadings. The report of the referee is only evidence, and the exceptions merely restrict the testimony to be offered against the report, *S. C.*, 9 *Vr.* 488. Where the case is regularly noticed by the plaintiff for trial at the succeeding circuit but not moved, and he does not show sufficient reason for not proceeding with the trial before the circuit, the true practice is, to dismiss the exceptions, vacate the rule for a *venire*, confirm the report and enter a judgment *de novo*, the same as when a rule to show cause has been dismissed in an ordinary case. *Dean* v. *Susade*, 8 *Vr.* 50. The death of one of several plaintiffs in a cause referred by rule of court to referees, is not a revocation of the authority of the referees. A suggestion of such death may be entered upon the record, *Freeborn* v. *Denman*, 3 *Hal.* 116. A variance between the original rule of reference and the copy presented to the referees, the former submitting "all matters in difference in the said cause," and the latter submitting "all matters in difference between the parties in the said cause," will not vitiate the report, if it appear that the referees really went into an examination only of the matters in difference in the cause, *Westcott* v. *Somers*, 4 *Hal.* 99. A rule of reference once entered, cannot be discharged on motion of one party, without due notice to the other, *Seamans* v. *Pharo*, 1 *South.* *123. The refusal of one of the referees to act, duly substantiated, would be good ground to discharge the rule, *Ibid.* If the report of a referee is unsupported by the evidence before him, or if the referee must have contravened some rule of law in reaching his conclusion, the report should be set aside; but if it is not against the evidence in the cause, and no rule of law has been violated, it should stand, *Fitch* v. *Archibald*, 5 *Dutch* 160. The report of a referee is entitled to the same weight as the verdict of a jury upon the facts in the case, *Ibid* Where a reference is ordered by the court, with the consent of parties, the report of the referee will be controlled as the verdict of a jury would be, and set aside if unsupported by the evidence, *Excelsior Carpet Lining Co.*, ads. *Potts*, 7 *Vr.* 301; see Rules of Supreme Court, § 109. A report of referees will not be set aside because the referees report the title to the land to be in the lessors of the plaintiff, instead of in the defendant; nor because the referees report, that the lessors of the plaintiff are tenants in common of the whole premises, although the declaration contains no joint demise of the whole, but three separate demises for entire parcels of land, *Den* v *Brands*, 3 *Gr.* 465. Where no damages are found by referees, nor costs mentioned, no costs are allowed, *Anderson* v. *Exton*, 1 *South.* *173, (a). Forms of rule, report and judgment, *Craig* v. *Craig*, 4 *Hal.* 198.

(b) See *Wright* v. *Rogers*, *Pen.* *547.

(c) A juror is not allowed to give evidence to his fellow jurors without being sworn. *Anderson* v. *Barnes*, *Coxe* 203. See *Den* v *McAllister*, 2 *Hal.* 46.

(d) The court may recommend the jury to find a special verdict against the consent of either or both the parties, *Watkins* v. *Pintard*, *Coxe* 378. See *Springer* v. *Reeves*, 1 *South.* *207.

shall be good; but the defendant may apply to the court to instruct the jury to disregard such faulty or bad counts.(*a*)

Writ of inquiry in detinue.

187. If in detinue the verdict shall omit price or value, the court may at any time award a writ of inquiry to ascertain the same.

Ib. § 39.

Verdict in detinue.

188. If on an issue concerning several things in one count in detinue, no verdict be found for part of them, it shall not be error; but the plaintiff shall be barred of his title to the things omitted.

Ib. § 40.

Motions for new trial and in arrest of judgment.

189. The party against whom a verdict hath been rendered may first move for a new trial; and if it be denied, may then move in arrest of judgment; but he shall not be permitted to move for a new trial after he hath moved in arrest of judgment and failed.

R. S. 929, § 75.

Special verdict.

190. Every special verdict and demurrer to evidence shall be entered on the minutes of the court, after which either party may move the court to assign a day for argument.

Ib. § 94.

[For the mode of selecting Juries and Challenges, see Juries].

XIII. Judgment.

No inspection.

191. The inspection of judgment and process shall not be deemed necessary in any case.(*b*)

R. S. 929, § 79.

Proceedings recorded which shall be record.

192. No judgment roll shall be made up in any action; but when any civil cause, of whatever nature it be, shall be finally determined, the clerk of the court shall enter the warrants of attorney, declaration, pleadings, proceedings, and judgment in such cause, so as to make a complete record thereof in a separate book to be kept for that purpose, with a complete alphabetical index to the same; which entry shall constitute the record, and shall be signed by one of the judges of the said court, as of the day on which the judgment was entered; and the clerk for such service shall be allowed one dollar, and no more. [See Title Judgment, § 4].(*c*)

Ib. §§ 77, 78.

Signed by judge.

Fee of clerk for recording.

May be signed by judge though not in office when judgment recovered.

193. The justices of the supreme court, and the judges of the circuit courts of this state, and the judges of the court of common pleas in the several counties of this state, for the time being, shall be, and they are hereby authorized to sign all judgments, in their respective courts, that have been or may hereafter be recorded in their said courts, respectively; and such judgments, so signed by any one of the said justices or judges in office, though not in office at the time of rendering such judgments, shall be as good and effectual in law as if such judgments had been rendered and recorded, and signed, by a justice or judge who was in office at the time of rendering, recording and signing the same.

P. L. 1847, p. 56.

Minutes of court evidence until judgment recorded.

194. In any civil cause which has been heretofore or shall hereafter be finally determined, until the clerk of the court shall enter the warrants of attorney, declaration, pleadings, proceedings, and judgment in such cause, as is required by the one hundred and ninety-second section of this act, the verdict or rule for judgment in the minutes of the court, shall be held and taken in the court in which the same is obtained, to be the record of the judgment in such cause, and shall be received in evidence in said

P. L. 1863, p. 10.

(*a*) See *Stout* v. *Stevenson*, 1 *South.* *178, *182, (*b*). *Harrison* v. *Newkirk*, *Spen.* 176. *Browning* v. *Skillman*, 4 *Zab.* 351. *Stewart* v. *Fitch*, 2 *Vr.* 17. Such verdict is bad, where the counts amount to a misjoinder, *Potts* v. *Clarke*, *Spen.* 536. Where, in one suit, there are several distinct causes of action, it is proper to direct the jury to find the issues separately, and to assess the damages for each matter separately, *Ward* v. *Ward*, 2 *Zab.* 699.

(*b*) See *Den*, *Inskeep* v. *Leconey*, *Coxe* 39.

(*c*) Distinction between judgments final and interlocutory, *State* v. *Wood*, 3 *Zab.* 560, 561, *Green*, *C. J.* A judgment cannot be entered until after the *postea* is filed, *Dansen* ads. *Johnson*, 1 *Gr.* 264, 265. A judgment by *cognovit*, after process has been served, may be entered in vacation, without a judge's or commissioner's order, and without affidavits, *Stewart* v. *Walters*, 9 *Vr.* 274. The court will not give judgment on a *postea* after a trial, when it appears, that in truth and fact, no pleas have ever been filed in the cause, unless it is with the consent of the party against whom the verdict may be, *Caldwell* v. *Estell*, *Spen.* 326. The judgments of the courts of New Jersey must always be entered in the current money of the state, *Warder* v. *Whitall*, *Coxe* 84. What is called a judgment *nisi*, is nothing more than a rule to show cause why judgment should not be rendered, *Young* v. *McPherson*, *Pen.* *895, *897. *Pennington*, *J.* What constitutes a sufficient entry of a judgment by the common pleas, *Den*, *Pearson* v. *Hopkins*, *Pen.* *195, *203. All the precedents, in debt, *assumpsit*, &c., include the costs with the sum recovered, and form one entire judgment, *Hay* v. *Imley*, *Pen.* *832, *836. The entry of the judgment being substantially correct, is not vitiated because unnecessarily preceded by copies of the rules from the minutes, *Griggs* v. *Drake*, 1 *Zab.* 169. When a delay in giving judgment, caused by the court, affects the rights of the parties, the court, when necessary to justice, will order the judgment to be entered *nunc pro tunc*, as of the term when the matter was submitted to them, *Hess* v. *Cole*, 3 *Zab* 116. *Teneick* ads. *Flagg*, 5 *Dutch.* 25, 35. See *Ruckman* v. *Decker*, 12 *C. E. Gr.* 244. Where a rule to show cause had been obtained by a defendant who died before an argument of the rule could be had, judgment if in favor of the plaintiff, may be entered *nunc pro tunc*, as of the term of return of the *postea*, *Den* v. *Tomlin*, 3 *Harr.* 14. *Corlies* v. *Little*, 2 *Gr.* 373, 382, *note.* If judgment be continued by *curia advisare vult*, and be not given until the term succeeding that at which the verdict was rendered, the judgment must be entered and signed as of such succeeding term, *Thorpe* v. *Corwin*, *Spen.* 311. See *Jones* v. *Oliver*, 3 *Hal.* 86. A final judgment cannot properly be entered *nunc pro tunc*, without a special order of the court, *Erie Railway Co.* v. *Ackerson*, 4 *Vr.* 33. After a judgment has been actually signed, no addition can be made to it by the insertion of the costs or the filling up of the *in toto attingunt* clause, nor can the costs be rightly put in the execution unless they actually formed a part of the judgment, *Den* v. *Morse*, 7 *Hal.* 331. *Camman* v. *Traphagan*, *Sax.* 230. Such irregularity is to be corrected when directly questioned, and not collaterally, *Cumman* v. *Traphagan*, *Sax.* 230, 231.

court, as such judgment, as fully as if the record had been made up and signed as by said section required.

[For Judgment by default, see supra. For mode of recording, docketing, judgments, entering satisfaction and lien of, see Title Judgments. For mode of entering Judgments on Bond and Warrant of Attorney, see that title.

Docketing judgment in supreme court.

Judgments of the Circuit Court and Court of Common Pleas may be docketed in Supreme Court. For proceedings to docket and effect of judgments, and execution and error thereon, see Title Judgments].

XIV. Execution.

1. IN GENERAL.

Against whom to issue.

R. S. 976, § 1.

195. Upon judgment for debt, damages, and costs, or other sum of money, in the supreme court, or in any circuit court or court of common pleas of this state, the party obtaining the same may have execution against the body or against the goods and chattels, or against the goods and chattels, lands, tenements, hereditaments, and real estate of the party against whom such judgment is or shall be awarded; but no execution shall be issued against the proper goods and chattels, lands, tenements, hereditaments, and real estate of any executor, administrator, heir or devisee, unless he or she should have made his or her estate liable for the money so recovered by false pleading or otherwise.(*a*)

Executors, heirs, devisees

Endorsement.

196. The party at whose instance any writ of execution shall issue against the body or against the goods and chattels, or against the goods and chattels, lands, tenements, hereditaments, and real estate of any person, shall endorse on the said writ, before it be sealed, the debt, damages, and costs, or sum of money really due and to be made.(*b*)

Against goods and lands returnable in term or vacation.

P. L. 1871, p. 7. Amended.

197. Executions against goods and chattels, or against goods and chattels, lands, tenements and hereditaments, may be made returnable and returned, either in term or in vacation, and for the purpose of such return the court shall be always open, except on Sunday, and upon such return being made in vacation, the like proceedings may follow and be had thereon, as if the same were made at a regular term of the court.

On judgments in supreme court to several counties.

P. L. 1855, p. 288, § 41. Amended.

198. Upon all judgments recovered or docketed in the supreme court, executions may issue at the same time to any county or counties in this state without any suggestion of the issuing of a prior execution to the county in which the venue may be laid; *provided*, that if more than one execution be levied at the same time, there shall not be any sale made of the property of the person against whom such executions are issued under more than one of them, except to satisfy a deficiency remaining after a sale under that one; and if any sale be made contrary to this provision, the party in whose favor such executions are issued and his attorney shall be liable to the other party as trespassers, for all damages he may sustain thereby, to be recovered in an action of trespass; and the court or a judge may, for good cause shown, stay the proceedings on any one or more of such executions, or direct under which a sale shall first be made, or order the proceeds of any sale to be paid into court.

Court may direct under which execution sale shall be first made.

(*a*) No execution can be sealed or recorded until the rule for judgment is actually entered on the minutes, *Smith* v. *Trenton Del. Falls Co.*, *Spen.* 116. Execution may be issued immediately after the return of the postea, and the entry of a rule for judgment *nisi;* but if a rule is allowed to show cause why there should not be a new trial, the execution becomes a nullity. *Erie R. R. Co.* v. *Ackerson*, 4 *Vr.* 34. It is irregular to take out execution pending a motion to show cause why execution should not issue, *Stille* v. *Wood*, *Coxe* 162. The supreme court will set aside an execution, which has been issued after the death of the plaintiff, *Harwood* v. *Murphy*, 1 *Gr.* 193, affirmed *Feb.* 1832. See *Quigley* v. *Middleton*, 5 *Hal* 293. *Den* v. *Manning*, *Spen.* 612. *Wade* v. *Scudder*, 2 *South.* *681. Where the plaintiff dies after the entry of the judgment his administrators cannot be substituted plaintiffs in order to issue a *testatum*, *Warwick* v. ——, *Spen.* 116. If an execution be tested in the defendant's lifetime, it may be taken out and executed after his death, *Den. Rickey* v. *Hillman*, 2 *Hal* 180. On an application for leave to issue execution against a certificated bankrupt, on a judgment obtained before his discharge, upon allegation of fraudulent preference of creditors, the court can and will in a proper case, order an issue to try the facts, *Ogden* v. *Harris*, 2 *Zab.* 540. If an executor or administrator plead payment with notice of set-off under the statute, and obtain a verdict for a balance due to his testator or intestate, he may have judgment and execution thereon with costs, if the plaintiff sued in his own right; but if he sued as executor or administrator, no judgment can therein be entered against him for such balance, but it becomes a debt of record, the truth of which cannot be questioned, and which can be enforced only by action of debt or by *scire facias*, and which must be responded to according to the laws regulating the administration of estates, *Shinn* v. *Paterson*, 2 *Harr.* 322.

(*b*) On a bond payable in instalments, judgment was obtained and execution had issued thereon endorsed for the whole sum. *Held*, that the execution was right, but the endorsement wrong, *Griffith* v. *Jones*, *Pen.* *932. The practice is, to endorse upon the execution the sum or instalment actually due, and make the levy for that amount only, *Warwick* v. *Matlack*, 2 *Hal.* 165, 167. If the endorsements are erroneous, they may be corrected, on motion, *Horner* v. *Del. and Rar. Canal Co.*, 1 *Harr.* 265. When judgment on a verdict is entered for six cents damages with costs, which are afterwards taxed at $110.94, and a *ca. sa.* is issued, endorsed, "amount due, one hundred and eleven dollars; damages and costs, $111," the writ will not be set aside, although the endorsement is not in strict conformity with the statute, which requires the plaintiff to endorse upon every such writ the real debt or damages due and claimed by him, and the costs of suit, in words at length, *Ferguson* ads. *State*, *Reeves*, 2 *Vr.* 283. If the statute is imperative and not merely directory, the departure from it is too small to be fatal to the writ. *Ibid.*

Actions against principal and surety. Ib. § 40.

199. In actions against a principal and surety or sureties, where an execution has been issued, the court or a judge, on application of any surety, and notice of the application to the principal debtor and to the plaintiff, may direct the sheriff, or other officer, after making a levy upon the property liable to the execution, to make the money out of the property of the principal, if it can be done, before selling the property of such surety; and if the judgment be paid by a surety, it shall not be considered satisfied, except as to such surety; and he, on like application to the court or a judge, and like notice, and subject to such regulations as may be imposed, shall have the full benefit and control of the judgment, for the purpose of compelling repayment from the principal or contribution from his co-surety, and on this last application, the court or judge may order an issue to try the questions in controversy.(a)

Judgment after payment kept alive for benefit of surety.

When execution on second judgment stayed.

200. If the defendant bring a writ of error, and the plaintiff bring an action on the judgment, and recover, he shall not sue out execution on the second judgment till the writ of error be determined.

May issue within twenty years after judgment.

P. L. 1855, p. 288, § 42

201. Execution may issue, without a revival of the judgment by *scire facias*, at any time within twenty years from its recovery; *provided*, that if more than six years have elapsed since the recovery of the judgment, a special order of the court or a judge thereof shall be necessary before the execution issue, to be made upon ten days' notice to the defendant of the application therefor, and proof to the satisfaction of the court or judge of the amount remaining due upon the judgment.(b)

Notice, how served.

When defendant does not reside in the state.

P. L. 1869, p. 1296. Amended.

202. The notice required by the last preceding section shall be served upon the defendant personally, or by leaving a copy at his residence in case he resides within this state; or if he do not reside in this state, then by publication, as the court or a judge thereof shall direct, in a newspaper printed and circulating in any county where the defendant may be possessed of real estate, or have any estate or interest therein, for the space of twenty days next preceding such application, at least once in every week during said time, and the cost of such publication shall be included in said execution and collected thereby.

Death of one of several parties plaintiff.

203. When one or more of several parties in whose favor judgment is recovered shall die after judgment and before execution issued, execution may be sued out in the name of the survivor or survivors, such death being suggested on the record.

Death of sole party plaintiff.

An execution may issue in name of executor.

204. Where a sole party in whose favor a judgment is recovered shall die after judgment, it shall be lawful for the court in which such judgment was recovered, or for any judge thereof, on the application of the executor or administrator of the deceased, to make an order that such death and the fact of the grant of letters testamentary, or of administration, be entered upon the record; and thereupon execution may issue on such judgment in the name of the executor or administrator, without the judgment being revived by *scire facias*.(c)

Administrator de bonis non to have execution.

R. S. 350, § 5. Amended.

205. Where any judgment shall be had in the name of any executor or administrator, and administration *de bonis non* shall afterwards be granted, such administrator *de bonis non*, may by order of the court, or a judge, suggest such grant of administration on the record, and have execution on such judgment in his own name, or may sue out a *scire facias* to revive the same.

Death of one of several parties defendant.

206. Where one or more of several parties against whom a judgment has been recovered, shall die after judgment and before execution issued, execution may be sued out against such parties as if such death had not occurred; but the execution shall be executed upon the persons and property of the survivors only.

(a) See *Brown* v. *White*, 5 *Dutch.* 514, reversing, *Id.* 307. *Paulin* v. *Kaighn*, 5 *Dutch*, 480. *Irick* v. *Black*, 2 *C. E. Gr.* 189.

(b) A special order is not required before issuing an *alias*, where an execution had been issued within a year after the recovery of the judgment, and returned unsatisfied, *Claflin* v. *Voorhees*, 6 *Vr.* 484. An application to the orphans court will not bar a *scire facias* issued to revive a judgment entered before the application was made, nor prevent the issuing of execution upon such judgment when revived, *Howell* v. *Potts*, *Spen.* 1. A motion to issue a *scire facias* is of course, and no notice need be given to the opposite party, *Pears* v. *Bache*, *Coxe* 206 A *scire facias* may issue where an execution has been partly satisfied, *Stille* v. *Wood*, *Coxe* 118. That a *scire facias* may be amended, see *Condit* v. *Gregory*, 1 *Zab.* 429.

(c) In 1871 the plaintiff recovered a judgment against the defendants, an execution was issued and returned unsatisfied; in 1872 the plaintiff died, but the fact of his death was unknown to his attorney; in 1873 an *alias* execution was issued, and property of defendants levied on; on motion to quash the writ. *Held*, that prior to the passing of the amended practice act, upon the death of a sole plaintiff after final judgment, an execution could only properly issue in the name of the plaintiff's personal representatives, and no other method but the proceeding by *scire facias* would serve to bring them into court, *Morgan* v. *Taylor*, 9 *Vr.* 317. The fact that the plaintiff's attorney, who caused the *alias* writ to be issued, was, at the time of its issue, uninformed of the plaintiff's death, will in no way affect the case, *Ibid.*

Execution by assignee of bankrupt or insolvent on judgment before bankruptcy, &c.

207. If a party, in whose favor a judgment shall be recovered, shall become bankrupt, and the proceedings in bankruptcy shall have proceeded to the appointment of an assignee, or shall make an assignment for the equal benefit of his creditors, before execution issued, it shall be lawful for the assignee of such party to suggest such bankruptcy or assignment upon the record, and issue execution upon such judgment in his own name.

Scire facias, how served.

R. S. 929, § 104. Amended.

208. Whenever a writ of *scire facias* shall issue out of any of the courts of record in this state, the sheriff or other officer to whom the writ of *scire facias* shall be directed, shall serve the same either personally on the defendant, or by leaving the copy of the writ with some person of the age of fourteen years, at his or her usual place of abode, at least six days before its return.

If the defendant non-resident.

Ib. § 105.

Publication or service on defendant wherever found.

209. Whenever a writ of *scire facias* shall issue, and the defendant has removed out of the jurisdiction of the court issuing such process, or cannot be found by the sheriff or other officer to whom the writ shall be directed, the plaintiff may proceed as though the said writ of *scire facias* had been duly served in the manner prescribed in the next preceding section of this act; *provided*, the said plaintiff first cause the said writ to be published four successive weeks in one of the newspapers printed in this state, as near the last residence of the defendant as can be conveniently ascertained, or cause a copy of the said writ to be served on the defendant, wherever found, either in this state or in any other place, at least twelve days before the return thereof.(*a*)

Sheriff to file statement of amount collected, &c.

P. L. 1863, p. 469.

210. Every sheriff, under sheriff, or coroner of this state, to whom any execution is or shall be delivered, shall, without fee or reward, when he returns said execution, return and file with the same, in the office of clerk of the court from which the execution issued, a true statement, in writing, specifying the amount of money, if any, and the time when collected by him, and the balance due thereon, and also the items of his bill of costs or execution fees, verified by his written oath or affirmation annexed to or endorsed on said statement, which statement shall not be conclusive against any person other than the officer making the same; and the sheriff, under sheriff, or coroner shall not be entitled to receive or collect of the plaintiff any fees or costs thereon, until he shall have returned such statement, verified as aforesaid.

Not entitled to fees till statement filed.

[Property subject to levy. From what time execution binds. How sales under are made. Exemption laws. Discovery of property held in trust, &c., &c., see Title of Execution].

2. CAPIAS AD SATISFACIENDUM.

When ca. sa. may issue.

R. S. 321, § 2.

211. The writ of *capias ad satisfaciendum* shall not be awarded or issued upon any judgment founded upon contract, express or implied, except—

First, Upon satisfactory proof being made before a justice of the supreme court, or a supreme court commissioner, to be certified by such justice or commissioner, and filed in the office of the clerk of the court wherein such judgment was recovered, establishing the particulars specified in either of the sub-divisions of the fifty-eighth section of this act; or,

Second, That the defendant has rights or credits, moneys or effects, either in his own possession or in the possession of any other person or persons to his use, of the value of fifty dollars or over, which he unlawfully and fraudulently refuses to apply in payment of such judgment.(*b*)

(*a*) This and the preceding section applying to the same subject matter, must be construed to operate co-extensively, *Custner* v. *Styer*, 3 *Zab.* 236. Judgment cannot now be rendered, as at common law, upon a return of *nihil* to two writs of *scire facias*, but only upon an actual service or publication of the writ, *Ibid.* Publication is not required in case of a special *scire facias*, issued to show cause why lands levied on by a deceased sheriff, should not be sold, &c., (*R. S.* 833, § 35), *Haight* v. *Spader*, 3 *Hal.* 132. In *Reed* v. *Bainbridge*, 1 *South.* *351, after a personal service on defendant out of the state and rule for appearance, judgment was entered.

(*b*) The fraud which by the constitution of this state may subject a debtor to arrest and imprisonment, is not confined to fraud in the creation of the debt, but extends to subsequent fraudulent conduct of the debtor for the purpose of defeating his creditor in the recovery of the debt by due course of law, *Ex parte Clark*, *Spen.* 648. The clause in the constitution prohibiting imprisonment for debt except in cases of fraud, is not incompatible with any of the provisions of the act of 1842 abolishing imprisonment for debt, *Ibid.* A *ca. sa.* cannot be issued pending proceedings under the act to prevent fraudulent trusts and assignments, *Bowne* ads. *Titus*, 1 *Vr.* 340. The proof of the circumstances necessary to authorize the award of a *ca. sa.* is to be to the satisfaction of the judge or commissioner. The legality of the evidence received by him, and its applicability, may be reviewed; but its weight and credibility rest with the commissioner, *Wire* v. *Browning*, *Spen.* 364. The officer who makes the order to hold a debtor to bail on the ground of fraud, is the exclusive judge of the weight of the evidence, and this court will not review or set aside his order upon the weight of evidence; but when there was no evidence before him of any legal fraud, they will review it, *Van Wagenen* v. *Coe*, 2 *Zab.* 531. It is not sufficient for the commissioner to decide that there was proof, to his satisfaction, that the defendant had rights or credits, moneys or effects, either in his own possession or in the possession of some other persons; in the words of the act, he should specify by means of which of the several

212. The oath or affirmation required by the preceding section, may, if the person by whom the same is to be made be out of the state, be made before a judge of any court of record or notary public of the state, kingdom or nation in which such person resides or happens to be. Oath by plaintiff out of state. Ib. § 6.

213. Where an order to hold the defendant to bail has been duly made according to the provisions of the fifty-eighth section of this act, and remains in force, it shall be lawful for the plaintiff, upon the recovery of a judgment in such action against the defendant, to issue a *capias ad satisfaciendum* without any other or further proof, notwithstanding anything in the preceding sections contained. Ca. sa. may issue if order for ca. ad. res. in force. Ib § 3.

214. Nothing in the last three preceding sections shall apply to proceedings as for contempt to enforce civil remedies. Not applicable to contempt.

215. The plaintiff shall endorse every *capias ad satisfaciendum*, before the delivery thereof to the sheriff, the real debt or damages due and claimed by such plaintiff, and the costs of suit, in words at length.(*a*) Endorsement on ca. sa. R. S. 929, § 80.

XV. Miscellaneous provisions.

1. NOTICE.

216. There shall be two days' notice of all special motions before the court or a judge, in matters of practice, unless otherwise specially directed by this act; *provided*, that if the exigency of the case be such as not to admit of such notice, the court or judge may dispense with such notice and make such order as the ends of justice may require; but no application for any judgment or other proceeding in the regular course of the cause shall for this purpose be considered a special motion.(*b*) Notice of special motion before the court or a judge.

217. All notices required to be given by this act shall be in writing, and shall be served upon the attorney, when the party appears by attorney, unless otherwise specially provided.(*c*) Notices, how served.

218. Where, by any act of the legislature of this state, now in force or hereafter to be enacted, advertisement, publication, or notice of any suit, order or proceeding, in any court of this state, is required to be made or given in any newspaper printed and published in this state, the court in which such suit may be pending, or by which such order or proceeding may be made or taken, may, whenever the circumstances of the case shall, in the opinion of the court, require a more extensive publication, order and Court may order publication of notice in another state. R. S. 957, § 2.

things mentioned, the fraud was committed, *Bowne* v. *Titus*, 1 *Vr.* 340. The order made by the justice or commissioner must show, upon its face, that he has considered and decided upon the evidence of fraud submitted to him, and that the proof was to his satisfaction, *Hill* ads. *Hunt, Spen.* 476. A *ca. sa.* must be directed to the sheriff of the county in which the venue is laid; although the defendant was arrested in another county, and entered into recognizance of bail with condition that he pay, &c., or render himself to the sheriff of said county where the arrest was made, *Cockran* ads. *Drake*, 3 *Harr.* 9. The bail as well as his principal is bound to take notice where the *venue* is laid and should search for a *ca. sa.* in the office of the sheriff of that county to know whether the plaintiff intends to proceed by execution against the defendant's body, *Ibid.* In order to fix the bail on a recognizance, the sheriff may be instructed to return a *ca. sa.* "*non est inventus*." although he might have served it on the defendant. But if the defendant be in the sheriff's custody, such a return cannot be made, *Van Winkle* v. *Alling*, 2 *Harr.* 446. The sheriff is not bound to arrest the defendant upon a *ca. sa.* lodged with him for fixing the bail, even if he can arrest him as well as not, *Ibid.*

(*a*) An attachment for contempt is not in the nature of *ca sa.*, and it is not necessary to make such endorsement thereon, *State* v. *Gulick*, 2 *Harr.* 435. See *Ferguson* ads. *State, Reeves*, 2 *Vr.* 283, *Supra*, § 196 (*b*).

(*b*) A notice of an application to reinstate an action should be written and not verbal, *Hunt* v. *Langstroth*, 4 *Hal.* 223. All notices in matters of practice in this court, whether required by the practice act, or by the rules of this court, must be in writing, unless otherwise expressed in the act of assembly, or in the rule of this court, requiring the same. *Tillou* v. *Hutchinson*, 3 *Gr.* 178. On all special motions, the other party is entitled to two days' notice, *Den.* v. *Matlack*, 2 *Harr.* 354. Where a motion is made on behalf of a defendant in confinement after sentence, to take up his case out of its turn, special notice to the attorney-general must be proved, *Stone* v. *State, Spen.* 404. So, a motion to quash a *certiorari* because improvidently issued, *State* v. *Road, Pen.* *919. Also, a motion for a rule to show cause, *Crane* ads. *Condit*, 1 *Harr.* 349. *Halsey* ads. *Van Wagenen*, 1 *Harr.* 350. No notice is necessary of a motion to issue a *scire facias*, *Pears* v. *Bache, Coxe* 206. A notice which states that a motion will be made on Friday the seventh (when Friday is the eighth of the month), is bad, *Brown* v. *Williamson*, 3 *Hal.* 363. The notice of taking affidavits, to be used on the argument of a rule to show cause should be given to the attorney, and not to the party, *Den.* v. *Geiger*, 4 *Hal.* 225. A notice to assess damages upon a judgment entered upon a sheriff's bond, is properly served upon the sheriff and his sureties, and need not be served upon the attorney who appeared for the defendants in the suit on the bond, *State* v. *Hamilton*, 5 *Hal.* 190. Notice of taking affidavits must be given to the opposite party, although he has not appeared, *Warford* v. *Smith*, 1 *Dutch.* 212. *State* v. *Justices of Middlesex, Coxe* 244, 245. *State* v. *Lyon, Coxe* 403, 409. Proof of the service of a notice of taking affidavits to be used on the argument of a cause, may be made *viva voce*, at the bar of the court where the affidavits are offered to be read, *Anonymous*. 7 *Hal.* 94. See *McCourry* v. *Suydam*. 5 *Hal.* 245. A motion for time to plead is a special motion, *Trenton Ins. Co.* ads. *Hodges*, 4 *Zab.* 673. No notice is necessary of affidavit to obtain a rule to show cause. *Crane* ads. *Condit*, 1 *Harr.* 349. *Halsey* ads. *Van Wagenen*, 1 *Harr.* 350. Notice must be given of an application to discharge a defendant on common bail, *Morris* ads. *Geiger*, 5 *Hal.* 331. Notice of a motion given to the administrator of the attorney, ten years after his death, is insufficient, *Waddle* v. *Dayton*, 3 *Hal.* 174. Whether notice of a motion for a *certiorari* need be given, See *State* v. *Giberson*, 2 *Gr.* 388 *State* v. *Morris Canal Co.*, 7 *Hal.* 365. *State* v. *New Brunswick, Coxe* 393.

(*c*) The notice of taking affidavits to found thereon an application for an attachment, is properly served on the party and need not be served on his attorney. *Flommerfelt* v. *Zellers*, 2 *Hal* 31. *State* v. *Edsall*, 5 *Hal.* 190, 191. Proof of mailing to a sheriff a *capias* and a notice of amercement, and that he has served and returned the *capias*, is presumptive proof that he received the notice, but not that he received it ten days before the first day of the term, *Melvin* v. *Purdy*, 2 *Harr* 162. Proof of putting a letter, containing a notice, into the post office, directed to the opposite attorney, is not sufficient proof of the service of such notice to found thereon an application in the attorney's absence, *Anonymous*, 6 *Hal.* 94. Where the attorney of a lunatic ceases to act, the notice to substitute another attorney must be served upon his committee, *Den* v. *Folger, Spen.* 115. *Ante*, pp. 382, 383, *notes* (*e*) and (*e*).

direct such advertisement, publication or notice, to be made or given in one of the newspapers printed and published in one of the other states of the United States, or in the District of Columbia, at the discretion of the court, and for such time as the court may deem proper.

[By the first section of the act of February twenty-fourth, eighteen hundred and thirty, all acts of the legislature requiring publication of notice of any suit, order or proceeding in any court of this state, in any other state, or service of any such order or proceeding on persons residing out of this state, were repealed; the preceding section is the second section of that act, R. S. 957].

2. AFFIDAVITS.

Notice of taking.

219. Affidavits taken in pursuance of any rule of court, shall be taken on four days' notice of the time and place of taking the same.

Both parties may take under rules obtained by either.

220. When leave is granted by rule to either party in a cause to take affidavits, both parties may take affidavits within the purview of such rule, without further leave or rule; and on notice for the taking of affidavits, given by either party, both parties may take affidavits, but the officer shall, if required, first take the affidavits of the party giving the notice.(*a*)

Examination, how conducted.

221. The party producing the witness shall first examine him without interruption, and then the other party shall cross-examine, if he shall think fit; and the testimony shall be reduced to writing by the officer himself, or by the deponent, and shall be signed by such deponent.

3. HABEAS CORPUS CUM CAUSA.

Suits removable to supreme court if sum exceed $200.

R. S. 200, ¿ 7.
" 929, ¿ 86.

222. Any suit or action commenced in any circuit court, or court of common pleas, where the debt, damages, matter or thing in controversy shall exceed two hundred dollars, (but not otherwise) may be removed into the supreme court at any time before issue joined by writ of *habeas corpus*, first duly allowed by one of the justices of the said supreme court; *provided*, the defendant shall, at or before the allowance of said writ, enter into recognizance to the plaintiff with two sufficient sureties in double the sum demanded, for the payment of the condemnation money and costs, in case judgment shall pass against him; which recognizance shall be filed with said writ and returned with the same to the supreme court, and in default thereof, said suit or action shall not be removed, nor said writ returned.(*b*)

Recognizance of bail.

Bail on habeas corpus may be excepted to.

R. S. 929, ¿ 92. Amended.

223. Exceptions to the bail required upon the removal of a cause by *habeas corpus* shall be taken and entered in the clerk's book at the return of the said writ or within ten days thereafter, and justification shall be made within the time and in the manner prescribed for the justification of bail in other cases; and if such bail, when excepted to, shall not be perfected in due time, the plaintiff shall have a *procedendo*.

Courts open, etc.

P. L. 1857, p. 296, ¿ 13.

224. The circuit courts and courts of common pleas, in and for the several counties of this state, shall be open at all times for the presentation and return of writs of *habeas corpus* in civil cases.

Not to be received after issue joined.

R. S. 929, ¿ 87.

225. No writ of *habeas corpus*, for the removal of a cause, shall be received by the circuit court or court of common pleas, to which it may be

(*a*) An *ex parte* affidavit taken without notice in the absence of the opposite party and of his attorney, cannot be read, *Dare* v. *Ogden*, *Coxe* 91. *Cooper* v. *Galbraith*, 4 *Zab.* 219. *Layton* v. *Cooper*, *Pen.* *65. See *Vandervere* v. *Reading*, 1 *Stock.* 446. *State* v. *Green*, 3 *Gr.* 88. An *ex parte* affidavit allowed to be read on the motion to set aside verdict, *Harwood* v. *Smethurst*, 1 *Vr.* 230. See *Lummis* v. *Stratton*, *Pen.* *245. A rule to take affidavits only authorizes the taking of legal and competent evidence, and should specify the purpose for which the affidavits are to be taken, *Scott* v. *Beatty*, 3 *Zab.* 256, 260. A rule to take affidavits does not expire at the next term after it is taken but stands until the cause is argued, *Rogers* v. *Chadwick*, 5 *Hal.* 59. When a general rule is obtained by one party to take affidavits for a specific purpose, both parties have leave, by virtue of the rule, *Anonymous*, 4 *Hal.* 224.

(*b*) A *habeas corpus* is the proper writ to remove a civil action from the common pleas into the supreme court, *Chandler* v. *Monmouth Bank*, 4 *Hal.* 101. On removing a cause by *habeas corpus*, bail must be put in (even by a corporation) according to the statute, if required by the plaintiff, *Morris Canal Co.* ads. *Vanatta*, 2 *Harr.* 159. *Marcellis* v. *Hamburg Co.*, *Pen.* *948. On *habeas corpus* the defendant will not be permitted to file common bail, although bail below was not required, where the cause removed was commenced by summons, *Anonymous*, *Pen.* *641. Where the defendants were administrators, the court ordered common bail to be filed, on removing a cause from the common pleas, *Sneed* ads. *Wallen*, 2 *South.* *682. *Anonymous*, *Pen.* *539. Nor will the plaintiff be permitted to file a waiver of bail on *habeas corpus*, in order that the cause might be continued and tried in the supreme court, *Craig* v. *Berry*, 2 *South.* *852. Where no bail is filed nor waiver of it entered, the practice is for the plaintiff to have his option, either by proceeding in the supreme court, or taking a *procedendo*, *Morris Canal Co.* ads. *Vanatta*, 2 *Harr.* 159. *Dickinson* ads. *Morris Bank*, 1 *Harr.* 354. See *Craig* v. *Berry*, 2 *South.* *852. *Marcellis* v. *Hamburg Co.*, *Pen.* *948. On *habeas corpus* where the defendant had not filed bail, no bail being required below, the supreme court granted leave to take ten days to file recognizance, *Marcellis* v. *Hamburg Co.*, *Pen.* *948. So, the plaintiff in order to prevent delay, may rule defendant to put in bail in twenty days, or sitting the court, and at the same time take a rule to plead, *Hughes* v. *Hughes*, *Coxe* 209.

directed, nor shall any cause be removed by such writ, after issue joined upon matter of law or of fact.(*a*)

226. If any cause be removed or stayed by writ of *habeas corpus*, and afterwards be remanded or sent back by writ of *procedendo* or other writ, the same cause shall never again be removed or stayed by any writ of *habeas corpus*. Nor after cause once remanded. Ib. § 88.

227. If any writ of *habeas corpus*, for the removal of a cause, shall be issued out of the supreme court, contrary to the true intent and meaning of this act, then the court to which such writ shall be directed or offered shall proceed in the said cause as though no such writ had been issued or offered. When writ may be disregarded. Ib. § 89.

228. Upon the return of the *habeas corpus*, the plaintiff shall be deemed to be in court, and the declaration and pleadings of the parties shall be filed within the time allowed or granted in other cases; or else the plaintiff shall be nonprossed, or judgment be awarded against the defendant. Proceedings on return of habeas corpus. Ib. § 93.

4. VENUE.

229. Every issue joined in the supreme court, or any other court and brought into the supreme court to be tried, and which is or may be triable by the country, shall be tried in the county where the lands, tenements or hereditaments in question are situate, or the cause of action or offence hath arisen or been committed, or shall arise or be committed;(*b*) unless the supreme court, upon motion in behalf of this state, if the state be interested, or upon motion of either party in the action, shall think proper to order the trial to be at the bar of the said supreme court, which shall only be done where the matter or property in dispute shall be of the value of three thousand dollars; and if the party who shall obtain a rule for a trial at bar shall not recover to the amount of the said sum, he shall be entitled to no more costs than if the cause had been tried at the circuit court of the proper county. Venue in supreme court issues. R. S. 196, § 4. Unless trial at bar ordered.

230. An action merely transitory shall, at the discretion of the court, be tried in the county in which the cause of action arose, or the plaintiff or defendant reside at the time of instituting such action, or if the defendant be not an inhabitant of this state, in the county in which process shall have been served upon him.(*c*) In transitory actions. Ib. § 5.

(*a*) After arbitrators have been appointed and met, it is too late to remove a cause by *habeas corpus*. A *habeas corpus* is too late after interlocutory judgment, *Bickham* v. *Denny*, *Coxe* 12. *Sharp* v. *Sinnickson*, *Coxe* 46. See *Chandler* v. *Monmouth Bank*, 4 *Hal.* 101, 104. If improperly brought a *procedendo* will be ordered, *Sharp* v. *Sinnickson*, *Coxe* 46. *Austin* v. *Nelson*, 1 *Hal.* 381.

(*b*) An action for nuisance to lands by overflowing them with back-water raised by a dam, is local, and must be tried in the county where the lands lie or the cause of action arose, *Deacon* v. *Shreve*, 3 *Zab.* 204. An action of trespass *quare clausum fregit*, being local, must be laid in the county in which the *locus in quo* is situated, at the time the trespass is alleged to have been committed, *Champion* v. *Doughty*, 3 *Harr.* 3. The creation of a new county, including the land trespassed upon, prior to bringing the suit, but after the trespass complained of, does not warrant charging the act to have been done in the new county, *Ibid.* See *Anonymous*, 1 *Harr.* 393. In a suit brought against a corporation, the *venue* should be laid in the county where their principal office is located, that being considered their place of residence; the rule applies to railroad companies, where their road runs through, and their franchises are exercised in different counties, *Thorn* v. *Central R. R. Co.*, 2 *Dutch.* 121. *State Bank* v. *Hedenberg*, 1 *Harr.* 352, *Ford*, *J.* Where a deputy sheriff of the county of A. is sued in the county of B. for an act done in the course of his official duty in the county of A., the court will, upon affidavit of this fact, change the *venue* from B. to A., *Dennis* ads. *Ford*, 2 *Hal.* 200.

(*c*) In actions merely transitory, the *venue* may be laid at the discretion of the plaintiff: first, in the county in which the cause of action arose; second, if the plaintiff resided in the state when the action was commenced, he may lay the *venue* in the county in which he then resided; third, if the defendant resided in the state when the suit was instituted, the *venue* may be laid in the county in which the defendant then lived; and fourth, if the defendant shall not be an inhabitant of this state, it may be laid in the county in which process shall have been served upon him. If the plaintiff has laid the *venue* in one of the places, thus designated by law, it cannot, upon the common affidavit, be changed to any other of the specified counties, or to any other county in the state, though under special circumstances the court will change the *venue* from one to another of the designated counties, *Bell* v. *Morris Canal Co.*, 3 *Gr.* 63. An action of debt for an escape is a transitory action, and the plaintiff may lay the *venue* in any county he pleases, *Jones* v. *Pemberton*, 2 *Hal.* 350 An action upon the third section of the act of Feb. 25th 1820, (*R. L.*, p. 689), "for restraining the plaintiff from navigating the waters between the ancient shores of New York and New Jersey," is not a local, but a transitory action, *Gibbons* v. *Ogden*, 1 *Hal.* 285. In an action for a *tort* to the person, committed in another state, the *venue* may be laid in the county in which the defendants were served with process, *Ackerson* v. *Erie Railway Co.*, 2 *Vr.* 309. When it is deemed necessary or expedient to state where the cause of action actually arose, and the place thus stated is out of the county in which the *venue* is laid, it is necessary to lay the *venue* under a *videlicet*. In all other cases, the introduction of the *videlicet* in stating the *venue* is neither necessary nor useful, *Duyckinck* v. *Clinton Ins. Co.*, 3 *Zab.* 279. In a transitory action, if the plaintiff reside out of the state, and the *venue* is not laid in the county where the cause of action arose, or where the defendant resides, the court will on motion, and without affidavit of defence, change the *venue* to the county where the defendant resides, *Worley* v. *Scudder*, 5 *Hal.* 231. *Dauchy* v. *Taylor*, 4 *Hal.* 96. So, where an appearance was endorsed on the writ, the plaintiff being non-resident, *McMenomy* v. *Williamson*, 6 *Hal.* 316. In an action for breach of a covenant of seizin and warranty, the court will not change the *venue* to the county where the lands lie, without an affidavit stating special circumstances, *Ward* v. *Holmes*, 2 *Hal.* 171. Court has the power under special circumstances to change the *venue* in an action of debt on a bond *Meldrum* v. *Sarvis*, *Coxe* 203. Contra, *Shotwelt* v. *Clark*, *Coxe* 205. *Venue* may be changed in ejectment, *Ibid.* *Coxe's Case*, *Coxe* 205. *Parvin* v. *Miller*, *Coxe* 206. Contra, *Deacon* v. *Shreve*, 3 *Zab.* 204. The court will order the *venue* changed, even when laid in the proper county, if it appears that a fair trial cannot be had there. *Murray* v. *New Jersey R. R. Co.*, 3 *Zab.* 63 In order to warrant a change of *venue*, it must appear that a fair trial cannot be had in the county where it is laid, by positive evidence or facts, and not by the mere opinion of the witnesses, *Ibid.* Nor upon their belief, *Meldrum* v. *Sarvis*, *Coxe*, 203, 206. Hearsay evidence not sufficient to support a motion to change the *venue*, *Den. Lee* v. *Evaul*, *Coxe* 283. In local actions the *venue* may be changed, but it must be

Judge may grant rule to show cause why venue should not be changed.

Granted with or without a stay of proceedings.

231. In causes commenced in the supreme court or removed there from any other court a justice of the supreme court in vacation, on application of the defendant and upon good cause shown, may grant a rule to show cause before the said court at the next term, why the *venue* should not be changed to some other county than that in which it is laid in the declaration, and for the taking of depositions to be used on the argument of such rule; which rule shall be granted with or without a stay of proceedings, as such justice may in his discretion in such order direct.

5. SECURITY FOR COSTS.

Non-resident plaintiff to give security for costs by bond.

R. S. 929, § 74.

232. If the plaintiff reside out of this state, he shall, if required before issue joined, give bond to the defendant in one hundred dollars, with sufficient sureties being freeholders and residents in this state, with condition to prosecute his action with effect, and to pay costs if he discontinue, be non-suited or a judgment pass against him; which bond shall be filed in the clerk's office of the court in which such action is pending.(a)

Deposit in lieu of bond.

233. In lieu of the bond mentioned in the last preceding section the plaintiff may deposit the sum named with the clerk of the court in which the action is pending, to be and remain as security to defendant for costs.

Defendant to demand securlty in writing.

Plaintiff on filing security to give notice thereof.

234. When a defendant is entitled to security for costs, he shall give notice in writing to the plaintiff that he requires such security, and thereupon all proceedings shall be stayed until such security is filed or deposit made, and the plaintiff upon filing such security, or making such deposit, shall give notice thereof in writing to the defendant, with the names and residences of the sureties; and after the service of such notice, the defendant shall have the same time to plead that he had at the service of the notice requiring security.

Sureties to justify or be approved by a judge.

235. The plaintiff may, at the time of filing his bond for costs, file therewith an affidavit of each surety, that he is a resident of this state, and is worth two hundred dollars after all his debts are paid; or an approval of the

on clear proof that an impartial trial cannot otherwise be had, *Ibid.* When the plaintiff is desirous of changing the *venue* he must move to amend, and a suggestion must be entered on the record, *Ibid.* A motion to change the *venue* on the common affidavit, must be before plea filed; if a special ground is laid, the *venue* may be changed after plea pleaded, *Wildes* v. *Maires*, 1 *Hal.* 320. Where a special ground is laid, and circumstances are brought before the court, by which it is shown that the defendant may be exposed to unnecessary difficulty, or the fair administration of justice be interrupted, the *venue* may be changed, after plea pleaded, *Bell* v. *Morris Canal Co.*, 3 *Gr.* 63. *Venue* may be changed after issue joined, *Wistar* v. *Johnson, Coxe* 260. *Snowden* v. *Johnson, Pen.* *469, *471. Change of *venue*, on common affidavit, refused, *Kerr* v. *Whitaker, Pen.* *514. *Hall* ads. *Cumberland Bank*, 2 *South.* *718. An affidavit taken without notice to the adverse party cannot be read in support of a motion to change the *venue*, *Parker* v. *Sussex Bank*, 3 *Hal.* 160. A motion to change the *venue* to M., when the cause of action did not arise there, was refused, there being no proof that the witnesses of either party resided there, *Abrams* v. *Wood*, 1 *South.* *30. *Dauchy* v. *Taylor*, 4 *Hal.* 96. *McMenomy* v. *Williamson*, 6 *Hal.* 316. Where the defendant was a bank corporation, and the transaction out of which the suit arose occured at the bank, and all the books, &c. of the bank were necessary evidence, and could not be removed without great inconvenience and loss, the *venue* was changed to the county where the bank was situated, *Kerr* v. *Bank of New Brunswick*, 1 *South.* *363. See *State Bank* v. *Hedenberg*, 1 *Harr.* 352.

(a) A non-resident prosecutor of an administration bond, shall give security for costs, if required, *Governor* v. *Sureties, Pen.* *551. The right of a defendant in equity to require from the complainant, who is resident abroad, security for costs, does not rest alone on the provisions of the statute. It is an ancient and well established rule, that if the complainant is resident abroad, the court, on the application of the defendant, will order him to give security for costs, and in the meantime will direct all proceedings to be stayed, *Newman* v. *Landrine*, 1 *McCart.* 291. Nor is it necessary that the complainant should reside out of the state at the time of filing his bill to entitle the defendant to the order. It will be granted if the complainant goes abroad to reside after the commencement of the suit, *Ibid.* If, after knowledge of the non-residence, defendant takes any step in the cause before applying for the order, he thereby waives security for costs, *Ibid.* When the defendant's affidavit or an application for security fails to show clearly that the defendant did not know of the complainant's removal before taking the last step in the cause, the application will be denied, *Ibid.* Rule for security for costs in ejectment may be granted after issue joined, *Den* v. *Wilson*, 2 *South.* *680. Rule to stay proceedings till security for costs is filed, refused when some of the plaintiffs were non-residents, *Anonymous, Pen.* *886. The defendant in ejectment will not be compelled to enter security for costs, on the ground, that he had removed out of the state after entering into the common rule, *Den* v. *Inslee*, 1 *Hal.* 475. Infant plaintiffs residing in the state are not required to give security, *Cotheal* ads. *Moorehouse*, 1 *Zab.* 335. Where an infant plaintiff residing out of this state sues by a *prochein ami* residing in the state, the defendant by the statute is entitled to security for costs, *Ibid.* Where the *prochein ami* is irresponsible, the court may order security or appoint one responsible, *Ibid.* Where the defendant was unable to find who or where the plaintiff is, or his place of residence, the court granted a rule that the plaintiff file security for costs, *Mulford* v. *Geschiat*, 1 *Harr.* 272. Plaintiffs in *certiorari*, residing out of the state, will be required on motion and affidavit to that effect, to give security for costs, and proceedings will be stayed till such security be given, *Scull* v. *Assignees, &c.*, 3 *Gr.* 430. Where the plaintiffs (a foreign corporation) filed their declaration in season, the court refused an application to require them to file security for costs made by the defendants at the term next after the return of the writ, who offered no excuse for neglecting to make an earlier application, nor any affidavit of merits, *Mechanics Bank* v. *Godwin*, 2 *Gr.* 439. The court will not annex to a rule for a trial at bar, the condition, that the plaintiffs give security for costs, though the plaintiffs are an insolvent and irresponsible corporation, *State Bank* v. *Evans*, 2 *Gr.* 298. A corporation created by a law of this state, and for purposes to be carried on within its jurisdiction, although it has no property within the state, is not a non-resident within the meaning of the statute respecting security for costs, *Penna. and N. J. Boat Co.* v. *Andrews*, 3 *Hal.* 177. The court will not impose upon a party applying for a commission to examine witnesses out of the state, the terms of payment of costs to his adversary, *Roumage* v. *Mechanics Ins. Co.*, 7 *Hal.* 95. A plaintiff who resides in this state, and brings a *certiorari* to remove a judgment rendered against him in an action of forcible entry and detainer, will not be required to file security for costs, though it is proved that he is unable to pay the costs if the decision be against him, *Smith* v. *Williamson*, 6 *Hal.* 315. This court will not order the plaintiffs to give security for costs upon the ground that but one of the plaintiffs resides in this state, and that he had several years before the commencement of the suit taken the benefit of the insolvent law, *Den* v. *Boqua*, 5 *Hal.* 192. *State Bank* v. *Evans*, 2 *Gr.* 298, 300. The affidavit of non-residence, to obtain security for costs, may be made by a party in the cause, *May* v. *Morton*, 3 *Hal.* 177. The prosecutor in a writ of *habeas corpus* need not enter security, *State* v. *Lyon, Coxe* 403.

sureties endorsed on said bond by a judge of the court in which the action is pending; in case no such affidavit or approval be filed, the defendant may, within ten days from service of notice of filing security, give notice that he excepts to the sureties; in which case the plaintiff shall file such affidavit, or a new bond with such affidavit of the sureties thereto annexed; and the defendant shall have the same time to plead after service of notice of filing such affidavit or new bond, as he had at the service of the notice of exceptions; any plaintiff may file such bond and affidavit and give notice thereof before security is required.

Exceptions to sureties.

6. PARTICULARS OF DEMAND.

236. In any action on a record, or on a contract express or implied, if the defendant shall, before plea filed, demand in writing a bill of particulars of the demand, or a copy of any note, bond, contract, deed, record or writing on which the declaration is founded, or if in any such action the plaintiff shall, before replication filed, demand in writing a bill of particulars of the demand, or a copy of any bond, note, contract, deed, record, or writing on which a plea or notice of set-off is founded, it shall be the duty of the party, or his attorney, on whom such demand shall be made, to comply therewith within fifteen days, or in default thereof, besides the remedies now allowed, such defaulting parties shall, if it be the plaintiff be barred in such suit from all claim under such declaration, or, if it be the defendant be barred in such suit from all claim under such plea or notice; *provided, however*, that the court or a judge thereof, in vacation, may, upon good cause shown before or after such default, extend the time for complying with such demand.(*a*)

Bill of particulars to be furnished if demanded.

P. L. 1857, p. 296, § 3.

Amended.

Demand to be complied with in fifteen days.

Unless further time is given.

237. The plaintiff or defendant may annex to his declaration or plea, a schedule containing such particulars of demand, and copies of such notes, bonds, contracts, deeds, records, or writings on which the declaration, plea, or notice is founded, and in such case the adverse party shall not be at liberty to make the demand aforesaid; but the party so annexing the same shall be bound thereby, unless in case of surprise, or for other good cause, the court shall give relief, which they are hereby empowered to do.

Plaintiff or defendant may annex schedule to declaration or plea.

Ib. § 4.

238. The attorney for such schedules, and each copy thereof, shall be entitled to receive eight cents per folio, and the clerk of the court, for copying the same in the record, shall receive six cents per folio.

Fees for schedule and recordiug.

Ib. § 5.

7. CIRCUIT RECORD. POSTEA AND JUDGMENT.

239. When an issue in the supreme court is to be tried at a circuit court, a transcript of the declaration and pleadings in the cause, with a proper *placita*, and nothing more, shall be made and sent, under the seal of the supreme court, to the said circuit court, which shall be a sufficient warrant or authority for the latter to proceed upon, hear and determine the said cause; and the plaintiff or defendant, or both, may have such transcript of the said proceedings, if required.(*b*)

Circuit record sent down.

R. S. 196, § 8.

240. The justice before whom such circuit court shall be held shall return the said transcript, with the verdict and other proceedings before him had upon it, to the supreme court at the next term, and the said

Postea to be returned.

Ib. § 13.

(*a*) Bill of particulars being delivered, no proof is requisite, that notice requiring it was given, *Clinton* v. *Lyon*, *Pen.* *1036. Bill of particulars, when required, must be delivered before a plea. In a charge for money had, it should name the person of whom received, *Whitall* v. *Vaughn*, *Pen.* *636. The defendant has the same time to plead after receiving the bill of particulars, that he had at the time of demanding it, *Anonymous*, 1 *Harr.* 346. If a bill of particulars fully and substantially apprise the opposite party of the matter intended to be given in evidence, it will be sufficient, although it is not as minute and specific, as it might have been, unless it shall appear by affidavit, or otherwise to the satisfaction of the court, that the party has been misled or suprised by the bill, or is in great danger of being prejudiced for want of a better particular, *Stothoff* v. *Dunham*, 4 *Harr.* 181. *Tillou* v. *Hutchinson*, 3 *Gr.* 178. The plaintiff is only required to furnish the defendant with notice of the particular subject-matter, in relation to which the covenant or agreement has been broken, and not the items or particular facts constituting such breach and necessary to be proved on the trial, *Van Voorst* v. *Morris Canal Co.*, *Spen.* 200. A party is not bound to furnish his adversary with a copy of any record or writing which is not the foundation of his suit or claim, *Maryott* v. *Young*, 4 *Vr.* 336. It is no variance from the bill of particulars rendered if the book of accounts charge to A. B., overseer of the poor, &c., items which in the bill are rendered as charged to A. B., *Bay* v. *Cook*, 2 *Zab.* 343. A bill of particulars served, forms no part of the record; and it is not error, that the name and style of the defendant below as set forth in said bill of particulars, do not entirely correspond with the name given in the record; especially when such variance has not been assigned for error, *State Street Church* v. *Gordon*, 2 *Vr.* 264.

(*b*) The transcript when once sealed and certified by the clerk, need not in ordinary cases be altered in date or resealed, though the trial does not take place at the first circuit after the transcript is made out and certified; but the same certificate will answer for the trial of the cause at any future term, *Den*, *Mickle* ads. *Dunham*, 5 *Hal.* 150. The clerk may permit the attorney to make out a transcript of the pleadings in a cause, and affix the signature of the clerk and the seal of this court to the certificate required by law, when, in fact, such pleadings are on file, *Caldwell* v. *Estell*, *Spen.* 326. It does not constitute a variance, that the circuit record differs from a copy of the declaration furnished defendant by plaintiff's attorney; he should obtain a copy from the files of the court, made by the clerk, *Ogden* v. *Gibbons*, 2 *South.* *518, *532.

supreme court shall receive and file the same, and give judgment thereon according to law.

Judgment on postea, relicta, &c., by order of judge at circuit.

P. L. 1855, p. 289, § 39. " 1857, p. 298, § 8.

241. In actions in the supreme court, whenever a *cognovit* or *relicta* is given, or a verdict is obtained at the circuit, the party obtaining the same may, by order of the justice at the circuit, on two day's notice, and upon such terms as he may impose, file the circuit record and *postea*, and enter judgment, and issue execution thereon forthwith, after the making of such order; but in case a rule *nisi* for a new trial shall be granted, the proceedings on such judgment and execution shall be stayed until the determination of the same, and the court in bank may in all cases, in its discretion, stay said excution.

8. BILLS OF EXCEPTIONS AND RULES TO SHOW CAUSE.

Bills of exceptions to be sealed.

R. S. 980.

242. When any person, impleaded before any court, in any cause where a writ of error lies to a higher court, shall allege an exception, praying that the court will allow it, if he who alleged the exception instantly writes the same, and requires that the judge or judges of the said court shall put thereto his or their seal or seals in testimony thereof, such judge or judges, or the greater part of them present, shall so do; and if such higher court, upon the cause being removed before them, do not find the same exception in the record, and the plaintiff show the exception, written and sealed as aforesaid, the said higher court shall proceed to judgment according to the same exception, as it ought to be allowed or disallowed.(*a*)

Death of judge without having sealed exceptions

P. L. 1865, p. 776. Amended.

243. Where exceptions shall have been taken at the trial of any cause in cases where a bill of exceptions may be taken, and the justice of the supreme court or judge of the circuit court shall die without having sealed such exceptions, the cause shall be heard in the court of errors, upon such exceptions being stated and agreed to in writing by the parties or their attorneys; or, if the parties or their attorneys cannot agree upon the bill of exceptions that were in fact taken, though not sealed, the same shall be settled and sealed, on five days' notice, by any justice of the supreme court as the same shall be found by him to have been in fact taken, and shall be returned with the writ of error.

Cause may be heard on exceptions agreed on.

What bill of exceptions to contain.

244. A bill of exceptions shall contain only so much of the evidence as may be necessary to present the questions of law upon which exceptions were taken at the trial; and it shall be the duty of the judge, upon the

(*a*) The design of the statute was to provide a mode for examining errors which could not properly be inserted in the record, and allows an exception wherever a party is impleaded, not limiting its application to trials, *Ford* v. *Potts*, 1 *Hal.* 388, 392. An exception may be taken to the opinion of the court on the sufficiency of objections to an award of arbitrators, *Ibid.* A challenge to the array was made, and on being overruled, a bill of exceptions was taken, and carried before the governor and council by whom it was determined, *Anonymous*, cited by *Kinsey, C. J. Ibid.* That a verdict is larger than it ought to have been, is not the subject of a bill of exceptions, *Apgar* v. *Hiler*, 4 *Zab.* 812, 817. In settlement cases, no bill of exceptions lies to the proceedings of the quarter sessions, *Newton* ads. *Gloucester*, 1 *Hal.* 405. A bill of exceptions can only be taken in a case where a writ of error lies. It cannot be taken in insolvent cases, *Van Waggoner* v. *Coe*, 1 *Dutch.* 197. *Roston* v. *Morris*, 1 *Dutch.* 173, 176. Errors assigned on the admission of testimony can only be presented on a bill of exceptions, *Johnson* v. *State*, 2 *Dutch.* 314. The office of a bill of exceptions is not to assign errors, but to certify and make part of the record the precise acts or omissions complained of. It is not a pleading of the party, but the return of the judge of his decisions made upon the trial, and its sufficiency is not to be tried by the rules regulating the pleadings of the parties, *Associates, &c.* v. *Davison*, 5 *Dutch.* 415, 417. A bill of exceptions is a statement of the point on which the court below gave an opinion, *Coxe* v. *Field*, 1 *Gr.* 215, 218. Refusal of the court to grant a new trial is not a proper matter for a bill of exceptions, *Furman* v. *Applegate*, 3 *Zab.* 28, 33. In an action for damages, if the court refuse to non-suit, where the plaintiff shows without contradiction, a want of ordinary care on his part, the defendant is entitled to a bill of exceptions, *Central R. R. Co.* v. *Moore*, 4 *Zab.* 824. The act directing bills of exceptions to be sealed, is substantially the same as the statute of Weston, 2 *Car.* 31, and though silent in regard to the influence the bill is to have on the subsequent progress of the cause in the court below, yet it manifestly contemplates a review of the matters contained in the bill, only in a higher court, *Mann* v. *Glover*, 2 *Gr.* 195. See *Belton* v. *Gibbon*, 7 *Hal.* 76, 78. A decision of the court overruling irrelevant testimony is not a subject for a bill of exceptions, *Brand* v. *Longstreet*, 1 *South.* *325, *328. The practice has been for the judge on the exception being taken and a minute thereof made, to grant time for the preparation of a formal bill of exceptions, and if the bill be presented within a reasonable time, to affix his seal to it; when this is done, it relates back as if the bill was sealed at the trial, *State* v. *Holmes*, 7 *Vr.* 62. Bills of exception should be prepared and sealed immediately, during the progress of the trial. If that is not done, the court will be warranted in treating the exceptions as nugatory, *Donnelly* v. *State*, 2 *Dutch.* 465. *State* v. *Holmes*, 7 *Vr.* 62. *Agnew* v. *Campbell*, 2 *Harr.* 291. No bill can be afterwards sealed without the mutual consent of the attorneys, or unless settled by the judges who tried the cause, in pursuance of an agreement made at the trial, in open court, to that effect, *Agnew* v. *Campbell*, 2 *Harr.* 291. The case of *Agnew* v. *Campbell's Administrators*, 2 *Harr.* 291, examined and approved, *Wilson* ads. *Moore*, 4 *Harr.* 186. Where the judge who tried the cause refuses to seal the bill of exceptions, the court sitting in error cannot compel him to do so. *Ibid.* But where the common pleas refused to hear read an affidavit of one of the referees, on a motion to set aside the report, the supreme court granted a rule to show cause why a *mandamus* should not issue to compel the common pleas to seal a bill of exceptions taken to such refusal, *Anonymous. Pen.* *664. The court of common pleas on the trial of an appeal, has no authority to seal a bill of exceptions, *Moore* v. *Hamilton*, 4 *Zab.* 532. *Roston* v. *Morris*, 1 *Dutch.* 173. *Van Waggoner* v. *Cole*, 1 *Dutch.* 197. *Clarke* v. *Fulse*, *Pen.* *263. *Martin* v. *Thompson*, 5 *Hal.* 142. But see *Brand* v. *Longstreet*, 1 *South.* *325. *Williams* v. *Sheppard*, 1 *Gr.* 76. Upon proof that the bill of exceptions has been improperly or irregularly signed, the court in error may dismiss the cause from the record, *Agnew* v. *Campbell*, 2 *Harr.* 291, 295. *State* v. *Holmes*, 7 *Vr.* 62, 64. *Wilson* ads. *Moore*, 4 *Harr.* 186. Judgment of reversal on writ of error will not be given where no record is returned with the writ, or where the bill of exceptions on which errors are assigned, is not signed by the judge below. *Lutes* v. *Alpaugh*, 3 *Zab.* 165.

settlement of the bill, to strike out of the same all the evidence and other matters which shall not have been necessarily inserted.(*a*)

To be returned and filed with writ of error.

245. Every bill of exceptions shall be returned and filed with the writ of error and record in the case; and unless so returned and filed, the judgment shall not be reversed, nor shall there be any assignment of error, for any matter contained therein.

Obtaining rule to show cause, a waiver of exceptions except on points reserved in rule.

246. Where the party holding a bill or bills of exceptions applies for a rule to show cause why a new trial should not be granted, the granting thereof shall be a waiver of all bills of exceptions, except on points expressly reserved in said rule; a rule to show cause why a new trial should not be granted, may, in the discretion of the court, be special, and then the case shall be heard and decided on the grounds upon which the rule was allowed.(*b*)

9. CASE CERTIFIED.

Judge at circuit may certify case to supreme court.

R. S. 200, § 5.

247. The judge holding any circuit court, may at his discretion, and upon such terms as he may think reasonable, direct any case of doubt or difficulty to be made and stated, and certified by him to be argued at the bar of the supreme court; which court shall hear the same, and after opinion given therein, shall certify the same to the said circuit court, which court shall render judgment therein in conformity to such opinion.

Clerk to file certificate and enter rule.

248. Whenever a case is certified from any circuit court for the advisory opinion of the supreme court, the clerk shall file the certificate, enter a rule as of course, setting the cause down for argument, and place the same on the paper, giving it priority according to the date of filing the certificate.

Error may be assigned on certified opinion.

P. L. 1855, p 288, § 86.

249. Where judgment shall be rendered by any circuit court, in conformity to the certified opinion of the supreme court, upon a case certified, and a writ of error shall be brought to reverse such judgment, such certified opinion shall be returned with the writ of error as part of the record, and errors may be assigned thereon; and if error be found therein, the judgment may be reversed therefor.

10. STENOGRAPHIC REPORTER.

Stenographic reporter may be employed.

P. L. 1871, p. 92.

250. The judge of the circuit court in the several counties of this state, whenever in his discretion it shall seem proper, may employ a competent stenographic reporter, whose duty it shall be to attend all trials in said circuit court and in the court of oyer and terminer, and exactly and truly take notes and record *verbatim* all the evidence and proceedings under the direction of said judge, except the arguments of counsel upon such trials, and when requested, make and furnish true reports thereof to the judge, and to each party in such cause.

(*a*) A bill of exceptions should state specifically the grounds of objection to the evidence offered, and should apprise the court and the adversary of the precise objections intended to be made, *Donnelly* v. *State*, 2 *Dutch.* 465. *Associates, &c.* v. *Davison*, 5 *Dutch.* 415. The facts upon which the objection to evidence is founded, must appear on the bill of exceptions affirmatively. It is not sufficient that the bill is silent, even where proof of the facts is necessary to legalize the evidence objected to, *Moran* v. *Green*, 1 *Zab.* 562. A bill of exceptions, founded on the refusal of a judge to charge a specified proposition, must show either that there was a refusal to charge upon the point at all, or what the charge upon such point was. *Petre* ads. *State*, 6 *Vr.* 64. The bill must show that the precise point of which a review is sought was made by the counsel, presented to the mind of the court, and decided before the bill was sealed. *Associates, &c.* v. *Davison*, 5 *Dutch.* 415. Even if the trial was held before a special term of the court of oyer and terminer, it is not necessary that the evidence set forth in the bill of exceptions should show that the special term was rightly called; this will be presumed to have been proved, unless an exception be taken specifically to the insufficiency of such proof. Such parts of the evidence only should be put in a bill of exceptions, as is necessary for the matter excepted to, *Dodge* v. *State*, 4 *Zab.* 456. See *Budd* v. *Crea*, 1 *Hal.* 370, 373. A paper purporting to be a bill of exceptions, sealed by the common pleas, is nothing more than a voluntary return of a state of facts, made by the court without any legal authority, by which the adverse party is not bound, and being objected to cannot be received, *Moore* v. *Hamilton*, 4 *Zab.* 532. A statement made by the judge, and accompanying the bills of exception was by agreement of the parties, considered as a bill of exception, *Gibbons* v. *Ogden*, 2 *South.**853,*854. Exceptions to the charge of a judge should specify what is alleged to be erroneous, and a general exception to the whole charge is irregular, and may be disregarded by the appellate court, *Oliver* v. *Phelps*, 1 *Zab.* 597. *S. C., Spen.* 180. *Associates, &c.* v. *Davison*, 5 *Dutch.* 415, 418.

(*b*) Where a party who has obtained bills of exceptions applies for a rule to show cause why a new trial should not be ordered on the points contained in said bills, or any of them, it will be made a condition of granting the rule that he abandon all his bills of exception, *Meeker* v. *Boylan*, 3 *Dutch.* 262. *Mann* v. *Glover*, 2 *Gr.* 195. *Odgen* v. *Gibbons*, 2 *South.* *853. If the application is solely on points which cannot be raised on a writ of error, the bills of exceptions need not be abandoned; but in that case the rule will be special, so as to confine the argument to the grounds upon which the rule has been allowed, *Ibid.* If the judge errs in ruling, that certain evidence is admissible, and a bill of exceptions is thereupon prayed and sealed, but no evidence is afterwards given in consequence of such decision, the bill of exceptions ought to be given up, *Bunting* ads. *Allen*, 3 *Harr.* 299. A consent to the reference of an account by the court, under sections 201 and 252 of the Practice Act, or a submission to arbitration, is not an abandonment of exceptions, when the parties have expressed a different purpose by entering their dissent. *Paulison* ads. *Halsey*, 8 *Vr.* 255. *S. C.*, 9 *Vr.* 488. Where bills of exceptions have been fraudulently obtained, or sealed irregularly, improvidently or in clear violation of a plain rule of law, the court, to which the writ of error has been returned, will quash them, *Wilson* ads. *Moore*, 4 *Harr.* 186.

Compensation, how paid.

251. The compensation of such reporter shall not exceed ten dollars per day, which sum shall be paid by the board of chosen freeholders of said county, on certificate of said judge as to the number of days upon which he shall be employed; *provided*, that said reporter shall, for reports of evidence and other proceedings by him furnished, be paid by the party in such cause requesting the same, at the rate not to exceed ten cents for one hundred words; *provided further*, that said reports shall be furnished within one day after request is made; *provided also*, that said reporter shall be duly sworn in open court, faithfully to perform all the duties required by this act; and such reporter shall be removable, and other appointments made from time to time by the judge of said court at his discretion.

Provisos.

Fees to be paid.

252. Towards defraying the expense of the county under this act, a fee of one dollar shall be paid to the clerk of said county, by the party noticing any trial in the circuit court, at every term the same shall be noticed, which fee shall be included in the taxed bill of costs, and be recoverable as other costs in said suit, and the clerk of such county shall pay such fees at the end of every term to the county collector of said county.

[All special acts authorizing appointment of stenographic reporters in particular counties were repealed by this act].

11. SUITS BY COMMON INFORMERS.

Time of commencing action noted.

R. S. 919, § 14.

253. Upon every action or information, which shall be instituted or exhibited by any informer on a penal statute, a special note shall be made of the very day, month, and year of its institution or exhibition, and such action or information shall be of record from that time and not before; *and further*, that no manner of ante-dating thereof shall be made or allowed.(*a*)

Name of prosecutor and title of statute to be endorsed on process.
Ib. § 2.

254. Upon every process which may be sued out in such action or information to compel the appearance of the defendant, shall be endorsed the name of the party who prosecutes, and the title of the statute upon which the said action or information is founded;(*b*) and any clerk, issuing process contrary to this provision, shall forfeit to the party against whom such process is awarded ten dollars for every offence, to be recovered by action of debt, with costs, in any court having cognizance of that sum.

Defendant may plead the general issue, etc.
Ib. § 3.

255. If any action or information shall be brought or exhibited for an offence against any penal law, made or to be made, the defendant in such action or information may plead the general issue, that he is not guilty, or that he oweth nothing, and give in evidence any special matter which, if pleaded, would be a bar to the said action or information, giving notice, with the same plea, of the matter so intended to be given in evidence.

Recovery by covin no bar, etc.
Ib. § 4.

256. No recovery, by verdict or otherwise, obtained by *covin* or collusion in an action popular, shall be a bar to any other action prosecuted in good faith.

In what cases prosecutor liable for a proportion of the penalty.
Ib. § 5.

257. If any prosecutor of an action or information, for the recovery of any penalty not wholly appropriated to the use of such prosecutor, shall compound with the defendant, or direct such action or information to be discontinued, unless it be by leave of the court in which the said action or information shall be pending, then such prosecutor shall be liable for so much of the penalty to the state of New Jersey, or any other person than the prosecutor, as the said state or such other person would have been entitled to, if the defendant had been convicted.

When prosecutor to pay costs.
Ib. § 6.

258. Every informer or prosecutor on a penal statute shall pay costs to the defendant, if he discontinue or be nonsuit, or if a verdict or judgment pass against him, for which costs the said defendant shall have execution against the goods, chattels, and person of such informer or prosecutor.

(*a*) In an action by a common informer to recover a penalty, the justice must make a special note in his docket of the day, month and year of its institution, *Ackerson* v. *Zabriskie*, 2 *Hal.* 167. Merely stating the time of the commencement of the action, and the amount of the penalty, without stating what the penalty was for, or on what statute it accrued, is not sufficient, *Ibid.* What is an insufficient state of demand to recover a penalty under the "act regulating travelling on public and turnpike roads in this state," *Ibid.* This note should be made at the time or on the day of the commencement of the suit; and if the justice omits to make the entry until the return of the summons, the judgment will be reversed, *Griffith* v. *West*, 5 *Hal.* 301. Although it would be convenient and proper to make the entry more special, yet where the nature of the action appears from the subsequent proceedings, and the act is in terms complied with, it is sufficient, *Dallas* v. *Hendry*, *Pen.* *973.

(*b*) The title of the statute and the name of the prosecutor, must be endorsed on the writ, *Miller* v. *Story*, 2 *South.* *476.(*b*). *Oliver* v. *Larzaleer*, 2 *South.* *513. On an information for profanity the title of the statute on which the complaint is made, or the name of the prosecutor, need not be endorsed on the process, *Johnson* v. *Barclay*, 1 *Harr.* 1.

259. Nothing in the last six preceding sections shall apply to any certain person, body politic or corporate, to whom or to whose use any forfeiture, penalty or suit is or shall be specially limited or granted by any statute, but that every such certain person, body politic or corporate, may in such case sue, prosecute, or inform, as he or they might have done if this act had not been made.

Preceding sections not to apply to certain persons. Ib. § 7.

12. EXCEPTIONS TO JUDGES.

260. No justice or judge of any court of record in this state, who shall be related in the third degree to either of the parties in any cause pending in such court, or be interested in the event of such cause, or shall have been attorney on record or counsel for either party in any such cause, or shall have given his opinion upon the matter in question in any such cause, shall sit in judgment upon the trial or argument of any point in controversy in any such cause; and the degrees of kindred, in such case, shall be calculated according to the common law manner of computation; *provided nevertheless*, that any matter or thing herein contained shall not be construed to prevent any justice or judge from sitting on the trial or argument of any point in controversy in such cause, merely because he may have given his opinion in any other cause where the same matter in controversy shall have come in question, nor from his having given his opinion on any question in controversy in the same cause, in the course of the previous proceedings therein.(*a*)

Who shall not sit in judgment upon the trial of a cause.

R. S. 992, § 1.

Proviso.

261. No justice or judge of any court of record in this state, who shall be related in the third degree, as aforesaid, to either of the parties in any cause pending in such court, or shall be interested in the event of any such cause, or shall have given his opinion in either of the said relations upon the matter in question in said cause, shall nominate or strike the jury in any such cause.

What judges excluded from striking a jury. Ib. § 2.

262. All challenges to a justice or judge, for the causes aforesaid, shall be made previous to the trial or argument, and the court may try such challenges, or appoint three indifferent persons triors for that purpose, at the discretion of the court, and that the finding of a majority of such triors shall be received as the determination of such triors.(*b*)

Challenges, when to be made and how tried. Ib. § 3.

263. No judge of any court in this state shall act as clerk of the court of which he is a judge, nor as attorney at law or counsellor in any court in this state, unless otherwise specially provided by act of the legislature.(1)

Judge of court not to act in certain offices. Ib. § 4.

264. No justice or judge of any court of record in the state shall be disqualified from sitting in judgment upon the trial or argument of any cause, or of any point in controversy in any cause pending in such court, wherein the board of chosen freeholders of any county, or the inhabitants of any township or city, are or may be parties to the record, or otherwise interested, because such justice or judge is an inhabitant of such county, township or city, or liable to be taxed within the same.

Judge not disqualified by reason of interest as taxpayer.

P. L. 1849, p. 129.

(*a*) It is good ground of challenge to a justice that he had married a sister of the plaintiff's wife, and that the justice's wife was deceased leaving issue, *Vannoy* v. *Givens*, 3 *Zab.* 201, 202. If one of the justices making an order of filiation, is a cousin of the mother, the proceedings will be quashed, *State, Stoll* v. *Gariss*, 9 *Vr* 200. When the legislature provides for the exercise of judicial functions it cannot change their essential nature, and authorize a judgment in violation of the maxim that no person can be a judge in his own cause. That maxim is founded in natural justice and fundamental law, and is inherent in, and a part of the nature of judicial action, *State, Winans* v. *Cranford*, 7 *Vr.* 394. See *Schroder* v. *Ehlers*, 2 *Vr.* 44. The assessment in this case was set aside, because three of the commissioners who made it were owners of the land to be assessed, and therefore judges in their own cases, *Ibid. State. Kingsland* v. *Union*, 8 *Vr.* 268. Where a new trial was ordered, the chief justice, who dissented, was held incompetent to sit at the new trial at the circuit, because of having expressed an opinion, *Den Snedekers* v. *Allen, Pen.* *35, *51, *note.* In the supreme court, on a motion for a new trial, a challenge to a judge because he had tried the cause below, was overruled, *Den, Pearson* v. *Hopkins, Pen.* *195. The judges who concurred in the judgment below are excluded from sitting on the review, in the court of errors and appeals, although there had been no argument below, and no formal opinion delivered, *Gardner* v. *State*, 1 *Zab.* 557. But this does not exclude them from voting or expressing opinions on preliminary and collateral motions. The exclusion only applies to the hearing of the cause, *Engle* v. *Cromlin*, 1 *Zab.* 561. A law is unconstitutional which provides that no judgment of the supreme court shall be reversed by the court of errors, unless a majority of those members of the court who are competent to sit on the hearing and decision of the case shall concur in such reversal, *Clapp* v. *Ely*, 3 *Dutch.* 622. A judge is not incompetent to appoint commissioners to review the damages on laying out a road because he has once been a member of the town committee; nor because he was once employed as surveyor by the opponents of the road; nor because he has expressed an opinion that the road was unnecessary; these are matters unconnected with the question of the damages sustained, *Readington* v. *Dilley*, 4 *Zab.* 209.

(*b*) Form of challenge and trial, *Den, Pearson* v. *Hopkins, Pen.* *195 On a challenge to a justice of the peace three triers were appointed. Their determination of facts was held to be conclusive, under the statute, *Davis* v. *Mahany*, 9 *Vr.* 104. A challenge to a justice for relationship, must show how he is related, and to whom, *Stevenson* v. *Stiles, Pen.* *740.

(1) By the act to amend certain errors in the Revised Laws, approved April 9, 1875, (P. L. 1875, p. 91), this section not to apply to such of the judges of the court of errors and appeals as are specially appointed judges of that court.

XVI. Costs.

When plaintiff shall recover costs.

R. S. 449, ¿ 1.

265. If the plaintiff in any action, real, personal or mixed, shall by verdict or otherwise, recover debt or damages in such action, he shall have judgment to recover his costs against the defendant, to be taxed in the manner prescribed by law, which shall be levied and collected by execution, together with the debt or damages aforesaid.(*a*)

When defendant shall recover costs
Ib. ¿ 2.

266. In any action wherein the plaintiff, on a judgment in his favor, would be entitled to recover costs, the defendant, if the plaintiff shall be nonprossed or nonsuited, or a verdict shall be rendered for the defendant, shall have judgment to recover his costs against the plaintiff, (except against executors or administrators prosecuting in the right of their testators or intestates), to be taxed as aforesaid and may have such process or execution as the plaintiff might have had against him, if judgment had been given in such action for the plaintiff.(*b*)

Process to recover.

Costs on arrest of judgment.

267. Where judgment shall be arrested, each party shall pay his own costs.

When costs not recoverable in supreme court.

R. S. 449, ¿ 4.

268. If in any suit commenced in the supreme court, the plaintiff shall not recover above two hundred dollars, exclusive of costs, then such plaintiff shall not be entitled to costs(*c*); but this section shall not extend to any suit in which the title to lands, tenements, hereditaments or other real estate, may in any wise come in question.(*d*)

Costs, when title to land in question.
Ib. ¿ 5.

269. In all actions of trespass commenced or prosecuted in the supreme court, wherein the justice, at the trial of the cause, shall find and certify, under his hand, upon the back of the record, that the title to lands, tene-

(*a*) History of allowance of costs, *Aller* v. *Shurts*, 2 *Harr.* 188. It is a general principle, that the prevailing party in suits, in all courts of law, is entitled to costs, *Hann* v. *McCormick*, 1 *South.* *109, *111. *Reeve* ads. *Eft*, 2 *Vr.* 139, 141. *State* v. *Blake*, 7 *Vr.* 443. See *Stires* v. *Stires*, *Spen.* 52, 56. Costs are given, where the plaintiff recovers damages, *Reed* v. *Chegary*, *Spen.* 616. 617. Where each party succeeds in part, no costs are allowed, *Dewees* v. *Manhattan Ins. Co.* 5 *Vr.* 253. Where both parties are wrong, each should pay his own costs, *Cox* v. *Bennet*, 1 *Gr.* 165. Where the plaintiff has omitted to enter judgment for costs, he cannot recover costs below, *Hunt* v. *Allen*, 2 *Zab.* 537. If the defendant was entitled to costs, and none were given to him, the plaintiff could not complain, *Crawford* v. *Woodruff*, *Pen.* *277. Upon an appeal from an award of commissioners as to the value of lands taken by a city, the court, having no power to enter judgment, cannot give costs, *Beebe* v. *Newark*, 4 *Zab.* 47, 50. Until judgment pronounced the right to costs does not become vested, and it may be altered by the legislature *pendente lite*, *Ruder* v. *Road District*, 7 *Vr.* 273. Plaintiff cannot recover costs of copies or exemplifications of records used as evidence on the trial, *Den* v. *Johnson*, 1 *Gr.* 156. Where a defendant removes an indictment into the supreme court and carries it down to the circuit for trial, the attorney for the state cannot tax his costs as in a civil action, but is entitled only to his regular fees as in criminal cases, *State* v. *Reed*, 3 *Hal.* 178. There is no provision in the fee bill for revenue stamps, and there is no more authority to charge for stamps than for stationery, or copies of deeds, *Ferguson* ads. *State*, 2 *Vr.* 289. Costs cannot be awarded on a successful motion to set aside a return of surveyors laying out a road; there is no statute in settled practice to authorize it. *In re Highway*, 2 *Zab.* 293. On report of referees, where no damages or costs were found for the plaintiff, the defendant must pay an equal moiety of the costs, *Den* v. *Exton*, 1 *South.* *173(*a*), *Anonymous*, *Pen.* *228. Where defendant puts on a cause on affidavit, he will not be compelled to pay costs of a jury struck by plaintiff, *Kennedy* v. *Dixon*, 1 *Hal.* 159. In the taxed bill of costs on a rule for restitution, attorney and counsel's argument fee allowed, *McChesney* v. *Rogers*, 3 *Hal.* 272. On setting aside an irregular proceeding, the party against whom it has been taken, is not liable to costs, *Boggs* v. *Chichester*, 1 *Gr.* 209. In taxing costs, the only services rendered in a cause, for which charges can be taxed and allowed, are those specifically provided for in the fee bill, *Anonymous*, *Spen.* 112. Services are frequently rendered for which no specific provision is made and for which there ought to be a reasonable compensation; but costs are given by statute and the court and taxing officers cannot extend the provisions of the statute to meet such case, *Ibid.*

(*b*) Upon entering judgment the defendant is entitled to tax the costs of all proceedings subsequent to the filing of the *postea* and report of the referee, *Dean* v. *Susade*, 8 *Vr.* 50. Where the defendant moved the plaintiff's non-suit for not trying his cause at circuit, when he offered to proceed, but was prevented by the court, because he did not produce a paper he had promised to produce for the defendant's use, costs were denied the defendant, *Anonymous*, *Pen.* *513. A party who fails to pursue his notice of a motion or proceeding in this court is liable for costs, *Reeve* ads. *Eft*, 2 *Vr.* 139. The plaintiffs moved for leave to discontinue, which was granted on payment of costs, *Peltier* v. *Pennington*, 2 *Gr.* 312, 313. If a trial goes on on account of a defect or mistake of the judge or sheriff in making out the panel of a struck jury, the plaintiff is not obliged to pay costs, *Gibbons* ads. *Ogden*, 2 *Hal.* 122. Costs were allowed to a defendant who had succeeded on a motion to re-tax a bill of costs, *State* v. *Allen*, 2 *Dutch.* 147. *Reeve* ads. *Eft*, 2 *Vr.* 139, 141.

(*c*) The plaintiff is not entitled to costs in the supreme court, on a motion in arrest of judgment where the verdict is for a less sum than two hundred dollars, *Stille* v. *Jenkins*, 3 *Gr.* 302. The act of 1797, to prevent suits under a certain sum, being brought in the supreme court, does not repeal or modify the act of 1774, for the more speedy recovery of legacies, on the subject of costs, *Meeker* v. *Arrowsmith*, 1 *Harr.* 228. Affidavit that the debt exceeds $60, does not entitle plaintiff to costs in supreme court, on a judgment under $200, *Boudinot* v. *Lewis*, *Pen.* *566. If suit on a replevin bond is brought in superior court, and judgment for less than $60, no costs are allowed, *Hughes* v. *Hughes*, *Pen.* *577. Full costs allowed on judgment for $44.86, in a cause removed by *habeas corpus*, as the affidavit for bail exceeded $100, *White* v. *Cooke*, *Pen.* *898. On a judgment for less than £50, in the supreme court, no costs are allowed, *Vote* v. *Covenhoven*, *Sept.* 1791, *Coxe* 137, *in arg.* An action upon a record is not within the provisions of the act, *Barracliff* v. *Griscom*, *Coxe* 193. *Semble*, that in the supreme court in case of verdict for the plaintiff, if the value of the property in dispute exceeds $200, the plaintiff, under the statute is entitled to costs, *Hunt* v. *Chambers*, 1 *Zab.* 620. *S. C.*, *Spen.* 109. For that purpose the value of the property in replevin may be inquired into, but the amount at which it was appraised will be taken to be the value, until the contrary is shown, *Ibid.*

(*d*) In an action of trespass on the case for overflowing lands, brought in the supreme court, if the title is actually brought in question by the evidence of the defendant, the plaintiff though he recovers less than two hundred dollars, will be entitled to full costs, *Hunt* v. *Morris*, 7 *Hal.* 175. To a declaration, which was general, the defendant pleaded *liberum tenementum*, the plaintiff new assigned, describing the close as Chambers's lane in both counts of the declaration; to one count of the new assignment no new plea was filed, and to the other the defendant pleaded a public and common highway; a verdict was rendered for plaintiff for $4 damages. *Held*, that the plea of public highway was not a plea of title to lands, and that the plaintiff could not recover costs, *Chambers* v. *Wambough*, 4 *Dutch.* 531. Where the declaration in this court is for the same trespass as that in the suit commenced in the justices court, and the plaintiff new assigns and damages under two hundred dollars are assessed upon a plea of guilty as to part of the newly assigned trespass, the plaintiff will recover costs, *Van Pelt* v. *Phillips*, 4 *Zab.* 560. In suit in which the right to a pew comes in question, plaintiff in circuit is entitled to full costs, though verdict for less than 100 dollars, *Presbyterian Church* v. *Andruss*, 1 *Zab.* 325. The plea *liberum tenementum* puts the title in question, and where a verdict of six cents damages was rendered for the plaintiff, he was entitled to costs, *Budd* v. *Stille*, 1 *Harr.* 263. In an action for overflowing his lands to the permanent damage of the freehold, the plaintiff is entitled to full costs, though he recovers not more than five dollars damages, *Dixon* v. *Scott*, 3 *Harr.* 430. If it appear, on inquiry, that the production of the plaintiff's title was necessary to enable him to maintain his action, he is entitled to his costs, *Dickerson* v. *Wadsworth*, 4

ments, hereditaments or other real estate came in question on the trial of said cause, and the plaintiff shall recover any damages, he shall recover full costs of suit.(*a*)

Costs, when suit removed by habeas corpus. Ib. ¿ 6.

270. If any suit commenced in any circuit court or court of common pleas, shall be removed by writ of *habeas corpus* into the supreme court by the defendant, and the plaintiff shall recover in the supreme court, he shall recover full costs in case he would have been entitled to recover costs, had the suit remained and been tried in the circuit court or court of common pleas.(*b*)

Costs in circuit court.

R. S. 200, ¿ 9.

271. The same costs and fees shall be allowed in all personal actions brought originally in the circuit courts, as are by law allowed in the courts of common pleas for like services, and shall be recoverable in like manner; *provided*, costs would have been recovered in such case, in said courts of common pleas and not otherwise; and in all actions real and mixed, originally commenced in said circuit courts, and all personal actions removed therein, the same costs and fees shall be allowed and recovered as are by law allowed and recovered for like services in the supreme court.

In actions cognizable before justices court brought in another court,

R. S. 229, ¿ 63. Amended.

272. If any person shall institute a suit for any debt, demand or cause of action, made cognizable before the courts for the trial of small causes, in any other of the courts of law of this state, and obtain judgment therein for any sum which, without costs, shall not exceed one hundred dollars, then such person shall not recover any costs in such suit, except as hereinafter provided.

If recovery reduced by defence of failure of consideration or recoupment.

Plaintiff may recover costs, if judge certify.

273. Whenever in an action on contract brought in the supreme or circuit court, the plaintiff shall recover, but the amount of the debt or damages recovered shall be reduced below the sum which would entitle plaintiff to costs in such courts, by allowance made to the defendant for a partial failure of the consideration of the contract sued on, or abatement by way of recoupment of damages, the plaintiff shall be entitled to his costs, if the justice of the supreme court before whom such action is tried, shall certify that in his judgment the plaintiff had reasonable grounds for bringing his action in such court.

In actions of tort cognizable in justices court.

Plaintiff to recover costs, if verdict is not over $100, if judge certify, &c.

274. If any action to recover damages for a tort, which is cognizable before the courts for the trial of small causes, shall be brought in the circuit court, the plaintiff shall be entitled to recover his costs, notwithstanding that he shall not recover a sum exceeding one hundred dollars; *provided*, that the judge, before whom such action is tried, shall immediately after verdict found, certify that in his judgment the said action should have been brought in the circuit court.

Suits on same paper, but one bill of costs allowed for attorney and counsel.

R. S. 489, ¿ 7.

275. In suits on the same instrument, bond or note, where several are bound, and in suits against the maker, endorser or endorsers of any note, and in suits on any inland bill of exchange against the drawer, acceptor or any indorser or endorsers, thereof, there shall be a taxation and recovery of the attorney and counsel fees taxable by law in one of the said suits only, at the election of the plaintiff; and no fees for attorney or counsel shall be allowed or taxed in any bill of costs, in any suit or suits brought on the same instrument, bond, note or inland bill of exchange against any party or parties thereto, other than in the one where the election is made as aforesaid.

On sci. fa. how costs adjudged. Ib. ¿ 8.

276. In suits upon any writ of *scire facias*, the plaintiff obtaining judgment or award of execution, after plea pleaded, or demurrer joined therein, shall recover his costs of the suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same, in the manner aforesaid.

Vr. 357. The inquiry may be made by affidavits, or by the examination of witnesses *ore tenus*, *Ibid.* Plaintiffs complaining of injuries not exceeding $100, are compelled in many cases, at the hazard of losing their costs to institute suits in a justices court, notwithstanding the title to land may come in question, *Tindall* ads. *Tindall*, *Spen.* 146, 148, *Hornblower*, *C. J.*

(*a*) *Query.* Whether the certificate may be given at any time, *Budd* v. *Stille*, 1 *Harr.* 263. *Query.* Whether an oral statement is sufficient, *Hunt* v. *Morris*, 7 *Hal.* 175, 177. This section relates only to actions of trespass, *Ibid.* Where an action of trespass *quare clausum fregit* is brought in a justices court and title pleaded, and a suit for the same trespass brought in the supreme court thereupon, although the suit in the court below is not referred to in the pleadings, the supreme court will take notice of that fact upon the plea being produced, countersigned by the parties, so as to enable them to award costs, *Van Pelt* v. *Phillips*, 4 *Zab.* 560. Costs cannot be recovered without the certificate, *Chambers* v. *Wambough*, 4 *Dutch.* 530, 532. See *Dickerson* v. *Wadsworth*, 4 *Vr.* 357, 359.

(*b*) If an action wherein the title to land must come in question be commenced in the common pleas, and be removed by the defendant into the supreme court, the plaintiff shall recover full costs, although the judgment in his favor be less than $200, *Hankinson* v. *Baird*, 1 *Hal.* 130.

In actions for assault, slander, libel, &c.

277. In actions for assault, battery, or imprisonment, or for slander or libel, if the plaintiff shall not recover damages to the amount of fifty dollars, he shall recover no more costs than damages.(*a*)

One of several defendants acquitted shall have costs.

R. S. 449, ¿ 9.

278. Where several persons are made defendants to any action of trespass, assault, false imprisonment, trespass on the case, replevin or ejectment, and any one or more of them shall be, upon the trial thereof, acquitted by verdict, every person, so acquitted shall recover his costs of suit, in like manner as if all the defendants had been acquitted; unless the judge before whom such cause shall be tried, shall, immediately after the trial thereof, in open court, certify upon the record or in the minutes of the court, under his hand, that there was a reasonable cause for the making such person or persons a defendant or defendants to such action.(*b*)

Except in what case.

When upon demurrer, defendant to have costs.

Ib. ¿ 10.

279. If any person shall prosecute, in any court of record, any action or suit, wherein, upon any demurrer, either by plaintiff or defendant, judgment shall be given by the court against such plaintiff, in every such action or suit, the defendant shall have judgment to recover his costs against such plaintiff and have execution for the same in manner aforesaid.(*c*)

Costs on privilege to plead after demurrer over-ruled.

280. When a demurrer shall be over-ruled after argument, and the court shall give the party demurring liberty to plead anew, it shall be upon terms of the payment to the adverse party of the costs upon the demurrer.(*d*)

State to recover, but not pay costs.

R. S. 449, ¿¿ 16, 17, 18.

281. In suits upon any obligation or specialty, or upon any contract, express or implied, to or with the state of New Jersey, or the governor thereof, or any person to or for the use of the said state, the state of New Jersey or other plaintiff, shall recover costs, as any other persons may do in suits for his or her debts; but if the plaintiff in such action shall be nonsuited, or if a verdict shall pass against him, the defendant shall not recover any costs against such plaintiff; *provided*, that nothing in this section shall extend to any popular action, nor to any action to be prosecuted by any person in behalf of himself and this state, upon any penal statute, nor to any indictment, presentment or inquisition.

Clerk to tax costs.

R. S. 455, ¿ 4.

282. The clerk of the court shall tax and subscribe his name to all bills of costs in any civil cause in the court whereof he is clerk, agreeably to the fees allowed by law, and shall in no case allow any item or charge unless the service in his opinion, shall have been necessary in regularly conducting the cause, and shall have actually been performed, and shall so appear on the minutes of the court.(*e*)

Costs due court, officers, &c., to be separated.

Ib. ¿ 9.

283. Every judge, clerk, or other person, who, by law, is authorized to tax any bill of costs, shall, in such bill, class and set together those which belong to the court, or justices or judges, clerk, attorney and counsellor, sheriff and other person or persons, distributively.

Retaxation, how obtained.

Ib. ¿ 8.

Amended.

By whom expense of retaxation be paid.

284. Any person aggrieved by any bill of costs may apply to the court in which the action is pending, at the next term after payment demanded, to have the same retaxed according to law, whose decision shall be final; and if any charge is contained in such bill as taxed, for services not actually rendered, or any item therein is charged higher than is allowed by law, the court shall order that the expense of retaxation shall be paid by the attorney who drew said bill or by the clerk who taxed the same, as the court may direct; but if the court shall find the said bill to be taxed according to law, the applicant shall pay the expense of retaxation.(*g*)

(*a*) In an action of trespass, if plaintiff recovers less than £50 damages, he shall not recover costs, *White* v. *Hunt*, 1 *Hal.* 415. The rule is the same, whether the damages are assessed by a jury on the trial or on writ of inquiry. *Ibid.*

(*b*) Where a verdict was rendered in favor of one of two defendants, and no certificate made by the court that there was reasonable cause for making him a defendant, a rule was entered in his favor for his costs of suit, *Abrams* ads. *Flatt.* 2 *South.* *544.

(*c*) On demurrer by plaintiff to the plea of the defendant, costs abide the event of the suit, *Garr* v. *Stokes*, 1 *Harr.* 403, 410.

(*d*) The party applying to amend must pay costs, *Condit* v. *Neighbor*, 7 *Hal.* 320. *Den* v. *Seagrave*. 1 *Harr.* 357. *Den* v. *Ganoe*, 1 *Harr.* 439. *Hall* v. *Snowhill*, 2 *Gr.* 9. *Mayor of Newark* v. *Davis*, 3 *Harr.* 22. *Condit* v. *Gregory*, 1 *Zab.* 431. *Weart* v. *Hoagland*, 2 *Zab.* 521. *Lanning* v. *Shute*, 2 *South.* *778. *Rogers* v. *Phinney*, 1 *Gr.* 1. *Wood* v. *Leslie*, 6 *Vr.* 474. A plaintiff will be allowed to amend his writ and declaration, without the payment of costs, when the practice and law have been unsettled, *Williamson* v. *Updyke*, 2 *Gr.* 270. *Somers* ads. *Sloan*, 3 *Harr.* 49. See *Perrine* v. *Applegate*, 1 *McCart.* 532. Where both parties are wrong each should pay his own costs, *Cox* v. *Bennet*, 1 *Gr.* 172.

(*e*) Costs as taxed are presumed to be legal, *Romaine* v. *Norris*, 3 *Hal.* 80, 83. See *Phillips* v. *Hunt*, *Coxe* 137. The rule does not prevent the clerk from inserting in the record the whole amount of costs, if the bill has been taxed and filed at the time of making up the record; notwithstanding such bill may not have been taxed and filed within the period mentioned in the rule, *Bruere* v. *Britton*, *Spen.* 268. Statement of items proper for taxing in a bill of costs, *The Ordinary* v. *Allen*, 2 *Dutch.* 145. *Andrews* v. *Ford*, 2 *Hal. Ch.* 488. On *scire facias* to revive a judgment the question of illegally taxing costs cannot be raised on motion, *Phillips* v. *Hunt*, *Coxe* 137.

(*g*) An action will not lie to recover an unreasonable amount of costs, which have been taxed and paid, the proper remedy is by re-taxation, *Allen* v. *Hickson*, 1 *Hal.* 409. The party obtaining the taxation of a bill of costs, must,

285. The supreme court and the court of errors and appeals, shall have power by general rule or by a special rule in any case pending in said courts, to make such order for the payment of the cost of printing and other disbursements by either party, and the taxation and allowance thereof in the bill of costs, as said courts may deem just.

Supreme court and court of errors may make order for payment of expenses of printing, &c.

P. L. 1873, p. 65.

[For table of Fees, see Title FEES AND COSTS].

XVII. Powers of the Court or a Judge.

286. In any action in which the right to real estate or to goods and chattels is in controversy, the court or any judge thereof, may make an order for the protection of the property in controversy from waste, destruction, or removal beyond the jurisdiction of the court, upon satisfactory proof being made of the necessity for such order, and to enforce such order by an attachment for contempt.(*a*)

Order to protect property, or prevent its removal pending suit.

P. L. 1855, p. 288. § 84.

287. The justice of the supreme court to whom a judicial district has been or may be assigned, is authorized to appoint a suitable person in each county in the district, as sergeant-at-arms of the courts within the county, to hold office during the pleasure of said justice; whose duty it shall be to attend daily upon the said courts in the county wherein appointed during the several terms thereof; for which services they shall be entitled severally to receive two dollars per day for each day of actual attendance upon said courts, to be paid by the county collector of the county on the certificate of the presiding judge; *provided, however*, that he shall not for the same time receive a per diem compensation as a constable or as a crier of the courts in the county.

Sergeant-at-arms may be appointed.

P. L. 1857, p. 191.

Compensation of.

288. The court in which any civil action is tried, before a jury, may, unless objection is made by either party, direct that the verdict of the jury shall be taken by the clerk in open court in the absence of the judge, and may order that the court remain open for that purpose; and any such verdict shall be valid the same as if it were given in the presence of the judge.

Court may order that verdict be taken by the clerk.

289. Where several actions are pending in the same court brought by the same plaintiff against the same defendant, in which the same or similar matters of controversy are involved, or cross-actions are pending between the same parties in the same court, with respect to the same transaction, which are triable in the same manner, and may conveniently be tried together, it shall be lawful for the court in which such actions are pending, on the application of either party, or on its own motion, to order that such actions be consolidated for the purpose of trial; and in case of the consolidation of cross-actions, the court shall make such order for the trial and for the apportionment of the costs as shall be just and equitable.(*b*)

Consolidation of actions or cross-actions.

How costs apportioned on consolidation of cross-actions.

290. Wherever it is provided by this act, that application may be made to a judge, as distinguished from the court, for any rule or order touching any action, such application may be made before any judge of the court where the action is pending, in vacation or term time.

Application for rules, &c.

P. L. 1855, p. 288, § 88.

291. Any justice of the supreme court or judge of the circuit court shall have power in vacation to grant all rules and make all orders that may be necessary or proper in any cause pending in said courts, and may direct the taking of testimony to be read on the application for such rule or order; *provided*, that this power shall not extend to the final hearing of motions to set aside judgments entered in the supreme court on bond and warrant of attorney, or by confession; nor to the appropriation of moneys in the supreme court between judgment creditors, except by consent in writing; nor to any matter which by the rules or practice of the supreme court is required to be placed on the argument list of the said court.

Judge may make all orders in causes in vacation.

Except setting aside judgments by confession in supreme court.

upon a re-taxation, prove the items objected to. But the party moving for a re-taxation must give his adversary notice, and state the particulars of the bill of costs to which he objects, and the nature of his objection, *Hays* ads. *Williams*, 4 *Hal.* 383. The application to the court to re-tax a bill of costs must be made at the next term, after the bill is taxed by the clerk and payment thereon demanded. But the re-taxation may be made at that or any subsequent term according to circumstances, *Den* v. *Chapman*, 3 *Hal.* 176. Where on appeal by a demandant in dower from the clerk's taxation, several items were deducted, the demandant was held liable for the costs of the re-taxation, *Anonymous*, *Spen.* 112, 114.

(*a*) Such rules were granted before the passage of this statute, *Harker* v. *Christy*, 2 *South.* *717. *Flommerfelt* v. *Zellers*, 2 *Hal.* 31.

(*b*) The court will not consolidate two actions brought against the same person, by the same plaintiffs, upon promissory notes drawn at different dates and payable at different times, where it does not appear that the defence is the same in each, *Worley* ads. *Glentworth*, 5 *Hal.* 241. Two several writs of *scire facias* to revive two several executions by the same plaintiff against the same defendant, cannot be consolidated. *Mickle* v. *Brewer*, 3 *Hal.* 85. Form of rule, *Den* v. *Kimble*, 4 *Hal.* 335, 338.

May grant rule to show cause why fraudulent judgment should not be set aside.

And stay execution.

292. Any justice of the supreme court shall have power in vacation, upon affidavit laid before him showing that any judgment entered in the supreme court by confession or otherwise was confessed or obtained for the purpose of defrauding the creditors of the defendant, to grant a rule to show cause before the supreme court at the next term why such judgment should not be set aside as in favor of other judgment creditors of the defendant, and to stay the execution issued thereon; and also to order that testimony be taken to be used at the hearing.

May make order for payment of money in case of dispute between execution creditors.

293. Whenever a controversy arises between execution creditors as to the application of the proceeds realized from the sale of the property of a defendant under executions issued out of different courts, it shall be lawful for a justice of the supreme court, by an order, to direct into which of the said courts the moneys so made shall be paid; and the court into which such payment shall be directed to be made, shall thereby obtain jurisdiction to hear and decide the whole controversy between such execution creditors in relation to the proceeds of such sale; and the said justice may, at the time of making such order, or at any time thereafter, grant a rule to show cause before the said court, in such form as will present for decision the matter in controversy, and may make an order for taking testimony to be read on the argument of such rule.

May grant rule to show cause why mandamus or quo warranto should not issue.

294. Any justice of the supreme court in vacation may grant rules to show cause why writs of *mandamus* and of *quo warranto* should not issue, and make orders for the taking of testimony to be used on the argument of such rules.

Certain causes in supreme court may, by consent, be argued in vacation.

295. The argument of any motion or cause in the supreme court which by the rules and practice of the court is cognizable before the branch of the supreme court, sitting for the hearing and deciding of common business, may, by the consent of the parties interested, be heard before one or more of the justices of the supreme court at chambers, either in term time or vacation; whose decisions and judgments shall be as good and effectual as if they had been rendered at the bar of said court.

Judge may refer motions to supreme court.

296. Any justice of the supreme court or judge of the circuit court to whom application may be made for any rule or order by virtue of this act, may, in his discretion, refer the same to the supreme court, and make such order for the taking of testimony and for stay of proceedings as may be equitable.

Courts to make rules.

297. The justices of the supreme court, and the judges of the courts of common pleas in every county of this state, shall make such rules and regulations for expediting and conducting suits, and the management of business in their respective courts, as they shall from time to time judge proper.

Power of the supreme court to make rules regulating pleading and practice.

R. S. 929, § 107.

P. L. 1851, p. 317, § 10.
" 1855, p. 288, § 87.
Amended.

298. It shall be lawful for the justices of the supreme court to provide by general rules for the hearing and argument of any litigated or unlitigated motions before any one of the justices of the said court in vacation, whenever, in their judgment, it may be expedient so to do, and under such regulations as they may prescribe, and for fixing the costs to be allowed for and in respect of the matters herein contained, and the performance thereof, where said costs are not fixed by law, and for apportioning the costs of issues; and it shall be the duty of the justices of the said court to make all such rules and regulations as may be necessary to obviate any difficulties that may arise in the practice of the courts of law by reason of any omissions or defects in the same, and to regulate the pleadings and practice in the said courts so as to render the practice and proceedings therein more efficient, expeditious and simple, and for that purpose they shall have power to change and regulate such pleadings and practice.

Circuit court rules of.

R. S. 200, § 8.

299. The justices of the supreme court shall and may adopt uniform rules of practice in all matters not regulated by law for the government of the circuit courts, and the same from time to time, alter, repeal and modify as occasion may require.

[As to power of court to require indemnity to be given to a defendant in actions on negotiable instruments which have been lost, see Title PROMISSORY NOTES, *Sec.* 7.]

XVIII. Construction.

Singular number and masculine gender, applicable to what.

300. Whenever, in describing or referring to any person, party, matter or thing, any word importing the singular number or masculine gender is used in this act, the same shall be understood to include, and shall apply to several persons and parties, as well as one person or party, and females as well as males, and bodies corporate(*a*) as well as individuals, and several matters and things as well as one matter or thing, unless it be otherwise provided, or there be something in the subject or context repugnant to such construction.

P. L. 1855, p. 288, § 89.

This act not to affect proceedings before justices court.

301. Nothing in this act contained shall in any way affect any proceedings by virtue of the act entitled, "An act constituting courts for the trial of small causes," except that the provisions of this act relating to variances and amendments of pleadings (as modified by the act above referred to) shall apply to actions in the several courts of common pleas on appeal from any court for the trial of small causes.(*b*)

Ib. § 91.

Supplement.

Approved March 22, 1876. P. L. 1876, p. 61.

Sheriff shall keep and cause to be entered in a book the return made by him to each writ of summons, &c.

302. SEC. 1. That the sheriff of each county in this state shall keep in his office a book, in which he shall cause to be entered the return made by him to each writ of summons, *capias ad respondendum*, attachment, *scire facias*, *subpœna ad respondendum* and *ne exeat* that shall come to his hands for service, the day before any such writ shall be returnable; such book shall be at all times available for the inspection of any of the parties to any such writ or their respective attorneys of record, and on the death of said sheriff or expiration of his term of office said book shall be deposited and kept in the custody of the clerk of the court of common pleas of his county, and the record of any such return so made by such sheriff or a transcript thereof certified to be a true transcript by such sheriff or clerk of the court of common pleas as the case may be shall be *prima facia* evidence in any court of this state of the return made by such sheriff to any such writ.

Supplement.

Approved April 11, 1876. P. L. 1876, p. 95.

Statement of judgments when to be recorded by clerks and index made.

303. SEC. 1. That unless otherwise directed by one of the parties in the cause, or the attorney of such party, it shall be the duty of the clerks of the several and respective circuit courts and courts of common pleas in this state, whenever any final judgment shall be entered in either of said courts for the payment of any debt, damages, costs, or other sum of money, to record, in well bound books, to be provided for that purpose, a statement of such judgment, and to make a complete alphabetical index to the same, which statement shall contain:

What to contain.

I. The title of the court, the names at length of all the parties to such judgment, designating particularly against whom it is rendered, and also the title of any corporation, and the corporate name of all firms, if such appear in the pleadings.

II. The style of action and the amount of debt, damages, or other sums of money recovered with the costs, which shall be entered in figures and words at length.

III. The date of the actual entry and signing of such judgment.

When rule entered in minutes may be transcribed.

And that in all entries of judgments under this act, where the judgment is not for a specified sum therein named, and in all judgments in cases of ejectment, certiorari, or on discontinuance, the rule entered in the minutes of the court where such judgment was obtained may be transcribed in the book of judgments record herein provided for; and that the entries and record of judgments so made as aforesaid under this act, shall be signed by the presiding judge of the court in which such judgment is entered, and a transcript of such record duly certified by the clerk of said court, shall be evidence in any court of this state as to the fact of the entry of such judgment; that upon payment or satisfaction of any such judgment, the record thereof so made as aforesaid may be canceled in the

Entries and record to be signed by presiding judge.

(*a*) See *Dock* v. *Elizabethtown Manuf'g Co.*, 5 *Vr.* 312, 313.

(*b*) See *Cole* v. *Williams*, *Pen.* *558, *559. *Schuyler* v. *McCrea*, 1 *Harr.* 248, 251. *Craft* v. *Smith*, 6 *Vr.* 302, 306.

manner now provided by law for the satisfaction of judgments; and that, unless otherwise directed as above mentioned, or unless by writ of error or other writ or proceeding, the record shall be required to be removed to any other court, no further or other record or enrolment of such judgment shall be made.

When clerk to record said judgment as now required by law.

304. SEC. 2. That whenever any of the parties to a cause in said courts, or their attorneys or attorney shall direct the judgment in such cause to be recorded in full, or whenever any writ of error, or other writ or proceeding shall require the removal of the record of judgment in said cause to any other court, then such clerk shall record the said judgment and the proceedings in said cause as now required by law; and in such case, if the statement and record provided for by the first section of this act has been then made, it shall be the duty of the clerk to enter on the margin of the said statement and record the date and place where the same judgment is recorded in full; and, in case of a satisfaction and cancellation of said judgment on one of said records, the said clerk shall also enter, at the foot of the other of said record, a statement of the fact of the cancellation and satisfaction of the other record, with the date thereof; and the cancellation and satisfaction of said judgment on one of such records shall be a sufficient discharge and satisfaction of the other.

Satisfaction and cancellation on such record.

Supplement.

P. L. 1877, p. 112.

Approved March 9, 1877.

When defendant held to bail in action on contract, lawful on trial to enquire into facts of fraud.

305. SEC. 1. That when any defendant or defendants in any action on contract has been held to bail upon preliminary affidavits, upon the ground of fraud in the inception of the contract, it shall be lawful, upon the trial of said cause, to inquire into the fact of said fraud; and if it shall appear on said trial that there was no fraud on the part of the defendant or defendants in the inception of said contract, then there shall not issue in said action a body execution; and the judge or justice presiding at the trial of said cause shall determine from the evidence and certify upon the record whether said fraud was proved or not.

Judge to certify whether fraud proved or not.

XIX. Miscellaneous acts.

Rev. 183.

R. S. 964.

An act for the recovery of damages in writs of assize and real actions.

Passed March 5, 1795.

Plaintiff to recover damages in assizes, etc.

306. SEC. 1. That in all assizes, if judgment be given for the plaintiff, he or she shall recover his or her damages; and in all assizes of novel disseisin and writs of entry the demandants, if they recover the tenements demanded, shall also recover their damages against the disseisors; and if the disseisors alien the land, and have not whereof the damages may be levied, they to whose hands such tenements shall come shall be charged with the damages, so that every one shall answer for his or her time: *and further*, that in all writs and actions possessory, whereby lands or tenements are demanded, damages shall be recovered as aforesaid.

Rev. 393.

R. S. 901.

An act to assist poor persons in the prosecution of their suits.

Passed January 28, 1799.

Preamble.

WHEREAS justice ought to be administered to such poor persons as are not of ability to sue according to law for the redress of injuries and wrongs, or the recovery of their demands and rights—therefore,

Poor persons to have process gratis.

307. SEC. 1. That every such poor person, as shall have cause of action against any person in this state, shall have, at the discretion of the court before which he or she would sue, a writ or other process, according to the nature of his or her case, without paying for the same.

Courts to assign them counsel, etc.

308. SEC. 2. That the said court shall, at their discretion, assign to such poor person counsel, learned in the law, attorneys and other officers, requisite to prosecute the said action, who shall perform their respective duties therein without fee or reward.

Being plaintiff, not to pay costs.

309. SEC. 3. That such poor person, being plaintiff or complainant in any such action, shall not be compelled to pay costs.

A supplement to the act entitled "An act to regulate the practice of the courts of law." P. L. 1873, p. 51.

Approved April 15, 1846.

Notice of appeal by private corporations, how made.

311. SEC. 1. That in any and every case where proceedings have been or shall be taken by any private corporation authorized to exercise or use the right or power of eminent domain, to exercise or employ that right or power to acquire any lands, tenements, hereditaments, real estate, or any other property for the use of such corporation, and an appeal has been or shall be taken from the award of commissioners, and notice is required by the charter of such corporation to be given of the presentation of the petition or of the making of the application to the appellate court to enter an appeal, five days' notice of the presentation of such appeal, or of the making of such application, served upon the opposite party, in case of an individual, personally, or left at his or her usual place of abode, or in case of a corporation, by delivering the same to the president, secretary or treasurer thereof, personally, or leaving the same at the principal office of the company with some person employed in said office, shall be sufficient notice and sufficient service thereof.

An act relating to the proceeds of real estate sold or taken by law. P. L. 1858, p. 459.

Approved March 18, 1858.

Distribution of proceeds of sale of lands paid into court.

312. SEC. 1. Whenever any lands, tenements, hereditaments, or real estate, shall be sold or taken upon compensation, pursuant to any competent judicial authority, or any law of this state, and the proceeds of such sale or the compensation for such taking, shall be paid into any court of this state, pursuant to such authority or law, such court shall order and direct such payment or payments, in gross, to be made out of such proceeds, as compensation to such person or persons as shall be entitled to any vested, certain and absolute estate or interest, less than the fee simple, of, in, and to such lands, tenements, hereditaments and real estate, or any part thereof, as such court shall deem a just and reasonable satisfaction for such estate or interest, and as the person so entitled shall consent, in writing, to accept in lieu thereof; but in case any such person shall fail to give such consent, before the making of the order for the distribution of such proceeds or compensation, then such court shall ascertain and determine what proportion of such proceeds or compensation will be just and reasonable to be reserved for the benefit of such person, and shall order the same to be put out at interest on sufficient security of real estate, or invested in public stock, under the direction and control of such court, for the benefit of such person.

Promissory Notes.

I. IN GENERAL.

1. When binding and transferable; action by endorsee.
2. Inland bills subject to same law as foreign bills.
3. Bills at sight, etc., entitled to grace if not drawn on bank.
4. Checks and drafts on banks payable without grace.
5. Bills in satisfaction of a debt when to be accounted payment.
6. If bill lost drawer to give another.
7. Actions at law on lost bills.

II. PROTEST AND NOTICE OF DISHONOR.

8. Notaries appointed by governor.
9. By whom protest to be made.
10. Oath of notary.
11. Notary or justice to keep record.
12. Record may be referred to in giving testimony.
13. Fees for protesting.
14. Legal holidays.
15. Notice of dishonor may be given on day next after a holiday.
16. Deposit in post office when a sufficient service of notice.

An act concerning promissory notes, bills of exchange, and notaries public. R. S. 798.

P. L. 1850, p. 194.
" 1854, p. 366.
" 1859, p. 81.
" 1860, p. 410.
" 1862, p. 194.
" 1871, p. 13.
" 1873, p. 107.

Revision—Approved March 27, 1874.

I. In general.

What promissory notes good.

1. That all notes in writing, heretofore or hereafter made and signed by any person or corporation, or by his, her or their agent thereunto lawfully authorized, whereby such person or corporation doth promise to pay to any other person or persons, or corporation, or order, or unto bearer, R. S. 798, § 4. P. L. 1871, p. 13.