

- Proviso.
- Fines heretofore imposed to be paid in thirty days.
- Penalty for failure to report and make payment.
- Fines not appropriated to any distinct use, payable to county collector.
24. SEC. 2. That all fines which may have been heretofore imposed by any justice of the peace, and included within the terms of the preceding section shall be paid over as above provided, within thirty days from the time this act shall take effect.
25. SEC. 3. That if any justice shall fail to report and make payment as above directed for thirty days after notice in writing from the county collector so to do, such justice shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or imprisonment not exceeding one year, or both, at the discretion of the court.
26. SEC. 4. That all fines which may be authorized under any proceedings before any justice of the peace, and which have not been appropriated to any distinct use by existing legislation, shall be and they are hereby appropriated and made payable to the county collector of the county in which the justice may reside, for the use of the county.

## Justices' Courts.

### I. JURISDICTION.

1. Extent of jurisdiction.
2. In case of penalty.
3. When debt, &c., exceeds \$100.
4. Limitation of jurisdiction.
5. What penalties cognizable.
6. Entry of action without process.
7. Amended by section 159.
8. Justice whose term has expired may conclude a case.
9. Where justices' writs shall run.

### II. PROCESS.

10. Process, when tested and signed.
11. Justice not to issue blank writs.
12. When process void.
13. Process to compel appearance. When warrant may issue.
14. Justice to make order.
15. Defendant may apply to set aside order.
16. Justice to furnish a copy of order.
17. Summons, when returnable; how served.
18. How served on corporation.
19. Sum indorsed on warrant; if paid, defendant discharged.
20. Proceedings upon warrant
21. Recognizance and form of.

### III. PLEADING.

22. Amended by section 156.
23. When demand and plea to be filed.
24. Defendant, when precluded.
25. Title to lands pleaded.
26. Effect of plea.
27. Bond required in such case.

### IV. TRIAL.

28. Proceedings if defendant does not appear.
29. When cause shall be heard.
30. Trial, when and how adjourned.
31. Hour of adjournment.
32. Adjournment in case of set-off filed.
33. Jury demanded and when.
34. Juror's oath. Witness' oath.
35. Fines of jurors and witnesses.
36. If defendant has filed offset, plaintiff shall not withdraw suit.

37. Proof by affidavit of book account.
38. Affidavit of partnership.
39. Proof by affidavit of notes, &c.
40. Competent knowledge in affiant.
41. Disagreement of jury.

### V. JUDGMENT.

42. When judgment against plaintiff.
43. Judgments by confession.
44. Where case is submitted to jury.
45. Form of judgment in case of action on bond, &c., with penalty.

### VI. EXECUTION.

46. The execution.
47. When execution against body may issue.
48. Order of justice.
49. Application to set aside.
50. Justice to file order and give copies.
51. Effect of order to set aside.
52. When constable, &c., to incur no penalty.
53. Service of order.
54. Justice to furnish copies of order.
55. When second application allowable.
56. Stay of execution.
57. But not in suit upon former judgment.
58. Goods, how advertised and sold.
59. Claim of property, proceedings.
60. Effect of, and proceedings after verdict.
61. Of taking the body on execution.
62. *Scire facias* not necessary.
63. Notice, how served.
64. Execution in force one year.
65. *Alias* and *pluries* execution.
66. Priority of executions.
67. Property levied on to be inventoried.
68. Constable liable for neglect.
69. Execution against corporation.

### VII. DOCKETING JUDGMENTS.

70. Judgment may be docketed, when.
71. Clerk to keep docket.
72. Mode of docketing.
73. How docketed judgment to operate.
74. No proceedings in justice's court thereafter.

- 75. How revived.
- 76. Clerk to index.
- 77. In cases of appeal and *certiorari*.
- 78. Clerk to enter the determination on *certiorari* or appeal.

## VIII. APPEAL.

- 79. Amended by section 138.
- 80. Pleas may order stay of execution.
- 81. Execution stayed where bond filed with judge or clerk.
- 82. New appeal bond substituted.
- 83. Justice to send up transcript and bond.
- 84. When appeal may be heard.
- 85. How appeal tried.
- 86. Admission of evidence on trial of appeal. How new evidence admitted.
- 87. Repealed by section 149.
- 88. Amended by section 150.
- 89. Judgment on report of referees reviewed.
- 90. No non-suit on trial of appeal.
- 91. Amended by section 151.
- 92. Justice who tried case not to sit.
- 93. Entry of rule necessary to make judgment lien on land.
- 94. Clerk to record such judgment.

## IX. CERTIORARI.

- 95. Judgment may be reviewed only by *certiorari*.
- 96. No *certiorari* allowed where appeal lies.
- 97. How *certiorari* obtained.
- 98. When adjudicated.
- 99. Costs on affirmance, but not on reversal.
- 100. Jurisdiction extended to circuit courts.
- 101. What errors or mistakes corrected.
- 102. Costs in such cases.
- 103. Judgments not reversed for mere irregularities.
- 104. When a rehearing before the justice may be ordered.

## X. COSTS.

- 105. Fees. Items of.
- 106. Fees on appeal.
- 107. Who to pay the jury of twelve men.
- 108. Or six men.
- 109. When constable not required to serve process.
- 110. Fees of justice to be paid before appeal.
- 111. Fees to be paid before hearing of appeal.

## XI. MISCELLANEOUS.

## 1. AMENDMENTS.

- 112. Amendments made.
- 113. Provision of section 138 of "Practice Act" extended to justices' courts. Proviso.
- 114. Defective return of constable may be amended, when.

## 2. REFERENCES.

- 115. Rules of reference to be entered.

## 3. DEPOSITIONS.

- 116. Depositions of witnesses, when taken.
- 117. Such depositions, how taken.
- 118. What provisions of "Evidence Act" applicable.

## 4. JUSTICES—THEIR DUTIES AND DOCKETS.

- 119. Justice's docket, entries in.
- 120. Justice to enter full bills of costs.
- 121. Justices out of office may give transcripts.
- 122. Where docket deposited after death of justice.
- 123. If impeached, docket, where deposited.
- 124. Same, on removal from county.

- 125. Justice to have access to docket.
- 126. Penalty for not depositing.
- 127. Transcript from docket in clerk's office, evidence.
- 128. Justice not to keep a tavern.
- 129. Who not to prosecute or defend suits.

## 5. CONSTABLES—THEIR DUTIES.

- 130. Constables to be ministerial officers.

## 6. PARTIES.

- 131. What provisions of the "Practice Act" applicable.

## 7. CONSTRUCTION.

- 132. Section 300 of the "Practice Act" applicable.
- 133. Act applicable to district courts of Newark.

## XII. SUPPLEMENTS.

- 134. Justice whose term has expired may determine any cause undetermined and grant appeal.
- 135. May issue *scire facias* to revive judgment.
- 136. Amended by section 149.
- 137. When not necessary to give notice of the production of new evidence on appeal.
- 138. Terms upon which justice is required to grant an appeal.
- 139. Preceding section to apply to all actions in which appeals might be taken.
- 140. Holder of bill or note may include all parties in one action.
- 141. Copy of bill or note to be annexed to state of demand.
- 142. Judgment against one or more defendants. Costs in case of set-off.
- 143. Verdict shall certify amount of set-off allowed.
- 144. Rights, &c., of parties as between each other to remain as heretofore.
- 145. Constable to make money out of person principally liable.
- 146. When an *alias* or *pluries* execution may issue.
- 147. Repealer.
- 148. Fees of constables in serving criminal warrants.
- 149. Repealer.
- 150. Appeal from judgment not over \$30 to be tried by court unless jury be demanded.
- 151. New trial may be granted on appeal.
- 152. Appeals in city having district court. Procedure.
- 153. Appeals in city having two district courts. *Certiorari*.
- 154. Repealer.
- 155. State of demand may be served with summons.
- 156. What actions to be styled actions upon contract.
- 157. What actions to be styled actions of tort.
- 158. County clerk to make transcript of record in docket and docket judgment.
- 159. Suits by and against corporations and attorneys.
- 160. In trial of appeals, witnesses not produced or evidence not offered or admitted in the court below may be introduced without notice.
- 161. Either party may demand trial of appeal by jury upon notice to clerk.
- 162. Repealer.

## XIII. MISCELLANEOUS ACTS.

- 163. Amended by section 164.
- 164. When appeals to be put on list.
- 165. Repealer.
- 166. Jurisdiction of justices' courts increased to amount of \$200.
- 167. Repealer.
- 168. Justice not to have jurisdiction in cases of persons for whom he is agent, &c.
- 169. Final judgments may be docketed in the court of common pleas.

R. S. 229.

P. L. 1848, p. 127.  
 " 1856, p. 142.  
 " 1857, p. 558.  
 " 1858, p. 34, 49,  
 477.  
 " 1862, p. 27,  
 219, 325.  
 " 1870, p. 61.  
 " 1871, p. 116.  
 " 1873, p. 119.  
 " 1875, p. 77,  
 142.

Extent of jurisdiction

R. S. 229, § 1.

In case of penalty.  
 Ib., § 64.  
 Amended.

## I. Jurisdiction.(1)

## An act constituting courts for the trial of small causes.

Revision—Approved March 27, 1874.

1. That every suit of a civil nature at law, where the debt, balance or other matter in dispute does not exceed, exclusive of costs, the sum or value of one hundred dollars, (a) shall be and hereby is made cognizable before any justice of the peace of any county in this state, who is hereby authorized to hold a court within such county, to hear, try and determine the same according to law, (b) although the cause of action did not arise in said county; which court shall be a court of record and vested for the purposes aforesaid, with all such power as is usual in courts of record of this state; (c) *provided always*, that this act shall not extend to any action of replevin, slander, (d) trespass for assault, battery (e) or imprisonment, (g) nor to any action wherein the title (h) to any lands, tenements, hereditaments, or other real estate shall or may in any wise come in question. [See Sec. 166, *post*.]

2. That whenever the amount really due or recoverable upon any bond, bill, note or other contract in writing, does not exceed, exclusive of costs, the sum or value of one hundred dollars at the time when the suit was instituted, such amount shall be recoverable before a justice of the peace, without regard to any kind of penalty expressed therein, in the same manner

(a) Where the amount in dispute, or the balance does not exceed one hundred dollars, the justice has jurisdiction, whatever may be the amount of the accounts involved. *South v. Hall, Coxe 23. McCauley v. Barnes, Coxe 52. Johnson v. Cootbaugh, Coxe 55. Laerli v. Keen, 1 South. \*208. Farley v. McIntire, 1 Gr. 190. Keep v. Kelly, 3 Vr. 56. Baker v. Braisted, Pen. \*350.* So, if the interest on an account added thereto would make the total exceed one hundred dollars, yet the creditor, being at liberty to claim any rate of interest under seven per cent., may sue for one hundred dollars. *Hopper v. Steelman, Pen. \*908. Saddle River v. Colfax, 1 Hal. 115. Griffith v. Clute, 4 Hal. 264. Howell v. Burnett, Spen. 285.* In actions of tort sounding in damages, where counts are added to meet the evidence, and where one injury only is sought to be redressed, a justice has jurisdiction although the sums added together exceed one hundred dollars. *Sayres v. Ward, Pen. \*1007.* The plaintiff cannot by *fictionis credits* reduce his claim to an amount within one hundred dollars. *Souder v. Stratton, Pen. \*528. Cobwell v. Farwell, Pen. \*561. Howell v. Burnett, Spen. 285.* The credits must be specific, and set out particularly. *Price v. Smock, Pen. \*208. La Rue v. Boughamer, 1 South. \*104. Williams v. Hamilton, 1 South. \*220. Haggerty v. Van Kirk, 4 Hal. 118. Pinkney v. Ayres, 1 Zab. 694. Keep v. Kelly, 3 Vr. 56.* A defendant cannot by an unverified charge over one hundred dollars out the justice of his jurisdiction. *Hoffman v. Reading, Pen. \*561. Montgomery v. Snowhill, Pen. \*361.*

(b) The justice must charge the jury on the law involved in the case, and this duty can in no way be evaded. *Sayres v. Ward, Pen. \*1007. Pullen v. Boney, 1 South. \*125. Broadwell v. Nixon, 1 South. \*362. Todd v. Collins, 1 Hal. 127. Linn v. Ross, 1 Har. 55. Allen v. Wamamaker, 2 Vr. 370. Reading a statute to the jury is no charge. *Broadwell v. Nixon, 1 South. \*362. Boylston v. Valentine, 1 Har. 346. Berry v. Williams, 1 Zab. 423, criticising Pullen v. Boney, 1 South. \*125.* But it is not error to refuse to charge if there is no question of law in dispute. *Westcott v. Danzenbaker, 1 Hal. 132. Davison v. Schooley, 5 Hal. 145.* Or, if the justice was not requested to charge on that point. *Cole v. Taylor, 2 Zab. 59.* It is improper to ask him to charge the jury in a certain way on a point stated, especially if it be not purely a question of law. *Bellis v. Phillips, 4 Dutch. 125.* Nor is the justice bound to take up several points and express a separate opinion on each one. *Young v. Sunderland, 3 Vr. 32.* So, if he should be requested to declare that to be the law which is not so, and he refuse, the party has no advantage. *Mills v. Sleight, 2 South. \*565.* Or, on a minor matter which would not change the result or prejudice the party excepting. *Ayres v. Van Lieu, 2 South. \*267. Campfield v. Ely, 1 Gr. 150. Rodenbough v. Rosebury, 4 Zab. 491.* So, if the justice should err in the admission or rejection of evidence, a party can derive no advantage unless he prove how he was injured thereby. *Lyons v. Davis, 1 Vr. 301.* In an action or *seire factas* on a judgment, errors in such judgment cannot be inquired into. *Bordine v. Service, 1 Har. 87. Schuyler v. McCrea, 1 Har. 248.**

(c) The justice's court is a court of record. *Schooley v. Thorne, Coxe 71. Hinckman v. Cook, Spen. 271.* A judgment of a justice's court is conclusive between the parties, if the record shows his jurisdiction. *Van Doren v. Horton, 1 Dutch. 205. Russel v. Work, 6 Vr. 316.* The presumption is in favor of all his proceedings. *James v. Dirksen, Coxe 257. Westcott v. Danzenbaker, 1 Hal. 132. Van Dyke v. Bastedo, 3 Gr. 224.*

*Doughty v. Reed, Pen. \*902.* A justice of the peace sitting in the court for the trial of small causes, engaged in the trial of a civil cause, has no power to commit to prison as a punishment for a contempt committed in open court. *Rhinehart v. Lance, 14 Vr. 311.*

(d) *Sparks v. Holston, Pen. \*344.*

(e) *Curnan v. Smock, Pen. \*112. Bates v. Adams, Pen. \*934. Marentille v. Oliver, Pen. \*380.*

(g) *Jeffers v. Brookfield, Coxe. 38.*

(h) The justice may try the right of possession, as cutting down trees or grass. *Gregory v. Kamouse, 6 Hal. 62. Hill v. Carter, 1 Har. 87.* But not where there is any dispute as to the title of the land on which the trees grew. *Harvey v. Drummond, Coxe 217.* In trespass for cutting down a tree in a highway, a deed may be admitted in evidence to show the boundary line of an adjoining farm. *Winter v. Peterson, 4 Zab. 524.* In trespass against an overseer of the roads for trespassing on lands of plaintiff and removing stones, &c., therefrom. *Ward v. Folly, 2 South. \*482.* Or, for an injury to a crop of grain by breach of warranty in the sale of clover seed. *Vanoy v. Goens, 3 Zab. 201.* He may try trespass *quere clausum freight*, where the title is not involved. *Ming v. Compton, Pen. \*345.* But not in trespass for fishing where defendant claims title to the fishery. *Bispham v. Inskeep, Coxe 231.* Action for overflogging lands lies in a justice's court. *Blackwell v. Hagerman, Pen. \*1032. Satterthwaite v. Morgan, Pen. \*962.* But not if the freehold be permanently injured. *Vantuyt v. Marsh, 2 South. \*507. Dixon v. Scott, 3 Hal. 430. See Hunt v. Morris, 7 Hal. 175.* Nor where the defendant claims title to lands, the rents of which plaintiff alleges due to him. *Smith v. Layton, Coxe 177.* Nor for injury to plaintiff's land by the projection of a building over it, and damage caused by water dripping therefrom. *Blackwell v. Leslie, 1 South. \*112.* He cannot try an action for *mesne profits*. *Pickle v. Covenhoven, 1 South. \*819.* Nor a *right of way*. *Randolph v. Montfort, 1 Har. 228.* Nor an action for obstructing a private road. *Osborne v. Butcher, 2 Dutch. 308.* Nor for breach of a covenant of warranty, where plaintiff sets up that defendant had not a good title when the deed was made. *Burrough v. Vanderveer, 2 South. \*809.* Nor whether *grain* passed by a conveyance of the land. *Westbrook v. Eager, 1 Har. 81, 84.* Nor trespass for pulling down a house. *Vanmater v. Real, Pen. \*492.* His jurisdiction extends only to try the fact of possession, and not the right of possession. *Campfield v. Johnson, 1 Zab. 83. Messler v. Fleming, 12 Vr. 108. Jeffrey v. Owen, 12 Vr. 260. Hillman v. Stanger, 20 Vr. 191.* Proof of the dedication of land to public use as a highway, by means of a transfer of title, from which the inference of dedication is sought to be drawn, involves a question to title of lands, &c., not capable of being tried in the court for the trial of small causes. *Vanatta v. Jones, 13 Vr. 561.* A justice of the peace has jurisdiction of an action for cutting or destroying growing trees, when the plaintiff can prove actual possession of the premises. *Bloom v. Stenner, 21 Vr. 59.* If the defendant produces evidence that the plaintiff is entitled only to a temporary possession, and that the fee is in another, the question of title is presented in the case and therefore the justice must dismiss the suit because he has no jurisdiction. *Id.* A justice of the peace may decide cases which involve the question of actual possession, but he has no jurisdiction in cases which rest upon the constructive possession which follows the title to lands. *Ely v. Schanck, 23 Vr. 120.*

(1) By Sec. 168, *post*, the jurisdiction extended to every suit of a civil nature at law, &c., where the debt, balance or other matter in dispute does not exceed, exclusive of costs, the sum or value of \$200.

as any other debt or demand of one hundred dollars or under is made recoverable by this act. (a)

3. That where the debt, balance, or other matter in dispute, or amount really due or recoverable as aforesaid exceeds, exclusive of costs, the sum or value of one hundred dollars, the plaintiff may recover in such court a sum not exceeding one hundred dollars and costs, but such recovery shall be a bar to the recovery of the residue of such debt, balance, or other matter in dispute in any court whatsoever.

When debt, &c., exceeds \$100.

4. That nothing in sections two or three of this act shall be held or construed as conferring jurisdiction upon any justice in any of the cases excepted out of the justice's jurisdiction by section one.

Limitation of jurisdiction.

5. That every sum of money or penalty, not exceeding one hundred dollars, to be sued for and recovered by virtue of any law of this state, in any court of record, or in any court having cognizance thereof, shall be and hereby is made cognizable before any justice of the peace, in manner aforesaid. (b) [Reference to this section is erroneously made in Sec. 24, on page 1454, *ante*; it should have been to Sec. 148, *post*.]

What penalties cognizable before justice.  
R. S. 229, § 65.

6. That parties may agree to enter without process any action before a justice of the peace to the decision of which he is competent, if process had been executed, and the court shall proceed thereon to final judgment, and execution in the same manner as if a summons or warrant had been issued and duly served. (c)

Entry of action without process.  
Ib., § 21.

7. [Amended by Sec. 159, *post*.]

8. That any justice of the peace whose term of office may hereafter expire shall proceed to the final determination of any cause or proceeding then undetermined before him, and also make return to all writs, orders or rules to him directed, issuing out of any court in this state, in the same manner as if his term of office had not expired. [See Sec. 134, *post*.]

Justice whose term of office has expired may conclude a cause.  
P. L. 1858, p. 34, § 3.

9. That the territorial jurisdiction of every justice of the peace under this act shall be co-extensive with the limits of the county for which he is appointed and commissioned; his writs, precepts and process shall run in and through such county, and he may, in causes pending before him, award writs of subpoena for witnesses into other counties of this state.

Where justices' writ shall run.  
R. S. 229, § 2.

## II. Process.

10. That all the precepts, summons, warrants, writs and other process of said court for the trial of small causes, shall be tested the day on which they are respectively issued, and shall be signed (d) and sealed (e) by the justice who issued the same.

Process, when tested and signed.

11. That if any justice of the peace shall sign his name to any blank summons or warrant, and allow any constable or other person to fill up the blank or blanks in the said process, without the special direction of the said justice, and in his presence, and shall afterwards issue the said process, or suffer the same to be served, such justice shall be deemed guilty of misbehavior in office, and on conviction thereof shall forfeit and pay the sum of fifty dollars, to be recovered by action of debt, by any person who shall prosecute for the same, in any court having jurisdiction of the case, one-half for the use of the person prosecuting, and the other half for the township in which such justice shall reside.

Justice not to issue blank writs.  
R. S. 229, § 5.

Penalty.

12. That the service of any summons or warrant which shall have been issued by the justice as aforesaid in blank, and afterwards filled up by the constable or other person, without the special direction of the justice as aforesaid, shall be taken and considered to be altogether void, and any judgment

When process void.  
Ib., § 6.

(a) This includes jurisdiction of a bond given by a defendant for his appearance, when arrested on a warrant. *Graecen v. Allen*, 2 Gr. 74. The original act was limited to bonds, &c., "for the payment of any sum of money" and a *bastardy bond* given to indemnify a township &c., was held not to be within his jurisdiction. *Bolt v. Maxwell*, 2 South. \*49. Sec. 148, *post*, gives jurisdiction upon a bond whereon is due more than \$100 but less than \$200, although the penalty named therein exceeds \$200, *Anderson v. Rose*, 22 Vr. 471.

(b) See *Penna. R. R. Co. v. Society, &c.*, 10 Vr. 400.

(c) If the parties "agree to come to trial," it is sufficient. *Vanderveer v. Ingleton*, 2 Hal. 140.

(d) Signing the initials of his Christian name and his surname in full, is no error. *Wood v. Fithian*, 4 Zab. 33, 838. So, signing J. P. to his name annexed to an affidavit is sufficient. *Scudder v. Coryell*, 5 Hal. 340. An error which is the result of an oversight of the justice, which might have been cured by amendment, and has caused no injury, is no ground for reversal. *Wright v. Moran*, 14 Vr. 49.

(e) It must be sealed. *Veal v. Brown*, Pen. \*72.

or other proceeding afterwards had or taken, in consequence of such service, or founded thereupon, shall be void and of no effect.

Process to compel appearance.

**13.** That the first process to compel appearance shall be a summons or warrant in the nature of a *capias ad respondendum*; *provided*, that no warrant shall issue against the body of any female; the summons may be used in any case whatsoever; the warrant shall only be used in the following cases:

When warrant may issue.

I. Where the defendant is not a freeholder and resident of the county in which process shall issue, and where the action being founded upon contract express or implied, due proof is made on oath or affirmation to the satisfaction of the justice, of the amount of the debt or damages claimed, and of such other facts and circumstances as would warrant a justice of the supreme court in making an order to hold to bail in pursuance of the fifty-eighth section of an act entitled "An act to regulate the practice of courts of law."

II. Where the defendant is not a freeholder and resident of the county in which such process shall issue, and where, the action being founded upon tort, due proof is made on oath or affirmation to the satisfaction of the justice, of the amount of the damages claimed, and of such other facts and circumstances as would, by the practice of the supreme court, warrant a justice thereof in making an order to hold to bail in a case of tort.

III. If the defendant be a freeholder and resident of the county in which such process shall issue, and due proof is made on oath or affirmation to the satisfaction of such justice, that the defendant has assigned or disposed of, or is about to assign or dispose of, all his land lying in said county with intent to defraud his creditors, then such defendant may be held to bail in like manner, and upon the same proof that would warrant his arrest in case he were not a freeholder and resident in the county in which such process shall issue. (*a*)

Justice to make order.

**14.** That upon proof made as aforesaid the justice shall make and subscribe an order that a warrant issue against the defendant for such amount as such proof shall justify and require; but before said warrant issue, such order and the affidavit or affidavits upon which the order is founded, shall be filed by said justice. (*b*)

Defendant may apply to set aside order upon which warrant issued.

**15.** That if the defendant be arrested upon such warrant, he may, at any time before the trial of the cause, make application to a justice of the supreme court, or to the law judge, if any, of the court of common pleas of the county in which such process issued, or to any supreme court commissioner, to set aside said order, the defendant having first given reasonable notice to the plaintiff of such application, and the giving bond or entering into recognizance in manner hereinafter directed shall be no waiver of the defendant's right to make such application; and if such justice of the supreme court, law judge or commissioner, shall deem the proof made, insufficient to warrant an arrest, he may order that the order made by the justice be set aside; such order setting aside the justice's order shall thereupon operate as a discontinuance of the suit in which such warrant issued; the bond or recognizance, if any, shall become void, and the plaintiff shall be forever thereafter barred from proceeding against the body of the defendant for the same cause of action, but he may proceed against the defendant by summons in the same manner as if no other proceeding had been instituted.

Justice to furnish copy of order.

**16.** That the order made by the justice of the supreme court, law judge or commissioners, shall be filed with the justice who issued the warrant,

(*a*) A freeholder resident in the county is exempt from arrest in cases of fraudulent debt, unless the justice adjudges that he is satisfied the plaintiff will be in danger of losing his debt. *Barcklow v. Hutchinson*, 3 Vr. 195. *Query*—Whether a justice can issue a warrant in a case of tort. *Neighbour v. Trimmer*, 1 Har. 58. Any irregularity in issuing it is waived by a *appearance*. *Foulkes v. Young*, 1 Zab. 488. And cured by a *trial*. *Dallas v. Hendry*, Pen. \*978. A person arrested on a warrant under this section, may set up that he was, at the date of the order, a freeholder and resident of the county, as a defense; such a defense is in the nature of a plea to the jurisdiction in abatement of the action. *Cole & Taylor v. Cliver*, 14 Vr. 182. Objections to the sufficiency of the proof of a plea of privilege must

be made at the trial, or they will be regarded as having been waived. *S. C.*, 15 Vr. 212.

(*b*) A defendant may apply to set aside the warrant for the insufficiency of the affidavits on which the order to arrest was made. But he cannot offer evidence to show that he made no such representations, and that he was perfectly responsible for all debts he might incur. *Cole v. Cliver*, 14 Vr. 182, distinguished. *Stiles v. Vandewater*, 19 Vr. 67. Where the order for the warrant fails to state the amount for which the warrant is to be issued, and the order for bail supplied the omission, the two together will be a substantial compliance with the statute. *Loftus v. Fraz*, 14 Vr. 667.

and such justice shall furnish certified copies thereof to the parties or their agents on request.

17. That the summons shall be made returnable between the hours of nine o'clock in the forenoon and three o'clock in the afternoon, both inclusive, and shall specify a certain place (a) and time, (b) not less than five, (c) nor more than fifteen (d) days from the date of such process, and shall be served at least five days before the time of appearance mentioned therein, by reading the same to the defendant, and delivering to him a copy thereof, (e) if he or she shall be found, and if not found, by leaving a copy thereof at his or her house or place of abode, in presence of some person of the family, of the age of fourteen years, who shall be informed of the contents thereof, (g) and the constable serving such summons shall, on the oath of his office, indorse thereupon the time and manner he executed the same, and sign his name thereto. (h)

18. That if the defendant be a body politic or corporate, the summons may be served on the president, treasurer, cashier or clerk of said corporation if found, and if not found on any of the directors or managers thereof in the manner hereinabove directed. (i)

19. That the said justice shall enter in the body of every summons or warrant, the sum demanded (and indorse the same, with costs, on the said summons or warrant), which he shall issue by virtue of this act; and if the defendant think proper to pay such debt, damages or demand, with costs, so entered or indorsed, without any further proceedings in the cause, then it shall be lawful for the constable to receive the same, and his receipt shall be a full discharge to such defendant from such debt, damages or demand, and costs aforesaid; and if any constable shall not pay the money so by him received for such debt, damages or demand, to the justice issuing such process, or to the plaintiff in the said process, or his legal representative, within fifteen days after he shall have received the same, then such constable shall be liable to pay to such plaintiff or his legal representative, the amount of the said debt, damages or demand, with interest, to be recovered by action of debt, with double costs.

20. That the warrant commanding the defendant to be arrested, shall be returnable forthwith after service thereof; and the constable serving said warrant shall, according to the tenor thereof, forthwith convey the said defendant before the justice who issued the same, who shall thereupon, at his discretion, either cause the said defendant to enter into recognizance in the manner hereinafter mentioned, or on neglect or refusal, shall com-

Summons, when returnable and how served. R. S. 229, § 8. Amended.

Return indorsed.

How served on corporation. *Ib.*, § 76. Amended.

Sum indorsed on warrant; if paid, defendant discharged. *Ib.*, § 13.

Liability of constable.

Proceedings upon warrant. *Ib.*, § 12. Amended.

(a) The township in which the justice's office is situated may be omitted. *Johnson v. Holmes*, Pen. \*134. The place must be designated in the summons. *Layton v. Cooper*, Pen. \*62.

(b) The return day being in figures is not error. *Cooper v. Roberts*, 1 Har. 353. *Maires v. Smith*, 1 Har. 360. To appear "at 12 o'clock in the afternoon," is bad. *Ross v. Ward*, 1 Har. 23. To appear at two o'clock — noon, is defective. *Cumman v. Perrine*, 4 Hal. 253.

(c) In computing the five days, the day of the service or of the appearance should be excluded and the other included. *Dry v. Hall*, 7 Hal. 203. It must be five full days. *Pedrick v. Shano*, Pen. \*57.

(d) A summons issued June 11th, returnable July 11th, is erroneous. *Ratton v. Webb*, Pen. \*608.

(e) "Served by delivering a copy to the defendant" is defective. *Rape v. Titus*, 6 Hal. 314. "Served the summons on the defendant by offering to read the same to him, but he would not stay to hear it," is good service. *Slaght v. Robbins*, 1 Gr. 340. "That he read it to the defendant, but omitting to state the delivery of a copy, is bad. *Ross v. Ward*, 1 Har. 23. "Served on the defendant by his reading it himself," is bad. *Ayres v. Swayze*, 2 South. \*812. "Served this summons June 2, 1837, on G. F." is defective. It should be by reading it to him. *Moore v. Miller*, 1 Har. 233.

(g) A copy can only be left when the defendant cannot be found in the county. *Cooper v. Roberts*, 1 Har. 353. *Gardner v. Small*, 2 Har. 162. Reading it to the agent of the defendant, and leaving a copy at his store, is not a legal service. *Penny v. Harrison*, 2 Gr. 24. So, at the place of abode. *Polhemus v. Perkins*, 3 Gr. 435. But if defendant direct the constable where to leave it, he can take no exception if such place is not his actual abode. *Taylor v. Cook*, Cox 54. "Reading it to a person over the age of fourteen," is insufficient. *Polhemus v. Perkins*, 3 Gr. 435. So, "served by reading the contents of the within, to the families of the defendants, at their place of abode." *Bullinger v. Sherron*, 2 Gr. 144. So, "served the 23d, by copy." *Mulford v. Perrine*, Pen. \*474. If served on defendant's wife, it must be at his residence. *Rogers v. Jannan*, Pen. \*527. If not his wife and living elsewhere, service is defective. *Vigers v. Mooney*, Pen. \*909. Or, the housekeeper of defendant. *Despreaux v. Barber*, Pen.

\*1041. So, "by copy left with the wife of defendant," without informing her of the contents. *Cobb v. Decker*, 1 South. \*119. Or, leaving a copy at the defendant's house without stating that the person with whom it was left, was of his family, and informed of the contents. *Murat v. Hutchinson*, 1 Har. 46. A mistake in the copy of a summons, stating the hour of appearance to be 10 A. M. instead of 2 P. M., is not ground for reversing the judgment, where the defendant did not appear at any time or show that he has been injured by the mistake. *Titus v. Whitney*, 1 Har. 85.

(h) Return on a summons "lawfully served," is insufficient. *Boylan v. Hopper*, Pen. \*95. So, "served the thirtieth day of January." *Layton v. Cooper*, Pen. \*62. So, "duly served." *Zane v. Piscant*, Pen. \*319. *Budd v. Marvin*, 1 South. \*248. So, "served." *Steddyford v. Ferris*, 1 South. \*108. So, "served on one of the defendants," not naming him. *Mattack v. Layman*, Pen. \*993. Where there are two or more defendants and service on some of them only, the justice cannot proceed unless the constable's return shows that those not served could not be found. *Ford v. Munson*, 1 South. \*93. *Stull v. Outcall*, 1 Hal. 130. "The other defendant out of the county," bad, because he might have an abode therein; but if not, then return should so state. *Moore v. Miller*, 1 Har. 233. "Served by leaving a copy with the wife of J. T., one of the defendants," good, but not to sustain a judgment against two. *Oliver v. Howell*, 2 South. \*581. An appearance by the defendant without objection, cures any irregularity in the process. *Halsey v. Nutman*, Pen. \*329. *Cook v. Hendrickson*, Pen. \*343. *Budd v. Marvin*, 1 South. \*248. *Ayres v. Swayze*, 2 South. \*812. *Murat v. Hutchinson*, 1 Har. 46. *Clifford v. Frankford*, 8 Vr. 152. And an adjournment at his request. *Doughty v. Jones*, Pen. \*653. And a trial. *Campbell, Cox 92. Dallas v. Hendry*, Pen. \*978.

(i) See ante, p. 924, note (b). The term manager is used in this section as synonymous with director, and indicates an officer exercising the same functions. *Penna. R. R. Co. v. Bennett*, 18 Vr. 276. Service on a superintendent of a railroad, whether general or of a division, not good. *Ib.* Service on the ticket agent of a railroad company is not a service on a representative of the company, within the meaning of this section. *Penna. R. R. Co. v. Kreitzman*, 28 Vr. 60.

When trial to be had.	<p>mand the said constable to convey the said defendant to the jail of the county, to be there detained in custody until time may be had for the hearing or trial of the cause, not exceeding three days from the time of the return of the said warrant, or such justice may direct the said constable to hold the said defendant in custody, until the plaintiff shall be notified and have time to appear and proceed to such hearing or trial; (a) and the constable who served the said warrant as aforesaid, shall, on the oath of his office, indorse thereon the execution of the same and sign his name thereto; <i>provided always</i>, that nothing in this act contained shall be construed to prevent the constable from discharging from arrest any person arrested either on mesne process or process of execution, in pursuance of an act entitled, "An act abolishing imprisonment on civil process in certain cases;" <i>and provided also</i>, that if any person or persons whatsoever, shall hereafter be arrested by virtue of such warrant, it shall be lawful for the constable who served the same, to permit the defendant to enter into bond to the plaintiff, with a good and sufficient freeholder, resident in the county, to the amount of the debt or damages and costs indorsed on the warrant, for his, her or their appearance on the day and hour mentioned in the bond, not more than eight days (excluding Sundays) from the service of the warrant; the bond to be entered into by the defendant, shall be in the form and to the effect following, to wit: We, A. B. and C. D., do hereby acknowledge ourselves indebted to E. F. in the sum of _____ to be paid to E. F. on the following conditions: that if the said A. B. shall be and appear before _____, one of the justices of the peace of _____, on the _____ day of _____ at _____ o'clock _____noon, and answer unto the complaint of the said E. F., then this bond to be void, or else to be and remain in full force and virtue; in witness whereof we have hereunto set our hands and seals, the _____ day of _____ in the year of our Lord one thousand eight hundred and _____; sealed and delivered in the presence of G. H., I. K., signed A. B. and C. D.; which bond the said constable is hereby ordered and directed, when taken, to deliver to the justice on the return of the warrant, to be by him filed in his office to and for the use of the plaintiff, for which service the constable shall be entitled to thirty-five cents costs, to be paid by the defendant, and not recoverable by him from the plaintiff; and in all cases, the said constable shall attend at the said justice's court, on the day and hour mentioned in said bond, to be there and then ready to secure and take into his custody the said defendant; and if the said justice shall not be found at his dwelling or usual place of holding trials, the defendant shall be permitted to renew his bond, with sureties as aforesaid, for his appearance at some future day not exceeding ten. (b)</p>
How defendant may be discharged.	
May give bond.	
Form of.	
Duty of constable.	
<p>Recognizance and form of. R. S. 229, § 14.</p>	<p><b>21.</b> That the recognizance directed in the twentieth section of this act, shall be entered into by the defendant, with at least one surety, having sufficient freehold, and residing in the county, to the plaintiff in the said action, in the amount of the demand specified in the warrant, according to the effect and meaning of the following form, that is to say:</p> <p>_____ county, to wit:</p> <p>Whereas, A. B. hath been arrested and is now in custody, by virtue of a warrant issued by C. D., one of the justices of the peace in and for the said county, at the suit of E. F. in an action of _____ for the sum of _____; now be it remembered, that on the _____ day of _____, in the year of our Lord one thousand eight hundred and _____, the said A. B. and G. H., of the county aforesaid, personally appeared before me the said</p>

(a) If the plaintiff discharges the defendant from arrest on a warrant, on defendant's promise to appear and he does not, the plaintiff cannot take judgment. *Anonymous*, 2 *Hal.* 120. If the defendant enters into bond and fails to appear at the day, the justice cannot proceed in his absence or render judgment against him. *Camman v. Randolph*, 2 *Hal.* 136. So, on an adjournment, the defendant must give a like recognizance, but the constable will not be liable for an escape, unless the justice order the defendant to do so. *Dunham v. Solomon*, 1 *Har.* 50.

(b) Such bond is good if taken in the amount of the debt only, and not of the debt and costs. *Day v. Hall*, 7 *Hal.* 203. If the defendant appears and answers, it is no breach of his bond if he runs away after judgment rendered. *Smalley v. Vanorden*, 2

*South*. \*811. *Baird v. Cole*, *Hal. Dig.* 123, § 3. Suit cannot be brought on the recognizance until after judgment obtained by the plaintiff against the defendant in the original suit. *Oliver v. Howell*, 2 *South*. \*581. In an action on the bond it is necessary for the plaintiff to allege that he filed his state of demand or appeared and prosecuted his action at the time mentioned in the bond. *Condit v. Baldwins*, 4 *Har.* 143. Judgment cannot be entered jointly against defendant and his surety; the latter has a right to be heard. *McWhorter v. De Kay*, *Pen.* \*310. *Sayre v. Voorhees*, *Pen.* \*1041. The constable cannot take a bond to himself for the defendant's appearance. *Ludlum v. Wood*, *Pen.* \*56.

C. D. and jointly and severally acknowledged themselves to owe to the said E. F. the sum of ——— to be made and levied of their several goods and chattels, upon condition, that if the said A. B. shall not appear on the ——— day of ——— next, before the said justice, or if he does appear and is condemned in the said action, at the suit of the plaintiff, that he shall pay the costs and condemnation money, or surrender him up to the constables, on the execution to be thereafter issued against him, on the day judgment shall be obtained, and if he fails so to do, that he the said G. H. will pay the said costs and condemnation money for him, and suffer judgment to be entered up against him for the same.

Acknowledged the day and year last abovesaid, before me C. D., one of the justices of the peace in and for the said county of ———; and every justice of the peace is hereby empowered and directed to take such recognizance, which shall remain with such justice, for the benefit of the plaintiff in the suit.

### III. Pleading.

22. [Amended by Sec. 156, *post.*]

23. That the plaintiff in such suit shall, on or before the return day of the said summons, or on the return of the warrant, or at the time of appearance specified in the recognizance, deliver or cause to be delivered, to the justice before whom the action is to be tried, a copy of his or her account or state of demand against the defendant, and in default thereof, the said plaintiff shall be non-suited with costs; (a) and if the defendant have any account or demand against the plaintiff, he shall be permitted to discount or set off the same against the account, debt or demand of such plaintiff; but such copy of his or her account, or state of his or her demand, so intended to be set off, shall be delivered to the said justice, on or before the return day of the summons, or on or before the day to which the hearing shall be first adjourned, or if on a warrant, then at the time of hearing of the cause; (b) and in default thereof the said account or demand shall not be received in evidence on the trial of the said cause; but if the said warrant shall not have been executed three days prior to the day of hearing, then the said defendant, if he or she have any account or demand to set off, and will enter into recognizance, as directed by the twentieth section of this act, shall be allowed further time, not exceeding three days, to deliver to the said justice such copy of his or her account or state of demand as aforesaid.

When demand  
and plea filed.  
Ib., § 16.  
Amended.

24. That if any defendant neglect or refuse to deliver a copy of his or her account or state of demand, against such plaintiff, he or she shall forever thereafter be precluded from having or maintaining any action for such account or demand or from setting off the same in any future suit; *provided always*, that where the balance found to be due to such defendant exceeds the sum of one hundred dollars, then the said defendant shall not be precluded from recovering his or her account or demand against such plaintiff, in any other court of record having cognizance of the same. (c)

Defendant, when  
precluded.  
Ib., § 17.

(a) Justice must non-suit if no state of demand be filed. *Sandford v. Hoover*, Pen. \*99. *Sloman v. Holland*, Pen. \*141. *Layton v. Carman*, Pen. \*163. *Goble v. Snover*, Pen. \*107 (o). Or, it is ground of reversal on certiorari. *South v. Toomey*, Pen. \*98. *Gustin v. Whitaker*, Pen. \*610. *Sprague v. Crane*, Pen. \*955. *Addis v. Evans*, Pen. \*142. It cannot be altered or remedied by subsequently filing a bill of particulars. *Vankirk v. Little*, Pen. \*976. *Blackwell v. Leslie*, 1 South. \*112. It must be filed before an adjournment. *Hunt v. South*, 2 South. \*495. Unless the justice is absent on the return day of the summons, or the defendant adjourns the cause. *Shreeves v. Liveson*, Pen. \*247. The transcript need not show that it was filed, if it appears from the proceedings and papers in the cause, or may fairly be presumed. *English v. Bonham*, 2 Hal. 350. See *Van Dyke v. Bastedo*, 3 Gr. 224, 228.

(b) No written plea is necessary except in a case of set-off. *Bray v. Van Note*, Pen. \*143. *Phillips v. McCullough*, Pen. \*69. *Hewes v. Mungon*, Pen. \*256. *Freeman v. Marsh*, Pen. \*473. *Mintas v. White*, Pen. \*531. *Jovis v. Ellis*, Pen. \*548. *Smith v. Van Houten*, 4 Hal. 381. It must contain the items of the account. *Walton v. Lippincott*, Pen. \*161. *Montgomery v. Snowhill*, Pen. \*361. *Doughty v. Jones*, Pen. \*653. *McCormick v. Brookfield*, 1 South. \*69. *Lacey v. Collins*, 2 South. \*490. And be filed in due time. *Alexander v. McCleanon*, Pen. \*364. *Lacey v. Collins*, 2 South. \*490. *Infra*, Sec. 32. Without a set-off, defendant can recover nothing but costs. *Robbins v. Baker*, Pen. \*745. Filing a set-off does not preclude the defendant from relying on any other defense. *Price v. Combs*, 7 Hal. 188. A judgment in a justice's court may be set off against a judg-

ment in the supreme court. *Coxe ads. State Bank*, 3 Hal. 172. In trespass before a justice, if the defendant admits some of the trespasses he will be entitled to costs on those issues and may set them off against the plaintiff's judgment therein. *Van Fell v. Phillips*, 4 Zab. 560. When a plea of set-off claiming a balance of more than \$200, is tendered in a justice's court, the justice should overrule the plea for want of jurisdiction, and proceed with the trial of plaintiff's demand. *Clancy v. Neumeyer*, 22 Vr. 299. A stipulation between parties to an action that the cause shall stand adjourned to a certain day without prejudice to either party, does not contain a waiver of the statutory requirement that if the defendant have a set-off he shall deliver it to the justice on or before the day to which the hearing shall be first adjourned. *De Mot v. Taylor*, 22 Vr. 307. The right to set off one judgment against another is the exercise of a purely equitable jurisdiction, which has not been given by statute to a justice of the peace. *Flavel v. Britton*, 27 Vr. 218. (c) That defendant is barred from a subsequent action, see *Righter v. Van Ripper*, Pen. \*715. *Henry v. Milham*, 1 Gr. 266. *Johnson v. Pennington*, 3 Gr. 188. See *Schenck v. Schenck*, 5 Hal. 276. So, if the plaintiff allows a set-off to the defendant, the latter cannot afterwards sue therefor. *Johnson v. Colbaugh*, *Coxe* 55. The plaintiff is not barred. *Smock v. Throckmorton*, 3 Hal. 216. If a defendant omit to file his claim to a set-off, he may nevertheless recover the sum due him in any other court having cognizance of the same, provided he prove therein that the balance due him exceeds \$100. *Siple v. Wass*, 13 Vr. 187. *Clancy v. Neumeyer*, 22 Vr. 301.

Title to lands  
pleaded.  
Ib., § 40.  
Amended.

25. That when, in any action to be brought by virtue of this act the defendant shall as a justification, plead title to any real estate in himself or another, under whom he acted or entered, such defendant shall commit the said plea to writing, and having signed the same shall deliver such plea to the said justice, who shall countersign and deliver it to the plaintiff; and thereupon it shall and may be lawful to and for such plaintiff to commence and prosecute his action against such defendant in the supreme court, or in the circuit court of the county wherein such action shall have been commenced, and if in such action the plaintiff recover any damages, he shall be entitled to and recover therewith all costs of suit. (a)

Effect of plea.  
Ib., § 41.

26. That on every trial so to be had in such action where title is pleaded, the plea so as aforesaid signed by the said defendant, shall be conclusive evidence that such defendant relied on title by way of justification.

Bond required in  
such case.  
Ib., § 42.  
Amended.

27. That the justice to whom a plea of justification is tendered as aforesaid, shall, before he receives such plea, require and obtain from the defendant a bond, with one good surety, being a freeholder in the said county, in the penalty of one hundred dollars, executed to the plaintiff, and conditioned, that if the said plaintiff shall commence such action in the supreme court, or in the circuit court of the county wherein the justice holds his court, within three months thereafter, the said defendant will appear thereto, within twenty days after the writ to be thereupon issued against him shall be returned served, and shall pay such costs as may be awarded against him in the said action; and in case such plea is tendered and the defendant shall not forthwith enter into such bond to the plaintiff, the said justice shall proceed in the same manner as if such plea had not been tendered.

Condition.

#### IV. Trial.

Proceeding if de-  
fendant does not  
appear.  
R. S. 229, §§ 9, 15.  
Consolidated.

28. That if the defendant does not appear at the time and place expressed in the summons or recognizance, and no sufficient reason shall be assigned by the justice why the defendant does not appear, and if, where the process is a summons, it shall further appear by the return indorsed thereon that the summons was duly served, then the said justice may proceed to hear and determine the cause in the absence of such defendant. (b)

When cause shall  
be heard.  
Ib., § 18.

29. That when the parties in any suit to be instituted by virtue of this act shall appear at the place and the time expressed in the summons, or at the return of the warrant, or at the time of appearance mentioned in the recognizance, the said justice shall proceed to hear or examine their respective allegations and proofs, unless he shall think it proper to adjourn the trial. (c)

(a) A plea of title may be filed after the return day, but not after the day to which the cause may be first adjourned. *Shannon v. Flood*, 1 Gr. 301. It may be filed in an action of *trover*. *Vanness v. Naffe*, 2 South. \*683. See *Wilson v. Clark*, 1 South. \*379. The bond should be legibly written and free from abbreviations or erasures. *Graceen v. Beam*, 3 Gr. 480. A plea of a private way is a plea of title. *Randolph v. Montford*, 1 Har. 228. *Hawk v. Seagraves*, 5 Vr. 355. A right of private way by prescription or by grant, if wrong, must be demurred to. *Brain v. Snyder*, 1 Vr. 56. A plea of a public way is not a plea of title. *Chambers v. Wambough*, 4 Dutch. 530. *Brain v. Snyder*, 1 Vr. 56. *Yawger v. Manning*, 1 Vr. 182. The defendant is confined in the supreme court to his plea of title alone, and cannot plead *not guilty* or *license*. *Justices of Dover v. McFarlan*, 2 Gr. 471. *Brain v. Snyder*, 1 Vr. 56. *Westervelt v. Marinus*, Pen. \*693. If the plaintiff demands \$30 damages before the justice and \$100 in the supreme court, or use and occupation for five years below, and use and occupation generally above, defendant is not confined to his plea of title. *Snediker v. White*, 6 Hal. 87. *Chambers v. Wambough*, 4 Dutch. 530. The declaration in the supreme court should set out the description of the land by metes and bounds., *Ellet v. Pullen*, 7 Hal. 357. The plaintiff may *new assign*, but cannot allege the trespass to have been committed in a different township. *Tindall v. Tindall*, *Spen*. 148. Proof of possession by plaintiff is unnecessary, because admitted by defendant's pleading title. *Appleby v. Obert*, 1 Har. 338. Under *lib. ten.* the defendant need not show title to any part except that on which the trespass is alleged to have been committed. *Phillips v. Phillips*, 1 Zab. 42. Nor is defendant limited to proof of freehold title, but he may prove any right to enter and have possession. *Campfield v. Johnson*, 1 Zab. 83. So, he may plead title below in A., and above in B. *Phillips v. Kent*, *Spen*. 686. Or, rely on title by way of justification. *Hawk v. Seagraves*, 5 Vr. 355. *Form of pleading*. *Ib.* A replication that the plaintiff was actually in possession, and that the right of possession was out of the defendant, or those under whom he entered, is good. *Phillips v. Kent*, 3 Zab. 155.

The supreme court will notice the fact that the suit was begun before a justice, upon the plea being produced countersigned, &c., although not referred to in the pleadings, so as to award costs. *Van Pelt v. Phillips*, 4 Zab. 580. If a defendant, not having filed a plea of title and given bond, at the trial offers to prove legal title within himself or a third person, under whom he justifies, the justice should refuse the offer and proceed to determine the case. *Edgar v. Anness*, 18 Vr. 465. If the offer is to prove absence of title merely in the plaintiff and such evidence is relevant, the justice should dismiss the case for want of jurisdiction. *Ib.* In an action of trespass, the defendant need, by formal plea and tender of bond, arrest the jurisdiction of the justice only in those cases in which, for his own acts, he seeks legal justification by the establishment of title in himself or in another, under whom he claims, in respect to the real property in controversy. *Ely v. Schenck*, 23 Vr. 118. In all other cases, where the decision of a question of title becomes an essential feature of the plaintiff's case, the justice must dismiss the suit without requiring the statutory plea, notwithstanding the offered proof may have emanated from the defendant. *Ib.*

(b) There must be a trial and legal evidence of plaintiff's claim produced—the justice cannot give judgment against the defendant by default. *Snyder v. Hummel*, Pen. \*87. *Zane v. Pissant*, Pen. \*319. *Cooper v. Madara*, Pen. \*530. *White v. Crammer*, Pen. \*649. *Heritage v. Daniels*, Pen. \*551. *Pearson v. Briggs*, Pen. \*621. *Crane v. Crane*, Pen. \*412 (o). *Gale v. Hill*, Pen. \*114 (o). *Clarke v. Clarke*, Pen. \*724. *Murphy v. Davis*, Pen. \*648. *James v. Dyer*, Pen. \*399. *Outcalt v. Rankin*, 2 Gr. 33. The justice cannot proceed in the absence of the plaintiff. *Holliday v. Large*, Pen. \*653. *Vail v. Wright*, Pen. \*681. *Cavatter v. Doughty*, 1 Hal. 227. See *Steward v. Sears*, 7 Vr. 173. He must be present when the verdict is rendered. *Hunt v. Young*, 2 South. \*318.

(c) The justice cannot dismiss the suit after trial. He should give judgment for one of the parties. *Miller v. Miller*, 1 Gr. 165.

**30.** That any justice of the peace, before whom a suit is instituted by virtue of this act, may, to prevent fraud or surprise on either side, or on reasonable cause being assigned by or in behalf of either party, adjourn the trial to any time not exceeding thirty days from the return day of the summons, or, if the process be by warrant, from the time when the same was returned, or from the time of appearance mentioned in the recognizance, except where the applicant for such adjournment shall make oath or affirmation that he cannot safely go to trial for want of a material witness, whom he shall name, being absent and out of this state, and then such justice may postpone the trial to any time not exceeding three months from the return day of the summons; *provided*, that if the process is by warrant, the defendant shall, previous to such adjournment, if required by the justice, enter into recognizance to the plaintiff, as in and by this act is before directed; *provided also*, that if either of the parties to a suit hereafter brought before a justice of the peace cannot, on the day of the first adjournment, safely go to trial for the want of a material witness in the cause, whom he shall name, and thinks he can produce on a future day, and shall file an affidavit thereof with the justice, then the justice may adjourn the trial to any future day, not more than thirty days from the day of such adjournment, on payment of the cost by the party who makes application for the same. (a)

Trial, when and how adjourned. *Ib.*, § 20.

**31.** That all adjournments shall be made to some hour between the hours of nine o'clock in the forenoon and three o'clock in the afternoon, both inclusive, unless the respective parties mutually agree that the cause be adjourned to some other hour.

Hour of adjournment. *P. L.* 1858, p. 49, § 1. Amended.

**32.** That if the defendant file his set-off on the day to which the hearing shall be first adjourned, he shall then consent to an adjournment of said hearing if the plaintiff request the same, and shall also pay the witness fees of said plaintiff for that day.

Adjournment in case of set-off filed. *P. L.* 1873, p. 119, § 3. Amended.

**33.** That in every action, it shall and may be lawful for either of the parties, after the defendant has appeared or put in his plea to such action, and before the said justice has proceeded to inquire into the merits of the cause, (b) to demand a trial by jury, which the said justice is hereby required to grant, and thereupon a venire shall be issued to summon a jury of six men, and no more, if the debt, demand or matter in dispute do not exceed the sum of fifty dollars, or a jury of twelve men, if the debt, demand or matter in dispute exceed the sum or value of fifty dollars, (c) being citizens of this state, above the age of twenty-one years, and under

Jury demanded and when. *R. S.* 229, § 22. Amended.

Process and qualifications.

(a) An adjournment is a matter of discretion in the justice. *Doughty v. Jones*, 1 *South*. \*653. Except where a party is deprived of the attendance of his witnesses. *Gould v. Brown*, 4 *Hal.* 165. *Haines v. Roebuck*, 18 *Vr.* 227. A justice may for his own convenience adjourn a trial. *Pierson v. Millan*, *Pen.* \*1011. But not beyond thirty days. *Lloyd v. Hance*, 1 *Har.* 127. Nor before the return day, by notifying the defendant. *Nicholson v. Wright*, 1 *Har.* 232. *Halsey v. Whitlock*, *Pen.* \*869. *Steelman v. Cox*, *Pen.* \*953. *Taylor v. Doremus*, 1 *Har.* 473, 478. It should be on the return day or day of adjournment, and both parties be notified. *Brannin v. Voorhees*, 2 *Gr.* 590. See *Neighbour v. Trimmer*, 1 *Har.* 58, 61, note. Query—Is a defendant regularly summoned entitled to notice of an adjournment? *Slough v. Robbins*, 1 *Gr.* 340. See *Cumman v. Perrine*, 4 *Hal.* 253. If the cause is adjourned to such day as counsel may agree upon, and one of the counsel refuses to agree to a day, the justice cannot fix a day and notify the party. *Woodworth v. Wolvorton*, 4 *Zab.* 419. An adjournment before the return of the summons is good, if made by consent. *McCollister v. Eichman*, *Pen.* \*208. That defendant is out of the state is a proper ground for adjournment. *Combs v. Johnson*, 7 *Hal.* 244, 246. The adjournment cannot be beyond thirty days, (formerly fifteen). *Pedrick v. Shaw*, *Pen.* \*57. *Allen v. Bryan*, *Pen.* \*185. *Bispham v. Tucker*, *Pen.* \*253. *Montgomery v. Woodruff*, *Pen.* \*610. *Cozens v. Allen*, *Pen.* \*851. Nor less than five days. *Midler v. Lazadder*, 2 *Gr.* 34. Unless by consent of parties. *Walker v. Kearney*, *Pen.* \*621. *Farrand v. Gray*, *Pen.* \*920. Consent cannot be inferred from an appearance. *White v. Lippincott*, *Pen.* \*268. Adjournment cannot be made after hearing evidence. *Andrews v. Wright*, *Pen.* \*280. *Stretch v. Forsyth*, *Pen.* \*713. A motion to non-suit does not preclude a motion to adjourn. *Potter v. Carman*, *Pen.* \*521. A reference cures an illegal adjournment. *Chance v. Chambers*, *Pen.* \*884. And an appearance and trial. *Hillman v. Hayden*, 2 *South*. \*575. A justice may grant a second adjournment to any time within thirty days from the return of the process, on reasonable grounds. *Horner v. Hewlings*, 3 *Hal.* 227. The party applying for a second adjournment on account of the absence of a material witness, must make affidavit, &c., and the justice may then adjourn to any time not less than five

nor more than thirty days. *Midler v. Lazadder*, 2 *Gr.* 34. If upon filing such affidavit the justice adjourned to a time less than thirty days from the return day, the second adjournment cannot be legally granted the party to a time exceeding thirty days from the return day, a further affidavit of the continued absence of the witness not being filed. *Savage v. Collins*, 20 *Vr.* 630. If plaintiff do not appear on the day adjourned to by his own consent, the defendant is entitled to a non-suit. *Dunham v. Solomon*, 1 *Har.* 50. When a cause has been adjourned to a particular time and place, and the justice fails to attend, but, at another place, in the absence of the parties, and without the consent of the defendant, adjourns the cause to another day, he cannot, on that day, proceed to trial and judgment, although notice of the adjournment had been given defendant. Such an adjournment operates as a discontinuance of the suit. *Allen v. Summit Board of Health*, 17 *Vr.* 99.

(b) Venire cannot issue before the appearance of the defendant. *Sutton v. Coleman*, *Pen.* \*134. *Keen v. Scull*, *Pen.* \*544. It may issue in defendant's absence after his appearance. *Lummis v. Stratton*, *Pen.* \*245. If issued before defendant's appearance and he does not afterwards appear, the jury may be dismissed and the cause tried by the justice. *Wills v. McDole*, 2 *South*. \*501. A jury cannot be called after the cause has been heard in part by the justice. *Tilton v. Brand*, 1 *South*. \*289. The justice's judgment will be reversed where a trial by jury is refused. *Cury v. Forsyth*, *Pen.* \*432. But not where such refusal is caused by the misconduct of the party complaining. *Dantels v. Scott*, 7 *Hal.* 27.

(c) Where the sum in dispute is larger than the law allows to be decided by a jury of six men, they cannot try it, although by consent. *Falkenburgh v. Cramer*, *Coxe* 31. *Parker v. Munday*, *Coxe* 70. *Milton v. Smock*, *Pen.* \*911. A demand for \$50 cannot be tried by six men. *Ashcroft v. Clark*, 2 *South*. \*577. Where the plaintiff demands less than \$16 (now \$50), and the defendant files an offset of more than \$16, the cause must be tried by twelve men, although the jury be demanded by the plaintiff. *Jones v. Oliver*, 2 *Hal.* 123. A cause cannot be tried by eleven jurors. *Briani v. Russell*, *Pen.* \*146. See *Den, Denman v. Baldwin*, *Pen.* \*944.

the age of sixty-five years, (a) and in no wise akin to the plaintiff or defendant, (b) nor interested in the suit, (c) to be and appear before the said justice at such time and place as shall be expressed in the venire, to make a jury for the trial of the action between the parties mentioned therein; and the constable shall, at the return of the said venire, return annexed thereto a panel containing the names of the jurors whom he shall have summoned by virtue thereof; and if, on the return of the venire, it shall appear that one or more of the jurors are disqualified to serve or do not appear, then it shall be lawful for the constable who served the same, by order of the court, immediately to summon others who shall serve in their stead. (d)

**34.** That to the jurors and each of them who shall be returned to try the said cause as aforesaid, the said justice shall administer the following oath or affirmation:

Juror's oath.  
Ib., § 25.

You do swear in the presence of Almighty God (or do affirm, as the case may require), that you will well and truly try the matter in difference between ———, plaintiff, and ———, defendant, and a true verdict give, according to evidence. (e)

That to every witness produced at the said trial, the justice shall administer the following oath or affirmation:

Witness' oath.

You do swear in the presence of Almighty God (or do affirm, as the case may require), that the evidence you shall give to the court and jury in this matter in difference between ———, plaintiff, and ———, defendant, shall be the truth, the whole truth, and nothing but the truth.

And that to the constable who shall be appointed to attend the jury, the said justice shall administer the following oath or affirmation:

Constable's oath.

You do swear in the presence of Almighty God (or do affirm, as the case may require), that you will, to the utmost of your ability, keep every person sworn (or affirmed) on this jury together in some private or convenient place without meat or drink, water excepted, that you will not suffer any person to speak to them nor speak to them yourself, except by order of the court, unless it be to ask them whether they have agreed on their verdict, until they have agreed on their verdict.

Fines of jurors  
and witnesses.  
Ib., § 26.

**35.** That every person summoned as a juror or subpoenaed as a witness, who shall not appear, or appearing, shall refuse to serve or give evidence in any such action, shall forfeit and pay for every such default or refusal, unless some reasonable cause be assigned, such fine, not exceeding twenty dollars nor less than one dollar, as the said justice shall think proper to impose; and such justice is hereby authorized and required to issue an execution, directed to any constable of the said county, to levy the same of the goods and chattels of the offender, which fine when recovered shall be applied by the said justice to the use of the said county. (g)

If defendant has  
filed offset, plain-  
tiff shall not with-  
draw suit.  
P. L. 1870, p. 61, § 1.

**36.** That if the defendant have filed an offset the plaintiff shall not be permitted to withdraw his suit, nor shall any judgment of non-suit or discontinuance be entered without the consent of the defendant, but the case shall be heard on motion of the defendant, if the plaintiff neglect or refuse to move the same, and if it shall appear upon evidence produced by the defendant that the plaintiff is actually indebted to the defendant, judgment shall be rendered in favor of the defendant for the amount found due him; provided, such defendant have filed an affidavit with the justice at the time of filing his offset, that the offset is not filed for the purpose of delay, and that he verily believes he does not owe the plaintiff anything,

(a) The words of the act are mandatory. *Sayres v. Scudder*, Pen. \*53, *Kirkpatrick, C. J.* It seems "good and lawful men" for "citizens of this state," &c., is not fatal. *Shaw v. Hendrickson*, Pen. \*65. Such error is cured by verdict and judgment. *Barton v. Murry*, Pen. \*97. *Doughty v. Read*, Pen. \*902. See *Halsey v. Nutman*, Pen. \*329. A juror, although above sixty-five years of age, may be sworn by consent. *Sutton v. Petty*, 2 South. \*504.

(b) A juror who had married a niece of a party is disqualified. *Den, Hinchman v. Clark*, Cox 446. The disqualification continues after the death of the relative, if issue survive. *Vannoy v. Givens*, 3 Zab. 201. That the constable who returns the venire, is related to a party is good ground for challenge to the array. *Vanauken v. Beemer*, 1 South. \*364.

(c) A challenge for relationship must show how related. *Stevenson v. Siles*, Pen. \*740. A challenge of a juror for favor "that he is a neighbor" is illegal. *Jones v. Butterworth*, Pen. \*455. A juror cannot challenge himself. *Den, Bickham v.*

*Pissant, Cox 220.* An administrator of the maker of a promissory note, cannot be a juror in a suit on such note against the payee. *Mackler v. Potter*, 2 South. \*586. That a juror has a suit for the like cause against the challenger, is good. *Gardner v. Lanning*, Pen. \*651. That a constable is interested, is good cause. *Cranmer v. Crawley*, Cox 43.

(d) See *Boyles v. McEwen*, Pen. \*877. A person who is not a constable or ministerial officer of the court, cannot be deputed to serve a venire. *Robins v. Martin*, 15 Vr. 639.

(e) The form of oath usually administered in courts of justice is sufficient. It need not follow the exact language of this oath. *Earle v. Vanburen*, 2 Hal. 344.

(f) A justice ought not to impose a fine upon a non-attending juror without first giving him, personally or in writing, a reasonable notice to appear before him and show cause, if any he have, why he should not be fined. *State v. Hollinshead*, 1 Har. 539. See *Rhinehart v. Lance*, 14 Vr. 318.

but that the plaintiff is indebted to him in a certain sum, which shall be stated in the affidavit.

37. That whenever the nature of the plaintiff's demand is such that his book or account of original entries would be competent evidence and the defendant does not appear at the hearing, or if appearing does not require the production of said book or account, a copy of the entries therein, so far as they relate to the plaintiff's demand, together with a statement of the credits or allowances if any, to which the defendant is entitled, shall be received in evidence, with the same effect as if the plaintiff's books or accounts were produced and proved; *provided*, such copy and statement be accompanied by an affidavit or affidavits, setting forth that the copy is a true copy of said original entries and that all the credits and allowances to which the defendant is entitled appear on such statement, or in case the defendant is not entitled to any, then setting forth that the defendant is not entitled to any credits or allowances, and that the sum of money or balance claimed by the plaintiff is justly due and owing to him.

Proof by affidavit of book account. P. L. 1873, p. 119, § 1. Amended.

Proviso.

38. That where a copy of said entries may be used by the plaintiff, it shall be competent to prove any partnership by affidavit.

Affidavit of partnership.

39. That in actions upon promissory notes, bills of exchange, checks, drafts or other written contracts whether simple or under seal, for the payment of money only, if the defendant does not appear at the hearing, or if he appear and consent thereto, the plaintiff may prove his case by affidavit; the affidavit or affidavits shall contain a copy of the writing or writings sued on and shall set forth and aver such facts and circumstances as would warrant a recovery in case such facts and circumstances were proved by witnesses.

Proof by affidavit of notes, &c. P. L. 1873, p. 119, § 2. Amended.

40. That in all cases in which proof is made by affidavit, it must appear by affidavit that the affiant or affiants have competent knowledge of the fact or facts sworn to, and in actions upon promissory notes, bills of exchange, checks, drafts, or other written contracts, simple or under seal, for the payment of money only, such notes, bills, checks, drafts, or other contracts, must be produced at the hearing, or their non-production accounted for by affidavit.

Competent knowledge in affiant.

41. That if the jury disagree, other writs of venire may issue in the same cause until a verdict be obtained. (a)

Disagreement of jury.

## V. Judgment.

42. That if the plaintiff, other than executors or administrators, in any such action shall be non-suited or shall discontinue or withdraw his action, without the consent of the defendant, where he may lawfully do so, then judgment shall be given against such plaintiff for the costs which have accrued, or if such plaintiff shall appear to owe, or be indebted to the defendant, then judgment shall be given against him for the debt, or damages and costs, as the case may require.

When judgment against plaintiff. R. S. 229, § 27.

43. That if judgment by confession shall be entered against the defendant, unless an affidavit shall first be made, as directed by the act entitled "An act directing the mode of entering judgments on bonds, with warrants of attorney to confess judgments" (which affidavit shall be filed and preserved by the said justice), such judgment shall not operate or have any effect against any person or persons not parties in said action, but shall be binding and have its full effect so far as relates to the parties in the suit only. (b)

Judgments by confession. *Ib.*, § 21.

(a) After a case has been tried with a jury, and the jury, failing to agree, has been discharged, jurisdiction is restored to the justice's court over the cause, for all purposes, until final judgment is rendered. If either party desires a jury, he must demand it, or, failing in that, his right is waived, and the justice may proceed to trial and judgment. *White v. Hathaway*, 21 Pr. 119.

(b) A defendant could formerly take advantage of the fact that no affidavit had been filed. *Parker v. Griggs*, 1 South. \*161. A defendant sued by a constable for goods taken in execution, may show that the judgment was entered without affidavit.

*Otter v. Applegate*, 2 South. \*479. See *ante*, p. 172, note (g). Such a judgment, although valid between the parties, has no operation against third persons and cannot be read in evidence even in mitigation of damages. *Sheppard v. Sheppard*, 5 Hal. 250. The affidavit should conform to the words of the act. *English v. Sharp*, 3 Gr. 457. See *Wright v. Wood*, *Sper*, 309. *Scudder v. Coryell*, 5 Hal. 340. No affidavit is necessary where the defendant has been brought into court by serving process on him. *Budd v. Marvin*, 1 South. \*248. *Lee v. Woodhull*, 7 Hal. 126. *Ferguson v. Earl*, 2 Gr. 124. *Hoguet v. Wallace*, 4 Dutch. 524.

Where case is submitted to jury. *Ib.*, § 19.

Form of judgment in case of action on bond, &c., with penalty.

**44.** That in cases of trial by jury, there shall be no judgment of non-suit or discontinuance after the merits of the cause on either side are submitted to the jury, unless by the consent of both parties.

**45.** That where the amount really due and recoverable upon any bond, bill, note, or other contract in writing, does not exceed, exclusive of costs, the sum or value of one hundred dollars, at the time when the suit is instituted, proof shall be made of the amount really due and owing, and the justice shall give judgment therefor, with costs, and not for the amount of the penalty expressed, whether such penalty exceed or be less than one hundred dollars. (a)

## VI. Execution.

The execution. R. S. 229, § 28. Amended.

Against whom, and how to be issued.

When execution against body may issue.

Where warrant has issued.

Where judgment is rendered in case of tort.

Where no warrant has issued in an action founded on contract.

Order of justice. Rev. 1875, p. 142.

Application to set aside.

**46.** That when judgment shall be given against the plaintiff or defendant, by virtue of this act, the said justice shall grant execution thereupon, commanding the constable to levy and make the debt, or damages and costs, of the goods and chattels of the party; and in the cases hereinafter specified, for want of sufficient goods and chattels whereon to levy and make the same, to take the body of such party and convey him to the jail of the county; *provided*, that no execution shall issue against the body of any female; *and provided also*, that when judgment shall be obtained against executors or administrators, execution shall issue thereon, in the same manner as it is issued against them in the other courts of law of this state. (b)

**47.** That an execution against the body shall be granted only in the following cases:

I. Where a warrant in the nature of a *capias ad respondendum* has issued upon an order made in accordance with the provisions of the fourteenth section of this act, and such order has not been set aside, or if set aside has been subsequently approved by a justice of the supreme court.

II. Where no warrant in the nature of a *capias ad respondendum* having been issued for the same cause of action, due proof is made on oath or affirmation to the satisfaction of the justice, that the defendant, at the time when execution is applied for, is not a freeholder in the county where the same shall be issued, and judgment has been rendered in an action of tort. (c)

III. Where no warrant in the nature of a *capias ad respondendum* has issued for the same cause of action, and the action being founded upon contract express or implied, due proof is made to the satisfaction of the justice by affidavit or affidavits, filed as aforesaid, establishing the particulars specified in the first subdivision of the thirteenth section of this act, or establishing 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 ten dollars or over, which he unlawfully and fraudulently refuses to apply in payment of such judgment. (d)

**48.** That if the requirements of the next preceding section have been complied with, the justice shall make and subscribe an order that execution issue against the goods and chattels of the defendant, and for want of sufficient goods and chattels, against the body, whereupon execution may issue in accordance with such order as directed in section forty-six of this act.

**49.** That except where previous application has been made and passed upon under the fifteenth section of this act, the defendant may, at any

(a) See *Harrison v. Hill*, 3 N. J. L. J. 380.  
 (b) Execution cannot issue until after the judgment is entered. *Grandall v. Denny*, Pen. \*137. *Parker v. Frambes*, Pen. \*156. *Johnson v. Johnson*, Pen. \*317. *Lofton v. Champion*, Pen. \*157. *Lee v. Steelman*, Pen. \*319. *Conner v. Souder*, Pen. \*529. Nor can it issue for costs until after judgment therefor be entered. *Zane v. Pissant*, Pen. \*319. The awarding of an execution is no part of the judgment, and hence may be reviewed by *certiorari*. *Krumetick v. Krumetick*, 2 Gr. 39. So, the execution may be set aside and the judgment affirmed. *Hinchman v. Cook*, Spen. 271. The justice cannot use another form of execution than that prescribed. *Kipp v. Chamberlin*, Spen. 658.  
 (c) An affidavit showing that a search has been made, and that

it appeared that no deed to the defendant is on record in the county, is not sufficient proof that he is not a freeholder. *Eldrige v. Murphy*, 16 N. J. L. J. 239. A body execution issued on such an affidavit will be set aside. *Ib.* The proof required for such an execution in an action of tort, is such as would be competent to go before a jury to prove the fact that the defendant is not a freeholder. *Ib.* An execution against the body will not be set aside for irregularity or defect of proof after the defendant has given a bond in insolvency. *Kohen v. Neger*, 16 N. J. L. J. 241.  
 (d) Witnesses in order to establish fraud must swear only to facts, not to conclusions of law. *Kipp v. Chamberlin*, Spen. 656.

time, after order made under the forty-eighth section of this act, apply to any one of the persons to whom he may apply under said fifteenth section, to set aside said order so far as it authorizes the taking of the body, the defendant having first given reasonable notice to the plaintiff of such application, and if such person to whom application is made shall deem the proofs made insufficient to warrant the issuing of process against the body, he may make order that the justice's order, so far as it authorizes the taking of the defendant's body, be set aside.

50. That such order shall be delivered to the justice who shall file the same with the other papers in the cause, and who shall furnish certified copies thereof to the defendant or his agent on request.

Justice to file order and give copies.

51. That the order, from the time of the filing thereof with the justice, shall operate to discharge the defendant from arrest or imprisonment, if arrested or imprisoned, or if not, from liability to arrest or imprisonment in the suit in which the order was made, and shall have no other or further operation.

Effect of order to set aside.

52. That no constable, jailer, warden, or other officer or person, taking or detaining the body of the defendant in pursuance of the warrant mentioned in the thirteenth section of this act, or in pursuance of the writ of execution shall incur any liability whatsoever for any act done or committed pursuant to the commands of the writ, in or about such taking or detention, prior to service upon him of a copy of the order of the justice of the supreme court, law judge or commissioner, certified by the justice of the peace with whom such order is filed.

When constable, &c., to incur no liability.

53. That service of said order upon the person in whose custody the defendant may be, shall warrant the immediate discharge of such defendant from arrest or imprisonment under said writ.

Service of order.

54. That the justice shall furnish to the defendant or his agent on request, a certified copy of the order and affidavit or affidavits upon which the warrant or execution against the body issued or may issue, and such copy may be used before the justice of the supreme court, law judge, or commissioner, who may make order thereupon in the same manner as if the original order and affidavit or affidavits were produced before him.

Justice to furnish copies of order.

55. That where a justice of the peace has made an order pursuant to the fourteenth section or to the forty-seventh section of this act, and application has been made in the first instance to a justice of the supreme court to set the order aside, if the justice refuse to do so, the defendant shall not be permitted to renew his application, but if such application has been made in the first instance to a law judge or commissioner, who either makes or refuses to make such order, then either party may, on notice to the other party, within six days after such order has been made or refused, apply to a justice of the supreme court, to review the action of the law judge or commissioner, such justice of the supreme court may, in his discretion, modify or set aside the order of the law judge or commissioner, and make such other order in reference to the taking or retaking of the defendant's body either on the warrant or on any execution issued or that may be issued, as the nature of the case may justify or require, and the order of such justice shall be final.

When second application allowable.

56. That if any defendant shall appear at the return of the summons or warrant, or by consent without process, or on the day that judgment shall be rendered, or before the issuing of execution, whether the suit has been defended or not, and procure a good and sufficient freeholder, resident in the county, to join with such defendant in a confession of judgment, to the adverse party, with costs, then if the judgment shall not be more than fifteen dollars, nor less than five dollars, no execution shall issue until after one month from the time of rendering such judgment; and when the judgment shall exceed fifteen, and not exceed sixty dollars, no execution shall issue until after three months from the time of rendering such judgment; and when the judgment shall exceed sixty dollars, no execution shall issue until after six months from the time of rendering such judgment. (a)

Stay of execution. R. S. 229, § 29. Amended.

One month.

Three months.

Six months.

(a) If the plaintiff conceives himself in danger of losing his demand after the first confession, he may require another freeholder as security. The defendant cannot object that the judgment is entered against the freeholder alone. *Hunt v.*

*Shivers, 1 South. \*89.* The defendant and the freeholder must appear personally before the justice and jointly confess the judgment. *Bilderback v. Hinckman 2 Gr. 570.*

- But not in suit upon former judgment.**  
*Ib.*, § 80.
- 57.** That where a suit shall be brought upon any judgment recovered before a justice of the peace, and judgment rendered in favor of the plaintiff, no stay of execution shall be allowed thereon; *provided*, the time herein-before limited, for stay of execution upon such sum, shall have expired since the date of the first judgment, and if not, such further stay of execution shall be allowed as with the time already passed since the date of the first judgment, will make up the time allowed for stay of execution on such sum, as is directed by the preceding section of this act.
- Goods, how advertised and sold.**  
*Ib.*, § 81.
- 58.** That the constable, who by virtue of such execution, levies on any goods and chattels, shall give notice by advertisements, signed by himself, and put up in three of the most public places in the township where they were taken, of the time and place they will be exposed to sale, at least five days before the time appointed for selling them, and therein describe the goods and chattels so taken; and shall, at the time and place so appointed, expose them to sale by public vendue, and strike them off to the highest bidder, and pay the money thence arising to the plaintiff, or in case of his absence to the justice, and within thirty days from the time he shall receive the execution, make return to the justice who issued the same of the proceedings had thereon, and the said justice shall make a record thereof. (*a*)
- Money, when paid over.**
- Proceedings on claim of property.**  
*Ib.*, § 82.
- 59.** That in all cases where any constable shall, by virtue of any writ of execution or attachment, issuing out of this court, levy on, attach, or take into his possession, any goods or chattels which shall be claimed, by notice in writing, delivered to said constable by any other person than the defendant, he shall immediately upon such claim, delay his sale of the same for the space of ten days, that the said claimant may, within the said term, apply to some justice of the peace within or near the township where such goods or chattels were so seized, for a venire to summon a jury of six lawful men as jurors, to try the right of such claimant to said property; and it shall be lawful for such justice of the peace to issue the same, and direct a return thereof to be to him made, and to proceed therein as in other cases of trial by jury; but the claimant shall, in all cases, give notice in writing to the plaintiff of the time and place of the said trial; but if the said claimant shall not, within ten days, apply to a justice and have his right tried, as aforesaid, the said claim shall be considered abandoned, and the constable shall proceed as if it had not been made. (*b*)
- How claim tried.**
- 60.** That the verdict of such jury shall protect the said constable from any action for taking and seizing such property, or delivery thereof to the claimant; and if the said property shall be found to belong to the said claimant, the said constable shall proceed no further with the same; but if it shall be found to belong to the defendant, he shall proceed to dispose of the same, as is directed in such process; and the costs attending such trial shall be taxed by the said justice as in other cases, and shall be paid by the plaintiff at whose suit the said property was taken and seized, if the said claimant obtain a verdict in his favor; and by such claimant if the verdict is found against him; *provided*, that if the plaintiff, upon notice being given to him, as aforesaid, shall indemnify the constable against the demand of the claimant, then he shall suspend any further proceeding therein; and proceed to sell. (*c*)
- Effect of, and proceedings after verdict.**  
*Ib.*, § 83.
- Constable to sell if indemnified.**

(*a*) The constable is not estopped by the sale from showing that he never received the money therefrom. *Lomerson v. Huffman*, 1 *Dutch*, 625.

(*b*) The claim must be filed with the justice. The notice to the constable ought to describe the property sufficiently to identify it. Form of verdict. *Baird v. Johnson*, 2 *Gr.* 120. Applies to goods seized on attachment. *Stryker v. Stillman*, 2 *Gr.* 189. A claimant, upon a trial of his title to property which has been levied upon under an execution out of a justice's court, need not prove the execution and levy. *Fowell v. Fuller*, 24 *Vr.* 572. If plaintiff in execution, on return day of the venire, does not challenge the existence of the jurisdictional facts, but obtains an adjournment, and afterwards permits the jury to be sworn and the trial to proceed, he is presumed to have admitted such jurisdictional facts. *Ib.* The twenty-fourth section of the attachment act does not so far apply to an attachment before a justice of the peace as to alter section 59 of the justice's court act. *Emdauer v. Teeter*, 2 *N. J. L.* 28.

(*c*) Constable can recover from plaintiff in execution who

indemnified him, the costs and expenses of defending the action brought against him by claimant, as well as the amount of judgment obtained by claimant. *Thompson v. Coleman*, 1 *South*, \*216. The only remedy for the costs on a claim of property, is by action of debt, in case they are not voluntarily paid by the party made liable. *Cole v. Zunger*, 13 *Vr.* 381. It is not requisite that a copy of the taxed costs should be served on the party made liable for them before suit brought. *Ib.* Chattels in the possession of a mortgagor, who, according to the terms of the mortgage, is entitled to possession until default be made in the payment of the mortgage debt, do not, before default, belong to the mortgagee within the meaning of this section. *Riawell v. Fechtman*, 19 *Vr.* 430. When, under the statute, the property levied on is claimed and the title tried, the verdict therein is conclusive for all purposes as between the claimant and the plaintiff in execution. *Berry v. Chamberlain*, 24 *Vr.* 463. The provision calling for a jury of six men in such case is constitutional. *Ib.*

**61.** That for want of goods and chattels whereon to levy, the said constable shall, when execution is issued against the body, according to the tenor of the said execution, take the body of the person against whom the said execution is issued, and convey and deliver him to the keeper of the common jail of the county, who is hereby commanded to keep such person in safe custody, in the common jail aforesaid, until the debt or damages, with costs, be fully paid, or until he be thence delivered by due course of law; and the said constable shall at the same time deliver to the said jailer a copy of said execution, and shall take said jailer's receipt upon the execution, and return the same to the justice who issued it, who shall make a record thereof in his docket; and if the said keeper shall suffer such person so committed to his custody, to go or to be at large out of said jail, except by virtue of some writ of habeas corpus, or by virtue of the order mentioned in the fifty-second section of this act, before the said debt or damages, with costs, be paid, or he be thence delivered by and in due course of law, then every such going or being out of the said jail, shall be an escape, for which the sheriff shall be responsible to the plaintiff to the amount of the debt or damages and costs, for which such person shall be committed, to be recovered by the said plaintiff, with costs, by action of debt.

Of taking the body on execution.  
Ib., § 34.  
Amended.

**62.** That execution may issue without a revival of the judgment by scire facias at any time within twenty years from its recovery, if the justice, by successive elections or otherwise, continues so long in office; *provided*, that if more than six years have elapsed since the recovery of the judgment, a special order of the justice 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 justice of the amount remaining due upon the judgment. (a)

Scire facias not necessary.  
P. L. 1862, p. 27, § 1.  
Amended.

Where more than six years have elapsed, order necessary.

**63.** That the notice required by the last preceding section, may be served upon the defendant personally, either within or without this state, or in case he resides within this state, may be served by leaving a copy at his residence in the presence of some person of the family of the age of fourteen years, who shall be informed of the contents.

Notice, how served.

**64.** That every execution which shall or may be issued by any justice of the peace, upon any judgment rendered in pursuance of this act, shall be in full force and operation against the goods and chattels levied on for the term of one year from the time of issuing the same, unless sooner satisfied; and all executions which shall remain unsatisfied for the space of one year, thereafter, shall be null and void; but the plaintiff may thereupon have a subsequent execution or executions, which shall continue in force and operation and become void in like manner.

Execution in force one year.  
R. S. 229, § 35.  
Amended.

**65.** That upon the return of the original execution unsatisfied, the justice who issued the same shall have power and authority to issue an alias execution, and upon the return of the alias unsatisfied, the said justice may issue a pluries execution, which said writs may be levied on the goods and chattels of the defendant, and shall be made returnable, and be in all things executed in like manner as the original execution. [See Sec. 146, *post*.]

Alias and pluries execution.  
Ib., § 36.

**66.** That where one or more executions, issued by virtue of this act, shall have been levied by one or more constables upon the goods and chattels of any defendant, the said executions shall have and obtain priority according to the time of levying the same, and all surplus moneys arising upon any sale by virtue of any execution, shall be paid to the officer or person holding the next oldest execution which shall have been levied as aforesaid, until all executions levied upon the goods and chattels of any defendant, at the time of sale upon the first execution, be satisfied or so far satisfied as there shall be proceeds for that purpose, according to their respective seniority as aforesaid; and in case two or more executions, at the suit of different plaintiffs, shall be levied at the same time, such execution or executions shall have preference according to the time when they were received, which shall be noted on each execution by the constable at

Priority of executions.  
Ib., § 37.

(a) See *McGovern v. Connell*, 14 Vr. 106.

the time of receiving the same ; and if two or more executions shall have been delivered to a constable at the same time, against the same defendant, then the moneys arising from the sale under or by virtue of the said executions, or either of them, shall, if not sufficient to satisfy both or all of them, be applied towards the satisfaction of the several executions in proportion to the sums due on them respectively.

Property levied on to be inventoried.  
Ib., § 38.

**67.** That it shall be the duty of the constable to whom shall be delivered any execution, issued under the provisions of this act, to take an inventory, in writing, of such and so much of the property of the defendant as he means and intends to levy upon ; which inventory and levy and the actual time of making the same, shall be annexed to the said execution, and signed by the said constable, under his oath of office, and shall, at all times, be received as evidence of the levy and of the time of making the same, as contemplated by this act, and that the property so levied upon shall be bound from the time of such levy and not before. (a)

Constable liable for neglect.  
Ib., § 39.

**68.** That if the constable to whom any execution is delivered shall not perform the duties, or any of them prescribed by this act, respecting such execution, such constable shall be liable to pay to the person in whose favor the said execution is issued, the debt or damages and costs, or any of them, mentioned therein, to be recovered by action of debt with double costs, by the person so as aforesaid injured thereby ; and when any constable shall have in his hands one or more executions, and not have performed the duty required of him by law on the same, he shall be liable to be prosecuted on such execution or executions, separately or jointly, by the person or persons in whose favor said execution or executions were issued, who may recover as aforesaid in an action of debt with double costs ; and if it shall appear that the said constable has received the money or any part thereof, on any execution for which a suit shall be brought, in that case he shall pay to the plaintiff treble costs ; and when any judgment shall be had against any constable for any delinquency in his office, execution may be issued immediately against him for debt and costs. (b)

Execution against corporation.  
Ib., § 77.

**69.** That if judgment shall be given against any body politic or corporate by virtue of this act, the justice shall grant execution thereupon against the goods and chattels of such body politic or corporate, which may be levied on and sold according to law.

## VII. Docketing judgments.

Judgment may be docketed, when.  
P. L. 1848, p. 127, § 1.  
P. L. 1858, p. 477, § 2.

**70.** That final judgments of courts for the trial of small causes in any county of this state, if not less than ten dollars including costs, remain due on such judgments, may be docketed in the court of common pleas of that county, in the manner herein directed. (1) [See Sec. 169, *post*.]

Clerk to keep docket.  
P. L. 1848, p. 127, § 2.

**71.** That the clerk of every court of common pleas shall provide and keep a docket in which shall be entered, upon complying with the provisions of this act, all such final judgments if not less than ten dollars remain due thereon as aforesaid.

Mode of docketing.  
Ib., § 3.

**72.** That when a judgment is obtained in any court for the trial of small causes, for an amount not less than ten dollars, including costs, and execution shall issue thereon, and be returned by the constable to whom it has been delivered to be executed, indorsed to the effect that he could not

(a) A constable cannot maintain trover for goods levied on by him, unless he has inventoried them. *Brinck v. Decker*, Pen. \*902. *Cusher v. Peterson*, 1 South. \*817. *Wintermute v. Hankinson*, 1 Hal. 140. They are not evidence without producing the judgments. *Cusher v. Peterson*, 1 South. \*818 (a). A writ of execution from a justice's court does not bind the goods of the defendant until an actual or constructive levy be made. A bare inventory without levy is insufficient for that purpose. *Nelson v. Van Gazelle Mfg. Co.*, 18 Steu. 594. If a constable takes actual possession of defendant's chattel, or places a keeper in possession, it will amount to a valid levy, although no inventory be taken. *Delaney v. Martin*, 22 Vr. 148. An inventory, made as required by this section, is necessary to support a levy resting upon a constructive seizure only. *Ib.*

(b) Mere delivery of an execution to a constable does not

render him liable ; some neglect must be shown. *Bennett v. Bozorth*, Pen. \*543. *Leaming v. Denny*, Pen. \*611. *Parker v. Parker*, Pen. \*867. *Merritt v. Downs*, Pen. \*928. Debt is the proper form of action for not making a proper levy and inventory. *Sandford v. Colfax*, 1 South. \*120. Case, for not returning it. *Ib.* Constable is liable for the debt, damages, costs and interest. *Hunt v. Boylan*, 1 Hal. 211. *Hunt v. Gutlick*, 4 Hal. 208. *Jones v. King*, 4 Hal. 209. The supreme court will not stay proceedings against a constable for neglect on an execution issued on a judgment, which has been removed by *certiorari* into the supreme court. *Combs v. Johnson*, 7 Hal. 178. The liability of the constable applies to the requirement to return the execution within thirty days. *McLaren v. McVicar*, 12 Vr. 271. The action is penal, and must be brought within two years next after the cause of action accrued. *Ib.*

find any personal property of the party against whom the execution was issued on which to levy, or that he had levied and sold goods and chattels, and had made thereof part of said judgment, and that the same was not fully satisfied, and stating the balance still unsatisfied, the clerk of the court of common pleas of the county where such judgment was obtained, upon the request of the person or persons obtaining such judgment, and upon filing in his office a transcript of the proceedings from the docket of the justice of the peace before whom such judgment was obtained, under the hand and seal of said justice, and a certified copy of the state of demand and set-off filed in said action, with a certified copy of the return of the constable, and also an oath or affirmation of the party, his or their attorney or agent making such request, that at the time of filing such transcript a certain amount not less than ten dollars is still due, stating the amount, and that he believes the debtor is not possessed of goods and chattels sufficient to satisfy said amount due, shall enter in the docket provided for that purpose the transcript of such judgment in words at length containing the name of the justice of the peace before whom the judgment was obtained, the names at length of the parties to said judgment, the style of the action, the date of the judgment, the amount recovered with costs, the substance of the return of the constable, and the amount stated to be due in the affidavit. (a)

73. That the said judgment shall from the time of said docketing in the court of common pleas, operate as a judgment obtained in a suit originally commenced in said court, and satisfaction thereof may be entered in the margin of the docket, in the same manner and upon the same evidence as is now provided by law in case of judgments rendered in the courts of common pleas; and the execution issued thereon shall be of the same effect as to the property of the debtor, either of a personal or real nature, as if issued on a judgment originally obtained in the courts of common pleas, upon a suit commenced therein.

How docketed  
Judgment to operate.  
Ib., § 4.

74. That after such judgment shall be docketed in the court of common pleas, no execution shall issue thereon out of the court for the trial of small causes, nor shall any proceeding be had except the due and proper granting of an appeal or certiorari.

No proceeding in  
justice's court  
thereafter.  
Ib., § 5.

75. That every judgment docketed, as herein directed, may be revived by scire facias in the court of common pleas, in the same manner, in the like cases, and with the like effect, as if said judgment had been obtained in a suit originally commenced in that court.

How revived.  
Ib., § 6.

76. That the clerk of the court of common pleas shall make to the docket in which such judgments are to be entered, a complete alphabetical index; and said docket shall be a public record, to which all persons desiring to examine the same shall have access. (b)

Clerk to Index.  
Ib., § 7.

77. That if any judgment recovered in any court for the trial of small causes shall be removed by appeal or certiorari, and the necessary bond be perfected, and such judgment shall, either before or after such removal, be docketed as herein provided, execution from the court of common pleas in which said judgment is docketed shall be stayed and suspended until the final determination of such appeal or certiorari. (c)

In case of appeal  
and certiorari.  
Ib., § 8.

(a) The statute authorizing the docketing of judgments in the court of common pleas, requires that an execution shall have been issued and returned by the officer, indorsed to the effect that he could not find any personal property of the party against whom the execution was issued on which to levy, or that he has levied and sold goods and chattels, and has made thereof part of the judgment, stating the balance still unsatisfied. *Tasto v. K'lopping*, 14 Vr. 448. A return made by the officer, "I return the within execution, after searching the premises, dissatisfied, not finding any goods to cover the above sum and costs," is not a compliance with the statute. *Ib.* Although, where the judgment of the justice is not docketed in conformity with the statute, it may be attacked collaterally and treated as a nullity, yet the party aggrieved by the docketing may certify it for the judgment of the supreme court as to its validity, without waiting until his property is sold, and thereby incurring the risk of loss which would fall upon him if he mistook the law. *Roller v. Roller*, 17 Vr. 511. A judgment of a justice was docketed on a constable's return in these words, viz., "I

return the within execution this 25th day of September, 1872, unsatisfied, no goods or chattels found within my county belonging to the defendant to make any part of the debt and costs on this execution except that which is exempt by law." *Held*, such judgment was valid. *Pioneer v. Bagnall*, 20 Vr. 226. *Case of Matthews v. Miller*, 18 Vr. 414, disapproved. See *Dumas v. Matthews*, 22 Vr. 582. A constable's return on an execution—"Montville, April 12th, 1886. I return the within execution unsatisfied; found no goods and chattels on which to levy"—is sufficient for the purpose of docketing the judgment in the court of common pleas. *Newman v. Van Duyne*, 15 Stew. 485. *Freichnecht v. Meyer*, 12 Stew. 551.

(b) See *Lum v. McCarty*, 10 Vr. 289.

(c) In order to review a judgment which has been docketed in the pleas, upon the ground of illegality in the proceedings of the trial court anterior to the judgment, the writ of *certiorari*, when allowable, should be directed to the court for the trial of small causes, not to the common pleas. *Davis v. Osborne*, 22 Vr. 101.

Clerk to enter the determination on certiorari or appeal.  
 Ib., § 9.

**78.** That if any judgment docketed as hereinbefore provided, shall be reviewed upon certiorari or appeal, and a duly-certified transcript of the judgment of the court wherein such appeal or certiorari may have been determined, shall be delivered to the clerk of the court of common pleas of the county where such judgment is docketed, it shall be the duty of the said clerk to file the same in his office, and enter in the margin of the docket opposite the entry of said judgment, in short form, the substance of such determination upon the appeal or certiorari.

### VIII. Appeal.

Fleas may order stay of execution.  
 Ib., § 44.

**79.** [Amended by Sec. 138, *post.*]

**80.** That in all cases of appeal the court of common pleas to which such appeal shall be taken, upon filing of the appeal bond with the clerk of said court shall, if they are satisfied with the legality and sufficiency of the same, have power to order a stay of the execution which may have been issued by the justice, until the said court of common pleas shall make some further order thereon, a rule to which effect shall be entered in the minutes of the said court, and a copy thereof certified by the clerk, shall be served on the constable in whose hands the execution may be. (a)

Execution stayed where bond filed with judge or clerk.  
 P. L. 1856, p. 142.

**81.** That if a legal and sufficient appeal bond be filed with any judge of the court of common pleas to which said appeal shall be taken or if satisfactory proof be made to him, that such a bond has been filed with the clerk of said court or with the justice from whose judgment such appeal was taken, such judge, if the other requirements of the law have been complied with, shall have power in vacation to order a stay of the execution which may have been issued by the justice, until the said court of common pleas shall make some further order thereon, a rule to which effect shall be entered in the minutes of the said court, and a copy thereof certified by the clerk shall be served on the constable in whose hands the execution may be.

New appeal bond substituted.  
 R. S. 229, § 47.

**82.** That the court of common pleas may permit the appellant to substitute a new appeal bond in the place of the appeal bond filed and sent up by the justice; *provided*, that no delay in the trial of the said appeal shall be occasioned thereby. (b)

Justice to send up transcript and bond.  
 Ib., § 54.

**83.** That the justice who grants an appeal as aforesaid, shall send a transcript of the proceedings and judgment in the said cause, under his hand and seal, together with the bond aforesaid, to the clerk of the court of common pleas to which such appeal is made, on or before the first day of the court next ensuing such appeal. (c)

When appeal may be heard.

**84.** That either party to an appeal may bring on the hearing thereof at the term of court to be holden next after the rendering of judgment by the justice, upon giving notice in writing of such hearing to the opposite party, at least fifteen days previous, and filing a copy of such notice and

(a) Such order could only be made by the court in session, and not by a single judge under a general rule. *Chadwick v. Reeder*, 4 Har. 156. See Sec. 81.

(b) The common pleas must receive the new bond; it should be dated on the day when executed. *Kennedy v. Congle*, 2 Gr. 82. *Ferrine v. Cheseman*, 6 Hal. 195. The "delay" is not to be limited so as to exclude a bond drawn in court, although a short delay necessarily ensues. *Egbert v. Thatcher*, 2 Gr. 77. If an appeal bond without a seal has been accepted by the justice and sent up, another should be substituted before the pleas. *Garrabrant v. McCloud*, 3 Gr. 462. An appellant may tender a sufficient bond and the pleas must accept it, although two defective ones have been offered and rejected. *Watson v. Marple*, 3 Har. 8. But a *mandamus* will not be awarded to restore an appeal dismissed because there was no subscribing witness to the appeal bond, unless the appellant offered to execute a new and sufficient bond. *Thorpe v. Keeler*, 3 Har. 251. Nor can the appellant, under permission to file a new bond, add the affidavit required by law to be filed with the justice before the appeal is granted, and which he had neglected to file. *Parke v. Hunt*, 7 Hal. 82.

(c) If the appeal be demanded on the first day of the term, and the bond be left at the house of the justice on that day, but is not received by him, on account of his absence, until the next

day, it is his duty to send up the appeal papers on the latter day. *Dyer v. Ludlum*, 1 Har. 531. The act is directory only to the justice, not to the common pleas, who may receive the papers after the first day of the term. *State v. Bergen Common Pleas*, Pen. \*737. But see *Stevens v. Scudder*, 2 South. \*503. If the justice certifies it to be a true transcript from his docket, and annexes his hand and seal, without adding "witness my hand and seal," or similar words, it is sufficient. *Henry v. Campbell*, 4 Zab. 141. See *Müller v. Müller*, 2 South. \*508 (a). If the justice has neglected to certify his transcript, the appellant is entitled to a rule on him. *Hochenbury v. Alpaugh*, 5 Vr. 342. Certificates of inferior courts as to what has transpired in their presence cannot be contradicted by affidavits. *Dyake v. Camp*, 16 Vr. 293. If an appellant who has taken an appeal from a justice to the common pleas, does not exercise proper diligence to have the transcript duly certified and promptly sent up, and thereby the respondent loses a trial day, it is within the discretion of the common pleas to dismiss the appeal. *Ib. Mandamus* will not be awarded to compel a court to do what, in its discretion, it might lawfully refuse to do. *Ib.* The common pleas may reinstate an appeal dismissed for apparently good cause, on discovering mistake of law or of fact, or where the appellant has a meritorious case. *Lash v. Foster*, 15 Vr. 378.

proof or an acknowledgment of service with the clerk of said court at least ten days previous to the first day of said term. (a)

**85.** That the several courts of common pleas in and for the respective counties of this state, shall have cognizance of and hear and determine (b) all such appeals in a summary way, and give judgment (c) and award execution thereon with costs (d) either on the affirmance or reversal of the judgment so appealed.

**86.** That upon the trial of an appeal the same and no other documents, proofs, and witnesses, (except as hereinafter provided), shall be produced and examined in the said court of common pleas, as had been previously produced and examined in the court below, except where the justice shall have admitted illegal or rejected legal evidence, or for any cause shall have deemed any witness incompetent to testify, and then such court of common pleas on the hearing of the said appeal shall reject such illegal evidence so admitted, and admit such legal evidence so rejected by the said justice, and shall admit such witness so rejected, if in the judgment of the said court of common pleas such witness shall be competent to testify; and if either party to an appeal shall desire to produce upon the trial thereof any witness or witnesses not produced or sworn in the court below, or any documentary evidence not offered or admitted in the court below, the said party shall be at liberty to do so, and the same shall be admitted by the court, if otherwise legal and competent, the court being satisfied that the said evidence was not withheld on the trial below for any unfair or fraudulent purpose; provided, that the party first offering such new evidence shall have given the opposite party, or his attorney, ten days' notice thereof in writing previous to the day of trial, setting forth the substance of such evidence if documentary, and the names of the witnesses intended to be produced at the time of the trial, and upon the production of such evidence, the opposite party may produce new evidence in rebuttal of the same, without notice; and upon the trial of such appeal the transcript from the docket of the justice shall be conclusive evidence of what witnesses were produced, and of what documents, papers and proofs were offered in the trial below. (e) [See Sec. 160, post.]

Hc.w appeal tried. *Ib.*, § 45.

Admission of evidence on trial of appeal. P. L. 1875, p. 77.

Production of new evidence. P. L. 1862, p. 325. Amended.

Proviso.

(a) The appellee is entitled to notice of trial. *Woodruff v. Carns*, Pen. \*605. See *Appar v. Degraw*, 4 *Dutch* 527. So, where the appellee moves to dismiss the appeal. *Dayton v. Burnet*, 3 *Hal.* 253. The appellant should move the cause, or it will be dismissed. The appellee is not bound to proceed *ex parte*. *Lum v. Price*, 1 *Har.* 195. It may be reinstated on good cause shown. *Houell v. Van Ness*, 2 *Vr.* 442. *Fifield v. Seeds*, 3 *Har.* 166. Appeals from a justice's court must be put upon the appeal list at the first term of the pleas after judgment rendered, without the notice required by this section. *Johnson v. O'Neil*, 17 *Vr.* 510.

(b) The common pleas do not act as a court of errors, but re-hear and retry the cause on the merits. *Clarke v. Fulse*, Pen. \*263. *Cheeseman v. Leonard*, Pen. \*549. *Ryerson v. Marsellis*, 1 *Har.* 450. *Hendricks v. Craig*, 2 *South.* \*587, 589 (a). *Strader v. Freeholders*, 3 *Gr.* 433. *Schwytler v. Mills*, 4 *Dutch.* 137. The appellant cannot move for a judgment of non-suit on a judgment obtained below by the appellee. *Reed v. Rocap*, 4 *Hal.* 347. Nor can he, in such case, obtain a non suit by withdrawing. *Williamson v. Brown*, 5 *Hal.* 296. *Vannoy v. Glwens*, 3 *Zab.* 201. If they non suit wrongfully, their judgment will be reversed, and the cause remitted for trial. *Blair v. Snover*, 5 *Hal.* 153. A reversal of a judgment of the pleas, which reverses that of the justice, does not restore that of the justice. *Small v. Ward*, 3 *Hal.* 302. *Smock v. Throckmorton*, 3 *Hal.* 216. *Steamboat Co. v. Flanagan*, 12 *Vr.* 116.

(c) See form of entering judgment. *Hendricks v. Craig*, 2 *South.* \*569. The pleas may give judgment for more or less than the justice did. *Woodruff v. Carns*, Pen. \*506. But not for more than one hundred dollars, besides costs. *Glover v. Collins*, 3 *Har.* 232. Nor more than the plaintiff claimed in his state of demand. *Hawk v. Anderson*, 4 *Hal.* 319. *Lake v. Merrill*, 5 *Hal.* 288. They must specify the amount of debt or damages and costs. *Jains v. Schooley*, 3 *Har.* 293. *Doyenus v. Howard*, 3 *Zab.* 390. *Jones v. Pittman*, 7 *Hal.* 93. *Woodruff v. Badgley*, 7 *Hal.* 367. *Saxton v. Landis*, 1 *Har.* 304. It may be remitted for correction. *Blair v. Snover*, 5 *Hal.* 154. If on appeal a verdict is rendered for less than the sum before the justice, the pleas should reverse the judgment below. *Cheeseman v. Cade*, 4 *Zab.* 632. They cannot reverse because the judgment of the justice is not entered in legal form. *Martin v. Thompson*, 5 *Hal.* 142. A judgment of the pleas that did not state that any evidence was heard, held *prima facie* good. *Barcklow v. Hutchinson*, 3 *Vr.* 195. If the pleas are equally divided, they must retry cause. *Strader v. Freeholders*, 3 *Gr.* 433.

(d) The amount of costs must be specified. *Woodruff v. Badgley*, 7 *Hal.* 367. An entry "with costs to be taxed" is defective. *Cook v. Brister*, 4 *Har.* 73. If the judgment of the justice is reduced in amount the, appellee is not entitled to costs. *Robinson v. Hedges*, Pen. \*688. Where the amount of the damages

obtained before the justice is increased, and the appeal was on that ground, the appellee is entitled to costs, although the amount of costs awarded by the justice is reduced. *Romaine v. Norris*, 3 *Hal.* 80. If plaintiff appeals from judgment in his favor, and on appeal receives an increase of debt and damages, he is not entitled to costs of appeal on affirmance. Costs on appeal will only be given to a successful party who has judgment in his favor on an appeal. *Housel v. Higgins*, 13 *Vr.* 72. *Redstrake v. Swayze*, 23 *Vr.* 132.

(e) The common pleas, in the admission of evidence, are confined to the same documents and witnesses as were admitted before the justice. *Sandford v. Hoover*, Pen. \*100. Where a deposition of a witness (who was sick) was offered and overruled by the justice, the witness himself cannot be admitted on the trial of the appeal. *Ward v. Small*, 2 *Hal.* 40; criticised in *Ramsey v. Dumars*, 4 *Har.* 68. Unless the other party has been notified, and the pleas are satisfied, &c. *Ryerson v. Marsellis*, 1 *Har.* 450. *Infra*, Sec. 137. Formerly the points and materiality of the new witnesses' testimony were set out in the notice. *Hoagland v. Nevius*, 2 *Hal.* 75. If it appear that the party knew the facts or knew that the witness knew them previous to the trial before the justice, such witness ought to be excluded. *Gulick v. Thompson*, 7 *Hal.* 149. The evidence must be newly discovered. *Sherson v. Humphreys*, 2 *Gr.* 217. That it is only cumulative does not exclude it. *Ryerson v. Marsellis*, 1 *Har.* 450. The witnesses sworn below may testify to new or additional facts, without notice, &c. *Voorhees v. Hendrickson*, 5 *Dutch* 101. *Reed v. Rocap*, 4 *Hal.* 347. *Ramsden v. Bryden*, 2 *Vr.* 27. If a competent witness has been examined below, or offered and rejected, his deposition may be read, if he is dead or out of the state, &c. *Ramsey v. Dumars*, 4 *Har.* 66. *Query*—Whether what a witness testified below may be proved on the appeal by a person not sworn before the justice. *Johnson v. Pennington*, 3 *Gr.* 188. *Ramsey v. Dumars*, 4 *Har.* 66. See *Stoan v. Summers*, *Spren.* 66. *Jessup v. Cook*, 1 *Hal.* 434. *Kutsmeyer v. Ennis*, 3 *Dutch.* 372. *Cumden and Ambroy E. R. Co. v. Stewart*, 4 *C. E. Gr.* 343. *Turner v. Hand*, 3 *Wall. Fr.* 88. Formerly the transcript of the justice was not conclusive as to what witnesses, documents, &c., were produced below. *Crane v. Ward*, Pen. \*650. Nor was it necessary for the justice to enter on his docket written evidence. *Manning v. Randolph*, 1 *South.* \*144. *Casher v. Peterson*, 1 *South.* \*318. *Sutton v. Petty*, 2 *South.* \*504. And whether the witnesses have been sworn or the evidence offered below was determined by the justice's certificate, or the oath of witnesses. *Ramsey v. Dumars*, 4 *Har.* 66. Where either party wishes to introduce new evidence on the trial of the appeal under this section, ten days' notice of the intention to offer such evidence must be given, and it will then become the duty of the common pleas to postpone the trial to such day that the new evidence can be received. *Johnson v. O'Neil*, 17 *Vr.* 510.

- Judgment on report of referees reviewed.  
Ib., § 50.
- No non-suit on trial of appeal.  
Ib., § 51.
- Justice who tried case not to sit.  
Ib., § 53.
- Entry of rule necessary to make judgment lien on land.  
P. L. 1862, p. 219, § 1.
- Clerk to record such judgment.  
Ib., § 2.
87. [Repealed by Sec. 149, *post.*]  
88. [Amended by Sec. 150, *post.*]  
89. That if such judgment shall have been rendered upon the report of referees, the court of common pleas to which such appeal shall be made, shall have power to inquire into such report of referees, and the judgment thereupon, and either to affirm or set aside the same for the same causes and upon the same principles as reports of referees are set aside in such court in other cases, and to award a trial before themselves, if need be, in the same manner as is directed in other cases. (a)  
90. That the provisions of the forty-fourth section of this act, shall apply as well to causes on appeal before the court of common pleas as to causes pending before the justice. (b)  
91. [Amended by Sec. 151, *post.*]  
92. That no justice of the peace who heard and determined the said cause, shall sit as a judge of any of the courts of common pleas, on the hearing and determining of the same cause on appeal, or give any opinion thereon.  
93. That judgments of the court of common pleas upon appeals from the courts for the trial of small causes shall not affect or bind any lands, tenements, hereditaments or real estate, unless a rule shall be entered in the minutes of the court of common pleas in which such judgment shall be rendered, for recording such judgment, which rule shall be a rule of course, and may be entered at any time without notice.  
94. That it shall be the duty of the clerk of the several courts of common pleas, upon the entry of such rule as aforesaid, to record any such judgment in the book of judgments of said court, and index the same, as now required by law respecting the judgments of such courts in suits originally commenced therein, which record shall be a transcript from the minutes of the said court on said judgment, and for this service the clerk shall be entitled to receive twenty-five cents; and such judgment shall, from the time of entering such rule, affect and bind all lands, tenements, hereditaments and real estate, within the county where such court of common pleas is held, belonging to the person or persons against whom such judgment may be; and executions against the goods and chattels, lands, tenements, hereditaments and real estate of such person or persons, may be issued out of such court of common pleas thereupon, immediately upon the entry of such rule.

## IX. Certiorari.

- Judgment reviewed only by certiorari.  
R. S., 2:3, § 66.
- No certiorari allowed where appeal lies.  
Ib., § 67.  
Amended.
- How certiorari obtained.  
Ib., § 68.
- Reasons.
95. That no judgment, order or proceeding, to be had or made by virtue of this act, shall be removed by writ of error, but by certiorari only.  
96. That where the justice has jurisdiction, no judgment hereafter to be rendered in any court for the trial of small causes, from which an appeal is given to the court of common pleas by this act, shall be removed into the supreme court or circuit court by certiorari or otherwise, for the correction of any supposed error therein; but the party thinking himself aggrieved shall have relief upon the appeal only, and that both as to matter of law and matter of fact. (c)  
97. That no justice of the supreme court shall grant or allow any certiorari to remove any judgment, order or proceeding, to be had by virtue of this act, unless the party applying for such certiorari, shall present to

(a) The affidavit must be filed the same as on appeal from a justice's judgment. *Coleman v. Warno*, 4 Hal. 290. The powers of the pleas are the same as in other cases of appeal. *Taylor v. Vanderhoof*, 2 Gr. 214.

(b) *Doremus v. Howard*, 3 Zab. 390. *Bogert v. Chrystie*, 4 Zab. 57.

(c) A refusal of a justice to adjourn a cause cannot be removed by certiorari. *Gould v. Brown*, 4 Hal. 165. The issuing of an execution by a justice, being a proceeding distinct from the judgment, may be reviewed by certiorari. *Krumeick v. Krumeick*, 2 Gr. 38. See *Hinchman v. Cook*, *Spen*. 271. Judgments by confession are still to be removed by certiorari only. *Bitter v. Kunkle*, 10 Vr. 259. As to all other cases where the justice has jurisdiction in the sense of the act, relief can only be had by appeal to the common pleas. *Ib.* When the justice has no such jurisdiction, the remedies by appeal and certiorari are

concurrent. *Ib.* *Hillman v. Stanger*, 20 Vr. 191. It is a proper case for certiorari, where the question is fairly raised, whether the justice had authority to render any judgment between the parties. *Drake v. Berry*, 13 Vr. 80. Where there has been a trial by jury on an appeal, a party cannot object, on certiorari to the pleas, that the jury below was illegally summoned. *Robins v. Martin*, 15 Vr. 388. On certiorari removing judgment in a justice's court affidavits are not admissible in the first instance to show what facts appeared before the justice. *Wahrman v. Horan*, 17 Vr. 465. Where defendant appeared at the trial, and the justice has jurisdiction of the cause, appeal is the only remedy. *Ib.* See *Mets v. Bussom*, 28 Vr. 383. On certiorari the judgment below will not be reversed unless the errors complained of appear on the face of the papers. *Barclay v. Brabston*, 20 Vr. 629.

the said justice the reasons therefor, drawn up in writing and subscribed by himself or some attorney-at-law, and the same to be deemed by the said justice to contain a probable cause for allowing such certiorari; (a) and also, unless such applicant shall enter into bond to the other party in the sum of one hundred and fifty dollars, with one or more good surety or sureties, conditioned, that such applicant shall prosecute the said certiorari in the supreme court, shall pay the sum recovered in the court below, with interest and costs, if the judgment be affirmed, and shall, in all things, stand to and abide the judgment of the said supreme court respecting the judgment, order or proceeding given or made by the court below; which said bond shall likewise be tendered to the justice granting such certiorari, to be by him filed with the clerk of the supreme court, for the benefit of the obligee therein named, and on failure thereof, no certiorari shall be allowed. (b)

98. That such certiorari shall be determined and adjudicated upon by the supreme court, at the first term after due return thereof shall be made, or be dismissed with costs, unless the said court shall think proper to adjourn the same till the next term, for further argument and advisement. (c)

99. That if any judgment, to be given by virtue of this act, shall, on removal by certiorari, be affirmed by the supreme court, the plaintiff in certiorari shall pay to the defendant all costs arising on such suit in the said supreme court, for which the party entitled to such costs, may have execution, to be issued out of the supreme court against the body, or goods and chattels of the adverse party; but if such judgment be reversed, then the plaintiff in certiorari shall not be entitled to any costs. (d)

100. That the provisions of the last three preceding sections of this act shall extend to the circuit courts in the several counties of this state. (e)

101. That no judgment of any justice of the peace, removed by certiorari before the supreme court or circuit court, shall be reversed in the whole on account of any error or mistake made by the justice by whom such judgment may have been rendered, in the entering, calculating or awarding of the costs of suit, but such judgment shall only be reversed so far as respects the said error or mistake; which error or mistake the court are hereby empowered to correct. (g)

102. That in case any judgment be so affirmed in part and reversed in part, neither party shall pay costs in certiorari to the other.

103. That it shall not be lawful for the supreme court or circuit court to reverse any judgment of any court for the trial of small causes, for any irregularity in the proceedings of such court, unless such irregularity tends to defeat or impair the substantial right or interest of the party in certiorari praying such reversal. (h)

104. That if in any cause or proceeding removed by certiorari, it shall appear equitable and just that a rehearing thereof be had before a justice, the supreme court or circuit court may order that such rehearing be had upon such terms and conditions as are reasonable, and the justice shall thereupon proceed to rehear said cause or proceeding and give judgment as in other cases. (i)

Bond.

When adjudicated.  
Ib., § 69.Costs on affirmation, but not on reversal.  
Ib., § 70.Jurisdiction of circuit court.  
Ib., § 71.What errors or mistakes corrected.  
Ib., § 72.Costs.  
Ib., § 73.Judgments not reversed for mere irregularity.  
Ib., § 74.

When justice of supreme court may order rehearing.

(a) The reasons ought to be filed within thirty days after the return of the writ. *Bell v. Bergen*, 2 Gr. 131. But further time may be allowed for good cause shown. *Ballinger v. Sherron*, 2 Gr. 144. *State v. Kirby*, 2 South. \*835.

(b) It is not necessary that the party enter into bond. *Grier v. Gould*, Feb., 1836. A bond must be given on a certiorari to the pleas to remove a judgment given by them on appeal. *Balantine v. Weible*, 2 Gr. 285. The condition of the bond is broken if the certiorari is dismissed for want of prosecution. *Maryott v. Towns*, 4 Vr. 336.

(c) The motion to dismiss for want of prosecution may be made at any term after the default. *Anonymous*, 1 Har. 394.

(d) No costs awarded on reversal; secus on affirmation. *Jewell v. Armuine*, Coze 38. If quashed for want of jurisdiction, the defendant is entitled to costs. *Montgomery v. Bruere*, 6 Hal. 168. If the execution be set aside, although the judgment be affirmed, the plaintiff shall not pay costs. *Hinchman v. Cook*, Spen. 271. On allowance of a motion for restitution, plaintiff is entitled to costs. *Hann v. McCormick*, 1 South. \*109. See ante, p. 368, Sec. 8. *Randolph v. Boyles*, Pen. \*52. Where plaintiff in certiorari is allowed costs by order of the court, such costs become an incident to the judgment and may be enforced by execution, and attachment will not be allowed. *Ritter v.*

*Kunkle*, 10 Vr. 618. Where there is an order or rule to pay costs or money, which cannot be enforced by execution, a writ of attachment may issue. *Ib.* See *Everham v. Huit*, 16 Vr. 60.

(e) The circuits have not jurisdiction in matters of taxation. *State, Dufford v. Decue*, 2 Vr. 302.

(g) *Smith v. Williamson*, 6 Hal. 313. *Gill v. Hackney*, Pen. \*920. *Hill v. Herbert*, Pen. \*924. *Kerr v. Phillips*, 2 South. \*820. *Cheeseman v. Cade*, 4 Zab. 632.

(h) An irregularity in the common pleas is not saved by this section, and the supreme court will reverse therefor. *Nicholson v. Wood*, 3 Gr. 464. A judgment on appeal by the pleas will not be reversed for an error of the justice in the same cause. *Obert v. Whitehead*, 4 Hal. 245. *Rodenbough v. Rosebury*, 4 Zab. 491. *Hendricks v. Craig*, 2 South. \*589 (a). *Vannoy v. Givens*, 3 Zab. 201. See *State, Dunn v. South Amboy*, 3 Vr. 275. It seems in such case the court may inspect the transcript of the justice. *Dancer v. Craven*, 5 Hal. 255. *Contra, Philhower v. Voorhees*, 7 Hal. 69. Where both the judgment of the justice and that of the pleas are wrong, both will be set aside. *Clarke v. Fulse*, Pen. \*283.

(i) Where there has been a mistrial of the cause below, the supreme court may, under this section, order a rehearing before the justice. *Drake v. Berry*, 13 Vr. 60.

**X. Costs.**

Fees.  
P. L. 1871, p. 116,  
§ 1.  
R. S. 229, § 86.  
Amended.

**105.** That in all actions which may be brought by virtue of this act, the following and no other fees shall be allowed :

## JUSTICES.

Summons, twenty-five cents ;  
Each copy thereof, ten cents ;  
Warrant, twenty-five cents ;  
Order that warrant issue, fifty cents ;  
Entering each suit, twenty cents ;  
Recording return on summons, ten cents ;  
Recognizance, thirty-five cents.  
Entering every non-suit, twenty cents ;  
Entering discontinuance, twenty cents ;  
Venire facias, thirty-five cents ;  
Administering every oath or affirmation, ten cents ;  
Subpoena for every witness, ten cents ;  
Swearing the jury, thirty-five cents ;  
Entry of every verdict, twenty cents ;  
Entry of every rule of reference, fifty cents ;  
Every copy thereof, twenty-five cents ;  
Entry of every judgment, twenty cents ;  
Every execution, thirty-five cents ;  
Recording return of execution, fifteen cents ;  
Drawing, signing and sealing return to certiorari, one dollar ;  
Copy of docket or of any proceeding or paper, per folio, fifteen cents ;  
Transcript of judgment, fifty cents ;  
Entering suit without process, fifty cents ;  
Filing each paper requiring to be filed, ten cents ;  
Issuing commission to take deposition, twenty-five cents ;  
Recording return of commission, one dollar and fifty cents ;  
Entering particulars of costs, fifteen cents ;  
Every affidavit, twenty-five cents ;  
Every adjournment, twenty cents ;  
Hearing every contested case, seventy-five cents ;  
Hearing case not contested, twenty-five cents ;  
Granting appeal and sending up transcript and papers, fifty cents ;  
Recording description of each paper offered in evidence, seven cents ;  
Approving bond, fifty cents ;  
Taking deposition, per folio, fifteen cents ;  
Scire facias, thirty-five cents.

## CONSTABLES.

## Constables.

Serving every summons on one defendant, sixty cents ;  
And for service thereof on every additional defendant in the same summons, thirty cents ;  
Serving every warrant, against one or more persons, for each person, seventy-five cents ;  
Serving every scire facias, against one or more persons, for each person, sixty cents ;  
Serving every subpoena, thirty-five cents ;  
Summoning every jury of six men, seventy-five cents ;  
Summoning every jury of twelve men, one dollar ;  
Attending jury until agreed on their verdict, fifty cents ;  
Serving every execution, seventy-five cents ;  
In addition to which three cents on each dollar secured to the plaintiff ;  
Advertising property under execution, thirty-five cents ;

JUSTICES' COURTS.

1885

Selling property under execution, fifty cents ;  
 For every copy of an execution filed with the jailer, twenty-five cents ;  
 For every mile of travel in serving any summons or warrant, issued by  
 a justice of the peace, after the first mile, the distance computed by count-  
 ing the number of miles in and out, by the most direct route from the  
 place where such process is issued and returnable, four cents.

JURORS.

For all cases tried, twenty-five cents a man ;  
 When summoned to attend, and cause not tried, fifteen cents a man. Jurors.

WITNESSES.

For their services under sections 116th and 117th of this act, fifty cents ; Witnesses.  
 For all other services the same fees as are or shall be allowed in causes Fees on appeal.  
 before the court of common pleas ; *provided*, that no fees shall be allowed R. S. 229, § 87.  
 for the services of any subpoenas, for more than two witnesses, nor shall Amended.  
 fees be allowed to more than two witnesses for each party in a cause. (a)

**106.** On all appeals as aforesaid, heard and determined in the court of  
 common pleas, the following and no other fees shall be allowed :

COURTS.

Every appeal heard, fifty cents. Court.

CLERKS.

Entering action and filing bond and transcript, fifty cents ; Clerk.  
 Every subpoena, ten cents ;  
 Entering judgment, ten cents ;  
 Every witness sworn or affirmed, ten cents ;  
 Every order or rule of court, or of a judge, ten cents ;  
 Every execution, forty cents ;  
 Entering and filing execution, twenty cents ;  
 Calling and swearing a jury, twenty cents ;  
 Taking and entering verdict, ten cents ;  
 Docketing judgment and filing transcript and affidavit, seventy-five  
 cents.

SHERIFF.

Making out and returning a list of the jury, twenty cents. Sheriff.

CONSTABLES.

Serving every subpoena, thirty-five cents ; Constable.  
 Attending jury, fifty cents.

CRIERS.

Every appeal, ten cents ; Crier.  
 Calling and swearing each witness, five cents ;  
 Calling jury, ten cents.

(a) Costs allowed for only two witnesses. *Quimby v. Gilman*, two trials, costs for two witnesses at each trial allowed. *Combs*  
*Pen.* \*430. *Blackwell v. Leslie*, 1 *South.* \*112. Where there were *v. Murphy*, *Pen.* \*741.

## TO THE JURORS.

Jurors. The same fees as are allowed in other cases in the court of common pleas.

## JUDGE OR COMMISSIONER.

Judge, &c. Supreme court justice, law judge or commissioner, for hearing application to set aside order, one dollar.

Who to pay the jury of twelve men. **107.** That when the plaintiff, in any action of debt, shall demand a jury of twelve men, and such jury shall find a sum in favor of the plaintiff, not exceeding fifty dollars, and not less than ten dollars, then the plaintiff shall pay one-half of the costs of the jury; and if the sum found by such jury in favor of the plaintiff be less than ten dollars, then the plaintiff shall pay the whole costs of the jury.

Of six men. **108.** That when the plaintiff, in an action of debt, shall demand a jury of six men, and such jury shall find a sum in favor of the plaintiff, under ten dollars, the plaintiff shall pay the whole costs of the jury. (a)

When constable not required to serve process. **109.** That no constable or other officer, authorized to serve a subpoena, summons or other mesne process issued out of the court for the trial of small causes, shall be required to serve such process until his legal fees and mileage for so doing shall have been paid to the officer of whom such service is required.

Fees of justice to be paid before appeal. **110.** That no appeal from the judgment of a justice shall be allowed until the party applying for the same shall, in addition to the matters now required by law, pay to said justice all costs incurred by him except such as shall be adjudged to the prevailing party.

Fees to be paid before hearing of appeal. **111.** That the fee of the court for hearing the appeal, and the fees of the clerk for entering the action and filing the bond and transcript, shall be paid in the first instance by the appellant; if he refuse to pay the same before the hearing, the court shall, on application of the clerk, refuse to hear such appellant and the appellee, if he will pay the same, may move the court to make, and the court may thereupon make such disposition of the case as if the appellant failed to appear and prosecute his appeal.

## XI. Miscellaneous.

## 1. AMENDMENT.

Amendments made. **112.** That when judgment shall have been rendered upon the verdict of the jury, the court of common pleas, to which such appeal shall be made, shall, before they proceed to hear and determine the same, amend the process, proceeding, verdict and judgment in all things which by the act entitled "An act respecting amendment and jeofails," are amendable on writs of error, after verdict in other courts; and if it should be inconvenient, actually to make such amendments, then everything so amendable, shall be taken and considered as amended, and proceeding shall be had thereupon, as if the same had been actually done.

Provisions of section 138 of "Practice Act" extended to justice's court. **113.** That the provisions of the one hundred and thirty-eighth section of an act entitled "An act to regulate the practice of the courts of law," are hereby extended to the courts constituted by this act, and to the courts of common pleas on an appeal taken thereto; *provided*, that if any objections be made before the justice by either party, in any cause, upon the return day or upon the trial or hearing of the same to any process or pleading in respect to any matter which might be amended by the justice under the provisions of said section of said act, and no such

(a) Query—Whether Pat., p. 317, § 21, providing that when either party to a suit \* \* \* shall demand a jury of twelve men, who find in favor of the applicant above five and not exceeding sixteen dollars, the applicant shall pay one-half of the costs of such jury, and if under five dollars the whole costs,

and when either party demand a jury of six who find in favor of the applicant under five dollars, then the applicant to pay all the costs of such jury, is in force as to juries demanded by *defendants*, or by either party in cases of *tort*.

amendment shall be made before the conclusion of the trial or hearing, then it shall not be in the power of the court of common pleas, on the trial of the appeal, to amend or to order amended the said process or pleading in respect of any of the matters to which such objections shall relate or were made. (a)

Amendment in common pleas.

114. That if the constable's return to any summons or warrant be defective, and such constable has, in point of fact, complied with all the requirements of this act, in serving such writ, whether the defendant appears or does not appear, and whether he objects or does not object, such constable may amend his return in such manner as to make it conform to the fact; *provided*, he do so on or before the return day.

Defective return of constable may be amended, when.

## 2. REFERENCES.

115. That in every suit to be instituted before any justice of the peace by virtue of this act, and in every appeal to be made before any court of common pleas, it shall and may be lawful for such justice of the peace, or court of common pleas, as the case may be, with the assent and at the request of the parties, to enter rules of reference of the matters in difference, to such person or persons as shall be nominated and agreed upon by and between the parties; and the reference so made shall and may be conducted in the same manner in all respects, as directed in the case of references by rule of court, in and by the act entitled "An act for regulating references, and determining controversies by arbitration," and the report of the said referee or referees, or the major part of them, whether in favor of the plaintiff or defendant, appellant or appellee, shall be final and conclusive to the parties, judgment shall be entered thereon with costs, and execution issued accordingly. (b)

Rules of reference to be entered. R. S. 229, § 55. Amended.

## 3. DEPOSITIONS.

116. That if a material witness in an action, instituted in the said court for the trial of small causes, be in the state, but is ancient or very infirm, or is sick, or is bound on a voyage, or is about to go out of the state, the deposition of such witness may, at the option of either party, be taken before a justice of the peace; *provided*, the person at whose request the deposition is to be taken, shall cause notice to be given to the adverse party of the time and place, and before whom the deposition shall be taken, immediately, or at such short day as the cause in the opinion of the said justice may require, to attend and be present at the taking thereof, and to put questions, and cross-examine, if he shall think fit; and a deposition so taken and offered in evidence, shall be subject to the same rules and exceptions that the witness would be if personally present. (c)

Deposition of witness, when taken. *Ib.*, § 79.

Notice required.

117. That every person deposing as last aforesaid, shall be carefully examined and cautioned, and sworn or affirmed, to testify the whole truth, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magis-

Such deposition how taken. *Ib.*, § 80.

(a) Where a note was filed as a state of demand, if the appellant had moved the pleas to non-suit on that ground, they might have allowed a state of demand to be then filed. *Steward v. Sears*, 7 Vr. 173, 175. *Butts v. French*, 13 Vr. 397. An omission in the summons to describe the justice of the peace of the county for which he is elected, is cured by appearance and proceeding without objection and is also amendable under this section. *Drake v. Berry*, 13 Vr. 60. Where objection is made in the court for the trial of small causes, and no motion made to amend there, amendment cannot subsequently be made. *Fine v. High Bridge M. E. Church*, 15 Vr. 148. *Brant v. Froelich*, 20 Vr. 388. *Davis v. Osborne*, 22 Vr. 102. *Jones v. Cook*, 25 Vr. 518.

(b) It must be with the consent of parties. *Schooley v. Thorne*, *Coxe* 71. And there must be an action actually depending. *Burroughs v. Genung*, Pen. \*103. *Prosser v. Richards*, Pen. \*377. *Ogden v. Didiene*, Pen. \*413 (o). The justice himself cannot be one of them. *Crane v. Hand*, Pen. \*413 (o). *Little v. Silverthorne*, Pen. \*680. *Rogers v. Woodmanse*, Pen. \*854. They must be sworn. *Reeves v. Goff*, Pen. \*143. *Parker v. Crammer*, Pen. \*271. *Crammer v. Mathis*, Pen. \*550. And

it should appear on the docket. *Ib.* But it is sufficient if in the report. *Swayze v. Riddle*, Pen. \*660. A report of two on a reference to three, is not binding. *Reeves v. Goff*, Pen. \*143. All must act. *Hoff v. Taylor*, 2 South. \*629. A verbal report is void. *Stechman v. Stewart*, Pen. \*316. And one made after the time limited. *White v. Kemble*, Pen. \*461. It cannot be altered by two referees after its delivery. *Egbert v. Smith*, Pen. \*923. On a submission by an administrator, his individual accounts must not be investigated. *Montford v. Vanarsdalen*, 2 South. \*686. Judgment must be entered thereon by the justice. *Bowen v. Lanning*, Pen. \*139. *Johnson v. Johnson*, Pen. \*817. *Little v. Fleming*, Pen. \*552. *Swayze v. Riddle*, Pen. \*660. And notice is necessary to the losing party. *Fairholme v. Forker*, Pen. \*995. *Pierson v. Pierson*, 2 Hal. 125. Demand need not be filed. *Ayres v. Burt*, Pen. \*739. And a defect therein is cured. *Bozorth v. Pritchett*, Pen. \*268. And not filing it in time. *Chance v. Chambers*, Pen. \*384. And mistake in the form of action. *Applegate v. Schureman*, Pen. \*588.

(c) It may be taken before the justice before whom the cause is pending. *Burley v. Kitchell*, *Spen*. 305. Notice must be given to the party. *Wilson v. Cornell*, 1 South. \*117 (a).

And transmitted to court.

Copies allowed.

What provision of "Evidence Act" applicable. *Ib.*, § 81.

trate taking the deposition, or by the deponent, in his presence, and the deposition, so taken, shall be retained by such magistrate until he deliver the same, with his own hand, into the court for which it was taken, or shall be by him, the said magistrate, sealed up, directed and transmitted to such court, and remain under his seal until opened in court, and when so opened, the same shall be deposited in the office of the justice before whom the action shall be brought, there to remain on record, and that either of the parties in the said action or suit, may, at his or her cost and charges, take copies of such deposition as soon as it is deposited in the office as aforesaid. (a)

**118.** That the provisions of the act entitled "An act concerning evidence for taking the testimony of witnesses residing out of this state," so far as the same can be applied, be and they are hereby extended to the courts for the trial of small causes.

#### 4. JUSTICES—THEIR DUTIES AND DOCKETS.

Justice's docket, entries in. *Ib.*, § 56. Amended.

**119.** That it shall be the duty of every justice of the peace, before whom any suit shall be instituted, to enter in a book, to be kept for that purpose, the names of the plaintiff and defendant, (b) the style and nature of the action, (c) the sum demanded, the time of issuing process, and when returnable, (d) the return made thereto by the constable, when the copy of the account, or state of the demand, or set-off, was delivered by the parties, or either of them, (e) the time of taking the recognizance, of making or filing any order, the adjournment, (g) the rule of reference, and report of referees, (h) the jury, (i) when and by whom demanded, the venire, when issued and how returned, the time of trial, and names of the jurors and witnesses, (k) the admission of evidence objected to, and the rejection of evidence offered, a description of each paper offered in evidence, the verdict and judgment (l) and when given, the execution or executions, when issued, the indorsement thereon, and how returned by the constable, (m) the appeal, (n) when and by whom demanded, and all the proceedings before him had, touching the said suit; (o) and further, it shall be the duty of such justice to grant to either party, when required, a certified copy of such proceedings.

Party entitled to certified copy.

Justice to enter full bill of costs. P. L. 1858, p. 49, § 3.

**120.** That it shall be the duty of the justice before whom any judgment is rendered, to make out and enter upon his docket a full bill of costs in the case, specifying each item, and the fees for the same, and the amount paid him by each party.

Justice out of office may give transcripts. R. S. 229, § 58.

**121.** That every justice of the peace, whose term of office has expired, or may hereafter expire, or who has resigned, or may hereafter resign, shall and may, when required so to do, make out transcripts from his docket or dockets, under his hand and seal, and certify them as late justice of the peace; which said transcripts, so certified, shall be used as evidence in all

(a) And affidavits of non-residence, &c., of witnesses be presented. *Hendricks v. Craig*, 2 *South*. \*587. It ought to appear on the deposition that the witness was cautioned, &c. *Stewart v. Bourne*, *Pen.* \*959. Although not indispensable. *Benley v. Kitchell*, *Spen.* 305. *Ante*, pp. 1402 to 1403, notes.

(b) Stating the initials only is not sufficient. *Clayton v. Tonkin*, 4 *Hal.* 252.

(c) *Ludlam v. Wood*, *Pen.* \*56. *Stokes v. Coombs*, 1 *South*. \*159. *Ashcroft v. Clark*, 2 *South*. \*577. *Pierson v. Pierson*, 1 *Hal.* 168. *Bilderback v. Powner*, 2 *Hal.* 64. "Summons in debt, thirty-one dollars and twenty-nine cents, issued February 25th, 1830," is sufficient. *Branson v. Eayre*, 7 *Hal.* 127.

(d) Record should state the day and year when issued. *Marentille v. Oliver*, *Pen.* \*379. "Issued 13th April, 1811, returnable the 27th," is good. *Potts v. Stoutenburgh*, *Pen.* \*953. So, under the names of the parties and style of action, "April 3d, 1830," *Day v. Hall*, 7 *Hal.* 203. See *Folly v. Smith*, 7 *Hal.* 140. "The command of the justice to the constable to detain the defendant must be entered." *Dunham v. Solomon*, 1 *Har.* 50.

(e) The state of demand is no part of the record. *Vandyke v. Bastedo*, 3 *Gr.* 224. But the docket and transcript ought to show that it was filed. *English v. Bonham*, 2 *Har.* 350.

(f) When a justice renders judgment in the absence of the parties, it must appear by the record that the cause was regularly adjourned, or notice given to the parties. *Semple v. Trustees, &c.*, 3 *Hal.* 60. *Vandoren v. Vandoren*, 5 *Hal.* 286. *Moreton v. Scroggy*, *Pen.* \*875. See *Chance v. Chambers*, *Pen.* \*354.

(h) That they were sworn should be entered. *Anonymous*, *Pen.* \*632. *Steward v. Chamberlain*, *Pen.* \*742. Need not show

that the constable was sworn. *Gould v. Magee*, *Pen.* \*475. *Darnel v. Sheldon*, *Pen.* \*522.

(i) And the names of the jurors and witnesses. *Lindsay v. Boyle*, *Pen.* \*207. *Steelman v. Boulton*, *Pen.* \*321. *Doughty v. Kinale*, *Pen.* \*660. That the witnesses were sworn will be presumed although not stated on the docket. *Doughty v. Reed*, *Pen.* \*902.

(k) An entry that "defendants paid [the execution] in full to the constable," is not sufficient after reversal to order a restitution without notice. *McChesney v. Rogers*, 3 *Hal.* 179. *Arrow-smith v. Vanarsdale*, 1 *Zab.* 471.

(l) A judgment should not be entered in figures. *Cole v. Petty*, *Pen.* \*60. *Walton v. Vandenhoff*, *Pen.* \*73. *Newcomb v. Davis*, *Pen.* \*32. *Stout v. Hopping*, 1 *Halst.* 125. *Melrs v. Bussom*, 28 *Vr.* 383.

(m) An indorsement on the back of the transcript that an appeal was demanded is not sufficient. *Bennet v. Kite*, 4 *Hal.* 106.

(n) The name of the county need not be entered. *Gulick v. Vanarsdalen*, *Pen.* \*746. *Case v. Rowland*, 2 *Har.* 76. It may be amended by the justice. *Allen v. Joice*, 3 *Hal.* 135. *Camp v. Martin*, 7 *Hal.* 181. *Backer v. Van Fleet*, 1 *Gr.* 195. *Ridgway v. Fairholm*, *Pen.* \*906. See *Searing v. Lum*, 2 *South*. \*683. If there are several transcripts, the first one will be taken as true. *Woodward v. Porter*, *Pen.* \*233. See *Van Vliet v. Jones*, *Spen.* 340.

(o) The county clerk certifies transcripts of dockets after they are so deposited. *Woodruff v. Woodruff*, 1 *South*. \*375. Where a justice moved out of the state without depositing his docket, a plaintiff was allowed to take a copy of his docket and annex affidavits thereto, as a return. *Ball v. Van Houten*, 1 *South*. \*32.

courts of law and equity in this state, and have the same force and effect, and be liable to the like legal objections, as though the said justice was still in commission. (a)

**122.** That the book in which such proceedings shall be entered by any justice of the peace, shall, within one year after death of the said justice, be deposited in the office of the clerk of the county wherein the said justice resided and held his commission, to be there kept as a public record ; and if the executors or administrators of such deceased justice shall neglect or refuse to deliver the said book, at the expiration of the said term of one year, to the said clerk as aforesaid, he, she or they, so refusing or neglecting, shall forfeit and pay the sum of sixty dollars, to be recovered by action of debt, with costs, in any court having cognizance of the same, and paid when recovered, to the collector of the county, for the use of the county, who is hereby authorized and required to prosecute for the same.

Where docket deposited after death of justice. *Ib.*, § 57.

Penalty for neglect.

**123.** That if any justice of the peace shall be hereafter removed from his office by impeachment, the docket or dockets of the said justice shall be forthwith deposited in the clerk's office of the county in which he resides at the time of impeachment, there to be kept as a public record.

If impeached, docket, where deposited. *Ib.*, § 59.

**124.** That if any justice of the peace, either before or after the expiration of his term of office, shall be about to remove from the county in which he was commissioned, it shall be his duty to deposit his docket or dockets in the clerk's office of said county, prior to his removal therefrom, there to be kept as a public record.

Same on removal from county. *Ib.*, § 60.

**125.** That every justice of the peace and his legal representatives shall and may at all times, after the said docket or dockets are deposited as aforesaid, have free access to the same without payment of any fees to the clerk therefor, to enable them to recover any costs which may be due the said justice thereon.

Justice to have access to docket. *Ib.*, § 61.

**126.** That if any justice of the peace shall neglect or refuse to deposit his docket or dockets in the clerk's office, at the time and in the manner by this act directed, he shall forfeit and pay the sum of fifty dollars, to be recovered by action of debt, with costs, in any court of competent jurisdiction, and to be paid, when recovered, to the collector of the county, for the use of the county ; which suit shall be brought by the county collector, for the use of the county.

Penalty for not so depositing docket. *Ib.*, § 62.

**127.** That a transcript of the record of any case entered in any docket, deposited in the clerk's office as aforesaid, certified to be a true transcript by said clerk, shall be received in evidence in any court of this state, and be as good, effectual, and available in law, as if the deposited docket were then and there produced. (b)

Transcript from docket in clerk's office, evidence.

**128.** That it shall not be lawful for the court of common pleas, or any other court or municipal authority having power to grant license to keep an inn and tavern in any of the counties, cities or towns corporate within this state, to grant a license to any person to keep an inn and tavern, who shall be at the same time a justice of the peace, or in virtue of his office exercising the powers of a justice of the peace ; and if any person shall be appointed a justice of the peace, or an officer with the power of a justice of the peace, in any of the counties, cities or towns corporate within this state, during the time that he holds a license to keep an inn and tavern, and accept of the said office, such license shall thenceforth be absolutely void.

Justice not to keep tavern. *R. S.* 229, § 84.

**129.** That no justice of the peace or constable shall appear and prosecute or defend in any action before any justice of the peace, unless such justice or constable shall be one of the parties on record in the cause ; and any justice or constable who shall offend against the provision of this section, shall forfeit the sum of fifty dollars, to be recovered by action of debt with costs of suit, in any court having cognizance thereof, by and for the use of any person who shall prosecute for the same ; and such suit shall be commenced within six months after the offense shall have been

Who not to prosecute or defend suits. *Ib.*, § 85. *Amended.*

(a) See *Tichenor v. Hewson*, 2 Gr. 26.

(b) It does not prevent a justice, &c., who is the *bona fide*

assignee of a claim, from prosecuting it. *Conover v. Solomon*, *Spen.* 296.

committed ; *provided*, that nothing herein contained shall prevent a justice from transacting the general concerns of a person who is absent and resident without the state. (a)

## 5. CONSTABLES—THEIR DUTIES.

Constables to be ministerial officers. *Ib.*, § 2.

**130.** That the constables of the several townships in any county shall be the ministerial officers of the said courts, and it shall be the duty of said constables to execute within the county all precepts, summons, warrants, writs, and other process, issuing out of the said court, and to them or any of them directed and delivered, and make return thereof, and to perform all matters, acts, and things appertaining to their offices aforesaid. (b)

## 6. PARTIES.

What provisions of the "Practice Act" applicable.

**131.** That the provisions of sections nineteen, twenty, twenty-one, twenty-three, twenty-five and twenty-six, of "An act to regulate the practice of courts of law," shall apply to the courts for the trial of small causes, except where they conflict with the provisions of this act.

## 7. CONSTRUCTION.

Section 300 of the "Practice Act" applicable.

**132.** That the provisions of section three hundred, of "An act to regulate the practice of courts of law," shall be extended to courts for the trial of small causes.

This act to apply to district courts of Newark.

**133.** That the provisions of this act shall apply to the district courts of the city of Newark, except where the provisions hereof are inconsistent with the provisions of the act constituting said courts and of the supplements thereto.

## XII. Supplements.

## Supplement.

Approved March 17, 1875.

P. L. 1875, p. 31.

Justice of the peace whose term of office has expired may determine any cause undetermined before him, and grant appeal.

**134. SEC. 1.** That it shall and may be lawful for any justice of the peace whose term of office has expired or may hereafter expire, or who has resigned or may hereafter resign, to proceed to the investigation and determination to judgment of any cause then undetermined before him, and it shall be the duty of every such justice to grant, when demanded, an appeal from any such judgment, and also from the judgment by him rendered in any cause theretofore brought before him, and also to make return to all writs, orders or rules to him directed issuing out of any court in this state, in the same manner and as fully as though his commission had not expired or he had not resigned.

May issue writs of scire facias, to revive unsatisfied judgments.

**135. SEC. 2.** That every such justice shall and may, when required so to do, issue writs of scire facias to revive any judgment then remaining unsatisfied upon his docket or dockets, and to issue all and any final process of execution upon any such judgment so revived, or upon any other judgment then remaining unsatisfied as aforesaid ; and such writs and process shall be returnable before such justice, and shall have the same force and effect and be liable to the same legal objections as though the said justice was still in commission ; *provided*, that the docket or dockets of such justice then remain lawfully in his possession.

## Supplement.

Approved April 7, 1875.

P. L. 1875, p. 57.

**136. SEC. 1.** [Amended by Sec. 148, *post*.]

(a) A marshal of a city cannot serve process. *Dunham v. Solomon*, 1 *Har.* 50.  
(b) A person who is not a constable or ministerial officer of

the court cannot be deputed to serve a venire. *Robins v. Martin*, 15 *Vr.* 368.

## Supplement.

Approved March 7, 1876. P. L. 1876, p. 25.

**137. SEC. 1.** That in all cases of appeal from the judgment of any justice of the peace founded on an affidavit or affidavits, as provided for in the thirty-seventh, thirty-eighth and thirty-ninth sections of the act to which this is a supplement, it shall not be necessary for either party to such appeal to give notice of the production of new evidence, but on the trial of such appeal before the court of common pleas to which the same shall be taken, it shall be lawful for either party to produce and offer such witnesses and other evidence, as the said party shall desire, without previous notice to the other party; *provided*, the same shall be lawful and competent in other respects. [See Sec. 160, *post*.]

When not necessary to give notice of the production of new evidence on appeal.

## Amendatory act.

Approved April 12, 1876. P. L. 1876, p. 117.

**138. SEC. 1.** That section seventy-nine of the act entitled "An act constituting courts for the trial of small causes," which now reads as follows, to wit [see P. L. 1876, p. 117], be and the same is hereby amended so as to read as follows, to wit:

[That from any judgment which may be obtained before any justice of the peace, except such as shall have been given by confession, either party (a) may appeal to the court of common pleas of the county to be holden next after the rendering of such judgment; (b) which appeal the said justice is hereby directed to grant, on the following and no other terms, (c) that is to say, if the judgment appealed from be one entered against the party demanding the appeal, or if there be in the action an offset against his demand, then he shall file with the justice a bond to the other party, with at least one sufficient security, being a freeholder in the county, and in double the amount of such judgment or set-off conditioned that the appellant shall appear and prosecute the said appeal in the said court of common pleas, shall stand to and abide the judgment of the said court, and pay such costs as shall be taxed against him if the judgment be affirmed; (d) if the judgment appealed from be in favor of the party demanding the appeal, and there be no offset in the action against his demand, then no appeal bond shall be required, but the appeal shall be taken by a notice in writing, signed by or in behalf of the appellant, briefly describing the judgment and stating that the party appeals therefrom to the next court of common pleas; *provided always*, that no appeal shall be granted to remove any judgment entered against the party demanding the appeal for any amount beyond the costs of suit where such judgment shall have been rendered on the verdict of a jury, or on the report of referees, unless the party shall at the time of taking the

Terms upon which justice is required to grant an appeal.

Proviso.

(a) Where there are several plaintiffs or defendants, one of them can appeal. *Sheppard v. Fenton*, 4 Hal. 8. *Pharo v. Parker*, 1 Zab. 332. *Van Buskirk v. Hoboken, &c., E. R. Co.*, 2 Vr. 367. See *Wilson v. Moore*, 2 Dutch. 458. A party against whom a judgment is rendered in a justice's court, in a matter over which the justice has no jurisdiction, can raise the objection to the jurisdiction of the court either upon a *certiorari* or upon an appeal. *Steinlein v. Rohrer*, 24 Vr. 178. If jurisdiction is lost by irregular adjournments, objection can be raised on appeal. *Id. Barclay v. Brubston*, 20 Vr. 829.

(b) The appeal must be taken to the next term. *Stevens v. Scudder*, 2 South. \*503. An appeal demanded on the first day of the term of the pleas, next after rendering the judgment, is in time. *Dyer v. Ludlum*, 1 Har. 531. But not after the first day. *Miller v. Martin*, 3 Hal. 201. Unless the party intending to appeal has been prevented by the absence of the justice, or other good cause. *Lacy v. Cox*, 3 Gr. 469. See *Schooley v. Ivins*, 6 Hal. 169. If a party, desiring to appeal from a judgment rendered in a court for the trial of small causes, neglects to demand an appeal on or before the first day of the term of the common pleas next after the rendition of the judgment, his right of appeal expires. *Lear v. Budd*, 27 Vr. 457.

(c) The justice must decide, (1) Whether it is a case in which an appeal lies. (2) Whether the application is made in due time. (3) Whether the bond is in due and legal form. (4) Whether the surety is a freeholder in the county and otherwise sufficient. (5) Whether the bond has been legally executed.

*Tichenor v. Hewson*, 2 Gr. 26. Nor ought the pleas to grant a rule on the justice to return an appeal without proof that an appeal has been legally demanded. *Stull v. Abbott*, 3 Gr. 368.

(d) The tendering of a bond, executed according to law, is a demand of an appeal. *Thompson v. Wright*, 2 Gr. 38. Which the justice has no discretion to refuse. *Rodenbough v. Rosebury*, 4 Zab. 491. If the condition of the bond recites so much of the judgment as identifies it, it will be sufficient. *Glentworth v. Hutchinson*, 6 Hal. 90. The amount of the judgment need not be stated. *Griffith v. Scipies*, 5 Hal. 228. It need not be executed by the parties. *Kennedy v. Copley*, 2 Gr. 83. It may be executed by a minor, against whom a judgment has been rendered, and a freeholder. *Andrus v. Stewart*, 5 Hal. 160. The county in which the obligor resides and the court to which the appeal is made ought to be designated. *Meresole v. Meresole*, 1 Gr. 238. An interlineation or alteration vitiates it. *Shinn v. Roberts*, 6 Hal. 187. *Bell v. Smith*, 1 Gr. 312. *Thorpe v. Keeler*, 3 Har. 251. The appellant was allowed to prove that interlineations, apparent on the face of the bond, were made before its execution. *Rockafellow v. Rea*, 7 Hal. 180. Questioned in *Thorpe v. Keeler*, 3 Har. 251. If a party obtains the dismissal of an appeal on the ground of the insufficiency of the bond, he cannot afterwards prosecute such bond. *Van Riper v. Scott*, 6 Hal. 318. Nor where the appeal is dismissed for want of jurisdiction in the court. *Gregory v. Obrian*, 1 Gr. 11. Sufficient state of demand against a surety. *Teel v. Tice*, 2 Gr. 444.

same, file with the justice an affidavit made by the party, or in his absence by his agent, stating that the said appeal is not intended for the purpose of delay, and that the affiant verily believes that the appellant hath a just and legal ground of appeal upon the merits of the case; which affidavit shall be sent up to the court to which the appeal is taken, with the other papers in the cause.] (a)

Act to apply where appeals might now be taken.

**139. SEC. 2.** That this act shall take effect immediately, and shall apply to all actions in which appeals might now be taken according to law.

#### Supplement.

Approved March 9, 1877.

P. L. 1877, p. 140.

Holder of note or bill of exchange may include all parties in one action.

**140. SEC. 1.** That 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. (b)

Copy of bill or note to be annexed to the state of demand.

**141. SEC. 2.** That in every such action the plaintiff shall annex to the state of demand a notice containing a copy of the bill or note with the indorsements, and stating that the action is brought to recover the amount due thereon; but he shall not recover judgment against any several drawer, maker, indorser or acceptor not served with process, and any joint drawer, maker, indorser or acceptor may prove in abatement the non-joinder of any other joint drawer, maker, indorser or acceptor; 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 against one or more of the defendants.

**142. SEC. 3.** That 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 or on 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.

Costs to be allowed in case of set-off.

**143. SEC. 4.** That 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 shall be in favor of the defendants generally, and in the last case for the excess; and in all cases the verdict shall certify the amount allowed to each defendant as a set-off.

Verdict shall certify amount of set-off allowed.

**144. SEC. 5.** That 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

Rights, &c., of the several parties, as between each other, shall remain as heretofore.

(a) A plaintiff appealing from a judgment in his favor was required to make the affidavit. *Miller v. Martin*, 3 Hal. 201. The affidavit should not be indorsed on the bond. *Freas v. Jones*, 3 Gr. 20, 1 Har. 358. The affidavit is good, but it vitiates the bond. *Robbins v. Bonnell*, 1 Har. 234. It ought to appear on the transcript that the affidavit was filed at the time of filing the bond. *Anonymous*, 1 Hal. 230. But if indorsed on the bond, and sworn to before the same justice on the day the bond was filed, it is sufficient proof as to the time. *Cornman v. Smith*, 2 Gr. 117. It will be presumed that it was filed on the day mentioned in the transcript on which the appeal was demanded. *Miller v. White*, 3 Gr. 486. It must be filed on the same day that the bond is filed. *Coleman v. Warne*, 4 Hal. 290. *Parke v. Hunt*, 7 Hal. 82. A mistake in the date may be shown and corrected. *Freas v. Jones*, 3 Gr. 20. *Lacy v. Cox*, 3 Gr. 469. It should appear on its face to be in the same cause, although it is not necessary to entitle it. *Dunham v. Rappleyea*, 1 Har. 75. *Blair v. Stewart*, 3 Har. 123. A substantial compliance with the words of the act is sufficient. *Steamboat Co. v. Baldwin*, 2 Gr. 440. *Hitsman ads. Garrard*, 1 Har. 124. *Tomlin v. Morris*, 1 Har. 178. *Hamilton v. Peacock*, 3 Har. 485. *Yard v. Bodine*, 3 Har. 480, overruling *Engle v. Blair*, 6 Hal. 339. *Schemek v. Ayres*, 2 Gr. 211. It need not be signed by the affiant. *Hitsman ads. Garrard*, 1 Har. 124. *Contra*, where there are two appellants and the affidavit is made by one. *Gaddis v. Durashy*,

1 Gr. 324. It is not requisite that all should join. *Van Campen v. Ribble*, 2 Har. 433. It may be made by an officer of a corporation. *Steamboat Co. v. Baldwin*, 2 Gr. 440. It must be taken by the justice who tried the cause. *Munn v. Merry*, 2 Gr. 183. On satisfactory proof of loss, a new affidavit may be substituted. *Van Campen v. Ribble*, 2 Har. 433. It not appearing that the affidavit was presented to the justice within the time limited by law for demanding an appeal, the common pleas properly dismissed the appeal; a *mandamus* to reinstate refused. *Wilcox v. Smith*, 17 Vr. 342. An appeal will lie in an action of debt, *qui tam*, to recover a penalty under the same act, although the justice's court has not jurisdiction over these actions. *Williamson v. Middlesex Common Pleas*, 13 Vr. 386. An action for a penalty for a violation of a municipal ordinance, must be brought in the court of small causes, where the statute provides that the penalty shall be recovered in an action of debt before a justice of the peace, and the judgment in such case is reviewable only on appeal to the common pleas. *Smith v. Vinton*, 24 Vr. 323. See *White v. Neptune City*, 27 Vr. 222. (b) A justice's docket showed an action of debt commenced against two defendants, legal service upon one of them only, and every subsequent step in the cause taken as against a single defendant. *Held*, that the judgment so entered was rendered only against that defendant who was legally served with summons. *Malaney v. Hughes*, 21 Vr. 546.

entitled to the testimony of any co-defendant as a witness in all cases where he or they 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.

**145. SEC. 6.** That whenever an execution against goods and chattels shall issue in any such action upon a bill or note, as is hereinbefore provided, it shall be the duty of the constable, after making a levy upon the property liable to the execution, to make the money out of the property of the person or persons principally liable, as between themselves, for its payment, 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 justice to indorse 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 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 said justice, giving two days' 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 said justice may order an issue to try the question in controversy.

Constable after levy to make the money out of the property of the person or persons principally liable.

#### Supplement.

Approved March 14, 1879.

P. L. 1879, p. 202.

**146. SEC. 1.** That when any judgment is obtained in any court for the trial of small causes in this state, and an execution shall issue thereon, and be returned by the constable to whom it has been delivered to be executed, indorsed to the effect that he could not find personal property of the party against whom the execution was issued, on which to levy, or that he had levied and sold goods and chattels, and had made thereof part of said judgment, and that the same was not fully satisfied and stating the balance still unsatisfied, and if the person against whom such execution shall have been issued and returned as aforesaid, shall reside in or be possessed of goods and chattels in any other county of this state than that in which such execution shall have been issued and returned as aforesaid, then an alias or pluries execution may issue, as the case may be, out of said court, directed to any constable in the county where said person against whom such execution may issue shall at that time reside or be found, or be possessed of goods and chattels, and it shall be the duty of the constable to whom such execution shall be given to carry it to some justice of the peace of the county wherein said person or goods and chattels may be found, and the justice to whom the same shall be presented, on proof being made to him of the handwriting of the justice of the peace who issued such execution, shall indorse his name thereon, with an authority to make levy and sale of the goods and chattels of said person in the same manner as in other cases on executions issuing out of the court for the trial of small causes, which execution shall be returned to the justice issuing the same, in the same manner as in other cases. (u)

When an alias or pluries execution may issue.

Indorsement in foreign county.

**147. SEC. 2.** That all acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed, and this act shall take effect immediately.

Repealer.

#### Supplement.

Approved February 5, 1880.

P. L. 1880, p. 12.

**148. SEC. 1.** That section one hundred and thirty-five of the act to which this is a further supplement, which reads as follows, to wit [see Rev., p. 563, and Sec. 136, *ante*], be amended to read as follows :

(u) This act applies only to judgments obtained after its passage. *McGovern v. Connell*, 14 Vr. 107.

Fees of constable in serving criminal warrants.

[That the constables of the several counties of this state shall be entitled to receive from the collector of said county, their lawful fees for serving any criminal warrant, together with any proper and reasonable expenses by them incurred in conveying any offender to the county jail for commitment to the custody of the sheriff, whether such offender shall be indicted or not, for the offense for which such offender may have been committed; *provided*, that the bill of expenses so incurred shall be itemized and shall be certified by the prosecutor of the pleas of said county to be proper and reasonable.] [See p. 1454, Sec. 24, *ante*, and Sec. 5, *ante*.]

Proviso.

#### Supplement.

Approved March 12, 1880.

P. L. 1880, p. 326.

Repealer.

**149.** SEC. 1. That section eighty-seven of said act, which is in the following words, to wit [see P. L. 1880, p. 326], be and the same is hereby repealed.

**150.** SEC. 2. That section eighty-eight of the act to which this is a supplement, and which is in the following words, to wit [see P. L. 1880, p. 326], be and the same is hereby amended to read as follows :

Appeal from judgment not exceeding \$30 to be tried by court unless jury be demanded.

[That every appeal from the judgment of any justice of the peace founded on the verdict of a jury, where the judgment appealed from shall not exceed, exclusive of costs, the sum of thirty dollars, shall, be heard and determined by the court to whom such appeal is or shall be made; and all appeals from the judgment of any justice of the peace founded on the verdict of a jury, where the judgment appealed from shall exceed, exclusive of costs, the sum of thirty dollars, shall be heard and determined by the court to whom such appeal is or shall be made, unless either of the parties to the said appeal, where the judgment appealed from shall exceed, exclusive of costs, the sum of thirty dollars, shall demand a trial by jury, in which case said appeal shall be tried by jury, and the sheriff shall return a jury either immediately or at such future time as the said court shall direct, and that by order of the court and without writ.](a) [See Sec. 161, *post*.]

#### Supplement.

Approved March 25, 1881.

P. L. 1881, p. 259.

**151.** SEC. 1. That section ninety of an act entitled "An act constituting courts for the trial of small causes" [Revision], approved March twenty-seventh, one thousand eight hundred and seventy-four [see Rev., p. 555, § 90, and Sec. 91, *ante*], be and the same is hereby amended so as to read as follows :

New trial may be granted on appeal.

[That after the trial of an appeal in the court of common pleas a new trial may be granted by the said court.](b)

#### Supplement.

Approved March 17, 1882.

P. L. 1882, p. 137.

Appeals in city having district court may be made to such court only.

**152.** SEC. 1. That from any judgment which may be obtained before any justice of the peace or any police justice in any city where a district court or district courts are established, in any bastardy or desertion actions, and from any judgment in all proceedings of a civil nature in which such justice of the peace has or may hereafter have jurisdiction, either party may appeal only to the district court of said city, which appeal shall be taken by a notice in writing, signed by or in behalf of the appellant, briefly describing the judgment and stating the name of the district court to which the appeal is taken, which appeal must be taken within ten days after the rendering of said judgment by said justice, and the proceedings on appeal

Appeals, how taken.

(a) There is no constitutional right to trial by jury on appeal from the courts for the trial of small causes in cases where no jury was demanded below. *Wanser v. Atkinson*, 14 Vr. 571. In an action of trespass, the verdict of a jury was for the defendant. On appeal to the common pleas by the plaintiff, the defendant demanded a jury, which was refused, under this act, because the judgment appealed from did not exceed, exclusive of costs, the sum of \$30. *Held*, that the defendant could not be

denied his right to a jury trial. *McGinty v. Carter*, 19 Vr. 113. See *Raphael v. Lane*, 27 Vr. 108.

(b) Where a new trial has been granted the supreme court will not review such discretionary order on *certiorari*, where it does not appear that the court below has exceeded its jurisdiction, or assumed a power not warranted by law. *Albert v. Hart*, 15 Vr. 368.

shall be conducted in the district court in the same manner as appeals are now heard and determined by the inferior courts of common pleas of the several counties of this state and may be brought on to hearing at any time after filing in district court upon ten days' notice by either party to the other. (a)

Procedure on appeal.

**153. SEC. 2.** That in any city having two district courts, any appeal may be taken to either of said courts, and said appeal shall stay all proceedings until the same is determined by the district court to which the appeal is taken; that such order, determination or decision of any district court of this state, upon any point of law or upon the admission or rejection of evidence, may be removed into the supreme court by writ of certiorari; said writ shall remove said order or determination and a case agreed upon by the parties or their attorneys, and if they cannot agree, the judge, on being applied to by them or their attorneys, shall settle the case and sign it, and such case shall be agreed upon or settled within fifteen days after such determination or direction; *provided*, that the party applying for a writ of certiorari shall comply with section ninety-seven of an act entitled "An act constituting courts for the trial of small causes" [Revision], approved March twenty-seventh, eighteen hundred and seventy-four.

Appeals in city having two district courts.

Certiorari.

**154. SEC. 3.** That all acts or parts of acts inconsistent herewith, whether general or special, be and the same are hereby repealed.

Repealer.

**Supplement.**

Approved February 25, 1885.

P. L. 1885, p. 49.

**155. SEC. 1.** That in any suit begun by summons in a court for the trial of small causes, if the plaintiff shall deliver to the justice a copy of his account or state of demand against the defendant at the time of the issuing of the summons, and furnish as many copies of said account or state of demand as there are defendants to be served, then the same shall be attached to the summons and one of said copies shall be attached to and served with each copy of said summons, and the return of the constable upon the summons shall be proof of the service of such account or state of demand upon the defendant; and in every such case the defendant shall not be entitled to an adjournment of the trial on the return day, except upon reasonable cause being shown by affidavit, or by oath or affirmation; the constable making such service shall be entitled to the same fees as for serving a summons alone.

Account or state of demand may be served with summons.

Adjournment.

**Supplement.**

Approved March 26, 1886.

P. L. 1886, p. 120.

**156. SEC. 1.** That the twenty-second section of the act of which this is amendatory be amended to read as follows:

[That all suits brought or commenced hereafter before any justice of the peace in this state, which, under the present practice, would be either actions of debt, covenant, assumpsit or trespass on the case, for injuries arising from breaches of contract or the non-performance of duties arising from contract, shall be in the name and style of actions upon contract, and counts for the said causes of action may be joined in the same suit, any law, usage or custom to the contrary notwithstanding.]

What actions to be styled actions upon contract.

**157. SEC. 2.** That all actions of trespass, trover and of trespass on the case, cognizable before any court for the trial of small causes, shall hereafter be in the name and style of actions of tort, and counts for said causes of action may be joined in the same suit.

Actions styled actions of tort.

(a) This act is unconstitutional with respect to appeals in bastardy and desertion cases, over which justices of the peace have no jurisdiction by force of the act creating courts for the trial of small causes, for the reason that to that extent the object of the act is not expressed in its title; but in other

respects the act is constitutional. *Everham v. Hull*, 16 Vr. 53. The remedy to review a judgment in the court of small causes, except where there is a district court, is by appeal to the common pleas. *Smith v. Clinton*, 24 Vr. 331. *Jackson v. Kelly*, 6 N. J. L. J. 85.

## Supplement.

Approved March 9, 1891.

P. L. 1891, p. 92.

County clerk to make transcript of record in docket and to docket judgment.

**158. SEC. 1.** That it shall and may be lawful for the clerk of any county to make a transcript of the record of any case entered in any docket deposited in the clerk's office of such county as required in sections one hundred and twenty-one, one hundred and twenty-two, one hundred and twenty-three, one hundred and twenty-four, of the act to which this is a supplement, and to docket any judgment obtained in any court for the trial of small causes, of which the record appears in any docket so deposited, for an amount not less than ten dollars, including costs, if execution shall appear by said record to have been issued thereon and returned unsatisfied; and if it shall appear that no execution has been issued upon such judgment, or, if issued, has not been returned, the said clerk of the county be and he is hereby authorized, upon the request of the person or persons obtaining such judgment, his or their executors, administrators, assignee or assignees of such judgment, to issue execution thereon under the seal of the clerk of said county against goods, chattels and personal estate, and upon such writ being returned unsatisfied to proceed, upon the request of the person or persons obtaining such judgment, his or their executors, administrators, assignee or assignees of such judgment, to make a transcript from the said docket so deposited, and to proceed in manner and form as provided in the seventy-second section of the act to which this is a supplement, as though the justice of the peace by whom such judgment was granted had himself made such transcript, to docket the same in accordance with the provisions of said seventy-second section, and such judgment from the time of said docketing shall operate in all respects as though it had been docketed under and by force of said section; and for his services hereunder the clerk of the county performing the said functions shall receive the same fees, and no more, as the justice of the peace would have been entitled to for the same had his docket not been so deposited in the office of the clerk of the county. [See Sec. 169, *post*.]

And to issue execution.

Fees.

## Amendatory act.

Approved March 23, 1892.

P. L. 1892, p. 182.

**159. SEC. 1.** That the seventh section of an act entitled "An act constituting courts for the trial of small causes" [Revision], approved March twenty-seventh, one thousand eight hundred and seventy-four, be and the same is hereby amended so as to read as follows:

[That any body politic or corporate of this state, or of any other state, may sue and be sued in any court for the trial of small causes, in any action or proceeding over which said court has jurisdiction; and all attorneys-at-law shall and may be sued in said court in like manner, or form of action, as other citizens of this state are liable to be sued in said court.](a)

Suits by and against corporations and attorneys.

## Supplement.

Approved May 17, 1894.

P. L. 1894, p. 440.

In trial of appeals witnesses not produced or evidence not offered or admitted in the court below, may be introduced without notice.

**160. SEC. 1.** That hereafter upon the trial of any appeal from any judgment which has heretofore been or shall hereafter be obtained before any justice of the peace, if either party shall desire to produce upon the trial thereof any witness or witnesses not produced or sworn in the court below, or any documentary evidence not offered or admitted in the court below, the said party shall be at liberty to do so and the same shall be admitted by the court if otherwise legal and competent, without notice to the opposite party or his attorney.

(a) A bank may be sued before a justice. *State Bank v. Van Horn*, 1 *South*. \*382. A turnpike company may sue for tolls. *Ayres v. Turnpike Co.*, 4 *Hal*. 55. A municipal corporation cannot be so sued. *Inhabitants of Princeton v. Mount*, 5 *Dutch*. 289. Trustees of a school, in their corporate capacity, are not liable to be sued in a justice's court. *School Trustees v. Stocker*,

13 *Vr*. 115, following *Townsend v. Trustees*, 12 *Vr*. 312. The only effect of this supplement of 1892 was to confer on such courts jurisdiction over corporations of other states. The mode of serving process on corporations provided by Sec. 13, *ante*, was not altered. *Penna. R. R. Co. v. Kretzman*, 28 *Vr*. 60.

## Supplement.

Approved March 22, 1895. P. L. 1895, p. 604.

**161. SEC. 1.** That in all cases of appeal from the judgment of any justice of the peace, it shall and may be lawful for either party to the appeal, upon giving notice in writing to the clerk of the court of common pleas of the county, on or before the first day of the term to which the appeal shall have been sent up, if the trial be had at that term, or if not, then on or before the first day of the term at which such appeal shall be tried, to demand a trial of said appeal by jury, and upon receiving such notice said clerk shall file the same in his office, and the said appeal shall be tried by a jury, and the sheriff shall return a jury either immediately or at such future time as the said court shall direct, and that by order of the court and without writ.

Either party may demand trial of appeal by jury upon notice to clerk.

**162. SEC. 2.** That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed, and that this act shall take effect immediately.

Repealer.

## XIII. Miscellaneous acts.

## An act respecting appeals from justices' courts.

Approved April 21, 1876. P. L. 1876, p. 268.

**163. SEC. 1.** [Amended by Sec. 164, *post.*]

## Supplement.

Approved February 5, 1880. P. L. 1880, p. 14.

**164. SEC. 1.** That section one of the act to which this is a supplement, which section reads as follows [see P. L. 1876, p. 268], be and the same is hereby amended so as to read as follows :

[That all appeals from justices' courts to the court of common pleas of any county in this state shall be put on the list for trial at the first term to which the same shall be appealed ; *provided, however,* that if said appeal is taken within the five days prior to the beginning of such term, and if the papers are not filed with the clerk of said court three days prior to the beginning of such term, then, and in that case, said appeal to be put on the list for trial at the next term thereafter.] (*a*)

When appeals from justice's court to be put on list.

Proviso.

**165. SEC. 2.** That all acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed.

Repealer.

## An act to increase the jurisdiction of justices of the peace.

Approved March 12, 1879. P. L. 1879, p. 115.

**166. SEC. 1.** That every suit of a civil nature at law where the debt, balance or other matter in dispute does not exceed, exclusive of costs, the sum or value of two hundred dollars, shall be and hereby is made cognizable in any court for the trial of small causes of this state where the same may be heard and determined according to law ; *provided always,* that this act shall not extend to any action of replevin, slander, trespass for assault and battery or imprisonment, nor to any action wherein the title to any lands, tenements, hereditaments or other real estate shall or may in anywise come in question, nor to any cause of action over which any district court of this state now has or hereafter may have exclusive jurisdiction ; *and provided further,* that it shall be at the option of the plaintiff in any suit at law to bring his action in the circuit court ; *and provided further,* that no justice of the peace in any city where a district court now exists,

May have jurisdiction in cases of sums not exceeding \$200.

Proviso.

Proviso.

Proviso.

(1) The common pleas may reinstate an appeal dismissed for apparently good cause, on discovering mistake of law or fact, or where the appellant has a meritorious case. *Lush v. Foster*, 15 Vr. 378. This act clearly dispenses with the necessity for the notice required by the eighty-third section of the justice's court act. *Johnson v. O'Neil*, 17 Vr. 510.

shall exercise jurisdiction over any cause cognizable in such district court. (a) [See Sec. 1, *ante*.]

Repealer.

**167. SEC. 2.** That all acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed, except such acts or parts of acts as give to certain district courts jurisdiction over suits mentioned in the first section of this act, in the cities wherein such district courts now exist or may hereby be established.

Justices not to have jurisdiction in cases of persons for whom he is agent, &c.

**168. SEC. 3.** That it shall not be lawful for any justice of the peace to issue any summons, writ of attachment or other process for or on behalf of any person for whom he is agent or attorney in fact, nor to take any fee or reward for any such service, or for receiving and paying over any moneys paid to him by any defendant in any suit instituted in his court, or for writing out or preparing, or assisting in preparing or writing out any state of demand, bill of particulars, set-off or counterclaim or affidavit, plea of title or other paper necessary or proper to be made use of in the progress of any suit or proceeding in his court; *provided*, that any justice may charge and receive not more than twenty-five cents for writing out or preparing any state of demand on a book account, or drawing up an affidavit; any justice of the peace violating the provisions of this section shall be liable to a penalty of twenty-five dollars, to be sued for and recovered in any court of competent jurisdiction by any person who may sue for the same. (b)

Proviso.

An act concerning the docketing of judgments recovered in the courts for the trial of small causes in the state of New Jersey.

P. L. 1892, p. 386.

Approved April 4, 1892.

Docketing of final judgments.

**169. SEC. 1.** That final judgments of courts for the trial of small causes in any county in this state, if not less than ten dollars, including costs, remain due on such judgments, may be docketed in the court of common pleas in that county, and that in docketing any judgments from the courts for the trial of small causes in any county in this state, it shall only be necessary to file with the clerk of the court of common pleas a statement signed by the justice of the peace before whom the said judgment was recovered in the court for the trial of small causes, under his hand and seal, which statement shall only be required to contain the names of the justice before whom such judgment was obtained, and the names of the parties, the amount and date of judgment, and the date of issue and return of the execution, if any, and it shall not be necessary before obtaining such statement for docketing from the justice of the peace, that execution on the judgment shall issue out of and be returned unsatisfied unto the court where judgment was rendered, and that said statement may be made and taken at any time after judgment in the court for the trial of small causes, and be of the same force and effect as if execution had been issued and returned as now required by law; *provided, however*, that an affidavit of the plaintiff, or his attorney, shall be filed with the clerk of the court of common pleas with said statement setting forth that the said judgment about to be docketed is bona fide, and is still due and unpaid, in whole or in part; and that the fee of the clerk of the court of common pleas for filing said statement and docketing said judgment will be one dollar, and the fee of the justice of the peace for issuing said statement shall be fifty cents, and that any judgment docketed as aforesaid shall operate as a judgment in a suit originally commenced in said court of common pleas to the same extent as now provided by law. [See Sec. 158, *ante*.]

Statement, what to contain.

Proviso.

(a) The effect of the third proviso of this section is merely to prevent the justices mentioned in the proviso from acquiring the increase of jurisdiction which the enactment confers upon justices generally. *Stout v. McComb*, 13 Vr. 484. This section does not increase jurisdiction in attachment cases. *Wright v. Moran*, 14 Vr. 49. The section is constitutional. *Cotwell v. Chamberlain*, 14 Vr. 387. *Wagoner v. Watts*, 15 Vr. 126. The small cause court has jurisdiction where the damages laid in

an action of tort do not exceed \$200, although the trespass or injury may be to property of greater value. *De Camp v. Miller*, 15 Vr. 617. This act gives jurisdiction upon a bond whereon is due more than \$100, but less than \$200, although the penalty named therein exceeds \$200. *Anderson v. Rose*, 22 Vr. 471. (b) Query—Is this section unconstitutional on the ground that its object is not expressed in the title of the act? *Cotwell v. Chamberlain*, 14 Vr. 388.