

day assigned, it will be a discontinuance, Com. Dig. Acct. E. The proceedings before the auditors are in the first place by formal pleadings, where the plaintiff states the sums for which the defendant is sought to be charged and the defendant either states the substance of the accounts required with details and the necessary schedules, or else gives any answer amounting to a discharge, as payment, delivery over of money or goods, expenditure on the plaintiff's behalf, inevitable losses, &c. provided always, that what might have been pleaded to the action be not alleged before the auditors, and the matter so given in discharge be not contrary to the previous verdict and judgment. For in *Godfrey v. Saunders*, 3 Wils. 94, a verdict was given against the defendant, as surviving bailee of goods delivered to him and his co-bailee to be merchandized, on a plea in bar that he had delivered the goods to the deceased and his concern in the trust thereof had ended, and he became thereby discharged, and it was held that he could not afterwards plead before the auditors that he had delivered the goods to his co-bailee with the plaintiff's consent, for that might have been given in evidence on the issue.

Where the defendant is charged as bailiff *ad merchandizandum* or factor, he is answerable for the increase of the goods or for losses through his negligence, as if he retain a fund in hand when he might improve it, or does not improve it as he might, (unless he make oath that he found nothing to buy without hazard of loss,) or sell the goods at an under value, or give credit without authority, Com. Dig. *supra*: Anon. 2 Mod. 100. If these pleas in discharge are traversed or demurred to as being invalid in law, the auditors certify the record to the Court, who thereupon award a *venire* to try the question, see 2 Harr. Ent. 182, or give judgment on the demurrer. Otherwise the auditors investigate the items of the account by examination of the vouchers, and under 4 Ann. c. 16, s. 27, and our Act of 1864, ch. 109,⁶ the parties may be examined under oath. The auditors may take the whole account between them down to the date of the report, *per* Lord Mansfield, *Robinson v. Bland*, 2 Burr. 1086, and they have the power to award a balance due from either party, 2 Inst. 380. The result is presented in the shape of a report which either party may except to or appeal from, but till that is done it is a matter of record and the items cannot be again gone into. The party in whose favor the report is made may obtain judgment for the balance due, or for a discharge, or bring an action of debt on the report, 2 Inst. 380.

Between joint tenants and tenants in common.—A joint tenant or tenant in common may bring an action of account against his fellow, as bailiff, for receiving more than his just share or proportion by Stat. 4 Ann. *c. 16, 50 §. 27.⁷ In *Wheeler v. Horne*, Willes, 208, it was held that if the defendant is charged as bailiff generally, the plaintiff will be nonsuited unless he prove

⁶ Code 1911, Art. 35, sec. 1.

⁷ That Statute applies only to cases where there is no question either as to the existence of a tenancy in common, or as to the title of the party seeking the account which it allows. *Worthington v. Hiss*, 70 Md. 184. It gives no lien to one tenant against his co-tenant's interest in the land for rents in excess of his share collected and retained by him. *Flack v. Gosnell*, 76 Md. 91. Cf. *Hogan v. Mahon*, 115 Md.—.