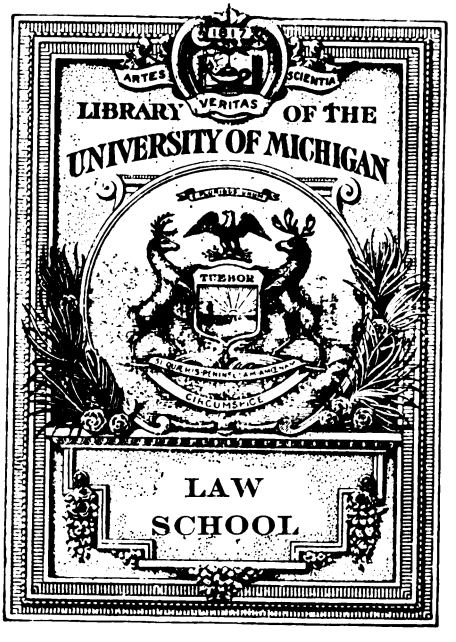

THE

PRACTICE

OF THE

COURTS

OF

King's Bench and Common Pleas.

ORIGINALLY COMPILED

BY GEORGE CROMPTON, ESQ.

REVISED, CORRECTED, AND NEWLY ARRANGED,

BY BAKER JOHN SELLON,

SERJEANT AT LAW.

THE SECOND EDITION,

WITH THE

Addition of the MODERN CASES to the PRESENT TIME, and a PRACTICAL TREATISE on the Mode of PASSING FINES and SUFFERING RECOVERIES.

IN TWO VOLUMES.

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PREFACE.

THE following pages are, in a great measure, composed of the materials of a work formerly compiled by the late Mr. Crompton; some part of which still retains nearly its original shape (as the Historical Introduction, the Proceedings in Real Actions, and a few other heads which have been but little affected by modern decisions); but the greatest portion hath been new-modelled and materially altered, and the whole considerably enlarged.

The intent of a Book of Practice is to point out the different modes of commencing and prosecuting suits; now these modes are governed by the *nature* of the *action* and the *situation* of the *parties* concerned. For an action may be either a *common personal* action, brought by and against common persons, that is to say, such as sue and are sued in their own right, and who are in no respect privileged; or it may be a particular *kind* of action, or the parties concerned may sue or be sued in some relative capacity and not in their own right, or they may be entitled to some peculiar privilege.

This distinction forms the general division of the work into, first, *The Mode of Proceeding in all* COMMON *Cases*, where the action is a common personal action, and brought by and against common persons: and, secondly, *The Mode of Proceeding in* PARTICULAR *Cases*; namely, either where the action is brought by or against particular persons, as peers, members of parliament, attornies, prisoners, infants, paupers, and the like; or where the action itself is of a particular kind, such as ejectment, replevin, penal actions, and also all real actions. The First

Volume treats of the proceedings in all *common* caſes:—and the proceedings in *particular* caſes, together with ſome detached heads of Practice, as Amendment, Diſcontinuance, Error, Coſts, together with the mode of paſſing Fines and ſuffering Recoveries, form the contents of the Second Volume.

Again, when an action is brought, certain proceſs iſſues to compel the party's appearance in court, to anſwer the plaintiff's charge; which proceſs varies according as the defendant is to be arreſted or not. The Editor, therefore, in order to render this part of the ſubject clear and intelligible, has firſt fully pointed out in what caſes Special Bail may or may not be required, and has then proceeded to explain the proceſs or means of compelling the defendant's appearance, firſt in actions not bailable, and next in bailable actions, treating of the practice in both caſes ſeparately and diſtinctly until the *Declaration*; at which period, the parties being once in court, the diſtinction which before prevailed in a great meaſure ceaſes, and the future proceedings may with propriety be conſidered under one head.

There are alſo certain peculiarities attending the work, which may be found not ill adapted to the purpoſe for which it was deſigned; namely, as an uſeful Common-place Book. All the practical directions, ſhewing *what* is to be done, *how*, *when*, and *where*, which may be termed the mere *routine* of buſineſs, are printed, for diſtinction's ſake, in *Italics*, ſo that the Practitioner may at one glance diſcover how to proceed. The adjudged caſes immediately applicable to each ſtage of the cauſe are afterwards arranged in due order, ſerving as a *comment* upon the *text*. The work is alſo divided into Chapters, and the Chapters ſubdivided into Sections and diſtinct heads, to which *letters* are annexed as marks of reference, upon the principle adopted in *Comyns*'s Digeſt. To the caſes cited, not only the

name of the reporter but of the caſe itſelf is generally ſubjoined. Whenever, therefore, any *dictum* or aſſertion ſtands unſupported by authority, the Reader is adviſed to pay no more attention to it than he thinks it merits. The grand objects of the Editor throughout the work have been Syſtem and Method.

Such is the general diviſion, and the plan of this Book of Practice, which has hitherto appeared in detached parts, as time and opportunity would permit; but now, being completed, aſſumes a more regular form. The favourable Reception of the Firſt Edition is perhaps the beſt apology which can be offered for the publication of the Second.

BOSWELL-COURT,
October 1, 1798.

B. J. S.

TABLE

OF THE

CONTENTS

OF THE

FIRST VOLUME.

INTRODUCTION.

SEC. 1. Hiſtory of the Origin and Juriſdiction of the reſpective Courts - - Page i

SEC. 2. Of the increaſed Juriſdiction of the Court of King's Bench over Civil Actions; their Proceſs to bring the Defendant into Court, and of their Proceedings by Special Original, and the Fine payable thereon - - - xxx

SEC. 3. Of the Original Proceſs of the Court of Common Pleas, and the Alteration therein; and of the Pledges to proſecute in both Courts xliv

SEC. 4. Of the Arreſt in Civil Actions - lii

SEC. 5. Of Bail, and of the Difference between Common and Special Bail - - lvii

SEC. 6. Of the ancient Mode of Pleading and trying Cauſes, and the Alteration therein; and of the Origin of Trials at Niſi Prius - - lxiii

SEC. 7. Of the different Ways in which Actions may now be brought in the Courts of King's Bench and Common Pleas - - lxxiii

CHAP. I.

SEC. 1. Of the Terms, and particular Days in the Terms - - Page 1

The Eſſoin Day - - - - 4
The Day of Exception - - - 7
The Retorno Brevium Day - - - ib.
The Day of Appearance - - - 11
The Dies Non Juridici - - - ib.

SEC. 2. Of Attornies.

Of the Origin of the Practice of proſecuting and defending by Attorney - - - 14
Of the Warrant of Attorney to proſecute and defend 17
Of the Memorandum or Minute of the Warrant 19
Of the Clerkſhip of Attornies - - 21
Of the Admiſſion of Attornies - - 23
Of taking out the Certificate - - - 25
Of delivering and taxing Attornies Bills - ib.
General Obſervations relating to Attornies - 26
A Table of the Terms and Returns - 30

CHAP. II.

In what Caſes ſpecial or common Bail is required, which depends upon

SEC. 1. The Nature of the Cauſe of Action, and its Object; as if the Action be

For a Debt or Demand of Money due - 32
For Damages unliquidated - - 35
Founded on a Penalty - - - 37
On a Judgment recovered - - 38
On a penal Statute - - - 41
A ſecond Action for the ſame Cauſe, pending the firſt, or otherwiſe - - - 42
An Action removed from an inferior Court - 44

Further, it depends upon

SEC. 2. The Perſon againſt whom the Action is brought.

Of Defendants ſued *in auter Droit*, as Executors, &c. 45

Of

Of Perſons privileged from Arreſts - Page 46
By reaſon of legal Incapacity - - 47
By reaſon of Dignity of Station - - 48
By reaſon of their Profeſſion or Office - - 52
Of Perſons protected only in certain Caſes, and to a certain Amount - - - ib.

Sec. 3. Of particular Circumſtances in the Caſe which exempt Perſons from being held to ſpecial Bail, who would otherwiſe be liable thereto 54

Sec. 4. The Conſequence of arreſting any Perſon not liable to be arreſted, by reaſon of Privilege or otherwiſe, and of their Remedy and Diſcharge 57

CHAP. III.

The Mode of proceeding when common Bail only is required, from the Commencement of the Suit to the Declaration - - - 62

Sec. 1. Of the Proceſs and its Incidents - 64
The ſeveral Forms and Purpoſes of the Proceſs - ib.
How to ſue out the Proceſs:
In the King's Bench - - - 68
In the Common Pleas - - - 71
The Notice to appear, to be inſerted in the Copy of ſuch Proceſs:
The Intent and Form thereof - - 72
How to be filled up - - - 73
In what Caſes neceſſary - - 74
Of the Indorſement of the Attorney's Name on the Proceſs - - - 76
Obſervations on the Proceſs:
The Nature and Extent thereof - - 77
How to be directed - - - 78
Of filling up the Proceſs as to Names of Parties, Cauſe of Action, and Teſte and Return - - 79
How ſubſequent and former Proceſs ſhould agree 83
Of the Time when Proceſs may iſſue, its legal Operation as to being the Commencement of the Suit, and how it may be pleaded and Oyer craved thereof - 84

Sec.

SEC. 2. Of the Service of Copy of Proceſs on Defendant.

What ſhall be deemed a good and effectual Service; and herein,

Of the Copy of Proceſs to be ſerved - Page 88
The Perſon by whom it is to be ſerved - 89
The Manner in which it is to be ſerved - ib.
The Time when it is to be ſerved - - 90
The Places where it is to be ſerved - - ib.
In caſe the Proceſs be againſt ſeveral Defendants, or againſt Huſband and Wife - - ib.
Of Puniſhment of Defendant if he treats Proceſs with Contempt - - - 91

SEC. 3. Of Defendant's Appearance according to Proceſs - - - - - ib.

How Defendant is to appear in the reſpective Courts 92
Who may appear by Attorney - - 93
When Attornies are compelled to appear for Defendant ib.
Of the Time of appearing - - 95
Of Appearance in Actions againſt Huſband and Wife ib.
Whether liable to any Penalty for not appearing 96

SEC. 4. Of Plaintiff's appearing for Defendant according to the Statute.

How Plaintiff is to appear for Defendant according to Statute - - - - 97
When Plaintiff is to appear - - 98

SEC. 5. Of Defects and Irregularities in Proceſs.

How far the Courts will amend Proceſs - 99
How Defects or Irregularities cured - - 100
How and when Defects or Irregularities to be taken Advantage of - - - - - 101

CHAP. IV.

Of the Proceedings in bailable Actions, from the Commencement of the Suit to the Declaration.

SEC. 1. Of the Affidavit to hold to Bail - 104

The Degree of Certainty requiſite in ſuch Affidavit 105

With

With respect to
The actual Existence of the Debt - Page 105
The Description of the Cause of Action - - 108
The Language in which it is drawn - - 109
Exceptions as to Executors, Assignees, &c. - ib.
Before whom Affidavit to be made - - 110
How to be stamped, and of joining several Defendants and Causes of Action in one Affidavit - 112
Of the Title, Jurat, and Time of filing Affidavits - ib.
Of counter and supplementary Affidavits - 113

SEC. 2. Of the Process or Writs in bailable Actions, and how to sue them out - - - 115

SEC. 3. Of the Warrant and Arrest - - - 119

The Nature of the Warrant and its Requisites - ib.
How an Arrest is to be made - - 121
By whom, and when the Arrest is to be made - 122
Of particular Times and Places when and where the Defendant is privileged from Arrest - - 123
Of the Sheriff's Fees and Conduct towards Defendant upon an Arrest - - - - 124
Of the Defendant being rescued after the Arrest - 125

SEC. 4. Of Bail to the Sheriff, or Bail below.

The general Meaning of Bail below, and how given to the Sheriff - - - - 127
The Statute of 23 H. 6. fully considered - 129
Respecting the Nature, &c. of Bail-bond.

SEC. 5. Of Bail to the Action, or Bail above 137

When and how Bail is to be put in, and of the Notice thereof:
In Town - - - 138
In the Country, before a Commissioner - 141
Of the Time of putting in Bail in Town and Country, and of transmitting the Bail-piece - - 143
Of filling up the Bail-piece and Recognizance 146
Of the Extent of the Liability of the Bail - ib.
Of the Notice of Bail having been put in - 147
Of accepting Bail, and filing the Bail-piece - 148
Of excepting to Bail - - - 150
Of the Time of excepting - - ib.
Of the Manner of excepting, and the Notice thereof 151

Of

Of the Grounds of Exception - - Page 152
What ſhall be deemed a Waiver of Exception - ib.
Of perfecting Bail - - - - 153
Of the Time and Manner of juſtifying and adding Bail 156
Of the Notice of Juſtification - - 159
Of oppoſing Bail, and upon what Grounds - 160
Of the Exoneretur, and of ſtriking the Bail out of the Bail-piece - - - 162
Of the Allowance of Bail - - 163

SEC. 6. Of the Surrender in Diſcharge of Bail.

When Defendant is at large - - - 165
When Defendant is in Cuſtody - - 166
The Time of making ſuch Surrender, and what is neceſſary to be done before the making thereof - 167
Of the Power of the Bail to take their Principal, to ſurrender him - - - 170
Of the neceſſary Steps to be taken after the Surrender, and herein of the Exoneretur - - 171
Of Circumſtances which diſcharge the Bail without any Render - - - - - - 173

SEC. 7. Of the Aſſignment of the Bail-bond, and the Proceedings thereon - - 174

Of the Manner, Time, &c. of aſſigning the Bail-bond - - - - 175
Of the Action on the Bail-bond - - 177
Of ſtaying and ſetting aſide Proceedings on the Bail-bond - - - - 180
In what Caſes, and upon what Terms Proceedings will be ſtayed - - - ib.
In what Caſes Proceedings will be ſet aſide - 187
In what Manner the Proceedings are to be ſtayed, or ſet aſide - - - 188

SEC. 8. Of proceeding againſt the Sheriff, called ruling the Sheriff - - 190

When Sheriff is out of Office - - 193
Of ruling Sheriff to return the Writ, and how the Rule is to be ſerved - - - 194
Of ruling Sheriff to bring in the Body, and what he muſt muſt do in conſequence thereof - - 197
Of moving for an Attachment againſt Sheriff, and of the Nature and Operation thereof - - 200

In

In what Caſes the Attachment will be ſet aſide, or Proceedings ſtayed againſt the Sheriff - Page 202
Of proceeding againſt the Coroner to return the Attachment - - - - 206
Of proceeding againſt Sheriff, when out of Office, to return the Writ and bring in the Body - ib.

CHAP. V.

Of the Mode of proceeding by ſpecial Original in B. R.; and by original Quare Clauſum fregit in C. B. from the Commencement of the Suit to the Declaration - - - - 211

SEC. 1. Of the Mode of proceeding by ſpecial Original in B. R. - - - - ib.

SEC. 2. Of the Mode of proceeding by Original Quare Clauſum fregit and Summons in C. B. 216

CHAP. VI.

Of the Declaration and its Incidents.

SEC. 1. Of the Declaration - - 220
The Time of declaring - - - 221
The different Ways of declaring - - 222
In Chief - - - 223
De bene eſſe - - - 224
By the Bye - - - 225
Of engroſſing, filing, and delivering Declarations 229
The Notice of Declaration, and paying for ſame - 232
Declaring againſt two Defendants when one only has appeared - - - 235
Of Declaration varying from Proceſs - 236
Of conſolidating Declarations, and ſtriking out ſuperfluous Counts - - - 238
Defects in Proceſs how cured by Declaration, and otherwiſe - - - - 239
Of the Rule to declare - - - 240
Of intitling Declaration, and of ſpecial Memorandums 241

SEC. 2. Of the Venue.
Of laying the Venue - - - 243

Of

Of changing the Venue - - Page 247
Of bringing back the Venue by Plaintiff, and his altering his own Venue - - - 253

CHAP. VII.

Of the Proceedings from Declaration to Iſſue.

SEC. 1. Of claiming Conuſance - - 256
Of the Nature of inferior Juriſdictions, and what Courts can demand Cognizance - - ib.
In what Caſes granted or refuſed - - 258
Of the Time and Manner of claiming it - 259

SEC. 2. Of demanding Oyer.

Of what, and in what Caſes Oyer may be demanded 261
Of the Time and Manner of demanding and giving Oyer, and the Conſequences of refuſing it - 263
How the Deed muſt be ſet out on Oyer, and of the Uſe of craving Oyer - - 264

SEC. 3. Of Imparlance - - 266

SEC. 4. Of pleading in Abatement.

Of the Time and Manner of pleading in Abatement 270
Of the Affidavit and Signature requiſite - 272
Of the Judgment on Plea in Abatement - 273
General Obſervations on pleading in Abatement 275
Of moving to amend Declaration, and of entering Caſſetur Billa - - - - 276

SEC. 5. Of paying Money into Court.

The Meaning and Origin thereof - - 277
The Manner and Time of paying Money into Court 278
In what Actions and Caſes Money may or may not be paid into Court - - - 279
Of the Conſequence of paying Money into Court 287
Of bringing a further Sum into Court - - 291
Of Defendant's refuſing to pay Coſts, and how Plaintiff is to proceed - - - ib.

SEC. 6. Of pleading in Bar.

Of the Time of pleading - - - 292
Of pleading the General Iſſue - - 293

Of pleading ſpecially - - Page 294
Of pleading double - - 296

Sec. 7. Of the Rule to plead - - 300

Sec. 8. Of demanding a Plea - - 302

Sec. 9. Of ſearching for Plea, and ſigning Judgment for want thereof - - 304

Sec. 10. Of obtaining Time to plead.

How to be done, and in what Caſes granted 306
When Summons to be taken out, and of the Effects thereof - - - 307
Of the Terms on which Time is granted - ib.
What are iſſuable Pleas within a Judge's Order 308
Of the Conſequence of not pleading agreeable to Judge's Order - - - 310
Of ſigning Judgment at the Expiration of the Order ib.

Sec. 11. Of moving to abide by the Plea - 311

Sec. 12. Of Replying, Rejoining, &c. - 313

Sec. 13. Of the Plea of Tender - 314

What conſtitutes a good Tender - - ib.
In what Actions a Tender may be pleaded - 316
When and how to be pleaded, and of the Conſequences thereof to the Parties in the Suit - - 317
How Defendant may avail himſelf of the true Time of the Tender, though ſubſequent to Teſte of Writ, or the like - - - - 320

Sec. 14. Of the Plea and Notice of Set-off.

Its Origin and Nature - 321
Of the Demands and Actions within the Statutes of Set-off - - - 322
Of the Parties between whom there may be a Set-off 326
Of the Form of a Notice of Set-off, and its Incidents 328

CHAP. VIII.

Sec. 1. Of Proceedings on Demurrer.

Of general and ſpecial Demurrers - 333
How to proceed on Demurrer - - 335

How

How when Iſſue to Part and Demurrer to Part Page 339
Of waiving and withdrawing Demurrers, and amending after Argument - - - 340
General Obſervations on Demurrers - 341

Sec. 2. Of Judgment by Default.

How to ſign Judgment by Default, and of the Proceedings therein - - - 342
Of the Effect of Judgment by Default, in what Caſes Plaintiff entitled to it, and how and when to be ſet aſide - - - - - 345
Of the Writ of Inquiry - - - 346
Of ſetting aſide Inquiſition, arreſting Judgment, and amending the Proceedings - - 356

Sec. 3. Of Judgment of Non-pros - 359

Sec. 4. Of Judgment as in caſe of a Nonſuit 364

The Nature and Meaning thereof - - ib.
When to be moved for - - ib.
How to be moved for - - - 365
What Excuſe is ſufficient, and of the peremptory Undertaking - - - - 366
In what Caſes ſuch Judgment is allowed - 368
How Defendant can have Judgment as in caſe of Nonſuit, and alſo Coſts for not proceeding to Trial - 371

Sec. 5. Of Judgment by Confeſſion - 372

Sec. 6. Of Judgment on Warrant of Attorney 374

The Validity of a Warrant of Attorney - 375
Of its Operation and Extent, and of the Revocation and Countermand thereof - - 378
Of entering up Judgment thereon - 380

Sec. 7. Of Trial by Record - - 382

CHAP. IX.

Of the Proceedings from Iſſue to Trial.

Sec. 1. Of the Iſſue and Paper-book.

Of the Time and Manner of making it up, and of the Forms thereof - - - 388

Of

Of ſtriking out Pleadings and demurring, or pleading General Iſſue - - - - Page 397
Of delivering and returning Paper-book - 398
Of Variance between Iſſue and Pleadings, and amending ſame - - - 399
Of the Continuances on Iſſue Roll - 402
Of entering the Iſſue - - 403

Sec. 2. Of Notice of Trial, and countermanding ſame; and of Coſts for not proceeding to Trial.

What Notice neceſſary - - 406
When Plaintiff is compelled to give Notice 409
Of the Form of the Notice, and to whom to be given ib.
Of continuing Notice of Trial - - 410
Of countermanding Notice of Trial - 412
Of Coſts for not proceeding to Trial - 413

Sec. 3. Of carrying down the Record by Proviſo 416

Sec. 4. Of putting off the Trial - 418

Sec. 5. Of making up the Record, ſuing out Jury Proceſs, entering Cauſe for Trial, and of Remanets 422

Of making up the Record for Trial, and paſſing the ſame - - - ib.
Of ſuing out Jury Proceſs, Venire, &c. - 426
Of entering Cauſe for Trial - - 433
Of the Cauſe being made a Remanet - 435

Sec. 6. Of Special Juries - - 436

Sec. 7. Of granting a View - 441

Sec. 8. Of examining Witneſſes on Interrogatories 447

Sec. 9. Of compelling Witneſſes to appear at the Trial - - - 450

Of the Proceſs for that Purpoſe, and its Incidents ib.
Of the Expences of Witneſſes, and how paid 454
Of the Remedy againſt Witneſſes in caſe of Diſobedience. - - - ib.

CHAP. X.

Of Trial and its Incidents.

SEC. 1. Of Trials at Bar - Page 456
SEC. 2. Of preparing Briefs and attending at Trial 459
SEC. 3. Of challenging the Jury, and of Tales Men 460
SEC. 4. Of nonsuiting at the Trial - 463
SEC. 5. Of References at Nisi Prius - 466
SEC. 6. Of Bills of Exception, and Demurrers to Evidence - - - 469
SEC. 7. Of Verdicts and Cases reserved - 471
Of General Verdicts - - - ib.
Of Special Verdicts - - 472
Of Cases reserved - - - 474
SEC. 8. Of Certificates for Costs - - 475

CHAP. XI.

Of proceeding from Trial to Execution.

SEC. 1. Of the Postea and Rule for Judgment 478
SEC. 2. Of new Trials - - 482
Their Nature, Origin, and Utility - ib.
When and how to be moved for - 484
In what Actions and Cases granted - - 485
Of the Costs in case of new Trial - - 493
How to proceed if new Trial granted - 494
Of the Venire Facias de Novo, and the Difference between that and Motion for new Trial - 495
SEC. 3. Of arresting the Judgment.
When and how to move in Arrest of Judgment 497
Of the Nature of an Arrest of Judgment, and to what Courts and Cases it extends - - 498
Of the Grounds of arresting the Judgment - ib.
Of awarding a Repleader - - 503

SEC.

SEC. 4. Of taxing Coſts, and ſigning final Judgment Page 504
SEC. 5. Of docketing Entries and Judgments 505

CHAP. XII.

Of Execution.

The Nature and different Kinds of Execution - 512
When, by whom, and againſt whom Execution ought to iſſue; and herein of joint and ſeveral Executions 514
Into what Places Execution may go; and herein of the Teſtatum Writs - - 518
Of the Teſte and Return of the Writs of Execution, and of amending the ſame - - 520
Of the Mode of executing the ſeveral Writs
Of Capias ad Satisfaciendum - - 521
Fieri Facias - - - 523
Elegit - - - - 531
Of the Lien for Rent on Goods taken in Execution 534
Of iſſuing a ſecond Writ of Execution, and of retaking Defendant after his Eſcape or Diſcharge - 536
Of the Sheriff's Fees, Poundage, &c. - 538
Of ſuperſeding Execution by Writ of Error, or otherwiſe 542
Of entering Satisfaction on the Roll - - 545

INTRODUCTION.

SEC. 1. *History of the Origin and Jurisdiction of the respective Courts.*

SEC. 2. *Of the increased Jurisdiction of the Court of King's Bench over Civil Actions; their Process to bring the Defendant into Court; and of their Proceedings by Special Original, and the Fine payable thereon.*

SEC. 3. *Of the Original Process of the Court of Common Pleas, and the Alteration therein; and of the Pledges to prosecute.*

SEC. 4. *Of the Arrest in Civil Actions.*

SEC. 5. *Of Bail; and of the Difference between Common and Special Bail.*

SEC. 6. *Of the ancient Mode of pleading and trying Causes, and the Alteration therein; and of the Origin of Trials at Nisi Prius.*

SEC. 7. *Of the different Ways in which Actions may now be brought in the Courts of King's Bench and Common Pleas.*

SECTION I.

History of the Origin and Jurisdiction of the respective Courts.

THE darkness and obscurity in which the history of the remoter ages of antiquity is hidden, render it difficult to obtain any clear or accurate account of the legal polity of the ancient Britons, or of those nations that from time to time made inroads upon and settled among them.

But in the reign of the great and illuſtrious Alfred, the light of information breaks in upon us; and we find that upon his ſucceſſion to the monarchy of England, founded by his grandfather Egbert, the conſtitution of the country was entirely new-modelled, and the whole kingdom reduced under one regular and gradual ſubordination of government, wherein every man was anſwerable to his immediate ſuperior for his own conduct and that of his neighbours. By his eſtabliſhment the people were claſſed in *decennaries*, conſiſting of ten families each, who were reciprocally the pledges and compurgators of each other. Ten of theſe *decennaries* made up the larger diviſion of an *hundred*, and an indefinite number of theſe hundreds compoſed the ſtill larger diviſion of a *county*. Over every claſs of people preſided the moſt diſcreet and able amongſt them. Over the county were the alderman, (who, after the *Daniſh* invaſion and conqueſt, was denominated the earl,) biſhop, ſheriff, and coroner. Over the hundred, the lord; and over every tything, the tythingman or borſholder. In the few miſerable towns in which there was any trade, the people were, in all probability, under ſome ſpecies of corporate government, of the nature of which we are little informed. Writers, deſcribing the progreſs of ſociety, apprehend that ſome ſuch government exiſted in them; but ſay, that it was under abſurd regulations, built on oppreſſive notions, and tending rather to curb than aſſiſt the ſpirit of induſtry and commerce. And ſo well indeed are they convinced of this fact, that they aſſign it as one of the principal cauſes, that prevented towns in *England*, as well as in other parts of *Europe*, from emerging out of the deſpicable ſtate they continued in till the dawn of the fifteenth century.

Decennaries.

Hundreds.

Counties.

How each governed.

Of the ſtate of towns at that time.

The laws at this time were few and ſimple, made at the general aſſembly of the ſtate when convened by the ſovereign, and promulged to the people by the earls and ſheriffs in their perambulations through their ſeveral counties, in order to array and claſs the people within them. Matters of debt and contract were uſually adjuſted in the *decennaries*, but the principal cauſes came into the great county-court, held by the ſheriff, who was aſſiſted by the biſhop and earl; which court had cognizance, Firſt, Of offences againſt religion: Secondly, Of temporal offences which concerned the public, as felonies, breaches of the peace, nuiſances, and the like: Thirdly, Of civil actions, as titles to land, and ſuits upon debt or contract. Beſides which, it alſo held the view of *frankpledge*; an inqueſt impannelled by the ſheriff, to ſee that every one above the age of twelve years had entered into ſome tything and taken the oath of allegiance. From the time of king Edgar,

Laws, how made.

Juriſdiction of decennaries.

Of the county-courts.

View of frankpledge, what.

Edgar, this great county-court was divided into two; the one a *criminal*, the other a *civil* court. The criminal was called the ſheriff's tourn, and was held by the ſheriff and biſhop twice in the year in the months following *Eaſter* and *Michaelmas*, for the purpoſe of trying all criminal matters whatever; from this was afterwards derived the court-leet. The civil court retained the name of the county-court, (from which came the court-baron,) and in it all the civil pleas of conſequence ariſing in the county were diſcuſſed and decided. In the criminal court, offences were inquired of by an inqueſt impannelled, and offenders were puniſhed according to the ſuperſtition of the times; if they did not purge themſelves of the matter wherewith they were charged by the *ordeal*, by the *corſned* or morſel of execration, or by wager of law with compurgators. In the civil court parties complained againſt might purge themſelves by their ſureties by wager of law. Trial by *jury* was alſo frequently uſed; for that mode of trial is undoubtedly of *Saxon* origin; though whether ſuch jury was compoſed only of twelve men, or whether they were bound to a ſtrict unanimity is not precifely known at this diſtance of time.

Diviſion of county-court into criminal and civil court.

Origin of court-leet and court-baron.

Of the ordeal, corſned, or wager of law.

Trial by jury.

Great advantages attended the eſtabliſhment of theſe tribunals. The people were not drawn away from their domeſtic avocations, to attend cauſes at a great diſtance from home; due order was obſerved throughout the kingdom, the public peace ſecured, and juſtice adminiſtered to every one in an eaſy and expeditious manner by the intervention and ſuffrages of his neighbours. But in caſe a party conceived himſelf to be aggrieved by the judgment, or by favour or affection ſhewn at the trial of the cauſe, there lay an appeal to the king in his ſupreme court, or general aſſembly of the ſtate, called the *Wittenagemote;* which was convened annually, or oftener, where the ſovereign pleaſed, to conſult on public buſineſs, and to try great offenders, and which, in ſhort, had a ſupreme and univerſal juriſdiction. To this ſupreme court, as the nation emerged from its ſtate of barbariſm, and civilization put men on different purſuits, whereby litigations increaſed, appeals became frequent; ſo that the intervention of the *Wittenagemote*, to ſettle the various claims and pretenſions to property, and reconcile differences, at length grew neceſſary in almoſt every caſe. But, notwithſtanding the exerciſe of this *appellant* juriſdiction muſt have taken up a conſiderable ſhare of the time allotted for the ſitting of this great aſſembly, it does not appear that there was any other tribunal erected for the hearing and inveſtigation of appeals from the inferior courts. Such was the nature of the juriſprudence of the country till the time of the Conqueſt. For although

Advantages of the above tribunals.

Of the court of appeal.

The Wittenagemote.

Appeals to it became frequent.

Such the ſtate of things till the Conqueſt.

although the *Anglo-Saxon* conſtitution received many ſevere ſhocks from the irruptions of the Danes and other nations, and many new laws and cuſtoms were introduced by the ſeveral invaders; yet ſo excellent was the outline of the government, as ſketched by the maſterly hand of king *Alfred*, that through the various revolutions, neither the provincial nor judicial polity of it were diſcontinued or materially altered. It is certain, however, that the whole race of our *Saxon princes*, on their acceſſion to the throne, with the advice of their great council, made ſuch alterations in the laws as the exigencies of the times might require.

Alteration by the Conqueror.

But when the *Conqueror*, by the deciſive advantage he gained over *Harold* at *Haſtings*, got poſſeſſion of the crown, he put in force the old *Saxon* law, by which the eſtates of all perſons were forfeited, who were found in arms in oppoſition to their ſovereign. Theſe he divided amongſt his followers and favourites, to hold of him by the like military and feudal ſervices which prevailed in his native duchy of *Normandy*: the nature of which was ſcarcely known here before his arrival. This new eſtabliſhment, involving in it a variety of prerogatives and duties due from ſuch tenants to the king, neceſſarily introduced a great alteration in the conſtitution of the kingdom. The remedies for the recovery of theſe duties, and the conſequences of neglecting them, together with the appendages of ſuch tenures, became the moſt material and intricate learning in the law: by far too intricate for the underſtandings of the ſuitors in the county-courts and courts-baron; and which, for that reaſon, came uſually to be diſcuſſed in the ſovereign Eyre of the king. The ſubſequent treaſons too, of ſuch of his *Engliſh* ſubjects as were permitted to retain their ancient poſſeſſions, had ſo much increaſed the Conqueror's ability during the firſt thirteen years of his reign, to enlarge the number of theſe grants with feudal reſervations, that he at length took occaſion, in a general meeting of the realm, to introduce univerſally that ſyſtem of laws, which at firſt had only a partial reception amongſt his followers from *Normandy*. The grand principle of this ſyſtem was, that all lands were held *mediately* or *immediately* of the king, by the ſervices in the grants thereof reſpectively reſerved.

Introduction of the feudal ſyſtem amongſt his followers.

Law thereby became intricate.

General eſtabliſhment of the feudal ſyſtem.

Nature of it.

Conſequences thereof upon the buſineſs in inferior courts.

Upon this general eſtabliſhment of the *feudal ſyſtem* in *England*, all the intricacies and refinements which diſtinguiſhed it on the continent, were imported into this country by the *Norman* juſticiars; and, as the ſuitors and judges in the inferior courts were unable to decide the law on the ſubject, it became neceſſary to apply in almoſt every caſe to the ſupreme council of the crown; which neceſſity was ſtill further

further increaſed, by a diſtinction introduced ſoon after the Conqueſt, between courts of record and not of record. For by an edict of the Conqueror's it was ordained, that all proceedings in the king's courts ſhould be carried on in the *Norman*, inſtead of the *Engliſh* language. By this edict the remedial influence of the county-courts, and other inferior juriſdictions, was neceſſarily narrowed: for as the judges and ſuitors of ſuch courts did not underſtand that language, they were prohibited from recording their acts. So that the diſcuſſion of matters of importance ceaſed in the great *Saxon* ſeats of juſtice, and an *original* juriſdiction over all cauſes was given to the ſupreme court where the king preſided in perſon. The dignity and importance of the county-courts was alſo further impaired by the receſſion of the biſhops (a), and the ſeparation which took place in conſequence of their receſſionbetween the *civil* and *eccleſiaſtical* courts. The earls too ſhortly afterwards neglected to attend them; from which time their conſequence has been gradually declining, and though there remains a ſhadow of them to this day, it is but a ſhadow of their priſtine ſplendour and dignity.

Diſtinction between courts of record and not of record.

Introduction of Norman language.

Effect thereof.

Original juriſdiction given to ſupreme court.

Seceſſion of biſhops from county-courts.

Decline of county-courts.

The clergy had been for ſome time endeavouring throughout *Europe* to exempt themſelves from the ſecular power; and as they had all along ſeconded the views of the Conqueror, he thought it moſt prudent to comply with their demands. He therefore granted them ſeveral immunities, and amongſt the reſt he permitted the biſhops to eſtabliſh courts in their ſeveral dioceſes, in which they aſſumed a juriſdiction over the inferior clergy and all their dependants, who were to have juſtice diſpenſed to them in the conſiſtorial court by the biſhop or his ſubſtitute. The erection of theſe courts for the future inveſtigation of eccleſiaſtical matters, with which the ſecular judges were no longer to interfere, not only deprived the county-courts of a great number of cauſes, and the attendance of many ſuitors, but alſo of the aſſiſtance and veneration they derived from the learning and ability of the prelates. And though the diſputes which afterwards aroſe between the biſhops themſelves, and ſuch of the clergy as were able to cope with them, called for the neceſſity of a juriſdiction ſomewhere, yet their litigations uſually came into the ſovereign *Eyre*. For however willing in thoſe days they might have been to appeal to the ſupreme pontiff for juſtice, they were nevertheleſs glad to have it adminiſtered at home by the king's court, held before himſelf

Seperate juriſdiction of the clergy.

Eccleſiaſtical courts eſtabliſhed.

Another cauſe of decline of county-courts.

(a) In the time of *William* the Conqueror it was ordained, *quod Epiſcopus vel Archidiaconus* (who before ſat with the ſheriff) *placita in hundredo non teneat*; but right ſhall be done by himſelf according to the Canons, &c.

in perſon at the time of his parliaments; which were uſually aſſembled where he kept the three great feſtivals of *Chriſtmas*, *Eaſter*, and *Whitſuntide*.

Juriſdiction of ſupreme council increaſed.

The *original* as well as *appellate* juriſdiction, exerciſed by the ſupreme council when convened (a), in like manner as by the *Wittenagemote* in the Saxon times, drew into it the final determination of all cauſes of conſequence, whether of eccleſiaſtical, civil, or criminal conuſance. So extenſive a juriſdiction interfering with the diſcuſſion of matters of ſtate, occaſioned the members thereof, when aſſembled, to ſit for a long time together. But the Conqueror, finding theſe long ſeſſions inconvenient, and apprehending danger from ſo large a meeting of his chief vaſſals, under the pretext of eaſing the ſubject by erecting a conſtant court for the trial of cauſes and determination of appeals, took an opportunity to ſeparate the *judicial* power of the members of this aſſembly from their *deliberative* as counſellors to the crown. In this new court, erected in his own palace, and thence called by *Bracton*, *Aula Regia*, ſat with other chief vaſſals, the firſt officers of ſtate, the Chancellor, Earl MARESCHAL, Chamberlain, Seneſchal, and Treaſurer; over all of whom preſided a ſpecial and new appointed magiſtrate, next in authority to the king himſelf, called *Capitalis Juſticiarius totius Angliæ*.

Inconvenience thereof.

Judicial power ſeparated from deliberative.

Inſtitution of the Aula Regia.

The Aula Regia was ambulatory.

This new-erected court by its conſtitution was ambulatory, and followed the ſovereign whenever he changed his place of abode. In the county where it happened to be, it had an *original* juriſdiction of all matters ariſing therein, whether of a civil or criminal nature; but of cauſes ariſing in other counties it only exerciſed an *appellate* juriſdiction. And to give this capital *juſticiary* a more extenſive authority, and to leſſen ſtill further the remaining influence of the county-courts, it was ordained by the Conqueror, that from thenceforth all cauſes of action amounting to *forty ſhillings* and upwards ſhould be determined by the king's *writ*, which was uſually made returnable in the *Aula Regis*; but in ſome caſes they were made out to give the ſheriff authority to proceed in the ſuit, and then they were called *Vicontiel*. *Vicontiel* writs were of two ſorts, the one founded on *Torts*, the other on *Contracts*. The *vicontiel* writs adapted for torts were thoſe of *treſpaſs*, *replegiari facias*, *nuiſance*, and others of the like nature; and thoſe for matters of contract were called writs of *juſticies* (b), which was a command to the ſheriff to do

Juriſdiction thereof; original —appellate.

How increaſed by cognizance of cauſes above 40 s.

Vicontiel writs, what.

Juſticies, what.

(a) *Vide* Spel. Gloſ. *verbo* Parliamentum.

(b) Though a *Juſticies*, *Replegiari facias*, and other *vicontiel* writs may be had of courſe at this day, and if improperly iſſued, the party has no redreſs but by *ſuperſedeas quia improvide emanavit*; yet it is not improbable but that, at the commencement of the *Norman* period, before the extent of the remedy given by

do juſtice between the parties in that particular cauſe; for if the debt or demand exceeded *forty ſhillings*, the ſheriff was no longer empowered to hold plea thereof by a *plaint* levied in court as in the Saxon times. So alſo the *writ of right*, iſſued to enable the lord to hold plea of land within his juriſdiction. For the maxim introduced by the *Norman* juſticiars was, that no one could hold lands without the king's *patent*, nor plea of *forty ſhillings* without the king's *writ*.

Plaint, extent thereof.

Writ of right.

Though theſe great officers at the eſtabliſhment of the *Aula Regis* ſat together in court, as well to try the civil and criminal matters referred to them, as to receive and ſettle the revenue; yet our legal *antiquarians* think, that, even at this period of time, each of them had a peculiar office and juriſdiction aſſigned to him. The Chancellor, it is ſuppoſed, as being the king's chaplain and confeſſor, more immediately preſided when the complaint was of ſome oppreſſive act of the ſovereign;—the Treaſurer, when the revenues and rents were to be received from the ſheriffs, and the fines and amerciaments from the eſcheators, and on paſſing the public accounts;—the Conſtable and Mareſchal (a), upon the diſcuſſion of matters of honour, and war, and the rights of foreigners;—the Seneſchal, when the diſpute aroſe within the limits of the royal reſidence;—and the Chamberlain, when the money was to be told in and paid out of the Treaſury.

Different officers preſiding in Aula Regia.

The reſpective duties of

the chancellor;

treaſurer;

conſtable and mareſchal;

ſeneſchal;

chamberlain.

The Conqueror, like his predeceſſors, had his royal table ſupported by the tenants of his *ancient demeſnes*, whoſe annual renders of *corn*, *ſheep*, *oxen*, and other produce of their lands, were brought to the place of his reſidence. And that the ſame might be paid with more punctuality and convenience to the reſpective tenants, the ſovereign frequently changed his place of abode. But *Henry* the Firſt generally commuted theſe renders into certain fixed ſums, after whoſe reign, the removal of the king's houſehold being no longer neceſſary, we find it to have been leſs frequent. The ſovereign's remedy againſt theſe tenants in *ancient demeſne*, upon neglect to diſcharge their bounden renders, was by entry and ſeizure of their lands, without applying to any court for redreſs, or taking out any proceſs againſt them. And if ſuch

Tenants of ancient demeſnes; their rent;

afterwards reduced to a fixed ſum.

Remedy of ſovereign againſt them.

by the various writs of *accedas ad curiam*, *recordari facias loquelam*, *falſe judgment*, &c. were fully eſtabliſhed, the Chancellor exerciſed a diſcretion in allowing theſe writs, and only permitted them to go in thoſe caſes where the policy of reducing the county-court was not neceſſary to be regarded. *Vide* of ſuperſeding Writs, 1 *Eq. Abr.* 415. and title Writs in the abridgments.

(a) In our old books there is great confuſion with reſpect to the number and duty of the Marſhals. *Vide* Mr. *Madox* from page 31 to 33, and ſeveral of the old ſtatutes. Lord Coke ſtyles the marſhal who preſided with the conſtable, the *Earl Marſhal of England*, by way of pre-eminence. 4 Inſt. 123. Co. Lit. 74.

entry and seizure were improperly made, the tenant's only remedy was by petition to the king's bailiff, the steward of the court of *ancient demesne*, who heard and finally determined the matter; so that no other court interfered between the king and his tenants, with regard to these renders (a).

Of the other chief vassals.

Our greatest legal *antiquarians* have so long and so widely differed, concerning the other chief vassals of the crown previous to the Conquest, whether they were military tenants, socage tenants, or whether they were tenants at all, but merely allodial possessors (*allodarii*), that it might appear unbecoming to interfere with their discussions. But certain it is, and indeed agreed by them all, that the slavish services, the perpetual concomitants of our old tenures, were unknown in this country till introduced by the *Norman* justiciars shortly after the Conquest.

Of the feudal burdens and fines.

At which time the establishment of the *feudal* burdens of *escheat, fines for alienation, primer-seisins, aids, wardship, marriage, and relief*, with their numberless appendages, multiplied the pretensions of the crown to some claim or other, on every alteration in the family or domestic concerns of the tenants.

Disputes concerning them, where settled.

These claims and pretensions, and disputes in consequence of them, were at first heard and adjusted with all other matters of importance in the court where the Chief Justiciar presided. But as the revenues thereby derived were very considerable, and generally well paid to the receivers in the country, it was found necessary that their accounts should undergo a closer inspection and revision than could possibly be given them in the supreme court, whose attention was wholly engrossed by the multifarious matters referred to it.

Origin of court of Exchequer.

The Conqueror, therefore, appointed a select committee, of whom the Treasurer was the chief, to sit apart from the supreme court, in a chamber of his palace, particularly to *audit* these accounts, and compel the payment of those dues to which he laid claim. This court was built on the model of one erected for the like purpose in his own native duchy. It assumed the name of the king's *Scaccarium* or Exchequer, and the same authority was delegated to its judges, as was exercised by the *Masters of the Exchequer* in *Normandy*.

An abridgment of chief justiciar's power.

This new court on its establishment stripped the *Chief Justiciar*, in the very zenith of his power, of a material branch of his jurisdiction; though it appears that this powerful magistrate for some time afterwards continued to interfere in the Exchequer. For in dialogue *de Scaccario, lib.* 1. *c.* 9., speaking of this officer, it is said, "he was great in the Exchequer, as well as

(a) *Vide* Brac. *lib.* 1. *c.* 11., who, in describing these tenants, says, "*quod a gleba amoveri non poterunt, quamdiu solvere possunt debitas pensiones.*"

"in

" in the court—ſo that nothing of moment was or could be " done there without his conſent or advice." However, this firſt deprivation of the Chief Juſticiar's authority, who on his appointment was inveſted with powers ſo large and boundleſs, that he became both a tyrant to the people, and formidable to the crown itſelf, certainly aroſe from mere neceſſity, and not from the jealouſy either of the ſovereign or his people, to which the ſubſequent diminutions of it are properly attributed.

Juriſdiction of the Exchequer.

In this court of *Exchequer* were all matters relating to the revenue hereafter to be determined; ſo that when any patent or royal grant was ſealed by the Chancellor, the ſame was *eſtreated* into this court, and execution went forth for the reſervations therein contained to the crown. So all original writs from the Chancellor, giving other courts a juriſdiction to hear and determine cauſes between the people, gave the court of Exchequer a power to collect the fines and amerciaments due to the king, in the progreſs and inveſtigation of thoſe cauſes impoſed on the parties. And when the great court inflicted fines on criminal offenders, the records were eſtreated into the Exchequer, from whence iſſued a proceſs to get in the ſame; or if they had been paid to the clerk, he was made to account for them there. In this court, too, all the Sheriffs, Coroners, Eſcheators, and other officers employed in receiving the revenue, were to make up and paſs their accounts With juriſdiction over ſuch matters, this court continued till the reign of *Edward* the Firſt, who is ſuppoſed to have formed it in the manner we find it at this day; conſiſting of *two diviſions*, the receipt of the Exchequer, and the court or judicial part of it, which hears cauſes relating thereto. And it has long ſince been both a court of *equity* and *common law*, and holds plea of matters not at all relating to the revenue, ariſing between ſubject and ſubject.

Of eſtreats, &c.

How altered by Edw. I.

The proceſs uſed on the common law ſide of the court of *Exchequer* may be ſeen in a variety of tracts, and does not properly come within the ſcope of this work, which is only intended to explain the origin and operation of the proceſs of the courts of King's Bench and Common Pleas; but to do this in a ſatisfactory manner, it was neceſſary to treat ſlightly of the juriſdiction of the *Aula Regis*, inſtituted by the *Norman* invader, and to ſhew what ſhare of that juriſdiction our ſeveral courts of juſtice at this hour reſpectively exerciſe.

Of the equity ſide of Exchequer.

From what has been ſaid of the origin of the *Exchequer*, it may naturally ſtrike the ſtudent as ſomething remarkable, that there ſhould exiſt in it a court of *equity*, as well as a court of *law*. The preciſe time when the court of Exche-

quer first assumed an *equitable* jurisdiction, or from what cause it originated, is not well ascertained. But we may reasonably suppose, that when it was found necessary, in order to effectuate justice, to propound articles to compel persons to answer *upon oath* to allegations therein contained, between subjects in civil suits, and which articles were made to the king, and by him generally referred to his chancellor, the officer of the crown (in later times called the Attorney-General) was induced to exhibit like articles in the Exchequer for the discovery of facts relating to the revenue. Hence arose informations for *treasure-trove*, and for the discovery of the forfeited goods of an *outlaw* filed in the *Exchequer* (a). And when afterwards this court, by the exposition they put on the statute of *Rutland* (b), by which it is enacted, "that no suit shall be prosecuted in the Exchequer, unless it concern the king or his officers," held in contradiction to the evident meaning of the legislature, that pleas between subjects who were *debtors* to the crown, came within the idea of ministers of the Exchequer, this court upheld a jurisdiction, as well of matters inquirable by exhibited articles, as of matters cognizable in actions at common law. And though the *subpœna* was not invented in Chancery till the reign of *Edward* the Third, they certainly before that time exercised both an equitable jurisdiction on exhibited articles, and in actions at common law, whenever the complainant suggested that he was *a debtor or fermor to the king*. It seems too, that before the *subpœna* was invented, the process they used was a *venire*, *attachment*, and *commission of rebellion*, the process usually awarded in the *Aula Regis* on great and particular occasions. But when *Richard de Waltham* had devised the *subpœna* returnable in Chancery, the treasurer of the Exchequer, in imitation of it, framed a similar writ for matters of *equity*, under the seal of his own court, returnable before himself, instead of using the process of the *venire* in the first instance; retaining, however, that and its following process, in case the party should shew any contumacy to his *subpœna*. The Exchequer writ of *subpœna* was also afterwards extended as an original process in a civil action commenced there, though how long before the reign of *Henry* the Eighth is not well known. And this writ, together with the *venire ad respondendum*, and writ of *quo minus*, which came into use in civil actions between subject and subject in consequence of the above exposition of the statute of *Rutland*, are the three methods at this day of commencing civil actions in the court of *Exchequer*. But to return to the remaining jurisdiction of the *Chief Justiciary*.

Origin accounted for.

Jurisdiction increased by the causes of king's debtors being heard there.

And the fiction of the quo minus.

(a) Hard. 22. (b) 10 *Edward* the First.

The

The *Aula Regis*, wherein the magiſtrate preſided, had ſtill an original juriſdiction over all cauſes of moment not immediately concerning the revenue, cognizance of all criminal offences committed in the county where it happened to be, the puniſhment of all capital delinquents, and an *appellate* juriſdiction from every inferior common law-court in the kingdom. It was not long, however, before the authority which this magiſtrate enjoyed received another conſiderable ſhock. For as it was the duty of the *Chief Juſticiar*, as well as the reſt who compoſed the *Aula Regis*, to attend their ſovereign, and be at hand to adviſe him in all matters of law and ſtate, the people who had cauſes depending complained loudly of the inconvenience they ſuffered in being neceſſitated to follow the king's ſuit from place to place to have them determined. A reſtoration of the ancient conſtitution, and particularly of the power of the county-court, the grand ſeat of juſtice in the *Saxon* times, whereof they had been unjuſtly deprived, partly by the policy and partly by the force of the *Normans*, was now much wiſhed for by the people. And though the dignity of the county-court was not only greatly diminiſhed, but the matters uſually diſputed were become too intricate for the underſtandings of the ſuitors, yet, from the intolerable expence and delay occaſioned by following the ſupreme tribunal, travelling about with the king's perſon, the chance of injuſtice ſeemed preferable to procraſtination. In the reign of *Rufus*, the Conqueror's ſon and ſucceſſor, it was found expedient to pare off ſome of the excreſcences of the *Norman* regulations, by reſtoring in certain caſes the laws of *Edward* the Confeſſor. The outline of the new conſtitution, however, was ſuffered to remain as in his father's time. In the reign of *Henry* the Firſt ſome little alteration, with reſpect to the trial of cauſes in a more eaſy and expeditious manner for the ſubject, took place for a while. And in the following reign of *Stephen* the Uſurper, though much was promiſed, little was performed towards redreſſing the numberleſs grievances of the people. But in the time of *Henry* the Second the laws were reviſed and methodiſed, and reduced into a regular order; and to obviate the inconveniencies of following the ſupreme court, this prince, at the parliament of *Northampton*, eſtabliſhed certain officers, called *Juſtices in Eyre, juſticiarii itinerantes*; I ſay eſtabliſhed ſuch juſtices, contrary to the old chronicles, which maintain that this prince firſt introduced them. For Mr. *Madox* (a) gives inſtances upon record of ſuch juſtices going their circuits ſo early as the eighteenth year of king *Henry* the Firſt. And I

Aula Regia ſtill retained great power.

Cauſes of its abridgment.

Juſtices in Eyre eſtabliſhed.

(a) *Hiſt. Scacc.* d. 3.

follow

follow his opinion in preference to that of the monkiſh writers, in conſequence of lord *Coke*'s advice not to mind *chronicle law*, when put in competition with *records*. Beſides, lord *Lyttleton* ſeems inclined to think that ſuch juſtices were firſt appointed in this iſland by king *Henry* the Firſt, who had obſerved the great benefits derived to the people in *France* from a ſimilar inſtitution by *Louis le Gros*; and ſays, that during the inteſtine commotions under *Stephen* they had been diſuſed, and were therefore only revived and regularly ſettled by king *Henry* the Second.

Their circuits. Theſe new-created judges at firſt went their circuits frequently, but were ſoon prohibited from going them oftener than once in ſeven years. This prohibition was probably owing to the jealouſy of the barons, whoſe independent and hereditary juriſdictions were much infringed by this regular exerciſe of power, derived from the immediate authority of the ſovereign. It was not long, however, before the barons, finding it neceſſary in order to ſupport their pretenſions againſt the crown, to make ſome regulations in favour of the commons, ſtifled the jealouſy they had formerly conceived againſt the *Juſtices in Eyre*, and expreſsly ſtipulated with their ſovereign that they ſhould be ſent into every county once in the year to try certain actions, then called *Recognitions* or *Aſſizes* (a).

Aſſizes, what. Aſſizes were remedies which had been introduced at the ſame parliament of *Northampton*, for the purpoſe of trying titles to land in a more certain and expeditious manner before commiſſioners appointed by the crown, than before the ſuitors in the county-court, or the king's juſticiars in the *Aula Regis*. The invention of this mode of trial, as well as that of the grand aſſize, or trial by a ſpecial kind of jury in a writ of right, at the option of the tenant or demandant, inſtead of the *Norman* trial by battel, are attributed to *Glanvil*, Chief Juſticiar to king *Henry* the Second.

Juſtices in Eyre had alſo commiſſions. Theſe *Juſtices in Eyre*, beſides being empowered to take the aſſizes, were commiſſioned alſo by the king, or the guardians of the realm in his abſence, to do juſtice of all kinds

Extent thereof. in their reſpective circuits, where the property in contention did not amount to half a knight's fee, or where the controverſy was of that importance that it could not be determined but in the ſovereign's preſence. And if a matter of difficulty aroſe in taking the aſſize, theſe judges were afterwards directed to adjourn it, and cauſe it to be brought before the juſtices of the *bench* (b). Theſe itinerant magiſtrates were alſo charged to make inquiſitions concerning robbers and

(a) Vide *Magna Charta*, c. 12. (b) *Ibid.*

malefactors

malefactors in the counties through which they paſſed, and to take ſpecial care of the rights and profits accruing to the crown from the reſervations in the feudal grants. And at their firſt inſtitution, they were directed to inquire of ſeveral matters which the preceding commotions had made neceſſary (a).

Their power.

Wherever theſe juſtices came they ſuperſeded the *tourn*, and all matters civil and criminal were referred to their judgments; but ſtill an appeal lay from their determination to the great *Aula Regis*. And if the king went into the county where they happened to be ſitting, all pleas before them immediately ceaſed, and came into the ſovereign Eyre before the Chief *Juſticiar*.

Appeal from their deciſions.

Their further juriſdiction.

In their circuits theſe Juſtices *in Eyre* acted alſo as auxiliaries to the ſupreme court; for whenever any matter of fact was ſtrongly litigated by the contending parties above, and which aroſe at a great diſtance from the *Aula Regis*, there iſſued a writ, directed to the Chief Juſtice *in Eyre*, to inquire into the fact (b). From this circumſtance we may perhaps look for the origin of the practice in the court of Chancery, of directing *a feigned iſſue* in law to try a fact ſtrongly controverted between the parties in a ſuit there. Nor is it improbable, but that the legiſlature at *Edward* the Firſt's ſecond parliament at *Weſtminſter* took the hint from the like uſage, to ordain, that pleas depending in either bench that required an eaſy examination ſhould be tried in the county wherein the facts aroſe, before the juſtices appointed to take the aſſizes, by virtue of the writ given by that ſtatute; from which has ariſen the very beneficial juriſdiction of the auxiliary courts of *niſi prius*.

Origin of feigned iſſues;

and of the courts of niſi prius.

How their power was exerciſed.

Upon receiving a plea, if it was of a matter of fact, a jury was impannelled by the ſheriff, who gave in their verdict to the *Juſtice in Eyre*, which was afterwards ſent to the *Aula Regis* to be recorded. In debt upon *ſimple contract*, the defendant charged therewith might *wage his law* as in the *Saxon* times. But *wager of law* was never permitted, unleſs the defendant bore a fair and irreproachable character; and it was alſo confined to ſuch caſes where a debt might be ſuppoſed to be diſcharged, or ſatisfaction have been made in private without any witneſſes to atteſt it; as in actions of debt on ſimple contract, or for an amercement in a court-baron, in actions of detinue, account, and on parol ſubmiſſions to an award. For on all theſe occaſions the action is

Of the wager of law.

In what caſes allowed.

(a) *Vide* Lord *Lyttleton*, b. 4. *ſub anno* 1176, and the records cited from *Madox* in his Appendix, No. 11.

(b) Vide *Riley's Plead. in Parl.* 74, 75.

built

built on a feeble foundation, and the law presumes that the party might either have discharged the debt in secret, or before witnesses that are dead or not to be found. In actions on *specialty* debts, witnesses were produced to attest the truth of the deed (a). In *pleas of land*, the investiture thereof, signed by the *pares curiæ*, was produced to the court; but if that could not be found, the parties joined issue by *battel*, till that barbarous and absurd mode of trial fell into disuse, and the grand assize was introduced in its room. *Criminal matters and offences* were inquired of by an inquest impannelled, and presented on articles of inquiry, as in the *Saxon* times. But the old custom of putting the party accused to purge himself by the *ordeal*, or in lesser offences by *compurgators*, was disused, and instead thereof a *petit jury* was introduced, to hear the evidence of the fact wherewith he was charged. And then the prisoner did not, as formerly, produce his witnesses to the *first* jury, who now only heard evidence to accuse, but reserved his defence for the *second* jury, before whom he was to be tried.—Hence arose the distinction between the *Grand* and *Petit* Juries.

Ordeal, &c. abolished.

Petit jury introduced.

Distinction between them and grand juries.

When the *Justices in Eyre* returned from their circuits, they lodged the records in the *Exchequer*, from whence issued process to collect and gather in the fines and amerciaments due to the crown. But when the division of the courts took place, in the reign of *Edward* the First, the records were deposited in the respective treasuries, and only *extracts* thereof, so far as related to the revenue, were made out and transmitted to the Exchequer.

Records of judges on circuits lodged in Exchequer.

The *Justices in Eyre* having only a delegated power from the crown to hear and determine the causes referred to them, a writ of error and appeal lay from their judgment to the supreme court where the *Chief Justiciar* presided. This right of appeal brought back to that powerful magistrate the final determination of almost all causes of consequence, and occasioned not only a great delay of justice, but a considerable increase of expence to the parties. So great an influx of business to the supreme court, neither affording them leisure to hear nor opportunity to dispatch the causes re-

Writ of error and appeal from their judgments.

(a) In those days a great difficulty attended the proving of a deed. For, according to Lord *Coke*, they anciently added the names of the witnesses in the contents of the deed, after the clause of "*in cujus rei memoriam*," and impannelled them with the jury. This not only occasioned delay, from the necessity there was of awarding process to bring these witnesses in, but also from the cause being frequently obliged to be adjourned for their default. But to prevent this delay, and save the trouble and expence which attended it, *recognizances* were introduced; which being an acknowledgment of a debt in court, attested by the court itself, needs no other species of trial to make it more evident. Vide *Co. Lit.* 6. *a.*

ferred to them with expedition and punctuality, soon occasioned a loud cry for the establishment of another jurisdiction, for the sole investigation of *civil* disputes. And as by this time the extravagant powers assumed by the *Chief Justiciar* had kindled a jealousy in the crown, and sometimes filled the nation with just alarms for its privileges, a diminution of his authority was in the contemplation both of the king and the people.

Origin of court of Common Pleas;

From the first appointment of this officer by the Conqueror, his power, notwithstanding parts of his jurisdiction had been diverted into other channels, had yet, from various circumstances, been continually increasing. But Mr. *Madox* thinks, that this increase of authority was rather owing to the personal dignity and consequence of those who had been successively appointed to the office, than to the extent of the jurisdiction allotted to it. In this, perhaps, he is not mistaken; for we find it to have been generally held by some great prelate or powerful baron. And it appears that all the great offices of the *Aula Regis* were usually filled with the first personages in the kingdom; it being observed by our ancient writers, "that the splendour of the king's court "appeared much in the greatness of his ministers; but that "some were so great in themselves, that they diminished "the grandeur of their master, and, by attracting the eyes "of the multitude, made the king often entertain wishes to "diminish that lustre, which so much exceeded his own." The frequent attempts of our princes to lessen the power and authority of the *magnates regni*, are very conspicuous in the subdivision of the great *fiefs*, which on escheats and forfeitures had been made; but which practice was soon put a stop to by the statute *de donis* (a); however, not before some of them had received great checks in acquiring and perpetuating in their own families their extensive possessions.

owing to the multiplicity of business of Aula Regia;

and the great power of the Justiciar,

The diminution of the jurisdiction and authority of the *Chief Justiciar*, the object of our present attention, must certainly have been an essential part of the policy of the descendants of *Henry* the Second. But perhaps it was owing more to the assumed consequence and importance of the *Chief Justiciar* himself, than to any thing else, that this great office received the most severe and fatal blow to its authority—I mean by the erection of the court of *Common Pleas*, which seems to have been first separated from the *Aula Regis* in the time of *Richard* the First, though it was not confirmed and made stationary at *Westminster* till the seven-

which the sovereign wished to check.

Antiquity of court of Common Pleas.

(a) *Westminster* the second, 13 *Edw.* 1.

teenth

teenth year of king *John*. In this opinion I follow Mr. *Madox*, although it muſt be acknowledged, that he differs from the authority of moſt writers on this ſubject, and amongſt others of Lord *Coke*, who in *Coke Lyttleton*, 71. *b.* and in the preface of his eighth report, ſeems inclined to believe that the *Common Pleas* was not only a diſtinct court at the time of *magna charta*, but that there was a court of ſuch peculiar and ſeparate juriſdiction even before the Conqueſt. Lord *Coke* as a lawyer, no doubt, merits our greateſt reverence; but *Madox*, as an antiquary, is certainly deſerving of our attention, and particularly in a matter of this ſort, in which we cannot but ſuppoſe his reſearches to have been higher than thoſe of his lordſhip. According to the antiquary, then, for ſome time after the Conqueſt, there was (as I have ſaid before) but one great and ſupreme court, called the *Aula Regis*, exerciſing a juriſdiction over civil and criminal matters, from which gradually ſprung the courts of *Exchequer* and *Common Pleas*; and as the former became altogether independent, ſo the latter became wholly diſtinct from it. He thinks too, that the ſeparation of the *Common Pleas* took place in the reign of *Richard* the Firſt, though it was not (as he (a) ſays) firmly eſtabliſhed till that of *Henry* the Third. In this opinion the antiquary ſeems to be confirmed by ſome remarkable paſſages in the hiſtory of that reign, in which he lays the foundation of the *Common Pleas*, one of which in particular I ſhall advert to.

Its eſtabliſhment greatly owing to the cabals of the Juſticiar and great officers of ſtate.

Amongſt the various ſchemes put in practice by *Richard* the Firſt, to obtain money to ſupport his projects againſt the infidels, he forgot the policy which it was clearly his intereſt to purſue; and while he was intent only on that one object, neglected altogether the rights of his crown, and the welfare of his people. For we are informed, that he put up all the higheſt offices and titles to ſale; and, amongſt the reſt, ſold that of *Chief Juſticiary* to *Hugh de Puzas*, biſhop of *Durham*, for one thouſand marks; which prelate was alſo rich enough to buy the earldom of *Northumberland*. When *Richard* afterwards ſet out on the knight-errantry of a Croiſade, he intruſted the guardianſhip of the realm to this *Hugh de Puzas*, jointly with his favourite *Hugh de Longchamp*, who held the biſhopric of *Ely*, the office of chancellor, and who was alſo the Pope's legate. Whether *Puzas* conceived, as he had bought the office of Chief Juſticiar, it was an infringement on the rights of his purchaſe to put another in commiſſion with himſelf in the viceroyſhip of the kingdom; or whether it was owing to the jealouſy or ambition of *Long-*

(a) Vide *Madox*, Excheq. on the diviſion of the courts.

champ,

champ, it is certain, that the inſtant the king was gone on his project, theſe joint guardians, from their quarrels, threw the whole kingdom into a flame. In their contentions *Longchamp* got the better of *Puzas*, and not only compelled him to reſign all his offices, but uſurped that of *Juſticiar* himſelf, and ſent *Puzas* to priſon. *Richard*'s time was ſo much taken up with the Saracens while abroad in the Holy Land, that, notwithſtanding theſe commotions reached his ears, he took no ſtep to deprive *Longchamp* of the authority he had uſurped; but ſuffered him to continue for ſome time in the full enjoyment of his offices: till at laſt his inſolence and oppreſſions rouſed up the barons, who, under prince *John*, met at *Reading*, and not only ſtript him of his uſurpations, but compelled him to fly; and gave the office of *Chief Juſticiar* to the archbiſhop of *Rouen*.

If then we conſider the ſeveral great offices veſted at one and the ſame time in *Puzas* and *Longchamp*, the kingly authority which they poſſeſſed, and the deep ſchemes of ambition in which by their rivalſhip they were engaged, we cannot think that either of them when in poſſeſſion of the office of *Chief Juſticiary* wiſhed for the *Aula Regis* to hold a long ſeſſion; or that they had any great inclination, or much leiſure, for the hearing and inveſtigation of private matters referred to them. To their cabals and ambition then, more than to any thing elſe, we may look for the firſt ſeparation of the *Common Pleas* from the *Aula Regis;* as in all probability, to ſave their own trouble and time, they delegated the cognizance of civil concerns to others of the Juſticiars, who, for the better hearing thereof, and that they might not protract the ſeſſion of the *Aula Regis*, left the High Bench and retired into ſome convenient apartment to hear thoſe pleas, which being merely civil, and more technically intricate, required a more private diſcuſſion. Nor did the *Chief Juſticiars* think they were parting with their authority for ever, by ſuch temporary delegations of it; as they reſerved to themſelves the power of reſuming it whenever they choſe, and an appellate juriſdiction to rectify any erroneous proceedings in the cauſes referred to their ſubſtitutes. But the nation having once experienced the benefits ariſing from this newly-conſtituted juriſdiction, loudly called for its permanent eſtabliſhment; and the barons dreading the reſumption of the power of the *Chief Juſticiar* in its full latitude, and glad to ſee it once diminiſhed, joined in the voice of the commons. Accordingly, in the ſucceeding reign of king *John*, when he, to quell the inſurrections of the great feudatories, conſented to the two famous charters of Engliſh liberties, *magna charta*, and *carta de foreſta*, the

By delegating their civil juriſdiction and ſeparating the trial of cauſes from the Aula Regia.

The convenience of which was felt;

and inſiſted upon to be continued.

barons took care to provide, amongſt other things equally calculated for the relief and protection of the ſubject, that this court for the inveſtigation of the *civil* concerns of the people ſhould be fully eſtabliſhed. With this article that unfortunate prince did not long heſitate to comply, having himſelf experienced many inconveniences in the earlier part of his life from the ſuper-eminent authority exerciſed by the *Chief Juſticiars*, whoſe tyranny had extended itſelf, as well over the prerogatives of the king as the rights of the people: and ſo much ſo, that he himſelf had once formed a deſign to aboliſh the office, but which unfortunately proved abortive, from the great aſcendency which that magiſtrate had gained in the country. The barons therefore from their diſlike of the office, under the pretence of relieving the people from the inconveniences of following the *Aula Regis* from place to place to have their cauſes determined, made it an article in the *great charter*, that "*Communia placita non ſequantur curiam noſtram, ſed in aliquo loco certo teneantur.*" This article effectually eſtabliſhed and confirmed the *Common Pleas;* and the *loco certo*, where theſe pleas were to be heard and determined, was fixed to be in a receſs of the Great Hall of the Palace at *Weſtminſter*, built in the time of king *Rufus*, where the ſovereign uſually reſided. The *Common Pleas* has moſtly (a) ſince that time remained in the ſame place, while the court of the *Chief Juſtice of England*, which afterwards ſprung from the old root of the *Aula Regis*, continues ambulatory with the ſovereign.

This court was fully eſtabliſhed by the Magna Charta,

and rendered immoveable,

at Weſtminſter.

By the eſtabliſhment of the court of *Common Pleas* or *Common Bench*, as it was ſtiled to diſtinguiſh it from the *High Bench*, whereon the *Chief Juſticiar* ſat as repreſentative of the ſovereign, this magiſtrate was intirely ſtript of another conſiderable branch of his juriſdiction; and his power was ſo much curbed by other articles in the Great Charter, ratified and confirmed by king *Henry* the Third, that we behold this mighty officer gradually on the wane, during the long and troubleſome reign of that king: towards the end of which there appears to have been no ſuch magiſtrate; for the laſt *Chief Juſticiar* we read of in hiſtory, and it is even doubted whether he was *Chief Juſticiar* or not, was *Hubert du Burgh*. The court too, in which this magiſtrate uſed to preſide, ſeems by this time to have loſt its name of the *Aula Regis*, though whether it aſſumed the name of the *King's Bench* or not, till the ſucceeding reign of *Edward*

Called alſo Common Bench, why.

Great abridgment of Juſticiar's power.

Office aboliſhed.

Aula Regia, now called the King's Bench.

(a) I ſay *moſtly*, contrary to the opinion of many, who affirm that it has ever ſince remained there; for by the ſtatute 2 *Edw.* 3. *c.* 11. it appears, that the *Common Bench* had been removed; and that ſtatute provides, that it ſhall not hereafter be removed without warning given the ſuitors.

the

the Firſt, does not appear. For *Bracton*, who wrote towards the cloſe of the reign of *Henry* the Third, and was *Chief Juſtice*, ſpeaking of the remaining juriſdiction in it, ſays, "*Habet Rex plures curias in quibus diverſæ actiones terminantur, & illarum curiam habet unam propriam*, SICUT *Aulam Regiam, & Juſticiarios capitales, qui proprias cauſas Regis terminant, & aliorum omnium per querelam, vel per privilegium, ſeu libertatem.*" And afterwards, ſpeaking of the Judges, he ſays, "*Item Juſticiariorum quidam ſunt capitales, generales, perpetui, & majores a latere Regis reſidentes, qui omnium aliorum corrigere tenentur injurias & errores* (a).

Originally only a criminal court, and court of appeal.

Beſides the eſtabliſhment of the *Common Pleas*, the *Aula Regis*, during the reign of *Henry* the Third, had received other conſiderable ſhocks, particularly that of the chancellor's withdrawing from it, and exerciſing his judicial authority alone in a ſeparate apartment. But the preciſe time of the chancellor's ſeceſſion is not well aſcertained, though there is great reaſon to think it took place in the courſe of that reign; and that it was owing to the inteſtine commotions and diſputes which happened, not only between the king and the barons, but between the *Magnates Regni* themſelves when aſſembled together, which wholly prevented the chancellor from performing the ordinary functions of his office in the Great Hall of the Palace, where the ſovereign for the moſt part reſided.

Before this the chancellor had receded from the Aula Regis.

The jarring intereſts that prevailed between the greater barons and the leſs, when convened together, had long called for their ſeparation. In the reign of king *John* they had for a while been diſunited; for the firſt traces which remain of their ſeparation, in the conſtitution of parliaments, are found in the Great Charter obtained in his reign; though omitted in that of his ſon *Henry* the Third, in whoſe troubleſome reign they again claſhed with each other. The continual dangers to which the king and people were expoſed from the factions and contentions of theſe great feudatories when aſſembled, and it not being well ſettled what diſtinct powers the aſſembly of the great or leſſer barons ſhould ſeverally exerciſe, or where the extenſive authority veſted in the *Aula Regis* ſhould reſide, ſeem firſt to have ſuggeſted to young *Edward*, who had ſubdued the potent barons, the great idea of our juridical conſtitution; which he afterwards, upon his coming to the crown, with ſo much credit to himſelf, and happineſs to his ſubjects, firmly eſtabliſhed. This prince has been ſtyled our *Engliſh Juſtinian*; for in his time

Improvements in our legal polity, made by Ed. I.

(a) Theſe words clearly ſhew, that the *King's Bench* originally was no other than a *criminal court*, and *court of appeal*.

the law came to ſo ſudden a perfection, that Sir *Matthew Hale* does not ſcruple to affirm, that more was done in the firſt thirteen years of his reign to ſettle and eſtabliſh the diſtributive juſtice of the kingdom, than in all the ages ſince that time put together (a).

Supreme court of parliament.

King *Edward*'s eſtabliſhment of the conſtitution conſiſted, inſtead of one court of univerſal juriſdiction poſſeſſing a *legiſlative* as well as a *judicial* authority, and exerciſing a ſuperintendant control over ſubordinate juriſdictions, of one ſupreme court called the *Parliament*, compoſed of the ſovereign himſelf, the tenants *per baronium*, and the repreſentatives of other inferior tenants holding *in capite* of the crown; and after the *twentieth* (b) year of his reign of the repreſentatives of the cities and burghs. In this court was veſted the ſole right of legiſlation, and the exerciſe of an appellate juriſdiction in the *dernier reſort* over all cauſes civil and criminal, unleſs of eccleſiaſtical cognizance, which had before been given to the biſhops; but which was only to aſſemble when ſummoned by *writ*. The reſidue of the juriſdiction of the old *Aula Regis* he branched out into different courts (c), which were called *the ſuperior courts of common law, and the king's courts of maritime and military concerns*. He defined the limits of their ſeveral juriſdictions, ſo as not to interfere one with another. To each of them he aſſigned juſtices; and in that aſſignation ſeems to have had a parti-

Appellate juriſdiction.

Other alterations in juriſdiction of the Aula Regis.

(a) *Vide* a ſummary of the improvements made by this prince, 4 *Blackſt. Com.* 425-6-7.; and *Hale's Hiſt. Com. Law.*

(b) I have aſſigned, according to Mr. *Hume*, the 20th year of his reign, 12th Jan. 1269, as the true epoch of the eſtabliſhment of the Houſe of Commons. For though there are ſtill extant, writs from the 49th of *Henry* the Third, to ſummon as well knights, citizens, and burgeſſes to Parliament, yet this was but owing to the ſedition of the Earl of *Leiceſter*. But when Edward the Firſt had got the better of him at the *miſe* of *Lewes*, the burgeſſes were never ſummoned from that time till the 20th of *Edward* the Firſt; from which period, with a few interruptions, the conſtitution of the *Houſe* of *Commons* appears to be regular, though the diviſion, as we find at this day, did not take place till ſome time after. *Vide* Mr. *Hume*, 2 vol. 210. and 1 *Rym.* fol. 802.

(c) Lord *Hale*, in his *Analyſis*, has accurately divided courts into ſuch as are of record, and not of record. The former he ſubdivides into ſupreme, ſuperior, and inferior. The ſupreme is the high court of Parliament. The ſuperior he again ſubdivides into thoſe that are more principal, as the *Lords' Houſe* of parliament, the *Chancery*, *King's Bench*, *Common Pleas*, *Exchequer*, the courts of the *juſtices itinerant*, *ad communia placita & ad placita foreſtæ*. The leſs principal, he ſays, are the courts of *Gaol-delivery*, *Oyer*, *Terminer*, *Aſſize*, *Niſi Prius*, and *Palatinate*, courts of commiſſion of *ſewers*, and courts of *juſtices* of the *peace*. While he comprifes, under the term of inferior courts of record, *corporation courts*, *courts-leet*, *ſheriffs torn*, &c. And courts not of record, he ſays, are *courts-baron*, *county-courts*, *hundred courts*, *admiralty and eccleſiaſtical courts*. And all theſe, he continues, are bounded and circumſcribed by certain laws and ſtated rules, with which all their judicial proceedings and determinations muſt ſquare. *Vide* Lord *Hale's Analyſis*, which, though little read at this day, on account of the excellent *Analyſis* of Sir *William Blackſtone*, ſtill highly merits the attention of the ſtudent.

cular

cular reference to the peculiar provinces of jurisdiction exercised by the great officers respectively who composed the *Aula Regis*. And he reserved to one of these superior courts (that being the court in which he himself presided, and thence stiled the court of *King's Bench*) all such power as was not parcelled out to the rest, and which according to ancient custom was to follow his person in his royal progresses through the kingdom. In this court sate, as representative of the sovereign, the successor of the *Chief Justiciar*, but invested only with the tatters of his authority, whose title was now changed to that of *Chief Justice of England*, constituted by the king's *writ*; while the other judges of the superior courts were all appointed by *patent*. With the change of his name, this magistrate lost his pre-eminence over the chancellor of *England*, which the *Chief Justiciar* had always retained.

Power of King's Bench.

Office of Justiciar now supplied by Chief Justice of England; his power.

To the chancellor, on this division of the courts, was committed the custody of the great seal of England; and, as a consequent thereto, the power of issuing all the king's original writs, whether directed to the supreme, superior, or subordinate jurisdictions. The chancellor therefore sate in a distinct court to hear reasons, why certain writs that were not of course should issue, and by his *fiat* alone the clerks were empowered to make them out. These writs were called *Brevia de Cancellatâ*, in contradistinction to the others, which were denominated *Brevia de Cursu*, and issued on paying the usual fees for them. To the chancellor also, as the king's chaplain, appertained the custody of his conscience, or, in other words, that jurisdiction which must necessarily reside somewhere in every state, which makes pretension to independent privileges, to redress such injuries as the subject may suffer from the more immediate and personal acts of the sovereign. When the king therefore had granted any property or privilege to a subject by *patent*, (which was and still remains the only method of transmitting any property or conferring any privilege by the crown,) as the same passed under the great seal in the chancellor's custody, this officer had, when the grant was either prejudicial, improper, or forfeited, a right to hold plea thereof by a writ of *scire facias* returnable before himself; and if upon the hearing it was found proper to be repealed, to give judgment (a), "*quod* "*predictæ literæ patentes Domini Regis revocentur, adnullentur,* "*& vacuæ & invalidæ pro nullo penitus habeantur & teneantur,* "*ac etiam quod irrotulamentum eorundem cancelletur, cassetur, & adnihiletur.*"

Chancellor, his jurisdiction;

as to issuing writs;

as being king's chaplain;

as respecting patent;

(a) 4 *Inst.* 88. *Bro. Sci. Fa.* pl. 69. pl. 185.

as to inquests of office;

When the sovereign also, upon any inquiry made by his officer, sheriff, coroner, or escheator, *virtute officii*, or by writ sent for that purpose, or by commissioners specially appointed, became *entitled* to lands or tenements, or goods and chattels, to the chancellor's jurisdiction were assigned (when the record thereof was transmitted) all such pleas as might arise thereon upon any claim of a subject; it being an unquestionable privilege from the earliest times, for any one to come in and traverse or deny the sovereign's title. This power of traversing *inquests of office*, as they are called in our law books, in cases where a party is aggrieved, has since been farther extended by several statutes made in the reigns of *Edward* the Third and *Edward* the Sixth, by which the remedy is become universal in cases where the subject before was driven to his *petition of right*.

as to petitions of right.

To the chancellor also, by the illustrious *Edward*, was given a new jurisdiction to redress further injuries affecting the subject from the inadvertence or misconduct of the sovereign; this was by the invention of that universal remedy for such matters, called the *petition of right* (a). Before this time, the subject had but two remedies against the crown, the one the *traverse of office* already mentioned, the other a *monstrans de droit*. This latter was the proper remedy in cases where the subject's title appeared by record to be of as high a nature as the king's. But as there were injuries by which the subject might be affected from the mere act of the crown, and where his title might not appear of as high authority as the king's, or where he could not come in and traverse the record, this prince, in the plenitude of his justice, introduced the *petition de droit*. This was the proper remedy therefore, when the king was in full possession of the hereditaments or chattels, and the one could suggest a right to the same, at once controverting the king's, and grounded on facts alleged in the petition itself. The process adapted to the pursuit of this remedy was as follows: on presenting the petition to the king, it was indorsed by him, *soit droit fait al partie*, and delivered to his chancellor, who issued a commission from the office of the *Petty Bag*, to inquire into the truth of the allegations, unless that trouble was saved by the confession of the king's own attorney. If the commission went, and the title was found by the inquest of the king (b), a second commission might issue, and even a third, to give the petitioner an opportunity to establish his claim. But if title was found to be in the subject (c), there issued another

Monstrans de droit; its defects.

Petition de droit;

how proceeded on.

(a) *Vide* 33 *Edw.* 3. fol. 3. quoted in Bro. *Prerog. de Roi*, pl. 2.
(b) *Stamf. Prerog.* 73. *a.* (c) *Ib.* 73. *b.*

writ

writ before he could interplead with his ſovereign, to inquire alſo into the king's. And the reaſon of it was, that if a verdict on trial was given for the party, the king was concluded for ever.—The judgment being, *quod manus Domini Regis amoveantur & poſſeſſio reſtituatur petenti, ſalvo jure Domini Regis* (a): which laſt clauſe is always added to judgments againſt the king, to whom no *laches* is ever imputed, and whoſe right (till ſome late ſtatutes (b) was never defeated by any length or limitation of time.

Chancellor's juriſdiction over officers of his own court;

The chancellor had alſo juriſdiction given him over all civil matters, (except pleas of land,) wherein any officer of his own court was immediately concerned, and alſo of recognizances taken before him. But if any fact was diſputed either on the *ſcire facias*, *traverſe of office*, or the like, and iſſue was joined thereon, the chancellor was not permitted to try it: for as he had the power of iſſuing writs, he was prohibited from trying matters of fact, leſt he ſhould become as powerful as the *Juſticiar* had been before; and, if he had been ſuffered to try facts, he could eaſily have overturned the whole juridical ſyſtem eſtabliſhed by King *Edward* the Firſt, and the common law itſelf, by making out new writs returnable before himſelf, and giving unprecedented judgments thereon. Therefore in no caſe, when facts were controverted in Chancery, was the chancellor permitted to try them, but was obliged to deliver the record *propria manu*, into the court of *King's Bench*, from whence iſſued proceſs to the ſheriff to impannel a jury, whoſe verdict when taken was indorſed on the record, and returned to the chancellor.

but could not try matters of fact, why.

When tried.

A juriſdiction over theſe ſeveral matters ſeems to have been all that was originally aſſigned to the chancellor by our *Engliſh Juſtinian*; and though at this day it may appear to have been a very confined one, yet when we turn our eyes to the ſituation of things in thoſe days, and recollect that this officer was uſually a biſhop, and firſt miniſter of the country, we cannot but think his forenſic avocation as chancellor afforded ſufficient employment for thoſe hours which were not taken up with the labours of the ſtateſman, or devoted to the duties of the prelate.

Chancellor's power increaſed.

The occurrence of circumſtances ſince the days of *Edward* the Firſt, has given this court that great influx of buſineſs, and acceſſion of power, which it enjoys now by *Engliſh bill*; ſimilar to that ſort of juriſdiction which the court of *Exchequer* drew into it, and ſtill retains. But the peculiar juriſdiction by *Engliſh* bill for matters of equity, exerciſed by the chancellor, ſeems to have ariſen in the following

(a) 2 *Inſtit.* 695. *Finch.* l. 460. (b) 21 *Jac.* 1. c. 2. 9 *Geo.* 3. c. 16.

Proceeding by English bill, how introduced.

manner. In the *Roman* law there was such a thing as an *usufructuary* possession, as distinguished from the thing itself; and when the emperor *Justinian*'s pandects were discovered by the *monks* at *Amalfi*, they were studied with great avidity by the *Romish* clergy, from which they derived the notion of *uses*, and introduced them into this country. For when by the statutes of *mortmain* they were prohibited from purchasing lands in their own names, or from getting possession thereof by a feigned recovery of them in a real action, or by their own inventions, they introduced the custom of having the lands conveyed to their use. These conveyances being regarded in those days as a matter of conscience in the *feoffee to uses*, *John de Waltham*, who was chancellor to *Richard* the Second, by a strange interpretation of the statute of (a) *Westminster* the second, devised the writ of *subpœna*, and made it returnable before himself, to make the *feoffee to uses* accountable to his *cestui que use*. From this scheme the clergy derived great advantages for a while, till afterwards the statute 15th of *Richard* the Second, *chap.* 5. declared such taking to *uses* to be within the compass and purview of the statutes of *mortmain*, and such feoffments were amortized accordingly. But this process of *subpœna* returnable in Chancery, having been once introduced, it was afterwards extended to a variety of other cases in that court, and is now become universal. In an ancient treatise entitled *Diversité des Courts*, which Sir *William Blackstone* thinks was written in the sixteenth century, there is a catalogue of all matters then cognizable by the *subpœna*. The process of *subpœna* also soon found its way into the court of *Exchequer*, and came to be used there on the *equity* side of it, as the fundamental and operative process to bring the parties into court, and from the same root have sprung many bastard slips of *equitable* jurisdiction in the counties palatine, and other royal franchises in different parts of the kingdom. Having said thus much of the juridiction of the court of Chancery, and of those matters which were assigned to the chancellor on the division and establishment of the courts by our *Edward* the First, I shall next proceed to shew what sort of jurisdiction he permitted the *Chief Justice of England* to retain and exercise in the court of *King's Bench*.

Of the subpœna;

which soon found its way into Exchequer.

Power and jurisdiction given to King's Bench by Edw. 1.

To the *King's Bench*, on the distribution of the power of the *Aula Regis*, was allotted a twofold jurisdiction;—the one over all pleas of the crown not relating to the revenue,—the other over such matters between subject and subject as savoured of a *criminal* nature. Of criminal matters or pleas

(a) 13 of *Edw.* 1.

of

of the crown it retained a ſupreme original juriſdiction, and was termed the *cuſtos morum* of the people; as, upon hearing of any offence militating againſt the firſt principles of juſtice or morality, it was empowered to inflict a proper puniſhment for it, and for that purpoſe might iſſue proceſs returnable before itſelf.

The *criminal* matters therefore of which it had cognizance were of all kinds; but they were divided into crimes and miſdemeanors, properly ſo called, and into pleas relating to franchiſes and liberties. As to crimes and miſdemeanors, it had a juriſdiction aſſigned it over every ſpecies thereof, from high treaſon down to the moſt trivial treſpaſs; and it had alſo a controlling power given it over all courts of criminal juriſdiction then in being, or that might be eſtabliſhed. Over ſuch as proceeded according to the common law, by *writ of error*, or *certiorari*; and over ſuch as proceeded in a ſummary way, or in a courſe different from the common law, by *certiorari* only, unleſs ſpecially prohibited by the ſtatute eſtabliſhing ſuch ſummary or extraordinary juriſdiction. If a matter came into this court by *certiorari* before trial, the *King's Bench* might ſummon a jury, and try it at bar; and ſince the ſtatute of *Weſtminſter* the ſecond, may award a *niſi prius* to try it in the country, with the conſent of the king's own attorney. And this court retained ſo much of the criminal juriſdiction exerciſed by the *Aula Regis*, that, upon its removal with the ſovereign, it *ipſo facto* ſuſpended, if not entirely put an end to, all criminal proceedings before any other tribunal.

Pleas of the crown,

and power over all courts of criminal juriſdiction.

Extent thereof.

With reſpect to matters relating to franchiſes and liberties, if any ſubject or body politic had uſurped any franchiſe or privilege, this court iſſued the *writ of quo warranto*, or received an information thereon filed *ex officio* by the proper officer of the crown, or filed ſuch information on their own authority upon facts diſcloſed in the affidavits of private perſons, provided there appeared ſufficient ground for their extraordinary interpoſition. If the uſurpation upon the trial was found unlawful, the party was ouſted, and the franchiſe, if capable of ſeizure, ſeized into the king's hands. Alſo in caſes where otherwiſe juſtice was obſtructed, or the king's charter neglected, in the reign of *Edward* the Firſt, was eſtabliſhed a remedy, at this day frequently in uſe, called a *mandamus*. This writ was framed to command and compel inferior courts, corporations, and magiſtrates, to do that juſtice which in duty they were bound to perform. A *mandamus* is *a writ of right*, as ſome have imagined, founded on *magna charta*, though no inſtance has been traced of its having iſſued earlier than the reign of *Edward* the Firſt; but the

Uſurpations of offices, &c.

by quo warranto;

or neglect of charters, &c.

by mandamus.

Nature thereof.

the court is bound to grant it, if applied for, without imposing any terms on him who demands it. Also when inferior courts exceed the jurisdiction assigned them, this court had the power given it of issuing the *writ of prohibition* to stop any further proceedings, as being then *coram non judice*. And if any subject was illegally confined, he was entitled to the prerogative *writ of habeas corpus*, issuing by the common law out of this court in term-time, or grantable by one of the judges thereof in the vacation. All which seem to have been the principal points of the *criminal* jurisdiction of this superior court, as allotted to it by king *Edward* the First.

Or exceeds of jurisdiction, by prohibition; or illegal imprisonments, by habeas corpus.

Civil branch of jurisdiction,

As to the *civil* branch of its jurisdiction, that originally was very narrow indeed, though at this day it ingrosses most of its attention. For as a court of primary jurisdiction, it had only cognizance of injuries alleged to have been committed *with force*, or in which the defendant was charged with falsity or deceit. Injuries committed with force were all *trespasses vi et armis*, and others of the same nature, as *ejectment*, *replevin*, *rescous*, *pound-breach*, and *forcible entry*. And those wherein the defendant was charged with *falsity* or *deceit*, were remedied by *writs of conspiracy*, *deceit*, and the like; for in all these cases the defendant was liable to pay a *fine* to the Crown, as well as damages to the party complaining. In what manner the court of *King's Bench* obtained cognizance of the various civil actions it now holds plea of, will be seen in the next note; but it must be remembered, that this court was also constituted a court of *appeal* from the *Common Pleas*, and other inferior courts in the kingdom; and that a *writ of error* also lay in it till the 22d and 23d of *George* the Third from the *King's Bench* in *Ireland*, and it also lies in those cases where the chancellor proceeds according to the course of the common law, as upon *petition de droit*, *monstrans de droit*, *traverse of office*, *scire facias* to repeal letters-patent, or on *recognizances*, and *executions upon statutes*. And from this court, as being the superior court of the Lord Paramount, all prerogative process whatever issues to any place which has been, or may hereafter become, a part of the dominions of the Crown; and therefore when King *Edward*, by the conquest of *Wales*, had added that country to his dominions, the *King's Bench* had jurisdiction in *Wales*. When that king had also established his claim as *Lord Paramount* over the king of *Scotland*, the court of *King's Bench* actually sate at *Roxburgh* there, and afterwards summoned the *Scottish* king and his vassals to appear at *Westminster*. So at this day it has a jurisdiction over the *Isle of Man*, the *Norman* isles, and the plantations, by its prerogative writs; but with *Scotland*, *Ireland*, or the private

confined to offences of a criminal nature.

It was a court of appeal.

Its process may run to any part of the king's dominions.

private dominions of the ſovereign, as *Hanover*, it has nothing to do (a).

Common Pleas, its power and juriſdiction.

The court of *Common Pleas*, which had been perfected and eſtabliſhed by *magna charta* at *Weſtminſter*, was next in authority to the *King's Bench*; and as it was erected ſolely for the inveſtigation of the civil concerns of the people, has very emphatically been ſtiled by Sir *Edward Coke*, The *Lock* and *Key* of the Common Law. By King *Edward*'s plan in this court, all cauſes whatever, amounting to *forty ſhillings* and upwards, of a civil nature between ſubject and ſubject, were intended to be decided. For here not only all *real* actions, unleſs where the king himſelf was a party, who might ſue in any of his courts, but alſo all perſonal and mixt actions were to be proſecuted; though in ſome perſonal and mixt actions the *King's Bench* had a concurrent juriſdiction aſſigned it, as in *treſpaſs vi et armis*, *replevin*, *ejectment*, *and the like*: theſe ſavouring of a criminal nature, and in which the defendant was formerly liable to pay a fine to the king.

over all civil offences,

or of a mixed nature.

The *Common Pleas* had alſo a juriſdiction given it over cauſes originally commenced in inferior courts, and at the inſtance of one of the parties, ſometimes upon ſhewing cauſe to the court, at others without ſhewing any cauſe at all, was empowered to award proceſs, as the writ of *pone*, *recordari facias loquelam*, *accedas ad curiam*, and *falſe judgment*, to remove the proceedings. But it ſeems that it had not the power to inveſtigate *errors* in a judgment of a court of record, though ſome lawyers of eminence have ſuppoſed that juriſdiction belongs to it. This court too, as being one of the king's ſuperior courts, was authorized, upon a ſuggeſtion made in term time, that an inferior court, whether temporal or eccleſiaſtical, was exceeding its juriſdiction, or holding plea of matter not cognizable by them, to award a *prohibition*, though no original plea was therein depending. This right of the Common Pleas to grant *prohibition* was ſolemnly diſcuſſed and allowed by all the judges of *England* (b); and *Vaughan* (c) Chief Juſtice, acknowledges ſuch juriſdiction to belong to it. To this court appertained, as it did alſo to the court of *Exchequer*, the right at common law, where any ſuitor of it was impriſoned, to grant the writ of *habeas corpus*; and if he was illegally detained, to diſcharge him: but if it appeared that he was confined for a *criminal* matter, neither this court, nor the court of Exchequer, could proceed to inveſtigate the charge, but were bound to remand him; or elſe, if the offence was bailable, to take bail for

Of removing proceedings from inferior courts.

Not a court of error;

but may award prohibition;

or habeas corpus.

(a) Vide *Burr.* 4 pt. 850. (b) *Mich.* 7 *Jac* 1.
(c) Vide *Vaugh. Rep.* 157. 4 *Inſt.* 99.

his due appearance in a court of criminal jurisdiction (a). And the *Habeas Corpus* Act (b), for the better securing the liberty of the subject, provides, "That it shall be lawful for any "prisoner to move and obtain his *habeas corpus*, as well out "of the high court of Chancery or court of Exchequer, as "out of the court of King's Bench or Common Pleas, or "either of them; and if the said lord chancellor or keeper, "or any judge or judges, baron or barons, for the time be- "ing, of the degree of the coif, of any of the courts afore- "said, in the vacation-time, upon the view of the copy of "the warrant of commitment or detainer, or upon oath "made that such copy was denied, shall deny any writ of "*habeas corpus* by the said act required to be granted, being "moved for as aforesaid, they shall severally forfeit to the "prisoner or party grieved the sum of five hundred pounds."

Court of Exchequer, its power.

The jurisdiction of the *court of Exchequer* has been already discussed, as the establishment of it took place long before the reign of *Edward* the First, though he certainly new-modelled it, when defining and ascertaining the jurisdiction of the superior courts on the division of the power of the great *Aula Regis*.

How divided.

In his time we find the court of *Exchequer* divided into the court of *Pleas*, the court of *Receipt*, (which is the true center into which the sovereign's revenues and profits ought to fall,) the court of *Accounts*, and the court of *Equity* in the Exchequer-chamber, composed of the lord treasurer, chancellor of the Exchequer, and barons.

Of the court of appeal established by Edward 3. in the Exchequer-chamber.

To these courts King *Edward* the Third added another, composed of all the judges of *England*, held on account of some difficulty started in a point of law; the jurisdiction of which arises, when the judges of the respective courts of *King's Bench* and *Common Pleas* are equally divided in opinion, or apprehend great difficulty in a case. Whenever this happens, they are directed by the statute 14 *Edw.* 3. c. 5. to adjourn the matter into the *Exchequer-chamber*, to have it

Use thereof.

argued by all the judges of *England*. Before this statute the record in such cases was adjourned and determined in parliament, which was attended with great inconvenience; but however the same statute ordains, that if all the judges in the Exchequer-chamber are equally divided, it shall be determined at the next parliament by a prelate, two earls, and two barons, with the advice of the lord chancellor, and treasurer, and others of the king's council (c).

Of another court of appeal established also in the Exchequer-chamber.

In the same reign a *court of appeal* was also instituted in the *Exchequer-chamber*, for the examination of errors in the

(a) See *Wood's* case, 3 *Wilf.* 172. (b) 31 *Car.* 2. c. 2. f. 10.
(c) See 4 *Inft.* 68. 110. *Co. Lit.* 72. *b.* and 2 *Bulft.* 46.

Exchequer,

Exchequer, by the ſtatute 31 *Edward* the Third, *c.* 12. Before the eſtabliſhment of this court, errors in the Exchequer had ſometimes been examined before commiſſioners appointed by the Great Seal, and ſometimes in parliament; the uncertainty of which became a conſiderable grievance to the ſubject, and therefore Parliament was petitioned, ſo early as 22d of *Edward* the Third, that the erroneous judgments in the Exchequer might be examined in the King's Bench; but this petition for ſome reaſons was then diſliked, and therefore not acceded to. But the legiſlature ſoon afterwards enacted, "That in all caſes touching the king, or "other perſons, upon a complaint of error in the Exche-"quer, the chancellor and treaſurer ſhall cauſe the record "to be brought before them, and taking to them the judges "and other ſage perſons, ſhall call before them the barons "of the Exchequer to hear the cauſe of their judgment; "and if upon examination error be found, they ſhall amend "the rolls, and ſend them into the Exchequer to have ex-"ecution." This ſtatute however relates only to judgments on the *common law* ſide of the Exchequer, ſo that an appeal to this day from the *equity ſide* lies immediately to the Houſe of Peers.

Uſe thereof.

In the reign of Queen *Elizabeth* (a) another court of *Exchequer-chamber* was eſtabliſhed, for examining errors in cauſes *originally* commenced in the court of *King's Bench*, which, before that time, uſed to be examined in parliament. The practice of this, as well as of the other courts for the inveſtigation of errors in cauſes commenced in the King's Bench and Common Pleas, will be hereafter treated of in the courſe of this work.

Another court of appeal eſtabliſhed in Exchequer-chamber by Queen Elizabeth. Uſe thereof.

To the *inferior courts* King *Edward* conſigned a juriſdiction over all trifling actions, wherein the damage laid did not exceed *forty* ſhillings. For by the ſtatute of (b) *Glouceſter*, it was enacted, "That none ſhould have *treſpaſs* before the "king's juſtices, unleſs he ſwears by his faith that the goods "taken away were worth above forty ſhillings." The conſtruction put upon this ſtatute was, that it was only in affirmance of the common law, and the *treſpaſs* intended was only *treſpaſs on the caſe*, and that it could not mean *treſpaſs with force*; becauſe no *inferior court* was empowered to hold plea of treſpaſs *vi & armis*. On this expoſition of the ſtatute of *Glouceſter*, the caſe of *Lambard* and *Thurſton* (c) ſeems to have been decided, which was an action of treſpaſs, *vi & armis*, and damages laid to *twenty ſhillings* only: to which

Juriſdiction of inferior courts confined to actions not exceeding forty ſhillings.

Affidavit thereof.

No cognizance of treſpaſſes vi & armis.

(a) Stat. 27 *Eliz.* c. 8. (b) 6 *Edw.* 1. c. 8.
(c) *Carth.* 108.

decla-

declaration the defendant demurred, and inſiſted, that the court of *King's Bench* had no juriſdiction, the damages alleged being under *forty ſhillings*. But to this objection the court anſwered, that if treſpaſs *vi & armis* under forty ſhillings did not lie in a ſuperior court, the party had no redreſs in ſuch caſes, becauſe the *fine* (a) impoſed in ſuch action could not be ſet by an *inferior court*, meaning a court *not of record*.

Affidavit now diſuſed.

The affidavit required by the ſtatute of *Glouceſter*, previous to the commencement of an action in the ſuperior courts, "that the matter in diſpute amounted to forty ſhillings," has long ſince been diſuſed in the *King's Bench* and *Common Pleas*, though in the latter, as well as in the court of *Exchequer*, it is ſtill a frequent motion to diſmiſs the cauſes of ſuch trifling account, as beneath the dignity of the court.

But trifling cauſes diſcouraged by the different acts eſtabliſhing courts of conſcience.

The legiſlature, however, willing to reſtore to the inferior courts that portion of juriſdiction originally intended by the common law, and confirmed by the ſtatute of *Glouceſter*, and of which they have been deprived by the diſuſe of the affidavit preſcribed by that ſtatute, has by a ſide-wind endeavoured to revive their conſequence by the ſeveral ſtatutes made to deprive the plaintiff of the coſts of his ſuit, upon obtaining a verdict in caſe the damages found by the jury do not amount to *forty ſhillings*.

As to *maritime* and *military* affairs, and offences committed within the limits of the royal reſidence, which, with other matters, were cognizable by the *Aula Regis* originally, king *Edward* aſſigned them, on the diviſion of the courts, to the peculiar ſuperintendence of the *marſhal* and *conſtable*, to whom they were before uſually referred.

Section II.

Of the increaſed Juriſdiction of the Court of King's Bench over Civil Actions; their Proceſs to bring the Defendant into Court, and of their Proceedings by Special Original, and the Fine payable thereon.

The court of King's Bench originally confined to criminal offences.

The court of *King's Bench*, we have ſeen in the former ſection, had, on its eſtabliſhment, an original juriſdiction over all *criminal offences* or *pleas of the crown*, and of ſuch civil matters only as were in *breach of the peace*, and therefore denominated *treſpaſſes*. This appears plainly by

(a) The fine originally impoſed in ſuch actions is taken away by the ſtatute 5 *W. & M.* c. 12. as being oppreſſive to poor defendants, who were liable to be outlawed for non-payment thereof, being a debt due to the Crown.

the

the treatiſes of *Britton* and *Fleta*, who wrote in the reign of *Edward* the Firſt, and who deſcribe the juriſdiction of this court in civil matters to be, "to amend falſe judgments, "determine appeals, and other treſpaſſes committed againſt "the peace, & *enconter notre juriſdiction*," which is, ſays Sir *Edward Coke*, to grant *prohibitions*. Tied up to the trial of criminal offences and treſpaſſes only, the inveſtigation of the erroneous judgments of inferior courts, and the preſervation of the due bounds and limits aſſigned to the reſpective juriſdictions inſtituted by the crown, this court found itſelf left with little or no buſineſs to engage its attention: ſo little indeed, that a few days in term-time ſufficed to tranſact it; and as they did not ſit *de die in diem*, continuances of all that was done in each ſeparate matter before them, were entered from the day they ſat, till the day fixed for their meeting again. From this ſmall ſhare of employment too, a great part was again taken off by the *Juſtices in Eyre* *, of *Oyer and Terminer* *, *and Gaol-delivery* *, and the *conſervators of the peace* in the country; to which juſtices in their circuits, the trial of all criminals in the reſpective counties through which they paſſed was referred. But it was not long before this court contrived to increaſe its juriſdiction in civil actions.

Little buſineſs.

* See the origin of theſe Sec. vi.

Soon contrived to increaſe it.

The neceſſity which had called for the eſtabliſhment of a conſtant court in the capital, ſhewed itſelf more and more. The particular connection formed with the continent, and the intercourſe opened with other countries in *Europe*, had introduced a ſpirit of commerce amongſt the people. Foreigners were permitted to reſort here, and carry on trade, without moleſtation or hindrance. A ſpeedier way for the recovery of debts had been inſtituted in the reign of *Edward* the Firſt, by granting execution, not only upon goods and chattels, but alſo upon lands, by writ of *elegit*, which was of ſignal benefit to a trading people; and upon the ſame commercial ideas, former reſtraints upon landed property were taken off, and the charging it in a *ſtatute merchant*, to pay debts contracted in trade, was allowed, contrary to all feodal principles. [See Sect. iv.] Theſe improvements inſenſibly wrought a wonderful change in the manners of the people. Trade began to be embraced by thoſe orders of men who had formerly looked upon it with an eye of contempt; and while the merchant and mechanic grew rich by the returns of their induſtry, the nobleman, by endeavouring to ſurpaſs the citizen in magnificence, was greatly impoveriſhed, and his tenants oppreſſed by the ſlaviſh burdens impoſed on their tenures. In this progreſs of ſociety, litigations unavoidably increaſed; the contracts and engage-

Cauſes thereof.

ments

ments entered into in trade, the mutual credit neceſſarily required, the failures of ſome, and the diſhoneſty of others, together with the contrariety of opinions and conſtructions to which their engagements were liable, all conſpired to open new ſources of diſpute. The multiplicity of cauſes, ariſing from theſe various circumſtances, required a ſpeedy inveſtigation and diſpatch; but the inferior courts were too circumſcribed in their juriſdiction to hear and determine the far greater part of them. The parties, therefore, at firſt, were of neceſſity, compelled to reſort to the *Common Pleas* for redreſs; which occaſioned a great diſproportion in the buſineſs referred to the two ſuperior courts: the one, having a ſole juriſdiction over *civil* tranſactions, became fully employed; while the other, confined to *criminal* matters, pleas of the crown, and the keeping of inferior courts within their proper bounds only, found little or nothing to do.

Multiplicity of buſineſs in C. B.

The court of *Exchequer*, indeed, had very early drawn ſome civil actions between ſubject and ſubject, not in the leaſt relating to the revenue under their cognizance; and although the ſtatute of (a) *Rutland*, and the ſtatute of (b) *articuli ſuper chartas*, were evidently meant to prohibit them in future from holding plea of *any civil matter* between the people, yet they retained the juriſdiction they had uſurped in defiance of them, by conniving at the complainant's *falſely ſuggeſting* that he was a *debtor to the king*; which the plaintiff was not called upon to ſhew, nor the defendant allowed to diſpute. But the judges of the court of *King's Bench* had not, from the particular juriſdiction preſcribed to them, or the nature of their proceſs, which we have ſeen was calculated only for *treſpaſſes*, an opportunity of receiving complaint of any civil matter, or awarding proceſs againſt the defendant, unleſs it was for a *treſpaſs*; and therefore could not uſurp an immediate juriſdiction over civil matters, as the court of *Exchequer* had done. However, it was not long before an opportunity offered itſelf of drawing an action, which was merely civil in itſelf, under their cognizance; and their juriſdiction over that being once eſtabliſhed, other ſchemes were ſoon deviſed to enlarge it.

Court of Exchequer got cognizance of civil actions,

by fiction of quo minus.

Why court of King's Bench could not do this.

The *common law* had not provided an effectual remedy for many injuries to which the progreſs and extenſion of commerce gave birth. For the contracts made between merchants, and others in trade, were of ſuch various ſorts; and men were affected by non-performance of them in ſuch different ways, and ſuch *new* and *conſequential* injuries aroſe,

How they afterwards had an opportunity,

(a) 10 *Edw.* 1. (b) 13 *Edw.* 1. ſtat. 3. c. 4.

to

to which no writ in the regiſter was properly adapted; that the legiſlature was forced to provide, ſo early as the 13th of *Edward* the Firſt, that, "Whenſoever from thenceforth in "one caſe a writ ſhall be found in the *Chancery*, and in a "like caſe falling under the ſame right, and requiring like "remedy, no precedent of a writ can be produced, the "clerks in *Chancery* ſhall agree in forming a new one; "and if they cannot agree, it ſhall be adjourned to the next "parliament, where a writ ſhall be framed by conſent of "the learned in the law; leſt it happen for the future, that "the court of our lord the king be deficient in doing juſtice "to the ſuitors." In conſequence of this ſtatute a variety of new writs were invented; and a ſuitor who had received an injury to which no writ then in being was competent, had one made out for him according to the exigency of his own particular caſe. And the action founded thereon was called *a ſpecial action of treſpaſs on the caſe.*

by the introduction of ſpecial writs in actions of treſpaſs on the caſe;

Of this ſort of action the court of *King's Bench* contended they had cognizance, and that the *original writ* might, at the plaintiff's requeſt, be made returnable, as well in that court as in the *Common Pleas*; as the action was for a *treſpaſs*, of which they had an original juriſdiction: and though not alleged to be committed *vi et armis*, yet *favoured* ſo much of a *criminal nature*, as to make the defendant liable to pay a *fine* to the king, as well as damages to the party complaining.

of which the King's Bench took cognizance.

Not contented with a participation of all actions *on the caſe* with the *Common Pleas*, the *King's Bench* contrived alſo to ſhare with them the actions of *debt*, *detinue*, *covenant*, and *account*. But as theſe actions were merely *civil* in themſelves, the cognizance thereof could not be obtained in the ſame manner as the former, by procuring the *original writ* to be made returnable there, nor could it have been maintained (if it had been attempted) in ſo plauſible a manner as the action of *treſpaſs on the caſe*. So that, to draw theſe into their court, they were obliged to reſort to a fiction, in like manner as the court of *Exchequer* had done. This fiction was by ſuffering the plaintiff, after having alleged a complaint of *treſpaſs* againſt the defendant [in order to give the court juriſdiction], to waive his firſt charge of *treſpaſs*, when the defendant was brought into court, and declare againſt him for a debt, breach of contract or covenant, detention of his goods, or other matter of a mere civil nature. And to ſupport this new juriſdiction the judges maintained, that when a party was once brought into court, and either in the actual or ſuppoſed cuſtody of the *marſhal*, he could not be charged, even for any *civil* matter, elſewhere. By this doctrine, they not only got cognizance of that plaintiff's action who had

How extended to other actions,

by ſuffering declarations in other actions.

caused the defendant to be apprehended, but also of the actions of others who had liberty to charge him while he remained in such custody (a). And in order to found this jurisdiction, they held that it was not necessary that the defendant should be actually the *marshal*'s prisoner, but the plaintiff might presume him to be so, since he was already amenable to the court: and on this presumption it is, that at this day, as soon as the defendant appears, or puts in bail to the process, he is deemed, by so doing, to be in such custody of the *marshal*, as will give the court jurisdiction to proceed; it having been solemnly adjudged (b), that if any person be *in custodia mareschalli*, &c. be it by commitment, or by *latitat*, bill of *Middlesex*, or other process of law, it is sufficient to give the court jurisdiction of any matter referred to them. And to vindicate this, Lord *Coke* says, "And the rather, for "that the court of *Common Pleas* is not able to dispatch all "the subjects causes, if the said actions should be confined "to that court. And seeing none but serjeants at law can "practise in the court of *Common Pleas*, it is necessary, that "in this court of *King's Bench*, apprentices and other coun-"sellors of law might by experience enable themselves to be "called serjeants afterwards; otherwise, serjeants must "want experience, which is the life of their profession." This acquired jurisdiction is now fully established. For, says the same learned writer, "The proceedings in the court "of *King's Bench* for so long time, and under so many ho-"nourable judges, and reverend sages of the law, have got-"ten such a foundation as cannot, without an act of parlia-"ment, be shaken." Of such an act ever being passed there is not the least probability, since the legislature has, in several instances, confirmed its acquisition. Nor indeed can such an act ever be thought of, since not only the amazing increase of causes, from a wide-extended commerce, requires more than one court to investigate and determine them; but the inconveniences formerly experienced by the frequent removal of this court, have long ceased to be apprehended, and the parties can carry on their cause with equal celerity and cheapness, and find the same justice done them on the one side of *Westminster-hall*, as on the other.

on the supposition of defendant being in custody of the marshal.

This jurisdiction became established.

In this manner has the court of *King's Bench* obtained a concurrent jurisdiction, and now holds, as it were, a *divisum imperium*, with the court of *Common Pleas*, over all civil actions of a personal, and some of a mixt nature. Its *original* jurisdiction, we have seen, of causes between subject and

(a) Which is the foundation of the practice of delivering declarations *by the bye*, as it is now called.

(b) 31 *Hen.* 6. 10. *b.* 4 *Inst.* 72.

subject,

ſubject, was only of ſuch as were of a *tortious* kind, as all *treſpaſſes*, *reſcous*, or *pound-breach*, actions of *deceit*, *conſpiracy*, *forcible entry*, *ejectment*, *replevin*, and *treſpaſs on the caſe*. Whereas its acquired juriſdiction, or rather that juriſdiction which is by conſequence only, as being founded upon the defendant's being in the ſuppoſed or actual cuſtody of the *marſhal*, comprehends all actions of *contract*, whether expreſs or implied, *debt*, *annuity*, *covenant*, *account*, *caſe for negligence*, *non-feaſance*, *mal-feaſance*, *mis-feaſance*, and the like.

This juriſdiction nearly deſtroyed, by 13 Car 2. requiring true cauſe of action to be in writ.

But this acquired juriſdiction had nearly met with a fatal blow, without any ſuch intention of the legiſlature, in the reign of *Charles* the Second; when an act was paſſed (a), requiring *the true cauſe of action to be expreſſed particularly in the writ or proceſs*, otherwiſe the party arreſted could only be held to bail for 40*l*. This act was made for the purpoſe of relieving defendants from being held to bail without knowing upon what ground, no cauſe being mentioned in the writ, and was not deſigned to affect the juriſdiction of the courts. But as the *King's Bench* had ſtrictly only cognizance in matters of treſpaſs, which word was neceſſary to be inſerted in the proceſs, in order to give the court juriſdiction, and it was not till after the party had been ſo brought into court, and was ſuppoſed to be in their cuſtody, that any other civil action, as debt or the like, could be brought againſt him; a difficulty now aroſe how this ſtatute could be complied with, which required the real cauſe of action to be expreſſed in the writ, whereby the defendant was to be arreſted (if to be held to bail for more than 40*l*.). And, indeed, there would have been an end of their inveſtigation of civil actions of any conſiderable amount, if the court had not hit upon ſome expedient to ſave their aſſumed juriſdiction from being overthrown and deſtroyed.

How guarded againſt.

To their *bill or latitat*, commanding the ſheriff to arreſt the defendant to anſwer the plaintiff in a plea of *treſpaſs*, (provided the cauſe of action warranted the holding to bail in above 40*l*.) they inſerted an *ac etiam* clauſe, ſpecifying the true cauſe of action in this manner: "*And alſo*, to a "bill of the ſaid *A. B.* for one hundred pounds of *debt* (or as "the caſe happened to be) *according to the cuſtom of the court* "*of our lord the king, before the king himſelf to be exhibited*, "and that he have then there this," &c. as the caſe was. By this device the ſtatute was complied with, as the true cauſe of action was expreſſed in the proceſs to warrant the defendant's inſiſting upon bail to above *forty pounds*, and the court ſtill retained its juriſdiction, as the *civil* matter was

Introduction of the ac etiam.

Uſe thereof.

(a) 13 *Car.* 2. ſtat. 2. c. 2.

ſuggeſted to be only a collateral charge, and not the cauſe of action for which the arreſt was made—which was ſtill the *treſpaſs* ſuppoſed to have been committed, of which the court legally had cognizance.

Diſputed by C. Juſt. of C. B.

This curious device to retain their uſurped juriſdiction over *civil actions*, which, if not ſuggeſted, was certainly connived at by Sir *John Keelynge*, the then chief juſtice of the *King's Bench*, occaſioned a ſtrong remonſtrance from Sir *John Vaughan*, the then chief juſtice of the *Common Pleas*. For the judges and officers of the latter flattered themſelves upon the paſſing of this act of *Charles* the Second, that the cognizance of all *civil matters* would again revert ſolely to their court; the true intent of the act being, as they contended, that there ſhould be a proper *original writ* ſued out at the commencement of the ſuit, in all actions *bailable*, and that the true cauſe of action ſhould be inſerted in it, and its ſubſequent proceſs: and that the *King's Bench* muſt of neceſſity relinquiſh their uſupation over civil actions not amounting to a *treſpaſs*; becauſe their proceſs of *bill*, which was founded on their original juriſdiction over injuries committed *contra pacem*, was calculated only for ſuch as were denominated *treſpaſſes*. Sir *John Vaughan* frequently endeavoured to diſſuade the chief juſtice from the uſe of theſe *ac etiams* in his court, urging, that they were not only in face of the ſtatute, but founded on an allegation (viz. *ſecundum conſuetudinem curiæ*) that was falſe and contrary to law, there being no ſuch cuſtom to warrant them. But notwithſtanding all that Sir *John Vaughan* could ſay againſt the uſe of them, the chief juſtice of the *King's Bench*, though without a ſhadow of argument, was obſtinately determined not to

agreed to be referred.

ſurrender up the uſurped juriſdiction of his court. At laſt, it was agreed between the two chiefs to diſcuſs the matter before Sir *Matthew Hale*, then *lord chief baron of the Exchequer*, who ſhould preſide as moderator between them. This reference turned out very fortunate for the chief juſtice of the *King's Bench*; for his opponent, in his declamation againſt the unwarrantable uſe of theſe *ac etiams*, happening to go too far for his purpoſe, in contending that the cognizance of all *civil actions* of right belonged to the *Common Pleas* only, Sir *Matthew* perceived that ſuch argument aimed as well at overthrowing the uſurpations of the *Exchequer* as of the *King's Bench*; and that if the *Common Pleas* re-aſſumed its original juriſdiction, and the ancient boundaries were again ſet up between the courts, and neither the *King's Bench* nor the *Exchequer* were to interfere in perſonal actions between ſubject and ſubject, the *Common Pleas* would ſhine with all its former ſplendour, and leave the other courts with little

little or no buſineſs to engage their attention. Sir *Matthew* therefore begged to decline the umpirage, and left the two chiefs to ſettle their difference. Sir *John Vaughan* ſoon afterwards died, and from that time the practice has never been diſputed. Umpirage declined, and practice continued.

Thus has the court of *King's Bench*, by continual uſurpations, (if the expreſſion may be allowed,) gradually regained that juriſdiction over civil actions which the *Aula Regis* exerciſed of old, but which the *Common Pleas* was purpoſely formed to inveſtigate, and ought ſtrictly to have had the ſole cognizance of.

It may be uſeful to the ſtudent, as a ſummary of what has been ſaid, briefly to point out the ground upon which the various actions in the court of King's Bench are now maintained. Of treſpaſſes *vi et armis*, ejectment, replevin, deceit, conſpiracy, and the like caſes ſavouring of a criminal nature, they have cognizance by their original juriſdiction. Over actions of treſpaſs on the caſe, they uſurped an authority catching hold of the word treſpaſs mentioned therein; but it was at firſt only a derivative authority, the original writs out of Chancery in ſuch actions being made returnable in that court as well as in the Common Pleas, until the original afterwards grew into diſuſe. [See Sect. 4.] Over actions of debt, detinue, annuity, covenant, account, and the like, of a purely civil nature, they obtained juriſdiction by mere fiction; firſt by filing a bill for ſome ideal treſpaſs in order to bring the defendant into the actual cuſtody of the marſhal, (when we find he was amenable to all charges brought againſt him,) and then declaring in ſuch civil action, and afterwards by *ſuppoſing* him to be in ſuch cuſtody, and proceeding againſt him in ſuch action in the firſt inſtance. In this way they alſo afterwards proceeded in actions on the caſe, and diſcontinued ſuing out the original. But this juriſdiction is only in ſuch actions when the defendant is not to be held to bail; for where he is arreſted for any *debt* or the like, there the juriſdiction of the *King's Bench* hangs upon the ſubtle expedient of the introduction of the *ac etiam* into their proceſs. On what grounds court now exerciſes juriſdiction over the various civil actions. Original juriſdiction. Derivative. Fictitious. Ac etiam.

It is for this reaſon that it has been doubted whether an action of debt, covenant, or the like, could be brought in the *King's Bench* by ſpecial original. And there is certainly ſome colour for the objection; for although ſuch an original writ might be granted in caſes where this court had original juriſdiction of their own, as treſpaſs and the like, in which actions the parties might proceed by bill, or by ſpecial original out of *Chancery* returnable in *King's Bench*; and further, although in another ſpecies of action, namely, treſpaſs on Of the objection to an original in debt in K. B.

the caſe, they had openly uſurped a derivative juriſdiction, and ſuch ſpecial originals out of *Chancery* were made returnable there; yet they never pretended to any ſuch cognizance over debt or covenant, but only encouraged ſuch actions by a fictitious and bye way of proceeding: and in former times all originals out of *Chancery* in ſuch civil caſes were returnable in the *Common Pleas*.

All actions now, by bill or original.

But the juriſdiction of the *King's Bench* in this reſpect, by time, and the undiſputed exerciſe of the right, is too firmly eſtabliſhed to be now ſhaken. All perſonal and mixed actions (*real* actions being ſtill confined to the *Common Pleas*) may therefore, at this day, be proſecuted in the *King's Bench*, either by bill (the peculiar proceſs of that court) or by ſpecial original out of Chancery. We proceed to ſhew the nature of this proceſs by bill, and afterwards by original, and the reaſon why actions in both courts are now ſeldom brought by ſpecial original.

As to juriſdiction over peers by bill, ſee *poſt*.

Of the Proceſs to bring the Defendant into Court when the Proceedings are by Bill.

Supreme power of K. B.

The court of *King's Bench*, from its ſupreme juriſdiction over criminal matters, immediately upon its coming into any county, (for it always followed the king,) ſuperſeded the ordinary adminiſtration of juſtice by the general commiſſions of *Eyre*, and of *Oyer* and *Terminer*, and all parties who had received any injury, accompanied with force, had liberty to

Original bill.

apply to it for redreſs. This was done by the plaintiff drawing out his complaint, and which muſt have alleged a treſpaſs, and entering it on the records of the court, this was

Bill of Middleſex.

called the original bill, or bill of treſpaſs. The clerk of the court then iſſued a peculiar ſpecies of proceſs, intitled a bill of that county in which the court happened to be ſitting, now called the bill of *Middleſex*, which is ſigned with the name of the chief clerk to inrol pleas in the court; namely, *Mansfield* and *Way*; and the words "By Bill" are ſubſcribed, ſignifying that the action is by bill, and not by original; which bill was always firſt actually filed, and is ſtill *ſuppoſed* to be filed. This ſecond bill was directed to the ſheriff of the county, the proper officer to execute the king's

A precept.

writs; but this was rather a *precept* than a writ, as it was not

Effect thereof.

teſted, which writs are. The ſheriff was thereby commanded to take the body of the defendant, and have it on a certain day mentioned therein, in court, *wherefoever the lord the king ſhould be in England*; for as the court was ambulatory, no certain

certain place could be mentioned. If the sheriff apprehended him, he kept him in custody, and produced him in court on the return-day; it was at his peril to let him go at large. [See Sections 4 & 5.] He then made a return *cepi corpus*. But if he could not find him in his county, he returned *non est inventus*; and another bill, called a *testatum* bill, issued to the sheriff of such other county where it was likely for him to be found, reciting the former bill and return, and commanding the sheriff of the latter county to take him; this afterwards was called the *latitat*; and instead of suing out the bill of Middlesex, it became the practice, for expedition sake, to sue out the *latitat* in the first instance, and to *suppose* that the bill had previously issued, the form thereof of reciting such bill still continued with a little variation as to the day when it was returnable; for as no such day existed in fact, it was dangerous to specify any; it stated it generally, therefore, *at a certain day now past*. If the defendant was not taken upon the *testatum*, an *alias* and then a *pluries testatum* issued, and so on, to the same effect as the *alias capias* and *pluries capias* at this day, if he is not taken upon the *latitat*. If the defendant had fled into a liberty, and upon a warrant from the sheriff to the bailiff of the liberty nothing was done, the sheriff returned *mandavi ballivo, &c. et nullum dedit responsum*, and there then issued a writ to the sheriff, not to omit taking the defendant notwithstanding the liberty called a *non omittas* writ. When the defendant was taken, he was kept in custody till the return of the writ, he was then brought into court, and delivered over to the care of the king's marshal, earl marshal, or steward of the household, who had the custody of all the prisoners in the court of King's Bench, and detained them in the Marshalsea prison. From the office of earl marshal was derived that of the present marshal of the King's Bench prison, about the reign of *James* the First.

Return thereof.

How if defendant not found.

Testatum bill.

Latitat.

Alteration therein.

Alias, pluries testatum.

Capias.

Non omittas.

How when defendant taken.

Of the office of marshal.

When the defendant was thus in custody, he was suffered to put in bail, to stand the event of the suit, at the discretion of the court, or was brought up from time to time by the marshal till the matter was finally heard and determined. The plaintiff then delivered his bill or declaration, which was nothing more than a copy of the original bill; and the defendant answered thereto, and the plaintiff replied, and so on *ore tenus*, the whole of the proceedings being carried on *vivâ voce* in court; which practice continued till after the Reformation. [See Section 6.] But from the 13th *Edward* the First, the defendant was at liberty to attend the court by his attorney, whereas before that time he was obliged to be present in person.

Declaration.

Proceedings ore tenus.

When attorney allowed.

Neceſſity of original bill on error brought.

It has been obſerved that it gradually became the practice, which ſtill continues, of ſuing out the bill of Middleſex or *latitat* in the firſt inſtance, without any original bill, or bill of treſpaſs, previouſly filed. But ſtill it was ſuppoſed to have been filed; and the want thereof was cauſe of error, if a writ of error was afterwards brought. The court, therefore, in order to protect ſuch judgments grounded upon a fiction they themſelves connived at, permitted the plaintiff, in caſe a writ of error was brought, to file his *bill* of complaint; and, if neceſſary, to get the precept or bill of Middleſex returned as if regularly done at firſt, provided he did it before errors were aſſigned, but not afterwards. And this is even now neceſſary, where a writ of error is brought after judgment by *default*, but not after verdict. The want thereof in the latter caſe being cured by ſtatute of Elizabeth.

How allowed to be filed.

Of the Proceedings by Original in K. B. *and of the Fine payable thereon.*

It has been already ſhewn, that actions may be brought in the *King's Bench* either by bill or ſpecial original out of *Chancery*. If the latter mode be adopted, the proceedings are the ſame as in the court of *Common Pleas*; the whole of whoſe juriſdiction is derived from ſuch original writs, which are either actually, or ſuppoſed to be, ſued out and returnable therein.

Uſe of proceeding by original.

In ſome caſes it is uſeful to proceed in this court by *original*: firſt, if the party abſconds and the plaintiff wiſhes to outlaw him; for no outlawry lies upon any other proceſs; and ſecondly, if defendant is likely to bring a writ of error; in which caſe he muſt, in the firſt inſtance, carry the record from this court to the Houſe of Lords, which is too ſerious a matter merely for delay, whereas in proceedings by bill he may bring a writ of error in the Exchequer-chamber.

Proceedings alſo againſt a peer of the realm ſhould properly be by *original*, otherwiſe the defendant may plead in abatement; but if he does not then take advantage of it, it is too late afterwards to ſet the proceedings by *bill* aſide. *Earl of Lonſdale* v. *Littledale*, 2 H. Bl. Rep. 267. 299.

Of the fine payable thereon.

But the great objection againſt commencing a ſuit by ſpecial original is the fine, which in all ſuch caſes is payable to the king, the nature of which it may be uſeful to explain; and in ſo doing it may be proper to take notice as well of the *fines* formerly payable by the ſuitors in the ſuperior courts, as of thoſe which continue to this day to be exacted from them by

by the crown. All *fines* and *amerciaments* (a) (says *Bracton*) belong to the king, as *fines* upon original writs, and fines *pro licentia concordandi:* and the reason is, because courts of justice are supported at his charge; and whenever the law puts the *king* to any charge for the support and protection of his people, it provides him money for that purpose, which is called *vectigal judicorum. Fines* were originally of several sorts (*Beecher's case*, 8 Co.): some in nature of an exaction by the king upon giving leave to a subject to prosecute a suit in his superior courts; others in nature of a penalty set on offenders after conviction, and on plaintiffs failing in their suits; on parties making false claims; or for fraud and deceit to the court; for vexation under colour of law; for contempt against the king's writs or statutes. Others again in nature of an imposition set by the court on the suitors, with a view to enforce plainness and perspicuity in pleadings. These latter were imposed even in the inferior courts, till the statute of *Marlbridge* (52 *Hen.* 3. c. 11.) provided, "that neither in the circuit of justices, nor in counties, hundreds, and courts-baron, any fines shall be taken of any man *pro pulchre placitando*, or *beaupleading*." Which statute was further enforced, and made to extend to the superior courts also, by the statute *Westminster* the first (3 *Edward* 1. c. 8.). But the former species of *fines* have been suffered to continue. And they were formerly of money, or other things, as money was exceedingly scarce. Sir *Matthew Hale* gives an instance of a *fine* paid at the commencement of a suit between the men of *Yarmouth* and *Hastings*, in the reign of king *John*, in these words, "*afferunt domino* "*tres palfredos, & sex asterias narenses ad inquisitionem habendam per legales*," &c. which *fine* we see was of three statehorses, and six herons or egrets. So exorbitant were the *fines* upon original writs, exacted from the subject in the reign of this king, whose misfortune it was not to know in what manner to use his prerogative, that they made one amongst the many complaints of the times, and seem to have occasioned the 44th article in the great charter; wherein the sovereign expressly stipulated in these words, "*nulli* "*vendemus, nulli negabimus, nulli differemus justiciam vel* "*rectum*." But notwithstanding this concession, *fines* did

Fines belong to the king.

Different sorts of fines.

What fines taken away.

What continue.

How formerly paid.

Grew exorbitant.

Remedy applied.

(a) The difference between a *fine* and *amerciament* is this, an *amerciament* is ordered by the court, but affeered by the jury; but a *fine* is not only ordered, but assessed by the court. And as for *amerciaments* which are ordered and assessed by the court upon officers who are in contempt or in default of their duty, these seem to be rather *fines* than *amerciaments*, though they are commonly so called: and yet it hath been held, that where a *pecuniary penalty* is assessed by the court upon an officer, it is properly an *amerciament*, but when on a stranger, it is a *fine*.

not

not ceaſe to be required from the ſubject, upon obtaining leave to ſue in the king's courts. For the ſovereign's right to exact *fines* in ſuch caſes was not at all in diſpute, the barons only meaning to guard by the charter, that they ſhould hereafter be impoſed with moderation: having regard to the importance of the action, and ability of the party; as in criminal caſes the court always conſiders, as well *qualitatem delinquentis*, as *quantitatem delicti*, as directed by the ſtatute of *Weſtminſter* the firſt, ch. 6. In conſequence therefore of this proviſion in *magna charta*, the payment of *fines* was put on a regular footing, and as they were reduced to a certainty inſtead of being *ad libitum* of the ſovereign or his chancellor, and not ſo exceſſive as before, they were agreed to without any great heſitation.

Fines became afterwards fixed.

Of the time of paying it.

With regard to the time of paying the *fine*, and of whom it ſhould be exacted in civil actions, there was a diſtinction. For if a plaintiff ſued for a *debt*, and took out the *præcipe quod reddat*, he paid the *fine* immediately to the *curſitor* in proportion to his demand. And here the *fine* could be taken at firſt, the plaintiff having aſcertained his demand, for which the *curſitor* could eaſily apportion the ſum due for the *fine*; which ſum is mentioned, ch. 5. ſec. 1. But if he took out a *pone*, or *ſi te fecerit ſecurum*, with a view only to recover a ſatisfaction in general, the *fine* could not be taken at the firſt; becauſe the intervention of a jury was neceſſary to aſcertain the plaintiff's demand. And as this was the proper writ for *treſpaſs*, and conſequential injuries ariſing from the neglect or deceit of the defendant, *he* was to pay it, and the amount of it was to be regulated by the damages given in the judgment; and an award of the writ of *capiatur pro fine* in ſuch caſes was entered up after the judgment, in this manner, "*& prædictus defendens capiatur.*" A ſimilar entry was alſo made, and a like writ iſſued, in all caſes after a judgment in the *King's Bench* in a ſuit there by *bill*, which was the proceſs of that court for *treſpaſſes*, and ſuch like injuries committed *contra pacem*, for which a *fine* was always payable.

When on commencement of ſuit.

When after judgment.

Of the capiatur pro fine.

Fines gave riſe to the joinder in action.

From the nature of theſe *fines*, and manner of taking them, aroſe the *joinder in action*, as it is termed in our law books. For all matters of debt, which the plaintiff had againſt the defendant, could be put in one and the ſame writ, becauſe the *fine* could be taken at once by the *curſitor* upon making out the writ. But the plaintiff could not ſue for a debt, or ſpecific demand, and a *treſpaſs* or other conſequential injury, by one and the ſame writ; becauſe the *fine* for the *debt* was payable at firſt by himſelf, and for the *treſpaſs*, after the ſuit was determined, by the defendant: the amount whereof could

As if they occaſioned different judgments.

could not be known till it was impoſed by the court, and the court could not impoſe it till a jury had aſcertained what damage, injury, or vexation the plaintiff had ſuſtained. Beſides, the judgments in *debt* and in *treſpaſs* were different; for after a recovery in an action of debt, there was alſo a judgment *quod ſit in miſericordia*, for the *amerciament* (a), which was to be aſſeered in the county; whereas in *treſpaſs*, after the recovery of damages, there was a judgment *quod capiatur* for the *fine* to the crown. Nor could *treſpaſs* and *treſpaſs on the caſe* be joined in one and the ſame writ; becauſe, as the firſt favoured of a *criminal* nature, there was a *quod capiatur*; and as the laſt was only a *civil* injury, a *quod ſit in miſericordia* was entered.

How payment of fine avoided.

When it became the practice for plaintiffs in perſonal actions immediately to ſue out the writ of *capias quare clauſum fregit*, in order to arreſt the defendant, and thereby ſooner compel an appearance [for which ſee Section iii.], they avoided in great meaſure the paying of the *fine* to the crown. For upon a *capias* no *fine* was exacted; becauſe the writ was ſuppoſed to iſſue for a *treſpaſs*, though the court winked at a plaintiff's declaring in *debt*, *covenant*, or the like action, when the defendant was brought into court. And when the ſtatute of 13 *Car.* 2. was made, requiring the true cauſe of action to be expreſſed in the writ to hold the defendant to bail in above *forty pounds* upon the arreſt, the plaintiff had ſtill an opportunity of avoiding the *fine* upon ſuing for a *debt*, (unleſs he intended to proceed to *outlaw* the defendant,) becauſe he could ſhew his true cauſe of action by inſerting an *ac etiam* clauſe in a *capias*. And though in fact a *debt*, or other matter of contract, was his only cauſe of action, yet it was conſidered but as a collateral charge, for the defendant was in fiction of law arreſted for a *treſpaſs*; and the *ac etiam* clauſe was for nothing more than to ſhew the true cauſe of action, and point out to the ſheriff to what amount he might inſiſt upon bail. The *fine* therefore was only paid by the plaintiff when he actually ſued out a *præcipe quod reddat* for a *debt*, or a *præcipe* for a ſum certain upon *covenant* broken, or *pone* for a ſum certain on promiſe, which was never done, nor is it often done at this day, unleſs it is apprehended the defendant will be litigious, or is difficult of acceſs, and has property which the plaintiff can reach by proceeding with a view to outlaw him.

(a) As to *fines* and *amerciaments*, and when and by whom amerciaments ſhall be *aſſeered*, vide *Grieſly*'s caſe, 8 *Co.*—and *Beecher*'s caſe, *ibid.*

If the defendant was a duke, marquis, earl, viſcount, or baron, the amercement was to 100 *ſhillings*, which was the greateſt amercement; but if he was a gentleman or common perſon, it ſeems that it was aſſeered in proportion to the nature of the demand againſt him, and his apparent ability to pay it. Vide 6 *Co.* 45, and authorities there cited in the margin.

In

In case however a *writ of error* should be brought upon a judgment by default in an action of debt prosecuted by a common *capias quare clausum fregit*, or a *capias* with an *ac etiam* in it, the plaintiff, if he would protect his judgment, and prevent the want of an *original writ* from being assigned for *error*, must sue out a real original writ in *debt*, adapted to the action he prosecuted; on which the *cursitor* will then apportion and take the *fine* from him, otherwise the judgment must be reversed; because it would appear to be in *debt*, when the process was for a *trespass*. But in case no writ of *error* should be brought on such judgment by default, then the plaintiff need not purchase any such *original writ*, and consequently the *fine* will be avoided. Nor need he purchase it after verdict, as then the error is cured. 18 *Eliz.* c. 14.

The actual *amerciament* of the defendant after a judgment against him in *debt*, *covenant*, *case*, and the like actions, has long since been discontinued, though the form of awarding the writ continues in the entry of the judgment to this day. And the *capiatur* fine in actions of *trespass*, *ejectment*, and other actions savouring of a criminal nature, as it was oppressive to poor defendants who might have been *outlawed* for not paying it, or, if ever recovered, being seldom accounted for in the *Exchequer*, was taken away by the statute 5 *W.* & *M.* c. 12. and instead thereof the plaintiff is directed to pay the sum of 6*d.* 8*d.* to the *master* or *prothonotary* at the time of signing the judgment, which is afterwards allowed the plaintiff again when he comes before them to have the costs of his suit taxed against the defendant. So that the writ of *capias pro fine* has fallen into disuse.

Before the statute 5 *W.* & *M.* when the *fine* was pardoned, the judgment in the *King's Bench* was entered *nihil de fine quia pardonatur*. And since that statute, judgment is entered up in that court without taking any notice of the *fine*. But in the *Common Pleas* after the statute, they entered up judgment upon the statute, thus, *nihil de fine quia remittitur per statutum* (a).

Section III.

Of the original Process of the Court of Common Pleas, and the Alteration therein; and of the Pledges to prosecute.

Origin of jurisdiction of C. B.

The court of *Common Pleas* possessed no original jurisdiction. The justices were merely substitutes of the crown,

(a) Vide *Salk.* 54.

acting

acting under a delegated authority, and having cognizance of such matters only as were particularly submitted to them. All proceedings therefore were brought into the court of *Common Pleas* by virtue of the king's original writ, which was purchased by the party suing, and obtained from the high court of *Chancery*, the grand repository of all original writs. They were made out by the proper officer, called the *cursitor*, (from the words *de cursu*, such writs being grantable of course,) and were adapted to the nature and exigency of the case. They were made returnable in the court of *Common Pleas*, and thereby gave the court jurisdiction over the cause. All subsequent writs, called *judicial writs*, issued from that court. This was the way that causes, of above 40*s.* value were commenced in the county courts before the establishment of the *Common Pleas*, *viz.* by original writ out of *Chancery*; for the county court had no original jurisdiction in matters exceeding 40*s.*: and as the *Common Pleas* was intended to be a higher court in civil cases than the county court, it in a great measure was governed by the same practice, and adopted the same process. It was for this reason that *pledges* to prosecute used to be returned on the original, in pursuance of the practice of the county court, which originated in the old law of *Frankpledge* as established by king *Alfred*, and which still prevailed in all the kingdom.

All proceedings by original writ;

where got, and how returnable.

Intended as a superior court to the county court.

Practice of that court adopted.

When an original was applied for, a short note called a *præcipe* or *pone* was given to the *cursitor*, describing the names and additions of the parties, and the nature of the writ required, according as it might be a *præcipe* or *pone* wanted.

Of the præcipe for original.

Original writs were mandatory letters from the king, sealed with the seal in the chancellor's custody, and directed to the sheriff. They were in their nature two-fold, *optional* and *peremptory*; and were called by the names of a *præcipe quod reddat*, and a *si te fecerit securum*, or for shortness a *pone*.

Nature of original.

Their kinds; præcipe, pone.

The *præcipe quod reddat* was the proper writ when the plaintiff's action was for a specific thing; as for the recovery of a debt certain, or for the restoration of such a chattel, or for giving up such a house, or so much land, specifying the nature and quantity of it. By this writ the sheriff was commanded to summon the tenant or defendant to appear at *Westminster*, at such a day in term. But before the defendant was made acquainted with this writ, the sheriff was to take *pledges* from the plaintiff to prosecute his suit with effect, if he had not already found them in *Chancery* upon suing out the writ. These *pledges* were in those days real and responsible people, and not merely nominal, as of late; and the taking of them was usually entrusted to the sheriff, as he

Use of præcipe.

beſt knew thoſe in his bailiwick, and was to collect the *amerciament* ſet on them, if the plaintiff did not prevail in his ſuit; and if they could not anſwer the *amerciament*, the ſheriff was liable to the king for their inſufficiency. At the day ſpecified in the writ, or within a day or two after, the ſheriff returned to the court of *Common Pleas* what had been done in purſuance of it; and if the defendant diſobeyed the ſheriff's verbal monition, he returned as well the names of the *pledges* found him by the plaintiff, as the names of thoſe by whom the defendant had been warned or ſummoned to appear.

Uſe of pone. The *ſi te fecerit ſecurum* was the proper writ when the plaintiff only ſought a recompence in damages from the defendant for ſome injury done by him. This writ authorized the ſheriff, if the plaintiff made him ſecure to proſecute his claim, to put the defendant by *ſafe gages and pledges* to appear at *Weſtminſter* at the return, to anſwer the plaintiff's charge contained in the writ. In this caſe, if the defendant could not find *pledges* of ſufficient reſponſibility for his due appearance in court, the ſheriff was authorized to take *gages*, that is, ſome of his goods and chattels into his cuſtody, the better to compel his attendance. Whatever he did therefore in conſequence of this writ, he returned to the *Common Pleas*.

No taking of defendant's perſon. But ſo tender was the law in thoſe days of the liberty of the ſubject, that upon neither of the above writs could the *perſon* of the defendant be moleſted; nor indeed in any action, unleſs for ſome tortious act committed *with force*, and conſequently in breach of that peace which his allegiance and duty required him to keep and preſerve.

Proceſs by ſummons and diſtreſs. The proceſs therefore to compel an appearance to theſe writs was by ſummons and diſtreſs infinite.

If the defendant was to be found, the ſheriff ſummoned him to appear in the *Common Pleas* according to the exigency of the writ, either by perſonal ſervice of the ſummons, or by leaving it at his houſe or place of abode, and then returned the writ accordingly *ſummoneri feci*.

If the defendant was not to be found in the county, or had no houſe or land whereon he could be *ſummoned* or warned to appear, (for in real actions a warning on the land by erecting a white ſtick or wand was ſufficient,) the ſheriff returned the writ indorſed with a *nihil*, or "*nil habet in balliva* "*mea per quod ſummoneri poteſt*," that the plaintiff might ſue out proceſs elſewhere againſt him.

When the *original writ* was returned to the court of *Common Pleas*, the court thereby became poſſeſſed of the cauſe, and all further proceſs relating thereto iſſued from thence.

Fine allowed on ſummons. If the defendant had been *ſummoned*, and did not appear there within

within *four days*, the *quarto die poſt* of the return of the writ, or ſend an *eſſoin* or ſufficient excuſe to the court why he could not attend, the plaintiff was at liberty to take out a further proceſs againſt him. Of the *eſſoin* we have already had occaſion to ſpeak in the introductory obſervations; at preſent let it ſuffice to ſay, that theſe intermediate days were allowed *ex gratia* by the court, and partly aroſe from an idea entertained by our anceſtors, that it was beneath the dignity of a *free* man to appear or do any other act at the preciſe time for that purpoſe appointed, and partly from a conſideration of the court, that ſome unavoidable accident or other might happen to occaſion a delay, though the party did not mean to ſend an excuſe, and had no intention to diſobey the king's writ.

Of the attachment thereon.

The next proceſs which iſſued from the court of *Common Pleas*, upon a diſobedience to the original writ, was called an *attachment*, and though it could not actually be ſued out till the *quarto die poſt* of the return of the *original*, might yet bear *teſte* on the very return-day of that writ. The *writ of attachment* commanded the ſheriff to put by ſafe *gages* and *pledges* the defendant, ſo that he appear at *Weſtminſter* on ſuch a day in term. Theſe *gages* were again forfeited, and his ſureties alſo amerced in caſe of his non-appearance within the *quarto die poſt* of the return of this writ of *attachment*, unleſs he had ſent an *eſſoin* in time to excuſe his default. For the meaning of the *quarto die poſt*, ſee introductory obſervations, under letter B. 4.

Of the diſtringas.

The ſubſequent proceſs to the *attachment* to compel an appearance was a writ of *diſtringas*, which bore *teſte* on the very return-day of the writ of *attachment*, though not actually ſued out till the *quarto die poſt* incluſive of ſuch return; and if the defendant again made default, a like writ might iſſue *ad infinitum*, commanding the ſheriff to *diſtrain* the defendant from time to time; which was done by taking his goods, and the profits of his lands, called *iſſues*, which were all forfeited to the king if he did not appear. And here by the *common law* the proceſs determined with the moſt contumacious defendants in all civil injuries that were not accompanied *with force*; the defendant being gradually ſtripped of his ſubſtance, if he had any, by repeated diſtreſſes, till he rendered obedience to the writ: and if he had no ſubſtance, the law then conſidered him as incapable of making ſatisfaction, and therefore looked upon all further proceſs as nugatory.

Proceſs againſt the perſon in treſpaſs.

Thus then the only proceſs in ancient times to compel an appearance was by ſummons, and diſtreſs infinite, except in actions of treſpaſs *vi & armis*, and thoſe ſavouring of a

breach of the peace, as deceit, conſpiracy, and the like, which as they were looked upon of a more heinous nature, the law allowed a more compulſory proceſs, and ſuffered the ſheriff to ſerve the perſon of the defendant, and impriſon him till the return-day, when he might bring him into court. This was done by a writ or proceſs called a *capias ad reſpondendum*. But this did not iſſue in the firſt inſtance, there was ſtill an original writ, and the *capias* was only the proceſs on ſuch writ inſtead of the ſummons and diſtreſs. It was therefore made out conformable to the original writ before ſued out, and returned and bore *teſte* on the return-day of that writ: the *capias* being only a proceſs of the court grounded on the contempt upon diſobedience to the original. It iſſued therefore under the private ſeal of the court of *Common Pleas*, and not under the great ſeal of *England*; and was teſted not in the king's name but in that of the chief juſtice only; and was denominated a *judicial* writ, as all other writs were, ſubſequent to the return of the *original*. But this proceſs of the *capias* was gradually introduced, and allowed in other actions beſide thoſe of treſpaſs *vi & armis*, and the like, as will be ſhewn in the next Note; and as it was found a more ſummary and effectual mode of compelling an appearance than the proceſs by diſtreſs, and more eſpecially as an alteration afterwards took place in the practice of the court of *Common Pleas*, by permitting the *capias* to iſſue in the firſt inſtance without any original writ actually ſued out, (which will be alſo ſhewn in the next Note,) the proceſs by *capias* became generally adopted, and the old proceſs fell into diſuſe; ſtill however it is at the option of the ſuitor, either to proceed by original *quare clauſum fregit*, *ſummons* and diſtreſs, or by *capias*; and as the former mode is at this day frequently adopted where the defendant has goods, but cannot be met with, from the convenience of *perſonal* ſervice not being required upon the ſummons, which it is of the *capias*, I have endeavoured to explain the origin and meaning of this method of proceeding, and to ſhew, that however novel it may appear to the practitioner, it is in fact the ancient proceſs revived, and known to our law in many actions long before the proceſs by *capias*. The mode of proceeding by original *quare clauſum fregit* and ſummons is ſhewn, chap. 5. ſec. 2.

By capias.

How made out.

Nature thereof.

How ſigned,

and teſted.

Introduced into other actions.

Proceſs by ſummons diſuſed.

Still at plaintiff's election;

and in ſome caſes revived.

Of the Pledges for proſecuting.

As it has been obſerved, that in former times the ſheriff was to take real *pledges* from the plaintiff for the proſecuting of his ſuit; and, as even in theſe times the form is adhered to

to of putting *pledges* to profecute to the original writs in *C. B.* and to the bill or declaration in *K. B.* it may be uſeful to the ſtudent to add a few words upon the origin of this practice, and how it has ſubſtantially fallen into diſuſe, the ſhadow of it only, and indeed barely that, being now preſerved.

Introduction of pledges.

The finding of *pledges* was an inſtitution of the great *Alfred*'s, who claſſed the whole people in *decennaries*, conſiſting of ten families each, and thoſe numbered in each *decennary* he made the mutual and ſtanding *pledges* for each other's due obedience to the laws, and preſervation of the public peace. No one by his eſtabliſhment could proſecute any civil action whatever, unleſs he could find two or more of the ſame *decennary* as *pledges*, to ſatisfy the court that he had a real cauſe of complaint, and was not of a litigious and quarrelſome temper. And as the defendant was to be put to ſome trouble and expence in conteſting the ſuit, theſe *pledges* were always required of the plaintiff immediately upon his complaint to the court.

Reaſon thereof.

The ſmaller arrangement of the people in *decennaries* ſoon falling into diſuſe, from the difficulty there was of enrolling every ſubject, and claſſing thoſe foreigners who caſually reſorted here to carry on trade, and had no fixed habitations in *England*, it was thought ſufficient if the plaintiff upon commencing a ſuit, and the defendant upon being cited to appear to it, found *pledges* of the ſame hundred or county with himſelf. The finding of *pledges* was ſo reaſonable an inſtitution, and ſo well calculated to prevent both vexation and delay, that in the various revolutions of the government, from *Alfred*'s time till long after the reign of *Edward* the Firſt, it was never once diſcontinued or aboliſhed.

Of the time when they were to be found.

Upon the diviſion of the courts, however, in his time, when their ſeveral juriſdictions were aſcertained and eſtabliſhed, an alteration took place with regard to the time when the plaintiff's *pledges* for proſecution ſhould be found, and by whom they ſhould be taken.

Difference as to the time in K. B. & C. B.

If the plaintiff ſued by *original* writ returnable in the *Common Pleas*, his *pledges* were uſually found in the country and taken by the ſheriff, before even the defendant was ſummoned to appear to the action, and their names were returned by the ſheriff upon the original. But in the *King's Bench*, when a plaintiff filed his bill of complaint againſt the defendant for a *treſpaſs*, (for otherwiſe that court had not cognizance of it,) they did not always require him to find his *pledges*, before the proceſs went forth to the ſheriff to bring in the party; becauſe, as that court was ambulatory, and followed the ſovereign, the plaintiff might not have his *pledges* at hand, or be known to any one in the county where the court at that time happened to

be fitting. Beſides, it was imagined, that one who had committed a *forcible injury* in breach of the peace was likely to avoid being taken, as the commiſſion of ſuch an injury made him not only liable to pay a *fine* to the king, as well as damages to the plaintiff, but alſo ſubjected him to an impriſonment before trial or conviction. The court of *King's Bench*, therefore, did not as formerly inſiſt upon having the *pledges*, before proceſs was awarded to bring the defendant into court; becauſe if they had waited till the plaintiff could have produced them, it would not only have occaſioned a cauſeleſs delay to the inquiries of juſtice, but have given an opportunity for the defendant to effect an eſcape, and avoid the moſt diligent ſearch of the ſheriff.

Which is the reaſon why they are put to the declaration in K. B. and not in C. B.

But when the defendant was apprehended or brought into court by the *bill*, or its ſubſequent proceſs, the plaintiff was called upon for his *pledges*; and if they were not produced when he came to declare, the defendant might have demurred or pleaded in abatement, for he had no occaſion to make any defence till they were found. So that, when pleadings *ore tenus* in court were diſuſed, and came to be entered in writing by the clerk, and copies thereof made out for the parties, the names of the *pledges* for the proſecution were always entered in this court at the end of the declaration, that being the ſtage of the ſuit in which they were obliged to be found on the proceſs by *bill*; the form of which entry, though the finding of real and reſponſible *pledges* has long ſince ceaſed, continues to be uſed to this day. But in the *Common Pleas*, the names of the *pledges* were not inſerted at the end of the declaration, becauſe they were required immediately upon the *original*, and had been inſerted therein, and therefore had no need to be mentioned again when the plaintiff came to count on his writ.

Of the amerciament of the pledges.

If the plaintiff failed in his ſuit, his *pledges* were *amerced* by the court, and the entry thereof in the judgment was, "*Ideo conſideratum eſt quod prædict. quæren. & pleg. ſui de proſequend. ſint inde in miſericordia*," &c. but without taxing them at any ſum certain. After which the *amerciament* was

Eſtreating thereof.

eſtreated, then delivered to the clerk of the aſſize in the circuit, who afterwards delivered the ſame to the *coroner* of the county, who *aſſeered* (a), that is, aſſeſſed the amerciament according to the nature and proportion of the vexation, and the ability of the party. And that aſſeſſment by the coroner was held a ſatisfaction of the ſtatute of *magna charta*, which provided that "*nulla prædictarum miſericordiarum po-*

(a) *Vide* 8 Co. *Grieſly*'s caſe, and 1 Lord *Raym.* 380.

"*natur*,

" *natur, niſi per ſacramenta proborum & legalium hominum de* " *vicineto. Comites autem & barones, non amercientur, niſi* " *per pares ſuos & non niſi ſecundum modum delicti.*"

Sheriffs in time growing remiſs in their duty, allowed of any perſons as *pledges*, ſometimes returning the names of fictitious perſons as *pledges*, at others, neglecting to require or return any at all. And though the want thereof might have been taken advantage of by demurrer, plea in abatement, or aſſigned for error; yet the courts, in their liberality, ſooner than the plaintiff ſhould be delayed, or that their judgment ſhould be liable to be reverſed for ſo frivolous an objection, which did not affect the right of the ſuit, would ſuffer the plaintiff to find them at any time pending the ſuit, and enter their names as if really found at the proper time to the ſheriff or court. And the legiſlature, to ſupply the want of real perſons as *pledges*, and recompenſe the defendant where he has been unjuſtly or vexatiouſly ſued, has, by various ſtatutes, either given him the coſts he has incurred in making his defence, or elſe deprived the plaintiff of recovering thoſe coſts he is entitled to by law, in caſes of obtaining a verdict, by leaving it to the judge at the trial to certify on the record, that he had little or no cauſe of action. Since theſe ſtatutes for allowing the defendant his coſts, where the plaintiff fails, or is nonſuited, the writ to the coroner to affeer the *pledges* has fallen into diſuſe, and two ideal perſons, *John Doe* and *Richard Roe*, have become the ready and common *pledges* of every ſuitor. The want however of their names upon the *bill* or *original* was not aided till the ſtatute 16 & 17 *Car.* 2. c. 8. though a verdict had been had for the plaintiff. But for the better removal of this ground of objection, it was further enacted by the 4 & 5 *Ann.* c. 16. " that no exception ſhall be taken for default of " pledges on the declaration or bill, unleſs it be ſhewn for " cauſe of *demurrer*." And ſince this laſt ſtatute, on a *ſpecial demurrer* for want of *pledges* on a declaration by *bill*, the court, notwithſtanding, gave judgment for the plaintiff; holding, that he might enter them any time before judgment, becauſe *pledges* are not liable until judgment, and not even then if it be given for the plaintiff. Nor can the want of *pledges* now be taken advantage of in *error*, though judgment paſs by default; for ſince the above ſtatute of queen *Anne*, the want thereof is but matter of *form*.

How fictitious pledges introduced.

Allowance of coſts to defendant taken away uſe of pledges.

Even the form has now in a great meaſure vaniſhed.

Section IV.

Of the Arreſt in Civil Actions.

At common law no arreſt except in treſpaſs.

In the early ages of our conſtitution, ſo great a regard was paid to the liberty of the ſubject, that no arreſt or detention of the perſon was allowed in any civil caſe whatſoever, except in an action of treſpaſs *vi et armis*. The principle by which our anceſtors in this reſpect were governed was, that as all debts or breaches of contract could only be an injury or loſs to the perſonal eſtate of another; ſo nothing but the goods or perſonal eſtate of the debtor or offender ſhould be liable to make ſatisfaction. The *meſne* proceſs therefore to bring defendants into court to anſwer to the charge, was by *diſtreſs* on their chattels; and when judgment was obtained, their chattels only could be taken in *execution*. But if any actual aſſault or treſpaſs was committed upon the perſon or property of another, and thereby a breach of the public peace was occaſioned, which it was the bounden duty of all to preſerve, ſuch an offence was deemed a forfeiture of that perſonal protection to which the offender would otherwiſe have been entitled; and upon a charge of this kind, being rather of a criminal than a civil nature, his body was liable to be arreſted in the firſt inſtance, and after judgment to be detained in execution.

Principle thereof.

What was the meſne proceſs.

Same practice at the time of feudal ſyſtem, why.

The ſame practice continued for ſome time after the introduction of the feudal ſyſtem by William the Conqueror; but perhaps an additional reaſon may be given why it ſhould prevail under that form of government. The very eſſence of that ſyſtem was, that both the *lands* and *perſon* of the tenant were anſwerable for the duties to his lord. No alienation of the former was permitted without the lord's conſent; and the latter was obliged, if called upon, to attend the king in his wars; or when at home, to ſerve his lord according to the nature of his tenure. Neither the one nor the other therefore could be ſubjected to the payment of debts, the laws being at that time calculated and framed for a nation bred to warlike atchievements.

Cauſes of alteration therein.

But in progreſs of time, real property gradually became unfettered, alienations were in ſome meaſure allowed by the great charter without acquainting the lord, population increaſed, trade began to flouriſh, commerce was introduced, merchants grew reſpectable in character, and of conſequence in the ſtate; dealings between men became extenſive and complicated; the wide field of credit, the very life of commerce,

merce, opened itself; the complection of things were altered, towns rose from their insignificance into importance; and wealth, the natural fruit of industry, which poured in upon the cultivation of arts, manufactures, and science, soon elevated the middling class of people; whilst poverty, the sure attendant of prodigality, depressed, and at length proved fatal to the haughtiness and superiority of the powerful barons.

So great a revolution in the manners of a people necessarily occasioned a change in the government and laws of the country.

Arrest in civil cases necessary to protect trade and credit.

The extension of trade and commerce was soon found so important to the well-being of the state, that it was deemed expedient to give every encouragement and protection to the industrious trader, and to enforce, as much as possible, honesty and punctuality in the payment of debts and the observance of contracts. To effect this, it was found necessary to extend the law of arrests to civil cases, and to render *lands* liable to the discharge of debts, as otherwise the fraudulent debtor had the means of escaping justice by secreting personal property not his own, and living upon landed property in defiance of the very creditor to whom he was indebted for the identical money with which he purchased it; at the same time, as will appear from the following acts of parliament, the legislature proceeded step by step, cautious of making any unnecessary sacrifice of the personal freedom of the subject.

Different statutes authorizing the arrest.

Statute of Marlbridge, 2 Hen. 3.

The first statute of the kind was in the fifty-second year of the reign of Hen. 3. called the statute of Marlbridge, and was in aid of the barons, who had frequently experienced the fraud of their bailiffs in absconding with their rents, and leaving no property behind them to make satisfaction. It enacts, "That if bailiffs, which ought to make account to "their lords, *do withdraw* themselves and have *no lands nor* "*tenements* whereby they may be distrained, then they shall "be attached by their bodies; so that the sheriffs in whose "bailiwick they be found shall cause them to come to make "their accounts." But any freehold estate in his own right, though not sufficient to satisfy the demand, took the case out of the statute; so also, if he did not withdraw himself, and if the bailiff was arrested wrongfully, he might have his remedy against the lord by action. 2 Inst. 144.

Allowing arrests of bailiffs in certain cases.

Statute of merchants 11 Edw. 1. 13 Edw. 1.

The next statute was in protection of the merchants, made in the 11th year of the reign of Edward the First, and called the statute of Acton Burnel, the parliament at that time being held there. It recites, that "forasmuch as merchants, "which heretofore have lent their goods to divers persons,

Arrests allowed in favour of merchants;

" be fallen in poverty, becauſe there is no ſpeedy remedy " provided whereby they may ſhortly recover their debt at " the day of payment; and for this cauſe, many merchants " do refrain to come into the realm with their merchandize, " to the damage of ſuch merchants and of the realm;" and it then gives a power to the merchant of bringing his debtor before a magiſtrate, and getting his debt acknowledged, and after the day of payment ſuing out proceſs againſt his property; and if that was not ſufficient, to *take his body*. But as this ſtatute was not much enforced, in the 13th year of that king, another ſtatute was paſſed of a much more rigorous nature, reciting the former, and giving further powers of ſelling the *land* of the debtor by a reaſonable *extent*, and to impriſon him till ſatisfaction made.

and lands allowed to be ſold.

The two laſt-mentioned ſtatutes form one law called the Statutes of Merchants.

This privilege having been given to the merchants, the barons claimed ſtill further power on their part, and in the ſame 13th year of Edward 1. c. 11., another act paſſed in favour of them, ordaining, " that when maſters have " aſſigned auditors to take their *accounts*, and their ſer- " vants, bailiffs, chamberlains, and receivers are found in " arrear, their bodies ſhall be arreſted, and by the teſtimony " of the auditors, ſhall be ſent or delivered to the next " gaol, to be kept by the ſheriff in irons, at his own coſts, " till he ſatisfies the arrears." The ſtatute further gives the conſequential proceſs of exigent and outlawry thereon. *Vide* the ſtatute. This was a ſevere law, in compariſon to that of Henry the Third, firſt paſſed againſt bailiffs.

13 Edw. 1. c. 11. arreſt in actions of account, and proceſs of outlawry allowed thereon.

Thus ſtood the law of arreſts, till the 25th year of the reign of Edward 3. c. 17. when it was enacted, " that ſuch " proceſs ſhall be made in a writ of *debt* and *detinue* of chat- " tels, and *taking of beaſts*, by writ of *capias*, &c. as is uſed in " a writ of account."

25 Edw. 3. c. 17.

Arreſt extended to debt and detinue.

The ſtat. of Edw. 1. therefore was then extended to actions of debt, and detinue. The ſtat. of 27 Edw. 3. ſtat. 2. c. 9. enables the mayor of the ſtaple to arreſt the conuſor of a ſtatute ſtaple. For a long period of time, namely, a century and an half, no further extenſion of the law of arreſts took place, until at length, in the 19th year of the reign of Hen. 7. c. 9. The ſame proceſs is given in *actions upon the caſe* as in treſpaſs or debt. And in the 23d year of Hen. 8. c. 14. the like proceſs is ordained in actions for forcible entry on 5 Rich. 2. and alſo in actions of *annuity* and *covenant*. And, laſtly, by the 21 Jac. 1. c. 4. it is extended to popular actions, and the ſame proceſs given in them as in treſpaſs *vi & armis* at common law.

27 Edw. 3. Conuſor of ſtatute ſtaple.
19 Hen. 7. c. 9. Arreſt given in actions on the caſe;

23 Hen. 8. c. 14. in forcible entry, annuity, and covenant.
21 Jac. 1. c. 4. In penal actions.

Thus,

Thus, by the interference of the legiſlature from time to time, is the proceſs of the *capias*, and its concomitants the exigent and outlawry, now given in all civil caſes: in the action of treſpaſs, replevin, ejectment, deceit, conſpiracy and fraud, by common law; and in *account*, debt, detinue, caſe, annuity, and covenant, by the above ſtatutes.

How the arreſt was encouraged by the courts by indirect means.

One circumſtance, perhaps, which expedited this extenſion of the *capias*, might be, that the legiſlature ſaw the courts were effecting, by indirect means, the impriſonment of the defendant, though not directly authorized ſo to do. And this was accompliſhed by the practice of declaring, as it is now termed, by the bye; that is, of charging the defendant, after he was once in court for one cauſe of action, with another freſh cauſe. Now, as at common law, the charge muſt have been a *treſpaſs* to have authorized an arreſt, proceſs was ſued out upon a charge of *treſpaſs*, on which the party was taken into cuſtody, and then this fictitious charge was ſuſpended or abandoned, and a declaration delivered *by the bye*, charging him with a common debt or breach of promiſe; for it was held by the practice of the court, that when once the party was in the cuſtody of the court, he was to be detained there till he had anſwered every charge which might be brought againſt him, pending the inveſtigation of the original charge. Such was the mode adopted both in the King's Bench and Common Pleas, and the court of Exchequer alſo availed themſelves of the ſame kind of fiction, by charging a perſon with being a *ſuppoſed* debtor of the king, getting him into their cuſtody, and declaring in any common civil action.

By declaring by the bye.

In all the courts.

Capias at firſt only iſſued after defendant had diſobeyed the pone or attachment.

But although the *capias* was by degrees extended to civil actions as above ſhewn, ſtill it only iſſued in conſequence of the party's diſobedience to the proceſs of the court; for it was neceſſary in both courts that the original bill or writ ſhould be firſt filed or regularly iſſued, that the plaintiff ſhould find real pledges to proſecute, leſt his action ſhould be malicious, and that a ſummons or warning to appear ſhould be firſt given to the party by the ſheriff on the writ of *pone* or attachment, and it was not till a diſobedience thereto that the *capias* was to iſſue.

Capias afterwards iſſued in firſt inſtance.

But even theſe preliminaries were by degrees omitted as unneceſſary, the pledges to proſecute, as we have before ſeen, became mere matter of form, and at length, for the ſake of expediting the proceedings, and preventing the defendant from eluding the proceſs of the court, it became the practice to ſue out the bill of Middleſex and *capias* in the firſt inſtance, without any original bill actually filed, or original writ ſued out, or any ſummons or warning

given to the defendant. This practice prevailed in a great degree before the time of Charles the Second; but by the

Of the 13 Car. 2. statute of the 13th of that king, whereby the real cause of action was obliged to be inserted in the process, it came into

Introduction of ac etiam general use. For upon that the court of King's Bench, to preserve its jurisdiction over civil causes where the party was to be arrested for above 40 *l.* was obliged to resort to the expedient of inserting the *ac etiam* in their bill of Middlesex

in both courts. [as before shewn, Sect. ii.] On which account Sir John Keelynge, then Ch. Just. of the King's Bench, had a long contest with Sir John Vaughan, then Ch. Just. of the Common Pleas, who died during the altercation; and Sir Francis North, who succeeded the latter judge, being unwilling to renew the dispute, suffered the court of King's Bench to continue quietly in the exercise of that practice, and made an order for the allowance of a similar clause of *ac etiam* in

Operation thereof. the writ of *capias quare clausum fregit*, the common process of that court, and that it should be so used in all bailable actions. The consequence of which was, that the *ac etiam* became a substitute for the original writ; nor did any original writ issue; which is the practice at this day in all personal actions where the plaintiff does not intend to proceed to outlawry, in which case the original writ must be sued out. So that the arrest was authorized by the bill of Middlesex, or *capias*, which supposed that the defendant had committed a trespass, or broken the plaintiff's close *vi et armis*; and the engrafting of the clause of the *ac etiam* was only to shew the true cause of action, and to point out to the sheriff to what amount above 40 *l.* he might insist upon bail.

Such is the brief history of the law of arrests, and of the seizure of a man's person, in the first instance, upon a bill of Middlesex, *latitat*, or *capias*, without any previous writ. The delay of suing out the original is thus avoided, and the expence of the fine payable thereon to the king saved [for which see Sect. ii.], whilst the whole proceedings are grounded upon the mere supposition that an original bill or writ have been previously filed, without which the court

No use for original bill or writ, except on error after judgment by default. could have no jurisdiction in the action. The want therefore of such an original would have been fatal on a writ of error, but now it is cured by statute of Elizabeth *after* verdict, and is only cause of error after judgment by default; and even in this case, if error be brought upon application to the Master of the Rolls, an original may be made out *nunc pro tunc*, which will operate by relation so as to warrant the proceedings; and this, even in *penal* actions. [See Sect. ii.]

Thus

Thus have we endeavoured to shew the rise and progress of that power which the creditor exercised and still may exercise over the person of his debtor; it remains now to explain in what way the severity of the law has been in some degree mitigated in favour of the latter, by his discharge on bail, and the difference between common and special bail.

Section V.

Of Bail in Civil Actions; of the Difference between Common and Special Bail.

Arrest in trespass and on process of capias,

without any respect to the amount of debt.

The arrest of the defendant, as appears from the preceding note, was warranted in all actions wherein the process of *capias* was allowed, and in all cases whatsoever of trespass *vi et armis*. The amount of the debt or demand, or the extent of the injury, was of no consequence; the sheriff was ordered by virtue of the process to seize the defendant, and to detain him in custody till the return of the writ. No bail was allowed, at least it was at the peril and risk of the sheriff to take bail. The liberty of the subject, so strenuously protected by the arm of the common law, seemed now exposed to the most imminent danger. The security which a defendant derived from the pledges to prosecute, formerly given by the plaintiff at the commencement of his suit, and who were answerable if he did not shew some foundation for his claim, no longer existed. No specific charge was alleged in the process; no debt sworn to; any one was liable to be suddenly seized by the iron hand of power, and dragged from his home to a dungeon, a victim to malice or revenge; a serious sufferer for the smallest and most trivial debt or offence. When arrested, he was subject to the insults, oppression, and extortion of the sheriff or his bailiffs; who, availing themselves of the undue advantages of their situation, actually let out to farm the emoluments of their offices. The courts indeed exercised a discretionary power, and in very trifling actions suffered the parties, when brought into court, to go at large, which was the origin of common bail, as will be presently shewn; but then it must have appeared upon the face of the process that the demand was for a trifling sum, and there was no restraint upon the plaintiff to prevent his stating the cause of action to be to any amount. Such was the hardship which attended the law of arrests; nor was any remedy attempted to be applied till the 23d of the reign of Henry 6., when an act passed, enacting, "that such offices (namely sheriffs and the like) should no "longer be let to farm, and that persons arrested shall be "discharged

Hardships endured.

Extortion of the sheriffs.

Discretionary power in court to discharge on common bail but seldom exercised.

No remedy till the statute 23 Hen. 6. c. 9.

" discharged upon reasonable sureties of sufficient persons, " having sufficient within the counties where such persons " be so let to bail, to keep their days in such place as the " writ shall require." See an explanation of this stat. ch. 4. sec. 4. But this act was but of little avail, for still malice might be gratified, by prosecuting for a sum far beyond the ability of the defendant to get bail for: more especially in the King's Bench, as, by the practice of that court, whoever became bail was answerable not merely for his forthcoming to answer that charge for which he was arrested, but to answer all other persons that should come in against him, and sue him by *bill* pending the first suit; and moreover, as the charge was for a trespass, and the damages to be recovered uncertain, the bail were not bound in any certain sum, but engaged that the defendant should pay to the plaintiff whatever he recovered, or render himself to the marshal, or that they would satisfy the damages. But in the Common Pleas the practice was otherwise, for there a certain debt or damage was expressed in the writ, and the bail only stipulated for him in the action, and in a sum certain. It is for this reason, and from this ancient practice, that the recognizances in the two courts at this day differ; in the Common Pleas being taken in a sum certain, in the King's Bench not. Nor did the courts exercise their discretionary power so as to grant effectual relief; for their practice was, not to discharge the defendant on common bail in any case where the plaintiff stated his cause of action to amount to 10 *l.* or upwards, though a little before they limited it to 20 *l.*

which was but of little avail.

Extent of bail in K. B.

In C. B.

Reason of difference in their recognizances.

Courts did not bail, if action above 10 l.

The engine of oppression, which the law of arrests at that time was, in the hands of the wicked and powerful, manifestly appears, not only from the preamble of the above stat. of 23 H. 6. which reprobates the extortion and injustice complained of, but also from that of the statute of 8 Eliz. c. 2. whereby the legislature gave costs and damages to the defendant as a check to the abuse which prevailed of bringing malicious actions, and after the imprisonment of the party, not even declaring in them, and for which, before this statute, there was no redress to the party injured. The same statute also provides against another evil which existed, of suing out process and arresting a party in the name of a third person without his leave, and often when no such person existed.

Grievances still existed, appears from preamble of 23 Hen. 6. and 8 Eliz. c. 2.;

and the evils there noticed.

It surely appears surprising that no steps were taken to ease the subject of a load, the weight of which was so manifestly oppressive. But from the time of Henry the 6th, till the 13th of Charles the 2d, nothing appears to have been done: an act then passed which has before been noticed in Sect. ii & iv, ordering *the particular cause of action to be*

Act of 13 Car. 2.

be expreſſed in the writ, in all caſes where the ſheriff was required to take bail for 40 *l.* or upwards, which was the origin of the *ac etiam* clauſe in the writs. But ſtill nothing prevented the damages or debt being laid at any enormous ſum the party choſe; and the mere expreſſing the cauſe of action, as debt or the like, in the writ, ſo long as the amount of ſuch debt was laid at the option of the plaintiff, could be but of little avail: beſides which, even if the ſpecific demand was accurately ſtated, it only applied to caſes where bail was required for 40 *l.* The poorer claſs of people therefore were ſtill the objects of oppreſſion; and though no ſpecific cauſe of action were mentioned, yet they were compelled to find bail for 40 *l.* or be thrown into priſon. Nor was any relief beſtowed till the late period of the 12th year of the reign of George the Firſt, when an act paſſed (12 Geo. 1. c. 29.), by which it was enacted, "that no perſon ſhall "be held to *ſpecial* bail upon any proceſs where the cauſe of "action ſhall not amount to 10 *l.*; but in ſuch caſe the "plaintiff ſhall only ſerve him with proceſs, and if he does "not appear, plaintiff may file common bail, or enter an "appearance for him. And in all caſes where the debt or "cauſe of action amounts to 10 *l. an affidavit muſt be made* "before a judge or proper commiſſioner, and *the ſum ſpecified in ſuch affidavit ſhall be indorſed on the back of ſuch writ* "*or proceſs; for which ſum ſo indorſed, the ſheriff or officer ſhall* "*take bail, and for no more.* If no ſuch affidavit and indorſement, the defendant is not to be arreſted, let the "amount of the debt be what it may." The court ſtrictly require the affidavit to be poſitive. See ch. 4. ſec. 1.

Defect thereof.

Moſt effectual remedy given by 12 Geo. 1. c. 29.

No arreſt under 10 l.

Affidavit of debt required.

Sum ſworn to, indorſed on writ.

The above ſtatute was made perpetual by the 21 Geo. 2. c. 3.; and by 19 Geo. 3. c. 70. no arreſt is allowed on proceſs out of *inferior* courts, if the cauſe of action be under 10 *l.*

Made perpetual, and extended to inferior courts.

It is obſervable, that nothing is ſaid in the above ſtatute of the *ac etiam* clauſe, or of ſpecifying the true *cauſe of action* in the writ; ſo that the law in this reſpect ſtands as before, and no *ac etiam* need be inſerted unleſs the defendant is to be held to bail for 40 *l.*, as by the ſtat. 11 Car. 2. 1 H. Blac. 310.; though the common and indeed the beſt way is to inſert it in all writs where defendant is to be held to bail.

Ac etiam only required as before.

Such were the ſlow but gradual ſteps by which juſtice ſeems to have advanced to the relief of defendants, who, at length, when arreſted, became entitled to be diſcharged upon bail, and their adverſary compelled to ſpecify upon oath the nature of the charge, and exact amount for which the ſheriff was to take ſecurity.

Thus

How the ancient and modern practice of arrests differ.

Thus stands the law at this day; and the difference in this respect between the modern and ancient practice is most extraordinary. Originally no arrest was allowed for any debt, or purely civil cause of action, but only for trespasses committed *vi et armis*. Now the law is reversed, no arrest being allowed in actions of trespass *vi et armis*, (except by a particular order of a judge,) but only in cases of debt and other civil actions.

Different kinds of bail; to the sheriff, and to the action. Bail to the sheriff.

It is observable that there are two kinds of bail: bail to the sheriff, or bail below; and bail to the action, or bail above. The first is given to the sheriff immediately upon the arrest, according to the stat. Hen. 6. the sureties enter into a bail-bond, with a condition that the defendant shall appear in the court, and at the time specified in the writ. Formerly, if the condition of the bond was broken, the plaintiff could only proceed against the sheriff, by ruling him to return the writ; but he had no remedy against the sureties on the bail-bond, unless the sheriff delivered it up to him, and gave him leave to sue in his name, which was purely optional. But as an additional remedy (by the 4 & 5 Ann. c. 16. s. 20.), the sheriff, at the request and cost of the plaintiff, must now assign to him such bail-bond, by a proper indorsement thereon, and plaintiff may bring an action against the sureties in his own name; so that now he has a double remedy, either against the sheriff, which he may still pursue, or against the bail, as assignee of the bail-bond.

Of the assignment of bail-bond.

Bail to the action.

When the defendant has appeared according to the condition of the bond, bail *above*, or to the action, are then put in, who enter into a recognizance to be answerable for the damages, which may be ultimately awarded if the defendant does not pay them, or render himself to prison: these recognizances differ in the two courts, as before observed.

Origin of common bail, and difference between that and special bail.

Before I leave this subject of bail, it may be useful to add a few words on the origin of common bail, and the difference between that and special bail. The latter, we find, is when real responsible sureties are actually given; the former is merely nominal bail, John Doe and Richard Roe, of no possible use, by way of pledges or security. Yet it seems that the distinction between common and special bail took place very early, for Sir Edward Coke cites an entry of bail in the twenty-seventh year of King Henry the Third, *coram rege*, in these words, "*H. P. captus per querimoniam mercatorum Flandriæ, et imprisonatus offert domino regi* Hus & Haut *in plegio ad standum recto, & ad respondendum prædictis mercatoribus, et omnibus aliis qui versus eum loqui voluerint,*"

Common bail of great antiquity.

" *erint*," &c. " Of these words (says Sir Edward, 4 Inst. " 72.), *hus* and *haut*, (two French words,) *hus* signifying an " elder-tree, and *haut*, the staff of an halbert, &c. I leave " the conjecture that some have made thereof to themselves: " we think it was then common bail, now changed to *Do* " and *Ro;* and the rather, for this word *offert:* and it is " observable, that by putting in bail at one man's suit, he " was *in custodiâ marescballi* to answer all others which " would sue him by bill, and this continueth to this day."

This conclusion of that eminent lawyer appears fairly drawn; and the student may, from such an authority, with confidence infer, that the practice of putting in common bail is of ancient origin. We have before shewn, that the court exercised a discretionary power in holding defendants to special bail or not, according to the amount of the demand. At first, as appears by a rule of court in the Complete Attorney, printed in 1676, fol. 45. they limited it to 20*l.*, afterwards to 10*l.*; and although in causes under 10*l.* actual bail was not required, yet the defendant was brought up by the sheriff on the return of the writ, and in order that he might be in court, and supposed to be in their custody ready to receive any other charge that might be exhibited against him, common bail was filed of record in the names of John Doe and Richard Roe. And it is now necessary that this common bail should be filed in all actions not bailable, before the plaintiff can proceed, for till then the defendant is not in court; but by the last statute of 12 *Geo.* 1. c. 29. after the defendant has been served with process, the plaintiff, if he does not appear within the time allowed, may file common bail, or enter an appearance for him. Reason thereof.

In the Common Pleas the same distinction is made between common and special bail; but it is there called *entering an appearance;* and the form, instead of being as in the King's Bench, *that A. B. having been served with process, is delivered to bail, (that is to say,) to John Doe and Richard Roe, at the suit of C. D.*, it runs thus, B.'s *appearance* for A. B. late of *W. in the said county, yeoman, at the suit of A. B.* The reason of this seems to be, that in the King's Bench, as their original jurisdiction was only in matters of trespass, and the bill was therefore sometimes called the bill in trespass; and as in all cases of trespass the party was liable to be arrested, the defendant was of course in every action brought into court, and delivered into the custody of the marshal. How in C. B. called entering an appearance. Reason thereof.

There was no process to compel an *appearance*, as by distringas, or the like; but as the bill now called the bill of *Middlesex*, or the latitat, was only supposed to issue in cases of trespass, the defendant's person was liable to be seized: when

when in court, he was ſuppoſed to be in cuſtody of the marſhal; it was upon this ſuppoſition that other actions, not of treſpaſs, were afterwards brought againſt him. And to preſerve this juriſdiction, it was neceſſary that he ſhould either be in the actual cuſtody of the court, or let out by the court upon bail; which, when civil actions became bailable, was done by giving *ſpecial* bail, as it is called; or, if in the diſcretion of the court they thought it too trivial a caſe to require real ſureties, the defendant was ſuffered to remain at liberty, by putting in nominal perſons, called filing *common bail*, ſtill keeping up the *ſuppoſition* that he was in the cuſtody of the court, but only out upon bail. Whereas in the Common Pleas no ſuch ſuppoſition of the defendant being in the cuſtody of the court prevailed; and the intention of the proceſs was originally very different, the operation of the attachment, or ſummons and diſtringas, being nothing more than to compel the *appearance* of the party; if he voluntarily appeared, the proceſs ceaſed: and indeed, upon the firſt introduction of the capias, it was only as a puniſhment for the refractory diſobedience of the defendant in not appearing to the former proceſs. This appearance was entered in the proceedings of the court. There was a day called the *appearance* day, being the *quarto die poſt* after the return of the proceſs. The uſe of the appearance was to ſhew that the defendant was in court to anſwer the charge againſt him: it had no other end to effect. After the introduction therefore of the capias, and the practice of taking bail, if the judges of the court, who exerciſed their diſcretion, thought the action not of ſufficient importance to require ſpecial bail, they permitted the party to remain at liberty, and only requeſted him voluntarily to enter his *appearance*, ſo as to ſhew himſelf ready to anſwer the charge; and we find by the ſtat. of 12 Geo. 1. c. 29. that if this is not now done by the defendant after ſervice of proceſs in actions not bailable, the plaintiff may enter an appearance for him. This ſeems to account for the difference of the practice in the two courts, in actions not bailable, by *common bail* being filed in one, and an *appearance* entered in the other.

12 Geo. 1. does not take away proceſs by original, quare clauſum fregit, or ſummons. Bar. 407.

It may be proper to add one more obſervation upon the ſubject; namely, that the ſtatute 12 Geo. 1. does not take away the ancient method of proceeding in the court of Common Pleas by original and diſtringas: it only preſcribes a new mode by way of proceſs againſt the *perſon*; but plaintiff may ſtill proceed againſt the goods of the defendant by *pone* and diſtreſs, or *ſummons* and diſtreſs, as the caſe may be. If in treſpaſs, or on the caſe, or ſuch like actions ariſing *ex delicto*, the ancient proceſs is by pone, or attachment

ment and distringas; if in debt, covenant, or actions arising *ex contractu*, it is by *summons* and distringas; which is the reason why in the declaration in the Common Pleas, in the former actions, it is stated defendant was ATTACHED, and in the latter that he was *summoned* to answer plaintiff.

Reason why in declaration in C. B. defendant is sometimes attached, and sometimes summoned.

Section VI.

Of the ancient Mode of pleading Ore Tenus; *of the Assizes and Trials at* Nisi Prius; *and the Difference in making up the Records in the two Courts.*

Formerly, when the defendant was arrested, and brought into court upon the process that had issued against him, it was the duty of the plaintiff to deliver in his charge, to which the defendant answered, and the plaintiff replied *vivâ voce* in *person* in open court. The pleadings were then carried on by word of mouth; and the parties obliged personally to attend. But the statute of *Westminster* 2. which passed in the 13th year of the reign of Edw. 1. authorised the appointment of *attornies*, who had full power in all pleas moved during the circuit until the same were determined, or such attorney was removed. After that time, the personal attendance of the parties being dispensed with, they carried on the pleadings in the suit by their attornies; still however there were parol pleadings delivered *vivâ voce;* and it is said in a former part of this Introduction, Sec. ii. (upon the authority of Mr. Crompton, to whom I am indebted for the greatest part of this Introduction,) that these *vivâ voce* proceedings continued until after the reformation; but I greatly doubt that, and am inclined to think that they were reduced to writing in a much earlier period. It is said by some, so early as in the reign of Edward the Third, and there is certainly good reason to conclude, from the alteration in the pleadings about that time, that they were not hastily spoken, but rather deliberately penned. It is clear however, that the practice of delivering pleadings *ore tenus* continued longer in the Common Pleas than in the King's Bench. When this mode of pleading was discontinued in the King's Bench, the practice was, that if the defendant appeared personally at the return of the writ, the plaintiff was to declare within three days. If he appeared by attorney, he was to declare within the term. For this reason there was never any continuance from the appearance-day to the time of declaring, nor any precedent of *libertas narrandi;* and so is the practice of declaring within the term wherein

Proceedings originally ore tenus and in person.

When attornies allowed.

When vivâ voce proceedings discontinued.

Gilbert's Origin of King's Bench. Reeve's History of English Law.

Gilb. Hist. C. B. 44.

Lasted longer in C. B.

8 Eliz. c. 2.

Gilb. Hist. C. B. 41.

Meaning of dies datus prece partium.

the writ is returnable even at this day. But the parties might at that time have obtained *by consent* a day before declaration for the plaintiff to declare in, which was called *dies datus prece partium.* But in that case, if the defendant did not appear at the day given, since there was no declaration, the plaintiff could not have judgment, but was obliged to bring the defendant in again by process, that he might declare against him; for none could have judgment except *upon complaint exhibited to the court against defendant whilst in court.*

Of the imparlance roll.

When the plaintiff declared, the defendant in the King's Bench generally had of course an imparlance for time to plead till the next term, and the bill or declaration was entered on a roll. This practice in the King's Bench created a similar one in the Common Pleas; for when the plaintiff declared, though it was *ore tenus*, it was minuted by the prothonotary, and likewise the prayer or permission to imparl; then in conformity to the King's Bench, they entered a declaration on a roll which was called the imparlance roll; this was done the first term. They then entered the next term the further proceedings to issue which formed the plea roll; from which the *nisi prius* or issue roll was made up; upon the back of which the verdict was entered, which was afterwards transcribed upon the plea roll, and thereon judgment was entered. But, in time, these proceedings were changed, the pleadings were delivered in paper to each party; and if special, made out by the clerk of the papers in King's Bench; from them the *nisi prius* roll was made up, and the judgment entered thereon. The reason why paper proceedings were introduced instead of the rolls of the court, was on account of the increase of business in the courts; and that it was not possible for the prothonotaries to enter the pleadings upon the roll, and therefore the attornies were permitted to deliver their pleadings in paper one to another. Hence it is, that these paper proceedings are looked upon as the original materials to settle the *nisi prius* roll. In the Common Pleas the issues are now made up by the attornies themselves; in the King's Bench, if any special pleadings, they are prepared by the clerk of the papers, and called the paper books; and if no special pleadings, they are, as in the Common Pleas, called issues, and made up by the attornies. Possibly the difference in the two courts in their practice in this respect might arise from the cause above hinted at, viz. the multiplicity of suits which came into the Common Pleas, and which rendered it impossible for the prothonotaries to transcribe and make out the pleadings; for that court certainly on its first establishment, and for a length of time afterwards, had infinitely a greater quantity of business than the King's Bench.

Gilbert's Origin K. B. 314.

Plea roll.

Nisi prius, or issue roll.

Cause of introduction of paper pleadings.

How issue made up.

In K. B.

In C. B.

Before

Before the time of the Conqueror, law proceedings were in Latin. In his time they were ordered to be in French; which being a language introduced by the Normans, and little known in this country, created great confusion, as appears in the preamble of the statute 36 Edw. 3. sec. 1. c. 15. which enacts, that the pleadings shall be in *English*, but entered and inrolled in *Latin*, which was reviving the ancient usage; and this practice continued till the 4 Geo. 2. c. 26. when they were directed to be recorded and engrossed in the *English* language. From this time the use of court-hand in all law proceedings was also discontinued.

Law proceedings in Latin.

In French.

In English, but records in Latin.

The whole now in English.

Of the Assizes and Trials at Nisi Prius.

From the multiplicity of business which flowed into the courts of *Aula Regis* and *Exchequer*, the grand justiciary and his assessors on the Bench soon found themselves fully occupied; and as the application to these courts became more frequent, it was judged necessary, both in aid of themselves, and in relief of suitors, to erect some other tribunal of the same nature. Accordingly, justices were appointed to go *itinera* or circuits through the kingdom, and determine pleas in the several counties. To these new tribunals was given a very comprehensive jurisdiction. As they were a sort of emanations from the *Curia Regis* and Exchequer, and were substituted in some measure in their place, (except with the reservation of appeal thereto,) they were endowed with all the authorities and powers of those courts. These justices *itinerant* or *errant*, in their several *itinera* or *eyres*, held plea of all causes whether civil or criminal, and in most respects discharged the office of both the superior courts. The characters of the persons entrusted with this jurisdiction were equal to the high authority they exercised; the same persons who were justices in the king's court being (amongst others) justices *itinerant*. They acted under the king's writ in nature of a *commission*, and they went generally from seven years to seven years, though their circuits sometimes returned at shorter intervals. Their circuits became a kind of limitation in criminal prosecutions, as no one could be indicted for any thing done before the preceding *eyre*.

Institution of justices in eyre.

1 Reeve's Hist. Law, 52.

Their power.

Whence derived.

Circuits when held.

It is not easy to determine the exact period when this establishment of justices *itinerant* was first made. It has long been the common opinion that they were first appointed in the great council held at Nottingham, or, as some say, at Northampton, in the 22d year of Henry the Second, *anno Domini* 1176, when the king, by the advice of the great coun-

At what time justices in eyre first established.

cil, divided the realm into six circuits, and sent out three justices in each to administer justice.

Kingdom divided into six circuits.

The counties assigned to each of these circuits were as follow: to one, the counties of *Norfolk*, *Suffolk*, *Cambridge*, *Huntingdon*, *Bedford*, *Buckingham*, *Essex*, *Hertford*; to another, *Lincoln*, *Nottingham*, *Derby*, *Stafford*, *Warwick*, *Northampton*, *Leicester*; to another, *Kent*, *Surrey*, *Southampton*, *Sussex*, *Berks*, *Oxford*; to another, *Wilts*, *Dorset*, *Somerset*, *Devon*, *Cornwall*; to another, *York*, *Richmond*, *Lancaster*, *Copland*, *Westmoreland*, *Northumberland*, *Cumberland*.

Then into four.

About three years afterwards the kingdom was parcelled out into four circuits only, the county of Middlesex, which before was not noticed, was then included, and more justices assigned to each. But they were since again divided into six circuits as they are at this day. The criminal jurisprudence of the country being found very defective, from the great delay of justice in criminal cases, as all trials of that kind were obliged to be deferred till the justices *itinerant* came into the county, commissions used to be occasionally issued, empowering certain justices therein named to make a *delivery of the gaol* specified in the commission, that is to examine into the offences of all the prisoners therein, and to discharge, continue in custody, or punish them according to their several crimes. The exact time when this practice commenced is not ascertained. It had been a very ancient custom among the Normans, both in their own country and in France, to try titles to land, and other questions, by *duel*. When William had ordained that this martial practice of his own country should be observed here in *criminal* trials, it became very easy to introduce it in *civil* cases; and, being only used in the *Curia Regis*, it had not, among the other novelties of that court, as it certainly would have had in the county-court, or any other of the ancient tribunals of Saxon original, the appearance of so singular an innovation. With all its absurdity, this mode of trial was not without some marks of a rational reliance on testimony and vouchers for the truth of what was in dispute; for it was never awarded without the oath of a credible witness, who would venture his life in the duel for the truth of what he swore. "I am "ready," says the party litigant, "to prove it by my free-"man John, whom his father on his death-bed had enjoin-"ed, by the duty he owed him, that if at any time he should "hear of a suit for this land, he should hazard himself in a "*duel* for it, as for that which his father had *seen and heard*." Thus the champion of the demandant was such as might be a fit witness, and on that account the demandant could never engage

Afterwards into six.

Delay in criminal cases, from circuits being held seldom.

1 Reeve, 57.

Origin of commission of gaol delivery.

Of the trial by duel or battle.

Nature thereof.

Oath necessary.

Form thereof.

1 Reeve, 82.

engage in the combat himſelf; but the other party, who was defendant or tenant in the ſuit, might engage either in his own perſon or by that of another. Who might be parties.

It is difficult to ſay what matters were at one time ſubmitted to this mode of trial. Perhaps, at firſt, all queſtions of fact might, at the option of the demandant, have been tried by battle. In the reign of Henry the Second it was deciſive in pleas concerning freehold, in writs of right, in warranty of land, or of goods ſold, debts upon mortgage or promiſe, ſureties denying their ſuretyſhip, the validity of charters, and queſtions concerning ſervices. But notwithſtanding the general bent of this people to admit the propriety of a trial ſo ſuitable to their martial genius, there muſt have been men of gravity and learning among them at all times, and perſons of that character would always reprobate ſo ineffectual and cruel a proceeding. In what caſes, and in all matters relating to landed diſputes.

As men became more civilized, a change was effected; and we find in the reign of Henry the Second, that many queſtions of fact relating to property were tried by twelve *liberos et legales homines juratos* ſworn to ſpeak the truth, who were ſummoned by the ſheriff for that purpoſe. This tribunal was in ſome caſes called *aſſiſa*, from *aſſidere*, as it is ſaid, becauſe they ſat together: though it is moſt probable, and indeed ſeems intimated by the manner in which Glanville often expreſſes himſelf, that it was emphatically ſo called from the *aſſiſa*, as the laws were then termed, by which the application of this trial was in many inſtances ordained. On other occaſions this trial was called *jurata*, from the *juratos* or *juratores* who compoſed it. How changed into trial by jury. Reeve, 83. Which was ſometimes called aſſiſa. What aſſiſa properly means.

Although inſtances might have occurred before of trial ſomething ſimilar to that of trial by jury, yet it was not till the reign of Henry the Second that the preſent trial by jury became general. This law called *aſſiſa* ordained that all queſtions of *ſeiſin* of land ſhould be tried by a recognition of twelve good and lawful men, ſworn to ſpeak the truth; and that in queſtions of *right* of land, the tenant might elect to have the matter tried by twelve good and lawful *knights*, inſtead of the duel. It appears that ſome incidental points in a cauſe, that were neither queſtions of mere *right* nor of *ſeiſin* of land, were tried by a recognition of twelve men; and that in all theſe caſes, the proceeding was called *per aſſiſam* and *per recognitionem*; and the perſons compoſing it were called *juratores*, *jurati*, *recognitores aſſiſæ*, and collectively *aſſiſa et recognitio*; only the twelve jurors in queſtions of mere right, being knights, were diſtinguiſhed with the appellation of *magna aſſiſa*, which is the caſe at this day in trials on a writ of right. Thus far have we ſhewn the nature of this Operation thereof. Recognition what. Magna aſſiſa, what.

Juries used in other actions, what then called.

ſpecies of trial by jury called *aſſiſa*, and to what cauſes it related. Juries were alſo uſed in other caſes not called *aſſiſa*, as in queſtions of property not relating to land, in which actions the proceedings were ſaid to be *per juratam patriæ*, or *vicineti*, *per inquiſitionem*, *per juramentum legalium hominum*; and this in *criminal* as well as *civil* matters.

The above obſervations were thought neceſſary, in order that the ſtudent might underſtand the true meaning of the word *aſſize*, and the nature of the commiſſion of aſſize, and the office of judge of aſſize.

Eſtabliſhment of judges of aſſize.

In the reign of Henry the Third, in order to render the proceeding by aſſize more expeditious, and not to delay the inquiry until the coming of the juſtices in eyre, who we find ſeldom went their circuits, other juſtices were appointed to go circuits once every year to take aſſizes; they acted in this reſpect under the king's commiſſion, called the Commiſſion of Aſſize, and the juſtices were denominated Judges of Aſſize.

Origin of aſſociates with them.

To theſe juſtices were *aſſociated* the knights of the county, who with them took the aſſize; and this is probably the origin of the preſent *aſſociation* in the commiſſion of aſſize.

Of the commiſſion of oyer and terminer.

In ancient times, when any particular outrage or miſdemeanor had been committed, a certain writ uſed to iſſue *ad audiendum ad terminandum* ſuch offence, ſince called the Commiſſion of *Oyer* and *Terminer*, which was directed to any juſtice, or even private perſon, at the ſuit of the party requiring, or the diſcretion of the officer granting it; but in the reign of Edward the Firſt it was ordained by ſtatute, that this writ ſhould not be granted before any juſtices except juſtices of either bench, and juſtices in *eyre*, unleſs in caſes of particular enormity, where the king *ex neceſſitate rei* ſhould think fit to grant it.

I mention this, becauſe now the juſtices of aſſize act under the commiſſion of oyer and terminer.

Of trials at niſi prius, 13 Ed. 1. c. 30.

In this ſame reign of Edward the Firſt paſſed the ſtatute of *niſi prius*, as it is called. Indeed, before this time, the *niſi prius* clauſe was not altogether unknown; for as great expence was occaſioned to the parties in bringing up witneſſes and the like, from diſtant parts to Weſtminſter, on the trial of trifling cauſes, a practice very early obtained, of

Clauſe of niſi prius of earlier origin;

continuing the cauſe from term to term in the court above, provided the juſtices in eyre did not previouſly come into the county where the cauſe of action aroſe; and if they did, they had juriſdiction of the cauſe. *Semper dabitur dies* (ſays Bracton, lib. 3. tr. 1. c. 11. f. 8.) *partibus a juſticiariis de banco ſub tali conditione* "*niſi juſticiarii itinerantes prius venerint* "*ad partes illas.*"

But

But by the ſtatute of *niſi prius* in the reign of Edward the Firſt juſtices of aſſize were empowered to try common iſſues in treſpaſs and other leſs important ſuits, with directions to return them (when tried) into the court above, where alone the judgment ſhould be given. And as only the trial and not the determination of the cauſe was now intended to be had in the court below, therefore the clauſe of *niſi prius* was left out of the *conditional continuances* before mentioned, and was directed by the ſtatute to be inſerted in the writs of *venire facias* (a); that is, "That the ſheriff ſhould cauſe the jurors to "come to *Weſtminſter* (or whereſoever the king's court "ſhould be held) on ſuch a day in Eaſter and Michaelmas "terms: *Niſi prius*, that is to ſay, *unleſs before* that day the "juſtices aſſigned to take aſſizes ſhall come into his ſaid "county." By virtue of which the ſheriff returned his jurors to the court of the juſtices of aſſize, which was ſure to be held in the vacation before Eaſter and Michaelmas terms, and there the trial was had.

but now inſerted in different parts of the proceſs.

Of the venire.

Nature of niſi prius; clauſe therein.

But an inconvenience attended this proviſion; principally becauſe as the ſheriff made no return of the jury to the court at Weſtminſter, the parties were ignorant who they were till they came upon the trial, and therefore were not ready with their challenges or exceptions. For this reaſon, by the ſtat. 42 Edw. 3. c. 11. the method of trials by *niſi prius* was altered; and it was enacted, that no inqueſts (except of aſſize and gaol delivery) ſhould be taken by a writ of *niſi prius* till after the ſheriff had returned the names of the jurors to the court above. So that now, in almoſt every civil cauſe, the clauſe of *niſi prius* is left out of the writ of *venire facias*, which is the ſheriff's warrant to return the jury, and is inſerted in another part of the proceedings.

Inconvenience of niſi prius being in venire.

How altered.

The preſent practice is to make the ſheriff's *venire* returnable on the laſt return of the ſame term wherein iſſue is joined, *viz.* Hilary or Trinity terms, which, from the making up of the iſſues therein to be tried at the aſſizes, are called *iſſuable* terms; and he returns the names of the jurors in a *panel* (a little pane or oblong piece of parchment) annexed to the writ. This jury is not ſummoned, and therefore not appearing at the day, muſt unavoidably make default; for which reaſon a compulſive proceſs is now awarded againſt the jurors, called in the Common Pleas a writ of *habeas corpora juratorum*, and in the King's Bench a *diſtringas*, commanding the ſheriff to *have their bodies*, or to *diſtrain* them by their lands and goods, that they may appear upon the day appointed. The entry, therefore, on the roll or record after the

and now inſerted in diſtringas or habeas corpora juratorum.

Panel of jurors, what.

(a) For further information on this ſubject, ſee Gilb. Hiſt. C. B. 77.

Present form of entry of nisi prius clause or roll.

venire is, "that the jury is *respited* through defect of the "jurors till the first day of the next term, then to appear at "*Westminster*, unless before that time (*nisi prius*) viz. on "Saturday the 23d of February, the justices of our lord the "king appointed to take assizes in that county shall have "come to *Buckingham* (that is to the place assigned for "holding the assizes)." And thereupon the writ commands the sheriff to have their bodies at *Westminster*, or *before the said justices of assize*, if before that time they come to *Buckingham*, viz. on the 23d February aforesaid. And as the judges are sure to come and open the circuit commissions on the day mentioned in the writ, the sheriff summons the jury to appear at the assizes, and there the trial is had before the justices of *assize* and *nisi prius*, among whom are usually two of the judges of the courts of *Westminster*, the whole kingdom being divided into six circuits for this purpose. Thus we may observe that the trial of common issues at *nisi prius*, which was in its original only a collateral incident to the original business of the justices of assize, is now by the various revolutions of practice become their principal civil employment: hardly any thing remaining in use of the real *assizes* but the name.

Operation thereof.

3 Blac. Com. 354.

Of the different commissions judges on circuits act under.

The judges upon their circuits now sit by virtue of five several commissions, the origin and nature of which we have above shewn, and how they were respectively acted upon. 1. The commission of the *peace*, as conservators of the peace generally. 2. A commission of oyer and terminer. 3. A commission of general gaol delivery. 4. A commission of *assize*. 5. That of *nisi prius*. These commissions are constantly accompanied by writs of association, in pursuance of the statute of Edw. 1. & 2., whereby certain persons (usually the clerk of assize and his subordinate officer, called from thence the judge's associate) are directed to associate themselves with the justices and serjeants, and they are required to admit the said persons into their society, in order to take the assizes, &c. that a sufficient supply of commissioners may never be wanting. But to prevent the delay of justice by the absence of any of them, there is also issued of course a writ of *si non omnes*, directing that if all cannot be present any two of them (a justice or serjeant being one) may proceed to execute the commission.

Of the associate.

The non omnes clause.

3 Blac. Com. 59.

Construction of stat. Edw. 1. of oyer and terminer.

2 Woodeson, 313.

The ancient statutes before mentioned, which forbid the issuing of oyers and terminers, except to the justices of one bench or the other, or to those in eyre, are restrained by Serjeant Hawkins's judicious interpretation to mean special commissions only, granted at the complaint of particular persons, which practice hath long been obsolete.

The

The courts holden before our preſent itinerant juſtices, exerciſing either their civil or criminal juriſdiction, are of record. The records are made up in the ſuperior courts at *Weſtminſter*, and then go down to be tried in their proper county before theſe juſtices; after which they are returned back to the higher juriſdiction with the verdict of the jury, for the purpoſe of entering up judgment, and carrying that judgment into execution.

Courts of niſi prius.

Courts of record.

Judgment given in courts above.

Of the Difference in making up the Records in the two Courts.

The ſtudent will find in the courſe of the work (particularly Ch. ix.) a material difference in the mode of making up the records of the two courts; to explain which it will be neceſſary to conſider in what manner, after iſſue is joined, and the *venire* and *diſtringas* made returnable, the *continuances* are entered in the two courts.

If it be an iſſuable term, the *venire* is made returnable the laſt day of the term, without any *niſi prius* in it, as it anciently was [ſee *ante* this Section]; and from that day the *diſtringas* is teſted with a *niſi prius*, returnable with a day in bank; if iſſue be joined, and they do not go to trial the ſame term, then they award a *venire* on the roll, returnable the ſame or the next term; and if they do not go to trial, they continue the proceſs by a *vice comes non miſit breve*; and then there is on the roll a new *venire* awarded till the vacation, when they go to trial; and when they are going to trial, they take the roll and enter the *continuances* to the *diſtringas*, which award of the *diſtringas* is never entered on the plea roll, but only at the firſt day of next term after the aſſizes when the *poſtea* is returned, they enter it *poſtea continuato inde proceſſu*, which is a recital of the continuance warranted by the *niſi prius* roll. The reaſon of this practice is this, that if they had entered the award of the *diſtringas* on the plea roll, and had not gone to trial, they muſt from thence award an *alias* and *pluries diſtringas*, which would have obliged the jury to come in term, and in a term not iſſuable. By this practice, they ſaved all trouble and expence of that nature, and yet they continued the acts of the court as well; for *poſtea continuato inde proceſſu* ſhews on the plea roll, that the laſt award of the *venire* in the former term was continued to the day in bank by the proceſs, *viz.* by the *diſtringas*; and the award of the *diſtringas* was not neceſſary to be entered, ſince it was an act relating to a trial out of the court, and not in the court itſelf; and therefore, preparatory to the trial, was *formerly* entered on the *niſi prius* or iſſue roll, ſo called, becauſe on it the

How venire awarded.

Diſtringas.

How entered on the roll.

What kind of continuances.

Of the poſtea continuato inde, &c.

Uſe of that entry.

How continuances formerly entered on plea roll.

the pleadings were entered to the iſſue at that time; and as it was unneceſſary to enter the continuance on the plea roll, ſo it was not expedient, becauſe ſuch continuance would have embarraſſed the parties and jury; and therefore a general entry was thought ſufficient on the *niſi prius* roll: the declaration and pleadings are now entered to the iſſue joined, together with the firſt award to the *venire*. But to ſave the trouble of ſuch entry of continuances, they enter the *placita* of the term in the vacation, when they go to trial, at the bottom of the *niſi prius* roll, between the award of the *venire* and the *jurat*; and this ſhews the judge of aſſize, that it was an iſſue continued to the laſt term, and is a warrant to the officer above to continue the *venire* until the time of iſſuing the *diſtringas*. Hence in the Common Pleas they make no *placita* at the bottom when they go to trial the *ſame term iſſue is joined*; for that would apparently be unneceſſary ſince ſuch *placita* came inſtead of the continuances; but in the King's Bench, they always entered the *placita*, though they went to trial the ſame term; for anciently the continuances in that court were from one day to another day in the ſame term. Beſides which, it is to be noted, that in the Common Pleas, there was anciently a *continuance roll* for the jury proceſs; ſo that after the *venire* was awarded, and the jury proceſs was continued from term to term, they entered the continuance on a roll of that day to which ſuch proceſs was continued, entering up the ſtyle of the court on the top of ſuch roll, numbering the roll; and ſo, when continued to a ſubſequent term, they entered on the continuance roll of that day in the ſame manner; and when the *poſtea* came up, then their entry was made in this manner: *poſtea continuato proceſſu præd. inter partes præd. per jur. ponit inde inter eos in reſpectum huc uſq. ad tunc diem ſcil. in Octab. Sancti Trinitat. niſi Juſticiar. prius*, &c.

Now generally on niſi prius roll.

Reaſon why no placita in C. B.

but one in K. B.

Of the ancient continuance roll.

Uſe thereof.

And when ſuch records were ſent for by writ of error at the end of the judgment, they ſent the *placita* of the particular times of continuances to warrant that part of the roll that mentions the *continuato inde proceſſu*; and this is evident from Raſtall's Entries, title Error, in a roll in the 5 Edw. 4. where the very number of each roll of continuance is entered at the foot of the judgment. After 32 Hen. 8. c. 30. the continuance roll was dropt; becauſe, by that ſtatute, all diſcontinuances were cured after verdict; and therefore they only entered on the plea roll the award of the *venire*, which they continued as before mentioned, by a *vic. non miſit breve*; but now that is dropt, and they only enter *poſtea continuato inde proceſſu inter partes præd.* entering the verdict returned on the *poſtea*; and they need not, on the foot of the record, enter

When aboliſhed.

Why.

enter any continuance, since the want of a continuance is cured after verdict; but they enter the *placita* and the award of the *distringas* on the *nisi prius* roll, to be an authority to the judge to try the cause.

Use and operation of the postea.

The day at *nisi prius*, and in bank, are, in consideration of the law, the same; because the writ of *nisi prius*, which gives authority to the judge to try the cause in the country, is instead of the court; and therefore the *postea*, certified by him on the day of bank, is the same as if the jury had come up to the court; and this, as was said, is for the ease of the subject, that the jury and witnesses may not be brought out of their proper county.

How continuances now to be made.

If a *venire* is awarded, and they do not go to trial the next assizes, but it lies for several terms, the continuance may be made by a *vic. non misit breve;* but if a *nisi prius* be awarded, and some of the jury appear, and the panel be not full, so that the trial is not carried on, they only enter those of the jury that appeared, *et alii non venerunt, ideo respectuentur to the next* term *pro defecto jur.;* and at the day in the next term, they award an *alias distringas* to the next assizes, with a *nisi prius* until the next term.

Section VII.

Of the several Ways in which Actions may now be brought in the Courts of King's Bench and Common Pleas.

As a conclusion to this Introduction, and by way of assisting the Student in the better understanding of the following Work, I shall briefly shew the various modes of bringing Actions in the two Courts, recapitulating in part what has been before advanced in the two or three first Sections.

An action, what.

An action is defined differently by different writers: It is said, by Bracton and Fleta, to be *Nihil aliud quam jus prosequendi in judicio quod sibi debetur.* By Lord C. J. Coke (Co. Litt. 285.) it is called, "A legal demand of one's right." By another learned author (3 Black. Com. 116, 117.) it is considered as a "remedial instrument of justice, whereby redress is obtained "for any wrong committed, or right withheld." But, more immediately to answer our present purpose, it may not, perhaps, be improperly defined, "*The method prescribed* by dif- "ferent statutes, and by the rules and practice of the re- "spective courts, *for the recovery* of any debt due, or of an "equivalent in damages for any injury sustained."

The

How to be brought.

The first question which naturally suggests itself, is, What is the *method* so *prescribed?* In what way is this legal mode of redress, called an *action*, to be enforced? Which leads to the consideration of the several ways of bringing actions in the respective courts.

(A) In B. R.

(A) Of the several Ways of bringing an Action in the Court of King's Bench.

(A. 1)

(A. 1) *In all* common *Cases.*
1. *By Bill.*
2. *By Special Original.*

What meant by common cases.

By *common* cases, is to be here understood, all such actions as are brought by one common person against another, where the defendant is not a prisoner in the *actual* custody of the court.

It is well known, that the present usual method in such cases of commencing a suit in the court of King's Bench is either by *bill of Middlesex* or *latitat.*

But the bill of Middlesex and latitat, strictly speaking, are nothing more than *process* to bring the party into court, founded upon a certain *plaint*, called a *bill*, *supposed* to have been previously filed by the plaintiff. For which reason this mode of proceeding is termed, BY BILL.

1st, Of proceedings by bill.

As this *bill*, which, for distinction's sake, we will call the *original* bill, is not, in point of fact, now filed, but the process of the bill of Middlesex is sued out, in the first instance;

Mistaken for other bills.

the *former* is too often confounded with the *latter;* or sometimes it is as erroneously mistaken for the same kind of *bill* with that filed in proceedings against attornies and prisoners.

An explanation thereof.

To prevent, therefore, any such misconceptions, and to assist the reader in the better understanding of the practice of this court, we will endeavour, in as few words as the nature of the subject will admit, to explain this *general mode of proceeding* BY BILL *in common cases.*

The court of King's Bench had always, from its first establishment, an *original* jurisdiction over *criminal* offences, or pleas of the crown; and also over such *civil* matters as were in breach of the peace, and therefore denominated *trespasses.* [Sec. i & ii.]

[Section i & ii.]

It also necessarily possessed a mode of proceeding peculiar to itself, as incidental to such original jurisdiction: which mode of proceeding was by *bill.* And as this jurisdiction at first extended only to such civil matters as were deemed *trespasses*, it was necessary that this *bill* should allege, generally,

rally, a *treſpaſs* to have been committed by defendant. It has, therefore, ſometimes been called, and not improperly, the bill in *treſpaſs*. (Tidd's Pract. 85.) Called the bill in treſpaſs.

By ſpecious contrivances, and ſubtle legal fictions [Section ii.], this juriſdiction over civil matters was gradually extended, and the court of King's Bench now takes cognizance of all (a) *perſonal* actions, equally with the court of Common Pleas.

But this cognizance is ſtill *founded* upon the legal ſuppoſition, that a treſpaſs has been committed. [Section i.]

The ſame mode of proceeding, therefore, by *bill*, prevails, and is the general way of bringing actions, as well in treſpaſs. as in all common caſes.

But although the *ſpecies* of action by *bill*, at this day uſed in *all* civil matters, is the ſame as was originally confined to caſes of force or *treſpaſs* only; yet the modern practice of commencing ſuits (by *bill* of *Middleſex* and *latitat*) is very different from the ancient. The ancient and preſent mode of proceeding by bill the ſame.

Formerly the practice was, actually to file, in the firſt inſtance, a certain *plaint* in writing, with the proper officer of this court, charging defendant, generally, with the commiſſion of ſome *treſpaſs* [Section ii.]; and this plaint was called the *bill*, and is the ſame as we have before called the *original* bill, or the bill in *treſpaſs*. Upon this bill being filed, there iſſued the *proceſs* to bring the defendant into court, to anſwer to this plea of treſpaſs, which was afterwards more at large ſet forth, when defendant appeared in court, in plaintiff's declaration. But the practice in commencing ſuits different. The ancient practice.

This proceſs, according to ſome writers, was an *attachment*; and if the ſheriff returned, that defendant had nothing by which he could be attached, there then iſſued a precept in the nature of a *capias*.—According to other authors, the precept was the *firſt* proceſs that iſſued to compel an appearance. But whatever the *ancient* mode might have been, it gradually became the practice to ſue out the *precept* in the firſt inſtance. [Section ii.]

This precept was alſo called a *bill*; but, by way of diſtinction, was further denominated, a bill of the particular *county* in which the court ſat; for which reaſon it is *now* called a *bill* of *Middleſex*. If the defendant were not to be found in that county, the ſheriff returned the precept accordingly, *non eſt inventus*; and thereupon a writ iſſued to the ſheriff of ſuch county wherein it was thought defendant would be found; reciting, that the former precept had iſſued, The bill of Middleſex. Why ſo called.

(a) So alſo of *mixed* actions, as ejectment, &c but the court of C. B. ſtill exerciſes excluſive juriſdiction over *real* actions, as writ of right, &c.

and

The teſtatum bill, or latitat, why ſo called.

and had been returned, and that (*teſtatum eſt*), i. e. it was *teſtified*, that the defendant (*latitat*) lie hid and lurked in the county, to the ſheriff of which this laſt writ was directed; and from theſe two words in the writ, which was formerly in Latin (a), it was ſometimes called a *teſtatum* bill of Middleſex; but more commonly a *latitat*.

Alteration in ancient practice.

As the chief uſe of this plaint, or bill in treſpaſs, was to bring the defendant within the juriſdiction of this court [Section ii.], when this juriſdiction became more firmly eſtabliſhed, the actual filing of this bill fell into diſuſe; and that precept, which was before only as *meſne* proceſs *after* the bill was filed, became in fact *as* the *original* proceſs, and was (as *it* now *is*) ſued out in the firſt inſtance.

Still, however, a bill was, and yet is, *preſumed* to be firſt filed; and, in order to ſhew the nature of the proceeding, the words *by bill* are inſerted in the bill of Middleſex; ſo that the bill of Middleſex ought not to be (though it too often is) taken for the *original* bill, or bill in *treſpaſs*, *ſuppoſed* to be filed.

Introduction of preſent practice.

As one innovation generally introduces another, the neceſſity even of ſuing out the *bill of Middleſex*, in order to warrant the *latitat*, and which was formerly ſtrictly adhered to [Section ii.], was gradually diſpenſedwith; and unleſs the bill of Middleſex was actually wanted on account of the defendant reſiding in that county, it became the practice to ſue out the *latitat*, in the firſt inſtance, into the county where he was to be found. Now, therefore, *two* eſſential things were *preſumed* to have been done, in order to authoriſe this *latitat*; namely, the *original* bill, or bill in *treſpaſs*, to have been filed, and alſo a bill of Middleſex to have been ſued out, and returned *non eſt inventus*.

Strange as theſe legal fictions and preſumptions may at firſt appear, it is upon them that the preſent practice of commencing ſuits by *bill* of *Middleſex* and *latitat* is founded. If the defendant, therefore, live in Middleſex, the firſt proceſs is now a bill of Middleſex. If he is to be found elſewhere, the firſt proceſs is a *latitat*.

Such, then, is the general deſcription of the ancient and modern mode of proceeding by *bill* in common caſes; a mode very different from any other proceedings by bill, either in this court or the court of Common Pleas. Which difference is clearly diſcernible, if the particular characteriſtics

Characteriſtics of the original bill, or bill in treſpaſs.

(a) It was not till the reign of George the Second that law proceedings were in Engliſh; when, by the 4 G. 2. c. 26. they were directed ſo to be, and alſo to be written in a common legible hand and character, and not in court hand.

of

of this *original* bill, or bill in *treſpaſs*, be attended to.—— For,

1ſt, In this bill it was abſolutely neceſſary to allege a *treſpaſs* committed,—which is not the caſe with other bills.

2d, This bill is *peculiar to this court;* whereas the proceedings by bill againſt attornies, members of parliament, and the like, are equally uſed in the court of Common Pleas.

3d, This bill is *founded* upon the *original* juriſdiction of this court, as the court of *criminal* judicature; whereas other proceedings by bill, are either founded upon the juriſdiction of courts in general, over their own immediate officers and priſoners, or are given by ſtatute.

4th, This bill is uſed in all *common* actions, between common perſons; whereas other bills are uſed only in particular caſes, where the defendant is a privileged perſon, or a priſoner in actual cuſtody.

But it is obſervable, that although this way of bringing an action by *bill*, is the general mode of proceeding in this court, in all common caſes, and is founded upon its own *original* juriſdiction; yet the court of King's Bench may alſo take cognizance of any *perſonal* action, by virtue of a *derivative* or *delegated* authority from the court of Chancery.

Another Way, therefore, of bringing an Action in this Court, is by ORIGINAL WRIT.

2d, Proceedings in B. R.

In ſome caſes, indeed, it is abſolutely neceſſary to proceed by original; and in others, it is ſometimes adviſable. [See *poſt.* Chap. v.]

The mode of proceeding by *original* is the ſame as in the court of Common Pleas, founded upon the ſame kind of original writ, and proſecuted nearly in the ſame way; only, with this difference, that in that court, (as will be ſhewn,) it is not cuſtomary in *common* caſes actually to ſue out any original; but the proceſs by *capias* iſſues in the firſt inſtance; whereas in proceedings in this court by original, the *real* original writ muſt *actually* be ſued out before any proceſs can iſſue; it is therefore more properly called, proceeding by *ſpecial original.*

By ſpecial original.

Upon the whole, then, we find, that there are two ways of bringing an action in this court, in *common* caſes, (*i. e.*) by one common perſon againſt another, where the defendant is not a priſoner in actual cuſtody; viz.

1ſt, By BILL,—called, for diſtinction ſake, the *original* bill, or bill in *treſpaſs*, which is a proceeding founded upon the *original* juriſdiction of this court.

2d, By ORIGINAL WRIT, or, more properly, by *ſpecial original;* which is a writ iſſuing from the court of

Chancery, *delegating* to this court an authority to proceed in the action.

The other modes of proceeding in this court in *particular* cases.

It now remains to explain the several ways of bringing actions in this court in such cases as may be deemed *exceptions* to the above general mode of proceeding; but as the present Volume only relates to the bringing and prosecuting of actions in *common* cases, we shall here content ourselves with the mere enumeration of these several other methods of proceeding, without attempting any explanation thereof, which will be found at large in the Second Volume of this work.

(A. 2) (A. 2) *The several Ways of bringing Actions in this Court in* particular *Cases.*

Besides the two modes of proceeding as abovementioned, which relate to common cases, actions may be brought in this court:

Against prisoners. 3d, By bill against *prisoners:* the mode used in all cases where the defendant is a prisoner in *actual* custody of this court.

Against attornies, &c. 4th, By bill against *attornies*, or *officers of the court.* The mode used whenever an action is brought *against* such attorney or officer.

By attornies, &c. 5th, By *attachment of privilege;* the mode used when an action is brought *by* such attorney or officer.

Against peers, &c. 6th, By bill against *peers* and *members of parliament;* a mode given by the statute 12 & 13 W. 3. c. 3. before which all proceedings against them were by *original.*

Such are the several ways of bringing actions in this court in particular cases; upon which, as they will be more fully treated of hereafter, no further observation will in this place be made, than that the several last-mentioned modes of proceeding by *bill*, are all different from the mode of proceeding by bill in *common* cases; nor do they possess one of those criterions abovementioned, by which the latter bill is peculiarly marked and distinguished.

(B) In C. B. (B) Of the several Ways of bringing Actions in the Court of Common Pleas.

(B. 1) (B. 1) *In all* common *Cases.*
1. *By Original and Capias.*
2. *By Original* quare clausum fregit, *and Summons.*

The court of Common Pleas does not possess any *original* jurisdiction; nor has it, like the court of King's Bench, any mode of proceeding, in *common* cases, peculiar to itself.

Its

Its authority is founded on original writs, iſſuing out of the court of Chancery, (the ſame as thoſe before mentioned, by virtue of which the court of King's Bench alſo ſometimes takes cognizance of actions,) which original writs are the king's mandates for the court to proceed in the determination of the cauſes mentioned therein. (Sect. iii.) Its authority delegated.

The reaſon of original writs iſſuing out of Chancery is, becauſe, when the courts were united, which was formerly the caſe [Section i.], the Chancellor held the ſeal; therefore, when they were divided, he ſtill keeping the ſeal, ſealed all original writs. Gilb. C. P. 3. Why originals iſſue from the Chancery. [Section i.]

In all perſonal actions, therefore, brought by and againſt *common* perſons, the only way of proceeding in this court is by original. 1ſt, Of proceedings in C. B. by original and capias.

Formerly it was abſolutely neceſſary (as it is now in proceedings in B. R. by original, and *ſometimes* in this court) to ſue out the original writ before any *capias* could iſſue againſt the defendant, which was only *meſne proceſs* to bring him into court: but now the actual ſuing out of the original writ is diſpenſed with in all *common* caſes, and the *capias* goes, in the firſt inſtance, againſt the defendant. Original not really ſued out;

An alteration, ſimilar to that in the King's Bench, of the bill of Middleſex, or *latitat*, as before obſerved, being iſſued without any *original* bill previouſly filed.

But if it be the intention of the party to proceed to *outlawry*, then a ſpecial original muſt be properly ſued out, and the mode of proceeding according to the ancient practice ſtrictly adhered to; ſo, if judgment be by *default*, and a writ of *error* brought, a ſpecial original muſt be taken out, and filed, to warrant the proceedings; but the want thereof is cured after *verdict*. except in particular caſes.

Otherwiſe the common *capias*, without any original actually ſued out, though *preſumed* to be ſo, is the uſual way of commencing an action in this court in all *common* caſes.

There is, indeed, one other way of proceeding in this court in *common* caſes, which is ſometimes uſed.

It is called, proceeding by *original quare clauſum fregit*. (See Sect. iii.) Let it ſuffice here to obſerve, that this method of proceeding is grounded, in point of law, upon the ſame kind of original writ as the uſual proceeding above-mentioned by *capias* is; the only difference between them being in the *meſne proceſs* after the original is ſued out, or at leaſt *ſuppoſed* ſo to be; for in this laſt caſe alſo, the ſpecial original is not actually ſued out in the firſt inſtance. 2d, Of proceeding by original *quare clauſum fregit*. [Section iii.]

Inſtead of the proceſs to compel the appearance of the defendant, being by *capias* againſt his perſon, it is, in this caſe, by *ſummons* and *diſtreſs* againſt his goods. In a word, By ſummons and diſtreſs,

it is the same as the ancient mode of proceeding in this court was, before the general introduction of the *capias*; which was originally allowed but in few cases, and those favouring of *criminal* offences, but was afterwards extended to all *civil* actions. The advantage and use of this mode of proceeding, by *original quare clausum fregit*, is, where a defendant has effects which can be distrained, but he himself cannot be met with to be *personally* served; the process by *capias* requiring *personal* service, which is not required in the process by *summons*.

The advantage thereof.

There are two ways of proceeding, therefore, in this court in *common* cases, viz.

1st, By ORIGINAL, and *capias* founded upon the original.

2d, By ORIGINAL, and *summons* and *distress* founded upon the original, which is commonly termed, by way of distinction, by original *quare clausum fregit*.

It is to be observed, that the above mode of proceeding by original, relates only to actions between common persons.

For when any attorney, or officer of this court, either sues, or is sued, the proceedings *originally commence* in this court, and have no foundation in Chancery.

So proceedings against peers and members of parliament may be either, as at common law, by original, or agreeable to the statute 12 & 13 W. 3. c. 3. by bill.

But as the mode of proceeding in these particular cases will be fully considered in the Second Volume, we shall, in this place, merely enumerate, (without any further comment,)

(B. 2) (B. 2) *The several Ways of bringing Actions in this Court, in* particular *Cases.*

A third way of commencing an action in this court is,

Against attornies.

3d, By *bill*,—used in all actions against the *attornies* and *officers* of this court; which method is grounded upon the common law of the land, the general jurisdiction of courts over its own officers, and the established custom of this court, used and approved time out of mind.

4th, By bill, used in proceedings against *peers* and *members of parliament*; which method is given by stat. 12 & 13 W. 3. c. 3. but see as to peers *Lonsdale* v. *Littledale*, 2 H. Bl. 267—299. And lastly,

5th, By attachment of privilege, which may be used in all cases where any attorney or officer of the court is plaintiff in the action; which method is likewise grounded upon the acknowledged privilege of such officers, and the long-established custom of the court.

THE

THE PRACTICE OF THE COURTS OF King's Bench and Common Pleas.

CHAPTER I.

SEC. I. *Of the Terms, and particular Days in the Terms.*
SEC. II. *Of Attornies.*

SECTION I.

Of the Terms, and particular Days in the Terms.

(A) The Essoin Day.
(B) The Day of Exception.
(C) The Day of the Return of Writs, *or* Retorna Brevium Day.
(D) The Day of Appearance.
(E) Dies non Juridici.

THE Terms are those times or seasons of the year in which the Courts of Law sit for the dispatch of business. The Terms, what.

Writs were always returnable at certain stated days in different seasons of the year. These Returns, or *Termini ad Quos*, when they fell very near together, collectively constituted a period of legal business, which was called generally *Terminus*, or *Term*. 2 Reeve's Hist. 56. Derivation thereof.

Their origin.

The diviſion of the year into Term and Vacation has been the joint work of the *Church* and *Neceſſity*. The cultivation of the earth, and the collection of its fruits, *neceſſarily* required a time of leiſure from all attendance on civil affairs; and the laws of the *Church* had at various times aſſigned certain ſeaſons of the year to an obſervance of religious peace, during which all legal ſtrife was ſtrictly interdicted. What remained of the year not diſpoſed of in this manner was allowed for the adminiſtration of juſtice. The *Anglo Saxons* had been governed by theſe two reaſons in diſtinguiſhing the periods of Vacation and Term; the latter they called *Dies Pacis Regis;* the former, *Dies Pacis Dei et ſanctæ Eccleſiæ*. The particular portions of time which the Saxons had allowed to theſe two ſeaſons were adhered to by the Normans, together with the Saxon uſages, and continued until altered from time to time by future ſtatutes. In the latter part of the Saxon times, and in the reigns of William the Conqueror, Rufus, and John, the Terms were almoſt in the ſame ſtate as they are now, and by them the returns of writs and appearances were governed. 1 Reeve, 191. 3 Black. Com. 277.

By what courts they are obſerved.

The only courts confined to the Terms are the courts of King's Bench, Common Pleas, and Exchequer (the higheſt courts at common law). The court of Chancery is not; nor are they obſerved by the high court of Parliament, the Privy Council, the court of Lord High Steward, or the inferior courts. And it is ſaid, that the Exchequer may ſit out of Term. Mad. 551.

Their number and names.

Of theſe Terms there are four in every year, viz. *Michaelmas* Term, *Hilary* Term, *Eaſter* Term, and *Trinity* Term. The times when they reſpectively begin and end may be ſeen in the Table of the Terms and Returns at the end of this Chapter.

Their kinds, fixed and moveable.

The two firſt of theſe Terms are called *Fixed* Terms, as invariably beginning on certain fixed days in the year; and the two laſt, *Moveable* Terms, their commencement being regulated by *Eaſter* Day and *Corpus Chriſti* Day, both of which are moveable feaſts, not falling on any certain fixed days.

Iſſuable Terms.

Alſo two of the Terms, namely, *Hilary* and *Trinity*, are called *Iſſuable* Terms; becauſe in them the Records are for the moſt part made up of the *Iſſues* joined in the various cauſes depending, and which are to be tried at the aſſizes that reſpectively follow theſe Terms.

The

Which the first day in Term.

The first day in Term is, in law, the day that is called the Essoin Day, of which an account will be presently given; but the courts do not sit till the *Quarto Die post*, and if that be Sunday, not till the Monday following.

The Term deemed as one day.

The Term regularly is esteemed as one day; and therefore if a deed be said to be inrolled in such a Term; it shall be intended the first day. So if a Declaration be intitled generally of a Term, it shall be deemed a Declaration of the first day of the Term.

Except it be material to the justice of the case.

But where the day is material, it may be alleged that the thing was done on such a particular day in the Term; and it may be pleaded specially according to the fact, or evidence thereof given upon the trial, agreeable to the maxim, *Fictio cedit Veritati*.

Of the particular days in the Term.

There are four particular days in Term; the *Essoin* Day, the *Exception* Day, the *Return* Day, and the *Appearance* Day, called the *Quarto Die post*.

In all *personal* actions, the process according to the ancient institution was, first, for the sheriff to summon the defendant; which was done either personally, or the summons was left at his house; and the sheriff returned either *Summoneri feci*, or *Nil habet in Ballivâ meâ per quod summoneri potest*; on this summons the party either appeared, or *essoined*, or made default; if he *appeared*, the plaintiff proceeded against him, and defendant pleaded. If he *essoined* (that is, sent his *excuse* for not appearing), the excuse was to be sent on the day the writ was returnable; for if he omitted that day, plaintiff's *exception* might be entered the next day to his non-appearance, and he might have an order that the defendant's *Essonium non recipiatur*; and from this *exception*, so taken and entered, the *second* day, after the return of the writ, was called the Day of *Exception*. The *third* day the sheriff *returned* his writs into court, which were delivered into the custody of the *Custos Brevium*; and then it was that the court was seized of the cause by the possession of the writ. The *fourth* day was called the *Appearance* Day, or *Dies Amoris*; which was the time granted *ex gratiâ* for the party to appear. If the party did not then appear, the plaintiff offered himself and the Filazer recorded his appearance, and the return of the summons by the sheriff, and defendant was proceeded against by attachment and distress infinite, or by *Capias* as the nature of the case might warrant. Gilb. C. P. 13.

Such is the general explanation of the particular days abovementioned; but as it may be too concise to convey a sufficient idea of their nature and meaning, we will proceed to give a more full account thereof. And first, of

(A) The Essoin Day.

(A)

Its derivation. *Essoin* is derived from the French *essoiner*, or *exonier*, to *excuse*; and is an allegation of an excuse from one that is summoned, for his not appearing and answering to the action.

These essoins, or excuses, were allowed by the law, to the end that no person might be surprised or prejudiced by his absence, provided he had just cause to be excused by any thing that was not owing to his own default. Booth, 14.

Of the different kinds of essoins. There were *five* kinds of essoin: 1. *De servitio Regis*, being in the king's service. 2. *In terram sanctam*, being absent in the Holy Land. 3. *Ultra mare*, being beyond sea. 4. *De malo lecti*, being ill in bed; and 5. *De malo veniendi*, being seized with sudden illness or infirmity on the way; this last was called the *common* essoin.

When allowed. These essoins were allowed not only in *real*, but in *personal* actions; and *all* persons might essoin themselves except *minors*, disseisors, and a few others.

But there could be no essoin on a special *capias* where the sheriff is not to summon but arrest the party. *Bazelay* v. *Earle*. 2 Str. 1194.

At what time, and in what manner named. The *time* for making the essoin was, as before observed, the first day; that is, on the return of the writ; but it was sometimes even allowed on the second or third day, if no *exception* was entered by the other party.

The *mode* of making, or, as it is termed, *casting* an essoin, was in open court, before the justices, who sat on that day for the purpose of receiving the essoins; they were made by the servant of the party essoining, or by a *nuntius* or messenger, or a person called an *essoniator*, according as the case might be; for particular essoins were cast by particular persons.

But it could not be cast by an attorney for the party; for if he had appeared by attorney, it was sufficient, and there could be no essoin. *Anson* v. *Jefferson*. 2 Wil. 164.

Of the proceedings thereon. If, at the first summons, the common essoin *de malo veniendi* was cast, it was the ancient practice for the complainant, upon his appearing in court, (provided he doubted the truth of the essoin or excuse,) to demand from

from the *essoniator*, or person who made it, a lawful proof of the essoin on the very day; or that he should find *pledges*, or make a solemn engagement to bring a warrant or proof of the essoin; that is, the principal summoned, at a day appointed. And attachments issued against the essoniators *tanquam falsarios*, if they failed in the performance of the engagement they had made for their principal. But so early as the reign of Henry III. we find this practice disused; and except in particular cases, of barons and other great persons, who could well command a security, and upon whom the law still imposed the burden of finding pledges, essoniators were not required to give any security, but merely pledged their faith, to which credit was always given, that they would produce their principal at another day, to warrant the essoin, and prove it upon his oath.

1 Reeve, 116.

1 Reeve, 406.

How often essoined.

In the above manner might the tenant or defendant be essoined three times successively; and if he did not come at the third day, nor send an essoin, the court awarded that he should appear on another day, in person, or by a sufficient attorney (or *responsalis*, as he was then called), who would be received *ad lucrandum vel perdendum* in his place. If the party summoned, appeared on the fourth day after three essoins, and avowed them all, he was required to prove the truth of them by his own oath and that of another, and on the same day was to answer the action; and if he did not appear on the fourth day, nor send his attorney, his land was taken into the king's hands.

1 Reeve, 115.

What done on appearance.

Consequence of not appearing.

The law of essoins intricate.

The law respecting essoins, of the time of casting them, and by whom, and in what order, for there was a particular *order* also in which they were to be cast, was very intricate; and in former times, when the parties were anxious to take every advantage of the practice, was much studied and attended to.

Delay great, especially by *fourcher* by *essoin*.

Great and grievous was the delay occasioned by this practice. In one instance, indeed, it was carried to an intolerable length; which was, where there was an essoining *simul et vicissim*, or, as it was called, a *fourcher* by *essoin*: thus, when a *præcipe* was brought against two or more tenants, and after *each* had had *one* essoin, which was by law due to them, they further delayed the demandant by *alternately* successive essoins. As for instance, a præcipe is brought against A. and B.; A. is essoined, and B. appears, and hath *idem dies* given him, that is, some future day for his appearance; at which

2 Reeve, 122.

3 Inst. 259.

day A. appears, and B. is essoined, and A. hath *idem dies* given him; so far was usual: but then at the last mentioned day given, A. is essoined again, and B. appears, and so on alternately; this was called *fourcher*; that is, to *divide*, because they divided themselves in delay of the demandant by essoins and appearances interchangeably. This custom was carried to such excess, that in the reign of Edw. I. the legislature thought proper to interpose, and put a stop to it, by enacting, by the 3 Edw. I. c. 1. and 6 Edw. I. c. 10. that such tenant shall no more *fourch*, but have only *one* essoin.

Practice of essoining exploded.

As this practice of essoining (than which there could not perhaps be a greater grievance in judicial proceedings) is *nearly* exploded, and the law thereon become almost obsolete; it might be thought useless to say more upon the subject: the above being sufficient both to explain the nature and meaning of those days in the Terms, called *Essoin* Days, of which frequent mention is hereafter made, and to shew, in this instance, (as may be found in many others,) the great superiority and liberality of the modern practice, when compared with the ancient.

In what cases essoins may be now cast, and how.

But although the practice of *essoining* is nearly, yet it is not *wholly*, disused. In *real* actions, essoins may still be cast, which are entered in the office of the *Clerk of the Essoins*, where also the demandant, or plaintiff, may enter a *ne recipiatur*, if the essoin be not made in time.

In what not.

But it is now settled, that there can be no essoin in a *personal* action. *Argent* v. *the Dean and Chapter of St. Paul's.* E. 23 G. 3. *Rooke* v. *the Earl of Leicester.* 2 D. & E. 16.

Nor is a corporation entitled to an essoin. *Ib.*

Of proceedings on an essoin, and delivering declaration.

Where an essoin is cast, the parties should adjourn it to a particular day; but if that be not done, nor any motion made to quash the essoin, the plaintiff may still deliver his declaration on the first day of the following Term, but not before, nor will defendant be entitled to an imparlance. For the defendant is never entitled to an imparlance where the plaintiff is prevented from declaring before the Essoin Day, by an essoin cast. *Rooke* v. *the Earl of Leicester.* 2 D. & E. 16.

The modern practice of opening the courts on the Essoin Day.

It is observable, that agreeable to the old practice, some one of the judges of the respective courts still continues to go down to Westminster on the Essoin Day of each Term, in order to open the courts, and to take essoins,

eſſoins, ſhould any be offered; though they do not ſit for diſpatch of buſineſs till the *Quarto die poſt*.

For the reſpective Eſſoin Days preceding the reſpective Terms, ſee the Table of Terms and Returns at the end of this Chapter.——There are alſo other Eſſoin Days in the Terms, as many as there are return days. But by the Eſſoin Day generally ſpeaking, is to be underſtood, the firſt Eſſoin Day in each Term. The different eſſoins.

The Eſſoin Day is, in *law*, the firſt day of Term, the Quarto Die poſt being merely a day of grace. *Walter's* caſe. 1 Bul. 35. Eſſoin Day firſt day of Term in law.

Judgments relate, therefore, to the Eſſoin Day. *Ib.* Judgments relate thereto.

A judgment of Hilary Term had precedence to a ſtatute acknowledged between the Eſſoin Day and the *Quarto Die poſt*. *Stanford* v. *Cooper*. Cro. Car. 102.

But if the Eſſoin Day happen to be *Sunday*, the judgment can only relate to the firſt judicial day. *Davis* v. *Salter*. Sal. 627.

A writ pleaded as ſued out on a day, between the Eſſoin Day and Quarto Die poſt, held good on demurrer; for though the courts do not in fact ſit till the *Quarto Die poſt*, yet in law the Eſſoin Day is conſidered as the firſt day in Term. *Belk* v. *Broadbent*. 3 D. & E. 184. A writ well ſued out between Eſſoin Day and Quarto Die poſt.

(B) The Day of Exception. (B)

Of this day, ſufficient explanation has been already given. It being nothing more than the day next after the Eſſoin Day, when the demandant or plaintiff might enter his *Exception*, and obtain an order called a *Ne Recipiatur*, that the tenant's or defendant's eſſoin or excuſe ſhould not be received, in caſe ſuch eſſoin had not been put in, in due time, on the Eſſoin Day. Gilb. C. P. 13. Of the Day of Exceptions.

This *Ne Recipiatur* may ſtill be entered at the Clerk of the Eſſoins, in all actions, in which eſſoins are allowed. Of the *Ne Recipiatur*.

(C) The Day of the Return of Writs, *or* Retorna Brevium Day. (C)

It has been before obſerved, that writs were returnable at certain ſtated days in different ſeaſons of the year: but it does not appear that there was any preciſe rule requiring a writ to be returnable at any one of theſe ſtated days in preference to another. There ſeems, however, to have been ſome difference in the early How returns regulated formerly.

times of our law, between the length of time allowed to perſons ſummoned, to appear in. In a law of one of our Saxon kings (Ethered), it is directed, that if the party dwelt one county off, he ſhould have one week; if two counties, two weeks; and ſo for every county a week. The ſame is laid down by a law of Henry I. with a reſtriction not to go beyond the fourth week, *ubicunque fuerit in Angliâ;* but if the party were beyond ſea, he might have ſix weeks. There is no intimation, either in Glanville or Bracton, of any ſuch rule prevailing in their times. It is probable, that the returns in the time of the latter might nearly correſpond with the ſcheme laid down by the ſtat. of *Dies Communes in Banco*, which paſſed in the 51ſt year of Henry III. But this act does not give us entire ſatisfaction on that head; for being only a direction to the juſtices in Bank how to fix the returns of proceſs which they iſſued, in conſequence of the *return of ſome other* writ; we are ſtill uninformed as to the rule that governed in the return that was to be affixed to *original* writs. Theſe we know might be obtained in the office of the Chancery any day in the year. Whether they were made returnable at the pleaſure of the clerks who penned them, or, as is more probable, at the option of the purchaſor; or whether a certain rule ſubſiſted in the Chancery-office on this head, we are not able to collect. But when the original was once returned in *Banco*, the rule for making the return of proceſs upon it, and proceſs upon that proceſs, was preſcribed by the ſtat. of *Dies Communes in Banco*.

2 Reeve, 56.

Of the ſtat. of Dies Communes in Banco.

The uncertainty of the ancient practice.

The ancient mode, therefore, of regulating the preciſe returns of *original* writs, is hidden in obſcurity; and the aſſertion to be found in many books, and, among others, in Black. Comm. vol. 3. p. 277. that the returns of original writs "were *certainly ſettled* as early as the ſtat. "51 H. 3. ſt. 2." meaning the ſtatute of *Dies Communes in Banco*, is erroneous; ſince that ſtatute has nothing to do with the return of the *original* writ, but only ſettles the returns of the future proceſs, founded upon ſuch original writ *after* the original writ itſelf had been returned.

Returns regulated by ſubſequent ſtatutes.

Since the ſtatute of *Dies Communes in Banco*, other ſtatutes have been made relating to the returns of the reſpective Terms, particularly the ſtatutes of 16 Car. 1. c. 6. and 24 G. 2. c. 48. regulating the returns of Michaelmas Term, and 12 H. 8. c. 21. regulating the returns of Trinity Term.

As

As it is intended to treat hereafter more at large of the teſte and return of writs, it may be ſufficient at preſent to add a few general obſervations on the ſubject. Obſervations upon the Returns, as now ſettled.

In every Term there are ſtated days, called days in bank, *Dies in Banco*, upon ſome of which all original writs muſt be made returnable; they are therefore called the *General* Returns of that Term. They are at the diſtance of about a week from each other, and have reference to ſome Saint-day or feſtival, near which they fall. Theſe returns are frequently inſerted in the almanacks, and may be ſeen in the table hereto ſubjoined. But it is to be obſerved, that only *original* writs, and ſuch other writs as are grounded upon them, are to be made returnable on theſe *general* return days; and as, in many caſes, it is now uſual not to ſue by *original*, but by *bill* or attachment of privilege, as will be preſently ſhewn, there are other return days, called *particular* return days, on which all other writs, except originals, or thoſe founded upon them, may be returned. Dies in Banco, what. General Returns, what. Particular Returns.

Theſe particular returns may be made on any day in the Term, except Sundays, and a few other days, called *Dies non Juridici* (for which ſee poſt, E.); they expreſs the particular day in the proceſs, and bear reference to the general return day immediately preceding, and are ſaid, therefore, to be made returnable on a day *certain*.

As for inſtance, The general returns of Michaelmas Term, are on the morrow of All Souls, on the morrow of Saint Martin, and ſo on. Now if the plaintiff ſue by original writ out of Chancery, or by any writ grounded thereon, ſuch writ muſt be made returnable on *the morrow of All Souls*, or one of theſe *general* return days, agreeable to the time when it was ſued out. But if he ſue by bill, or attachment of privilege, he muſt make it returnable on ſome *particular* day, or day *certain*; as on *Monday*, or *Tueſday*, or *Wedneſday*, next after the morrow of All Souls, or after the morrow of Saint Martin, or the like, as the caſe may be. When, and how uſed.

Indeed, a *general* return day may be made a *particular* return day, and proceſs, by bill, &c. be returnable thereon; as thus: "On *Tueſday*, the morrow of All Souls," (by mentioning the day of the week,) which may ſometimes be expedient to gain time.

This rule of making writs and proceſs returnable, according to the nature thereof, upon general or particular return days, muſt be ſtrictly attended to in both courts.

The

What writs should be returnable in both courts on general return days.

The writs which must be made returnable on a *general* return day, are

In B. R.

All writs of *capias*, *alias*, and *pluries*, grounded upon *originals* out of Chancery, and all writs subsequent thereto to the outlawry. Writs of *scire facias quare executionem non, et ad audiendum errores*, upon writs of error out of the Common Pleas, or other inferior courts; writs of *capias ad satisfaciendum*, *fieri facias*, and other *judicial* writs, after judgment affirmed. Writs *De Retorno habendo Capias in Withernam*, and all other writs and process grounded upon any *recordari facias loquelam*, *audita querela*, *accedas ad curiam*, *capias si laicus*, and every other judicial writ out of Chancery.

In C. B.

All writs of *capias*, and other writs issuing out of this court, grounded on original writs out of Chancery. For which reason, the writs in this court are, for the most part, returnable on *general* returns. Their common process, by capias ad respond. being founded on an original writ out of Chancery, as will be shewn hereafter. But it is *otherwise* in proceedings by, or against, the officers of the court, as by *attachment* or *bill*.

In B. R. General Returns should be *wheresoever*, &c.

N. B. In the King's Bench, whenever a writ is made returnable on a general return day, it should also be with an "*ubicunque*," as it is called; that is, instead of making it returnable on that day at *Westminster*, it should say, "*wheresoever we shall then be in England*;" as "on the "morrow of All Souls, wheresoever," &c. For that court is removeable with the king at his pleasure. But in the Common Pleas it is otherwise, and the writ is made returnable before the king's justices *at Westminster*, that court being fixed by Magna Charta, and not removeable without previous notice given, agreeable to 2 Edw. 3. c. 11. [*Introduction*, Sec. I.]

In original writs, 15 days between teste and return.

Except in certain cases.

In all original writs, there should be fifteen days at least between the *teste* and *return*.

Formerly it was necessary that there should be 15 days between the teste and return of all writs in the *course* of the cause, even of the writs in *execution*, if the action had been commenced by *original*. But as that occasioned great delay, it was enacted by 13 Car. 2. st. 2. c. 2. § 6. that in all actions of *debt*, and all other *personal* actions, and also in all *ejectments*, *after* any *issue* therein joined, or any *judgment* obtained, in either of the courts, there need not be 15 days between the teste and return of any writ of *venire facias*, *hab. corp. jurat*; or, *distring. jurat. fi. fa.*

fi. fa. or *ca. fa.* Nor shall the want thereof be assigned for error. But this statute does not extend to any *ca. fa.* whereon a writ of exigent after judgment is to be awarded, nor to any *ca. fa.* against defendant in order to make bail liable.

The writs which must be made returnable, on a *particular* return day, or a day *certain* in Term, are, — What writs returnable on particular returns, or days certain.

In B. R.	In C. B.
All bills of Middlesex, latitats, alias capias, pluries capias, and all other writs, when the original proceeding was by *bill*; also habeas corpus super cepi corpus; hab. corp. ad faciend. et recipiend. and all other proceedings thereupon, both before and after judgment.	All writs of *attachment*, and writs subsequent thereto, and writs grounded on *bills*, filed against attornies, and such officers of the court, as are entitled to the privilege of the court; as also against members of the house of commons, and writs of habeas corpora, and the proceedings thereon.

These *particular* returns may be made, as before observed, even on the essoin days, or general returns, by specifying the *particular* day of the week, and so making the return on a day *certain*. But if the essoin happens on a Sunday, the writ must be returnable on *Monday* next after, &c. — May be returnable on general return days, if not Sunday.

(D) The Day of Appearance. (D)

The Day of Appearance, or *Quarto Die post*, is a day of favour or indulgence granted to the defendant to appear in, even four days after he has been summoned so to do, and one day after the writ has been returned by the sheriff, and the court have therefore got possession of the cause. This practice seems to have originated from the feudal law, which always allowed three distinct days of citation before the defendant was adjudged contumacious for not appearing. The proceedings, in case of defendant's appearance, or of his default, will be shewn in the body of the work. — Of the Appearance Day.

(E) Dies non Juridici. (E)

There are certain days in the Terms, called *Dies non Juridici*, on which care must be taken that no writ be made returnable. Such is the *Feast of the Purification* in Hilary Term, *Ascension Day* in Easter Term, and the *Feast of St. John the Baptist*, if it happen in Trinity Term (unless it be the first day of that Term, namely, — Purification. Ascension Day. St. John Baptist.

the Friday after Trinity Sunday, for then it is made *Dies Juridicus*, by ſtat. 32 H. 8. c. 21).

Writs if returnable thereon, void.

Writs returnable on any of thoſe days would be void. So that if a writ be returnable on a *Dies non juridicus*, on which it cannot legally be executed, it ſhall not be executed the next day, but is void; and if it be executed, and a writ of error brought on the proceedings, they ſhall be ſet aſide. *Harvey* v *Broad.* 6 Mod. 148. 196.

Sunday.

Sunday is *Dies non Juridicus*. *Davy* v. *Salter.* 6 Mod. 252.

What may or may not be done on Sunday.

The award of any judicial proceſs upon a Sunday is void. Sir W. Jon. 156. So the entry of any judgment upon record. Ib. So if judgment be given upon a Sunday in an inferior court. *Page* v. *Faucet.* Cro. Eliz. 227.

So the return of a writ by the ſheriff. *Harvey* v. *Broad.* 6 Mod. 148. 196.

How the courts will notice that day;

And the courts will take notice of this miſtake, though it does not appear upon the record, but they are only told of it, *ore tenus.* Ib.

and attend to the almanack.

For the almanack is part of the law of the land. 6 Mod. 41. And the court muſt take judicial notice of the commencement and return days of all Terms. *Davy* v. *Salter.* 6 Mod. 250.

No proceſs executed on Sunday.

By the ſtat. 29 Car. 2. c. 7. if any perſon ſerve, or execute proceſs, warrant, order, judgment, or decree, on a Sunday, (except for treaſon, felony, or breach of the peace,) it ſhall be void to all intents, as if done without proceſs or warrant.

Nor arreſt made.

For an arreſt therefore on a Sunday, falſe impriſonment lies. *Wilſon* v. *Tucker.* Sal. 78.

But the perſon arreſted muſt reſort to his action, for the court will not, on motion, diſcharge him. Ib. *Wilſon* v. *Guttery.* 5 Mod. 95.

What might be done before the ſtat.

Before the ſtat. 29 Car. 2. all *miniſterial* acts upon a Sunday, were lawful, though not *judicial* ones; as an arreſt by an officer upon proceſs. *Machally's caſe.* 9 Co. 66. 2 Cro. 280. *Pitt* v. *Weblay.* 2 Bul. 72.

But Q. taking a perſon in execution. Godb. 280. *Wait's caſe.* A perſon may now be taken in execution on any day but Sunday.

What criminal proceedings allowed.

By the above ſtat. 29 Car. 2. execution of proceſs, warrant, &c. in caſes of *treaſon, felony, or breach of the peace*, is allowed.

Execution of juſtice's warrant.

Within this exception, execution of a warrant of a juſtice of peace for good behaviour, is lawful. *Johnſon* v. *Coltſon*, T. Ray. 250. But before the ſtatute, it was held otherwiſe. *Priſon's caſe.* Cro. Car. 602.

If a defendant, arreſted on a Saturday, eſcapes, he may be retaken upon the Sunday, for that is not an execution of proceſs, but a continuance of the former impriſonment. *Jacob* v. *Dallow*. 6 Mod. 231. A retaking on an eſcape.

But not if the eſcape be voluntary. *Featherſtonhaugh* v. *Atkinſon*. Bar. 373. *Atkinſon* v. *Jameſon*. 5 D. & E. 25. Eſcape muſt be wrongful.

So a perſon may be taken upon an *eſcape* warrant on that day. *Parker* v. *Sir W. Moore*. 6 Mod. 95. Eſcape warrant executed.

A perſon may be arreſted on Sunday on the Lord Chancellor's warrant, on an order of commitment for contempt, for he is conſidered as in cuſtody from the time of making the order; and the warrant is directed to the gaoler, and is in the nature of an eſcape warrant. 1 Atk. 55. *ex parte Whitchurch*. An arreſt on the Chancellor's warrant.

On that day a perſon may ſurrender voluntarily. Ib. A voluntary ſurrender.

Proceſs on an indictment and attachment for a contempt, may be ſerved. Ib. Proceſs on indictment or attachment ſerved.

A man may be taken on an attachment for non-performance of an award. Ib. The party taken thereon.

A proclamation upon ſummons may be made, according to the ſtatute 31 Eliz. 3. *Anon*. 5 Mod. 449. Proclamation on ſummons.

A citation out of the Spiritual Court may be publiſhed at the door of the church, according to the uſage of the court, though it cannot be ſerved upon the perſon. Semb. 5 Mod. 450. *Alanſon* v. *Brookbank*. Carth. 504. Citation out of Spiritual Court publiſhed.

So Hue and Cry may be made upon a Sunday. *Wait's caſe*. Godb. 280. Hue and Cry may be made.

And if the Hundred refuſe to make it, they ſhall be puniſhed for the neglect. Ib.

On the 29th May, Reſtoration Day, buſineſs is not uſually done, and only one judge, in general, attends; but buſineſs may be done on that day, and in Eaſt. 7 G. 3. it being the *laſt common paper day*, the one judge went through the paper, otherwiſe the parties could not have had their judgments within that Term. 4 Bur. 2089. And in Eaſter Term 1797, it happened to be the laſt day of Term, and buſineſs was done as uſual. Reſtoration Day, how far Dies non, &c.

Dies non Juridici are only accounted ſo with reſpect to ſuch matters as muſt be tranſacted in court, but not as to buſineſs that may be done out of court, or even at a Judge's Chamber. Thus bail above may be put in on a *Dies non Juridicus*. *Baddely* v. *Adams*. 5 D. & E. 170. So if the Rule to plead, &c. expire on a DIES NON, defendant is bound to plead on that day. Herein therefore they differ from Sundays. The reaſon is, becauſe Sunday is no day of buſineſs for the ſake of the decent obſervance of the Sabbath, but on other *Dies non Juridici* the offices are open. *Meſure* v. *Britten*. 2 H. Blac. 616.

Section II.

Of Attornies.

(A) Of the Origin of the Practice of profecuting and defending by Attorney.
(B) Of the Warrant of Attorney to profecute and defend.
(C) Of the Memorandum or Minute of the Warrant.
(D) Of the Clerkfhip of Attornies.
(E) Of their Admiffion and Practice.
(F) Of taking out their Certificates.
(G) Of delivering and taxing their Bills.
(H) General Rules and Obfervations refpecting Attornies.

The ancient practice of fuing and appearing in perfon.

FORMERLY, actions were profecuted and defended by the plaintiff and defendant in *perfon*; they themfelves appeared in court to make and plead to the charge, or demand, which was the object of the fuit; nor was it allowable (except in particular cafes) to appoint an attorney. The modern practice is otherwife; attornies are now generally allowed; actions are, for the moft part, conducted by them on behalf of the parties; and it would be looked upon as fingular for a perfon (not being an attorney) to profecute, or defend his own fuit; though any one is ftill at liberty fo to do, there being no law, however cuftom may be, to the contrary. See *La Grue qui tam v. Penny.* 2 H. Blac. 600. where it was lately done.

Such a difference between the modern and ancient practice, may at firft appear not a little remarkable; and it may be deemed neither ufelefs nor unfatisfactory, briefly to explain the origin and reafon of the prefent prevailing practice of appointing attornies; how they were, and ftill ought to be, appointed; what is neceffary for them to do as evidence of fuch appointment, and to what reftrictions and regulations attornies are at prefent fubject.

(A) The

(A) The Origin of the Practice of profecuting and defending by Attorney. (A)

By the policy of the common law, fays Lord Coke, that fuits might not increafe and multiply, *cum lites potius reftringendæ funt quam laxandæ*, both plaintiff and defendant, or demandant and tenant, in all actions, whether real, perfonal, or mixed, appeared in *perfon*, as well in courts of record, as not of record, by reafon whereof, he adds, *there were but few fuits.* 1 Inft. 128. 2 Inft. 249. The parties formerly appeared in perfon.

But the king, by his prerogative, might have authorized either party to appoint an attorney, which was done by a certain fpecial warrant, called a *dedimus poteftatem de attornato faciendo*; and if the judges refufed to admit fuch perfon, by his attorney, the writ *de attornato recipiendo* was fued out to compel them fo to do. F. N. B. 59. 367. Unlefs the king, by writ or letters patent, authorized an attorney.

In particular cafes, alfo, the juftices might fuffer a deputy, or agent, to profecute or defend the fuit for the parties concerned; but this deputy was not called *attornatus*, or an attorney; but a *refponfalis*. The *latter* differed from the *former*, both in the *mode* of appointment, and in the *extent* of authority. The *attornatus*, or attorney, was appointed by virtue of the king's warrant or writ; and that, inftantly upon, or (if for the plaintiff) even before, the commencement of the fuit. The *refponfalis* was appointed by the juftices in open court, not until the fuit was commenced, and the party had appeared, for it was neceffary that the perfon appointing fuch *refponfalis*, fhould be *prefent*, and make the appointment before the juftices in open court. 1 Reeve, 169. Refponfalis what, and the difference between them and Attornies.

Again, the *attornatus*, or attorney, might be appointed with a *general* authority to act for the party in other fuits and matters; but the *refponfalis* was confined to the *particular* caufe then pending. It is clear, therefore, that the *attornatus* and *refponfalis* were very diftinct in their natures; although it is too common an error to confound them, and to make them fynonimous.

Lord Coke, however, endeavours to guard his reader againft this miftake. It appears, fays he, in Glanville's time, that the juftices admitted the parties *per refponfalem loco fuo ad lucrandum vel perdendum, verum oportet eum effe* PRÆSENTEM *in curia qui refponfalem ita in loco fuo ponit. Et nota* DIFFERENTIAM inter refponfalem & *attornatum.* 2 Inft. 249. 1 Inft. 128.

But

At what period attornies were more generally introduced.

But in time, the rigour of the common law, with reſpect to the perſonal appearance of the parties to a ſuit, gradually abated; and ſo early as the 13 Edw. I. an act paſſed, authorizing perſons, in certain caſes, to appoint attornies; which act has, for the moſt part, been looked upon as the foundation of the prevailing practice of ſuing and defending by attorney, and as giving *every perſon* a liberty of appointing an attorney. Gilb. C. B. 33. 2 Inſt. 378. 2 Reeve, 169.

But this was clearly not the caſe; ſince by ſubſequent ſtatutes, 7 R. 2. c. 14. and 15 H. 6. c. 7. this privilege was further extended to other perſons mentioned therein; and it was not until even the 29 Eliz. c. 5. that the liberty of appearing by attorney was extended to defendants in penal ſuits.

It ſeems, however, that from about that period, namely, the 13 Edw. I. it became the practice to proſecute and defend ſuits by attorney; that is to ſay, by a deputy or agent; an attorney, ſtrictly defined, meaning only a perſon ſet in the place of another; accordingly, the language of the warrant is—"*Talis loco ſuo ponit talem attornatum.*"—By the ſtatutes thus authorizing the appointing of attornies, with a general power, the *reſponſalis* became of no further uſe.

The conſequence of their introduction.

The natural conſequence of this general introduction of attornies was, their rapid increaſe, together with a multiplication of ſuits.

When the ſtatutes, ſays Lord Coke, gave way to appear by attorney, it is not credible how, with attornies and their multiplication, ſuits in law, for the moſt part unneceſſary, and for triſling cauſes, (when the parties themſelves might ſit quiet at home,) increaſed and multiplied. So dangerous, and ſuch ill ſucceſs have ever had the breach of the maxims and ancient rules of the common law. 2 Inſt. 249.

Such, indeed, were the inconveniences found to reſult from this rapid increaſe of attornies, that the legiſlature, at different times, interfered; and, by an act of parliament paſſed in the 33 H. 6. we find their number in Norfolk, Suffolk, and Norwich actually limited, to ſix in Norfolk, ſix in Suffolk, and two in Norwich.

Who may now appoint an attorney.

At preſent, however, the number of attornies is unlimited; and any perſon may appoint one to proſecute or defend a ſuit for him, except ſuch as, by reaſon of infancy, coverture, or the like, are not ſuppoſed to have ſufficient legal diſcretion to make ſuch an appointment.

This

This evidently shews, that originally there was a regular formal method of appointing an attorney, and which, indeed, ought still to be observed.

This leads to the consideration of

(B) The Warrant of Attorney to prosecute and defend. (B)

When the legislature allowed any person, at his discretion, to prosecute, or appear and plead, by attorney, nothing remained, when an action was about to be brought, or defended by any one, but the appointing of an attorney for the conducting thereof; which appointment was made by a certain written warrant, authorizing such a person, as an attorney, to prosecute or defend the said suit, for and on the behalf of such plaintiff or defendant. Of the warrant of attorney to prosecute and defend.

This warrant unquestionably answered many good purposes:—To the court, it was evidence of the authority of the attorney employed; to the attorney, it was a voucher of his appointment, and of itself a retainer by his client;—to the subject, in general, it was a beneficial check to the bringing or carrying on of suits in persons' names without their privity or consent. Its uses.

That the legislature was aware of the use and importance of these warrants, clearly appears by a statute so early as the 18 Hen. 6. c. 9. where every attorney was subjected to the penalty of 40 s. who had not his warrant entered of record in all suits wherein process of *outlawry* was awardable, the same term in which the *exigent* was awarded. Of filing the same of record.

By various other statutes, from time to time passed, as 32 H. 8. c. 30. s. 2.—18 Eliz. c. 14.—and 4 Ann. c. 16. particular times were appointed for the filing of these warrants, and penalties inflicted on default thereof.

By the last of the above statutes, the plaintiff's attorney should file his warrant the same term in which he declares, and the defendant's attorney the same term in which he appears; and for neglecting so to do, the attorney is liable to the forfeiture of 10 l. When to be filed. Forfeiture on default.

But, although such neglect subjects the attorney to a penalty, yet, with respect to the validity of the proceedings, it is sufficient, if the warrant be filed any time *pendente lite*, (i. e.) before final judgment. *Dyke* v. *Sweeting*. 1 Wil. 181. Or, even after judgment, and error brought. *Vincent* v. *Bodurdo*. 2 Keb. 199. But proceedings not invalid.

Want of warrant, when aided.

But by the ſtatute of Jeofails, 18 Eliz. c. 14. the want of a warrant is aided after verdict; though, in caſe of judgment by default, it ſeems ſtill neceſſary. 4 Ann. c. 16.

The practice of appointing by warrant now diſuſed.

The practice, however, not only of filing, but even of taking theſe warrants of attorney, is at this day, for the moſt part, diſuſed.

Perhaps it would be better otherwiſe.

A mere parol retainer is deemed ſufficient. But perhaps it might be better, and ſafer, if the old practice in this reſpect were more ſtrictly attended to, and greater caution uſed by attornies in procuring a proper authority before they proceed; for, even if a forged power of attorney be impoſed upon them, they are reſponſible for any thing they may do under it, however innocently.

Attornies anſwerable if they truſt even to a forged power of attorney, though innocently. They ſhould therefore be cautious.

Thus, in the caſe of *Robſon* and *Eaton*, 1 D. & E. 59. one Davis, having procured a forged power of attorney, went to Hodgſon, and commiſſioned him to bring an action in C. B. againſt Eaton, at the ſuit of Robſon. He did ſo, perfectly innocent of the fraud; and defendant, the action being in plaintiff's name, and ſeeing upon the record that William Hodgſon was the attorney put in by plaintiff, paid the money into court, which Hodgſon took out, and paid it over to Davis, who then abſconded; after which, this action was brought by the plaintiff himſelf for the original debt due. Per Lord Mansfield. There can be no doubt upon this caſe. The attorney, who truſted to the warrant of attorney, is liable; and Davis, who committed the forgery, is liable to him. Judgment for plaintiff.

So ſhould the parties alſo.

This ſhews, alſo, the neceſſity of caution on the part of the defendant himſelf; and that it is always adviſeable to be ſatisfied, that the action is, in fact, brought at the inſtance of the real plaintiff; for, ſuppoſe the attorney, in the above caſe, had not been a reſponſible perſon, Eaton, the defendant, muſt have ſubmitted to the loſs.

But although no regular warrants may be, at this day, either taken or filed of record by attornies, (ſtrictly ſpeaking, however, by the laws ſtill in force they ought to be,) yet, by a late ſtatute, ſubjecting every ſuch warrant to a ſtamp duty, attornies are now enjoined to file a *memorandum* or *minute* of ſuch warrant of attorney, at the particular times, and in the manner mentioned therein; as will be more fully explained in the treating of the

(C) Memo-

(C) Memorandum, or Minute of the Warrant, to profecute or defend. (C)

By the 25 G. 3. c. 80. f. 1. every warrant given to any attorney to commence, carry on, or defend any ſuit where the cauſe of action ſhall be above 40s. ſhall be charged with a ſtamp duty of 2s. 6d.

25 G. 3. c. 80. Every warrant to have a 2s. 6d. ſtamp.

And in order (as the act expreſſes it) to make ſuitable proviſions for the payment of this duty, it is, by ſect. 13. enacted, That no attorney ſhall ſue out any writ or proceſs, or commence or proſecute, or ſhall defend any ſuit, or appear for any defendant in any action, (for or in expectation of any gain, fee, or reward,) by virtue of any warrant or authority whatſoever, whether verbal or written, unleſs ſuch attorney ſhall have delivered a *memorandum* or *minute*, to the proper officer, or his deputy thereby appointed to receive the ſame, duly ſtamped with a 2s. 6d. ſtamp, of ſuch warrant or authority containing the names of the reſpective parties to the ſuit, the court in which the ſame ſhall be commenced, and alſo the name of the attorney or agent immediately retained to proſecute, carry on, or defend the ſame (agreeable to the form therein, and hereinafter preſcribed); which memorandum is to be entered, or filed of record, as hereinafter mentioned.

Every attorney proſecuting or defending a ſuit, to deliver ſuch ſtampt warrant

By ſec. 15. the proper officers, to whom the attornies are to deliver theſe ſtamped memorandums, and by whom they are to be duly filed, are on the part of the plaintiff's attorney, the clerk, or perſon who ſigns the writ, or firſt proceſs, and on the part of the defendant's attorney, the clerk, or officer who files the bail, or enters the appearance for defendant; and if bail be put in before a judge, then the memorandum is to be delivered to the judge's clerk before whom ſuch bail is put in.

to the officers to whom they have occaſion firſt to apply in the proſecuting or defending the ſuit.

S. 21. If plaintiff file common bail, or enter an appearance for defendant according to the ſtatute, he may do ſo without entering, or filing of record, any *memorandum* or *minute* for the defendant.

No ſuch memorandum on appearing for defendant according to ſtatute.

But no attorney ſhall, after ſuch appearance entered, according to the ſtatute, carry on any further proceedings for ſuch defendant, until the memorandum, or minute of the warrant, duly ſtamped, be delivered to the proper officer. S. 22.

Except further proceedings taken by defendant.

S. 24 If a new defendant, by any rule or order of the court, be added to a ſuit after the action be commenced,

If a new defendant added, no new memorandum neceſſary.

no new memorandum or minute is neceſſary upon the ſuing out of proceſs againſt ſuch defendant.

Memorandum neceſſary where judgment by default.

S. 19. If any defendant, before appearance, ſhall confeſs any action, or ſuffer judgment by default, a memorandum or minute of ſuch *cognovit* or warrant of attorney, muſt be delivered to the proper officer, previous to entering up judgment.

Want thereof not to vitiate proceedings.

S. 17. Any omiſſion, or defect in the entering, or filing of the memorandum or minute, does not vitiate the proceedings.

But attornies forfeit 5l.

S. 16. But the attorney, not conforming to the act, is ſubject to a penalty of 5l.

Officers not filing ſame, forfeit 50l.

S. 15. And if the reſpective clerks, or officers, who receive the memorandums or minutes, do not purſue the directions in the ſtatute, they are liable to a penalty of 50l.

This duty not to be charged by attornies.

S. 20. None of theſe duties to be charged by the attorney to his client; nor inſerted, under any pretence, in the attorney's bill.

But agents may charge them to attornies.

S. 21. But agents may charge them to the attornies who immediately employ them.

Form of the memorandum or minute.

The form of the memorandum, or minute to ſue or defend, to be entered in the reſpective courts, or filed of record, as preſcribed in the ſchedule to the above act, is as follows:

For plaintiff.

In the court of (inſert the name of the court in which the proceedings are to be carried on) in England (or Scotland, or Wales, &c. as the caſe may be).

Middleſex to wit. A. B. is retained to proſecute by C. D. as his attorney againſt E. F. (or otherwiſe as the caſe may be.)

A. B. plaintiff's attorney.

(If by an agent to the attorney immediately retained, add,)

By G. H. his agent.

Entered, or filed of record,
(As the caſe may require) this day of
in the year of the reign of
(Officer's name).

For defendant.

The like form for the defendant's attorney (*mutatis mutandis*).

In the court of (inſert the name of the court as before)

Middleſex, to wit. I. K. is retained to defend by E. F. as his attorney, at the ſuit of A. B.

I. K. defendant's attorney.

(If

(If by an agent, add,)

By L. M. his agent.

Entered, or filed of record, this day of in the year of the reign of (Officer's name).

N. B. Theſe forms are printed, and may be had at the ſtationers, or of the officers to whom they are to be delivered, and who generally keep ſome by them, for which is paid 2s. 7d.

☞ The laſt words, "Entered, &c." are written, or filled up by the officer whoſe duty it is to receive the memorandum, and file the ſame; ſo that the former part only is neceſſary to be written or filled up by the attorney.

(D) Of the Clerkſhip of Attornies. (D)

Of attornies ſerving their clerkſhip, how to be bound.

By the 2 Geo. 2. c. 23. ſ. 5. no perſon can act as an attorney either in his own name, or in the name of any other perſon, in any of the courts of law, (being a court of record,) unleſs ſuch perſon ſhall have *been bound by contract in writing to ſerve as a clerk for and during the ſpace of five years to an attorney* duly and legally ſworn and admitted in ſome or one of ſuch courts; and that *ſuch perſon, for and during the ſaid term of five years, ſhall have continued in ſuch ſervice*; and alſo, unleſs ſuch perſon after the expiration of the ſaid term of five years ſhall be examined, ſworn, admitted, and inrolled as by the ſaid act required.

To continue in the ſervice.

To be examined.

Of the affidavit of the contract.

Every perſon ſo bound muſt, within three months next after the date of every ſuch contract, cauſe an affidavit to be made, and duly ſworn, of the actual execution of every ſuch contract by the attorney and the perſon ſo bound; and in every ſuch affidavit ſhall be ſpecified the names of every ſuch attorney and of every perſon ſo bound, and their places of abode reſpectively, together with the day of the date of ſuch contract; and every ſuch affidavit ſhall be filed within the time aforeſaid, in the court where the attorney to whom ſuch perſon is bound hath been inrolled with the reſpective officer of ſuch court, (in K. B. the chief clerk of the court, or his deputy; and in C. B. the chief clerk of the warrants of that court, or his deputy,) who ſhall mark and ſign a memorandum or mark of the day of filing ſuch affidavit at the back or at the bottom thereof. 22 G. 2. c. 46. ſ. 3 & 5.

N. B. As the filing of the affidavit within time is ſometimes omitted, an indemnity bill often paſſes, enlarging the time and curing the neglect.

Of the duty paid on the articles.

Upon the articles of clerkſhip, certain duties are to be paid in proportion to the premiums given, *viz.* 6d. in the pound for 50l. or under, and 1s. in the pound if above 50l. which duty is to be paid by the maſter, 8 Ann. c. 9. ſ. 32. To be paid within the time mentioned in ſ. 36. of 8 Ann. In caſe the duty be not regularly paid by the maſter, the clerk may pay it, and make the maſter reimburſe it, together with a penalty as mentioned in 18 G. 2. c. 22. ſ. 24, 25. 20 G. 2. c. 45. and 5 G. 3. c. 4. ſ. 19.

Of the ſtamp duty.

But over and above theſe duties, there is by 34 G. 3. c. 14. a ſtamp duty impoſed of 100l. for every contract to ſerve as a clerk, in order to his admiſſion as an attorney in any court at Weſtminſter; and 50l. in order to his admiſſion in court of great ſeſſions, or other court of record.

Of inrolling and regiſtering the indenture.

The indenture ſo ſtamped muſt be inrolled or regiſtered with the proper officer of the court, together with an affidavit of the time of the execution of ſuch contract, within ſix months after execution, or the ſervice ſhall only commence from the time of ſuch inrolment. S. 2.

Of the affidavit of payment of the duty.

Every clerk, previous to his admiſſion, muſt make affidavit of the payment of ſuch duty, and the ſum paid in reſpect thereof; and ſhall inſert the name and place of abode of the perſon, &c. with whom ſuch contract was entered into, the time of execution thereof, and of inrolling or regiſtering the ſame. S. 3.

One payment ſufficient;

One payment of the duty entitles an attorney to be admitted to all the courts; nor is any new duty required from the ſame clerk, by reaſon of any ſubſequent contract with any other maſter, on the event of the former dying, leaving off practice, or the like. S. 4—8.

and if two parts, only one to be ſtamped.

Contracts, &c. to be ſtamped before ingroſſed; but if of two parts, one part only need be ſtamped, and the other may be ſtamped by commiſſioners, any time after the execution, on ſufficient proof of ſuch duty having been paid. S. 11.

How ſervice to be under the articles.

Every clerk muſt, during the whole time and term of ſervice to be ſpecified in ſuch contract, continue, and be actually employed by ſuch attorney, or his *agent*, in the proper buſineſs, practice, or employment of an attorney. *Id.* ſ. 8.

But

But no such clerk can serve the agent of such attorney, under such articles, for a longer time than *one year* of his clerkship; and any service to an agent beyond that time shall not be deemed good service. R. K. B. Trinity Term 31 Geo. 3.

How long clerk may serve his master's agent.

If any such attorney, to whom any clerk is so bound, shall happen to die before the expiration of such term, or shall discontinue, or leave off his practice; or if such contract shall, by mutual consent of the parties, be cancelled; or in case such clerk shall be legally discharged by any rule or order of the court wherein such attorney shall practise, before the expiration of such term; and such clerk shall, in any of the said cases, be bound by another contract in writing to serve, and shall accordingly serve as clerk to any other such practising attorney, during the residue of the said term of five years, such service shall be deemed good and effectual, so as an affidavit be duly made and filed of the execution of such second contract, within the time and in like manner as before directed concerning such original contract. 22 G. 2. c. 46. s. 9.

How in case of master's death, or leaving off business.

No attorney retained or employed as a writer or clerk by any other attorney shall, during the time of such employ, take or have any clerk under articles; and no service to any such attorney, during the time that such attorney shall be so employed by any other attorney, shall be deemed good service. R. K. B. Trinity Term 31 G. 3.

No attorney employed as clerk to another attorney can take a clerk.

(E) Of the Admission of Attornies. (E)

Every clerk, before he is admitted, must cause an affidavit of himself, or such attorney or solicitor to whom he was bound, to be duly made and filed, that he hath actually and really served and been employed by such practising attorney to whom he was bound, or his agent, during the said whole term of five years, according to the true intent and meaning of this act, 22 G. 2. c. 46. s. 10.

Of the admission of attornies.

Every person intending to apply for his admission as an attorney shall, for the space of one full term previous to the term in which such person shall so apply, cause his name and place of abode, and also the name and place of abode of the attorney to whom he shall have been articled, written in legible characters, to be affixed on the outside of the Court of King's Bench, in such place as public

Of the notice requisite before admission.

notices are usually fixed, and also to be entered in a book, kept for that purpose at each of the judge's chambers of the court of King's Bench. R. K. B. Trinity Term 31 G. 3. R. K. B. Trinity Term 33 G. 3.

Of the oath.

No person to be permitted to act as an attorney unless he takes the oath prescribed by the act, and is admitted and inrolled. 2 G. 2. c. 23. s. 1.

Of the examination.

The judges are to examine into the fitness and capacity of persons applying to be admitted; and if deemed duly qualified, to administer the oath, and cause him to be admitted, and his name to be inrolled, and his admission written on parchment, and signed by a judge, to be delivered to him. 2 G. 2. c. 23. s. 2.

Of the penalty for acting, or suffering any to act in his name.

No person to act who is not admitted agreeable to the above statute, on penalty of 50l.; and the same penalty for suffering any other person not duly admitted to practise in his name. 22 G. 2. c. 42. s. 12.

How many clerks allowed.

No attorney to have more than two clerks at one time, who shall become bound by contract in writing to serve him as clerks. 2 G. 2. c. 23. s. 15.

Of the punishment for acting as agent to an attorney not qualified.

If any sworn attorney shall act as agent for any person not duly qualified, or permit his name to be used, knowing such person not to be qualified, he shall, on a summary application to the court, be struck off the roll, and for ever afterwards be disabled to practise; and the court may commit him for any time not exceeding a year. 22 G. 2. c. 46. s. 11.

How an attorney of one court may act in the name of an attorney of another court. Penalty for acting without being admitted.

An attorney of one court, with the consent in writing signed by an attorney of another court, may sue out writs and proceed in actions in such other court in the name of such attorney. 2 G. 2. c. 23. s. 10.

Any person suing out any writ, or commencing, prosecuting, or defending any action for gain, fee, or reward, without being admitted and inrolled, shall forfeit 50l. to any person prosecuting. 2 G. 2. c. 23. s. 24.

Rule of court for attornies to enter their names, &c. in a book at the proper office.

When an attorney is admitted, if he reside in London or Westminster, or within ten miles thereof, he must enter in a book, kept at the Master's office in King's Bench Walks, (in alphabetical order,) his name and place of abode, or some other proper place within the cities of London or Westminster, where he may be served with notices, summonses, orders, and rules; and service of copies of rules, &c. at that place, with any person resident there, or belonging thereto, shall be deemed sufficient (unless personal service be requisite); and if any attorney shall not enter his name, &c. in such book, then the

the fixing up of any notice or copy of any ſummons, &c. for him in the Maſter's office, ſhall be deemed good ſervice. R. K. B. Hil. 8 G. 3.

(F) Of taking out the Certificate. (F)

Of the certificate.

Attornies muſt alſo take out *annually* a certificate of their admiſſion, inrolment, or regiſter, for which a duty of 5l. is to be paid if reſident in London or Weſtminſter, Southwark, St. Pancras, or St. Mary-le-Bon, or within the bills; and 3l. if elſewhere. 25 G. 3. c. 80.

How obtained.

To obtain which, he muſt deliver in to the proper officer of ſome one of the courts a note of his name and reſidence, who are to certify the ſame, ſec. 4. and iſſue certificates, which are to be renewed ten days before their expiration. Attornies reſiding 40 days in the year in London, &c. are to be deemed reſident there and ſubject to the 5l. duty.

Penalty for acting without it.

If any perſon acts without ſuch certificate, or delivers in a falſe name or place of abode, he incurs the penalty of 50l.

Perſons having taken out certificates may act in the name of any other perſon with his conſent, provided ſuch other perſon has taken out his certificate, but not otherwiſe. S. 8.

(G) Of delivering and taxing Attornies Bills. (G)

Of the attorney's bill, and taxation thereof.

When bill to be delivered.

No attorney ſhall commence or maintain any action for the recovery of any fees, &c. until the expiration of one month, or more, after ſuch attorney ſhall have delivered unto the party to be charged therewith, or left for him at his dwelling-houſe, or laſt place of abode, a bill of ſuch fees, &c.; which bill ſhall be ſubſcribed with the proper hand of ſuch attorney. 2 G. 2. c. 23. ſ. 23.

How to be taxed.

Upon application to any of the judges of the court in which the buſineſs contained in ſuch bill, or the greateſt part thereof in amount or value, ſhall have been tranſacted, the ſaid bill is to be referred to the proper officer of the court to be taxed and ſettled (although no action ſhall be then depending in the court touching the ſame); and if the attorney or party chargeable, having due notice, neglect to attend ſuch taxation, the ſaid officer may proceed to tax the bill *ex parte* (pending which reference and taxation, no action ſhall be commenced or proſecuted touching the ſaid demand); and if the party do not pay to

to the attorney what is found due, he ſhall be liable to an attachment or action at the election of the attorney; and if on ſuch taxation it appears that the attorney has been overpaid, he muſt refund the ſurplus, or be liable to an attachment or action at the election of the party. 2 G. 2. c. 23. ſ. 23.

Of the coſts of taxation.

The ſaid reſpective courts are authorized to award the coſts of ſuch taxation to be paid by the parties according to the event of the taxation of the bill; (*i. e.*) if the bill taxed be leſs by a ſixth part than the bill delivered, then the attorney is to pay the coſts of the taxation; but if it ſhall not be leſs, the court, in their diſcretion, ſhall charge the attorney or client in regard to the reaſonableneſs or unreaſonableneſs of ſuch bill. 2 G. 2. c. 23. ſ. 23.

The act of 2 G. 2. not to extend to bills from one attorney to another.

But by the 12 G. 2. c. 13. ſ. 6. the above act does not extend to any bill of fees due from one attorney to another attorney.

(H) General Obſervations relating to Attornies.

Courts ſtrict in enforcing their rules.

The courts are very ſtrict in enforcing obedience to the various acts of parliament abovementioned, particularly reſpecting the articles, and the time and manner of ſerving under them previous to admiſſion; inſomuch that caſes have ſometimes ariſen where attornies have been ſtruck off the roll many years after their admiſſion, upon ſome defect being diſcovered and ſworn to in the ſervice of their clerkſhip, or the like; and although in ſome inſtances the courts have thought them very hard caſes, yet they have declared it to be out of their power to exerciſe any diſcretion, but that they were bound by the ſtrict letter of the act.

This caution cannot be too much attended to.

Exceptions.

There are however caſes to be found which may be cited as exceptions to the general rule; but they are at beſt but exceptions, depending wholly on their own ſpecial circumſtances. Such are *Fletcher*'s caſe, Blac. 734. and *Carter*'s caſe, Blac. 957.

If an attorney be admitted fraudulently, with the colluſion of the maſter, he will not only be ſtruck off the roll, but the maſter will alſo be ſubject to an attachment. *Hill* and *Hargrave*. Blac. 991.

Of refunding part of the premium.

If a premium be given with a clerk, and the maſter ſoon after dies, or his buſineſs much decreaſes, or any other cauſe ariſes why in juſtice part of the premium ſhould not be reſtored, the court, upon motion, will refer the

the matter to the maſter, for him to conſider what is proper to be refunded; *Anon.* 1 Barn. 331. 2 Barn 227. or a court of equity will interfere. *Newton* v. *Rowſe.* 1 Ver. 460.

Of charging attorney in the cauſe.

By a rule of court, Mich. 1654, in both courts no perſon without rule of court, order of judge and prothonotary, and notice to the adverſe party, or his attorney, may change or ſhift his attorney; and ſuch attorney newly coming in, to take notice, at his peril, of the rules whereunto the former attorney was liable had he continued. *Kay* v. *De Mattos.* Blac. 1323. *Macpherſon* v. *Roriſon.* Doug. 216.

The court will not ſuffer the party to change his attorney without firſt paying the former attorney his bill. 12 Mod. 440. 8 Mod. 306.

Attornies formerly practiſed in K. B. by clerks in court.

All attornies now enter their own pleadings, and pay for their entries, and other fees of office, upon doing the act whereupon the fee accrues due; but formerly, the ſecondary, who is immediately under the chief clerk, was the ſuperior of the clerks in court; and from thence obtained the denomination of *maſter*, which is now adopted by the court; and the clerks in court were the agents of the attornies at large, as is now the practice of the plea ſide of the court of Exchequer, and were accuſtomed at certain periods of time, after every term, to account with the ſecondary; which explains the meaning of ſeveral rules of court, as Eaſt. 15 Car. 2. Rule 3 Trin. 20 Car. 2. and others which are now obſolete. Rules and Ord K. B. N. 102.

Maſter of K. B. whence ſo called.

Of the action for an attorney's bill.

Before an action can be maintained by an attorney for his fees, the act of 2 G. 2. c. 23. muſt be ſtrictly complied with. The bill muſt be *left* with his client for at leaſt a month. Where the plaintiff ſhewed his bill to defendant, though he acknowledged the debt, ſaid he could not pay it, and did not know what to do with the bill; upon which plaintiff took it back. It was held not ſufficient *Brooks* v. *Maſon.* 1 H. Blac. 290.

How bill to be firſt delivered.

If any part of bill be for buſineſs done in court,

If any part of an attorney's bill be for buſineſs done in the court, the bill muſt be delivered accordingly. 2 G. 2. as, "drawing and engroſſing an affidavit of debt, in order to hold party to bail, paid for ſwearing," &c. though the affidavit was never filed, and no writ taken out. *Winter* v. *Payne.* 6 D & E. 645.

or for buſineſs at Quarter Seſſions;

So, although the *whole* of the bill be for buſineſs done at the Quarter Seſſions. *Ex parte Williams.* 4 D. & E. 496. *Clarke* v. *Donovan.* 6 D. & E. 694.

but not for conveyancing.

But if the whole bill be for conveyancing, it is not within the ſtatute. *Hillier* v. *James.* Bar. 41.

Nor

Bills for agency, how liable to be taxed.

Nor is a bill for *agency* within the ſtatute, as it falls within the clauſe of 12 G. 2. c. 13. ſ. 6. but it hath been the practice of the courts to refer bills for agency buſineſs to be taxed; not indeed under the authority of the above acts, but under the general juriſdiction of the court, and the ſtat. 3. Jac. 1. c. 7. See the caſes in note to *Hooper* v. *Till.* Doug. 199.

But no bill need be delivered a month before action.

Although, on motion, ſuch bills may be taxed; yet to maintain an action upon them, it is not neceſſary to deliver any bill, agreeable to 2 G. 2.

By the 12 G. 2. c. 13. ſ. 6. it ſhould ſeem as if both parties muſt be attornies when the debt was contracted; but it is ſufficient if they are ſo when the action is brought. *Ford* v. *Maxwell.* 2 H. Black. 589.

After delivering bill, if not taxed, not to be queſtioned.

After an attorney's bill has been delivered a month, and no application has been made to have it taxed, the defendant will not be permitted to queſtion the reaſonableneſs of the items before a jury. *Williams* v. *Frith*, and *Hooper* v. *Till.* Doug. 198.

Attornies not liable to county court. Barriſter not admitted.

An attorney is not liable to be ſued in the court of conſcience for Middleſex. *Wiltſhire* v. *Lloyd.* Doug. 381.

A barriſter cannot be admitted an attorney. Q. Whether he can get firſt diſbarred, and then be admitted? *Ex parte Cole.* Doug. 114.

Attornies under controul of court, and ſubject to ſummary juriſdiction.

Attornies are immediately under the controul and correction of the courts; they are liable to be proceeded againſt, and puniſhed in a ſummary way, either by attachment, or by having their names ſtruck off the roll, for any malpractices of which they may be guilty. On the other hand, the courts are ever ready to yield them protection when they are deſerving of it.

How favoured as to their lien.

Thus, they are peculiarly favoured with reſpect to their lien on all deeds and papers in their hands, and judgments recovered by their clients, which are rendered ſubject to their bill of coſts; ſo that if the money come to his hands, he may retain to the amount of his bill.

To what it extends.

He may ſtop it *in tranſitu* if he can lay hold of it. If he apply to the court, they will prevent its being paid over till his demand is ſatisfied; nay, he may give notice to the defendant not to pay till his bill be diſcharged; and a payment by defendant, after ſuch notice, would be in his own wrong, and he would be liable to pay over again to the attorney the amount of his lien. *Welſh* v. *Hole.* Doug. 238. *Read* v. *Dupper.* 6 D. & E. 361.

Parties may compromiſe before notice from attorney.

But, if the plaintiff compromiſe the debt and coſts with defendant, or defendant pays the ſame to plaintiff *bonâ fide* before any notice from his attorney of his lien, it will be good. *Ibid.*

6.

So when the adverſe party, againſt whom a judgment has been obtained, applies to get rid of that judgment, the court will take care, if the attorney applies, that his bill be firſt ſatisfied: As if A. has a judgment againſt B. and B. has a judgment againſt A., and B. moves to ſet off his judgment againſt A.'s in the taxation of coſts, court will not permit it, unleſs B. firſt undertakes to ſatisfy the bill of attorney. *Mitchell* v. *Oldfield.* K. B. 4 D. & E. 124. *Randle* v. *Fuller.* 6 D. & E. 456. *Morland* v. *Hammerſley* and *Laſhley.* N. 2 H. Blac. 441. Lien on judgment for their coſts.

And this lien of attorney on the coſts and damages recovered is, in K. B., held to be a *general* lien, without any ſuch reſtriction as ſeems to be impoſed in the court of C. B.; who hold that the attorney has only ſuch a lien as is ſubject to the equitable claims of the parties in the cauſe; and therefore, as the principal can only in equity recover the *balance* due to him, the attorney ought not to ſtand in a better ſituation; and if no balance be due, the attorney can have no claim on the ground of a lien; and this although the attorney's client is inſolvent, and has no other means of paying the bill. *Schoole* v. *Noble* and others. 1 H. Blac. 24. *Nunez* v. *Modigliani.* Ibid. 217. *Vaughan* v. *Davis.* 2 H. Blac. 441. and *Dennie* v. *Elliott* and another. 2 H. Blac. 587. In K. B. a general lien. In C. B. reſtricted.

So that upon this point the two courts differ in their practice, and ſeem each to be at preſent fixed in their ſeveral opinions. Wherein courts differ.

An attorney has a lien on money levied by the ſheriff, under an execution on a judgment recovered by his client, and is entitled to have it paid over to him, notwithſtanding the ſheriff has had notice from the party againſt whom the execution iſſued, to retain the money in his hands; and that the court would be moved to ſet aſide the judgment for irregularity, and notwithſtanding a docket has been ſtruck againſt his client. *Griffin* v. *Eyles.* 1 H. Blac. 122. Lien extends to money levied by ſheriff.

The court will entertain a ſummary juriſdiction over an attorney of the court, in obliging him to deliver up deeds, &c. on ſatisfaction of his lien, though they came into his hands as ſteward of a court and receiver of rents; but if it appear that a third perſon is intereſted in the deeds, the court will take a ſecurity from the perſon to whom they are delivered, to produce them on demand for the inſpection of ſuch third perſon. Sir *Richard Hughes* v. *Mayne.* 3 D. & E. 275. Court will order attorney to deliver papers, but will protect intereſt of third parties.

For further information on this ſubject, and the privileges of attornies in ſuing and being ſued, ſee the *Mode of proceeding by and againſt Attornies*, in the ſecond volume of this work.

A TABLE

OF THE

TERMS and *RETURNS* in B. R. and C. B.

MICHAELMAS TERM

Contains three Weeks and two Days, and hath four Returns.

It begins on the 6th of November, if not Sunday, otherwise the 7th, and ends on the 28th of November, if not Sunday, otherwise the 29th.

The 3d of November is the *Essoin* Day of this Term.

For the regulation of this Term, vide statutes 16 Car. 1. c. 6. 24 G. 2. c. 48.

The Exchequer opens eight days before full Term in the other courts.

BY ORIGINAL.	*BY ATTACHMENT OF PRIVILEGE, BILL, &c.*
1. On the Morrow of All Souls.	1. On (*) next after the Morrow of All Souls
2. On the Morrow of Saint Martin.	2. On ( ) next after 8 days of Saint Martin.
3. In 8 days of Saint Martin.	3. On ( ) next after 8 days of Saint Martin.
4. In 15 days of Saint Martin.	4. On ( ) next after 15 days of Saint Martin.

* Any day in the week that plaintiff wishes writ to be returnable, except Sunday.

If a *latitat* or *bill of Middlesex* be made returnable in this Term on *Saint Martin's day*, which may be done, it must be thus, on "Tuesday the Feast of St. Martin," specifying the day on which the Feast of St. Martin happens to fall.

HILARY TERM

Contains three Weeks, and hath four Returns.

It begins the 23d January, if not Sunday, otherwise the 24th, and ends 12th of February, if not Sunday, otherwise the 13th.

The 20th of January is the *Essoin* day of this Term.

In the Exchequer, it begins eight days before the full Term in other courts.

BY ORIGINAL.	*BY ATTACHMENT, BILL, &c.*
1. In 8 days of Saint Hilary.	1. On ( ) next after 8 days of Saint Hilary.
2. In 15 days of St. Hilary.	2. On ( ) next after 15 days of Saint Hilary.
3. On the Morrow of the Purification.	3. On ( ) next after the Morrow of the Purification.
4. In 8 days of the Purification.	4. On ( ) next after 8 days of the Purification.

Writs must not be made returnable on the 2d day of February in this Term, it being a *Dies non Juridicus*.—This is an *issuable* Term.

EASTER TERM

Contains three Weeks and six Days, and hath five Returns.

It begins the Wednesday fortnight after Easter-day, and ends on Monday before Whitsunday.

The

The Sunday next preceding the Wedneſday fortnight after Eaſter Day, is the *Eſſoin* Day of this Term, which, falling on a *Sunday*, is held on the Monday.

In the Exchequer, it begins eight days before full Term in the other courts.

BY ORIGINAL.	*BY ATTACHMENT, BILL, &c.*
1. In 15 days of Eaſter.	1. On ( ) next after 15 days of Eaſter.
2. In 3 weeks (*a*) of Eaſter.	2. On ( ) next after 3 weeks from the day of Eaſter.
3. In 1 month (*a*) of Eaſter.	3. On ( ) next after one month from the day of Eaſter.
4. In 5 weeks from Eaſter Day.	4. On ( ) next after 5 weeks from the day of Eaſter.
5. On the Morrow of the Aſcenſion.	5. On ( ) next after the Morrow of the Aſcenſion.

Writs muſt not be made returnable on *Aſcenſion Day* in this Term, it being *Dies non Juridicus*.

TRINITY TERM

Contains twenty Days, and hath four Returns.

It begins the Friday after Trinity Sunday, and ends on the Wedneſday fortnight after it begins, unleſs that day happens to be the 24th of June, and then on the day following.

The Monday next preceding the Friday after Trinity Sunday, is the *Eſſoin* Day of this Term.

In the Exchequer, it begins four days before full Term in the other courts.

For the regulation of this Term, vide Statutes 51 H. 3. ſt. 2. and 12 H. 8. c. 21.

BY ORIGINAL.	*BY ATTACHMENT, BILL, &c.*
1. On the Morrow of the Holy Trinity.	1. On ( ) next after the Morrow of the Holy Trinity.
2. In 8 days of the Holy Trinity.	2. On ( ) next after 8 days of the Holy Trinity.
3. In 15 days of the Holy Trinity.	3. On ( ) next after 15 days of the Holy Trinity.
4. In 3 weeks after the Holy Trinity.	4. On ( ) next after 3 weeks of the Holy Trinity.

Writs muſt not be made returnable on the 24th June (*Midſummer Day*) if it falls in this Term, unleſs it happen to be the Friday next after Trinity Sunday, then they may by ſtat. 32 H. 8. c. 21.

This is an *iſſuable* Term.

N. B Upon all days in Term (except Sundays, and ſuch as are deemed *Dies non Juridici*, which are ſpecified in the above Table) writs may be made returnable. If *original* writs, or founded on ſuch, then on one of the *general* Return Days: if by *bill*, attachment, or the like, then on a *particular* day in the week immediately referring to the laſt general Return Day, in manner above-mentioned. But ſee ante, Sec. I. (C).

(*a*) In B. R. in theſe two Returns, it is uſual to ſay *after* Eaſter, and not *of* Eaſter. All the other Returns are the ſame in both courts.

CHAPTER II.

In what Caſes Actions are bailable, and of the Conſequence of arreſting Perſons not liable to be arreſted, and their Remedy and Diſcharge.

WHEN an action is about to be commenced, the firſt thing neceſſary to be conſidered is, whether it be *bailable* or not; that is to ſay, whether the caſe be ſuch as to authorize the plaintiff to *arreſt* the defendant, and keep him in cuſtody, unleſs he finds good and ſufficient ſureties, which are called *ſpecial bail*; or whether the defendant is only to be ſerved with proceſs, requiring him to appear in court to the plaintiff's charge, on a certain day mentioned therein, and which is afterwards effected by his entering an *appearance* if the ſuit be in the Common Pleas, or if in the King's Bench, by his putting in or filing what is called *common bail*.

The importance of this previous inquiry muſt be obvious: Not only the firſt proceedings in the cauſe are governed by it; but it is often of the greateſt moment to know whether the party can be arreſted, as well from the advantages which in caſes of emergency ariſe therefrom, as alſo to avoid the conſequences which may enſue from an illegal arreſt.

In order to diſcover whether the defendant may be arreſted and held to bail, or not, it is neceſſary to conſider,

SEC. I. *The Nature of the Cauſe of Action, and its Object.*

SEC. II. *The Perſon againſt whom the Action is to be brought.*

SEC. III. *The particular Circumſtances which may render the Caſe an Exception to the general Rule.*

SEC. IV. *The Conſequence of arreſting Perſons not liable to be arreſted, and of their Remedy and Diſcharge.*

SEC. I.

Section I.

The Nature of the Cauſe of Action, and its Object.

ACTIONS are either *perſonal*, *real*, or *mixed*.

Perſonal actions are ſuch whereby a man may claim, firſt, a debt, or perſonal duty, or damages in lieu thereof; or, ſecondly, a ſatisfaction in damages for ſome injury done to his perſon or property. Different kinds of actions perſonal.

Real actions, which concern real property only, are ſuch whereby a man claims title to any lands or tenements, rents, commons, or other hereditaments, in fee-ſimple, fee-tail, or for term of life. But theſe are now much diſuſed, ſince a more expeditious method of trying titles hath been introduced by other actions, perſonal and mixed. Real.

Mixed actions are ſuits partaking of the nature of the other two, wherein ſome real property is demanded, and alſo perſonal damages for a wrong ſuſtained, as ejectment and waſte. 3 Black. Com. 117, 118. Mixed.

Under theſe three heads may every ſpecies of remedy, by ſuit or action in the courts of common law, be compriſed; but it is to the firſt of theſe, namely, to *perſonal* actions only, that the preſent volume of this work relates. This volume relates only to perſonal.

Now perſonal actions are either *ex contractu* or *ex delicto*. Perſonal actions ex contractu or ex delicto.

That is, they are founded either upon the breach of ſome contract, expreſs or implied, or upon the commiſſion of ſome treſpaſs, tort, or fraud.

Actions ariſing *ex contractu* are, for the moſt part, brought for the recovery, either of ſome debt or ſum of money due, or of damages for the non-performance of ſome agreement or covenant.

Actions ariſing *ex delicto* are always brought for the recovery of damages proportionate to the injury ſuſtained, by reaſon of the commiſſion of ſome treſpaſs, tort, or fraud.

We will now proceed to ſhew in what caſes the defendant may be arreſted, and held to bail in each of theſe perſonal actions, when it is,

(A) For a Debt or Sum of Money due.
(B) For Damages unliquidated.
(C) For a Penalty forfeited.

(D) On a Judgment recovered.
(E) On a penal Statute.
(F) A second Action for the same Cause pending the first, or otherwise.
(G) An Action removed from an inferior Court.

(A) (A) Where the Action is for a Debt, or Demand of Money due.

The criterion is the amount; When an action is brought for the recovery of any debt, or money due, the *amount* of such debt, or demand, is the guide to shew whether such action be bailable, or not.

which must be 10l., And by the 12 G. 1. c. 29. the debt, or cause of action, must amount to *ten* pounds, to entitle the plaintiff to arrest the defendant, and hold him to special bail.

[This statute was explained and amended by 5 G. 2. c. 27.; extended to the court of Great Sessions in Wales by 6 G. 2. c. 14.; made perpetual by 21 G. 2. c. 3.; and extended to all inferior courts by 19 G. 3. c. 70.]

and more in some cases. N. B. This is the general rule; but there are some exceptions, which are mentioned hereafter, where the debt must be a still greater sum, in order to hold the defendant to special bail. (For which see *post*, Sec. III.)

If 10l., bail of course. Wherever, therefore, an action is brought for any debt, or money due, amounting to 10l. whether it be an action of debt, assumpsit, or covenant, special bail is of course.

But if the *cause of action* is 10l. it is sufficient: But it is observable, that the above-mentioned statute does not merely say, that the *debt*, but the *cause of action*, must amount to 10l.; so that in some cases, where the *action* is not for the recovery of any actual debt, or sum of money, yet if the *cause of action* really amounts to 10l., defendant may be held to special bail.

As in trover. Thus in *trover*, if the value of the goods converted by defendant amount to more than 10l., plaintiff may arrest him, and hold him to special bail, and this without any judge's order. *Catlin* v. *Catlin*, 1 Wil. 23. S. C. Stra. 1192. *Emerson* v. *Hawkins*, 1 Wil. 335. *Lumley* v. *Quarree*, Ray. 767. *Bangley* v. *Titcombe*, 6 Mod. 14.

But sometimes in trover, tho' for 10l. common bail only. But the court, under particular circumstances, will sometimes discharge a defendant in an action of trover on common bail; as where it appeared that the defendant was a custom-house officer, and that there was a reason-

a reaſonable ground for his ſeizing the goods, which were ſince depoſited in the king's warehouſe, and that he had uſed due diligence in proceeding toward a condemnation in the Exchequer; the Court, upon affidavit to this effect, ordered common bail to be accepted. *Barker* v. *Chalk*, 2 Blac. Rep. 1018. *Emerſon* v. *Hawkins*, 1 Wil. 335. Say. 53. S. C. contra.

There muſt be an oath of the amount,

Moreover, by the ſame ſtatute 12 G. 1. c. 29. it is not only neceſſary that the cauſe of action ſhall amount to 10l. but further, the plaintiff muſt *poſitively ſwear* that the cauſe of action is to that amount, in order to arreſt defendant, and hold him to ſpecial bail.

which muſt be poſitive.

Which affidavit muſt be framed agreeable to the nature of the caſe, with a certain degree of preciſion and formality. Vide *poſt*, chap. 4. ſec. 1.

In all caſes, therefore, where the plaintiff cannot *poſitively* ſwear that the cauſe of action amounts to 10l. it is a ſure criterion that ſpecial bail cannot, as a matter of courſe, be required.

Where mutual dealings, the balance muſt be ſworn to.

And this oath, of the amount of the debt, muſt be without any evaſion; ſo that, where there are mutual dealings and accounts between the parties, it is not ſufficient for plaintiff to ſwear to the ſum due upon one ſide only, without regarding the other ſide of the account. But the *balance* is the point in queſtion, and ſhould be the extent ſworn to. Bur. 1996. *Dr. Turlington's caſe.*

(B) Where the Action is for Damages unliquidated. (B)

Actions on the caſe, treſpaſs *vi & armis*, ſlander, &c.

In all actions, founded either *ex contractu* or *ex delicto*, where the object is the recovery of damages, either for the non-performance of any promiſe or covenant, or for miſfeaſance or negligence, or for the commiſſion of any treſpaſs or tort, ſuch as actions on the caſe, covenant, treſpaſs *vi & armis*, ſlander, and the like, which damages are *unliquidated*, and muſt be apportioned to the extent of the injury ſuſtained at the diſcretion of a jury, the defendant cannot be arreſted and held to bail; becauſe plaintiff cannot *poſitively* ſwear that the cauſe of action amounts to 10l.; as it is not ſufficient for the affidavit to be grounded merely upon his own conjecture, fancy, or caprice.

only common bail, why.

In ſome caſes, a judge's order may be obtained to hold defend-

But although plaintiff cannot, in ſuch caſes, arreſt defendant, and hold him to ſpecial bail as a matter of

ant to ſpecial bail,

courſe, yet it is in the diſcretion of the court, or any judge, to make a rule or order, authorizing him ſo to do, if the *cauſe of action* be attended with aggravated circumſtances, or it is apparent that the damages will exceed 10l. This, however, is only done where good cauſe is ſhewn, and upon an affidavit of facts. *Roberts* v. *Slingsby*, Sid. 307. Lev. 39. Brownl. 91. *Chetwin* v. *Venner*, Sid. 183.

upon good cauſe ſhewn.

To what amount bail to be taken.

In ſuch caſes, it is ſpecified by the rule or order, at the diſcretion of the court or judge, the amount for which bail is to be taken.

Thus for ſcan. mag.

Thus, on motion and order, plaintiff may have ſpecial bail for ſcan. mag. *Earl of Stamford* v. *Gordal*, T. Ray. 74. *Marquis of Dorcheſter's caſe*, 2 Mod. 215. *Chetwin* v. *Venner*, Sid. 183.

For *crim. con.*

So by judge's order, in an action for *crim. con.* *Haddenweek* v. *Catmur*, Bar. 61.

For meſne profits.

So for meſne profits after a recovery in ejectment. *Hunt* v. *Hudſon*, Bar. 85. In which caſe, if an order be made, the recognizance is uſually taken in two years value, but that is diſcretionary.

Groſs aſſault,

So for any violent or cruel aſſault.

or if defendant is about to quit the kingdom.

So alſo, in certain caſes, where the defendant is about to quit the kingdom.

Formerly in actions on agreements without any penalty.

Formerly, indeed, where the action founded only in damages, and thoſe damages were unliquidated, as in actions for the non-performance of any written agreement, where *no penalty*, or fixed ſum, was agreed to be paid in caſe of ſuch non-performance, if the plaintiff choſe to ſwear poſitively that the damage ſuſtained by him amounted to 10l. he might hold defendant to bail; nor would the court, on motion, interfere; for they held that the plaintiff, by the act of parliament, was the proper perſon to ſwear to his damages. *Cook and others* v. *Sankey*, Bar. 65. *Fleetwood* v. *Poictier*, Bar. 67.

Plaintiff ſwore to the damage at his diſcretion.

But now otherwiſe.

But a different doctrine was afterwards holden in the caſe of *Reynoldſon* v. *Blades*, Bar. 108. wherein the court ſaid, that the above caſes were not to be followed, and laid down this general rule:

A general rule.

Where damages can be reduced to a *certainty*, as in covenant for payment of money, or where a tenant covenants with his landlord to pay a certain ſum for every acre of land he ploughs up, or the like, plaintiff is entitled to bail; otherwiſe not, eſpecially without judge's order previous. For it is not reaſonable, that defendant ſhould be held to bail for ſuch damages as plaintiff

fancies

fancies he has ſuſtained, and is pleaſed to ſwear to. Bar. 108.

(C) Where the Action is founded on a Penalty. (C)

Upon a written agreement.

The caſe of *Reynoldſon* and *Blades*, above cited, ſeems only to apply where no penalty or forfeiture is mentioned in the agreement for the breach thereof; but where ſuch penalty is inſerted, the parties, by their own ſpecific agreement, have aſcertained the damage in caſe of non-performance, and defendant may be held to bail thereon.

Thus bail was allowed on an agreement in writing to deliver goods, or forfeit 100l., in an action for the penalty. *Kettleby* v. *Woodcock*, Bar. 86.

On a covenant.

So in *covenant*, where there is a penalty for the non-performance of any agreement.

To what amount bail ſhou d be taken in ſuch caſes;

But, in all ſuch caſes, bail ſhould only be taken for a ſum proportionate to the *damage* ſuſtained, by reaſon of the breach of the agreement or condition; the meaſure of which damage is to be aſcertained by plaintiff's oath.

and how far the Court will interfere.

The Court, however, will not interfere on motion, ſhould the plaintiff hold defendant to bail for the whole of the penalty, though the real debt, or damage, be under 10l.

In one caſe they did interfere,

But in the caſe of *Kirk* v. *Strickland*, Do. 449. where the penalty was 50l., and the real debt only 3l., and defendant was held to bail for the penalty; on motion for him to be diſcharged on common bail, the Court ſaid, the conduct of plaintiff was altogether unjuſtifiable, and that he was liable to an action. That in the caſe of a bond, for the performance of a promiſe of marriage, and in ſome other inſtances, the penalty is the real debt; but in other caſes, the bail could only be taken for the ſum to which the plaintiff would be entitled in damages for the breach of the condition; and although it had been their uniform practice not to go into the merits upon ſuch a motion, but to take the matter as it ſtood upon the affidavit to hold to bail, yet they granted the rule, declaring that they were perſuaded plaintiff would not venture to ſhew cauſe againſt it.

but have ſince refuſed.

Although in a later caſe, of *Willes* v. *Dent*, Hil. 23 G. 3. where defendant was arreſted on an affidavit, that he was indebted to plaintiff in 1000l. under *and by virtue* of a certain covenant contained in an agreement, Baldwin moved, that the defendant might be diſcharged

on filing common bail, and cited Kirk and Strickland as in point. But per Ld. Mansfield, and the Court, motion was denied, and no rule *nisi* granted.

Rule as now settled.

It now seems to be settled, that where the parties have agreed upon any specific penalty to be forfeited on the breach of any agreement, such penalty is to be deemed the debt for which the defendant may be held to bail; but it is necessary for the plaintiff in his affidavit to hold to bail to shew some breach of the agreement whereby such penalty became forfeited, otherwise defendant, upon motion, will be discharged on common bail. *Stenson* v. *Hughes*, K. B. Mich. Term, 1794. *Archer* v. *Ellard*. Say. 109.

Breach must be stated.

On bonds for the performance of covenants.

In actions on bonds, to save harmless and indemnified, or for the performance of covenants, bail should not be taken on the penalty, but plaintiff should swear how, and for how much he is damnified, and assign the breaches of the covenants in his affidavit. *Whitfield* v. *Whitfield*, Bar. 109. *Executors of Boothby* v. *Buller*, Sid. 63. *Anon.* Salk. 100.

To what amount bail should be.

So in debt upon a bond conditioned for the indemnification of a parish against a bastard child, the defendant ought not to be held to bail for the penalty, but only for the amount of the damage incurred; and if that be under 10l. cannot be held to bail at all. *Archer* v. *Ellard*, Say. 109.

General rule as to actions on bonds.

In strictness of law, the penalty in a bond is the debt due; but, by the equitable construction of the 4 Ann. c. 16. bonds with penalties are merely deemed securities for the payment of the principal, interest, and costs. The general rule, therefore, with respect to holding to bail in actions on bonds, is this: If they be for payment of money, defendant may hold to bail to the amount of the *real sum due*; if they be bonds of indemnity, or for performance of covenants, then to the amount of the *real damage* sustained by the breach; but if the *penalty* be the *real debt*, and in nature of stated damages, as in bonds for the performance of marriage, then to the full amount of the penalty.

(D)

(D) Where the Action is founded on a Judgment recovered.

There are five cases in which such actions are usually brought.

Actions on judgments may be brought,

1st, Where the original cause of action was bailable, and defendant was arrested, and held to bail thereon.

2d,

2d, Where the original cauſe of action was for a debt or demand under 10l. and therefore not bailable, but the judgment, with the coſts, amount to above that ſum.

3d, Where the original cauſe of action was for unliquidated damages, as in treſpaſs, &c. and therefore not bailable; but judgment is above 10l.

4th, Where the plaintiff was non-proſſed, or nonſuited, in the original action, and the defendant, in ſuch action, brings *his* action on the judgment of nonſuit, or nonpros.

5th, Where the action on the judgment is brought, pending a writ of error on ſuch judgment.

The practice of the courts in the firſt caſe the ſame.

In the firſt caſe, it ſeems to have been, and ſtill is the uniform practice of both courts, that a defendant is not to be *arreſted* twice for the ſame ſum; if, therefore, he was arreſted in the *original* action, he is not to be held to bail in an action on the judgment. *Collins* v. *Powell*, B. R. 2 D. & E. 757. *Kendal* v. *Carey*, C. B. 2 Blac. 768.

Defendant not to be held to bail, why.

And this, although the bail in the original action have abſconded or become inſolvent. *Bowen* v. *Barnet*, Say. Rep. 160.

Or the defendant has *ſurrendered* in their diſcharge, and obtained a *ſuperſedeas*. *Hall* v. *Howes*, 2 Str. 1039. Caſ. Pr. C. B. 34.

In both courts, defendant may be held to bail in the action on the judgment, provided the original cauſe of action was *bailable*; but plaintiff did *not arreſt*, and hold defendant to ſpecial bail thereon.

But in C. B. it has been determined, that although plaintiff did arreſt defendant in the original action; yet if he afterwards declared againſt him in a different cauſe of action from that mentioned in the writ, and thereby defendant obtained his diſcharge on filing common bail, that he might hold him again to bail in an action on the judgment, becauſe the plaintiff having loſt his bail in the original action, was in the ſame ſituation as if he had not holden the defendant to bail at all. *De la Cour* v. *Read*, 2 H. Blac. 278. But this ſeems contrary to the principle laid down in other caſes, that defendant ſhall not take advantage of his own laches. *Crutchfield* v. *Seyward*, 2 Wil. 93. *Blandford* v. *Foote*, Cowp. 72.

In the 2d, 3d, and 4th caſes, practice formerly different.

In the ſecond, third, and fourth caſes, the courts for a long time differed in their practice: in the King's

Bench special bail was *not* allowed; in the Common Pleas it was. See *Belither* v. *Gibbs*, Bur. 2117. *Gammage* v. *Walkin*, Str. 975. *Robinson* v. *Nicholls*, Str. 1077. *Palmer* v. *Needham*, Bur. 1389. *Anon.* Cowp. 128. *Creffy* v. *Kell*, 1 Wil. 120. *Bush* v. *Bates*, Bur. 2660. *Nightingale* v. *Nightingale*, Blac. 1274.

Principle of such difference.

The principle of the decisions in the Court of King's Bench seems to have been, that the action of debt on the judgment follows the nature of the original action; and that the intention of the act of 12 G. 1. c. 29. was, that special bail should only be required where the original debt or cause of action amounts to 10l.; whereas the rule in the Common Pleas was, that let the *original* cause of action be what it might, provided the *judgment* be above 10l. and provided *no bail has before been given* in the action in that court, plaintiff might arrest defendant on the judgment. The practice of the Court of Common Pleas certainly appears to have been the most reasonable; and it is not a little singular that such a difference of opinion between the then judges of the two courts should have so long subsisted, especially as in some of the above cases it was particularly noticed and animadverted upon.

Now settled and made uniform.

Nor was it settled till Hil. Term, 32 G. 3. when Lord Kenyon said, that as a different practice had prevailed in the different courts, it was proper that a conference should be had with the judges of the Common Pleas in order to make the practice in future uniform; and accordingly that such conference was had, and that the judges of the King's Bench had agreed to conform to the practice of the other court. *Lewis* v. *Pottle*, 4 D. & E. 570. So that now, in the above cases, defendant may be held to special bail in both courts.

In both courts defendant may be held to bail.

As to the fifth case, courts of C. B. and B. R. formerly differed,

As to the fifth case above-mentioned, viz. where the action on the judgment is brought, pending a writ of error on such judgment, the court of C. B. always allowed defendant to be held to bail, if there had been no bail in the original action, notwithstanding such writ of error was brought, and bail thereon in the court of King's Bench. *Kendal* v. *Carey*, Blac. 768. *Weyman* v. *Weyman*, Bar. 71; and this, although defendant had been arrested in the original action, but plaintiff had waived his bail by declaring differently from process. *De la Cour* v. *Read*, 2 H. Blac. 278; but see *Crutchfield* v. *Seyward*, 2 Wil. 93.

but now seem to agree in their practice.

So in K. B. by a note with which I have been favoured, Buller J. said, in Trin. Term, 25 G. 3. that plaintiff,

tiff, in the original action, may hold defendant to bail in an action of debt upon the judgment in such original action, notwithstanding error brought, provided no bail was given in the original action. Defendant may be held to bail.

In an action on a recovery, in a foreign court, there shall be only common bail. *De Balf* v. *Mackenzie*, Str. 1243. S. C. Bar. 73. What bail on judgment in foreign courts.

In an action on a judgment of an inferior court, though bail was given in the original action below, defendant may be held to special bail, because no bail has been given in the superior court before. *Davis*, executor, v. *Leckie*, Bar. 94. On judgment in inferior courts.

But it may be generally observed, that although in actions of debt on judgment, special bail may, in certain cases, as above mentioned, be required; yet it can only be had once; for if plaintiff in such case recovers, he cannot arrest defendant in another action upon such second judgment. *Chambers* v. *Robinson*, Str. 782. Special bail only once in actions on judgment.

In debt on a judgment, after defendant has been superseded, if owing to plaintiff's laches, common bail only is requisite in both courts. *Hall* v. *Howes*, Str. 1039. *Blandford* and others v. *Foot*, Cowp. 72. *Chambers* v. *Robinson*, Str. 782.; but see a seeming contrary principle laid down in *De la Cour* v. *Read*, 2 H. Blac. 278. How if defendant was superseded,

But if the supersedeas be gained by surprise, special bail. *Whalley* v. *Martin*, Bar. 62.

The defendant cannot, after being superseded, be held to special bail in an action brought upon such former judgment; yet he may be charged in execution after judgment obtained in the second action. *Poulter* v. *Salmon*, Bar. 383.

Where the defendant might have pleaded bankruptcy in the first action, but did not, he shall still be held to special bail upon the judgment, because the court will look no further than the judgment. *Combes* v. *Blackall*, Str. 477. or become bankrupt.

(E) Where the Action is on a penal Statute. (E)

In actions on penal statutes, the defendant, generally speaking, is not to be arrested and held to special bail, because the penalty is in the nature of a fine or amercement, set on the party for an offence committed; and, therefore, no persons ought to suffer any inconvenience, by reason of such law, till he is convicted of the offence. No bail.

St.

St. George's case, Yelv. 53. 2 Brown, 293. *Presgrave's case*, Comyns, 75. Barnes, 80. *Whittingham* v. *Coghlan*. So in *qui tam* actions.

Except authorised by the statute;

But there are some exceptions to this rule; as where the statute on which the action is brought expressly authorises an arrest, as the 11 & 12 W. 3. for exporting wool; 26 G. 2. c. 21. for having unsealed wrought silk in defendant's custody. *Rex* v. *Rebord*, Bur. 1569.

So in actions on the lottery act, 27 G. 3. c. 1. *Davis* v. *Mazzinghi*, 1 D. and E. 705. *Holland* v. *Bothman*, 4 D. & E. 228.

or the action be on a *remedial* statute.

So if the action be on a *remedial* statute, as on statute 9 Ann. c. 14. by the loser against the winner at play; because it is at the suit of the party grieved, wherein defendant is debtor to the plaintiff in so much money had and received. *Turner* v. *Warren*, Str. 1079; or on the 4 G. 2. c. 28. for double rent.

(F) Where it is a second Action for the same Cause, pending the first, or otherwise.

It is a maxim in law, *nemo debet bis vexari pro eâdem causâ*.

Upon this principle was the rule of court, Mic. Term, 15 Car. 2. that if a defendant be lawfully delivered from an arrest upon any process, the same defendant should not be again arrested at the same time by virtue of any process at the suit of the same plaintiff, otherwise both attorney and plaintiff to be punished.

Formerly no bail in a second action, after a nonpros or nonsuit.

So strictly was this formerly attended to, that even if a plaintiff were nonprossed or nonsuited, though perhaps for a mere defect in the pleadings, and afterwards brought a second action, defendant could not in such second action be arrested. *Almanzor* v. *Davila*, Com. 94. S. C. Ray. 679.

But now otherwise.

But the practice is now otherwise: and plaintiff may, after a nonpros or nonsuit, bring a second action, and hold defendant to special bail, it being deemed a sufficient punishment to plaintiff to pay costs in the first action. *Turton* v. *Hayes*, B. R. *Str.* 439. *Harris* v. *Roberts*, C. B. Bar. 73.

Difference between nonsuit on the merits or not.

In B. R. however, a distinction hath been made between a nonsuit upon the merits, and upon a slip or informality; in the *latter* case defendant *may* be held to bail in a second action, but *not* in the *former*.

There are also other exceptions to this rule.

As if plaintiff, by a mere miſtake of his attorney, hath miſconceived his form of action, he may *diſcontinue* upon payment of coſts, and arreſt defendant in a ſecond action for the ſame cauſe. *Bates* v. *Barry*, 2 Wil. 381; or if from defect in the affidavit, defendant be diſcharged on common bail.

Of arreſting defendant in a ſecond action, after diſcontinuance of the firſt.

But he ſhould be always careful to *diſcontinue* regularly the firſt action, and to get the coſts *taxed and paid*, before he commences the ſecond action; otherwiſe the defendant, upon motion, will obtain his diſcharge from ſuch ſecond arreſt, upon filing common bail; for it is a general rule, that no one ought to be arreſted in a ſecond action, whilſt another action for the ſame cauſe, and in which he had been before arreſted, is depending. *Beliſante* v. *Levy*, Str. 1209.

Such diſcontinuance muſt be regular.

The caſe of *Olmius* v. *Delaney* was, indeed, an exception to this rule: it was an action of debt on bond for 900l.; defendant put in bail, who juſtified, and were allowed; plaintiff afterwards, finding that they were forſworn and worth nothing, diſcontinued, having *firſt* arreſted the defendant in a ſecond action, and held him to bail; upon which defendant moved to be diſcharged on common bail, according to the above general rule; but on ſhewing cauſe, a ſcene of villany appearing to the court, they diſcharged the rule, and ſaid that plaintiff was right in laying hold of him as he did; for had he diſcontinued before, the defendant probably would have abſconded, and therefore ordered him to be held to ſpecial bail. Str. 1216.

Under ſtrong circumſtances of villany, arreſts in ſecond actions have been allowed before diſcontinuance;

There ſhould be ſtrong circumſtances of fraud and villany, on the part of defendant, to juſtify plaintiff in ſuch a ſtep; for, unleſs the neceſſity of it clearly appeared, no court would countenance the proceedings.

but the circumſtances muſt be ſtrong,

We accordingly find, in the caſe of *Belcher* and *Ganſell*, Bur. 2502, which was alſo an attempt by plaintiff to get rid of bail who had juſtified, but were afterwards found to be worth nothing, that the attorney was reprimanded by the court for his conduct, the ſide-bar rule for diſcontinuing the former action was diſcharged, and the original bail ſtill remained liable to their recognizance; and yet in this caſe the firſt action was actually diſcontinued before the commencement of the ſecond; but ſuch diſcontinuance not being until after bail had juſtified, and the Court, conceiving the whole to be a trick to oppreſs defendant, ſhewed their diſapprobation of it, notwithſtanding the caſe of *Olmius* and *Delaney*, and ſaid,

or the court will diſcountenance ſuch proceeding.

said, that the attorney ought first to have applied to them *disclosing* all the circumstances.

Plaintiff may arrest defendant without discontinuing if not held to bail in first action,

It is observable that the above cases only apply to a *second arrest* for the same cause; for if the defendant has before been only served with process, plaintiff may afterwards sue out bailable process, and arrest defendant *before* he has discontinued the first action, which may be discontinued at any time. *Bishop* v. *Powell*, 6 D. and E. 616.

or if discharged without plaintiff's fault.

Another exception to the above maxim is, when defendant was discharged from the first arrest for some act over which the plaintiff had no control, and for which he was not answerable, as a defect in the warrant, or the like. *Housin* v. *Barrow*, 6 D. & E. 218.

If cause referred, defendant may be arrested on the award, though bail in original suit.

So if out of the old action any new cause of action arises, it does not fall within the rule; as where a cause, in which defendant was held to bail, is referred to arbitration, and the arbitrator awards to the plaintiff a sum exceeding 10l. the defendant may be arrested again in an action upon the award; for the reference put an end to the first action, and a new cause of action arose by the arbitration. *Collins* v. *Powell*, 2 D. and E. 756.

So when defendant deceived plaintiff by giving him a draft for the debt, and promising immediate payment, which was discharged, and plaintiff arrested him again on the old affidavit, held good. *Puckford* v. *Maxwell*, 6 D. & E. 52.

(G)

(G) Where the Action is removed from inferior Courts.

Former practice.

Various cases are to be found in the books respecting the practice of holding to bail where the cause was removed out of an inferior court; and the general rule seems to have been, that in all cases, excepting that of an executor, where the cause was removed by *habeas corpus*, the defendant was obliged to find special bail, although the original cause of action would not have been bailable in the superior court; because otherwise, the defendant had it in his power to put the plaintiff in a worse condition than he was in before, and this they did out of indulgence to inferior courts. *Page* v. *Price*, Salk. 98. 102.

Now settled by statute.

But now the practice in this particular is clearly settled by the 19 G. 3. c. 70.; which, in the first place, by sec. 1. has abolished all distinction between *inferior* and *superior* courts, as to the sum for which a person may be arrested,

arrested, which must now be 10l. in both courts; and secondly, by sec. 6. has positively enacted, that defendants must find bail upon removal of the cause, though not originally of a bailable nature.

Having considered the nature *of the cause of action, and its object, the next thing to be attended to, in order to discover whether the action is bailable or not is; the* person *against whom such action is to be brought; for it often happens, that a defendant by reason of the character in which he is sued, or his peculiar station in life, or some other circumstance, is either wholly or partially protected from arrests; it is necessary therefore to consider to what persons such privileges and exemptions extend.*

Section II.

The Person against whom the Action is to be brought; and herein,

(A) Of Defendants sued in *auter Droit*, as Executors, Administrators, Assignees, &c.
(B) Of Persons wholly *privileged* from Arrests.
(C) Of Persons *protected* only in certain Cases, or to a certain Amount.

(A) Of Defendants sued in *auter Droit*. (A)

A defendant is said to be sued in *auter droit* when an action is brought against him as the representative of another, for a debt, or cause of action, contracted or incurred, not by the defendant himself, but by the person whom he so represents. What is meant thereby.

In which case, although he may be liable to an action, and answerable to the extent of the property of the principal which he may have in his hands, yet it would be contrary to reason and justice if his person were subject to an arrest and imprisonment.

Heirs, executors, and administrators, therefore, when charged *as such*, cannot be arrested and held to bail; because the demand is not on the person, but on the assets of the deceased. 2 Brown, 293. *Smale* v. *Warm*, 3 Bulst. 316. Heirs, executors, administrators, exempt,

If

unleſs they make themſelves anſwerable

If however, they commit any act, to make themſelves and their own property legally anſwerable for ſuch demand, then they may be arreſted and held to ſpecial bail; becauſe the action, in ſuch caſe, attaches upon them, and they are not ſued in *auter droit*, but in their *own* right.

by promiſe,

Thus, if an heir, executor, or adminiſtrator, perſonally promiſes and undertakes, in writing, to pay any debt or legacy, ſuch promiſe will be binding, and he himſelf rendered liable to be arreſted for payment of ſuch demand. *Mackenzie* v. *Mackenzie*, 1 D. & E. 716.

by a devaſtavit,

So if an executor, or adminiſtrator, has been guilty of a *devaſtavit*, or waſting the deceaſed's goods; in an action ſuggeſting ſuch *devaſtavit*, he may be arreſted; becauſe, by ſuch miſconduct, he has rendered himſelf and his own property liable. *Page* v. *Price*, Salk. 98. *Horſey* v. *Daniel*, 2 Lev. 145. Sid. 63. Executors of *Boothby* v. *Buller*.

But then it ſhould be an actual *devaſtavit*, returned by the ſheriff, or at leaſt grounded on an affidavit. *Duprett* v. *Teſtard*, Carth. 264. A mere ſuggeſtion of a *devaſtavit* is not ſufficient. Ib.

bail, or ſureties,

Upon a ſimilar principle, in actions againſt bail, defendants are not to be arreſted, ſince they are ſued, not for a debt contracted by themſelves, but by their principal for whom they are bound; and beſides, were it otherwiſe, it would lead to bail *ad infinitum*. *Brander* v. *Robſon*, 6 D. & E. 336.

In actions, therefore, on bail-bonds, replevin-bonds, and the like, common bail only is required. *Dux Ormond* v. *Brierly*, Salk. 99.

aſſignees of bankrupt.

So aſſignees of bankrupts, being merely the repreſentatives of another, are not to be arreſted.

(B) Of Perſons *privileged* from Arreſts.

(B)

In what caſes generally.

There are certain perſons who, though ſued *in their own right*, are by law *privileged* from arreſt; and this either

(B. 1) By reaſon of the Defendant's legal Incapacity.

(B. 2) By reaſon of the Dignity of Defendant's Station.

(B. 3) By reaſon of the peculiar Nature of Defendant's Profeſſion or Office.

(B. 1) Of

(B. 1) Of Defendants who, by reaſon of legal Incapacity, are privileged from Arreſts. (B. 1)

On account of the legal incapacity of minors to make any contract, no one ought to be arreſted for any debt incurred during his infancy, except it be for *neceſſaries* ſuitable to his ſituation in life, or he has promiſed to pay ſince he became of age. Minors.

So a feme covert cannot be arreſted, nor can any action be brought againſt her without making the huſband a party to the ſuit. Feme covert,

In which actions the huſband alone ought to be arreſted, who is to put in bail for himſelf and wife. *Roberts* v. *Andrews* & *Ux.* Blac. 720. *Edwards* v. *Rourke* & *Ux.* 1 D. & E. 486. not to be arreſted.

Nor can the wife be arreſted, although the huſband cannot be found, if it be notorious that ſhe is a married woman. Ib.

For this privilege, or protection, is founded not only upon the principle of the legal incapacity of a feme covert to do any act for herſelf; but alſo becauſe, as ſhe has for the moſt part no property of her own, ſhe might, if liable to an arreſt, be impriſoned for life. Why.

But there are ſome exceptions to this rule; ſo that in certain particular caſes, a feme covert may be arreſted. Exceptions to the rule,

As if the coverture be not open and notorious. and in what caſes ſhe may be arreſted.

Or defendant has impoſed upon plaintiff in paſſing for an unmarried woman. *Pearſon* v. *Meaden*, Blac. 903. *Wilſon* v. *Campbell*, M. 20 G. 3. *Partridge* v. *Clarke*, 5 D. & E. 194.

Or if ſhe live notoriouſly in a ſtate of ſeparation, and the like. *Corbet* v. *Poelnitz* & *Ux.* 1 D. & E. 5.

In which caſes, the action may be brought againſt her only. How action to be then brought.

With reſpect to taking a feme covert in *execution*, the law is ſomewhat different; but it is ſufficient, in this place, to have ſhewn how far ſhe is liable to be arreſted on *meſne* proceſs. Any further proceedings by or againſt baron and feme muſt be reſerved to another part of the work.

(B. 2) Of

(B. 2) (B. 2) Of Defendants who, by reaſon of the Dignity of their Station, are privileged from Arreſts.

1. Royal family and ſervants.

1ſt, The royal family, as the higheſt in dignity, are the firſt entitled to this privilege. It is extended alſo to the *king*'s ſervants in ordinary, and menial ſervants. *The King* v. *Moulton*, &c. 2 Keb. 3. *The King* v. *Thrampton*, ib. 485. *Dixon* v. *Killigrew*, T. Ray. 152.

The junior clerk of the kitchen to the king at St. James's was diſcharged out of cuſtody, upon motion, when taken in execution after judgment by default. *Bartlett* v. *Kebbes*, 5 D. & E. 686.

To what ſervants.

But this privilege only extends to the ſervants of the king and queen *regent*, and not to thoſe of the queen *conſort* or queen *dowager*. *Starkie's caſe*, 1 Keb. 842. *The King and Capell* v. *Baud and Segrave*, ib. 877.

2. Ambaſſadors, miniſters, and their domeſtic ſervants.

2d, Ambaſſadors, public miniſters, of any foreign prince or ſtate (authoriſed and received as ſuch by his majeſty), and their domeſtic ſervants, are privileged from arreſts.

7 Ann. c. 12.

This is *declared* to be the law by the 7 Ann. c. 12; but this act was only a *declaratory* act; for the privilege itſelf is founded upon the *law of nations*, and always exiſted. The only thing new in that act, is a clauſe, ſ. 4. which gives a ſummary juriſdiction for the puniſhment of the infractors of this law. Bur. 1480:—

S. 4. Puniſhment of offenders againſt that act.

"Whereby the party ſuing and the attorney proſecuting ſuch ſuit, and the officers executing the proceſs, being convicted by the oath of one witneſs before the Lord Chancellor, the C. J. of B. R. or C. J. of C. B., or any two of them, ſhall ſuffer ſuch pains, penalties, and puniſhment, as they, or any two of them, ſhall impoſe."

Occaſion of that act.

The above act of parliament was occaſioned by a particular circumſtance, namely, the arreſting of an ambaſſador from Peter the Great Czar of Muſcovy, who, highly reſenting the affront, this act was paſſed, and ſent to him as a national apology. See an account thereof, 1 Blac. Com. 255.

Proviſo with an exception to merchants and traders.

By ſ. 5. of the above act, there is a proviſo, "that no merchant, or other trader whatſoever, within the deſcription of any of the ſtatutes againſt bankrupts, who puts himſelf into the ſervice of any ſuch ambaſſador, or public miniſter, ſhall have the benefit of that act."

And

And further, "that no perſon ſhall be proceeded againſt as having arreſted the ſervant of any ambaſſador, or public miniſter, unleſs the name of ſuch ſervant be firſt regiſtered in the office of one of the principal ſecretaries of ſtate, and by ſuch ſecretary tranſmitted to the ſheriffs of London and Middleſex for the time being, or their under-ſheriffs, or deputies, who ſhall, upon the receipt thereof, hang up the ſame in ſome public place in their offices, whereto all perſons may reſort, and take copies thereof, without fee or reward." Neceſſity of regiſtering the ambaſſadors ſervants names, and where.

Since the paſſing of the act of 7 Ann. various caſes have been decided concerning this privilege, from which it may be collected, 1ſt, with reſpect to the *miniſters* themſelves who are privileged: The ſtat. Ann. explained.

That they muſt be ambaſſadors, or public miniſters, authoriſed, and received here as ſuch. With reſpect to the ambaſſadors themſelves to be protected.

Conſuls, or agents of commerce, though received as ſuch by the courts to which they are employed, are not ſuch miniſters as are protected or privileged.

2d, With reſpect to the *ſervants* of ſuch ambaſſadors: With reſpect to their ſervants. Muſt be domeſtic.

Such ſervants muſt be, *bonâ fide*, *domeſtic* ſervants. *Poitier* v. *Croza*, Blac. 48.

Not that it is neceſſary for them to lie in the houſe, (though that was formerly thought eſſential, 1 Wil. 79.) as many houſes are not large enough to lodge all the ſervants of ambaſſadors; but they ought to be actual ſervants, employed in or about the houſe. *Toms* v. *Hammond*, Bar. 370.

There muſt be a *retainer*, an *office by name*, and an *actual ſervice*, in that office. *Triquet* v. *Bath*, Blac. 474. Eſſentials to make them ſo.

The nature of the ſervice, and the actual performance of it, muſt be particularly ſworn to. Bur. 1479. *Peach and others* v. *Bath*. But it is not expected that every particular act of the ſervice ſhould be ſpecified. *Ib.* Which muſt be ſworn to.

The affidavit, therefore, to diſcharge ſuch ſervant, if arreſted, ſhould ſpecify his employment; for ſwearing generally that he is a domeſtic, or menial ſervant, is not ſufficient; nor, on the other hand, is it enough to ſhew that he is a ſervant of an ambaſſador, and to ſpecify the nature of that ſervice, unleſs it further appears, that he is alſo, generally ſpeaking, a *domeſtic* ſervant. *Poitier* v. *Croza*, 1 Blac. 48. *Seacomb* v. *Bowlney*, 1 Wil. 20. Carolino's caſe, 1 Wil. 78. *Lockwood* v. *Coyſgarne*, Bur. 1676. What the affidavit muſt contain.

But the *secretary* of a foreign minister, though not immediately a domestic, is a servant within the statute. *Hopkins* v. *De Robeck*, 3 D. and E. 79.

The affidavit must also shew, that he was such domestic servant at the *time* of the arrest; for it will be no protection to make him so afterwards. *Heathfield* v. *Chilton*, Bur. 2017.

It should, lastly, shew that he is not a trader, or subject to the bankrupt laws.

Privilege extends to the foreign servants of ministers.

N. B. This privilege from arrest extends as well to the servants who are natives of the country where the minister resides, as to his foreign servants whom he brings over with him. Bur. 1677.

The courts require the above particularities, in order to prevent any unjustifiable abuses of this privilege, which might otherwise be perverted into a mere scheme to screen people from their creditors.

For although the process of the law shall not take a domestic servant out of the service of a public minister, yet a public minister shall not take a man from the custody of the law. Bur. 2017.

With respect to the exception in the statute as to traders.

3d, With respect to the proviso in that act, in s. 5, as to the exception to traders or merchants, it was held, that an English secretary to a foreign minister, who was *formerly* a trader, but who hath some years back left off trading, does not come within the exception, though he may even be under suspicious circumstances. *Triquet, and others*, v. *Bath*, Bur. 1478.

For if such service, as is here spoken of, be sufficiently proved by affidavit, the court will not, upon bare *suspicion* only, suppose it to have been merely colourable and collusive. *Ib.*

With respect to the registering of the names of such servants.

4th, With respect to the other part of the proviso, namely, the *registering* of the names of such ambassadors servants, it is to be observed, that this is no condition *precedent* to the being entitled to the privilege of a public minister's servant. It only relates to the officer who arrested him, and who, in case of the neglect of such entry, is not liable to be punished under that statute, although the person arrested may still, on application to the court, be discharged. Bur. 2017. *Hopkins* v. *De Robeck*, 3 D. & E. 79. *Seacombe* v. *Bowlney*, 1 Wil. 20.

3. Peers and peeresses.

3. The next persons to be mentioned as privileged from arrest, on account of the dignity of their station, are,

are, peers of the realm of *England*, and peereſſes, as well by birth as by marriage.

The like privilege is given by the act of union, 5 Ann. c. 8. art. 23, to peers and peereſſes of *Scotland*.

And even if defendant ſucceeds to a peerage after he is arreſted in an action, he will on motion be diſcharged. *Trinder* v. *Shirley*, Do. 45.

What to be deemed ſuch.

But by peers of the realm of England, is to be underſtood lords of the parliament of England: ſo that all other noblemen, not being lords of the parliament of this realm, are not privileged. This privilege, therefore, does not extend to Iriſh or other foreign peers. 2 Inſt. 48. 3 Inſt. 30.

Not to peereſſes by marriage, who afterwards marry commoners;

Nor to peereſſes who became ſuch by marriage, and afterwards have married commoners: but it is otherwiſe, if they were peereſſes by deſcent: "For if a woman "that is noble by deſcent, marry one that is under the "degree of nobility, ſhe remaineth noble ſtill; but if ſhe "gain it by marriage, ſhe loſes it if ſhe afterwards "marry under the degree of nobility." Co. Lit. 16, b.

nor to the ſon of a peer;

Nor to the ſon and heir apparent of a peer; but an infant peer is privileged, his perſon being held ſacred. Co. Lit. 156. 2 Inſt. 48.

nor to their ſervants.

Formerly the ſervants of peers, who were neceſſarily and properly employed about their eſtates and perſons, were privileged from arreſt. *Cheſter* v. *Upſdale*, 1 Wil. 278.

But by the 10 G. 3. c. 50. ſ. 10. this privilege, together with all others which derogated from the common law in matters of civil right, ſave only as to the freedom of the members perſons, was aboliſhed. 1 Blac. Com. 165.

4. Members of parliament.

4. By the privilege of parliament, as alſo by the ſtatute 10 G. 3. c. 50, *members of parliament* cannot be arreſted.

To what extent.

This, however, is a limited protection; namely, for forty days after every prorogation, and forty days before the next appointed meeting; which is now in effect as long as the parliament ſubſiſts, it ſeldom being prorogued for more than four-ſcore days at a time. 1 Blac. Com. 165.

In what caſes.

This privilege of parliament holds in the caſe of informations for the king, except it be for treaſon, felony, or the like; that is, where ſurety for the peace is required, to which caſes it is not extended. *The King* v. *Wilkes*, 2 Wil. 159.

To what extent biſhops, members of convocation, and their ſervants, are entitled to this privilege. See ſtat. 8 Hen. 6. c. 1.

(B. 3) (B. 3) Of Perſons privileged by reaſon of the peculiar Nature of their Profeſſion or Office.

Attornies and officers of the courts.

Perſons privileged from arreſts, by reaſon of the nature of their profeſſion or office, are, *attornies and other officers of the courts*, whoſe conſtant attendance in the courts is preſumed to be neceſſary.

If therefore ſuch perſon be arreſted, he is entitled to his diſcharge; for the mode of obtaining which, ſee vol. 2. *Of Proceedings by and againſt Attornies.*

(C) (C) Of Perſons *protected* only in certain Caſes, or to a certain Amount.

The perſons who have hitherto been ſpoken of, are ſuch as are *wholly* privileged from arreſts; but there are ſome who are only *partially* protected in certain caſes, and to a certain amount; ſuch are,

Soldiers and ſailors.

Soldiers and ſailors in his majeſty's ſervice, who have either been inliſted therein againſt their will, or have voluntarily inliſted themſelves.

Inliſted ſoldiers not to be arreſted.

By the acts for recruiting his majeſty's land forces and marines, it is enacted, that no perſon inliſted ſhall be taken out of his majeſty's ſervice by any proceſs, other than for ſome criminal matter: but it was held in a caſe on one of theſe acts, *viz.* 30 G. 2. c. 8. that it only meant to privilege ſuch perſons from arreſts as were under that act *compelled* againſt their wills to ſerve as ſoldiers, and not to a perſon who *voluntarily* inliſted himſelf. *Turner* v. *Turner*, Bur. 466.

If arreſted, may be ſurrendered.

Where defendant, an inliſted perſon, has been arreſted and held to bail, he may be ſurrendered by his bail in their own diſcharge; for the manner of doing which, *vide* the caſe of *Bond* v. *Iſaac*, Bur. 339.

Volunteer ſeamen not to be arreſted under 20l.

By 1 G. 2. ſt. 2. c. 14. and 31 G. 2. c. 10. for encouraging ſeamen to enter, "No perſon who ſhall liſt himſelf to ſerve on board any of his majeſty's ſhips of war ſhall be held to bail, but on affidavit, that the ſum juſtly due amounts to 20l."

Who are deemed within this ſtatute.

A ſeaman, upon the ſhip's books, though he has abſented himſelf, is a ſeaman within the act. *Studwell* v. *Bunton*, Bar. 95.

Armourers,

Armourers, gunners, &c. inlisted as common seamen, are within it. *Barnsley* v. *Archer*, Bar. 114.

Volunteer soldiers not to be arrested under 20l.

By the mutiny act (31 G. 3. c. 13. s. 65.), in order to prevent so far as may be any unjust or fraudulent arrests that may be made upon soldiers, whereby his majesty and the public may be deprived of their service, it is enacted, that no person who is listed, or shall list himself, as a volunteer, shall be taken out of his majesty's service by any process or execution, other than for some criminal matter, unless the original sum, or cause of action, amounts to 20l. over and above all costs, and a memorandum thereof marked on the back of the process.

Who comes within this act.

Not only common soldiers, but non-commissioned officers and privates, have been held within the statute. So are serjeants; and the certificate of the *secretary* at war of the nature of a serjeant's station, may be read as evidence. *Lloyd* v. *Wooddall*, 1 Blac. 29.

So is a drummer and a gunner in the train of artillery. *Johnson* v. *Louth*, Str. 7. A trooper just inlisted. *Bayley* v. *Jenners*, Str. 2. Recruits just inlisted. But an out-pensioner of Chelsea Hospital is not. *Bowler* v. *Owen*, Bar. 432.

A militia-man, under the supplementary militia act, 37 Geo. 3. is not protected until embodied, and called into service, Easter Term 1797.

It only extends to civil cases, not to criminal.

And in all the above cases this exception only relates to *civil* actions, not to any thing of a *criminal* nature; so that a soldier is liable to be taken up for disobeying any order of a justice, inasmuch as that is an offence so far criminal, that in almost every instance the party may be indicted for it. *The King* v. *Archer*, 2 D. and E. 273.

Money to be refunded, if paid for his discharge.

If a person privileged within these statutes be arrested and pays the debt, in order to obtain his liberty, the court, on motion, will compel the party arresting him to repay him such money; it having been held equally reasonable, that the money paid by defendant to obtain his liberty should be repaid, as that his person, in case the application had been on that account, should have been discharged. *Methuen* v. *Martin*, Say. 107.

No arrest in Wales or counties palatine, unless cause of action amounts to 20l.

So persons living in Wales, and the counties palatine, are protected from arrests to a certain degree; for, by the statute 11 & 12 W. 3. c. 9. "sheriffs, &c. are not to take special bail in *Wales* or *counties palatine*, upon process out of his majesty's courts at Westminster, unless affidavit be first made, and filed in court, that the cause of

action amounts to 20l. or upwards; and bail not to be taken for more than the ſum expreſſed in the affidavit."

Special bail was taken for 12l. upon proceſs into Lancaſhire; and on motion for common bail, plaintiff inſiſted, that as the 12 G. 1. c. 29. about not holding to bail under 10l. had an exception to Scotland only, it was intended to extend to all other places, and conſequently was a virtual repeal of 11 & 12 W. 3. But per cur. they are not inconſiſtent; for the 12 G. does not ſay, you ſhall have bail for 10l. but only that you ſhall not have bail under 10l.; whereas, in 11 & 12 W. 3. there are negative words; and the oath, in this caſe, being only to 12l. plaintiff is not entitled to hold defendant to ſpecial bail. *Smith* v. *Dudley*, Str. 1102. Ld. *Molineux* v. *Charles*, Bar. 69. *Rayner* v. *Brough*, Bar. 89.; where it is alſo ſaid, that the ſtatute of W. is not repealed by the 12 G. 1.

Section III.

Of particular Circumſtances in the Caſe which exempt Perſons from being held to ſpecial Bail, who would otherwiſe be liable thereto.

THE action may, in its nature and object, be a bailable one, and the party againſt whom it is brought may not come within any of the deſcriptions above mentioned, ſo as to entitle him to privilege or protection; and yet, from ſome peculiar circumſtances, defendant may be exempt from ſpecial bail.

Certificated bankrupts diſcharged from debts before bankruptcy,

Such is the caſe of certificated bankrupts, with reſpect to all cauſes of action which accrued previous to the commiſſion of bankruptcy, and which could have been proved under it; for which they are not only not liable to be arreſted, but the debt, or demand itſelf, is diſcharged by the certificate; and this, though judgment is not obtained till after the certificate allowed. Cooke's Bankrupt Laws, 243.

and intereſts and coſts attaching thereto;

And not only the original debt itſelf is diſcharged, but the whole that relates thereto; as any intereſt that may have accrued thereon, or any coſts that may have been incurred, in the ſuing of ſuch debt ſince the bankruptcy; as they all ſtand upon the ſame footing. *Blandford* v. *Foote*, Cowp. 138. *Graham* v. *Benton*, 2 Str. 1196.

But

But if the bankrupt pleads a falſe plea in an action againſt him as executor, between the time of the commiſſion and of his obtaining his certificate, whereby he has had judgment againſt him as to the coſts of ſuch plea de bonis propriis, he ſhall not, after he has obtained his certificate, be diſcharged from ſuch coſts. *Howard* v. *Jemmot*, Bur. 1368.

but not ſo, if he pleads a falſe plea as executor.

It is, however, to be obſerved, that this exemption only holds good where the *cauſe of action* was previous to the bankruptcy, and the debt itſelf could be proved under the commiſſion; for otherwiſe they are liable to an arreſt. *Hockley* v. *Merry*, Str. 1043. *Tully* v. *Sparks*, Str. 867. *Cockerill* v. *Ouſton*, Bur. 436. and a variety of other caſes; for which ſee Cooke's Bankrupt Laws, 345.

Nor is a bankrupt free from arreſt, except where the debt could be proved under the commiſſion.

And even if a bankrupt, after having obtained his certificate, promiſes a creditor, who did not prove his debt under the commiſſion, to pay him, and is afterwards arreſted on that promiſe, the court will diſcharge him on common bail. *Bayley* v. *Dillon*, Bur. 736.

Bankrupt cannot be arreſted on a ſubſequent promiſe.

And upon *this* principle, that the action itſelf is founded merely upon a conſcientious obligation; for, in point of law, the certificate had exonerated him from the payment of the debt; the freſh promiſe, therefore, was made from a conſcientious motive. But were he liable to be arreſted and impriſoned on ſuch promiſe, "it would be taking advantage of conſcientiouſneſs to uſe it againſt conſcience;" an action, however, will lie on ſuch promiſe. Bur. 737.

Why.

But if the commiſſion, or the certificate, be fraudulent, the court will not diſcharge the bankrupt on common bail. *Sowley* v. *Jones*, Blac. 725. *Martin* v. *O'Hara*, Cowp. 823. *Robſon* v. *Calze*, Do. 228.

Commiſſion muſt not be fraudulent.

But in all ſuch caſes the defendant ſhould plead his bankruptcy; for if he might do ſo, and neglects it, and a judgment is obtained, he ſhall be liable to be arreſted in debt on ſuch judgment; nor will the court go further back than the judgment to inquire into the time of the bankruptcy. *Combes* v. *Blackall*, Str. 477.

Defendant muſt plead his bankruptcy in time.

If therefore, defendant has obtained his certificate in time, it may be pleaded; but if not properly allowed and obtained till after judgment, he muſt apply to a judge, or move the court for his diſcharge, and verify the certificate by affidavit. *Tarlton* v. *Fiſher*, Do. 671. *Graham* v. *Benton*, 1 Wil. 41.

If certificate not obtained time enough to plead it, how to proceed.

And even ſhould he, after judgment obtained, bring error, in order to delay execution until his certificate be

Whenever certificate obtained, he may be diſcharged.

allowed, and afterwards pending error, obtain such certificate, he may be discharged. *Ib.*

Which discharge is founded upon the 5 G. 2. c. 30. s. 13.

Discharge only extends to his person, not his goods.

But such discharge only extends to the *person*, not to the goods of the bankrupt; and the above last cited case must be so construed. If, therefore, an execution against the goods of a bankrupt be taken out after his certificate is signed by the creditors, and before it is allowed by the chancellor, it is valid. *Callen* v. *Meyrick*, 1 D. & E. 361.

Insolvent debtors and fugitives.

Another peculiar circumstance which exempts a person from being arrested, is, the having been discharged since the cause of action accrued on any of the insolvent acts, either as an *insolvent debtor* or a *fugitive*; for, by these acts, after such discharge, the *person* of the debtor is free from arrest for any cause of action accruing before the time mentioned in such act, but his *property* is still liable; for the debt itself is not extinguished, as in the case of a certificated bankrupt.

To whom as fugitives the acts extend.

By the acts of parliament, with respect to fugitives, they must be such persons as went abroad for the purpose of avoiding their creditors. If, therefore, they go there for the purpose of trading, or have chiefly lived and contracted their debts there, they will not be deemed fugitives within the acts. *Sheldon* v. *Foot*, Say. 308, *Honour* v. *Wetherhead*, 1 Wil. 85.

To what debts the acts extend.

A debt due, by bond or promissory note, given before the day mentioned in the insolvent act, though not payable till after, is *debitum in præsenti* though *solvendum in futuro*, and defendant so discharged shall not be liable to be arrested thereupon; but otherwise of a debt payable upon a contingency, from which he would not be discharged, unless the contingency had happened before the day mentioned in the act. *Paget* v. *Wheate*, Do. 671, *Workman* v. *Leake*, Cowp. 22.

To what places.

These acts only extend to England; a discharge upon such an act passed in Ireland not sufficient. *Denbury* v. *Perew*, 1 Barn. 420.

Persons superseded in a prior action for the same cause.

A third circumstance which exempts a person from being arrested, is, the having obtained a *supersedeas* in a prior action brought for the same cause; in which case, his *person* is afterwards free from arrest for such debt or demand, though his *property* is still answerable.

The effect of a subsequent promise.

Nor will any subsequent promise, in either of the two last cases, be a sufficient ground for arrest.

Thus,

Thus, where a defendant, having given his note for 36l. was discharged on an insolvent debtor's act, and afterwards promised to pay the debt by instalments, and actually did pay some of the instalments, upon his being arrested for the residue, he was discharged upon common bail. *Turner* v. *Scomberg*, Str. 1233. It will not render them liable to an arrest.

In like manner, where the defendant, being arrested for 25l. lay in gaol till he was superseded, and the plaintiff, meeting him afterwards, got a note of him for 20l. and brought a fresh action upon it, and held him to bail, the court discharged him upon common bail. *Taylor* v. *Wasteneys*, Str. 1218.

And upon this principle, that such subsequent promise being made without any new consideration passing, the old debt is still in existence, and is, in fact, the *real* cause of action. Since, therefore, the defendant would not be liable, after such discharge or *supersedeas*, to be arrested for the original debt, neither shall he be so by virtue of such subsequent promise, made without any fresh consideration. Why.

Under this head may be classed all actions brought upon illegal considerations, or even where the legality of the contract is doubtful; in which cases, if the defendant be arrested, the court, on affidavit of the fact, will discharge him on common bail. *Sumner* v. *Green*, C. B. T. R. 301. Common bail in actions on illegal considerations.

Thus have we endeavoured to point out the various considerations necessary to be attended to, for the better ascertaining whether special or common bail only is required; and to shew, that it depends first upon the nature *and* object *of the action itself; secondly, upon the* person *against whom it is brought; and, lastly, upon* particular circumstances *which may render it an exception to the general rule; it only now remains, before we conclude this chapter, to make a few general remarks upon*

Section IV.

The Consequences of arresting any Person not liable to be arrested, by reason of Privilege or otherwise, and of their Remedy and Discharge.

If a person, in any common case, arrest another, and hold him to special bail, without having some cause of action In common cases, the remedy by action for malicious arrest.

action against him amounting to 10l. such person will be liable to an action upon the case, for maliciously holding him to bail.

So if he hold him to bail for a much greater sum than is due.

Original suit must be first determined.

But before such action, for maliciously holding to bail, is brought, the first action on which the arrest is wrongfully made, ought to be determined. *Morgan* v. *Hughes*, 2 D. & E. 232.

Against whom such action to be brought.

And this action can only be brought against the party at whose suit such arrest was made; for neither the sheriff, or his officers who made the arrest, are liable. *Tarlton* v. *Fisher*, Do. 677. Nor the attorney who sued out the writ, although he well knew that there was no cause of action, and was even himself a witness to the payment or release of the debt for which defendant was arrested; for what an attorney does, is only as servant to another, and in the way of his calling and profession. *Barker* v. *Braham* & *Norwood*, 3 Wil. 379.

If defendant be held to bail, and no just cause of action exists, the Court of King's Bench will not, upon motion, discharge him, because they will not enter into the merits upon affidavits, but will leave the party to his remedy by indictment or otherwise, if plaintiff has sworn falsely; but the practice of the Common Pleas seems otherwise.

Of the remedy in case of a privileged person being held to bail.

Where there is a just *bailable* cause of action, but the defendant is not subject to an arrest by reason of his *privilege* or *protection*, as before described; the remedy, in case he be arrested, notwithstanding such privilege may be by a summary application to the Court.

Doubt as to any action being maintainable.

As to any *action* for damages, in such case, it seems somewhat doubtful, whether it can be maintained. In the case of *Cameron* v. *Lightfoot*, Blac. 1194. De Grey, C. J. took pains to discourage the kind of action; and although he did not positively give it as his opinion, that in no such case an action would lie; yet he strongly intimated the difficulty of supporting it; and that the unfrequency of such actions was no slender proof of the general opinion concerning them. For though, says he, in many cases (speaking of privileged persons being arrested) the process is declared *void*; yet in *none* has any instance been produced, of an action of false imprisonment being brought.

No instances.

A difference between arrest on void process, and at a wrong time.

He makes, however, a difference (and surely justly) between cases where the process itself is *void*, (as of arrest on Sundays, of ambassadors, and the like,) and where

where (as in the case of Cameron and Lightfoot, which was an action for arresting the plaintiff, *redeundo as a witness* from the court) the writ is not void, nor the arrest illegal, but only improperly *timed*.

In the first, De Grey seemed doubtful; but in the last, the court were unanimous, that no action would lie, although the officer, if he knew the circumstances, might possibly be punishable for the contempt. In last certainly no action.

But although such actions may be unfrequent, yet in strictness of law, an action of trespass will lie for arresting a privileged person, provided the writ on which such arrest was made be first *superseded*, but not otherwise; for till then it will be a justification. Per Buller, J. *Tarlton* v. *Fisher*, Do. 677. *Parsons* v. *Lloyd*, 3 W. 341. In first one will lie,

Such action must be brought against the party, not against the sheriff, or his officers. For it is settled, that no sheriff, nor his officer, is liable to an action for false imprisonment for arresting any privileged or protected person, as a certificated bankrupt, a feme covert, a peer, a discharged insolvent, and the like.—Ib. Nor for arresting an attorney, though the sheriff was served with a writ of privilege. *Crosley* v. *Shaw*, Blac. 1085. (The arresting of an ambassador, or his servant, properly registered agreeable to act of parliament, is an exception; for in such case, the bailiff would be liable by the statute 7 Ann.) against the party, not the officer; who is adjudged not liable. (Exception as to ambassadors.)

If, however, they should do any thing oppressive, after full notice of all the circumstances, an action on the case might, *perhaps*, be maintained against them. Ib. *Tarlton* v. *Fisher*, Do. 676. Perhaps otherwise in cases of oppression.

But the general rule, with respect to sheriffs and their officers, is, that a sheriff is bound to execute process issuing out of a court of competent jurisdiction, and though there be no cause of action, or the process be erroneous, the sheriff is not responsible. Ib. General rule as to sheriff's justification.

But the chief object, when a privileged person has been arrested, is to obtain his *discharge*. Discharge of persons privileged.

And it is now finally settled by Pitt's case, Str. 985, that a person entitled to privilege may be discharged upon motion, but it is discretionary in the Court, as if there is a doubt whether the party applying be really a person entitled to privilege or the like. Per Ld. Kenyon, in *Bartlett* v. *Hobbes*, 5 D. & E. 689.

In which case they may put him to his plea of privilege.

So a feme covert, if arrested, may be discharged on motion. Feme coverts.

The

Infants.

The court will not discharge infants on motion, but will put them to their plea of infancy.

Attornies.

In what cases attornies may be discharged on motion, see vol. 2. *Proceedings by and against Attornies.*

As to a certificated bankrupt, how to get discharged.

Formerly, when a bankrupt was arrested, and held to *bail*, who was entitled to his discharge, the method was, for the bail to surrender defendant, and then for him to apply to be discharged, upon an affidavit, stating the facts of his having become bankrupt since the cause of action arose, and having obtained his certificate. But now, where a bankrupt is clearly entitled to his discharge, the court, to avoid circuity, will order an *exoneretur* to be entered on the bail-piece on motion made for that purpose, without the form of a regular surrender by his bail. *Martin* v. *O'Hara*, Cowp. 824.

Ancient practice.

Modern.

When on motion.

If he be arrested, but not held to bail, his discharge may be effected by motion on his filing common bail.

Which is a rule nisi, and what may be shewn for cause against it.

But this is a rule *nisi* in the first instance; and it will be open to the plaintiff to shew any cause he thinks proper against it; and if it appear, upon such cause shewn, that the commission was fraudulently issued, or that defendant had concealed part of his effects, or had obtained his certificate surreptitiously, they will discharge the rule. *Sawley* v. *Jones*, Black. 725. *Robson* v. *Calze*, Do. 228. *Vincent* v *Brady*, C. B. Mich. 32 G. 3.

Feigned issue directed, if doubtful.

And should the court not choose, in such case, to determine the matter upon affidavits, they will direct a feigned issue to try the question. *Robson* v. *Calze*, Do. 228.

As to insolvent debtors and fugitives;

how to get discharged.

At what time.

Discharged *insolvent debtors* and *fugitives* may, if wrongfully arrested, move the court for a rule to shew cause why they should not be discharged on common bail, on producing the proper duplicate, as such insolvent debtor or fugitive.

And this, even after they have put in bail. *Baxter* v. *Overton*, Bar. 102. for they may be deemed in *custody* of their bail.

What cause may be shewn against the validity of the duplicate.

But plaintiff, notwithstanding the duplicate, may shew cause against its validity; as that, at the time defendant is said in the duplicate to have been abroad as a *fugitive*, he was abroad in the course of his trade, which is sufficient for court to discharge the rule. *Sheldon* v. *Foot*, Say. 308.

But in the case of *Norton* v. *Lutwidge*, Bar. 105. the court would not enter into the point, whether defendant was within the statute; or whether, on the face of the duplicate

duplicate the seſſions had exceeded their authority; but ſaid, that the quarter ſeſſions were to determine as to the immediate liberty of the party, and afterwards the court, or a judge, were to diſcharge the defendant on producing his duplicate; plaintiff, therefore, may put any point on trial, but defendant muſt not remain in *vinculis* till determination. But ſee 1 Barn. 420.

Such, then, are the conſequences of arreſting, and holding to bail, any perſon not liable to be arreſted, whether by privilege, or otherwiſe; ſuch their remedy by action; and ſuch the general methods of obtaining their diſcharge. It need only further be obſerved, that in all caſes not mentioned here, if any privileged or protected perſon be wrongfully impriſoned, and held to bail, the uſual mode of redreſs is, by application to the court.

CHAPTER III.

Of the Mode of proceeding when common Bail only is required from the Commencement of the Suit to the Declaration.

HAVING in the laſt Chapter conſidered the criterions by which an action may be diſtinguiſhed to be bailable or *not* bailable, we proceed now with our main deſign, to ſhew the method of commencing and proſecuting ſuits in the reſpective courts; but as this method is materially different according as the defendant is to be arreſted or not, which difference chiefly conſiſts in the *proceſs*, that is to ſay, in the means uſed to compel the defendant to appear in court; we ſhall, for the ſake of perſpicuity, treat of the practice in each of theſe caſes ſeparately and diſtinctly, from the commencement of the ſuit until the *declaration*; at which point, the proceedings as it were meet, and are afterwards carried on in nearly the ſame uniform courſe.

The proceedings in actions not bailable, governed by different ſtatutes.

Whenever the action is not a bailable action, or if it be*, and plaintiff does not wiſh to hold defendant to ſpecial bail, the mode of proceeding, to bring the defendant into court, is clearly pointed out by the following ſtatutes.

Defendant muſt be perſonally ſerved with proceſs,

By the 12 G. 1. c. 29. ſ. 1. (made perpetual by 21 G. 2. c. 3.) in all caſes where the cauſe of action ſhall *not* amount to the ſum of 10l. or upwards, the plaintiff or plaintiffs ſhall not arreſt, or cauſe to be arreſted, the body of the defendant or defendants; but ſhall *ſerve* him, her, or them, *perſonally*, within the juriſdiction of the court, with a *copy of the proceſs*.

indorſed with attorney's name,

By the 2 G. 2. c. 23. ſ. 22. (made perpetual by 30 G. 2 c. 19.) every *copy* of any writ or proceſs that ſhall be *ſerved* upon any defendant, ſhall, *before* the ſervice thereof, be *ſubſcribed* or *indorſed* with the *name of the attorney* or ſolicitor, written in a common legible hand, who ſhall be immediately retained or employed by the plaintiff in ſuch writ or proceſs.

* Although the cauſe of action be bailable, yet plaintiff is not obliged to arreſt defendant, and hold him to ſpecial bail; but he may decline making any affidavit, and by 12 G. 1. c. 29. ſ. 2. proceed by ſerving him with proceſs, as directed by that ſtatute in actions not bailable.

By

By the 5 G. 2. c. 27. f. 4. (made perpetual by 21 G. 2. c. 3.) upon every copy of ſuch proceſs to be *ſerved* upon any defendant, ſhall be written, in words at length, in a common legible hand and character, an Engliſh *notice* to ſuch defendant of the *intent* and *meaning* of ſuch ſervice, and deſiring the party to *appear* on the day mentioned therein, and for which no fee or reward ſhall be taken; the form of which notice is preſcribed in the act. and notice to appear annexed.

By the ſame ſtatute, f. 2. no attorney ſhall charge more than 5 s. for the making and ſerving a copy of ſuch proceſs on defendant. 5s. only to be charged for ſervice.

And by the ſtatute, 12 G. 1. c. 29. f. 1. (firſt above-mentioned), if ſuch defendant or defendants ſhall not appear at the return of the proceſs, or within four days (now extended to *eight* by 5 G. 2. c. 27.) after ſuch return, it ſhall be lawful for the plaintiff or plaintiffs, upon *affidavit* being made, and filed in the proper court, of the perſonal ſervice of ſuch proceſs as aforeſaid (which ſaid affidavit ſhall be filed *gratis*), to *enter a common appearance*, or *file common bail for* the defendant or defendants, and to proceed thereon, as if ſuch defendant or defendants had entered his, her, or their appearance, or filed common bail. If defendant do not appear, plaintiff may appear for him.

Such are the general directions given in the above ſtatutes, for the regulation of the proceedings in all actions wherein ſpecial bail is *not* required, from the commencement thereof to the bringing of the party into court, *i. e.* to the declaration; the ſummary of which is, that "a "*copy* of proceſs duly *indorſed* or *ſubſcribed* with the "*attorney*'s name, and with a *notice* thereunto annexed, re- "quiring defendant's *appearance* in court at the time "mentioned therein, is to be *ſerved perſonally* upon de- "fendant; and if the defendant do not appear accord- "ingly, *plaintiff* may, upon an *affidavit* of ſuch perſonal "ſervice of the copy of proceſs, appear *for him*, and "then proſecute the ſuit to judgment." A ſummary of the above.

From the above ſhort ſtatement, four things naturally preſent themſelves to our conſideration, *viz.*

SEC. I. *The* PROCESS, *with a Copy of which Defendant is to be ſerved.*

SEC. II. *The* SERVICE *of Proceſs upon the Defendant.*

SEC. III. *The Defendant's* APPEARANCE *according to Proceſs.*

SEC. IV. *The Plaintiff's appearing* for *Defendant according to the Statute.*

To which may be added,

SEC. V. *Some Obſervations on Defects and Irregularities in the Proceſs, and the Service thereof.*

SECTION I.

Of the Proceſs and its Incidents.

(A) Of the ſeveral Kinds and Forms of Proceſs.

(B) How to ſue out Proceſs.

(C) Of the Notice to appear ſubſcribed thereto.

(D) Of the Indorſement of the Attorney's Name thereon.

(E) General Obſervations as to the Extent, directing, filling up, and Time of ſuing out Proceſs.

(A) Of the ſeveral Kinds and Forms of Proceſs.

THE ſeveral kinds of proceſs in both courts have been already enumerated in the *Introduction* to this work; and, in all actions between common perſons, (except where the proceedings are by *ſpecial original*, or original *quare clauſum fregit*, which will be treated of in another place,) the firſt proceſs in the Court of King's Bench is a *bill of Middleſex*, if the defendant is to be ſerved in Middleſex; and, if elſewhere, a *latitat:* in the Common Pleas, let the defendant reſide where he may, it is a *capias*.

If the defendant cannot be found and ſerved with the proceſs before it is returnable, further proceſs muſt iſſue, which is called in K. B. an alias bill; or, if the firſt writ was a latitat, an alias capias; and in C. B. it is termed a capias by continuance; and if theſe be not duly ſerved before the time of their return, a *pluries bill* or pluries capias may iſſue in K. B., or another capias by *continuance* taken out in C. B. according to the firſt proceſs, and the court in which the action is brought; and if defendant is to be ſerved in any liberty, proceſs called a non omittas bill or capias muſt iſſue.

The above ſeveral kinds of proceſs are printed with proper blanks, and ſold at the different law ſtationers.

Their reſpective forms are as follow:

Form

Form of Writs in King's Bench.

Bill of Middlesex.

Middlesex, } *The sheriff is to wit.* } *commanded to take* Thomas Scott (*b*) *and* John Doe (*c*), *if they may be found in his bailiwick, and safely keep them, so that he may have their bodies before the Lord the King at Westminster, on* Saturday next after the morrow of the Holy Trinity (*d*), *to answer* Samuel Day *in a plea of* trespass (*e*); *and that he may have there then this precept* (*f*).

(*i*) By Bill,

Mansfield and Way (*b*).

(*k*) *Mr.* Thomas Scott, *you are served with this process to the intent that you may, by your attorney, appear in his Majesty's Court of King's Bench at the return thereof, being the* 16*th day of June next, in order to your defence in this action.*

Latitat.

George the Third, by the Grace of God of Great Britain, France, and Ireland King, Defender of the Faith, &c. *To the* sheriff of Buckinghamshire (*a*) *greeting: Whereas we lately commanded our sheriff of Middlesex, that he should take* Thomas Scott (*b*) *and* John Doe (*c*), *if they might be found in his bailiwick, and safely keep them, so that he might have their bodies before us at Westminster at a certain day now past, to answer* Samuel Day *in a plea of trespass* (*e*); *and our said sheriff of Middlesex, at that day, returned to us, that the said* Thomas *and* John *were not found in his bailiwick. Whereupon, on the behalf of the said* Samuel, *it is sufficiently testified in our Court, before us, that the said* Thomas *and* John do lurk and secrete *themselves in your county; therefore, we command you, that you*

Alias

(*a*) The direction of the writ to the proper sheriff or officer who is to execute it; and if in a county palatine, to the chancellor or bishop, as the case may be.

(*b*) The real defendant's name, if only one.

(*c*) If two defendants, this is also to be the real defendant's name; but if only one defendant, this blank to be filled up with John Doe or Richard Roe; the writs being printed in the plural number.

(*d*) The day that you make the writ returnable.

(*e*) If the writ is bailable, here the *ac etiam* is inserted:

In the *bill of Middlesex*, thus: And also to a bill of the said Samuel, to be exhibited against the said Thomas, for 50*l.* upon promises, (or as the case may be,) according to the custom of the court of our lord the king, before the king himself.

In the *latitat* thus: And also to a bill, &c. *according to the custom of our court, before us.*

(*f*) The bill of Middlesex is only a precept, and has no teste; the latitat being a writ, is tested.

(*g*) The teste of the writ, *viz.* the day when it is sued out.

(*h*) The chief clerk of the court's name, by whom the writs are sealed.

(*i*) If the writ is bailable, here is inserted the sum sworn to, thus: Oath for 50*l.* *per* affidavit filed, Thomas Smith, attorney. This is usually indorsed on other writs.

(*k*) If the action be bailable, and the defendant is to be arrested, (but not otherwise,) this notice is omitted in the process.

Alias Bill.

Middlesex, } *The sheriff is com-*
to wit. } *manded,* as before he was commanded, *to take,* &c.

Pluries Bill.

Middlesex, } *The sheriff is*
to wit. } *commanded,* as oftentimes he hath been commanded, *to take,* &c.

Non Omittas Bill.

Middlesex, } *The sheriff is*
to wit. } *commanded that he* omit not by reason of any liberty in his bailiwick, but that he enter the same and take.

you (*m*) *take them, if they shall be found in your bailiwick, and them safely keep, so that you may have their bodies before us at Westminster, on* Saturday next after eight days of the Holy Trinity (*d*), *to answer the said* Samuel *of the plea aforesaid; and have you there then this writ* (*f*). *Witness Lloyd Lord Kenyon, at Westminster, the 15th day of June, in the 37th year of our reign* (*g*).

Mansfield and Way (*b*).

Here is subscribed a notice the same as to the bill of Middlesex (*k*).

Alias Capias.

George, &c. *To the sheriff,* &c. *greeting: We command you,* as before we have commanded you, *that you take* Thomas Scott *and* John Doe, *if they may be found in your bailiwick, and safely keep them, so that you may have their bodies before us at Westminster,* on Monday next after 15 days of the Holy Trinity, *to answer* Samuel Day *in a plea of trespass* (*e*); *and have there then this writ. Witness,* &c.

Mansfield and Way.

Pluries Capias.

Same as above, only instead of the words as before, *say, as we have* oftentimes *commanded you.*

Non Omittas Capias.

Same as above, only say, We command you, that you omit not by reason of any liberty in your county, but that you enter the same and take, &c.

Writs to the Counties Palatine.

Same as latitat above, with the addition in the body of the writ as at note (*m*), *and a proper direction, as post* (C).

(*m*) If the writ is to be executed in the county palatine of Lancaster or Chester, you here say: *We command you, that by our writ, under the seal of our said county palatine, to be duly made, and to be directed to the sheriff of our said county palatine, you command the said sheriff that he take,* &c. But if the writ is to be executed in the county palatine of Durham, you here say: *We command you, that by our writ, under the seal of your bishoprick, in due manner to be made and directed to the sheriff of the county of Durham, you cause the said sheriff to be commanded that he take,* &c.

Ely is only a royal franchise, so no difference in the forms of process executed there.

For further information as to the directing and filling up process, see this Section (E).

From

Form of Writs in Common Pleas.

Capias Quare Clauſum fregit.

George *the Third, by the Grace of God of Great Britain, France, and Ireland King, Defender of the Faith, and ſo forth. To the ſheriff of* Middleſex (*a*), *greeting: We command you* (*m*), *that you take* Thomas Scott (*b*), *late of Weſtminſter in your county, yeoman, and* John Doe (*c*), *late of the ſame place, yeoman, if they ſhall be found in your bailiwick, and them ſafely keep, ſo that you may have their bodies before our juſtices at Weſtminſter,* on the morrow of the Holy Trinity (*d*), *to anſwer* Samuel Day *in a plea, wherefore, with force and arms, the cloſe* (*e*) *of the ſaid* Samuel, *at Weſtminſter, they broke, and other wrongs to him did, to the great damage of the ſaid Richard, and againſt our peace* (*f*); *and have you there this writ. Witneſs Sir James Eyre, Knight, at Weſtminſter, the* 10*th day of June in the* 37*th year of our reign* (*g*).

(*b*) *Mr.* Thomas Scott, *you are ſerved with this proceſs to the intent that you may, by your attorney, appear in his Majeſty's Court of Common Pleas, at the return thereof, being the* 16*th day of June inſtant, in order to your defence in this action.*

Capias by Continuance.

This is preciſely in the ſame form as the above capias, without any addition, as before we have commanded you, *or the like; the only difference is in the præcipe, where it is called capias by continuance. See this Section* (B).

Non Omittas Capias.

Same as common capias, only ſaying, We command you, that you omit not by reaſon of any liberty in your bailiwick, but that you enter the ſame, and take, *&c.*

Teſtatum Capias.

This writ was ſimilar in principle to the latitat in K. B.; after reciting the firſt capias, it then ſtated, that it was teſtified *that defendant doth lie hid, and runs from place to place in your county,* &c.; *ſo that when the defendant could not be found in the firſt*

(*a*) (*b*) (*c*) (*d*) See the notes to the above writs in King's Bench.

(*m*) If the writ is to be executed in any county palatine, then let it be as directed *ante* in note (*m*) to the latitat in K. B.

(*e*) This is the conſtant form of this writ, brought for a pretended treſpaſs, and therefore called a *quare clauſum fregit.* For explanation thereof, ſee the *Introduction* to this work.

(*f*) If it is a bailable writ, here inſert the ac etiam thus: And alſo, that the ſaid Thomas Scott may anſwer the ſaid Samuel Day, according to the cuſtom of our court of Common Bench, in a certain plea of treſpaſs on the caſe upon promiſes, (or as the cauſe of action may be,) to the damage of the ſaid Samuel of 100*l.*

(*g*) Teſte of writ, *viz.* the day when ſued out.

(*b*) This notice to be omitted if defendant is arreſted, and writ to be indorſed, with the ſum ſworn to, and the plaintiff's attorney's name.

county, a new capias issued, called a testatum capias, to the sheriff of the county where he was to be found; but, since the rule of Hilary Term 1782, this writ has been out of use. For the reason of which, see Ch. IV. Sec. II.

Writs to Counties Palatine.

Same as common capias, with proper direction, as post (C), *and the insertion mentioned in note* (*m*).

☞ It is to be observed, that under this head are contained the forms of writs in bailable actions as well as in actions not bailable: this was done to prevent the repetition which would otherwise have occurred in the next Chapter, and to render the subject more clear and explicit.

(B) How to sue out the Process.

When an action is to be commenced, the first step necessary to be taken in both courts, is to procure a *memorandum* or minute of the warrant, to prosecute on a 2s. 6d. stamp, agreeable to stat. 25 Geo. 3. c. 80. They may be bought at the law-stationers, or had of the officer who signs the process. See *ante*, chap. 1. sec. 2. (C).

Præcipe, what.

The next thing is to make out a *præcipe*, which is a mere note or abstract, written on a slip of unstampt paper, containing the nature of the process, the time when returnable, and the names of the parties, and of plaintiff's attorney. It is left with the officer who signs the process, and serves as his order or warrant for so doing, and also as instructions to him to make a proper entry of such process having issued, which is afterwards done in a book or on rolls kept for that purpose.

Its origin.

In the Introduction to this work, sec. 3. it is observed, that there were two kinds of original writs, a *præcipe quod reddat* and *si te fecerit securum*, or *pone*, which issued out of the Court of Chancery; and that formerly, when either of them were applied for, they were procured by a note to the *cursitor*, called a *præcipe* or *pone* according to the nature of the writ. This was always done in the Court of Common Pleas, and in the King's Bench, when proceedings were by special original. If they were by bill, there was no occasion for any such note or præcipe, as the original bill was filed; and the chief clerk upon that issued his process of the bill of Middlesex; but afterwards, when it became the practice not to file the original

ginal bill in K. B., nor to sue out the special original in C. B., but the *first* process in the one court became the bill of Middlesex or latitat, and in the other, capias quare clausum fregit (as may be seen in the Introduction, sec. 1, 2, 3.); it then became necessary, in all cases, to leave a note or memorandum of such process issuing with the proper officer, which is now, in all cases, called a *præcipe*. This serves as the document, from which an original bill in K. B. or original writ in C. B. may be afterwards made out if necessary.

In the Common Pleas, the *filazer* enters these *præcipes* on a roll, which, at the end of the Term, he delivers to the cursitor, who makes out the originals from them, all at once, to be filed with the *custos brevium*. But these originals are nothing more than printed blank forms of the *clausum fregit*, filled up by the *cursitor*, with the parties' names, &c. neither stamped nor sealed, but filed with him pro formâ *to give the Court jurisdiction*. These, however, will not do if a writ of error be brought after judgment by *default*; for then a special original in C. B., as was formerly necessary in the first instance, must be sued out, which is obtained by petition to the master of the rolls. So also is the original bill in K. B., if required, upon error brought. But, after *verdict*, the want of both are cured by the statute of *jeo faille*. As therefore, in the King's Bench, the student should always bear in mind the distinction between the *original* bill, or bill in trespass, and the *process* of the bill of Middlesex; so in the C. B. he should equally remember the difference between the real special original, by which all proceedings in that court are supposed to be, and the common *capias quare clausum fregit*, which, in strictness, is only mesne process, as founded upon such original writ. Its use.

The Form of the *Præcipe* as now used, is as follows:

In K. B.	In C. B.
For bill of Middlesex.	
Middlesex. *Bill for* Samuel Day *against* Thomas Scott (*a*), *returnable on Monday next after the morrow of the Holy Trinity.*	Middlesex. *Capias for* Samuel Day *against* Thomas Scott, *trespass at Westminster* (*a*), *returnable on the morrow of All Souls.*
Thomas Smith, *attorney.*	Thomas Smith, *attorney.*
June 10, 1797.	*June* 10, 1797.

(*a*) If it is to be a bailable writ, with an *ac etiam*, here insert in the præcipe, "*Case for* 50*l. upon promises*," or as the cause of action may be.

For Latitat.

Surry. *Latitat for* Samuel Day *againſt* Thomas Scott, *treſpaſs* (*a*), *returnable on*, &c. *(as above).*

Thomas Smith, *attorney.*

June 10, 1797.

So are all other præcipes, *only ſay*, alias *bill, or* pluries *bill, or* non omittas *bill, or* alias capias, non omittas capias, *or the like, according to the writ you want, and put the date when the firſt writ iſſued on the præcipe.*

Capias by Continuance.

As above, only ſay capias by continuance, *for*, &c. *and put the date of the firſt writ on the præcipe.*

So of a non omittas *and the like.*

N. B. If the writ is to go to a county palatine, or the cinque ports, the præcipe is as above; only in the margin, inſtead of the county, ſay *county palatine of Cheſter, or cinque ports*, as the caſe may be.

Having procured the *memorandum* of warrant (*b*), and prepared the *præcipe*, which is neceſſary in both courts, proceed as follows:

In the King's Bench.

How to ſue out proceſs.

Bill of Middleſex.

By Bill of Middleſex.

Get a blank bill, which may be bought at the ſtationers, or had at the Bill of Middleſex Office; fill it up; take the bill, præcipe, and memorandum of warrant, to the Bill of Middleſex Office, and the officer will ſign it, for which, if in Term, pay 6d.; *if in vacation*, 10d. *Leave the præcipe and memorandum of warrant at the office.——The bill of Middleſex is not to be ſealed.*

Latitat.

By Latitat.

Get a blank writ, to be bought at the ſtationers, or had at the K. B. Office; fill it up, carry it, with the præcipe and memorandum of warrant, to the King's Bench Office to be ſigned; pay the officer for ſigning 2s. 6d.; *leave the præcipe and memorandum of warrant with him. Then carry writ to Seal Office; pay for ſealing* 7d.

Alias bill.

Alias capias.

By alias bill.] *If defendant be not ſerved with the bill of Middleſex before the return thereof, ſue out an* alias *bill.*

By alias capias] *If the defendant be not ſerved with the* latitat *before the return thereof, ſue out an* alias capias.

Pluries bill.

Pluries capias.

By pluries bill.] *If the alias be not ſerved before the return, ſue out a* pluries *bill.*

By pluries capias.] *If the alias be not ſerved in time, ſue out a* pluries capias.

(*a*) *Vide* the note in the preceding page.

(*b*) If a bill of Middleſex has been, in fact, ſued out, and afterwards it be found neceſſary to ſue out a latitat, the old memorandum of the warrant which was got for the bill of Middleſex will be ſufficient; only add to the *præcipe* for the *latitat*, "Bill of Middleſex ſued out the 10th day of June 1797.

The

The mode of ſuing out the alias *and* pluries *is the ſame as the bill of Middleſex, only in the* præcipe *for the office, add the word* alias *or* pluries *bill, and alſo inſert the date when the* firſt *bill of Middleſex iſſued. Pay no more than* 2d. *for ſigning, whether in Term or vacation. They are not ſealed.*

The alias *and* pluries capias *are ſued out in the ſame way as the* latitat, *only nothing is paid for the ſigning, but* 7d. *for the ſealing.*

In the præcipe for the office ſay, alias *or* pluries capias, *inſtead of* latitat, *and inſert the date when the* latitat *iſſued.*

Non omittas bill.] *If defendant is to be ſerved in any liberty, ſue out a* non omittas *bill; and if that be not ſerved in time, an* alias *and* pluries non omittas. *They are ſued out in the ſame way as the bill of Middleſex, and the ſame fees paid; only in the* præcipe *call it, "* non omittas *bill of Middleſex."*

Non omittas capias.] *If defendant is to be ſerved in any liberty, ſue out a* non omittas capias; *and if that be not ſerved in due time, an* alias *and* pluries non omittas. *Theſe are ſued out in the ſame way as the* alias capias *or* latitat; *only in* præcipe, *ſay, "Surry* non omittas capias." *Pay for ſigning* 2s. 6d. *ſealing* 1s. 2d.

Non omit. bill: Non omit. cap.

The return of a *mandavi ballivo*, which was formerly neceſſary, is now preſumed and diſpenſed with; and the non omittas bill, or capias, may be ſued out in the firſt inſtance, without any previous writ or return.

Sued out in firſt inſtance.

If, after having ſued the *pluries* bill, or pluries capias, or pluries non omittas, as the caſe may be, defendant ſtill be not *ſerved* before the writ is returnable, then ſue out another *pluries* in the ſame way as the laſt, and ſo continue them from Term to Term, ſtill putting in the *præcipe* the date when the *firſt* proceſs iſſued.

Pluries writs continued from Term to Term.

It is ſaid in ſome books, that *pluries* writs can only be continued for four Terms, at the end of which a new bill of Middleſex or latitat muſt be ſued out; but I conceive a new bill of Middleſex or latitat is only neceſſary if plaintiff *lies by* for four Terms.

New writ only, if plaintiff lies by four terms.

In the Common Pleas.

Having procured memorandum of warrant, and prepared præcipe as above, take the præcipe *and* memorandum *of* warrant *to the proper filazer, who will make out the* capias, *and ſign the ſame; and, at his leiſure afterwards, as obſerved above, will procure the original writ from the* curſitor *to warrant it, which he returns, and files of courſe; pay him for ſigning* capias 2s. 2d. *ſealing* 7d.

Capias.

Capias by continuance.

If defendant cannot be served before the return thereof, sue out a capias by continuance (*a*), *which is precisely the same as the first* capias, *only put in the* præcipe *the words* capias by continuance, *and also the date when the first writ issued. If the* capias by continuance *be not served in time, sue another* capias by continuance, *and so on from Term to Term; pay signing these writs* 10d. *sealing* 7d.

Non omittas capias.

Non omittas capias.] *If defendant lives, or is to be served in a liberty, then sue out a* non omittas capias, *in same manner as common capias, only in* præcipe *call it* "non omittas capias."—*It may be sued out in the first instance; if not served in time, sue out an* alias *and* pluries non omittas capias, *always putting in* præcipe *the date when the* first *writ issued.*

☞ Such is the mode of suing out process in the respective courts of King's Bench and Common Pleas.—A *copy* of this process is to be served on defendant; but it is previously necessary, that to such *copy* of the process, let it be what it may, whether bill of *Middlesex*, *latitat*, or *capias*, there should be annexed, or subscribed, a written *notice* to the defendant to appear; and also the name of the attorney retained by plaintiff indorsed thereon.—We will consider, therefore,

(C) The Notice to appear, to be inserted in the Copy of such Process.

(C. 1) The Intent and Form thereof.
(C. 2) How Notice should be filled up.
(C. 3) In what Cases necessary.

(C. 1)

By the 5 G. 2. c. 27. s. 4. upon every *copy* of such process to be served upon any defendant, shall be *written*, in words at *length*, in a common legible hand and character, an *English notice* to such defendant, of the *intent* and *meaning* of such service, to the effect following, *viz.*

Form of notice.

A. B. *You are served with this process to the* intent *that you may, by your attorney, appear* (*b*) *in his Majesty's court of at the return thereof, being the day of* (as the case shall happen to be), *in order to your defence in this action.*

(*a*) So called, because it is *continued* on the roll by the filazer from the time the first writ issued, and so on from Term to Term, until the defendant is served.

(*b*) If it be against husband and wife, say, *for yourself and* Mary *your wife, or as her christian name may be.*

And

(C. 2) How Notice ſhould be filled up. (C. 2)

How to fill up the notice.

There are only three blanks in the above form to be filled up; firſt, the *name of the party* to whom it is addreſſed; ſecond, the *court in which* he is to appear; third, the *day on which* he is to appear.

1ſt, As to the name of the defendant.

As to the firſt, the *name* of the defendant muſt be mentioned in the notice; nor is it ſufficient merely to ſay, *you* are ſerved, &c. *Behema* v. *James*, 1 Wil. 104. B. R. *Worgman* v. *Plank*, C. B. T. R. 100.

If there be ſeveral defendants, they muſt all be named.

And they ſhould be *accurately* named; for if the name in the notice differs from the name in the proceſs, it will be bad. *Simpſon* v. *Claypham*, P. R. 348. *Cromwell* v. *Goodwin*, Bar. 409.

2d, As to the name of the court.

As to the ſecond, the name of the *court* in which the action is brought, either *King's Bench* or *Common Pleas*, ſhould be properly inſerted.

3d, As to the day on which defendant is to appear.

As to the third point, *viz.* the *day* on which he is to appear; it ſhould, perhaps, *ſtrictly* be the day of the month on which the return-day of the proceſs exactly falls; as, ſuppoſing the return in a common capias to be in eight days of St. Hilary, the notice ſhould be thus: "*at the return thereof, being the 20th day of January.*"

Muſt be the return-day, though Sunday.

And this, although the 20th of January ſhould fall on a *Sunday*. *Alſop* v. *Bagot*, P. R. 346. *Jenner* v. *Oatridge*, ib. For if it were made the 21ſt, it would be bad. *Green* v. *Watkins*, ib. 347.

The reaſon thereof.

The reaſon of this practice, of giving notice to appear on the *Sunday*, per Ld. Mansfield in the caſe of *Swan* v. *Broome*, Bur. 1600. is, "that in ancient times the courts "uſed to *ſit* upon *Sundays*; whilſt they *did* ſo, the notice "muſt *follow* the practice *then* in uſe, and muſt of con- "ſequence be given for appearing on the Sunday. But "now, that old practice of their actually ſitting upon "Sundays, being altered, and at an end, theſe notices "muſt neceſſarily relate to the Monday, when the courts "*do* ſit, and therefore the defendant cannot be miſled by "having notice given him to appear on the Sunday."

Reaſon not ſatisfactory.

But, with due deference to ſuch authority, this reaſon does not ſeem fully ſatisfactory; becauſe, firſt, the courts did not ſit on Sundays, at the time when the above act paſſed, namely, the 5 G. 2., nor long before; and therefore there was no ſuch practice *then* in uſe for the notice to *follow*; and, ſecondly, the ſpirit, and indeed the letter of the act, is clearly otherwiſe; for it directs, that the

Why.

plaintiff

plaintiff shall give defendant notice of the *intent and meaning* of the service; the *intent* of which cannot *now* be for defendant to appear in court on a *Sunday*.

In C. B. notice held good if agreeable to the fact, though not on the return-day.

The Court of Common Pleas, in a late case, were of opinion that the notice was good, though not made for the defendant to appear on the exact return-day, but agreeable to the fact. Defendant was served with a clausum fregit, returnable in 15 days of Easter (*i. e.* the 8th of May); but the notice to appear was thus: *at the return thereof, being the 11th day of May* 1791 (*i. e.* the quarto die post); and upon shewing cause why proceedings should not be set aside for irregularity, the court said, they were clearly of opinion, that the notice to appear on the *quarto die post* was good, that being the day when, in point of *fact*, the defendant *was* to appear. *Summer* v. *Brady and others*, C. B. T. R. 630.

There is a N. B. in the report of this case, that the old practice of giving notice to appear on the *Essoin*-day (the return of the process) is not done away by this determination.

May be either the essoign-day or quarto die post.

Clearly not; but as the practice now stands, the day in the notice of a *capias* may be made either the actual return-day, as mentioned in the writ; *i. e.* the *essoign*-day, or the day, in *fact*, when defendant is to appear, *viz.* the *quarto die post*.

No occasion to particularize the year.

Formerly the courts held it necessary for the notice to specify the year as well as the day of the month; or to add the word "instant," or "next." *Wingfield* v. *Beard*, Bar. 419. *White* v. *Washington*, P. R. 347.

The day of the month sufficient.

But now these cases are exploded, and it is held sufficient to insert the day of the month, as the 26th of June, without saying "instant," "next," or expressing the year. *The Weavers' Company qui tam* v. *Forest*, Str. 1233. *Elliott* v. *Parrot*, Bar. 425.

(C. 3)

(C. 3) In what Cases Notice is necessary.

In what cases notice is necessary.

In all actions under 10l.; and in C. B. in actions above 10l. if process served;

A notice is most unquestionably necessary, by the stat. 12 G. 1. and 5 G. 2. in all cases where the cause of action shall *not* amount to 10l.; and if omitted, proceedings will be set aside.

It also was held necessary in C. B. in *all* cases *where process is served*, although the cause of action be *above* 10l. *Longbotham* v. *Knapp*, Bar. 404. *Atwood* v. *Meredith*, P. R. 349. S. C. Cooke's Rep. 143. *Cock* v. *Turner*, ib. 100.

But in the case of *Willis* v. *Lewis*, in B. R. 1 Wil. 22, it was resolved, *per cur.* that there was *no* occasion to put the notice to appear at the bottom of the process, according to stat. 5 G. 2., it being above 10l. See also Tidd, 97. 30. but not so in B. R.

This question, however, came before the Court, Trinity Term 1797, on a motion to set aside proceedings for an irregularity in the notice. The process had been *served*, though it were a bailable writ. It was contended, therefore, that no notice at all need have been given, the cause of action being above 10l., and the case of Willis and Lewis relied on. But Lord Kenyon saw no reason for dispensing with the notice in such cases; and on looking into the acts of 12 G. 1. and 5 G. 2. thought that it was necessary, and rule was made absolute.

Surely such a notice is agreeable both to the letter and spirit of the above statutes. For the 12 G. 1. c. 19. and 5 G. 2. c. 27. being in *pari materiâ*, and the latter having passed, specifically, for the purpose of explaining and amending the former, must be considered together, and be looked upon and construed as *one* act. Now, by the 5 G. 2. s 4., a notice is positively directed to be written upon the copy of *every* process *served* on any defendant.

But it may be said, that by that act this clause can only relate to proceedings in actions *under* 10l. Be it so; it must then be looked upon as a *necessary* part of the proceedings, as *directed* by the 12 G. 1. in all cases where the cause of action does *not* amount to 10l.

Now, by the second sect. of that act, it is positively enacted, that if any writ or process shall issue for the sum of 10l. *or upwards*, and *no affidavit* and indorsement shall be made, the plaintiff shall not proceed to arrest the defendant, *but shall proceed* IN LIKE MANNER as is by *that act directed* in cases where the cause of action does *not* amount to the sum of 10l. It would seem, therefore, as if a notice were necessary in both cases, more especially when the intent and spirit of this law are considered; for it is a law in favour of defendant, to put him upon his guard, to explain to him the nature of the process, and warn him of his duty to *appear*. If, then, the legislature thought fit thus to caution defendant in matters of little moment, in actions under 10l., *à fortiori*, is this caution necessary in cases of greater magnitude? The only difference in a bailable writ is the

ac

ac etiam; but that by no means ſupplies the place of the notice.

(D) (D) Of the Indorſement of the Attorney's Name on the Proceſs.

Indorſement directed by ſtatute.

By 2 G. 2. c. 23. ſ. 22. it is enacted, that every *copy* of any writ, or proceſs, that ſhall be ſerved upon any defendant, ſhall, before the ſervice thereof, be ſubſcribed or indorſed with the name of the attorney, or ſolicitor, who ſhall be *immediately retained*, or employed by the plaintiff in ſuch writ or proceſs.

Omiſſion formerly did not vitiate proceſs.

It was formerly held, that the omiſſion of the attorney's name did not vitiate the proceſs, and proceedings were refuſed to be ſet aſide upon that account. *Fawkes* v. *Jay*, P. R. 440. *Blackhall* v. *Gould*, ib. 441. Bar. 407.

But now it does.

But theſe caſes were previous to the paſſing of the 12 G. 2. c. 13.; which, though it only immediately relates to *bailable* writs, on which warrants to arreſt iſſue, yet it ſhews the wiſh of the legiſlature to enforce this practice of the indorſement; and ſince that time ſuch indorſement has been deemed neceſſary by both courts. In C. B. *Chapman* v. *Ryall, and others*, Bar. 415. In B. R. Loft. 58. and *Oppenheim qui tam* v. *Harriſon*, Bur. 20; and for want thereof, proceedings may be ſet aſide.

It muſt be the real attorney's name.

Further, it muſt be the name of the attorney *actually* retained; for although, in the laſt caſe, it appeared that there was a real attorney's name thereto, yet it was put without any authority from him by the plaintiff's attorney, againſt whom, for ſo doing, the court granted an attachment. Ib. Bur. 20.

Intent of indorſement.

The *intent* of this indorſement is to ſhew the defendant who the attorney for plaintiff is, to whom he may apply for information about the ſuit, or to compromiſe the action if he thinks fit.

Not neceſſary if attorney plaintiff.

Where the plaintiff himſelf, therefore, is an attorney, and ſues as ſuch for himſelf, no ſuch indorſement is neceſſary. *Fields, one, &c.* v. *Lewen*, 4 D. & E. 275.

Indorſement of date no part of writ.

Nor is the indorſement of the date on the back of the writ any part of the writ; if the teſte is right it is ſufficient, though the indorſement be wrong. *Coleby* v. *Norris*, 1 Wil. 91.

Thus where the writ was in fact ſued out on the 24th January 1785, but by a miſtake it was indorſed 24th January 1784, the variance at the trial was held immaterial;

terial; but the ſame miſtake having been made in the *return* of the writ, the judge thought that a material variance, and nonſuited the plaintiff. *Green* v. *Rennet*, 1 D. & E. 656.

☞ *The proceſs having been thus formally iſſued, and a written* notice *to appear, ſubſcribed or annexed thereto, and the attorney's* name indorſed *thereon, it is completed for* ſervice *upon the defendant; but, before the treating of the ſervice thereof, it may be uſeful to make ſome general obſervations on the nature and extent of the proceſs, the mode of directing and filling it up, and the time of ſuing it out.*

(E) Obſervations on the Proceſs.

(E. 1) The Nature and Extent thereof.
(E. 2) How to be directed.
(E. 3) Of filling up the Proceſs as to Names of Parties, Cauſe of Action, and Teſte and Return.
(E. 4) Of ſubſequent and former Proceſs, how they ſhould agree.
(E. 5) Of the Time when Proceſs may iſſue; its legal Operation, as to being or not the Commencement of the Suit; and how it may be now pleaded.

(E. 1) Nature and Extent of Proceſs. (E. 1)

Nature and extent of proceſs.

The bill of Middleſex is a mere *precept*, having only a return, and no direction nor *teſte*; nor can it run over all England, but is confined to the county of Middleſex. It is a proceſs of the Court, iſſued by the chief clerk of the court, and not a writ in the name of the king.

Bill of Middleſex.

So that if defendant be ſerved with, or arreſted upon, a bill of Middleſex, in the city of London, or out of the county of Middleſex, proceedings will be ſet aſide. *Borman* v. *Bellamy*, 1 D. & E. 187. *Devenege* v. *Dalby*, Do. 384.

But if it be doubtful whether the ſpot where defendant was ſerved be in London or Middleſex, it ſhall be good ſervice. *Drew* v. *Marriot*, 1 Wil. 77.

A latitat

Latitat and capias.

A latitat and capias are sometimes considered in the nature of original writs, but sometimes only as process. *Vide post* (E. 5).

Extent of latitat.

A latitat is not confined to any particular county, but may be served in any. *Borman* v. *Bellamy*, 1 D. & E. 187. Even in Middlesex. *Kelly* v. *Shaw*, 6 D. & E. 74.

For if personal notice be given to the party, it is sufficient, provided it be not a *bailable* process.

Runs into Wales,

Although, after long argument, it was held, that a latitat did not run into Wales (*Lampley, and others*, v. *Thomas, and others*, 1 Wil. 193.); yet it has since been determined that it does. *Penry* v. *Jones*, Do. 213.

and to counties palatine.

The latitat and capias extend to a county palatine, and are immediately directed to the chancellor, or the bishop, as the case may be; for the meaning of the expression, *breve domini regis non currit*, is not, that the king's writs are not to be *executed* in such places, but that the Court cannot direct them immediately to the sheriff; if, however, such writ be directed immediately to the sheriff, and it is acted upon, and a bail-bond taken, such proceedings are not void; for the sheriff is bound to obey the process of the Court, although it may be an infringement of privilege; and the chancellor or bishop of the county palatine may interpose, and make his claim accordingly. But *Q.* Whether on application to the Court such process might not be set aside for irregularity. *Jackson* v. *Hunter*, 6 D. & E. 73.

(E. 2) How Process to be directed.

The bill of Middlesex has no direction.

How process to be directed generally.

The latitat and capias are generally directed to the sheriff of that county where defendant is likely to be found.

To the *sheriff of Berkshire*, and the like.

But there are many cities and towns of exclusive jurisdictions governed by their own officers; some having *two*, and others only *one* sheriff.

The cities of *Bristol*, *Chester*, *Coventry*, *Gloucester*, *Lincoln*, *London*, *Norwich*, and *York*, and the *town of Nottingham*, have *two* sheriffs.

Writs are therefore directed to *the sheriffs* of the *city* of *Bristol* and the like, and of the *town and county of Nottingham*.

But

But the cities of *Canterbury*, *Exeter*, *Litchfield*, and *Worceſter*, and the towns of *Kingſton upon Hull*, *Newcaſtle upon Tyne*, *Pool*, and *Southampton*, have only *one* ſheriff.

Writs are therefore directed to *the ſheriff* of the city of Canterbury, and the like, except Litchfield, which being a city and county of itſelf, it is the ſheriff of the *city of Litchfield and the county of the ſame city.*

And to *the ſheriff* of the town and county of Kingſton upon Hull, and the like.

When they iſſue to a county palatine, they are directed:

To the *Chamberlain of our county palatine of Cheſter, or his deputy, greeting.*

To the *Chancellor of our county palatine of Lancaſter, or his deputy there, greeting.*

To the *Reverend Father in God, by permiſſion, Lord Biſhop of Durham, or to his Chancellor there, greeting.*

How, if ſheriff be a party and the like.

But ſometimes a particular ſpecial direction is neceſſary; as if the ſheriff be a party, the writ would be bad if directed to him, although it were mere proceſs in a common action. *Weſton* v. *Coulſon*, Black. 506. But it ſhould in ſuch caſe be directed to the *coroners;* and if the coroners be parties alſo, it ſhould be directed to two perſons, either named by the court (3 Black. Com. 354.), or nominated by the maſter (Imp. 160.), called *elizors.*

(E. 3) Of filling up the Proceſs as to Names of Parties, Cauſe of Action, and Teſte and Return. (E. 3)

Of the deſcription of plaintiff in proceſs.

It is not neceſſary to inſert in the proceſs, on what account, or in what right, the party ſues; ſo that executors, adminiſtrators, aſſignees, and the like, need not be deſcribed as ſuch in the proceſs; but it may be generally *to anſwer* A. B. *in a plea, &c.;* and they may afterwards declare as executors, &c. or plaintiff, upon ſuch general proceſs, may declare *qui tam*. *The Weavers' Company* v. *Foreſt*, Str. 1232. *Lloyd qui tam* v. *Williams*, Black. 722. So, on the other hand, it was formerly held, that if the proceſs were *particular* to anſwer A. B. as *executor*, *adminiſtrator*, or the like, plaintiff might have declared *generally*, and not as executor or adminiſtrator. Not ſo, however, if the action had been a *qui tam* action; for then,

Need not ſtate in what right he ſues; but proceſs may be general, and plaintiff afterwards declare in ſpecial character;

then, if the process were *qui tam*, plaintiff could not have declared generally.

And the reason given for this distinction was, that though the plaintiff may be styled executor, or give himself any other superfluous description in the process, and declare otherwise; yet this will not hurt, for the demand is the same; but in the case where the process is *qui tam*, and the declaration general, the very nature of the demand is altered, the process importing a demand to the king and plaintiff, and the declaration a demand to the plaintiff only. *Lloyd* v. *Williams*, Black. 722. *Canning* v. *Davis*, Bar. 494.

This distinction, if closely examined, does not appear very satisfactory; and, indeed, has been since overruled.

but not vice versâ.

Where the process being to answer plaintiffs as assignees of a bankrupt, and declaration generally in their own right, proceedings were set aside; and it was held, that plaintiffs could not declare *generally* on process sued out in a *special* character. *Meggs, assignee*, v. *Ford*, East. 25 G. 3. Imp. 6th edit. 199.

The present practice therefore seems to be, that, upon *general* process, plaintiff may declare in a *special* character, but not *vice versâ*.

Of the description and number of defendants in process.

The process should express the defendant by his name of baptism and surname; and if more persons of the same name, a proper distinction should be made, as *elder* or *younger*, &c.; and in C. B. it sets forth his *addition* of place of abode and calling; but that is now become mere matter of form.

Only four in a writ.

No more than four defendants must be put into one writ. This number seems particularly recognized in a rule of Court, 20 Geo. 2. whereby attornies suing out attachment of privilege against any defendant, are ordered to leave a præcipe with the signer of the writs, with defendants' names, *not exceeding four in each writ*.

It need not be a joint cause of action; if action not bailable, otherwise it must.

It is not necessary that it should be a joint cause of action, because four are inserted; for plaintiff may join four defendants in a latitat for four different and several causes of action, and afterwards declare against all or any of them, as he pleases; the latitat being thus considered as mere process to bring parties into court. *Roe* v. *Cock*, 2 D. & E. 258.

But this is where the action is *not bailable*; for in a bailable action, the defendant or defendants in that action

Of filling up Proceſs.

only muſt be inſerted in the writ; for the *ac etiam* is a ſubſtitute for the original, and muſt be ſtrictly abided by. If, therefore, two are named in the writ, and one only declared againſt, proceedings will be ſet aſide. *Holland* v. *Johnſon*, 5 D. & E. 695. *Holland* v. *Richards*, and *Yardley* v. *Burgeſs*, ib. 697. *Moſs* v. *Birch*, ib. 792.

Of ſtating the cauſe of action in proceſs.

It is clearly not neceſſary in common proceſs, where no ſpecial bail is required, to ſtate the particular cauſe of action: in the Common Pleas the *capias* is *general wherefore he broke the cloſe*; and in the King's Bench it is as *general* to anſwer plaintiff in a *plea of treſpaſs*, let the cauſe of action be, in fact, what it may. *Foſter* & *Bonner*, Cowp. 455. See alſo the *Introduction*.

Need not be ſhewn.

We have ſhewn, in the *Introduction*, that as the court of King's Bench originally got cognizance of the cauſe, upon the ſuppoſition of a treſpaſs having been committed, it was formerly held *neceſſary* to allege a *treſpaſs* in the proceſs; but the juriſdiction of this court being, at this day, firmly eſtabliſhed, it is not ſo ſtrictly inſiſted upon; ſo that where the bill of Middleſex was to anſwer plaintiff in a plea of *debt* inſtead of treſpaſs, the proceſs was held good. *Barber* v. *Lloyd*, 2 D. & E. 513. *Cox* v. *Munday*, 1 Blac. 462.

Proceſs not bad, though to anſwer plaintiff in a plea of *debt* inſtead of treſpaſs.

But there is one inſtance where the cauſe of action muſt be inſerted in the proceſs, though ſpecial bail is not required; which is, in an action againſt bail upon their recognizance, when the following *ac etiam*, by a particular rule of the court of B. R. (E. 15 G. 2.) muſt be added after the words, in a plea of treſpaſs: "And alſo to the "bill of the ſaid Joſeph to be exhibited againſt the ſaid "James in a plea of debt on recognizance, *according to* "*the cuſtom of the court of our lord the king before the king* "*himſelf*," if it be a latitat; but if a bill of Middleſex, ſay, "*according to the cuſtom of our court before us*," otherwiſe the defendant, or his attorney, ſhall not be bound to accept of a declaration in debt upon ſuch recognizance. The intent of this rule was to prevent a ſurpriſe upon the bail.

Should ſtate the cauſe of action if againſt bail on recognizance.

The ſame writ muſt not contain different cauſes of actions againſt different defendants under *ſeveral ac etiams*. *Huſſey* v. *Wilſon*, 5 D. & E. 254.

A bill of Middleſex is no writ, and has no *teſte*.

Of the teſte and return of proceſs.

Every *latitat capias*, &c. muſt bear teſte in term, otherwiſe they are void. *Hart*, aſſignee, &c. v. *Hingeſton*, Bur. 2588. Black. 683.

Of filling up Process.

All process must be tested,

If therefore they be sued out in vacation, they are to be tested the last day of the preceding term. *Johnson* v. *Smith*, Bur. 964. *Bennet* v. *Sampson*, Bar. 407.

If sued out in term, they are generally tested the first day of such term, unless it be an *alias* or *pluries* writ; then its teste should be on the return day of the *last* writ; and the clerk should subscribe under it the term when the first writ issued. *Reg. Tr.* 1656.

and made returnable in term.

As writs are tested, so must they be made returnable in term; otherwise, void. *Mills* v. *Bond*, Str. 399.

Bill of Middlesex or latitat on day certain;

A bill of Middlesex or latitat, with their respective aliases, &c. must be returnable upon a day *certain* or particular return, not on a general return day. *Vid. ante*, Ch. I. (C).

which may be the next day after it is sued out.

There are no certain number of days in which the return must be made: a bill of Middlesex or latitat may be returnable the next day after it is sued out. *Loving* v. *Avery*, Str. 917. Nay, even the very same day it is issued. *Oxlade* v. *Davidson*, 4 D. & E. 610. Though the case of *Green* v. *Rivet*, Ld. Ray. 772, is expressly contrary, saying that the process is *de die in diem*; and it certainly seems hard, as the very day a debt is incurred, a writ may be sued out, made returnable, and a declaration delivered *de bene esse* without an opportunity for defendant to pay the debt. Imp. 6 edit. 135.

Capias ought strictly to have fifteen days between teste and return, if not, it is no irregularity, but may be amended.

In every *capias*, the proceedings being founded upon an original, the return should be made on a *general* return day; but if only a common *capias*, there need not be fifteen days between the teste and return. Formerly indeed, it was even held error if otherwise, and not merely an irregularity. *Williams* v. *Faulkner*, Bar. 409. Afterwards the court deemed it only an irregularity, and set aside the proceedings. *Atkinson* v. *Taylor*, 2 Wil. 117. The next step was, to allow the writ in such case to be amended. *Carty* v. *Ashley*, Black. 918. Ib. 3 Wil. 454.

And now, although there be not fifteen days between the teste and return, the court will not take notice thereof; nor even grant any thing upon a motion on that account, but allow it to be amended, as a matter of course. *Bourchier* v. *Whittle*, 1 H. Blac. 291.

It is to be observed, however, that this practice only relates to proceedings by *common capias quare clausum fregit*; which is a writ *founded* upon an original, *supposed* to be previously issued, and not to proceedings by *special original*. For which, see Chap. V.

In

When Proceſs may iſſue.

In all proceſs, in either court, a term muſt not intervene between the teſte and return, as the cauſe would be then out of court, and the writ abſolutely void; and if defendant were arreſted thereon, an action of falſe impriſonment would lie againſt the plaintiff in the action, though not againſt the officer. *Parſons* v. *Lloyd*, Blac. 846. S. C. 3 Wil. 341.

Proceſs bad, if a term intervene.

If it be teſted in the wrong year of the reign, as the 31ſt inſtead of the 32d, it is irregular. *Taylor* v. *Nicholls*, Bar. 409.

Or if teſted in a wrong year.

Formerly it was held neceſſary for the filazer to put his name to the *capias*; but there is now no occaſion for it. *Froſt* v. *Eyles*, 1 H. Blac. 120.

No need of filazer's name to capias.

(E. 4) Of ſubſequent and former Proceſs, how they ſhould agree. (E. 4)

All *alias* and *pluries* writs ſhould correſpond with the firſt writ ſued out; for if the *latitat* be againſt the defendant by one Chriſtian name, and the *alias* by another, and the plaintiff afterwards proceed, the court will ſet aſide the proceedings for irregularity. *Corbet* v. *Bates*, 3 D. & E. 660.

Subſequent and former proceſs ſhould agree.

(E. 5) Of the Time when Proceſs may iſſue; its legal Operation as to being the Commencement of the Suit, and how it may be pleaded. (E. 5)

Proceſs may be ſued out in vacation, but muſt be teſted as of the preceding term. *Hart*, aſſignee, v. *Hingeſton*, Bur. 2588.

When bill of Middleſex and latitat, &c. may iſſue;

So a latitat may ſometimes be iſſued before any cauſe of action has accrued; becauſe, generally ſpeaking, in all common caſes, a latitat, by the practice of the court, is conſidered merely as a *proceſs* or *ſummons*; and the declaration is deemed the commencement of the ſuit, and is what is meant by the exhibiting of the bill.

and whether to be conſidered as commencement of a ſuit, or as proceſs. In common caſes as proceſs.

The time of iſſuing the latitat, therefore, is immaterial; for if any cauſe of action accrues at any time, *ante exhibitionem billæ*, by which muſt be here meant before the filing of the declaration, though, after the ſuing out of the proceſs, it is ſufficient. *Foſter* v. *Bonner*, Cowp. 454. *Johnſon* v. *Smith*, Bur. 950.

Time of iſſuing immaterial.

When Process may issue.

And this, although the writ was a bailable one, for the reason given by the court is, that the *ac etiam* clause says, "and also to answer to a bill *to be filed*." *Best* v. *Wilding*, 7 D. & E. 4.

This seems to be now the settled practice of the court, and Lord Mansfield's determination in Foster and Bonner, that the *exhibiting of the bill means the filing of the declaration*, has been since adhered to. But, with great deference, I conceive that the phrase *ante exhibitionem billæ* properly means the exhibiting or filing of the *original bill* or *bill in trespass*, formerly actually filed, and still *supposed* to be filed, to give jurisdiction to the court, and to warrant the issuing of the bill of Middlesex or latitat. Just as the original writ in the Common Pleas is still *supposed* to have issued, to warrant the process of the *capias*; and, indeed, Lord Mansfield's own reasoning in the above case bears me out in the position. In order to prove that the filing of the bill is the commencement of the suit, he says, "the form of pleading a tender of amends, or the statute "of limitations, shews this; for, as in the Common "Pleas, where the suit is by original, it is pleaded *ante* "*impetrationem brevis*; so, in this court, it is said *ante* "*exhibitionem billæ*. The *bill*, therefore, is considered *as* "an *original writ*, and it is the first step on the record. "The want of a *bill*, is the common error assigned as the "want of an *original* is in the Common Pleas, and both "are alike cured after verdict. If the plaintiff, there-"fore, duly proves a trespass or injury before the ex-"hibiting of the *bill*, it is sufficient." All this I admit; but the question is, what *bill* is here alluded to? not surely the *declaration*; for how can that be considered *as an original writ?* Besides the common error assigned is never for want of a *declaration*. The very argument, therefore, I submit, proves the *exhibitio billæ* to be the exhibiting of the original bill or bill in trespass, which is in apposition to, in the nature of, and answers the same end as *the original writ* in the Common Pleas; and that, therefore, strictly speaking, whenever the exhibiting of the *bill* is termed the commencement of the suit, we ought surely to understand the filing of the *original bill*, which is still supposed to be filed; and the want of which was in *all* cases error, until the statute of Elizabeth, when it was cured after *verdict*; but for which, error still may be, and commonly is assigned after judgment by default.

But

When Proceſs may iſſue.

But the above reaſoning ſtill holds ſtronger in caſes of bailable proceſs; for it has been generally allowed, that the *ac etiam* clauſe was introduced as a ſubſtitute for the original writ; and in many caſes it has been declared to be *as* an original. *Moſs* and *Birch*, 5 D. & E. 712.

But the original writ has been always deemed the commencement of the ſuit; why not, therefore, an *ac etiam writ?* nor does the reaſon given in the caſe of *Beſt* and *Wilding* appear perfectly ſatisfactory, *viz.* that the *ac etiam* clauſe is, "and alſo to a bill *to be* exhibited;" becauſe it is to be remembered, that when this clauſe was firſt introduced into the proceſs, (for which ſee the *Introduction*, ſec. II.) it was merely to evade the ſtatute 13 Car. 2.; and its operation was to bring the defendant into court upon a *collateral* charge *to be exhibited* againſt him, whilſt the ſuppoſed offence for which he was arreſted, and held to bail, was the *treſpaſs* mentioned in the writ. It was upon this he was brought into court, and being once in court, he was then further to anſwer to the *civil* action *to be* exhibited againſt him, which was in fact a declaration *by the bye*. But now the practice is altered, and there can be no pretence that the defendant is arreſted or held to bail for any other cauſe than that mentioned in the *ac etiam*; becauſe, by 12 G. 1. c. 29. a poſitive affidavit is now required of the true cauſe of action, for which plaintiff is to be held to bail; which ſurely is an additional reaſon why all *ac etiam* writs upon which defendant has been held to bail ſhould be deemed *as* original writs, and, therefore, as the commencement of the ſuit, and not be iſſued before the cauſe of action has actually accrued; and this the rather, becauſe it has been determined, that an *attachment of privilege* ought not to bear date before the cauſe of action, on the ground of its being *in the nature of an original*. *Jones* v. *Burnet*, cited Burr. 967.

But although bailable proceſs may be ſued out, the defendant muſt not be arreſted before cauſe of action has accrued. *Hanway* v. *Merry*, Vent. 28. Bur. 967.

And moreover, in all caſes, even of proceſs not bailable, when ſued out before cauſe of action, it will not be good, unleſs the cauſe of action afterwards accrues before the time when the declaration ought in ſtrictneſs to be filed; that is to ſay, in the courſe of the term when the proceſs was returnable.

When Process may issue.

Which ought to be same term writ is returnable.

By the practice of the courts, indeed, the plaintiff may declare at any time within the second term after the writ is returnable; but that is merely an indulgence, and the declaration must still be intitled *as* of the term when the process *was returnable*. Therefore, if process be sued out, and no cause of action accrue until *after* the term when the writ is returnable, although before the expiration of the time allowed for plaintiff to declare in, and before he actually has declared, it will be of no avail; nor will plaintiff be assisted by intitling the declaration of the subsequent term. *Smith* v. *Muller*, 3 D. & E. 624.

In many cases latitat considered the commencement of a suit.

There are various cases, however, in which the latitat is not to be taken as mere process, but as the *commencement* of the suit; and these are, *whenever the actual time of suing out the writ is material, and the justice of the case requires that it should be precisely ascertained.*

Where the time of suing out writ is material; as in cases of penal actions, tenders, statutes of limitations, and the like.

As in penal and all other actions, where a limited time is fixed for the commencement of the suit, and which time expires in a vacation, if a latitat be sued out in that vacation, though long after such time has expired; yet, by being *tested* as of the preceding term, it would appear as if it had issued in due time. So it might be with the statutes of limitations.

In like manner a tender, made in *vacation*, and, in fact, *before* any action brought, if a writ were sued out in that vacation, would appear by the teste of the writ, being of the preceding term, to have been made after the bringing of the action. Again, if two actions be brought against defendant for the same offence, it may be material to shew the priority of one of the actions. Many other instances may be adduced of the like kind; but it is sufficient to say, that in the above, and in all other cases where the merits of the cause turn upon the exact time when the writ was sued out, that exact time may be shewn in the pleadings, or sometimes given in evidence, contrary to the *teste* of the writ, though a matter of record, for *fictio cedit veritati*; and although the fiction cannot be contradicted, so as to invalidate the writ, yet it may for the purpose of establishing truth and administering justice.

The exact time of issuing it may be shewn;

And defendant may do this as well as plaintiff.

In all such cases the *defendant* is entitled, as well as the plaintiff, to shew the true time of the writ issuing, if it be to his advantage so to do. The leading cases on this head, and in which the whole of the above doctrine may be found, are, *Johnson* v. *Smith*, Bur. 950. *Foster* v. *Bonner*,

When Proceſs may iſſue.

Bonner, Cowp. 454. *Wood* v. *Newton*, 1 Wil. 141. *Morris* v. *Pugh*, Bur. 1241. *Combe* v. *Pitt*, Bur. 1423. *Moſtyn* v. *Fabrigas*, Cowp. 178.

Which doctrine equally applies to the *capias* in the Common Pleas. Doug. 62. N. *Leader* v. *Moxon*, 2 Black. 924.

The above doctrine equally applies to the capias.

When an action muſt be brought within a limited time, it is ſufficient for the plaintiff to prove a writ ſued out within ſuch time, and a declaration within a year afterwards, without ſhewing ſuch writ to have been either ſerved or returned.

The return of writ when neceſſary to be proved.

But where two writs, as a *latitat* and an *alias*, were given in evidence, and it was neceſſary, in order to ſave the time, to ſhew that the ſecond writ on which plaintiff had declared, was a continuation of the firſt writ; in ſuch caſe, it is neceſſary to ſhew the return of the firſt in order to warrant the iſſuing of the *alias* writ. *Parſons* v. *King*, 7 D. & E. 6. *Harris* v. *Woolford*, 6 D. & E. 617.

As it is now ſettled that a *latitat* may be ſued out in the firſt inſtance; ſo it may be pleaded as in a replication to ſtatute of limitations and the like, without ſhewing any bill of Middleſex. *Holliſter* v. *Coulſon*, Str. 550. *Johnſon* v. *Smith*, Bur. 961.

Of pleading the latitat, &c.

In like manner it is ſufficient to ſhew a *capias* in C. B. which every body underſtands to be now the commencement of a ſuit there; and that the court always intends that an original has regularly iſſued, whereupon the capias is grounded, ſo that the *capias* is deemed ſufficient evidence of ſuch original. *Leader* v. *Moxon*, Black. 925.

No occaſion to ſhew original bill or original writ.

The want of an original bill, or original writ, is cured after verdict. *Foſter* v. *Bonner*, Cowp. 455. And although by the ſtatute, 4 Ann. c. 16. they are ſtill neceſſary in caſe of judgment by default; yet, if error be brought, they may be afterwards obtained to ſupport the judgment.

Want thereof cured after verdict, though not after judgment by default.

Formerly much delay and expence were occaſioned by defendants craving *oyer* of the original writ, in order to ſet it out upon the record, and plead any variance, omiſſion, or the like; but this practice is now wholly diſcountenanced, and it is a ſettled rule in both courts, that if defendant craves *oyer* of the writ, no notice need be taken thereof, but plaintiff may ſign judgment as for want of a plea. *Boats* v. *Edwards*, Do. 227. B. R. *Ford* v. *Burnham*, Bar. 340. C. B.

Craving oyer of original not allowed.

Section II.

Of the Service of Copy of Process on Defendant.

Of the service of the process.

IT has already been shewn, in the beginning of this Chapter, that, by the 12 G. 1. c. 29. whenever the cause of action does not amount to 10l. or if it does, and plaintiff makes no affidavit thereof, a copy of the process must be served *personally* upon the defendant; the form, nature, and effects of which process has also been fully treated of; it therefore only remains, in this place, to consider

[A) (A) What shall be deemed a good and effectual Service according to the Statute; and herein,

(A. 1) Of the Copy of Process to be served.
(A. 2) The Person by whom it is to be served.
(A. 3) The Manner in which it is to be served.
(A. 4) The Time when it is to be served.
(A. 5) The Place where it is to be served.
(A. 6) In case the Process be against several Defendants, or against Husband and Wife.
(A. 7) Of the Punishment of Defendant, if he treats Process with Contempt.

(A. 1) (A. 1) Of the Copy of Process to be served.

Of the copy of the process.

A complete and true copy of the whole process must be served. *Cutliff* v. *Standish*, Prac. R. 354.

How, if by original.

If the proceedings be by original, a copy of the *capias* upon the original, and not of the original itself, must be served. *Smith* v. *Anderton*, Prac. R. 342. *Peter* v. *Reignier*, ib. S. C. Bar. 410.

How, if in cinque ports.

If defendant be served within the *cinque ports*, it should be with a copy of process, properly directed to the constable of Dover Castle. *Bax* v. *Culmor*, Bar. 422.

How in county palatine.

If defendant be served in a *county palatine*, it must be with a copy of the process out of the original court, and not

Of the Service of Proceſs.

not with a copy of the mandate. *Byers* v. *Whitaker*, Prac. R. 344. S. C. Bar. 406. Though before held contrary in *Beach* and *Smith*, Prac. R. 343. But in all theſe kind of caſes, the general rule is, that a copy of the proceſs, out of the *ſuperior* court, muſt be ſerved.

(A. 2) The Perſon by whom it is ſerved. (A. 2)

It is not neceſſary that the proceſs be ſerved by a ſheriff's officer; if by the attorney, or his clerk, it is ſufficient. *Delafield* v. *Jones*, Prac. R. 345. By whom proceſs is to be ſerved.

But by the 5 G. 2. c. 27. ſ. 3. in particular franchiſes and juriſdictions, the proper officer there muſt execute the proceſs. County palatines, however, have been held not within this act, which has been conſtrued to extend only to particular *liberties* in counties. *Griffin* & *Alcock*, 2 Barn. 399. If in particular franchiſes; what deemed ſuch.

In theſe particular liberties, the proceſs ſhould be ſerved by the bailiff, or officer belonging thereto; but if it be ſerved by an improper perſon, the court will not ſet aſide the proceedings, though the party will be liable to an action. *Hall* v. *Wilby*, Bar. 404. S. C. Prac. R. 345. The conſequence of being ſerved improperly in a liberty.

But, in all caſes, the perſon who ſerves the proceſs ſhould be able to read, ſo as to ſwear, if neceſſary, that he ſerved a true copy; for where ſervice was made by a bailiff who could neither write nor read, it was held bad. *Delafield* v. *Jones*, Caſ. Prac. in C. B. 34. Perſon ſerving proceſs ſhould be able to read.

(A. 3) The Manner in which it is to be ſerved. (A. 3)

The defendant, by the ſtatute, is to be *perſonally* ſerved. Proceſs is to be ſerved perſonally.

There is no occaſion to ſhew the writ itſelf at the time of ſervice; for the act only requires defendant to be *ſerved* with a copy, which is the ſame as if it had been ſaid, *deliver a copy*. *Worley* v. *Glover*, Str. 877. B. R. *Penchand* v. *Woolley*, Bar. 302. S. C. Prac. R. 353. *Boſwell* v. *Roberts*, Bar. 422. But if defendant ſhould demand a ſight of the writ, it ſeems neceſſary to ſhew it. *Edgar* & *Farmer*, Caſ. temp. Hard. 138. Nor is there any neceſſity to read it over; but if defendant refuſe to take it, upon its being tendered, and it is left at his houſe, it will be ſufficient. *Wood* v. *Dodgſon*, Bar. 278. Or if ſent incloſed in a letter, and defendant opens the letter and takes out the copy. *Boſwell* v. *Roberts*, Bar. 422. Or if it be put through the crevice of a door to defendant, Need not ſhew the writ, unleſs requeſted; nor read it over. If left at his houſe, or ſent in a letter, or put through the door, it is good.

ant, who had locked himself in, the nature thereof being at the same time explained to him. *Smith* v. *Wintle*, Bar. 405. S. C. Prac. R. 354.

(A. 4) (A. 4) The Time when it is to be served.

The time when it is to be served.

Service of a latitat at eight o'clock in the evening of the day when it was returnable, held good; and this, although the declaration be left in the office in the course of the same day. *Robertson* v. *Douglas*, 1 D. & E. 191. *Mathews* v. *Partridge*, Prac. R. 352.

In one case it was held good service at eleven, on the night of the return day. *Wepburn* & *Neale*, cited in Bur. 813.

It may be upon return day,

though the court is up,

And it is now settled (notwithstanding the practice was otherwise formerly, as appears from Bar. 415. 424.) that service of process upon the return day thereof, is regular in both courts. In B. R. *Maud* v. *Barnard*, Bur. 813. In C. B. 2 Wil. 372.; and this, although it be notoriously after the rising of the court. *Ib.*

but not before the date thereof;

Service of process on a day *previous* to the date of the process is bad. *Humphreys* v. *Mitchell*, Bar. 408.

nor after the return;

So if it be after the date of the return. *Whale* v. *Fuller*, 1 H. Blac. 222. For if defendant cannot be served before the return of process, plaintiff should sue out fresh process. *Smith* v. *Muller*, 3 D. & E. 627.

nor when defendant is attending the court.

Process must not be served when defendant is attending the court upon any cause in which he is concerned; as it will be deemed a contempt of the court in the attorney who serves it. *Cole* v. *Hawkins*, Str. 1094.

(A. 5) (A. 5) The Places where it is to be served.

For this, see *ante*, this Chapter, sec. I. (E. 1).

(A. 6) (A. 6) In case the Process be against several Defendants, or against Husband and Wife.

How, if process be against several defendants.

If the process be against several defendants, you must name them all in the notice, and in the copy of the process. *Cutliff* v. *Standish*, Prac. R. 354. And every one must be *served*; for if any one of them cannot be served before the return, fresh process must be sued out (*Smith* v. *Muller*, 3 D. & E. 627.), unless plaintiff proceeded by *special* original; and then he may go on to outlaw such as could not be met with. *Worley* v. *Bull*, Prac. R. 351.

Of the Service of Proceſs.

All muſt be named and ſerved.

But until all the defendants be either ſerved or outlawed, plaintiff cannot proceed.

How, if againſt huſband and wife.

If proceſs be againſt huſband and wife, ſervice on the huſband is ſufficient for both; and if he does not appear for himſelf and wife, plaintiff may, on affidavit, enter an appearance for both. *Collins* v. *Shapland* and *Wife*, Bar. 412. *Buncomb* v. *Love & Ux.* Ib. 406. S. C. Prac. R. 351.

(A. 7) Of Puniſhment of Defendant if he treats Proceſs with Contempt. (A. 7)

Defendant muſt not treat proceſs with contempt.

If at the time of ſervice defendant ſpeaks contemptuous words of the *court*, or of the *proceſs*, an attachment will, on motion, be awarded againſt him: in the firſt caſe even without a rule to ſhew cauſe, but not ſo in the laſt. *Rex* v. *Kendrick*, Say. 114. *Semb.* cont. *Rex* v. *Jones*, Str. 185. Yet quere, whether, in the firſt caſe, without ſhewing cauſe, if upon the affidavit of one perſon only. *North* v. *Wiggins*, Str. 1068.

Section III.

Of Defendant's Appearance according to Proceſs.

Formerly in perſon.

Now by attorney.

What it is.

WHEN the defendant has been regularly ſerved with a copy of the proceſs, it is his duty to appear in obedience thereto. This appearance was formerly in perſon, and entry was accordingly made, that the defendant *obtulit ſe in propriâ perſonâ*; but it is now the practice to appear by attorney, which appearance is effected in K. B. by what is called *filing common bail*, and in C. B. by *entering an appearance*; for the origin and reaſon of which, ſee the *Introduction*, ſec. V.; and this appearance is neceſſary in all caſes, becauſe the defendant muſt be in court before his attorney can plead, or take any ſteps on his behalf, or plaintiff can proceed againſt him, except by declaring *de bene eſſe*, or conditionally; for which, ſee *poſt*, Chap. VI.

In treating of this head, we will briefly conſider,

(A) How Defendant is to appear in the reſpective Courts.

(B) Who may appear by Attorney.

(C) When

Of filing Common Bail,

(C) When Attornies are bound to appear for Defendant.

(D) Of the Time of Appearance.

(E) Of Appearance in Actions againſt Huſband and Wife.

(F) Whether Defendant is liable to a Penalty for not appearing.

(A) (A) How Defendant is to appear in the reſpective Courts.

How to file common bail and enter an appearance.

First get a memorandum, or minute of warrant, to defend, on a 2s. 6d. ſtamp, agreeable to ſtatute 25 G. 3. c. 80 and in the form therein preſcribed; for which ſee ante, Ch. I. ſec. II. (C); *then proceed in the manner following:*

In B. R.

By filing Common Bail.

Get a common bail piece, which may be bought at any law ſtationers, and is a piece of parchment in the following ſhape, ſtamped with a treble ſixpenny ſtamp; fill it up with the name of the parties, &c. as thus:

Hilary Term, in the 37th year of king Geo. 3d.

Middleſex, to wit:—James Davis having been ſerved with proceſs, is delivered to bail,

To John Doe, of Weſtminſter, yeoman, and Richard Roe, of ſame place, gentleman.

If filed according to ſtatute, inſert theſe words, *filed according to ſtatute.*

At the ſuit of Joſeph Sims.

Thomas Smith, attorney for defendant.

Carry this with the memorandum to the clerk of the common bails, in King's Bench Office, to be filed; for filing pay, if in term,

In C. B.

By entering Appearance.

A common appearance is written on a piece of unſtamped paper in the following form:

Middleſex. Appearance for James Davis, late of, &c. hoſier, (as named in the writ,) at the ſuit of Joſeph Sims, to a capias returnable on the morrow of All Souls.

T. S. attorney.

Carry this to the filazer of the county, in which proceſs was ſued out, who enters it in a book kept for that purpoſe.

At the filazer's pay 2s. 6d. (viz. 1s. 6d. for duty, and 1s. for entry,) if one defendant. If ſeveral ſued jointly, pay 2s. 6d. for firſt defendant, and 4d. for each of the others. If ſued ſeparately, 2s. 6d. each defendant.

The warrant or memorandum above mentioned is to be filed with it.

Where the proceedings are by bill (as againſt attorneys, &c.) appearance is then entered with the prothonotary.

(B) Who

and entering an Appearance.

term, or within six days after it. 1*s.* 2*d.* *If after that time,* 4*d.* *more for a post terminum.*

There is no further post term incurred till the vacation of subsequent term after writ is returnable. The warrant or memorandum above-mentioned must be filed with it.

For every judgment by default, or non sum informatus *or* cognovit, *bail should be filed for the defendant to warrant such judgment. Hil.* 1 *W. & M. Trin.* 4 *W. & M.*

And also a memorandum of warrant.

By rule, East. 30 *G.* 3. *the clerk of the bails of this court must mark the bail pieces numerically as they are received.*

(B) Who may appear by Attorney. (B)

All persons may now appear by attorney, except those who are presumed to want sufficient legal discretion to appoint one; such as *infants*, *ideots*, and *feme coverts*; the first of whom must appear by guardian, and the two last in person; and if they should appear by attorney, it would be error upon the record. *Milner* v. *Milnes*, 3 D. & E. 629.; where other cases are cited. All persons, except infants, &c.

(C) When Attornies are bound to appear for Defendant. (C)

If an attorney undertake to appear for defendant, the court will compel him to do so at all events, even though he were imposed upon when he made the undertaking. *Lorymer* v. *Hollister*, Str. 693. And he must appear in a proper manner, agreeable to the situation of the defendant; thus, if he be an infant, the appearance must be by guardian, and the like. *Stratton* v. *Burgis*, Str. 114. Must at all events, if he undertake so to do.

Should he refuse to appear, agreeable to his undertaking, an attachment will be awarded. Hil. 22 Car. 1.

An attorney had given the common undertaking to put in bail for defendant, or pay debt and costs. No bail being

Of filing Common Bail,

being put in, court was moved for a rule to shew cause why the master should not tax costs, and the attorney pay debt and costs. But on cause shewn, the court having consulted with the master, said the motion was premature; for that plaintiff should have got an appointment from the master, and taxed the costs, and then moved for an attachment. So the rule was discharged with costs. Mich. Term, K. B. 1794.

This undertaking must be in writing.

But Q.

But this undertaking must be an express undertaking to appear (*Power* v. *Jones*, Str. 445.); and it is said that it must be in writing, and even *signed* by the attorney. *Loft*, 192. But Q. Whether the Court, on motion, would not compel an appearance on a parol undertaking?

Must appear, if he accepts declaration, unless accepted conditionally.

If defendant's attorney receives a declaration against his client from plaintiff's attorney, this acceptance obliges the attorney to appear, unless it was accepted *conditionally* in case his client should approve of it; for then, if he soon afterwards return the declaration, he will not be compelled to plead thereto. 1 Lil. Reg. 102.

To appear for no more than retain him.

If there be several defendants in one declaration, an attorney is not to appear for more than those by whom he is retained. Pas. 24 Car. B. R. 1 Lil. Reg. 102.

Defendant cannot revoke any retainer;

If a defendant properly authorises an attorney to appear for him, though he should afterwards revoke it, yet the court will compel the attorney to appear; for the party shall not have it in his power to cause any delay by such countermand. Trin. 22 Car. 1. B. R. Mich. 1654, C. B.

nor change his attorney without leave.

Nor can any one change his attorney in any cause pending, without leave of the court. *Powel* v. *Little*, Black. 8. *Macpherson* v. *Rorison*, Doug. 217.

When attorney appears, court looks no further.

If an attorney take upon himself to appear, the court looks no further, but proceeds, as if he had sufficient authority so to do, and leaves the party to his action against him, should it be otherwise. Anon, Salk. 87.

When an attorney has given such undertaking, and has rendered himself liable to an attachment by not observing it, court will not discharge the attorney from it by putting plaintiff in the same situation, or the like, upon the principle of assignment of bail-bond, or attachment against sheriff. Mich. Term 1794.

(D) Of

and entering an Appearance.

(D) Of the Time of appearing. (D)

By the ſtatute, 5 G. 2. c. 27. common bail muſt be filed, or an appearance entered, on the return of the proceſs, or within eight days after. Within eight days from return.

Theſe eight days are to be reckoned in both courts, from the actual return day mentioned in the proceſs, and not the *quarto die poſt*; and they are *excluſive* of the day of the return; *i. e.* if the proceſs be returnable on the 6th, common bail ſhould be filed, or appearance entered, on or before the 14th (*Boſanquet* v. *Rundo*, Bar. 245. S. C. Prac. R. 33.), unleſs the 14th fall on a Sunday; in which caſe defendant has all the next day to appear in. *Shadwell* v. *Angel*, Bur. 56. Reckoned excluſive of return day; nor counting Sunday, if the laſt;

Common bail muſt be filed, and appearance entered as of the term writ is returnable, otherwiſe the cauſe will be out of court, and proceedings ſet aſide. *Edgar* v. *Farmer*, Caſ. temp. Hard. 138.

If defendant's attorney hath neglected to file common bail in time, let him ſearch and ſee if it has been filed by plaintiff's attorney; for, if not, he may ſtill file it for defendant, though after the time directed by ſtatute, provided it be within the next term after writ is returnable, and filed as of the *ſame* term writ is returnable. *Smith* v. *Painter*, 2 D. & E. 720. but may be filed afterwards, if not done by plaintiff's attorney;

Of which ſame term he ought alſo to plead; and where there are two defendants, and one does not appear in the ſame term, he muſt plead *as* of the term when he ought to have appeared. 3 D. & E. 627.

Defendant may appear even before the return of the writ; for the appearance is to the ſuit not to the proceſs. *Wynne* v. *Wynne*, 1 Wil. 39. Or if the writ be returned, not ſerved. *Moor* v. *Watts*, Ray. 616. Or even before any writ be ſued out; but to make ſuch laſt appearance effectual, plaintiff muſt ſue out proceſs within fourteen days afterwards. Trin. 4 W. & M. B. R. defendant may appear before the return, or before writ ſued out.

(E) Of Appearance in Actions againſt Huſband and Wife. (E)

If a man and his wife be ſued, the huſband muſt appear for both; and if he fail ſo to do, plaintiff may enter an appearance for them.

The

Of filing Common Bail, &c.

Husband must appear for both.

The case of *Clark* v. *Norris and Wife*, as reported in 1 H. Blac. 235. is indeed otherwise, and *seems* to have decided, that where the defendant is joined with his wife in the writ, he may enter an appearance for himself only; but I rather imagine that there were circumstances in this case (not reported) warranting this decision: *Norris*, the defendant, as I was informed, was in fact a *single* man; but plaintiff conceiving him to be married to the woman who had contracted the debt, sued him as a *married* man jointly with his *supposed* wife; upon which he only entered an appearance for himself, which was clearly proper; plaintiff, therefore, having signed judgment for want of his appearing for the wife also, and defendant's reason for not so doing being explained to the court, the judgment was held irregular; so that this determination by no means affects the general point of practice, that the *husband*, when jointly sued with his wife, ought to appear for both.

If wife appear without him, it is not void; but plaintiff cannot proceed.

But if a wife appear without her husband, such appearance is not void in law (*Traverse* v. *Buckley & Ux.* 1 Wil. 264.); though plaintiff cannot proceed without bringing the husband into court.

But see *ante*, Chap. II. sec. II. (B. 2), in what cases *feme coverts* may be sued without their husbands: and also *Partridge* v. *Clarke*, 5 D. & E. 194.

(F) Whether liable to any Penalty for not appearing.

By the 9 & 10 W. 3. c. 25. s. 33. if defendant did not file common bail, and enter an appearance in eight days, he was liable *immediately* to a penalty of 5l. This was by way of compulsion upon defendant to appear, and it was a rule absolute in the first instance. See 5 Mod. 392. Gilb. B. R. 369. *White* v. *Holland*, Str. 737.; but afterwards by 12 G. 1. c. 29. the time was altered to *four* days, and plaintiff was authorised to appear for defendant in case of his default; and by the 5 G. 2. c. 27. the time was again enlarged to eight days; it is doubted, therefore, in *Bac. Abridg.* 214. whether the clause in 9 & 10 Wil. is not virtually repealed by the latter statutes: now, if it were not repealed by 12 G. 1. c. 29. it does not seem to have been so by 5 G. 2. c. 27. which is merely explanatory of the former; but it does not appear to have been repealed by 12 G. 1. because the case

Of Plaintiff's appearing according to Statute.

case of *White and Holland*, Str. 737. was decided since that period; it rather seems, therefore, as if the legislature intended the latter statutes as an additional remedy to plaintiff, and that still the penalty might be enforced. But Q.

Section IV.

Of Plaintiff's appearing for Defendant according to Statute.

It has been just observed, that before the statute 12 G. 1. c. 29. the only compulsion upon defendant to appear according to the process, was the penalty of 5l. in case of his default, inflicted by statute 9 & 10 W. 3.; for no one could enter such appearance but himself or his attorney. But by the 12 G. 1. c. 29. and the 5 G. 2. c. 27. it is enacted, that in case defendant shall not appear within eight days after the return of such writ or process, the plaintiff, upon making and filing an *affidavit* of the *personal* service of such writ or process, may file common bail, or enter an appearance for such defendant, and proceed thereon, as if such defendant had duly appeared himself.

By what statutes such appearance authorized.

We will, therefore, consider,

(A) How Plaintiff is to appear for Defendant according to Statute.

(B) When Plaintiff is to appear.

(A) How Plaintiff is to appear for Defendant according to Statute.

(A)

At the expiration of the eight days, let plaintiff's attorney search in the proper office to see if defendant has appeared himself: if not, a proper affidavit must then be made by the person who served the process; which, by the 5 G. 2. c. 27. may be sworn before any judge or commissioner of the court out of which the process issued, authorised to take affidavits in such courts; or before the proper officer for entering the common appearance in such court, or his deputy; but in town it is generally sworn before the clerk of common bails, if in B. R.; or the filazer, if in C. B.; or their respective deputies.

The affidavit having been made and sworn, plaintiff's attorney may then file common bail, or enter an appearance.

Of Plaintiff's appearing according to Statute.

In which case the same form of common bail-piece, or appearance, will do, as mentioned in the last section, only add therein the words, "filed according to the statute," *agreeable to rule of court Mic. 10 G. 2.*

Form of affidavit.

The affidavit is to be filed gratis, and is to the following effect: A. *B. of, &c. clerk to* T. S. *attorney for the above-named plaintiff, maketh oath, and saith, that he did, on the day of instant, personally serve the above defendant with a true copy of (a writ of capias ad respondendum, if in C. B.; or bill of Middlesex or latitat, if in B. R.) which appeared to this deponent to be regularly issued out of this honourable court, and returnable on ; under which said copy was written an English notice to the said defendant of the intent of such service, pursuant to the statute in such case.*

Sworn, &c. A. B.

No memorandum, or warrant, is required in this case. Vide ante, Ch. I. *Sec.* II. (C).

When the suit is by original in B. R. an appearance is entered with the filazer in the same manner as an appearance in C. B.; and the affidavit of service, when by original, is like the above, only specifying the writ, and where returnable.

The affidavit ought not to be sworn before any attorney in the cause.

The kind of writ must be described in it; the affidavit of service of a writ of *mesne* process only held bad, *Lakin* v. *Dewall*, East. Term 25 G. 3., and judgment set aside, and defendant discharged, though in execution, on this objection only.

This affidavit may be sworn in the Common Pleas before any Commissioner, although he be plaintiff's attorney. R. East. 15 Geo. 2.

(B)

(B) When Plaintiff is to appear.

Not till the ninth day after return;

Plaintiff cannot appear for defendant before the 9th day, *exclusive* after the return of the process; *i. e.* if process be returnable on the 6th, not till the 15th. *Morse* v. *Farnham*, Prac. R. 32. Nor after a declaration delivered, if it be delivered in *chief*. *Wrath* v. *Bristow*, Prac. R. 31. *Smith* v. *Painter*, 2 D. & E. 719. But plaintiff may deliver a declaration against defendant *de bene esse*, or conditionally before the time for his appearing has elapsed, and afterwards file common bail in case he does not appear in time.

nor after declaration, unless delivered *de bene esse*;

nor after the next term from return.

Plaintiff must file common bail according to the statute, either in the term when the writ is returnable, or in the term following; and he cannot do it aftewards.

Smith

Smith v. *Painter*, 2 D. & E. 720. And in the latter caſe he ſhould intitle the bail piece *as of* the term writ was returnable. But if the defendant has given a *cognovit*, he is eſtopped from objecting to the irregularity, if before the time of making ſuch objection plaintiff has filed common bail *nunc pro nunc*. *Davis* v. *Hughes*, 7 D. & E. 206.

Where plaintiff files common bail for defendant on any day between the 2d and 6th November, and he is in other reſpects entitled to ſign judgment, it is ſigned as on the day preceding the eſſoin day of Mich. Term, *Wanſey* v. *More*, 5 D. & E. 65.

Plaintiff muſt appear for defendant in the ſame name that he ſued him in the proceſs. *Doo* v. *Butcher*, 3 D. & E. 611.

Section V.

Of Defects and Irregularities in Proceſs.

(A) How far the Courts will amend Proceſs.

(B) How Defects or Irregularities cured.

(C) How and when to be taken Advantage of.

(A) How far the Courts will amend Proceſs. (A)

Courts cannot amend originals;

The courts of King's Bench and Common Pleas cannot amend an *original* writ, becauſe it iſſues out of the court of Chancery: beſides, there is nothing to amend by; and if it be once executed, though improperly, it cannot afterwards be uſed, but muſt be ſuperſeded. *Ogier* v. *Hayward*, Bar. 417. *Cartey* v. *Aſhley*, 3 Wil. 454. But *meſne* proceſs, and alſo an attachment of privilege, which is in the nature of an original, the law courts may amend. *Ib.*

but may *meſne* proceſs.

Any thing will do to amend by—

A little matter will be deemed ſufficient to amend by: thus, a bill of Middleſex indorſed and filed of record as of the 24 G. 3. was ordered to be taken off the record, and amended according to the truth of the fact, and recorded again as of Hil. Term 25 G. 3.; and the court held, that the *præcipe* to the officer was ſufficient to amend by. *Green* v. *Rennet*, 1 D. & E. 782. And in the C. B. the court ſaid, that when a plaintiff beſpeaks a writ, returnable ſuch a day, he *impliedly* orders the officer to make the teſte regular; and by thoſe *implied* inſtructions we may amend. *Carty* v. *Aſhley*, Black. 918. See *ante*, Sec. I. (E. 6).

As the præcipe,

or even implied inſtructions.

Of Defects and Irregularities in Process.

No error on mesne process.

No error can be assigned on mesne process. *Ib.*

If therefore the process be in any respect defective as it cannot appear upon the face of the record by *oyer*, nor assigned for error, the only advantage to be taken thereof is, by motion to set aside the proceedings.

Appearance may be amended.

The court will also amend the appearance. In the case of *Wheston* v. *Packman*, 3 Wil. 49. defendant was rightly named *John* in the *capias* and in the declaration; plaintiff's attorney made an affidavit of the service of the writ on the defendant by his right name, and then entered an appearance for him according to the statute by the name of *James* instead of *John*: it was moved to set aside declaration, defendant not being in court; but it was held by the court a mere slip, and they ordered the filazer to rectify the mistake.

(B) (B) How Defects or Irregularities cured.

(B. 1) Whether by Defendant's Appearance.

(B. 2) Whether by Plaintiff's Appearance according to Statute.

(B. 3) Whether by accepting Declaration.

(B. 1) (B. 1) Whether by Defendant's Appearance.

Defects in process cured by appearance,

Any error in *mesne* process is cured by the party's appearance, and he shall not afterwards take advantage of it; because the only intent of *mesne* process is to bring the defendant into court, and when he is come in, there is an end of the process; for defendant might have come in upon the writ without it. *Rex* v. *Hare*, Str. 155. *Wilson* v. *Finch*, Bar. 163. *Wade* v. *Wadman*, ib. 167.

Though defendant was named wrong therein.

If defendant be served with process by a wrong name, or addition, and appears by his right name, and plaintiff declares against him by his right name, the defect is cured, and the court will not set aside the proceedings for irregularity. *Hole* v. *Finch*, 2 Wil. 393. *Doo* v. *Butcher*, 3 D. & E. 611.

But there is a distinction between a *defect* in the proceedings and a mere irregularity; in the former case, the appearance does not cure it, as where the writ comprised two different defendants for different causes of action in bailable process, on which one was arrested, his putting in bail did not cure the defect. *Hussey* v. *Wilson*, 5 D. & E. 254.

(B. 2) Whe-

Of Defects and Irregularities in Proceſs.

(B. 2) Whether by Plaintiff's Appearance according to Statute. (B. 2)

But although the appearance by defendant ſhall be deemed a waiver of ſuch defects or irregularities; yet the plaintiff ſhall not be able to correct his own errors by appearing for defendant according to the ſtatute. *Weſtall* v. *Finch*, Bar. 406. *Sed* CONTRA, *White* v. *Waſhington*, Prac. R. 348. But not cured by plaintiff's appearing according to ſtatute.

So that if proceſs be ſued againſt defendant by a wrong name, and plaintiff files common bail according to ſtatute in defendant's right name, and then declares againſt him in his right name, this ſhall not be of avail; but proceedings will be ſet aſide. *Doo* v. *Butcher*, 3 D. & E. 611.

(B. 3) Whether by accepting Declaration. (B. 3)

Whatever previous defect or irregularity there may have been in the *meſne* proceſs, or the ſervice thereof, ſuch as want of notice to the copy of proceſs, or a proper number of days between the teſte and return, or a regular perſonal ſervice of the proceſs, or even if no common bail has been filed for defendant; yet if defendant, or the attorney generally concerned for him, accepts the declaration, or takes it out of the office, and pays for it, it is a complete waiver of any ſuch defects or irregularities. *Morgan* v. *Luckup*, Caſ. temp. Hard. 242. Accepting declaration will cure defects.

So although plaintiff filed common bail for defendant according to ſtatute; yet any defect in the proceſs ſhall be cured by defendant's taking declaration out of office. *Caſwall* v. *Martin*, Str. 1072. *Marquand* v. *Mayor of Boſton*, Bar 416. Though bail was filed according to ſtatute.

(C) How and when Defects or Irregularities to be taken Advantage of. (C)

The proper way of taking advantage of any defects in proceſs or irregularities in the ſervice thereof, or the like, is by motion in court to ſtay proceedings. ——But if the error be in the proceſs, it muſt be firſt returned, and brought before the court, before any advantage can be taken thereof. 3 Wil. 58. *Perrott, one, &c.* v. *Hele*. By motion; But proceſs muſt firſt be returned.

The time of taking advantage of any irregularity depends upon the nature of the defect, whether it be ſuch as vitiates the proceedings *in toto*, ſo as to render them null This depends upon the nature of the defect.

and void; or only such an irregularity, which may be cured or waived by some subsequent act of the parties; for there is a distinction between a defect in the proceedings and a mere irregularity. *Hussey* v. *Wilson*, 5 D. & E. 254.

If process void, at any time.

Thus, if plaintiff's name be omitted in a writ, defendant may *at any time* apply to set aside proceedings, for it is as no process. *Thompson* v. *Brew*, And. 16. So where the affidavit of personal service was defective, proceedings were set aside, though defendant was in execution. *Vid. ante*, p. 98.

So where the affidavit and writ comprised two different defendants for different actions, *viz.* the maker and indorser of a note, it was held a *defect*, and not a mere *irregularity*; and therefore not cured by defendant putting in bail. *Hussey* v. *Wilson*, 5 D. & E. 254.

If only irregular, before judgment.

If the irregularity be in the notice subscribed to the copy of the process, the motion must be made before judgment signed; if in the notice of declaration, two days before the time appointed for the execution of the writ of inquiry. *Grimes* v. *Cleaver*, Bar. 256.

And in general it seems, that all irregularities in the process, *i. e.* previous to the declaration, should be complained of before judgment signed. *Grimes* v. *Cleaver*, Bar. 256. *Morse* v. *Farnham*, Bar. 243. *Jemmett* v. *Voyer*, Bar. 296. Though it need not be till after notice of declaration given to defendant. S. C. Prac. R. 355

But if defendant applies so soon as he has opportunity, though after judgment, court will set aside the proceedings. *Smith* v. *Painter*, 2 D. & E. 720.

If plaintiff enters an appearance for defendant before the expiration of the 8th day, and defendant has not himself appeared, but suffers plaintiff to proceed, he must complain of plaintiff's irregularity before judgment is signed, or it will be too late. *Morse* v. *Farnham*, Prac. R. 32.

If defendant complains of any irregularity in the process or notice, he must annex the copy to his affidavit, that it may appear to the court.

There are various cases in the books as to the time of making applications to set aside proceedings for irregularity; but the best and surest rule is, that they should be made in the first instance, the first opportunity that the party has to bring his complaint before the court, otherwise it will be received with suspicion; and if not made in a reasonable time, will be wholly refused.

CHAPTER IV.

Of the Proceedings in bailable Actions from the Commencement of the Suit to the Declaration.

HAVING fully treated of the PROCESS, *that is to ſay, the means of compelling an appearance* in actions not bailable, and ſhewn in what way the defendant himſelf is to appear, or the plaintiff appear for him, according to the ſtatute, the next thing to be conſidered is the method of effecting this appearance in bailable actions; for after the defendant is once in court to anſwer the plaintiff's charge, the proceedings in both kind of actions are nearly ſimilar.

The firſt ſtep to be taken when the party is to be arreſted, is the making of an *affidavit* by the plaintiff, of the true cauſe of action, which muſt be above 10l., agreeable to the ſtatute 12 G. 1. c. 29. A *writ* is then taken out, directed to the proper ſheriff of the city or county where the defendant is to be found; upon this a *warrant* is obtained, and the *arreſt* made. When the party is taken, he muſt either be kept in cuſtody, or muſt enter into a bail-bond to the ſheriff, with two ſureties, conditioned for his appearance on the return of the writ; this is called *bail below*, or *to the ſheriff*. If he appears according to the exigency of the writ and the bail-bond, freſh ſecurity is required of him, who are to be bound for the payment of the debt and coſts ſhould plaintiff recover in the action, or that the defendant ſhall be rendered into cuſtody. This is done by the defendant and his ſureties entering into a recognizance in court to that effect, which is called *putting in bail to the action*, or *bail above*. But as the plaintiff can have no greater ſecurity or ſatisfaction than the body of the defendant, he may either render himſelf, or be rendered by his bail, which is termed *ſurrendering in diſcharge of bail*. It frequently however happens, that after the bail-bond to the ſheriff has been entered into, the condition is broken, the defendant neither appearing on the return of the writ, nor any proper render of him being made; in which caſe there are two remedies, at the

election of the plaintiff; he may either take an *assignment of the bail-bond*, and bring an action against the bail for the *penalty*, or he may *proceed against the sheriff by attachment* for his contempt of the court in not having the defendant before them, in obedience to their writ, and thus compel him to pay the debt and costs, who may for his own indemnity resort to the bail-bond.

Such is the general outline of the proceedings enforcing the appearance of defendants in bailable actions, or of obtaining redress in default thereof; we will consider them more fully under the following heads:

SEC. I. *Of the Affidavit to hold to Bail.*
SEC. II. *Of suing out the Writs, or Process.*
SEC. III. *Of the Warrant and Arrest.*
SEC. IV. *Of Bail to the Sheriff, or Bail* below.
SEC. V. *Of Bail to the Action, or Bail* above.
SEC. VI. *Of the Surrender in Discharge of Bail.*
SEC. VII. *Of the Assignment of the Bail-bond, and the Action thereon.*
SEC. VIII. *Of proceeding against the Sheriff by Attachment.*

SECTION I.

Of the Affidavit to hold to Bail.

Directed by stat. 12 G. 1.

This affidavit is particularly directed to be made by the 12 G. 1. c. 29. s. 2. which enacts, That in all cases where the plaintiff's cause of action shall amount to the sum of 10l. or upwards, affidavit shall be made, and filed of such cause of action; which affidavit may be made before any judge or commissioner of the court out of which such process shall issue, authorized to take affidavits in such courts, or else before the officer who shall issue such process, or his deputy, which oath such officer or his deputy are thereby empowered to administer; and for such affidavit, one shilling, over and above the stamp duties, shall be paid, and no more.

How the law of arrests and bail was before this statute, has been shewn in the Introduction, sec. IV. and V.

We

Its Certainty.

We will now proceed to ſhew,

(A) The Degree of Certainty requiſite in ſuch Affidavit.

(B) By and before whom to be made.

(C) How to be ſtamped, and of joining ſeveral Defendants, or Cauſes of Action, in one Affidavit.

(D) Of the Title, Jurat, and Time of filing Affidavits.

(E) Of Counter and Supplemental Affidavits.

The ſtatute only generally ſays, that an affidavit ſhall be made; but, in order to prevent oppreſſion and evaſion, various reſtrictions and regulations have been made by the courts reſpecting it; and particularly as to

(A) The Degree of Certainty requiſite in ſuch Affidavit with reſpect to

(A. 1) The actual Exiſtence of the Debt.

(A. 2) The Deſcription of the Cauſe of Action.

(A. 3) The Language in which it is drawn.

(A. 4) Exceptions as to Executors, Aſſignees, &c.

Affidavit muſt be poſitive.

It is an invariable and regular rule, that the affidavit muſt be as *poſitive* as the nature of the caſe will admit, *Pomp* v. *Ludvigſon*. Bur. 655. Where a variety of caſes to the ſame point are cited. Alſo *Sheldon* v. *Baker*, 1 D. & E. 83.

It muſt therefore expreſsly ſtate, that *the defendant is indebted* to plaintiff without any thing being left to be collected by *inference*; for it muſt not be argumentative.

That plaintiff, on ſuch a day, gave defendant notice to quit on, &c. and that he held over, by reaſon of which, and by force of the ſtatute, an action has accrued to recover ſo much money; not ſufficient, no poſitive debt being ſtated. *Wheeler* v. *Copeland*, 5 D. & E. 364.

So when a penalty was entered into to ſecure the payment of a balance of accounts, the exact balance muſt be ſworn to, and that it is ſtill unpaid. *Hatfield* v. *Linguard*, 6 D. & E. 217.

Whenever

Of the Affidavit to hold Bail.

Not by way of reference.

Whenever an affidavit is only by way of *reference*, it is bad—as that defendant is indebted to A. B. in ſo much, as appears by the books and ledger of A. B. *Barclay* v. *Hunt*, Bur. 1995.; or as appears by a ſtated account atteſted by the Conſul at Oporto, *Swarbreck* v. *Wheeler*, Bar. 100.; or, as appears by an affidavit made by the plaintiff in Amſterdam, which the deponent believed to be true, *Rios* v. *Belifante*, Str. 1209: or upon a bond, as *thereby* may appear, *Heathcote* v. *Goſlin*, Str. 1157.; or, as appears by the maſter's allocatur, *Powell* v. *Portherch*, 2 D. & E. 55.; or, as acceptor of a bill of exchange, as appears by the ſaid bill, &c. *Rollin* v. *Mills*, 1 Wil. 279.; or, as appears by agreement dated ſuch a day, *Jennings* v. *Martin*, Bur. 1447.; or, as appears by an account ſtated under defendant's own hand, *Anon.* 1 Wil. 121.; or, as appears by the confeſſion of defendant, and by his promiſe to pay the ſame. *Kelly* v. *Devereux*, Say. 59.

Nor any words of ſuch tendency.

So if the words be not ſtrictly words of reference, yet if they be of the ſame tendency, leaving any thing to be collected therefrom, the affidavit will be bad; as, that defendant is indebted to plaintiff in 20l. and upwards, *according to the bill of this deponent delivered* to defendant, *Williams* v. *Jackſon*. 3 D. & E. 575.

Becauſe in all the above caſes the debt is not poſitively ſworn to, ſince although it may *appear* to be due by the books, or the bond, or the like, yet in fact it may have been paid and ſatisfied, and a ſeparate receipt or diſcharge taken.

In one caſe held otherwiſe, but Q.

In one caſe, indeed, the affidavit was held ſufficient, although the words were, that defendant was indebted to plaintiff in, &c. *as he computes it*. *Moultby* v. *Richardſon*, Bur. 1032. But Q. Whether this would now be deemed ſufficiently poſitive, and in the caſe of *Mackenzie* and *Mackenzie*, 1 D. & E. 717. Buller, Juſ. doubted whether it had not been over-ruled.

Swearing to belief bad.

Again: Swearing to belief is not, generally ſpeaking, ſufficient.

As where the affidavit made by the plaintiff's bookkeeper was, that the defendant was indebted to plaintiff in ſo much, as the deponent verily believed. *Claphamſon* v. *Bowman*, Str. 1226.

Though with reference to accounts.

Nor is ſwearing to belief ſufficient, though with a reference to accounts ſent from abroad where the debt aroſe. *Pomp* v. *Ludvigſon*, Bur. 655. *Van Morſell* v. *Julian*, 1 Wil. 231.

But

Its Certainty.

But if, from the nature of the caſe, the party can only have a ground of belief, and cannot make a direct aſſertion, it is otherwiſe.

Except from the nature of the caſe, the party cannot ſwear poſitively.

As where a bond was given, conditioned for the payment of bills of exchange drawn in England on A. in the Eaſt Indies, in caſe ſuch bills ſhould be returned to England proteſted for non-payment, it is no objection to an affidavit to hold the obligor to bail, becauſe, after ſtating that he was indebted to deponent in a certain ſum; ſtating alſo the condition of the bond; it ſaid, that the ſaid bills were not paid to his *knowledge or belief* in India or elſewhere, but were ſtill unpaid. *Hobſon* v. *Campbell*, 1 H. Blac. 247.

Court of C. B. not ſo ſtrict as B. R.

The court of C. B. is not ſo ſtrict with reſpect to the poſitiveneſs and certainty of the affidavit as the court of K. B. The former holding, that *circumſtances* of the cauſe of action are ſufficient without poſitively ſwearing to the debt. *Long* v. *Linch*, 2 Black. 740, Sc. 3 Wil. 154. Whereas the latter always requires a poſitive oath of a ſubſiſting debt.

In latter, affidavit muſt ſhew the debt to be ſubſiſting,

For in B. R. the affidavit muſt further ſhew that it is a *ſubſiſting* debt at the time of making the affidavit, and of ſuing out the writ. *Kelly* v. *Devereux*, 1 Wil. 339.

The affidavit ſhould therefore ſtate, that the debt is *ſtill due*; and if it does, it will be good, even although words of reference may be inſerted, becauſe it would be then rendered ſufficiently poſitive.

It was for want of this that the affidavit of a debt, as appears by the maſter's *allocatur* above-mentioned, was held inſufficient. *Powell* v. *Portherch*, 2 D. & E. 55. S. P. *Mackenzie* v. *Mackenzie*, 1 D. & E. 716. In which laſt caſe, Buller, Juſ. mentioned an inſtance where affidavit was bad, although the words were, that defendant was indebted to plaintiff in 5001. for money had and received, and for *which he has not accounted.*

So an affidavit ſtating that defendant was indebted to plaintiff in 245l. for money lent by plaintiff to defendant for the uſe of another; and for which defendant promiſed to be accountable, and to repay, or cauſe to be ſecured to plaintiff, &c.; it not appearing in affidavit that the money had not been *ſecured*, it was held inſufficient. *Jacks* v. *Pemberton*, 5 D. & E. 552.

at the time of ſuing out writ.

It is upon this principle, that an old affidavit, made ſome time ago, is not ſufficient, becauſe the debt may have

have been ſince paid; and it muſt appear to be as before mentioned, not only a ſubſiſting debt at the time of making the affidavit, but alſo of ſuing out the writ. *Collier* v. *Hague*, Str. 1270.

(A. 2) (A. 2) Of the Deſcription of the Cauſe of Action.

Affidavit muſt deſcribe with certainty the cauſe of action, and ſhew how the debt aroſe.

As the affidavit muſt be poſitive with reſpect to the actual exiſtence of the debt, ſo it muſt be certain as to the deſcription of the *cauſe of action*.

It muſt ſhew how the debt aroſe, and this, although the circumſtances be long and complicated, and although the ground of the demand cannot be ſet forth, without ſtating the whole ſubſtance of the declaration. *Cope and another* v. *Cooke*, Do. 467.

An affidavit, therefore, that defendant was indebted to plaintiff in 500l. and upwards, *Cooke* v. *Dobree*, C. B. T. R. 10.; or, in ſo much *upon promiſes*; *Cope* v. *Cooke*, Do. 467; or in 23l. and upwards in *trover*. *Hubbard* v. *Pacheco*, C. B. T. R. 28. or that defendants (*Baron & Feme*), or one of them, was indebted for board, &c. provided for the wife. *Paris* v. *Stroud & Ux.* Bar. 95.; and the like are not ſufficiently certain and deſcriptive.

So an affidavit in trover for goods and chattels of 50l., leaving out the word *value*. *Philpot* v. *Harlow*, Mich. K. B. 1793.

How if on bond of indemnity.

So in actions on bonds, to ſave harmleſs, &c.; and in actions of covenant, the affidavit muſt ſtate poſitively and certainly how, and for how much, plaintiff is damnified. *Whitfield* v. *Whitfield*, Bar. 109.

If on the lottery act.

An affidavit to hold to bail on the lottery act, 27 G. 3. c. 1. ſhould ſpecify the nature of the offence, and aver that defendant had incurred the forfeiture; but the offence need not be deſcribed circumſtantially; nor is the plaintiff obliged to ſwear that defendant is *indebted* to him to the amount of the penalty; for as no perſon is entitled to the penalty till the proceſs is actually ſued out, it cannot be ſaid to be a *debt* due to the plaintiff at the time of making the affidavit. *Davis* v. *Mazzinghi*, 1 D. & E. 705.

What a good affidavit in trover.

But an affidavit, that defendant is indebted to plaintiff in 103l. for goods which defendant converted to his own uſe; *Emerſon* v. *Hawkins and others*, 1 Wil. 335.; or that the defendants have poſſeſſed themſelves of divers goods belonging

Its Certainty.

belonging to plaintiff, and have refuſed to deliver them up, and that they, or ſome of them, have converted and diſpoſed of them to their own uſe; *Charter* v. *Jaques and others*, Cowp. 529. is ſufficient to hold to bail in trover.

(A. 3) Of the Language in which Affidavit is drawn. (A. 3)

The affidavit muſt be clear, certain, and correct in the *language* in which it is drawn. It ſhould be ſuch an oath as a perjury can be aſſigned upon. Affidavit muſt be correct in the language.

The moſt trifling inaccuracy, or clerical miſtake, therefore, will render it defective; as where an affidavit of debt was made, that defendant *in* indebted, inſtead of *is* indebted, the court held it defective, and as no affidavit, and diſcharged defendant on common bail; becauſe a perjury could not be aſſigned upon it. *Reeks* v. *Groneman*, 2 Wil. 225. A clerical miſtake will vitiate it;

So if the action be brought for a penalty in an act of parliament, if the act be miſrecited in the affidavit, it will be bad; as calling it an act paſſed in the 27 G. 3. when it paſſed in the 22 G. 3. But the party is not bound to ſet forth the year at all when the act paſſed. *Watſon* v. *Shaw*, 2 D. & E. 654. or if a ſtatute be miſrecited.

(A. 4) Exceptions as to Executors, Aſſignees, &c. (A. 4)

It has been already ſhewn that, generally ſpeaking, the affidavit muſt be poſitive, nor will ſwearing to belief be alone ſufficient; but there are ſome exceptions to this rule:—Thus in all caſes where *executors*, *adminiſtrators*, or *aſſignees* make the affidavit, they are permitted to ſwear as to their *belief* only, which, from the nature of their reſpective ſituations, is as much as they can do. 1 D. & E. 717. *Touna* v. *Edward*, Bur. 2283. *Swayne* v. *Crammond*, 4 D. & E. 176. Executors, adminiſtrators, and aſſignees are exceptions to the above doctrine.

Thus where an aſſignee of a bond ſwore that the obligor was indebted in 90l. for principal and intereſt, as he *believed*, the court held it ſufficient to hold to bail. *Loveland* v. *Baſſet*, Trin. 16 Geo. 2. They may ſwear to belief.

But it is better for the obligee and aſſignee to join in the affidavit.

So if an executor ſwears to the books of the teſtator, and that he belives them to contain a true account, and that

that the debt is ſtill unpaid; or if an aſſignee ſwears that the defendant is indebted, as appears to this deponent, by the laſt examination of the bankrupt, and as the deponent verily believes, and that he has not received the debt, or any part of it, and that he believes it to be ſtill due, ſuch affidavits are ſufficient to hold to ſpecial bail. *Touna* v. *Edwards*, Bur. 2283. *Swayne* v. *Crammond*, 4 D. & E. 176.

But words of reference alone will not do.

But it is to be obſerved, that in all theſe caſes, words of reference alone, ſuch *as appears by the teſtator's or the bankrupt's books*, and the like, are not ſufficient, unleſs followed up by the *belief* of the party who makes the affidavit. *Sheldon* v. *Baker*, 1 D. & E. 84. *Barclay* and *others*, aſſignees, v. *Hunt*, Bur. 1992. *Walrond* v. *Franſham*, Str. 1219. *Fludger*, aſſignee of *Jackſon*, v. *Hughes*, 27 Geo. 2.

If there be three aſſignees of a bankrupt, one may make an affidavit, and hold to bail. *Swaine* and *others* v. *Crammond*, 4 D. & E. 176.

(B) (B) By and before whom the Affidavit ought to be made.

Who may make the affidavit.

The affidavit may be made by plaintiff himſelf, or his wife, or ſervant, or any third perſon in his abſence who knows of the debt being contracted, and can ſwear that it is ſtill due.

Q. Whether it muſt be made by a perſon competent to be a witneſs?

It is generally laid down, that it ſhould be made by ſome perſon who is legally competent to be a witneſs. Tid. 39 So in *Nichols* v. *Dallyhunty*, Bar. 79. where an affidavit, made by a pickpocket returned from tranſportation, was held inſufficient, becauſe no credit could be given to the affidavit. Yet in later caſes, it has been held otherwiſe; and an affidavit made by a perſon convicted of perjury was deemed good; for it was ſaid, that although plaintiff cannot be a witneſs, yet he muſt not be ſtripped of his legal remedy to recover his juſt debts. *Horſley* v. *Somers*, Bar. 116. *Davis* v. *Carter*, Sal. 461.

Affidavit by a third perſon muſt be that debt is ſubſiſting.

Where the affidavit is made by a third perſon, it muſt be poſitive as to its being a ſubſiſting debt; for an affidavit that the defendant is indebted to the plaintiff in a certain ſum of money, as appears by a bottomry bond in the deponent's cuſtody, and that the defendant, on ſuch a day, acknowledged the debt to him, and promiſed to pay the ſame to the deponent, who has authority from the plaintiff by letter of attorney to receive the

ſame,

By and before whom to be made.

ſame, is not ſufficiciently poſitive. *Kelly* v. *Devereux*, 1 Wil. 339.

If the plaintiff, being in Scotland, wants to hold defendant to bail in England, he may go before a magiſtrate in Scotland, competent to adminiſter an oath, and make affidavit in the preſence of another perſon who is ſhortly coming to London; which perſon, upon his arrival in London, muſt alſo make affidavit that the former affidavit of the debt was made by the plaintiff; that the hand-writing ſubſcribed thereto is his own hand-writing; that the ſaid affidavit was made and taken before a magiſtrate, who, this deponent believes, had competent authority to adminiſter an oath; and that the hand-writing ſubſcribing ſaid affidavit, is the hand-writing of ſuch magiſtrate; on which ſeveral affidavits a judge makes an order to hold to bail.

If plaintiff living in Scotland, wants to hold defendant in England to bail, how he may do it.

By the act 12 G. 1. c. 29. affidavits to hold to bail are ordered to be made before any *judge* or *commiſſioner of the court*, out of which the proceſs ſhall iſſue, authoriſed to take affidavits in ſuch courts, or elſe before the *officer who ſhall iſſue ſuch proceſs, or his deputy;* which oath ſuch officer or his deputy are thereby empowered to adminiſter.

Before whom to be made.

The commiſſioners authoriſed to take affidavits mentioned in the above act, are thoſe appointed by the judges, &c. by virtue of the ſtatute 29 Car. 2. c. 5., which enacts, that the judge, &c. of the courts of Weſtminſter, by commiſſion, may empower perſons in the ſeveral counties of England to take affidavits concerning matters depending in their ſeveral courts.

By rule of K. B. Eaſter 15 G. 2. in both courts affidavits to hold to bail may be ſworn before any ſuch commiſſioner, although he be concerned *as attorney for the plaintiff.*

It is to be obſerved, however, that by a late rule of K. B. 31 G. 3. whenever an affidavit is taken by any commiſſioner of the court, made by any perſon who, from his or her ſignature, appears to be *illiterate*, the commiſſioner taking ſuch affidavit ſhall certify, or ſtate, in the jurat, *that the affidavit was read in his preſence to the party making the ſame, and that ſuch party ſeemed perfectly to underſtand the ſame; and alſo that the ſaid party wrote his or her ſignature in the preſence of the commiſſioner taking the ſaid affidavit.*

(G) How

Of the Affidavit to hold to Bail.

(C) How to be ſtamped, and of joining ſeveral Defendants, or Cauſes of Action, in one Affidavit.

The affidavit muſt be ſtamped with a two-ſhillings ſtamp. 2. 6

It would therefore be an injury to the revenue if ſeveral cauſes of action were to be put into one affidavit, whether againſt one or different defendants; and it would alſo be a vexatious proceeding againſt the party, becauſe he muſt take a copy of the whole affidavit, and would therefore pay for more than related to that particular cauſe of action againſt him. Beſides which, the proceedings by affidavit and *ac etiam* writ were to ſupply the place of the original, in which only one cauſe of action could be compriſed. For theſe reaſons no affidavit muſt contain two different cauſes of action, whether by the ſame plaintiff againſt the ſame defendant, *Crooke* v. *Davis*, 5 Burr. 2690., or againſt ſeveral defendants for ſeparate cauſes of action, *Gilby* v. *Lockyer*, Doug. 217. *Huſſey* v. *Wilſon*, 5 D. & E. 254.; but there muſt be ſeparate affidavits againſt each, *Goodwin* qui tam v. *Parry*, 4 D. & E. 577. *Holland* v. *Johnſon*, id. 697. Nor can two plaintiffs for ſeparate cauſes of action unite them in one affidavit againſt the ſame defendant. *Dean and Chapter of Exeter* v. *Seagell*, 6 D. & E. 688.

In all caſes, therefore, one affidavit ſhould only contain one cauſe of action.

But it may ſtate ſeveral offences as to be included in that action, as for penalties forfeited by unlawful inſurances with different perſons. *Holland* qui tam v. *Bothmar*, 4 D. & E. 228.

(D.) Of the Title, Jurat, and Time of filing Affidavit.

Several caſes have of late ariſen reſpecting the propriety of intitling the affidavits to hold to bail In Eaſt. Term 1794, motions were made to ſet aſide proceedings for want of titles to the affidavit; but the court held, that no title was neceſſary; that the affidavit to hold to bail is not ſtrictly the commencement of a ſuit; that there is no cauſe then in court; and that ſuch affidavit, therefore, need not be intitled in any cauſe. *Adams* v. *Pinfold*,

and of Supplementary Affidavits.

Pinfold, K. B. Eaſt. 34 G. 3. and *Adams* v. *Aſhfield*, in C. B. Imp. K. B. 122.

Afterwards, in the caſe of the *King* qui tam v. *Cole*, defendant was diſcharged on common bail, becauſe affidavit *was* intitled. And at length, in order to ſettle the practice by rule of court, Trin. 37 G. 3. it is ordered, That affidavits to hold to bail *ſhall not be* intitled either as of any court, or with the names of any parties.

By a late rule of court, Mich. 37 G. 3. great ſtrictneſs is required with reſpect to the jurats of affidavits, which orders, That upon every affidavit ſworn in the court, or before any judge or commiſſioner thereof, and made by two or more deponents, the names of the ſeveral perſons making ſuch affidavits ſhall be written in the jurat; and that no affidavit be read or made uſe of in any matter depending in this court, in the jurat of which there ſhall be any interlineation or eraſure.

In the caſe of *Huſſey* v. *Baſkerville* in K. B. cited in *Reeks* v. *Groneman*, 2 Wil. 225. it is ſaid that the affidavit muſt be filed with the proper officer before or at the time the writ is ſued out.

But I doubt that, for although the ſtatute directs the affidavit to be filed, it does not ſay *when*. It muſt ſurely be before the party can be arreſted, but I conceive that the writ may be firſt ſued out, and then the affidavit made as a juſtification to hold to bail. But when it is intended to arreſt the party, it is better to make affidavit in the firſt inſtance.

(E) Of Counter and Supplementary Affidavits. (E)

In the King's Bench, when a plaintiff has once ſworn poſitively to his debt in order to hold the defendant to ſpecial bail, the court will never receive any affidavit whatever either to explain or contradict the plaintiff's oath; even an affidavit of the plaintiff's confeſſion that the defendant owes him nothing, will not be received. *Emerſon* v. *Hawkins* and *others*, 1 Wil. 335. S. C. Say. 53. *Kelly* v. *Devereux*, 1 Wil. 339. *Heathcote* v. *Goſlin*, Str. 1157. Not allowed in K. B.

So that in this court, an affidavit once made, cannot be amended, nor its defects cured by a *ſupplementary*, nor in anywiſe contradicted by a *counter affidavit*. *Cope* and *another* v. *Cooke*. Do. 467. *Reeks* v. *Groneman*, 2 Wil. 225.

Of the Affidavit to hold to Bail,

225. *Mackenzie* v. *Mackenzie*, 1 D. & E. 717. *Jacks* v. *Pemberton*, 5 D. & E. 552.

Thus in the King's Bench, when plaintiff has obtained upon his affidavit a judge's order to hold defendant to bail, no counter affidavit shall be allowed to lessen the bail. But if plaintiff's affidavit is false, he must be indicted for perjury, as in the common case of affidavits for special bail. *Smith* v. *Fraser*, 1 Blac. Rep. 192.

So in debt on bond, though the defendant says it was usurious, or *per duress*, it shall not excuse from special bail, for the merits of the cause shall not be determined on motion. *Anon.* Salk. 99, 100.

But in C. B. supplemental and cross affidavits are allowed.

But the practice of the *Common Pleas* differs in this respect, and admits of *supplemental* and even *contradictory* affidavits; for they hold, that notwithstanding the plaintiff makes a positive affidavit of his debt, yet the matter of bail is examinable by the court. *Russell* v. *Gately*, Bar. 76. Sem. cont. *Hadderweek* v. *Catmur*, Bar. 61.

An action of debt on bond wherein defendant was held to bail on plaintiff's affidavit, defendant moved for a common appearance, and that plaintiff might produce the bond to the court, upon an affidavit that defendant had great reason to believe that the whole sum due was paid by one of the co-obligors, which would appear by indorsements made on the said bond when produced; plaintiff, in answer, made affidavit, that 100l. and upwards remained due to him on the bond after all just allowances; that he had seen the bond, which was uncancelled and in full force some months before, but had mislaid it; and being severely afflicted with the gout, could not search among his papers himself, so that it could not be produced. It was urged for plaintiff, that no declaration being yet delivered, defendant is not entitled to oyer of the bond. But after a declaration, with a profert in cur. he may demand oyer. The court held, That as the matter of bail is discretionary, and as the measure of the sum for which bail ought to be given is with certainty to be had only from the bond itself, the bond ought to be produced; and for want of producing it, a common appearance was ordered. *Shaw* Bart. v. *Hawkins*, Bar. 72.

An affidavit made by a third person, that the defendant was indebted, as appears by a stated account, was held

and of Supplementary Affidavits.

held insufficient, but made good by another affidavit that the defendant owned the account. *Swarbreck* v. *Wheeler*, Bar. 106.

So where an executor at first only swore to the debt, as appeared by the accounts of the deceased; a subsequent affidavit, that he *believed* the debt to be due, was admitted to hold to bail. *Roche*, executor, v. *Carey*, 2 Blac. 850.

So in the case of *Manning* v. *Williams*, plaintiff made two affidavits; the last was held *primâ facie*, sufficient; but cross affidavits being read controverting the fact, common appearance was ordered. Bar. 87.

But in C. B. supplementary affidavits are only allowed where the original affidavit is in itself a good one, such as a perjury can be assigned upon, though perhaps not sufficiently strong to hold defendant to bail; for where the original affidavit itself is null and void through any fatal inaccuracy, or clerical mistake, no supplementary affidavit can be had, nor can the defects be cured.

Provided the first affidavit be a good and valid one.

So that where the affidavit was as follows: A. B. of, &c. *make* oath, that C. D. of, &c. *in* justly indebted, instead of *is*; upon a supplementary affidavit being offered, it was refused by the court, who said, that the first was no affidavit, because no perjury could be assigned upon it; that the arrest, therefore, was contrary to law, and that the court could not make *that* lawful which the law says is unlawful; and that supplemental affidavits were only allowed by the court to supply small defects in affidavits not quite full enough, but never allowed, where the first amounted to no oath at all. *Reeks* v. *Groneman*, 2 Wil. 224.

So in an affidavit that defendant was indebted to plaintiff in the sum of 560l. and upwards, which was held bad for uncertainty, court refused a supplementary affidavit. *Cooke* v. *Dobree*, 1 H. Blac. 10.

Section II.

Of suing out the Writs or Process.

The affidavit of the debt, or cause of action having been made pursuant to the statute 12 G. 1. c. 29. as above directed, the next thing to be done is, to sue out the

Of suing out the Process.

What is the proper process or writ whereon defendant is to be arrested.

proper writ or process whereon the defendant may be arrested. If the action be brought in the *King's Bench*, and defendant live in *Middlesex*, the process is the *Bill of Middlesex*; if in any other county, a *Latitat*; and if the suit be in Common Pleas, it is a *Capias*; which writs differ from the writs used in unbailable actions as before-mentioned in this respect only, that in these bailable writs, by the statute 13 Car. 2. s. 2. c. 2. the cause of action must be particularly expressed; which is done by inserting the clause of *ac etiam** agreeable to the nature of the case; and as defendant is to be *arrested* upon the above writs, instead of being served with process, it is necessary also to get the proper *warrant* thereon at the respective sheriffs offices, in order to authorise such arrests. The mode of suing out such process or writs is as follows:

How to sue out process.

Get a warrant to prosecute, upon a 2 s. 6 d. *stamp, to be filed with the proper officer who signs the writ, agreeable to statute* 25 G. 3. c. 80. *They may be bought either of the officer, or at the stationers. For the form of which, see ante, ch.* 1. *pag.* 20.

Then if the action be in

B. R. Bill of Middlesex. C. B. Capias.

B. R.	*C. B.*
Make a præcipe in the following form, provided you sue by bill of Middlesex.	*Make a præcipe thus:*
Middlesex, ss. *Bill for A. B. against C. D. case for* 50 l. *upon promises (or as the case may be) returnable on Saturday next after the morrow of All Souls. Oath for* 25 l.	Middlesex to wit. *Capias A. B. against C. D. late of Westminster in the said county, yeoman, trespass at Westminster, debt for* 50 l. *returnable on the morrow of All Souls. Oath for* 25 l.
T. S. attorney.	*T. S. attorney.*
Nov. 1, 1797.	*Nov.* 1, 1797.
Get a blank bill (3 s. 6 d. *stamp), fill it up, carry the præcipe, bill, affidavit, and memorandum of warrant to the Bill of Middlesex office, and the officer will sign the bill; pay in term* 6 d.; *in vacation* 10 d.; *it is not to be sealed. Indorse the attorney's name and place of abode,*	*If the capias is sent into any other county, to wit, Cambridgeshire, lay the trespass at Cambridge, or any other town.* *Then get a blank writ* (4 s. 6 d. *stamp), fill it up, take præcipe, writ, affidavit, and memorandum of warrant to the proper filazer for the county; if the*

* For the different forms of bailable writs, with the ac etiam, see ch. 3. sec. 1., and the notes there.

Of ſuing out the Proceſs.

abode, and ſum ſworn to, and the day it is ſued out, on the back. Then get a (a) *warrant thereon at the ſheriff's office, for which pay* 4d. *If ſheriff cannot arreſt defendant before the return thereof, ſue out an* alias, *after that a* pluries; *ſigning each in term or vacation* 2d. *If defendant lives in any liberty within the county of Middleſex, as in Weſtminſter, ſue out a* non-omittas *bill of Middleſex, for which pay as for a common bill, and the ſheriff will thereupon grant his mandate to the high bailiff of Weſtminſter, who will make a warrant to his officer to arreſt defendant. If the defendant cannot be found in Middleſex, and is to be met with elſewhere, get an office-copy of the affidavit at the Bill of Middleſex office, which will ſave a new one being made; pay for ſame* 1s. *and* 1s. 7d. *for the ſtamp; take it to the ſigner of the writs in the King's Bench office, and ſue out a latitat thereon.*

If a warrant to proſecute has been once filed, there needs no other; but add that to the præcipe thus:

"Bill of Middleſex, ſued out —— day of ——."

Latitat. *Make a præcipe, ſame as for bill of Middleſex, only ſay,* latitat *inſtead of* bill; *get a blank writ (ſtamp); fill it up, carry the præcipe, latitat, affidavit, and memorandum of warrant to the K. B. office to be ſigned; pay for ſigning* 2s. 6d.; *then to the ſeal office, Inner Temple-lane, to be ſealed, for which pay* 7d.

If the affidavit has not been ſworn before, let your client ſwear it; then pay for the oath 1s.; *ſigning capias* 2s. 2d. (i. e. 1s. 2d. *for ſigning, and* 1s. *for original); the filazer will ſign it; get it ſealed at the ſeal office; pay* 7d. *then get a* (a) *warrant directed to your officer, at the proper ſheriff's office; pay* 4d.

B. R. Aljas and pluries bill.

Non-omittas bill.

If not executed before the return, ſue out a capias by continuance, *which is preciſely the ſame as the firſt capias; only in the præcipe to the filazer ſay, cap. per continuance, for which the filazer charges* 10d. *ſigning;* 7d. *ſealing.*

C. B. Capias by continuance.

Put the date of your firſt capias on the præcipe.

C. B.

If defendant live in any liberty, ſue out a non-omittas capias to empower the ſheriff to enter therein

pay ſigning 8s. 6d.; *ſealing* 1s. 2d.

Non-omittas capias.

It was formerly held, that plaintiff loſt his bail if he declared in any other county than that in which the capias iſſued; ſo that if defendant did not live in the county where plaintiff meant to lay his venue, *or could not be found in the county where the* capias *iſſued, plaintiff, in order to arreſt him in another county, was obliged to iſſue a* teſtatum capias, *grounded upon the ſuppoſition that a capias had been before ſued out, and returned non eſt inventus, but which in fact ſeldom was ſued out; wherein it was* teſtified *that the defendant lurked and wandered in the bailiwick of the ſheriff to which the teſtatum was to be directed;*

Teſtatum capias out of uſe.

B. R. Latitat.

(a) For obſervations on the warrant, ſee the next ſection of this chapter.

Of ſuing out the Proceſs.

B. R. Alias and pluries capias.

If defendant is to be arreſted in London, go to one of the compters, get a warrant thereon, pay 4d.; *if elſewhere, go to the proper ſheriff's office; for warrant in Surry, Eſſex,* or *Kent, pay* 6d.; *in any other county,* 2s. 6d. *indorſe the attorney's name, ſum ſworn to, and the day the writ iſſued.*

If latitat be not executed before the return thereof, ſue out an alias, *(called an* alias capias, *the teſtatum part being left out,) and after that a* pluries; *pay nothing for ſigning either; for ſealing* 7d.; *make a præcipe as before, only ſay,* alias *or* pluries capias, *inſtead of* "latitat," *and put in ſuch præcipe the day the firſt writ iſſued.*

The pluries writ may be continued from term to term until defendant be arreſted, unleſs plaintiff *lies by* for four terms, in which caſe a new latitat muſt be had.

Non-omittas. *If defendant live within a liberty, ſue out a* non-omittas. *If a latitat has been ſued out before, pay nothing for ſigning and ſealing; but if not, and it be ſued out in the firſt inſtance,* 2s. 6d. *ſigning, and* 1s. 2d. *ſealing.*

If the defendant live in a county palatine, viz. Cheſter, Lancaſter, or Durham, or any of the cinque ports, viz. Haſtings, Romney, Hithe, Dover, or Sandwich, then the latitat is to be directed accordingly.

directed; the ſame as a latitat in the K. B.

But now by a rule, Hilary, 22 G. 3. *the teſtatum writ is rendered uſeleſs; whereby "it is "ordered by this court, that "where an arreſt ſhall be by "virtue of a capias ad reſpon-"dendum in any county, and bail "ſhall be put in thereupon, and "the plaintiff ſhall think proper "afterwards to declare in a "different county, it ſhall not be "deemed a waiver of bail, but "the recognizance of the bail "ſhall be as effectual for the be-"nefit of the plaintiff, and he "may proceed thereon againſt "the bail in the ſame manner as "if the plaintiff had declared "againſt the defendant in the "ſame county in which the bail "was put in.*

So that now if the defendant cannot be found in the county where the firſt capias iſſued, the plaintiff's attorney, on taking an office copy of the affidavit marked by the filazer for the county where the firſt writ iſſued, may make out a capias (as before) into another county; pay 1s. *for the copy of the affidavit, ſtamp and paper* 1s. 7d., *ſigning capias with the new filazer* 2s. 2d. *ſeal* 7d. *without having any return of the firſt capias.*

N. B. The day when the firſt writ iſſued, and the county, ſhould be marked on the præcipe. Imp. C. B. 14.

If defendant live in a county palatine or cinque ports, the writ, in that caſe, may now be a capias *inſtead of a teſtatum capias as formerly, and the debt muſt be* 20l., *but the capias muſt be directed ſpecially.*

By

Of ſuing out the Proceſs.

By ſtatute 5 & 6 W. & M. c. 21. ſ. 4., and 9 & 10 W. 3. c. 25. ſ. 42., the officer who ſhall ſign any writ or proceſs to arreſt any perſon or perſons before judgment ſhall, at the ſigning thereof, ſet down upon ſuch writ or proceſs, the day and year of his ſigning the ſame. Officer muſt ſet down the day and year of ſigning writs,

And by a late rule of K. B. the cuſtos brevium muſt mark the writs numerically as they are received by him. 3 D. & E. 787. and cuſtos brevium mark them.

For further obſervations on the mode of ſuing out the proceſs, and its nature, extent, and operation, ſee *ante*, ch. 3.

But it may be remarked, that in bailable actions the party ſhould be more particularly cautious that his writ whereon he arreſts the defendant, is in every reſpect regular; becauſe if it be materially otherwiſe, as if a perſon be arreſted on a capias ad reſp. where one term intervenes between the teſte and return, and therefore the writ be void, not only the proceedings would be null, but the party might maintain his action againſt the original plaintiff for falſe impriſonment; nor could he juſtify under ſuch void proceſs. *Parſons* v. *Lloyd*, 3 Wil. 344. If void proceſs be ſued out, action will lie for falſe impriſonment.

Section III.

Of the Warrant and Arreſt.

(A) The Nature of the Warrant, and its Requiſites.

(B) How an Arreſt is to be made.

(C) By whom, and when to be made.

(D) Of particular Times and Places when and where the Party is privileged from Arreſt.

(E) Of the Sheriff's Fees upon an Arreſt.

(F) Of the Defendant being reſcued after Arreſt.

(A) The Nature of the Warrant, and its Requiſites. (A)

The ſheriff being the immediate officer to the King's courts, to him all writs and proceſſes are generally directed, who is ſworn to execute the ſame without favour, dread, or corruption. Dal. Sh. 96. Plow. 74. All writs directed to the ſheriff.

Of the Warrant and Arreſt.

But he not executing them himſelf, a warrant to his bailiff is made out.

When, therefore, a writ has been regularly ſued out, and directed to the ſheriff of the proper county, that alone would be a ſufficient commandment of the court whence it iſſued to juſtify the arreſt of the defendant, provided the ſheriff himſelf was to make ſuch arreſt; but as the ſheriff never executes ſuch writs himſelf, but has inferior officers under him for that purpoſe, the uſual way is, for the writ to be delivered to his immediate deputy or under ſheriff, who makes out his warrant to his bailiff or officer for the execution of ſuch writ.

How to be made.

This warrant muſt be made agreeable to the nature of the writ, containing the ſubſtance thereof, and be in the high ſheriff's name, under the ſeal of office. When ſo made, it is given to the attorney in the cauſe ſuing out the writ, who delivers it to the ſheriff's bailiff or officer whom he uſually employs in that county, and it operates as an authority to ſuch officer to make the arreſt.

How directed.

The warrant may be ſpecially directed to a private perſon.

Muſt not be a blank warrant.

But it muſt not be a blank warrant to be afterwards filled up by the attorney, as ſuch a one would be void, and the party arreſted thereon diſcharged. *Burſlem* v. *Fern*, 2. Wil. 47.

So if the warrant be directed to A. B. one of the ſheriff's bailiffs, and after it is ſealed C. D. executes it, and gets his name inſerted; or if a blank be left for the name, and C. D. puts his name in, and arreſts defendant, it is a void arreſt; and on motion party will be diſcharged. Mich. T. 1794.

Muſt be had before the arreſt.

The warrant muſt be had *before the arreſt*. For if an officer arreſt a perſon before he hath a warrant, though he may afterwards procure one, or though one may come to him to arreſt the party for the ſame cauſe; yet ſuch arreſt would be wrongful, and the party grieved may have his action of falſe impriſonment. 4 Bac. Abr. 452.

Muſt not be made out before the ſheriff has the writ.

The warrant muſt not be made out by any high ſheriff, under ſheriff, their deputies or agents, *before they have in their cuſtody the writ* upon which ſuch warrant ought to iſſue, on forfeiture of 10l. Stat. 6 G. 1. c. 21. ſ. 53.

Though formerly otherwiſe.

Previous to this ſtatute, if a writ was in fact ſued out, though the ſheriff had made his warrant before the writ came to his hand, it was held well. *Jones* v. *Green*, 2 Lev. 19. S. C. 1 Saund. 298.; but it is now otherwiſe.

Muſt be dated as the writ.

The warrant muſt have the ſame day and year ſet down thereon as ſhall be ſet down upon the writ itſelf, under forfeiture of 10l., to be paid by the perſons who ſhall

ſhall fill up or deliver out ſuch warrant. Stat. 6 G. 1. c. 21. ſ. 24.

Muſt have the attorney's name thereon.

The warrant muſt, before the ſervice or execution thereof, be ſubſcribed or indorſed with the name of the attorney by whom the writ was ſued forth. Stat. 2 G. 2. c. 23. ſ. 22.

But not void for want thereof, if it be on the writ.

But the want of ſuch ſubſcription or indorſement on the warrant ſhall not vitiate the writ, but ſuch writ ſhall be valid and effectual, provided the *writ* itſelf whereon ſuch warrant is made out, be regularly ſubſcribed or indorſed, according to the 2 G. 2. But the ſheriff or officer making out the warrant, and not ſubſcribing or indorſing the name of ſuch attorney thereon, ſhall forfeit 5l., to be aſſeſſed as a fine by the court out of which ſuch writ ſhall iſſue; one moiety to his majeſty, and the other to the perſon aggrieved. Stat. 12 G. 2. c. 13. ſ. 4.

Though ſheriff liable to a fine.

Practice formerly otherwiſe.

Before this ſtatute of 12 G. 2. it was held, that although no attorney's name were to the *writ*, yet the proceſs was not void; the attorney might be puniſhed for the neglect, but the party was not to ſuffer. *Fowkes* v. *Jay*, P. R. 440. *Blackall* v. *Gould*, Ib. 441. But now ſuch indorſement muſt be to the *writ*, though not neceſſarily to the *warrant*. *Grice* v. *Allen*, P. R. 442.

(B) How an Arreſt is to be made. (B)

An arreſt, what.

An arreſt muſt be by corporal ſeizing, or touching the defendant's body. No words will make an arreſt.

Bailiff muſt touch defendant.

A bailiff ſeeing the defendant at a little diſtance, told him, he arreſted him; upon which the defendant, having a fork in his hand, kept the bailiff off from touching him, and retreated into his houſe. An attachment was moved for, on the ground of a contempt; but was refuſed, becauſe there was no arreſt, nor reſcue, and the bailiff was left to his action for the aſſault. *Genner* v. *Sparks*, 6 Mod. 173.

What touching will do.

But any touching of the defendant's body is ſufficient, though the bailiff only lays hold of his hand as he holds it out of the window. *Anon.* 1 Vent. 306.

In what caſes doors may be broke open.

After the bailiff has once touched the defendant, but not till then, he may juſtify breaking open the houſe in which he is, to take him. *Anon.* 6 Mod. 105., where a variety of caſes are cited.

But

Of the Warrant and Arreſt.

Inner doors no protection.

But even before the touching, if the bailiff gets peaceable entrance at the *outer* door of the houſe, he may break open an *inner* door to make the arreſt, though it be the door of a lodger; for inner doors have no protection, but only outer doors and windows, which are intended for the ſecurity of the houſe. *Lee* v. *Ganſel*, Cow. 1.

(C) (C) By whom, and when the Arreſt is to be made.

In common caſes.

The bailiffs, or officers appointed by the reſpective ſheriffs, are, for the moſt part, the perſons who make arreſts; but the warrant may be directed to a private perſon, who may act as a ſpecial bailiff for that purpoſe.

In franchiſes, and what meant thereby.

By the 5 G. 2. in franchiſes and peculiar juriſdictions, the proper officers there muſt make the arreſt; but by franchiſes are merely meant particular *liberties*. Counties palatine are not included in that term. *Griffin* v. *Alcock*, 2 Barn. 400.

In counties palatine.

In liberties.

In counties palatine the arreſt is made by the ſheriff, or his bailiff, by virtue of a mandate from the officer to whom the writ is directed. In particular liberties it is made by the bailiff of ſuch liberty, by virtue of a mandate from the ſheriff.

Sheriff may enter liberties with non-omittas.

But this is only where no *non-omittas* is ſued out; for under that writ the ſheriff himſelf may enter the liberty, and make the arreſt. If there be two liberties in a county, and the ſheriff makes his mandate to the bailiff of one of them, who returns him no anſwer, he may, upon a *non-omittas*, arreſt the defendant in either liberty. 5 Co. 92. Gilb. C. B. 29.

The conſequence if he has none.

But ſhould a ſheriff make an arreſt in any liberty without a *non-omittas* being ſued out, the conſequence would only be, that the ſheriff would be ſubject to an action; for the arreſt would ſtand good. Gilb. C. B. 27.

It was formerly doubted, how far any follower or aſſiſtant of a bailiff could make the arreſt, eſpecially unleſs in the actual preſence of the bailiff himſelf.

How far it is neceſſary for the bailiff to be concerned in the arreſt.

But it ſeems now ſettled, that the bailiff need not be the hand that arreſts, nor need he be actually preſent, or even in ſight, nor within any preciſe diſtance of the perſon arreſted; but the arreſt muſt be made by the authority of the bailiff, who ought to be *quodam modo*, preſent at the time. *Blatch* v. *Archer*, Cow. 65. B. N. P. 63.

An

Of the Warrant and Arreſt.

An arreſt cannot be made *after* the return day of the writ or proceſs; for the writ has then expired. 1 Sid. 229. Moore, 701. Arreſt muſt not be after return day.

Writs returnable on the Sunday muſt be executed the lateſt on the Saturday before. If defendant be arreſted on the Monday, and detained only a ſhort time till writ renewed, the arreſt is void, and detention illegal. *Loveridge* v. *Plaiſtow*, 6 D. & E. 29.

(D) Of particular Times and Places when and where the Defendant is privileged from Arreſt. (D)

If a defendant be a party to, or a witneſs in any cauſe, and is either going to, or attending upon, or returning from the court, he is, during that time, privileged from arreſt, which is commonly called, being privileged *eundo, morando, et redeundo.* Parties to, and witneſſes in cauſes, privileged.

Nor have the courts ever been inclined to reſtrict this privilege; on the contrary, every reaſonable indulgence has been allowed to perſons claiming it. Courts have favoured this privilege.

Thus it has been held, that the protection was not forfeited, becauſe a man did not go home the direct road, but was arreſted forty miles out of the way; ſince it might be, he went to buy a horſe, victuals, or other neceſſaries for his journey. Neither is the law ſo ſtrict in point of *time* as to require the party to ſet out immediately after the trial is over. Thus in the caſe of *Hatch* v. *Bliſſet*, Gilb. Caſ. 308. the trial was at Wincheſter aſſizes, and was on *Friday* in the afternoon; but the party ſtaid until after dinner on the Saturday, and in the evening, at ſeven, was arreſted going home to Portſmouth, which is twenty miles; and the court held, ſhe ought to be diſcharged, her protection not being expired, and a little deviation or loitering would not alter it. *Holiday* v. *Pitt*, Str. 985.

To the ſame effect is the caſe of *Lightfoot* v. *Cameron*, 2 Blac. Rep. 1113., where, after the riſing of the court, defendant went to dine with ſome friends at the King's Arms Tavern in New Palace-yard, where he was arreſted, but was diſcharged on the ground of his privilege *redeundo.*

It is ſaid, that this privilege extends to a party, or witneſs, who attends in inferior courts of record, as in the courts of London, or at the ſeſſions. Com. Dig. Privilege, A.; but Q. ſee the caſes there cited. Whether it extends to inferior courts.

It

It does not, however, protect a perſon while attending commiſſioners of bankrupt to prove a debt. *Kinder* v. *Williams*, 4 D. & E. 377.

Clergymen how privileged.

Clergymen (by particular ſtatutes, 50 Edw. 3. c. 5. & 1 Ric. 2. c. 16.) whilſt they are performing divine ſervice, and not merely ſtaying in the church with a fraudulent deſign, are privileged from arreſts.

What places privileged.

There are alſo certain *places* within which a perſon is privileged from arreſt; ſuch is every man's own houſe, if the outer door be ſhut; the King's court of juſtice, if the court be ſitting; and the (a) verge of the royal palace, except it be on proceſs out of the palace court; nor can an arreſt be made in the king's preſence. 3 Blac. Com. 289.

An arreſt within the King's palace by an officer of the palace court, of a perſon not of the houſehold, againſt whom a writ has iſſued out of that court, is good, though no leave to make the arreſt has been obtained from the Board of Green Cloth, and no indictment will lie againſt the officer making it. *Rex* v. *Stobbs*. 3 D. & E. 735.

(E) (E) Of the Sheriff's Fees and Conduct towards Defendant upon an Arreſt.

The ſtatute 23 H. 6. cap. 10. enacts, "That for an "arreſt, or attachment, the ſheriff ſhall have 20d. and "the bailiff who makes the arreſt 4d.; and that the "ſheriff or bailiff who doth contrary, ſhall pay treble "damages to the party grieved, and forfeit the ſum of "40l.; one moiety to the king, and the other to the "party that will ſue; and that the juſtices of aſſize in "their ſeſſions, juſtices of the one bench and of the "other, and juſtices of peace in their county, may determine the ſaid offences."

For the conduct of the ſheriff or his officer towards the defendant immediately after the arreſt, to what place he ſhould be taken and the like, ſee 32 Geo. 2. ch. 28.

In the caſe of *Newnham* v. *Lunn*, 5 Mod. 225. an action of debt was brought againſt a bailiff on the ſtatute 23 H. 6. ch. 10. for taking 5s. 6d. for an arreſt, and plaintiff recovered.

(a) The verge of the palace of Weſtminſter extends by ſtat. 28 Hen. 8. c. 12. from Charing-Croſs to Weſtminſter-Hall. 3 Blac. Com. 289.

In

Of the Warrant and Arreſt.

In general now, the maſter allows 10s. 6d. for an arreſt in town, and 1l. 1s. in the country, and 1s. per mile for taking defendant to gaol if at any diſtance.

In the caſe of *Boldero* and *others* v. *Moſſe* and *others*, two of the defendants having been arreſted for 4231. each, by virtue of a latitat directed to the chamberlain of the county palatine of Lancaſter, a judge's order was obtained for ſtaying proceedings upon payment of debt and coſts. In the bill offered for taxation, the agent in the country made a charge of 4l. paid to the ſheriff's officer for the arreſts, being at the rate of 2l. each, which the maſter refuſed to allow, and ſtruck off the overplus above the uſual charge made in other counties, which is in general a guinea. Dallas now moved, that the maſter might review his taxation upon affidavits, ſtating, that the charge made was ſuch as was directed by a table of fees ſettled by the juſtices of the county in ſeſſions in 1767, and which had been acted under ever ſince; the ſeſſions having made the ſame under an idea, that they were authoriſed ſo to do by 32 G. 2. c. 28. The court, however, denied the motion, ſaying, that the juſtices in ſeſſions had no authority to fix fees for the court of B. R., and that if bailiffs ſhould in future exact more than the uſual ſum, they might be guilty of extortion in taking more than was allowed, *colore officii*. 3 D. & E. 417.

(F) Of the Defendant being reſcued after the Arreſt. (F)

If the defendant, after he has been legally arreſted, be reſcued by force from the officer *before* he is carried to priſon, ſuch reſcue is an excuſe to the ſheriff, and he may make a return thereof when called upon for the writ.

Reſcue, an excuſe to the officer, when.

A reſcue is deemed an offence of ſuch a nature, that whenever the ſheriff makes a return of any one having been guilty thereof, the court will grant an attachment againſt ſuch perſon in the firſt inſtance. *Anon.* Say. 121.

How reſcuer puniſhable, if returned ſuch by ſheriff.

And the court will proceed to puniſh him without going through the ordinary courſe of his being examined upon interrogatories, as no denial by him upon ſuch examination could excuſe him after having been returned

By attachment in a ſummary way.

guilty of a reſcue by the ſheriff, for the return is not traverſable. *Rex* v. *Elkins*, Burr. 2129.

For ſuch a return by the ſheriff, is of itſelf a conviction of a reſcue, and proceſs immediately iſſues from the crown-office againſt the reſcuer as upon a conviction; and if it is a falſe return, the remedy is by action againſt the ſheriff for a falſe return. The *King* v. *Pember*, Caſ. temp. Hard. 112.

But the court will permit the defendant, in mitigation of the fine, to ſhew, that in fact there was no legal arreſt, it being in the night, and the like. *Rex* v. *Minify* and *others*, Str. 642.

There was anciently a ſettled fine for reſcuers; namely, 4 nobles; but the courts now fine according to their diſcretion, governed by the circumſtances of the caſe. In the caſe of *Rex* v. *Minify*, they only fined the offender 1*s*; and in the caſe of *Elkins*, 5*l*.

No attachment without the reſcue is returned.

But the courts will not grant an attachment for a reſcue, without a return thereof by the ſheriff; a mere affidavit of the fact will not be ſufficient; and this, whether it be a reſcue on meſne proceſs or in execution. *Sheather* v. *Holt*, Str. 531. *Anon.* Salk. 586.

How attachment returnable.

Attachments for a reſcue muſt be made returnable at a general return, though the original proceſs was at a day certain. *Dominus* v. *Wilkins*, Str. 624.

What other remedies.

Beſides this mode of proceeding by attachment, there are other remedies at the election of the party; namely, by action on the caſe or indictment. Com. Dig. tit. Reſcous.

When a return of reſcue is not good.

But it is to be obſerved, that the return of a reſcue is only good where the defendant has been reſcued before he was committed to priſon; for afterwards the ſheriff is to take care of him at his riſk; and even if he be ordered to be removed, or to be brought up to any court by *habeas corpus*, the ſheriff muſt at his peril guard him; and ſhould any danger be apprehended, he muſt take the *poſſe comitatûs* to ſecure him; for in caſe of any reſcue by any perſons, except common enemies, the ſheriff will be reſponſible; nor will ſuch reſcue be any excuſe, but an action may even be brought againſt him for a *voluntary* eſcape. *O'Neil* v. *Marſon*, Bur. 2812.

Section IV.

Of Bail to the Sheriff, or Bail below.

For an account of the origin of bail in civil caſes, and the alterations which in this reſpect have from time to time been made in the common law by different ſtatutes, we muſt refer the reader to the introduction of this work, confining ourſelves at preſent to what more immediately concerns the modern practice.

(A) The general Meaning of this Bail, and how given to the Sheriff.

(B) The Statute 23 H. 6. conſidered, and herein,

(B. 1) *The Reaſon and Nature of the Statute.*

(B. 2) *To what Perſons and Caſes it extends.*

(B. 3) *How far the Sheriff is compellable to take Bail; and of the Number and Qualification of the Sureties.*

(B. 4) *Of the Nature of the Security, and how it muſt be made; with the Form of the Condition of the Bond.*

(B. 5) *What Variations in point of Form will vitiate the Bond.*

(B. 6) *Of the Operation of the Bail Bond, and how far the Plaintiff in the Action is affected thereby.*

(B. 7) *Of proceeding againſt the Sheriff for acting contrary to the Statute.*

(A) The general Meaning of Bail below, and how given to the Sheriff. (A)

When the defendant is regularly arreſted, he muſt either go to a priſon for ſafe cuſtody, or enter into a bond, called a bail bond, with ſureties, to be approved of by the ſheriff, conditioned for his appearance in court at the return of the writ. It is called *bail* (from the French word *bailer*, to deliver), becauſe the defendant is bailed, or delivered to his ſureties upon their giving ſecurity for his appearance, and is ſuppoſed to continue in their friendly cuſtody, inſtead of going to gaol; and it is further denominated bail *below*, in oppoſition to that bail which is afterwards put in when the defendant does appear upon the

Why called bail.

Of the Bail Bond.

the return of the writ, of which we ſhall preſently treat, and which is called bail *above*.

Sheriff may let defendant go without bail, at his own riſk.

The ſheriff, if he pleaſes, may let the defendant go without any ſecurity, but that is at his own peril; for having once taken him, he is bound to keep him ſafely ſo as to be forthcoming in court; otherwiſe an action lies againſt him for an eſcape.

So an action lies if he did not arreſt him when he had him in view, and might have arreſted him.

If forthcoming at return of writ, it is ſufficient.

But if the ſheriff has him at the return of the writ, though after the arreſt he let him go at large, it is ſufficient. *Atkinſon* v. *Matteſon*, 2 D. and E. 177.

How bail is given to the ſheriff.

The method of giving bail to the ſheriff is, by entering into a bond or obligation with one or more ſureties, (*not fictitious perſons* as in the former caſe of *common* bail, but real, ſubſtantial, reſponſible bondſmen,) to inſure the defendant's *appearance* at the return of the writ, which obligation is called the bail bond, and is in the following form:

Form of bail bond.

Know all men by theſe preſents, that we, C. D. of, &c. E. F. of, &c. and G. H. of, &c. are held and firmly bound to , Eſq. ſheriff of the county of Middleſex, in the ſum of (double the ſum indorſed on the writ) of lawful money of Great Britain, to be paid to the ſaid ſheriff, or his attorney, executors, adminiſtrators, or aſſigns, for which payment, well and truly to be made, we bind ourſelves, and each of us for himſelf, in the whole, our and every of our heirs, executors, and adminiſtrators, firmly by theſe preſents, ſealed with our ſeals, and dated, &c.

The condition of this obligation is ſuch, that if the above bounden, C. D. do appear before (a) *our lord the king at Weſtminſter, on, &c. (if by bill, &c. a day* certain; *if by original, a* general *return day), to anſwer to A. B. in a plea of treſpaſs, and alſo to, &c. (here inſert the* ac etiam), *according to the cuſtom, &c. then this obligation to be void, otherwiſe to remain in full force and virtue.*

The bail bond is on a double ſixpenny ſtamp, and the ſum indorſed uſually written in the margin of the bond.

What ſum bail to be taken for.

By the ſtatute 12 G. 1. c. 29. the ſheriff ſhall take bail for no other ſum than ſuch as is ſworn to by the plaintiff, and indorſed on the back of the writ.

(a) If in C. B. "Before the juſtices of our lord the king of the Bench."

But

Of the Bail Bond.

But the general practice is to take it in double the sum sworn to; and even if it be more, it shall not be bad, provided it appears to be through mistake, and without any intent to oppress the defendant. *Norden* v. *Horsley*, 2 Wil. 69.

Generally double the sum sworn to.

(B) The Statute of 23 H. 6. considered. (B)

The chief statute for the regulation of bail upon the arrest on mesne process, is the 23 H. 6. c. 9., which enacts as follows:

S. 5. *That the sheriffs, and all other officers and ministers therein mentioned, shall let out of prison all manner of persons by them or any of them arrested, or being in their custody by force of any writ, bill, or warrant in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail or mainprize, to keep their days in such place as the said writs, bills, or warrants, shall require.*

S. 7. *And that no sheriff, nor any of the officers or ministers aforesaid, shall take or cause to be taken, or make any obligation for any cause aforesaid, or* by colour of their office, *but* only to themselves, *of any person, nor by any person which shall be in their ward, by the course of the law, but* by the name of their office, and upon condition written, that the said prisoners shall appear at the day contained in the said writ, bill, or warrant, and in such places as the said writs, bills, or warrants shall require.

S. 8. *And if any of the said sheriffs, or other officers or ministers aforesaid, take any obligation* in other form by colour of their offices, that it shall be void.

S. 11. *And that all sheriffs, &c. which act contrary thereto, shall lose to the party grieved treble damages, and shall forfeit the sum of* 40*l. for every offence, one half to the king, the other to the informer.*

S. 14. *And if the said sheriffs return upon any person* cepi corpus, *or* reddidit se, *that they shall be chargeable, to have the bodies of the said persons at the days of the returns of the writs, bills, or warrants, in such form as they were before the making of this act.*

(B. 1) *The Reason and Nature of the Statute.* (B. 1)

By the common law, the sheriff was not obliged to let persons to bail, but might insist upon keeping them in custody till the return of the process, unless they were

At common law sheriffs not obliged to let to bail.

Of Bail to the Sheriff, or Bail below.

replevied by the writ *de homine replegiando*. Hence the greateſt hardſhips were endured, not only from the confinement itſelf, but eſpecially from the ſcandalous extortions from defendants by the ſheriffs, or their officers, in order to purchaſe their eaſe and favour in, or their temporary enlargement from priſon. It was to remedy theſe grievances that this ſtatute of Hen. 6. was made.

Great oppreſſions theretrom; to remedy which this ſtatute was paſſed.

Its intent and operation.

It was not paſſed to give the ſheriff any *new* power, or to enable him to take bail in caſes where he could not bail before; but in order to compel him to take bail in thoſe caſes where he might have taken bail, and refuſed ſo to do. *Bengough* v. *Roſſiter*, 4 D. & E. 508.

This ſtatute is a public ſtatute;

It was formerly the better opinion, ſo far as the majority of caſes go, that this ſtatute of H. 6. was a *private* ſtatute, and ought to the pleaded; but it ſeems now otherwiſe: and in the caſe of *Samuel* v. *Evans*, 2 D. & E. 575. all the judges agreed, that it was unqueſtionably a general and *public* ſtatute, of which the courts are to take notice without pleading. If, therefore, it appears in any manner upon the face of the record, that the bond was given under the ſtatute to a ſheriff *colore officii*, and is not a bond according to the ſtatute, even after verdict judgment ſhall not be arreſted, though the ſtatute was never pleaded, but only the general iſſue *non eſt factum*. Defendant may bring it upon the record if he pleaſe, by craving *oyer* of the bond, and demurring; but without that, in an action by the aſſignee of the bail bond it is ſufficiently notorious. *Vide* the above caſe, as all the other caſes are there cited and animadverted upon. As it is a public ſtatute, if the defendant unneceſſarily ſets it out in his plea, the miſrecital of a letter will be fatal. *Boyce* v. *Whitaker*, Do. 96.

therefore need not be ſet out in pleading.

(B. 2)

(B. 2) *To what Perſons and Caſes it extends.*

The ſtatute only ſpeaks of, and extends to perſons arreſted on meſne proceſs.

Only to arreſts on meſne proceſs, not in execution.

The caſes, therefore, of ſheriffs taking ſecurities, &c. by way of indemnifying them againſt any irregularity reſpecting executions of *fi. fac.* or perſons in execution on *ca. ſa.* do not affect any queſtion reſpecting this ſtatute. *Rogers* v. *Reeves*, 1 D. & E. 421.

Though by one caſe it ſeems otherwiſe.

But in the caſe of *Bracebridge* v. *Vaughan*, Cro. Eliz. 66. it was held, that where the marſhal of the King's Bench taketh

Of the Bail Bond.

taketh bond for the eaſement or delivery of a priſoner in execution, it is void by the ſtatute of 23 H. 6. although he be not named in the ſtatute; for divers perſons are intended in the purview of the ſtatute, which are not mentioned therein.

It is not actually neceſſary for the party to be arreſted in order to bring the bond within the ſtatute; for the bail bond may be given without the party having been expoſed to an arreſt; and in an action by an aſſignee on ſuch bond, the arreſt need not be ſtated, for it is not traverſable. *Haley* v. *Fitzgerald*, Str. 643.

The bond may be taken without any actual arreſt.

The arreſt not being traverſable.

But the bail bond muſt be taken by the ſheriff before the *return* of the writ, or will be void. *Pullein* v. *Benſon*, 1 Ray. 352.

This ſtatute refers only to proceſs in courts of common law. *Studd* v. *Acton*, 1 H. Black. 468.

It does not extend to courts of equity.

Not to any attachments out of a court of equity.

Ib.

Nor to any attachment for a contempt, Str. 479.; for ſheriff cannot take bail thereon.

Nor to attachments.

Nor to caſes of bail on *indictment* at the quarter ſeſſion. It may appear indeed, by the 5th ſection of the ſtatute, as if ſheriffs were authoriſed to take a *bond* for the appearance of perſons arreſted by them, under proceſs iſſuing upon an indictment; and if that ſtatute ſtood alone, they might perhaps, to a certain degree, have exerciſed that power; but even if ſuch a power exiſted, it was afterwards taken away by the ſubſequent ſtatute of 1 Edw. 4. c. 2. which paſſed in the next reign; and it is now ſettled, that it is the ſheriff's duty in ſuch caſe not to take a *bond* under this ſtatute, but only a *recognizance* in the uſual way. *Bengough* and *another* v. *Roſſiter*, 4 D. & E. 505.

Nor to indictments.

This ſtatute extends only to ſuch bonds, which any perſon in the ſheriff's *ward* makes to him. 10 Co. 100.

If a ſheriff, or gaoler, for the eaſe and enlargement of any who is in his ward, takes a *promiſe* to ſave him harmleſs, that, although the ſtatute ſpeaks only of an *obligation* with condition, is equally void, as being of equal miſchief. 10 Co. 101.

It extends to promiſes as well as bonds.

The ſtatute ſpeaks only of obligations given to the ſheriff, and does not extend to ſuch as are given to the party—plaintiff. 1 Term. Rep. 422.

But not to bonds given to the party.

If, after defendant is arreſted at the ſuit of plaintiff, a third perſon, together with him, gives a bond to plaintiff, with a condition, that if defendant ſhould give ſuch ſecu-

For the plaintiff may direct officer to take any agreement he pleaſes.

rity as the plaintiff ſhould approve of, for the payment of 90l. to him, or ſhould render his body to him at the return of the writ, then the obligation to be void, otherwiſe, &c. ſuch bond ſhall be good againſt the third perſon; becauſe, although if the ſheriff take a bond in another man's name to elude the ſtatute, ſuch bond is void; yet the plaintiff himſelf may give directions to the officer to take ſuch bond as this to himſelf, and the agreement of the plaintiff makes it good. 2 Mod. 314.

Nor to a bond given to plaintiff by a third perſon for the eaſe of defendant.

So if a capias be taken out againſt the defendant, and a third perſon gives the plaintiff a bond that the defendant ſhall pay the money, or render himſelf at the return of the writ, it is a good bond, and not within the ſtatute, becauſe it is not by the direction of the officer, but by the agreement of the plaintiff, and there is no law that makes the agreement of the parties void; and if the bond was not taken by ſuch agreement, it may be traverſed. 2 Mod. 305.

Nor to any undertaking between the attornies of plaintiff and defendant.

So all undertakings or agreements made between the attornies of defendants and plaintiffs ſhall be enforced by the court, even by the ſummary proceeding of attachment, they being officers of the court; becauſe when an application is made againſt an attorney on his undertaking, it is by the plaintiff againſt him, to compel a performance of a contract entered into to him, and on that ground it is valid. The rule of court, therefore, ſtands perfectly clear of the regulations of the act of parliament.

The diſtinction to be obſerved in ſuch caſes.

The diſtinction between the above cited caſes being, where the undertaking is to the plaintiff in the cauſe, and where it is made to the ſheriff; if the latter, the form of the ſtatute muſt be ſtrictly purſued. *Rogers* v. *Reeves*, 1 D. & E. 422.

(B. 3)

(B. 3) *How far the Sheriff is compellable to take Bail; and of the Number and Qualification of the Sureties.*

Sheriff obliged to take good bail if offered;

The ſheriff, or his officer, is now obliged to admit a man to bail, provided good and ſufficient ſureties be tendered, but not otherwiſe; and an action on the caſe will lie againſt him if he refuſes.

without any fee or reward.

And as it is his *duty* ſo to do, he muſt not take money for it; if he does, he will be liable to an attachment. And although he ſhould recover a verdict, upon a promiſe to pay him money if he would accept of the bail offered,

Of the Bail Bond.

offered, yet on error brought, judgment will be reverſed upon the ground of its being an illegal conſideration. *Stoteſbury* v. *Smith*, Bur. 927.

By the words of the ſtatute, "reaſonable ſureties of ſufficient perſons," (in the plural number,) it ſeems as if the ſtatute meant to preſcribe *two* ſureties, and that the bail bond would be void with a leſs number. But this clauſe is intended only for the benefit and ſecurity of the ſheriff, and is more for counſel and direction to him than for precept and reſtraint; as he is reſponſible for the appearance of the defendant after the arreſt, and as he is compellable to take bail according to this ſtatute, it is but juſt that he ſhould have reaſonable and good ſecurity for his indemnity; the ſtatute therefore *allows* him *two* ſufficient perſons as ſureties; and unleſs the defendant can find two bondſmen having ſufficient within the ſame county, the ſheriff is not obliged to let him to bail; but it does not compel him to take two: for if he chuſes to run the riſque, (it is at his peril ſo to do,) he may take *one* ſurety only, and the bail bond will not be void on that account. 10 Co. 101.

No actual neceſſity for two ſureties.

Sheriff if he pleaſes may take only one.

An action will not lie againſt the ſheriff for taking inſufficient bail; but if he hath not the defendant forthcoming to appear and anſwer the plaintiff, he may be amerced, provided the plaintiff has not accepted an aſſignment of the bail bond. Salk. 57. 6 Mod. 122.

No action againſt ſheriff for taking inſufficient bail.

(B. 4) *Of the Nature of the Security, how to be made, with the Form of the Condition of the Bond.* (B. 4)

The ſecurity given to the ſheriff muſt be a bond, the ſtatute having preſcribed that form of ſecurity, and declared that all others ſhall be void.

It muſt be a bond.

An agreement in writing, therefore, to put in good bail for a perſon arreſted on meſne proceſs, at the return of the writ, or ſurrender the body, or pay debt and coſts, made by a third perſon, with the bailiff of the ſheriff in conſideration of his diſcharging the party arreſted, was held void; for that was only a ſimple contract. *Rogers* v. *Reeves*, 1 D. & E. 418.

No agreement will do.

And this bond muſt be made in a peculiar mode, as directed by the act.

1ſt, The bond muſt be made to the ſheriff himſelf. 2dly, It muſt be made to him, *as ſuch*, by the name of his

How ſuch bond muſt be made.

Of Bail to the Sheriff, or Bail below.

office. 3dly, It must be only for the appearance of the party, and for no other purpose. Ib. & Cro. Eliz. 862.

1st, To the sheriff himself.

The bond must be made to the sheriff himself, and to no other person.

Not even to any bailiff.

Not even to their bailiffs; for the statute does not authorise sheriff's bailiffs to take obligations for the appearance of persons arrested. For though it mentions bailiffs, it only means bailiffs of franchises, and such officers as have the return of process; for where the process is directed to the sheriff, the indemnity must be to him. *Rogers* v. *Reeves*, 1 D. & E. 422.

Nor to any third person.

For although it be made to a third person, (by the nomination of the sheriff,) and upon such condition as the statute prescribes for the surety of the sheriff, it is void; because the act prescribes the bond to be made to the sheriff *himself*, and that is part of the essential form. 10 Co. 100.

2d, It must be made to him as sheriff.

It is not sufficient for it to be made to himself, but it must be made to him *as sheriff*. 1 T. R. 422.

It sufficiently appears, that a bond was taken by *the name of office*, when it is made payable *eidem vicecomiti & assignatis*. Str. 893.

Whenever it be taken *quatenus* sheriff, to let the obligor go at large, it is sufficient. 2 Keb. 108. 122. 1 Sid. 300.

3d, Condition must be for appearance of defendant.

The condition of the bond must be for the appearance of defendant on the *return of the writ*.

If the condition of the bond be not for the appearance of the defendant upon the very return day mentioned in the writ, it is void. Saun. 21.

Bail bond need not pursue the very words of the process.

But bail bonds need not pursue the very words of the process.

A special original was taken out returnable *coram domino rege ubicumque tunc fuerit in Anglia*, and the bail bond was without the words *ubicumque*, *&c.* and in an action upon it, it was objected, that by the statute of H. 6. (which was pleaded) the sheriff could take no bond but such as was to appear at the *place* mentioned in the writ, whereas this might be to compel an appearance out of England, if the king should happen to be so: but *per cur.* There are no set forms of words for these bonds; but if in substance they are to appear according to the design of the writ, it is sufficient. 2 Cro. 286. 2 Vent. 237. *Gardner* v. *Dudgate*, 2 Show. 51. 2 Lev. 180.

Of the Bail Bond.

Trin. 3 Geo. 2. *Philips* v. *Philips*, in *Scaccario* upon a *quo minus*, the bond was to appear in the office of pleas in the court of Exchequer at Weſtminſter, and that was held well enough, though the proceſs was to appear before the barons. We will underſtand, that by appearing before the king, is meant, before the king in his court, and not before the king in perſon. The plaintiff muſt have judgment. *Shuttleworth* v. *Pilkington*, Str. 1155. *King* v. *Pippett*, 1 D. & E. 240.

So where the writ was to appear before the lord the king at Weſtminſter, and the condition was to appear before the juſtices of the King's Bench at Weſtminſter, the bond was held good. 2 Lev. 180.

So where the condition varied from the writ, in not ſetting out the *ac etiam*, or the ſum mentioned therein, it was held immaterial. *Villiers* v. *Haſtings*, Cro. Jac. 286.

And where the proceedings were even by original, and the writ was on a plea of *treſpaſs on the caſe* on promiſes, and the condition of the bail bond in a plea of treſpaſs only, it was held immaterial, for the bail-bond need not diſcloſe the nature of the action, it is ſufficient if it ſets forth the parties and the time and place of appearance. *Owen* v. *Nail*, 6 D. & E. 703.

If a ſheriff takes one bail bond upon a debt by three jointly and ſeverally, it is not according to the ſtatute, being for a joint appearance to ſeveral actions. 6 Mod. 122.

(B. 5) *What Variation in point of Form will vitiate the Bond.* (B. 5)

By ſect. 8. it is ſaid, all bonds *in any other form* ſhall be void.

Now there are two kinds of forms, ff. forma *verbalis*, and forma *legalis*; the firſt ſtands upon the letters and ſyllables of the act; the laſt is forma eſſentialis, and ſtands upon the ſubſtance of the thing to be done, and upon the ſenſe of the ſtatute; it is only, therefore, variations in point of the forma *legalis*, or matter of ſubſtance, that ſhall vitiate the bond:

Muſt be a variation in matter of ſubſtance;

As, if the ſheriff takes a *ſingle* bond of one in his ward who was bailable, it is void: for this bond wants the eſſential form preſcribed by the ſtatute, for the condition preſcribed there is wanting. Ib.

as if without a condition,

Of Bail to the Sheriff, or Bail below.

or any addition to the condition.

So if the ſheriff adds to the condition, that he ſhall be kept without damage againſt the king and plaintiff, &c. that ſhall make the whole condition void. Ib.

So if the condition be, to be a true priſoner, or to pay for his meat and drink.

Or if the ſheriff adds any thing to the matter preſcribed by the ſtatute; as, to pay ſo much money for an horſe, &c. this addition makes the whole bond void, for it is taken in other form (touching the ſubſtance matter) than is preſcribed by the ſtatute. Ib. Inaſmuch as the condition ſhould be for the appearance of the party, and for no other purpoſe.

But mere verbal variation ſhall not hurt.

But variations merely in matters of forma *verbalis* ſhall not vitiate, as where the condition of the bond was for the defendant to appear *in perſon;* whereas the words of the ſtatute are, ſhall appear generally, without the words, in perſon, or, that he ſhall appear at the day, &c. *ad reſpondendum;* whereas the words *ad reſpondendum* are more than the ſtatute preſcribes: The bond ſhall not be void; becauſe, though there is a verbal, there is not a ſubſtantial difference; the *way* of appearance being in *perſon*, and the *purpoſe* thereof being *ad reſpondendum*. 10 Co. 101. *Kirkbridge* v. *Wilſon*, 2 Lev. 123. See alſo *Mildmay* v. *Caſe*, Sir T. Ray. 220. 3 Keb. 111. 164. 1 Vent. 233, and *ante* B. 4.

(B. 6) (B. 6) *Of the Operation of the Bail Bond, ſo far as it affects the Plaintiff in the Action.*

By the 14 ſec. of the ſtatute, it ſeems, that notwithſtanding ſuch bail bonds, the ſheriff ſhall be equally liable as before the ſtatute, to be called upon by plaintiff to bring in the body, or on default thereof, to be amerced. So that although the ſheriff takes a bail bond on this ſtatute, yet it is at his peril, and only for his own ſecurity; plaintiff ſhall not thereby be concluded, but may ſtill compel him to bring into court the body of defendant, by putting in good ſpecial bail. *Wolfe* v. *Collingwood*, Wil. 262.

(B. 7) (B. 7) *Of Proceedings againſt the Sheriff for acting contrary to the Statutes.*

If any one, aggrieved by the ſheriff's acting contrary to this ſtatute, wiſhes to ſue on the act, he muſt have his

his action on the caſe againſt the ſheriff for his damages, which muſt be aſſeſſed by a jury, and then plaintiff may enter up judgment for *treble* that ſum, according to this act.

He may alſo have another action for the penalty, for they are quite diſtinct matters, and recovered by different kinds of action, viz. caſe and debt qui tam.

A common informer may proſecute for the latter in *debt;* but the party *aggrieved* only can maintain an action on the caſe.

Section V.

Of Bail to the Action, or Bail above.

The defendant having put in bail to the ſheriff, by entering into a bail bond, as before deſcribed, the next ſtep to be taken is, his *appearance*, according to the condition of the bond, and the exigency of the writ; which appearance is effected by putting in *bail to the action*, commonly called bail *above*, in oppoſition to the bail given to the ſheriff, uſually termed bail *below*. What it is.

The bail *below*, or to the *ſheriff*, only undertake for defendant's *appearance on the return day of the writ*, (*i. e.*) for his putting in *ſpecial bail to the action;* for his appearance can be effected by no other means; whereas the bail *above*, or to the *action*, are bound either to ſatisfy plaintiff his debt and coſts, or to render their principal into his cuſtody, provided judgment ſhould be againſt defendant, and defendant himſelf ſhould fail ſo to do. The nature of their undertaking.

If the defendant's attorney has undertaken to put in bail, which is ſometimes the caſe, or if the ſheriff, or the bail below, for their own indemnity, wiſh to put in ſpecial bail, either of them may do ſo, although the defendant himſelf ſhould not conſent, for otherwiſe they might ſuffer by defendant's obſtinacy. May be put in againſt defendant's conſent.

In the treating of this extenſive and important head of practice, we ſhall conſider

(A) When and how Bail is to be put in, and of the Notice thereof.

(A. 1) *In Town.*

(A. 2) *Before Commiſſioners in the Country.*

(B) Of

Of Bail to the Action, or Bail above.

(B) Of accepting Bail, and filing the Bail Piece.
(C) Of excepting to Bail.
(D) Of perfecting Bail, and herein of the juſtifying, adding, oppoſing, and allowing of the Bail.

(A) (A) When, and how Bail is to be put in, and of the Notice thereof.

(A. 1) (A. 1) *In Town.*

When to put in bail above. In town.

If defendant be arreſted in London or Middleſex, he muſt put in ſpecial bail to the action.

In B. R.

In 4 days after the return of the writ or proceſs, let it be made returnable when it may be. R. M. 8 Ann.

Except the action be by ſpecial original, then defendant has till 4 days after the quarto die poſt *to put in bail. Frampton v. Barber,* 4 D. & E. 377.

In C. B.

In 4 days after the firſt day of term, provided the proceſs be returnable the firſt return of the term; but if returnable on any other return, then 4 days after ſuch day when it is made returnable. R. Trin. 30 G. 3.

N. B. How theſe days are reckoned, ſee Obſervations *infra.*

But if defendant be arreſted in any other city, or county, then

Six days after the return of the proceſs. R. M. 8 Ann.

Unleſs proceedings be by original, then in 8 *days,* i. e. 4 *days after* quarto die poſt.

Eight days after the firſt day of term, if proceſs returnable the firſt return; if on any other return, eight days after ſuch return day. R. Trin. 30 G. 3.

How to put it in.

If the ſuit be by bill, go to the office where the writ was ſigned, or to the ſheriff's office, for a ſhort copy of the writ, together with the ſum ſworn to; get a ſpecial bail-piece at the ſtationers, pay for ſame 2s. 1d.; *fill it up properly, with the name of the county, of the bail, &c. (for which ſee the remarks below); carry it to a judge's chamber, and having the bail with you ready,*

Carry an abſtract of the writ, and the names and additions of the bail to the filazer, who will enter them in his book, kept for that purpoſe, and he, or his clerk, will attend at the judge's chambers, with the bail, to take the recognizance; which is done by an entry in the filazer's book, and not by a bail-piece, which entry he will afterwards draw up in proper form, if there ſhould be

Of putting in Special Bail.

ready, apply to the judge's clerk to take the bail, to whom you pay 4s. *in term,* 5s. *in vacation.*

He will take the recognizance, which is in the following form:

You do jointly and severally undertake, that if A. B. shall be condemned in this action at the suit of C. D. he shall satisfy the costs and condemnation, or render himself to the custody of the marshal of the marshalsea, or you will do it for him.

Are you content?

The bail-piece is left at the judge's chambers until bail be perfected.

The special bail-piece abovementioned. is in the following shape and form:

Easter Term, in the 32d year of the reign of king Geo. the 3d. *Stormont* and *Way.*

Middlesex, to wit. } A. B. is delivered to bail on a cepi corpus, to

C. D. of Cheapside, London, mercer, and

E. F. of Newgate-street, London, hatter,

T. S. attorney, Sworn to 500l. At the suit of J. K.

4th May, 1792.

And the clerk of the bails of K. B. must mark the bail-pieces numerically as they are received. R. Trin. 30 G. 3.

If the suit be by original, bail is taken by the filazer, as in C. B.; which mode of proceeding see opposite.

be occasion to sue the bail on their recognizance.

But in the filazer's absence, or if he cannot attend, the recognizance may be taken without him, before a judge, on a piece of parchment, stamped with a double 12d. *stamp. R. H.* 8 G. 2.

This is then called a bail-piece, and is as follows:

In the Common Pleas.

Easter Term, in the 32d year of the reign of king Geo. the 3d.

Middlesex, (ff.) Capias against A. B. late of Westminster, yeoman, at the suit of C. D. for 200l. upon promise returnable in three weeks of Easter.

T. S attorney for defendant. } Affidavit for 100l.

Taken and acknowledged. } Bail are, E. F. of Cheapside, London, hatter; and G. H. of Ludgate-hill, London, mercer. The defendant bound in 200l. each of the bail in 50l.

If the action be at the suit of a privileged person, the prothonotary's clerk will attend the court or judge.

Pay filazer, in term, 12s.; *in vacation,* 19s.; *if taken at the judge's house,* 3s. 4d. *more.*

Form of the Recognizance.

You (naming the defendant, if present) do acknowledge to owe the plaintiff 200l. *(being double the sum sworn to). You (naming the bail) do severally acknowledge to owe unto the plaintiff the sum of* 100l. *a piece, to be levied upon your several goods and chattels, lands, and tenements, upon condition, that if the defendant be condemned in the*

Of Bail to the Action, or Bail above.

the said action, he shall pay the condemnation money, or render himself a prisoner to the Fleet for the same; and if he fail so to do, you (naming the bail) do undertake to do it for him. R. 5 W. & M.

If the defendant be not present, and does not enter into the recognizance, then the bail are bound in double the sum the cause of action is sworn to amount to; otherwise only in the sum sworn to, and the principal in double the sum.

Memorandum of warrant necessary.

But both in B. R. and C. B. every attorney, at the time of putting in bail, must deposit in the hands of the judge's clerk, the memorandum or minute of his warrant to defend, stamped with a 2s. 6d. *stamp, which the judge's clerk is to receive* gratis, *who is to deliver over the same to the proper officer, agreeable to* 25 G. 3. *c.* 80. *s.* 25.

How if defendant held to bail by a judge's order.

If defendant is held to bail by a judge's order upon an affidavit, such affidavit should, in B. R., be left at judge's chambers; *and in C. B. be filed with the* filazer *for the county where writ issues, who will mark on bail-piece the sum for which bail is given.*

Of the notice of bail having been put in.

Bail having been put in, it is necessary to give notice thereof, without delay, to the plaintiff, or his attorney. R. M. 16. *c.* 2.

Which notice is in the following form:

In B. R. A. B. plaintiff,
and
C. D. defendant.

Take notice, that special bail was this day put in (if by original, say, put in with the filazer for the defendant, &c.) for the defendant in this cause, before the Honourable Mr. Justice Buller, at his chambers in Serjeant's Inn, Chancery-lane, London; and the names are, C. D. of

Where bail are put in, in due time, the defendant is not bound to give notice, but the plaintiff must search in the filazer's book.

Otherwise if they be not put in in due time. Dawkins *v.* Reed, 1 *H. Blac.* 529.

In C. B. A. B. plaintiff,
and
C. D. defendant.

Take notice, that special bail was this day put in, with the filazer, for the defendant in this cause, before the Honourable Mr. Justice Gould, at his chambers in Serjeant's Inn, Chancery-lane, London; and the names are, E. F. of Cheapside, London, hatter, and G. H. of Ludgate

Of putting in Special Bail.

of Cheapside, London, mercer, and E. F. of Newgate-street, London, hatter. Dated the 4th day of May 1792.

Your's, &c.

Tho. Smith, attorney for defendant.

To Mr. A. B. attorney for plaintiff.

Red Lion-street, Clerkenwell.

If they are the same as the bail to the sheriff, then add— "and they are the same as are "bail to the sheriff."

gate hill, London, mercer. Dated the 4th day of May 1792.

Your's, &c.

Tho. Smith, attorney, for defendant.

To Mr. A. B. attorney for plaintiff.

(A. 2) *Of the Time and Manner of putting in Bail before a Commissioner in the Country.* (A. 2)

Formerly, special bail could only have been put in before a judge in town, which often occasioned, in country causes, great expence and inconvenience.

But by 4 & 5 W. & M. c. 4. the chief judges of the courts are empowered to appoint *commissioners* in the respective counties of England, for the purpose of taking recognizances of bail in causes commenced in the superior courts.

Which are to be taken in the same manner, and by such recognizances and bail-pieces as the judges themselves take them; when taken, they are to be *transmitted* to the court where the action shall be depending.

An *affidavit* also is to be made, of the due taking thereof, by some credible person present at the time.

The commissioners are further authorised to take *justifications of bail by affidavit*, and to examine the bail upon oath as to the value of their estates.

The time when bail must be put in, in country causes, has been already mentioned (*ante*, A. 1); namely,

B. R.	*C. B.*
In six days after the return of the writ. R. M. 8 *Ann.*	*In* 8 *days after the first day of term, if writ returnable the first return of the term; if on any other return, then* 8 *days after such return day.* 30 *G.* 3. *R. Trin.*
If by original, 8 *days,* (i. e.) 4 *days after the* quarto die post.	

When bail to be put in, in country cases.

For an explanation of these rules, see Observations infra.

Take

Of Bail to the Action, or Bail above.

How bail to be taken. &c. before a commissioner.

Take a bail-piece, as before directed in town causes, properly filled up; and go with the bail to a commissioner of the proper court, who will take the recognizance, for which pay in B. R. 6s. *in C. B.* 2s.; *you may carry also, at the same time, an affidavit of the* justification *of the bail, ingrossed on treble* 6d. *stampt paper, which may be sworn before the same commissioner, and which it is best to do at this time, in case there should not be time to send it after exception. Then take an affidavit of the* due taking of such bail, *made by some person present at the time, ingrossed on treble* 6d. *stampt paper, to be sworn before some* other *commissioner* (not the same who took the recognizance, for the affidavit of justification and of the due taking the bail must not be taken before the same commissioner) *after which annex the bail-piece thereto, and send them to the agent in town, that he may get it properly put in,* (i. e.) *allowed and filed within the time above mentioned. See the late rules of court to be observed by commissioners in taking affidavits of* illiterate *persons, and also how affidavits to be intitled, ante Sect.* I. *of this chapter,* C. D.

The agent having received the same,

B. R.	*C. B.*
Carries the bail-piece, and the affidavit of the due taking thereof, to the chambers of one of the judges of this court, and there files the same, together with the memorandum of the warrant to defend, agreeable to 25 *G.* 3. *for the filing whereof he pays in term* 5s. *in vacation* 6s.	*Applies to a judge for his allocatur, for which he pays in term* 5s. *in vacation* 12s. *which he files with the filazer of the proper county where the bail was taken; pay for filing thereof, in term or vacation,* 6s.
If suit be by original in B. R. same modo taken as in C. B.	

Of the notice in such case.

When the bail is thus put in, and filed, the defendant's agent should give notice thereof to the plaintiff's agent, and at the same time send him a copy of the affidavit of the justification.

In B. R. *Between* { *A. B. plaintiff, and C. D. defendant,*

Take notice, that the bail-piece in this cause, with the affidavit of the due taking thereof, was this day filed with the Right Honourable Lloyd Lord Kenyon, at his chambers in Serjeant's Inn, Chancery-lane, London.— Dated

In C. B. *Between* { *A. B. plaintiff, and C. D. defendant,*

Take notice, that special bail was, on the 1st day of May instant, put in for the above-named defendant, before J. S. Esq. a commissioner appointed to take special bails in and for the county of B.; and the names are, A. B.

Of putting in Special Bail.

Dated the 4th day of May 1792.

Yours, &c.

T. S. agent for defendant.

To Mr. W. H. agent for plaintiff.

A. B. of Bedford, in the county of Bedford, clothier, and C. D. of the same place, farmer, which have been allowed by the Honourable Mr. Justice Gould; and the bail-piece, together with the affidavit of the due taking thereof, is filed with the filazer of the said county. Dated the 4th day of May 1792.

Yours, &c.

T. S. Agent for defendant.

To Mr. W. H. attorney, or agent for plaintiff.

OBSERVATIONS.

1. *Upon the Time of putting in Bail in Town and Country, and of transmitting the Bail-piece.*
2. *Upon the Bail-piece and Recognizance.*
3. *Upon the Extent of the Liability of the Bail.*
4. *Upon the Notice of Bail having been put in.*

I. When bail may be put in, in town.

Bail may be put in before the return of the writ after an arrest, but never before the arrest, without consent; for if plaintiff dislike such bail, he may cause defendant to be arrested, and a bail bond given to the sheriff in a regular way. *Huggins* v. *Bambridge*, Bar. 83.

In B. R. the four days allowed for putting in bail are reckoned *exclusive* of the return day; and where the fourth day is Sunday, the party has all the next day to put in bail.

In B. R.

So that if the latitat be returnable on Wednesday, the defendant may put in bail any time on the Monday. *Studley* v. *Sturt*, Str. 782.

Bail cannot be put in after final judgment. *Jackson* v. *Knight*, Bar. 92.

In C. B. also, the days allowed for putting in bail are reckoned in the same way; and the meaning of the rule of Trin. Geo. 3. mentioned above, is, that four or eight days, as it may be a town or country cause, exclusive, shall be allowed in *full term*; if therefore the capias, which must be returnable on a general return day, be made returnable on the *first* general return of any term, which is always before the first day of term, then the defendant shall have four or eight days *from the actual first day of term*;

In C. B.

Explanation of the rule of Trin. 30 Geo. 3.

term; but if the capias be returnable on the *second*, or any other return, which must necessarily fall in full term, then the defendant is only allowed four or eight days, as the case may be from such return day. As for instance; the first return of Michaelmas term is November the 3d, but the term does not begin till November 6; now if a capias in any town cause be on that first return, defendant will have till the 10th, being four days exclusive from the 6th, to put in bail; whereas if a capias be returnable on the second return, defendant would only have four days from *that* return day to put in bail.

What time allowed when bail taken before a commissioner in the country.

The same mode of reckoning also applies to the time when the bail is to be put in which has been taken before a commissioner. For by being put in, is not meant that it must be *taken* by the commissioner, but that the bail-piece must be actually *filed* within that time with one of the judges in the King's Bench, or with the proper filazer in the Common Pleas. *Rolfe* v. *Steele*, 2 H. Blac. 276.

So that the bail-piece, &c. should be sent up so as to be actually filed with one of the judges on the 6th day after the return of the writ, if proceedings be by bill; if by original, on the 8th day, or the bail bond may be assigned. Rules and Orders, K. B. 283. n. Imp. K. B. 166.

If the bail be acknowledged before a judge of assize, no affidavit is necessary upon the transmission, the clerk keeps the bail-piece and enters same in the judge's book on his return to town. Imp. K. B. 167.

R. 8 W. 3. Commissioners to keep books of the bail.

By rule Trin. 8 W. 3. every commissioner is to have a book kept purposely for entering the names of the defendant and his bail, and of the plaintiff, and the time of taking bail, and the name of him by whom such bail shall be transmitted, and also the name of the attorney for the defendant. And plaintiff's attorney is to have liberty to repair to it for the names of the bail in order to inquire about their sufficiency, and if insufficient to except against them within twenty days after bail is transmitted and notice to plaintiff or his attorney of the taking thereof; and in that case defendant must put in better bail, or such bail must justify in open court or by affidavit before a commissioner.

Plaintiff to have access to them.

How to except to them.

Of transmitting bail-piece.

By the same rule, notwithstanding the time of sending up and filing bail-piece within six days above-mentioned, it is ordered that bail taken within 40 miles of London shall be transmitted within eight days, and above that

Of putting in Special Bail.

distance within 15 days, unless all the justices shall be on their circuits, and then as soon as any of them return. This appears contrary to the practice above laid down: but see an explanation of this part of the rule in the Observations *infra*.

Explanation of the rules 8 W. 3. & 10 G. 1. & 8 Ann. & 30 G. 3.

The rules of 8 W. 3. in B. R. & 10 G. 1. in C. B., which, primâ facie, allow a longer time for the transmitting of the bail-piece, are often confused with the rules of 8 Ann. and 30 G. 3. above mentioned, settling the time for the putting in of the bail. But I conceive their operation to be perfectly independent. The rules of 8 W. 3. in B. R. & 10 G. 1. in C. B. only apply to those cases where bail is taken before a commissioner in a *vacation*, and there is a *length of time* between the taking thereof and the return of the writ, in which case they direct such recognizances as are taken within 40 miles of London, to be transmitted within eight days after the *caption* in B. R. and 10 days in C. B.; and if taken above 40 miles, in 15 days in B. R. and 20 days in C. B. and empower the judges to accept such bail. But when the bail is not taken by the commissioner in the *vacation*, or when there is not that length of time, then the other rules take effect, and the bail must be *put* in within six or eight days after the *return*, as above-mentioned. That this is the true construction of the statute, and that it only alluded to the transmitting of bail in vacation, appears from the provision in the statute—*unless all the judges be on the circuit, and in such case, as soon as any one is returned*—as all the judges are never on the circuit in term time.

It is to be observed, therefore, that when bail is taken before a commissioner in the vacation, and there is above 10 or 20 days, as the case may be, between the taking thereof and the time when it ought to be put in, such recognizances should be transmitted agreeable to the above rules, 8 W. 3. & 10 G. 1. within the 10 or 20 days, as the distance may be, and when transmitted to the judge for his allowance, notice thereof should be given to plaintiff's attorney.

But in general practice this part of the stat. 8 W. 3. seems obsolete, and the rule appears to be that the defendant in all country causes shall have six days next after the return of the writ to acknowledge, file, and give notice of bail, and no more, however distant the county

in which he reſides may be. Notes on Rules and Orders in K. B. 283.

2. Of filling up the bail-piece.

The name of the county in the bail-piece ſhould be the ſame as that in the writ.

In the Common Pleas, bail are bound in a ſum certain; but in the King's Bench they are not bound in a ſum certain (except the action be by original), but only undertake that the defendant ſhall pay the condemnation-money, or render his body to priſon, and the recognizance being general, muſt be reduced by the judgment to a certainty. Salk. 102.

Whether it may be amended.

If the bail-piece be taken, and miſtake be made in the name of the cauſe, as *Furrers* v. *Cooke* inſtead of *Farrers* v. *Cook*, court will not amend it, unleſs bail conſent. *Farrers* v. *Cooke*, 1 Barn. 214.

A recognizance of bail was ordered to be amended, by making it, in an action of treſpaſs and aſſault, ad damnum of 2000l. inſtead of 200l. on aſſumpſit; two actions were depending between the parties, and bail was put in to the action of aſſumpſit before the bail now amended was put in, which was intended to have been in the action of aſſault, but by miſtake of the filazer was taken in the other action, contrary to the inſtructions given. *Faget* v. *Vanthiennen*, Bar. 59.

3. Of the extent of the liability of the bail.

Formerly it was the practice of the court, that if a man became bail for another in any ſum of money, as 10l. he was thereby bail in all actions brought in the ſame term by the ſame plaintiff againſt that defendant, let the ſum be ever ſo great. 6 Mod. 266.

This was, as C. J. Holt himſelf acknowledged, an extraordinary and moſt inconvenient practice; to rectify which, a rule was made, that where the plaintiff recovered a greater ſum than was laid in the action, the bail ſhould not be chargeable *in iſta actione*. By the conſtruction of this rule, the oppoſite extreme was fallen into; ſo that if a plaintiff brought an action, with an ac etiam for 40l. and recovered 100l.; the bail, agreeable to C. J. Holt's opinion, was not liable at all, even for the 40l.; for he held, that the recognizance was to anſwer the condemnation, and ſince that could not be, he was bound to nothing. *Genbaldo* v. *Cognoni*, Salk. 102.

This practice was ſurely as extravagantly favourable, as the former was rigorous towards the bail.

Not, however, that the doctrine laid down by C. J. Holt, ſeems to have been altogether adhered to; for in

Of putting in Special Bail.

the case of *Welsh* v. *York*, it was agreed to be settled by the court, that on a declaration of 200l. the bail was liable to all actions made under the same sum, but not to actions above that sum. 3 Keb. 16.

But the extent of the liability of bail on their recognizance, during the reigns of Car. 2. William, Ann, & 1 G. seems to have been a matter of much doubt; the question being, Whether, if the plaintiff recovered a greater sum than in the *ac etiam*, the bail should be answerable to the sum mentioned therein, or be wholly discharged. The case of *Martin* v. *Moor*, at length, settled the point, upon the grounds of reason and justice; the sum sworn to was 80l.; plaintiff recovered 104l.; court resolved, that as, on the one hand, there was no colour to subject the bail to more than they were bound, let the plaintiff's demand be ever so great; so, on the other hand, there was no reason the plaintiff should suffer by his moderation in taking bail, but the recognizance should be considered as an agreement to pay 80l. or deliver up the defendant; and therefore they made a rule, that the goods of the bail taken in execution, should be delivered on the bail's paying the 80l. and the costs, or else the goods to be sold, and the surplus returned. Str. 922.

Agreeable to which is the case of *Jackson* v. *Hassell*, Do. 330.

Indeed there is an express rule of court to this effect, East. 5 G. 2. K. B. That where the plaintiff declares for or recovers a greater sum than is expressed in the process on which he declares, the bail shall not be discharged, but be liable for so much as is sworn to and indorsed on the said process, or for any lesser sum which the plaintiff in such action shall recover.

So that bail above are not liable upon this recognizance beyond the sum *sworn* to and the costs, let the plaintiff recover ever so great a sum.

As to the liability of the bail below on the bail bond, or of the sheriff on an attachment, see post, Sec. 7. B. and Sec. 8. C.

4. Of the notice of bail having been put in.

Bail, when put in, are either *absolute* or *de bene esse*. They are absolute, when the plaintiff consents to and approves of them in the first instance. They are *de bene esse*, when put in without such consent; i. e. *conditionally*, provided no exception be made against them.

When necessary.

When put in *de bene esse*, notice of their being put in should be given in B. R.; but not necessary in C. B. if

Of Bail to the Action, or Bail above.

put in, in time; but otherwiſe, it is. *Dawkins* v. *Read*, 1 H. Blac. 529.

What it ſhould contain.

This notice ſhould be properly entitled, Loft. 237. and particularly ſpecify the names of the bail, Id. 187. their degrees, Id. 281. their trade or vocation, Id. 187. 6 Mod. 24. and not merely the pariſh or town, but the very ſtreet or place where they live, Loft. 72. 194. in order that the plaintiff may the more eaſily find them out.

In B. R. if the ſame bail as were given to the ſheriff become bail above, it is uſual to mention, that they are the ſame in the notice, becauſe they cannot in this court be excepted againſt, but they may in C. B.; therefore, in that court, there is no need to mention this circumſtance.

Of the origin of bail, &c. *bene eſſe*, and of the former practice in this reſpect.

Formerly notice of putting in bail was given before bail were acknowledged, for after the recognizance was taken they became abſolute; accordingly we find a rule of court, Mich. 7 Jac. 1. ordering defendant's attorney not to put in bail before notice given to plaintiff's attorney on pain of expulſion from his office. And by another rule, Mich. 21 Car. 1. 1645. the plaintiff's attorney on receiving ſuch notice is ordered to attend before the judge to accept or except to ſuch bail. But afterwards the practice of putting in bail *de bene eſſe* was introduced, and notice thereof given to plaintiff and time allowed for exception. And by rule Mich. 16 Car. 2. 1664. every attorney who ſhall put in any ſpecial bail *de bene eſſe* upon a *capi corpus*, ſhall give notice thereof without delay to plaintiff or his attorney, who muſt except thereto within twenty days, or within four days after ſuch bail may be filed.

(B)

(B) Of accepting Bail, and filing the Bail-piece.

The bail, when put in, muſt be either *accepted* or *excepted to* by plaintiff.

If the bail are *accepted*, it only remains for the defendant's attorney to file the bail-piece, which muſt be done within *twenty* days after. R. T. 13 Car. 2.

In B. R.

When the ſuit is by bill, and the bail are accepted, the bail-piece is taken and filed with the ſigner of the writs, for which is paid 4d.; *if by original, it remains with the filazer.*

In C. B.

If the bail are accepted, the bail-piece is filed with the filazer.

The

Of filing the Bail-piece.

The same practice prevails in country causes, when bail was taken *before a commissioner.*

If excepted *to, bail piece ought to be filed within* twenty *days after* justification. *Tr.* 13 *Car.* 2. *B. R. Mich.* 6 *Geo.* 2. *C. B.*

OBSERVATIONS.

If the bail-piece not filed in time, court will, in certain cases, permit it to be filed afterwards.

In C. B. the judges in the treasury refused to order a bail-piece to be filed, *twenty* days being elapsed since the caption; the rule being in such case, that it shall not be filed without leave of the court. But the court being moved afterwards, upon the affidavit of defendant's agent that he received the bail-piece in due time, but that it was omitted to be filed by his clerk's neglect, they ordered it to be filed. *Aucher* v. *Hamilton*, Bar. 65.

Of what term the bail shall be.

Every bail taken before or upon the *continuance* day, shall be a bail, and filed of the preceding term; and every bail taken *after* the continuance day, shall be a bail, and filed of the subsequent term, and not otherwise; but where any new bail is added to any other bail taken on or before the continuance day, the same shall be taken and filed as of that term in which the bail was first put in. Gilb. Prac. B. R. 341. Same in C. B.

Why bail-piece must be filed.

If defendant neglects to file the bail-piece, and plaintiff wants afterwards to sue on the recognizance, he may file it himself, which is often done; but if defendant is rendered in discharge of his bail, he must file it in order to get an exoneretur marked on it; as will be shewn in the next section.

How defendant may get it filed if bail not excepted to.

Formerly if bail were not excepted to within time, viz. *twenty* days after notice, affidavit was made by defendant of the service of notice of putting in bail, upon the back of the bail-piece, which was then filed with the master, for which no fee was paid. R. M. 16 Car. 2.

But at this day it is not usual for attornies to make affidavit of the service of notice of bail after the expiration of the twenty days and no exception entered. The intention of that rule was to compel the payment of the fee due to the master on filing the bail-piece; but by the rule of East. 29 Car. 2. which ordered the fee to be paid at the time of putting in special bail, that purpose was answered; and by a subsequent rule Mich. 8 Ann. it is ordered generally, that an exception to bail is void unless made within twenty days after notice, which rendered

Of Bail to the Action, or Bail above.

the rule of 16 Car. obsolete, and any affidavit unnecessary on the filing of the bail-piece.

(C) (C) Of excepting to Bail.

If plaintiff disapprove of the bail put in, he is at liberty to except to them, which exception must be made

When, and how such exception to be made.

In B. R.	*In C. B.*
Within twenty *days after notice given of putting in bail, otherwise void. R. M.* 16 *Car.* 2. *R. M.* 8 *Ann.*	*Same time as in B. R.*
It must be in writing in the judge's book before whom bail was taken. The form of the entry is, "*I except against these bail.*" *T. S. plaintiff's attorney.*	*It must be in writing in the filazer's book, or on the bail-piece.*
After exception made, notice thereof, in writing, must be given to defendant's attorney, which is as follows: *A. against B. I have excepted against the bail put in for defendant in this cause.* *Your's, &c.* *T. S. plaintiff's attorney.* *To Mr. A. B. attorney for defendant.*	*Same notice in writing necessary in C. B.*
If the suit be by original, it is the same practice as in C. B.	

In B. R.	*In C. B.*
In country causes, when Bail taken before a Commissioner:	
The bail must be excepted to the same as above, within twenty days after notice of bail being filed at the judge's chambers and notice of such exception must be given to defendant's agent in town. R. T. 8 *W.* 3.	*The same as above. Exception to be made under the bail-piece left at the filazer's, and notice thereof given to plaintiff's agent in town.*

OBSERVATIONS.

(C. 1) *On the Time of excepting.*
(C. 2) *On the Manner of excepting, and the Notice thereof.*
(C. 3) *On the Grounds of Exception, and what are good.*
(C. 4) *What shall be deemed a Waiver of Exception.*

If

Of excepting to the Bail.

(C. 1) Of the time of excepting.

If plaintiff thinks the bail put in, or tranſmitted, inſufficient, he may except to them, and thereby oblige them to appear, and juſtify by ſwearing themſelves *houſekeepers, and worth double the ſum* for which defendant was arreſted, after their own debts are diſcharged.

Muſt be within 20 days,

If bail are not excepted to within the *twenty* days, the bail become abſolute; and the bail-piece may be *filed*; ſee *ante*, B. If excepted to, defendant muſt perfect his bail within four days after exception taken.

If the laſt day of the *twenty* be Sunday, exception and notice on the Monday will be good. *Oldham* v. *Burrell*, 7 D. & E. 26.

or not good.

An exception entered after the expiration of the twenty days, is of no validity.

Though bail be irregularly put in, if notice thereof be given, and no exception made within *twenty* days, they ſhall ſtand.

Bail irregularly put in, if not excepted to, will ſtand.

Thus where a capias indorſed for bail being iſſued, defendant, previous to the return of the writ, and to his being arreſted, put in bail before a judge, and gave notice thereof to plaintiff's attorney, plaintiff regarded not the notice, but cauſed defendant to be arreſted; and he being in cuſtody, moved for a ſuperſedeas, and had a rule to ſhew cauſe. It appearing that plaintiff had not excepted againſt the bail within twenty days after notice thereof, the court was of opinion that the bail ought to ſtand, and the rule was made abſolute. *Huggins* v. *Bambridge*, Bar. 81.

Exception to bail muſt not only be within due time, but alſo before any ſtep is taken by plaintiff, which may be conſtrued a waiver of exception. For which ſee poſt, C. 4. of this ſection.

(C. 2) *Of the Manner of excepting, and the Notice thereof.* (C. 2)

Verbal notice not good.

The manner of making the exception, and of giving notice, has been ſhewn above, C.; and it is neceſſary that both ſhould be done; the one without the other is inſufficient; nor will a *verbal* notice be good. *Satchwell* v. *Lawes*, Bar. 88. *Goſwell* v. *Hunt*, Bar. 101. Caſ. of Prac. C. B. 33. R. Eaſt. 5 G. 2.

And not only the exception muſt be made, but the notice thereof muſt be given *within the twenty days*; for an exception without notice is as no exception. *Oldham* v. *Burrell*, 7 D. & E. 26.

Of Bail to the Action, or Bail above.

Unleſs defendant proceeds afterwards.

But if plaintiff gives a verbal notice of exception to defendant, or no notice thereof, and defendant afterwards proceeds by giving notice of juſtification, he has waived the irregularity with reſpect to *himſelf;* but it is not waived as relating to the *ſheriff*. No attachment therefore will, in ſuch caſe, lie againſt the ſheriff. *Cohn* v. *Davis*, 1 C. B. T. R. 80. *Rogers* v. *Maplebeck*, 1 C. B. T. R. 106.

Unleſs the utmoſt regularity therefore be preſerved in the exception and notice, the plaintiff will loſe his remedy againſt the ſheriff. See poſt, Sec. 8. B.

(C. 3)

(C. 3) *Of the Grounds of Exception.*

As the ſame objections to the bail, which would be reaſons for *excepting* to them, would alſo be good grounds for *oppoſing* the bail at the time of their juſtification, we ſhall, to avoid repetition, conſider them under the laſt head; for which, ſee poſt, D. 3.

If bail below become bail above, they cannot be excepted to in B. R. Otherwiſe in C. B.

But it may be proper here again to mention, that in B. R. if the bail *below* become bail *above*, you cannot except to them; but in C. B. you may. See more on this head, and alſo how plaintiff, in ſuch caſe, ſhould proceed in B. R. poſt, Sec. 7. D.

Bail, however improper, will ſtand, unleſs excepted to.

It is alſo to be obſerved, that if improper perſons be put in as bail, though even excluded by any rule of court, yet that does not render the bail-piece *ipſo facto* a nullity; but it is ſtill incumbent upon plaintiff, if he diſapprove of them, to except regularly to them, for otherwiſe he waives the objection, and they will ſtand good; nor can he take an aſſignment of the bail-bond, and proceed as if no bail were put in. Do. 467. n.

(C. 4)

(C. 4) *What ſhall be deemed a Waiver of Exception.*

Declaration is a waiver, unleſs delivered de bene eſſe.

If plaintiff, after ſpecial bail be put in, and before any exception, deliver a declaration *in chief*, (for the meaning of which ſee the next chapter,) or declares generally, *i. e.* without indorſing his declaration, as filed or delivered *de bene eſſe*, or conditionally, in which caſe it will operate as a declaration in chief, it is a waiver of the bail, and of exception thereto. So, if after exception, and before juſtification, he declares, as above-mentioned, it is a waiver, and the bail need not juſtify. *Friend* v. *Mullens*, Caſ. of Prac. C. B. 81. *Walſh*, aſſignee, v. *Hadcock*, Ib. 156. R. M. 8 Ann. (C.) B. R.

But

Of excepting to the Bail.

But he may declare *de bene esse* or conditionally, *i. e.* if before bail put in, conditionally, until good bail be put in; if after, until the bail put in do justify. *Lister* v. *Wainhouse*, Bar. 92.

The declaration should, in such case, be marked *de bene esse* or conditionally. *Mayo* v. *Weaver*, Bar. 105.

Nor must he take any further step in the cause until the bail be put in, or have justified, as the case may be; for if he demands, or accepts a plea, that will operate as a waiver. *Lister* v. *Wainhouse*, Bar. 92. So demanding or accepting a plea, is a waiver.

In C. B. where the bail below are put in as bail above, taking assignment of the bail bond is not a waiver of the exception. *Claxton* v. *Hyde*, Bar. 90. P. Reg. 68. When taking assignment of bail-bond is not a waiver.

But otherwise in B. R. R. M. 8 Ann. Sal. 97.

(D) Of perfecting Bail. (D)

When bail are excepted to, and due notice of such exception given, it is necessary that bail should be *perfected*; to do which they must appear in open court, and swear that they are housekeepers, and are worth, after all their debts are paid, double the sum they are bound for; and this is called *justifying*. If the same bail which have been already put in, cannot, or will not justify, other bail are to be *added*, *i. e.* put in, in their stead, who must justify. Should the circumstances or characters of the bail be suspicious, plaintiff may, at the time when they are justifying in court, examine and interrogate them accordingly; which is called *opposing* bail, and which is done to induce the court to reject them. But should no such opposition be made, or notwithstanding such opposition, the court should still suffer them to justify, it only remains to get them *allowed*, and the bail are then said to be *perfected*. Under this head, therefore, of *perfecting* bail, it will be necessary to consider the mode of *justifying*, *adding*, *opposing*, and *allowing* bail. What it is.

In B. R.

If exception be entered, and notice given in term time, bail must justify in four days after such notice, or other bail added, who shall justify within the said four days; but if exception be entered in vacation, then the bail shall justify upon the first day of the subsequent term. E. 5 G. 2.

In C. B.

Same as in B. R. R. Trin. 3 & 4 G. 2. & 8 G. 3. When bail must justify.

Two

In

Of Bail to the Action, or Bail above.

What notice necessary.

Two days notice must be given when the bail are to justify, unless the same bail as were put in are to justify, then one day's notice of justification is sufficient, (i. e.) *on the* 12*th for the* 13*th.*

*In C. B. two days notice, whether the same bail, or additional ones—*exclusive, *as in B. R.* (i. e.) *one exclusive, and the other inclusive. Notice* 12*th for* 14*th.*

How to justify in court.

When bail justify in court, go the evening before to the clerk of the judge before whom bail was taken, and desire him to bring the bail-piece into court the next day, who will do so accordingly; or get it of him yourself and bring it into court; pay him 2s. 6d.*; prepare an affidavit of the service of notice of justification, and get it sworn; indorse it with the names of the parties, and give it to the counsel, with* 10s. 6d. *to move to justify the within bail. Your bail are then brought into court, and sworn; pay* 9s. *and a rule is drawn up in the evening by the clerk of the rules for the allowance of the bail, for which pay* 4s.*, a copy whereof must be served on plaintiff's attorney. The bail-piece should afterwards be obtained from the judge's chambers, and filed with the master.*

When bail justify in court, having got sworn affidavit of service of notice, for which pay 2s.*; desire the filazer to attend at Westminster with the bail-book or bail-piece; pay him* 5s. 4d.*; give your affidavit to a serjeant to move to justify the bail, with a fee of* 10s. 6d. *and call in and swear your bail; pay* 3s. 6d.*; and get the rule for the allowance of the bail at the Secondaries office, pay* 4s. 6d. *serve plaintiff's attorney with a copy, and shew the original rule at the time.*

If bail are to be added, how to justify.

If the bail put in cannot, or will not justify, and others instead of them are added to justify, *two days notice must be given, that is, on the* 12*th for justification on the* 14*th. Sunday is no day; therefore notice on Saturday for Monday is not a good two days notice. So if one fresh bail be added in lieu of one of those before put in, and the notice is accordingly.*

When bail are to be added, take them to the judge's chambers with the filazer; pay for adding 7s. 4d. *and then justify as above.*

Bail are added, by going before a judge, and putting the names of such fresh bail on the bail-piece in B. R. and in the filazer's books in C. B. They may be added the same morning you justify, having given two days'

Of justifying, adding, and perfecting Bail.

days' previous notice of such intended added bail and of their justifying; for each bail added, pay 2s.; *and judge's clerk, for bringing bail-piece into court,* 2s. 6d. *The bail-piece is given to the master in B. R.*

When added, bail must justify.

The added bail must justify in court within the four days after exception, without waiting for any new notice, for the plaintiff need not except again to such new bail; but if they do not justify, may proceed on bail-bond.

How bail may be put in and justified at the same time.

You may put in bail and justify at the same time, by giving notice for that purpose two days exclusive previous thereto; which is done as follows: Fill up a bail-piece, take it to the judge's clerk at Serjeant's Inn, who will take the recognizance; pay 4s. *and* 2s. 6d. *for delivering it to the master in order to justify; have affidavit of service of notice ready, which give to counsel to move. Imp. B. R.* 161.

It is to be observed, that whenever bail justify in open court, the plaintiff may, by counsel, oppose *such bail, by examining them as to their sufficiency or competency. For which see* infra, D. 3.

May justify by consent at judge's chamber's.

But where there is a confidence between the attornies, they may consent that the bail shall justify at a judge's chambers, for which pay 2s.; *and* 10s. 6d. *used to be paid the plaintiff's attorney for such consent; but the court always reprobated the practice, and Lord Kenyon has at length put a stop to it.*

In B. R.

Notice having been given of bail being duly filed, and a copy of the affidavit of justification sent, if plaintiff excepts to them, notice of justification must be given as before, only the words "by affidavit" added.

Affidavit of the service thereof must be made, and the affidavit of justification and bail-piece being carried to Westminster, either by the attorney, if not filed, or by the judge's clerk, if it is; counsel must move to justify. The affidavit is then read in open court, for which pay 9s. *and afterwards the rule for allowance is made out, for which* 4s. *is paid.*

In C. B.

How to justify bail taken in the country before a commissioner.

Same as in B. R. as to notice of justification, &c. only in this court, speak to filazer to bring down the affidavit to Westminster; pay him 3s. 4d. *and court fees; on justification,* 3s. 6d.; *get the rule for allowance, and serve it on plaintiff's agent.*

In both courts, the usual way amongst fair practitioners is, to accept the justification by filing the affidavit with the judge's clerk in

Of Bail to the Action, or Bail above.

in B. R. and the filazer in C. B. at the time of filing the bail-piece; if not done then, to accept it by filing the affidavit afterwards with the proper officer.

OBSERVATIONS.

(D. 1) *On the Time and Manner of justifying and adding Bail.*

(D. 2) *On the Nature of Justification.*

(D. 3) *On opposing Bail, and what are good Grounds of Opposition.*

(D. 4) *On the Exoneretur, and of striking the Bail out of the Bail-piece.*

(D. 5) *On the allowance of Bail.*

When bail must justify.

It has been observed, that the time in which bail are to justify is four days after notice of exception, if there are four days in the term; if not, or if exception be in vacation, then on the first day of the next term.

It was formerly doubted in C. B. whether defendant should not have the first four days of the succeeding term to justify in, when exception was made to bail in *vacation*; and indeed that time was usually allowed. Bar. 79. 101. 111. 115. But it is now settled, that he must justify *as in B. R.* on the *first* day.

Of the four days allowed to justify, one is exclusive and the other inclusive. So that, if exception be on Wednesday, an attachment cannot issue till the Tuesday; for Sunday being the last day of the four, the bail have all Monday to justify. In C. B. *North* v. *Evans*, 2 H. Blac. 35.

If bail are suffered, by plaintiff's negligence, to justify, though after the expiration of the four days, and are allowed, plaintiff cannot move for an attachment, because he must swear that bail are *not* put in and *perfected*.

Bail cannot justify after the rule upon the sheriff to bring in the body is expired. *Overton*'s case, Mic. 26 G. 3. Imp. K. B. 169.

When bail must be added.

Where fresh bail are added, it should be done within the time allowed for their justification, and they must actually become bail before the delivery of the notice of justification to plaintiff's attorney. R. M. 18 G. 3. C. B. *Collier* v. *Godfrey*, 1 H. Blac. 291.

When added, bail must justify.

After an exception to bail put in before a judge, defendant *added* bail, but did not justify in court pursuant to

Of justifying, adding, and perfecting Bail.

to the rule for perfecting bail in *four* days; plaintiff proceeded on the bail-bond without excepting against the bail, and held regular. *Gregory* v. *Gurdon*, Bar. 74.

How if bail be not present at the sitting of the court.

Formerly if bail were not present at the sitting of the court, they used to wait till its rising; and then, unless opposed by counsel, their justification was a matter of course, upon the judge's clerk attending with the bail-piece, or filazer with his bail-book. But now it is not a matter of course, although sometimes allowed on special application. In general when the bail do not appear upon being called, but are prevented from attending, application is made for further time to justify, which the court often grants; but in such cases when the bail are afterwards brought up, an affidavit must be made alledging the reason of their former absence, which must be produced and read before they are permitted to justify. And whenever further time is allowed, the rule should be drawn up and served as notice thereof on plaintiff's attorney.

Where bail are to justify.

Bail may justify before a judge at his chambers, by consent of plaintiff or his attorney; but otherwise the justification, if in London or Westminster, or within 10 miles thereof, is in person, in open court, at Westminster; but if beyond that distance, by affidavit before a commissioner; as see *ante*, D.

And this affidavit should be formal and explicit.

Of the affidavit of justification in country causes.

An affidavit of justification, stating that the bail were severally worth the sum wherein they were bound by their recognizance, after all their *just* debts were paid and satisfied, was held insufficient; it not being in common form: the word *just* ought to be omitted. Bar. 67.

Yet in B. R. it is regular, I believe, to swear bail is worth, &c. after all his *just* debts are paid.

But further time is only applied for when the time allowed for putting in and justifying bail has expired; for otherwise defendant, without any such application, may continue his notice, or give fresh notice of justification for the next morning, if the same bail; if first bail, it must be two days notice: but if the original time of justifying will be out before such fresh notice expires, the court must be applied to enlarge the time, or an attachment may go.

The bail, who resided in the country, had entered into a recognizance before a judge in town; and being excepted

cepted againſt, ſent up an affidavit of ſufficiency, which was allowed, no oppoſition being made by plaintiff thereto. Bar. 102.

If any oppoſition is made to juſtification of country bail, it ſhould be by affidavit, ſtating the frauds.

If the affidavit be poſitive and thought ſufficient, bail are rejected. Sometimes however the court will give further time to put in other bail.

When it ſhould be ſent up.

But in a country cauſe, it is often impoſſible to juſtify, &c. within the four days; therefore it is uſual to ſend up an affidavit of juſtification along with the bail-piece; vid. *ante*, (A. 2); but if that is not done, application muſt be made for time to juſtify.

Summons for further time.

So in other caſes, as in adding bail, &c. if the attorney be preſſed for time, he may take out ſummons for further time.

What a defendant in cuſtody, muſt do to get diſcharged.

If defendant goes to gaol before return of writ for want of bail, he muſt put in and perfect bail above, before he can get diſcharged; but, when perfected, he may be diſcharged on ſummons.

How if in vacation.

If he happens to be in cuſtody in a vacation, as if he be ſurrendered in vacation and freſh bail are ready to appear for him, or if no bail can be found at the time of arreſt, but afterwards they come forward, which may be after writ is returnable and in vacation, in ſuch caſes, his bail may juſtify at a judge's chambers, and plaintiff may oppoſe them there; this being an exception to the general rule, that bail cannot juſtify at a judge's chambers without conſent, as defendant would otherwiſe, from plaintiff's obſtinacy, be incapable of getting diſcharged until the firſt day of term.

Bail muſt be juſtified at the place mentioned in notice.

Defendant gave notice to juſtify in court, and inſtead thereof, did ſo at a judge's chamber, and was then ſurrendered to the Fleet; held inſufficient, and rule to ſtay proceedings on bail-bond diſcharged. *Cremer* v. *Bulman*, Bar. 67.

A defendant was committed to the Fleet for endeavouring to bribe the plaintiff's attorney not to appear againſt him on juſtifying bail. Caſ. of Prac. C. B. 88.

When further time will be allowed for juſtifying.

Where the bail do not attend, or are not permitted to juſtify on account of a defect in the notice of bail or juſtification, the court will, in general, allow them further time to juſtify. But where they are rejected, on account of ſome perſonal inſufficiency, the court will ſeldom

Of justifying, adding, and perfecting Bail.

seldom allow further time to add and justify others; and if the bail do not justify at the time appointed, and no further time is given, they are out of court. Tid. 142. Loft. 72. 187. Per Cur. M. 25 G. 3. T. 24 G. 3.

But the usual way, in case the bail, through the hurry of the business of the court or otherwise, do not justify on the day mentioned in the notice, is, to give another notice that the bail will justify the next morning, and to make another affidavit of service of notice, and to attend with the bail to justify accordingly.

(D. 2) *Of the Notice of Justification.* (D. 2)

What time requisite.

In B. R. if plaintiff except to bail, defendant may give notice on Monday to justify on Tuesday, provided the same bail mean to justify, as have been already put in; for it is presumed plaintiff has made the proper inquiry in regard to their sufficiency before he excepts. But if new bail are added, then notice on Monday must be for Wednesday. So if only one fresh bail be added, there must be two days notice.

In C. B. whether the same bail, or fresh bail, two days notice, *i. e.* Monday for Wednesday, must be given. Bar. 82. 88. But Sunday is no day; so that notice on Saturday for Monday would be bad. *Gregory* v. *Reeves*, Bar. 303.

If the exception be entered and notice thereof given so late that four days do not remain of the term, or if it be in vacation, the defendant must justify his bail upon the first day of the following term, in which cases it is sufficient if he give notice of justification two days before the commencement of the term. N. on Rules and Orders of K. B. 246.

What it should contain.

The notice of justifying bail should particularly express the names of the bail.

A notice that A., B., and C., or two of them, will justify, is bad. Loft. 26.

Notice that three will justify, is irregular. You may as well give notice of threescore, and send plaintiff to inquire all over London. *Allen* v. *Keyt*, Blac. Rep. 1122. C. B. sed aliter per Loft. 252. in B. R.

In B. R. in Hilary term 7 G. 3. in a cause, *Smith* v. *Trinder*, bail were to justify in 4000l.; and court suffered one

Of Bail to the Action, or Bail above.

one bail to juſtify in 4000l. and *two* other bail in 2000l. each.

If one bail be added, and one of the original bail juſtify at the ſame time with that added, vary the notice according to the fact.

A notice given in the name of one of the plaintiffs only, where there are joint plaintiffs, is bad. Loft. 237.

If defendant changes his attorney without leave of the court, and gives notice of juſtifying bail by his new attorney, it is irregular, and plaintiff is not bound to accept ſuch notice. *Kaye* v. *De Mottos*, Blac. Rep. 1323. Do. 217.

Bail, though the ſame as were given to the ſheriff, cannot juſtify without having given notice. *Anon.* Barn. 31.

How it muſt be ſerved.

Copies of ſuch notices muſt be ſerved on plaintiff's attorney, by leaving ſame at his houſe with ſome one of his ſervants; and affidavit muſt be made by the perſon who ſerves notice of juſtification, which is afterwards annexed to the brief for moving to juſtify, and read in court; which affidavit muſt expreſs in what manner ſuch notice was ſerved, as by leaving it with the clerk at his chambers, or the like; and if put through the door, it ſhould ſtate a ſubſequent acknowledgment of the receipt of it, or ſomething tantamount.

Bail muſt become ſuch before notice.

Before any notice of juſtification is given, bail muſt actually have become ſuch, otherwiſe they will not be allowed to juſtify. *Collier* v. *Godfrey*, C. B. T. R. 291.

If bail do not juſtify on the day expreſſed in the notice, and no further time be obtained, they are out of court; and bail-bond may be aſſigned; nor can they ſurrender the principal. *Hardwicke* v. *Black*, 7 D. & E. 297.

(D. 3)

(D. 3) *Of oppoſing Bail, and upon what Grounds.*

Of the grounds of oppoſing bail,

When bail are about to juſtify, they may be oppoſed by plaintiff's counſel, the grounds of which oppoſition are various.

Sometimes it is a mere preliminary objection till the coſts are paid: this may be done, whenever there have been *three* different notices of juſtification of *different* bail; in which caſe they may be prevented juſtifying until the coſts of the trouble of inquiring after them are

Of justifying, adding, and perfecting Bail.

first paid (generally 40s.); but if the notices were of the *same* bail, no additional trouble has been *given*; and therefore in such case there can be no opposition on this ground.

In some cases bail may be objected to on account of their profession or avocation. by reason of their profession or avocation.

No attorney can justify as bail. R. M. 14 G. 2.

But a barrister may.

Nor an attorney's clerk. Cowp. 828. S. C. Doug. 450.

Though he is not an articled clerk. *Cornish* v. *Ross*, 2 H. Blac. 350.

Nor sheriff's officer, bailiff, or other person concerned in the execution of process; or the keeper of any prison. *Hawkins* v. *Magnall*, Do. 466. R. 14 G. 2.

Nor any of the Marshalsea-court officers; nor any serjeants at mace, nor other persons executing the process of any courts, although he may only be the summoning officer of the sheriff's court to warn juries, &c. *Bolland* v. *Pritchard*, Blac. 799.

This was held by Mr. J. *Lawrence* to apply only to officers of superior courts; and he permitted a person to justify, who was concerned in executing process in the Court of Conscience. Trin. T. 1794.

If defendant's attorney has promised to indemnify the bail, it is good ground for rejecting them.

Again, persons outlawed, after judgment, cannot be bail, nor any one convicted of perjury; and he may be even asked, Whether he has not stood in the pillory for perjury? *King* v. *Edwards*, 4 D. & E. 440. Persons outlawed, or guilty of perjury.

So a foreigner, if he had not property in England to the amount for which he is bail, is in B. R. objectionable. *Boddy* v. *Lyland*, Burr. 2526. Foreigners.

Property in Scotland not sufficient; because not liable to the process of our courts.

But in C. B. the circumstance alone of the foreigner not having effects here, is not sufficient to reject him. *Smith* v. *Scandrett*, Blac. 444. Especially if defendant be a foreigner. *Christie* v. *Filleul*, Blac. 1323.

So it has been objected, that the bail live in the verge of the court; but this, without other suspicious circumstances, such as his being much in debt, and the like, is not sufficient. *Glead* v. *Mackay*, Blac. 956. Living within the verge.

It is a ground of opposition that the bail are not housekeepers, though it is of no consequence how trifling the Not being housekeepers,

rent of the houſe is, or whether it is rated or not. Renting chambers in an inn of court above 10 *l. per ann.* is being a houſekeeper. So bail will be rejected if they are deficient as to property in not being worth double the ſum ſworn to after payment of all their debts. Uncertificated bankrupts, or ſuch as have been twice bankrupts, and not paid 15s. in the pound, are ſubject to this objection. Loſt. 148. 328.

or worth double the ſum ſworn to.

If ſuſpicious or prevaricating in their conduct.

So if any ſuſpicions ariſe from the conduct of the bail, as their having aſſumed fictitious or other people's names (*a*), for which they are liable to be put in the pillory; or their not knowing the defendant, or having frequently been bail before, without being able to ſay how often, or what ſums, or in what actions, and the like.

If the proceedings have been irregular.

The laſt ground of oppoſition which I ſhall mention is, any defect or irregularity in the proceedings, either in the notices themſelves, of putting in, or of juſtifying bail, &c. or in the ſervice thereof. See ante, D. 2.; or as to the time of the bail's juſtifying, *for* which ſee ante, D. 1.

(D. 4) (D. 4) *Of the Exoneretur, and of ſtriking the Bail out of Bail-piece.*

When bail are excepted to, and do not juſtify, but others are added who do, the names of the former bail ſtill continue upon the bail-piece, until a rule of court be made for ſtriking them out.

The uſe of the exoneretur.

So that in order to get themſelves diſcharged of their recognizance, they muſt move to be exonerated, and have their names ſtruck out of the bail-piece, for which a rule will accordingly be made. *Fulke* v. *Bourke*, Blac. 462.

Bail were put in, and excepted to; afterwards two freſh bail were added, one of which only juſtified and the other was rejected; two days further time was allowed to put in another in the room of the rejected bail, in

(*a*) By ſtat. 21 Jac. 1. c. 26. ſ. 2. & ſtat. 4 & 5 W. & M. c. 4. ſ. 4. "If any perſon ſhall acknowledge, or procure to be acknowledged, any recognizance or bail in the name of another perſon, not privy or conſenting to the ſame; or ſhall repreſent or *perſonate* another perſon before a commiſſioner, whereby he may be liable to the payment of any debt or damages, he ſhall, on conviction, ſuffer death without benefit of clergy."—To effect which conviction the bail-piece muſt be filed, 2 Sid. 90.; and after the offender is convicted, but not till then, proceedings will be ſet aſide againſt the party perſonated. Tidd 140.

which

Of the Allowance of Bail.

which time defendant was ſurrendered, which was held regular; becauſe as the two firſt bail were not ſtruck out of the bail-piece, they were liable on their recognizance and competent to ſurrender. *The King* v. *Sheriff of Eſſex*, Eaſt. 1794. 5 D. & E.

When bail may be ſtruck out of bail-piece.

If one perſon be excepted to as bail, and another be added, the name of the former may, with leave of the court, be ſtruck out of the bail-piece at any time before ſcire facias; and even after ſcire facias brought, proceedings as to him will be ſtayed. *Waller* v. *Green*, Say. 309.

Bail excepted to, but not ſtruck out of the bail-piece, may, if afterwards proceeded againſt, move to enter an exoneretur *nunc pro tunc*, which will be granted. *Humphrey* v. *Leite*, Bur. 2107. B. R.

Bail in error, who refuſe to juſtify, may have their names ſtruck out of the bail-piece at any time. 1 Wil. 337. B. R. *Jones* v. *Tub*, S. C. Say. 58.

When bail have once juſtified, if plaintiff ſhould not like them, he muſt not diſcontinue by a ſide-bar rule, without diſcloſing the fact, and bring a new action; as, in ſuch caſe, the court will diſcharge the ſide-bar rule: but he ought to aſk leave of the court to charge the defendant in cuſtody, diſcloſing the whole of the caſe to them. *Belchier* v. *Ganſell*, Burr. 2502.

Of ſtriking the bail out to make him a witneſs.

One who is a bail cannot be a witneſs in the cauſe for his principal; therefore if defendant ſhall have occaſion to examine one of his bail as a witneſs, he muſt make an affidavit that ſuch bail is a material witneſs for him in the cauſe, and thereupon move the court, that he may be ſtruck out of the bail-piece, on adding and juſtifying another in his ſtead; but it will not be granted without an affidavit that he is a material witneſs. *Young* v. *Wood*, Bar. 69.

Sometimes bail have moved to enter an exoneretur on the ground of defendant having been ſent out of the kingdom under the alien-bill, for which ſee poſt, Sec. 6. A.

(D. 5) *Of the Allowance of the Bail.* (D. 5)

How got.

It has been already obſerved, that after juſtification of bail, a rule for their allowance muſt be got of clerk of rules, with a copy of which plaintiff's attorney muſt be

ſerved, and the rule itſelf, at the ſame, time muſt be ſhewn to him.

The form of the rule is as follows:

Form thereof.

Wedneſday next after ——— day of ——— in the 22d year of the reign of King George the Third:

A. B. } Upon reading the affidavit of J. S. it is ordered, that C. D. } the bail put in for the defendant, who have this day juſtified themſelves in court, be allowed, and the bail-piece filed on the motion of ———.

By the Court.

The neceſſity of this rule.

Until this rule of allowance has been properly obtained, and ſerved upon the plaintiff's attorney, bail is not perfected; but an attachment may be ſued out againſt the ſheriff for not bringing in the body, nor will the court on motion ſet aſide ſuch attachment; and this, although the plaintiff was preſent, and oppoſed the bail at the time of juſtification. *The King* v. *Sheriff of Middleſex*, 4 D. & E. 494.

This rule of allowance having been ſerved, every thing has then been done, on the part of the bail, which is required by the practice of the court, and the bail are therefore ſaid to be *perfected*.

Section VI.

Of the Surrender in Diſcharge of Bail.

Having ſhewn in what manner bail are to be put in and perfected, and alſo how ſuch bail, by their recognizance, become anſwerable, either that the defendant ſhall pay the debt and coſts which may be adjudged againſt him, or ſurrender himſelf to priſon, or that they (the bail) will do ſo for him; it may not here be improper briefly to conſider the practice with reſpect to the ſurrendering of the principal in diſcharge of the bail, inaſmuch as it may be made at any ſtage of the ſuit; and in certain caſes it is adviſable for the bail to take this ſtep, without delay, in order to get themſelves diſcharged.

The ſurrender may be made either voluntarily, by the principal himſelf; or compulſory, by the bail ſeizing the principal, and ſurrendering him; and either in court, if ſitting, or before a judge at his chambers—the laſt of which is moſt uſual; and the mode of making ſuch ſurrender is as follows:

When

Of the Surrender in Discharge of Bail.

When defendant is at large,

In B. R.

Take defendant to a judge's chambers, and the judge's clerk will make out the committitur and surrender, and deliver him to the custody of the tipstaff, to be conveyed to the King's Bench prison; pay clerk 9s. 6d.; *tipstaff* 10s. 6d.

Notice of the render must be immediately given in writing to plaintiff's attorney, and an affidavit must be made before a judge of the service of the notice; carry affidavit to the judge's clerk or officer, who hath the custody of the bail-piece; who will take the same, and keep it as his voucher, and deliver you the bail-piece to be filed. The marshal (or gaoler) will also give you a certificate *of the surrender (that defendant is in his custody), which the tipstaff generally brings with him, and gives to you at the time the render is made; pay for same* 3s. 6d.; *carry the bail-piece and certificate to the master, who will enter an exoneretur upon the former; pay him* 2s. 4d.; *leave the certificate with him to be filed; carry bail-piece to the signer of the writs, Mr. Webb, to be filed; pay him* 4d.; *this done, you enter the committitur and surrender in the marshal's book at the clerk of the judgments office, for which you pay* 4d. *and then render is complete.*

Under the commitment must be added, the state of the cause at the time of surrender, viz. If before declaration, the sum sworn to on arrest; if declaration filed or delivered, to the sum sworn to, must be added—"De-

In C. B.

How to surrender defendant in discharge of his bail.

Get the filazer to attend at a judge's chambers with his book; bail are rendered therein, and the judge at the same time exonerates the bail, and delivers defendant to tipstaff to be taken to the Fleet; pay filazer 7s. 4d. *tipstaff* 10s. 6d. *judge's clerk* 13s.

Then give notice of such render to plaintiff's attorney; but as nothing further is to be done for the discharge of the bail, there is no need of any affidavit of the service.

N. B. The above is the mode when the proceedings are by original.

But if the action be by bill, or attachment of privilege, then bail-piece *must be carried to the judge's chambers, by Mr. Sherwood, clerk of the dockets, &c. and exoneretur entered thereon; pay him* 7s. 4d. *tipstaff* 10s. 6d. *judge's clerk* 16s.

Give notice as above, but no affidavit necessary. Imp. C. B. 504.

N. B. The above is the shortest way; but in the older books of practice, the same steps are directed to be taken in this court as in B. R. mutatis mutandis, *with respect to the different prisons and officers of the respective courts.*

Of the Surrender in Diſcharge of Bail.

" claration filed or delivered ;" iſſue joined, or interlocutory judgment ſigned, as the caſe may be, after final judgment in debt, the debt and damages ; and in other caſes, quantum of damages. R. Eaſt. 8 G. 3. 1768.

When defendant is in cuſtody :

If defendant be in cuſtody of any ſheriff at the ſuit of another plaintiff, or otherwiſe, the bail may have a habeas corpus either in term or vacation, directed to the ſheriff or gaoler in whoſe cuſtody he is, to bring them before a judge, returnable immediately, *in order to render him in diſcharge of his bail.* Burr. 1876.

Make out the habeas, as in other caſes, vide Hab. vol. 2d. ; lodge it with gaoler in whoſe cuſtody defendant is ; he will bring him into court, or to a judge's chambers, in order that he may render himſelf, or that his bail may do it ; and the ſame ſteps muſt be taken by the bail to complete render, as where defendant is at large ; only habeas, and return thereof, are left with judge, and return of habeas marked, or ſurrender ſigned by him, which is carried over to gaoler into whoſe cuſtody defendant is rendered ; attorney muſt get a tipſtaff to carry him over to warden or gaoler. Tipſtaff 10s. 6d.

OBSERVATIONS.

From the multiplicity of caſes which may be found in the books on the doctrine of ſurrender in diſcharge of bail, this point of practice at firſt appears obſcure, and difficult to be underſtood : it may, perhaps, not a little tend to the elucidating of the ſubject, if it be treated under two diſtinct heads. Firſt, the ſurrender of the defendant *before* judgment be obtained againſt him ; and next, the ſurrender of the principal *after* judgment has been obtained againſt him.

For, although no proceedings can be had againſt the bail until *after* final judgment againſt the principal, yet they may ſurrender him, or he may ſurrender himſelf at any ſtage of the cauſe, ſubject to the obſervance of certain rules and reſtrictions.

We ſhall at preſent confine ourſelves to thoſe rules and reſtrictions which ought to be obſerved in the making of the ſurrender, at any time *after* the commencement of the original ſuit, and *before* judgment therein ; reſerving the conſideration of the ſurrender *after* judgment to a future part of the work, when we ſhall treat of the proceedings

Of the Surrender in Diſcharge of Bail.

ceedings againſt bail, either by action upon their *recognizance*, or by *ſcire facias*.

The *manner* in which ſuch ſurrender is to be made has been ſhewn above; it now remains only to make a few remarks upon,

(A) The Time when ſuch Surrender may be made; and what is requiſite to be done before the making thereof.

(B) The Power of the Bail to take their Principal to ſurrender him.

(C) The neceſſary Steps to be taken after the Surrender; and herein of the Exoneretur, &c.

(D) Certain Circumſtances which diſcharge the Bail without any Render.

(A) Of the Time of making ſuch Surrender, and and what is neceſſary to be done before the making thereof. (A)

There is no part of the practice which ſeems to have undergone a greater alteration by modern rules and deciſions than this.

Formerly no ſurrender could be made before the return of the writ; for if the defendant had been arreſted and given bail, it uſed to be held that nothing could be a performance of the bail-bond but putting in bail above, nor could a ſurrender be made before that was done. *Harriſon* v. *Davies*, Burr. 2683.

But now it is determined otherwiſe; a defendant who has given a bail-bond, may ſurrender himſelf to the ſheriff before the return of the writ, the bail-bond may be given up, and it will be conſidered as if no ſuch bond had been given; for if the ſheriff has the defendant in his cuſtody to anſwer the exigency of the writ, it is ſufficient. *Jones* v. *Lauder*, 6 D. & E. 754. *Stamper* v. *Milbourne*, 7 D. & E. 122.

But *after* the return of the writ, it is neceſſary to put in bail before a ſurrender can be made.

And either party may put in bail above, that is to ſay, either the defendant himſelf to keep his liberty, the bail below in order to make a ſurrender, or the ſheriff to pre-

vent his being ruled. So that if the bail below wiſh to ſecure themſelves, and ſuſpect that the bail above which the defendant is about to put in cannot juſtify, they may at the ſame time give notice of other bail, or that they themſelves will be bail above. Thus two notices and two bail-pieces may appear at the ſame time; and if defendant's bail ſhould not be accepted, the bail put in by the bail below may immediately render defendant, and thus all parties be diſcharged, except the defendant himſelf. *Berchere* v. *Colſon*, Str. 876. *Golbeir* v. *Colſon*, 1 Barn. 369.

When bail above is put in in order to warrant a ſurrender, it muſt be complete bail, two perſons at leaſt; if only one, and a ſurrender made thereon, it is bad, and plaintiff may proceed on bail-bond. Bar. 46. 172. Cro. Eliz. 672.

But if any *two* bail be put in, they may render, even though they are excepted to; for it is not neceſſary that they ſhould juſtify firſt. If, however, they attempt to juſtify, and are *rejected*, then they cannot render, becauſe rejected bail are as no bail, but new bail may immediately be put in and render, provided the time for putting in bail is not expired, or further time has been obtained.

If bail are put in and excepted to, and then others added, and one of the added bail afterwards rejected, provided the firſt excepted bail be not ſtruck out of the bail-piece, they may make a ſurrender of the defendant.

Excepted bail ſurrendered after others were added and rejected.

Two bail had been put in, they were excepted to; notice of adding and juſtifying two freſh bail was given; one of them was afterwards rejected; two days further time was given to add another (though the rule to bring in the body had expired); inſtead of adding another, a ſurrender was made, and notice thereof given. An attachment iſſued, on the ground of the ſurrender being void. Upon motion to ſet aſide the attachment it was contended, that there was no bail to warrant the ſurrender, and that therefore it was bad; the firſt bail having been abandoned by adding others, and one of the added bail having been rejected, there was no complete bail. *Per* Lord *Kenyon*—On the bail-piece there are the two excepted bail, and the one added bail; the excepted bail had not been rejected; they therefore were competent

Of the Surrender in Discharge of Bail.

tent to surrender; they were still liable on their recognizance. No exoneretur was entered as to them. Attachment set aside. *The King* v. *Sheriff of Essex*, 5 D. & E. East. 1794.

At what time excepted bail must render.

But although bail excepted to may render without justifying, yet such render must be before the time for such justification expires. For if bail are excepted to, and they give notice of justification, and do not appear on the day appointed, and obtain no further time to justify in, they are out of court, and cannot afterwards surrender the principal; but bail-bond may be assigned. *Hardwicke* v. *Black*, 7 D. & E. 297.

In this case, however, surrender having been completed before the actual assignment of bail-bond, court set aside proceedings thereon, on payment of costs.

Another alteration in the practice in this respect is, as to the justification in order to surrender, if the bail-bond has been assigned.

Of rendering after assignment of bail-bond.

Formerly, when the bail-bond had been once assigned, it was necessary, in order to stay the proceedings thereon upon the ground of a render having been made, that not only bail should be put in, but that they should justify before such surrender was made; but now bail may be put in and render without any such justification, and then move to stay proceedings on bail-bond; and this in both courts. *Edwin* v. *Allen*, 34 G. 3. *Meysey* v. *Cornell*, 5 D. & E. 534. *Hall and Walker*, 1 H. Blac. 638.

Of rendering after sheriff ruled to bring in the body.

In like manner formerly, if the sheriff had been ruled to bring in the body, no render could be made to prevent an attachment, unless bail when put in had justified. But now by R. Trin. 33 G. 3. 5 D. & E. 368. it is ordered, That bail shall and may be at liberty to render the defendant, notwithstanding such rule upon the sheriff at any time *before the expiration thereof*; the attorney for defendant giving notice of such render to plaintiff's attorney without delay, and making affidavit thereof.

So that in such case no justification is now necessary; and this in both courts. *Hall and Walker*, 1 H. Blac. 638.

The above points seem now settled, though various contradictory cases before this period may be found in the books upon them.

How if bail be put in surreptitiously.

If bail be *surreptitiously* put in, though they may justify, and afterwards render the defendant, yet such render shall

shall be nugatory, because they shall be deemed as no bail, and therefore cannot surrender. *Jackson* v. *Morris*, 2 Blac. Rep. 1179.

(B) (B) Of the Power of the Bail to take their Principal to surrender him.

If defendant secretes himself, what bail may do.

If defendant secretes himself to avoid being rendered by his bail, they, or either of them, may take him wherever they meet with him, even in his own house, so that they break no locks. When taken, one of the bail must always remain with him, (for they cannot depute their right of custody to another, without defendant's consent in writing,) till he is rendered. If he consents to go to an officer's house till rendered, bail must take such consent from him in writing. But so soon as they have delivered him upon the render into the custody of the tipstaff, he is answerable for his escape.

When taken by them, how to proceed.

At what time and place they may take him.

Bail cannot take defendant on a *Sunday* in order to surrender. *Brooks* v. *Warren*, 2 Blac. 1273.

But 6 Mod. 231. *contra*. Bail may take principal on a Sunday, and confine him till next day, and then render him.

Bail may seize a bankrupt while under examination, or going to a court of justice.

So they may have a habeas corpus to bring up a king's debtor, or any one in custody of any sheriff or any gaoler, or a person convicted of felony, to render him in their discharge. Str. 1217. Vergen's bail.

Although such prisoner be sentenced for transportation. Ibid.

So if he be in custody on a charge of felony. It is, indeed, almost a matter of course, and what the bail are entitled to ask *ex debito justitiæ*. Per Lord *Kenyon*, in *Sharp* v. *Sheriff*, 7 D. & E. 226. where the court granted an habeas corpus to the sheriff of ———, in whose custody defendant was, under a charge of murder, for the purpose of bringing him up and surrendering.

In such cases the habeas corpus should be on the crown side. But if the convict be actually on board a ship, and ready for sailing, court will not grant such habeas corpus. *Fowler* v. *Dunn*, Burr. 2034.

But although no habeas corpus will be granted on account of the inconvenience which might result from

Of the Surrender in Discharge of Bail.

bringing him up, yet the court may be moved for a rule to shew cause why an *exoneretur* should not be entered on the bail-piece on the ground of impossibility to render the defendant, which rule will be granted. *Wood* v. *Mitchell*, 6 D. & E. 247. See this Sec. D.

So an impressed man in custody of the Savoy, may be taken and rendered; who shall first be delivered over to the marshal, with orders to be delivered *instanter* to the keeper of the Savoy. *Bond* v. *Isaac*, Bur. 339.

(C) Of the necessary Steps to be taken after the Surrender; and herein of the Exoneretur, &c. (C)

No surrender is good until notice in writing given to plaintiff's attorney. R. Trin. 1 Ann. Notice of the render must be given.

Nor is it complete until the fees are paid; for even if the judge's signature of the entry of the commitment be on bail-piece, if fees are not paid, it will be ordered, on motion, to be struck out. *Huxley* v. *Clendon*, Com. 554. Bar. 70. Fees must be paid.

Such omission shall not vitiate a surrender, but if any costs be incurred by reason thereof, court will require the bail to pay them before they are discharged. *Wells* v. *Ormond*, 6 Mod. 238.

When the surrender has been made, the bail-piece shall be marked and discharged, otherwise the plaintiff may proceed against the bail. Comb. 263. An exoneretur must be marked on bail-piece,

For without an exoneretur they are liable on their recognizance. See *ante*, A! *The King* v. *Sheriff of Essex*.

If bail-piece be filed without being discharged by master, bail remain liable, though defendant be in actual prison. Mod. Cas. 340. or bail will be liable.

This discharge is made by the master entering an *exoneretur* thereon, after which it is filed by the proper officer. How exoneretur entered.

A. sued B. in three actions, and he put in three bails; plaintiff recovered in all; defendant rendered himself, and one of the bails entered an *exoneretur* on the bail-piece, which the rest did not. And *per Cur.* the rendering is a discharge *in posse* to all, but not complete and actual as to all till *exoneretur* entered on all. *Williams* v. *Williams*, Sal. 98.

A bail excepted to, who does not justify, may at any time move to have his name struck out of the bail-piece; When it may be moved for.

for

Of the Surrender in Discharge of Bail.

for as he was excepted againſt, he might reaſonably conclude that he was no longer to be conſidered as bail. *Jones* v. *Tub*, 1 Wil. 337.

If omitted to be done at the proper time.

Upon rule to ſhew cauſe why an *exoneretur* ſhould not be entered upon the bail-piece, it appeared that the bail had rendered the defendant regularly, and had given notice of the render to plaintiff's attorney; that defendant had been ſince in cuſtody, and that defendant's attorney had omitted to enter an *exoneretur* upon bail-piece. Rule made abſolute upon paying the coſts which had accrued ſince the render. *Weaver* v. *Chandler*, Say. 7.

Where no *exoneretur* is entered on the bail-piece, and plaintiff proceeds to judgment againſt bail, if it appears that defendant has done every thing proper on his part, and that it was owing to plaintiff's attorney that the bail-piece was not properly diſcharged, by his taking the ſame away, judgment will be ſet aſide, and *reddidit ſe* ordered to be entered on bail-piece, and the ſame to be filed. *Knight* v. *Winter*, Bar. 68.

Of the reddidit ſe.

The *reddidit ſe* on the bail-piece is only an eſcrol or warrant to the officer, (viz. the ſigner of the writs in K. B. and filazer in C. B.) to enter the ſurrender on record. Where the entry on bail-piece, therefore, was obtained by fraud, and no ſurrender on record, the court held the ſurrender ineffectual, and ordered the *reddidit ſe* to be ſtruck out. Bar. 70.

How to get exoneretur if bail-piece loſt.

The bail-piece was loſt, on which the bail moved that a new bail-piece might be filed, in order that he might ſurrender the principal, (who had been actually in cuſtody of the bail for ſome days,) which he could not do for want of a bail-piece; and though the plaintiff refuſed to conſent, yet the court gave leave to put in bail *de novo*, on hearing the whole matter; which was done, and then the bail ſurrendered. Bar. 108.

Of the committitur, and the uſe thereof.

Although the bail be diſcharged by the entry of the *reddidit ſe* in the judge's books, and the *exoneretur* on the bail-piece, yet the marſhal is not duly charged with the cuſtody of the defendant until the entry of the *committitur* and ſurrender be made in the marſhal's books. So that until that be done, he will not be liable to an action ſhould defendant eſcape. *Watſon* v. *Sutton*, Salk. 273. But bail would ſtill remain liable, 6 Mod. 238.

Under

Of the Surrender in Discharge of Bail.

Under every commitment should be entered the state of the cause at the time of the render, agreeable to the rule of court. East. 8 Geo. 3.

(D) Of Circumstances which discharge the Bail without any Render. (D)

There are certain circumstances which entitle the bail to a discharge, and which are proper grounds, supported by affidavit, for moving the court for leave to enter an *exoneretur*; or in vacation a judge will order it. As if defendant is a bankrupt and has obtained his certificate. Bar. 104. Cow. 824. 1 D. & E. 624. Or if pending the suit he is made a peer; *Trinder* v. *Shirley*, Do. 45.; or becomes a member of the House of Commons; *Langridge* v. *Flood*, H. 26 Geo. 3. Tid. 152.

If defendant is a bankrupt, or made a peer, or the like.

The reason is, that the bail only engaged for the principal in the then situation of the parties, but by the change of circumstances, it is now become impossible for them to render him.

Reason thereof.

On the same principle since the passing of the alien act 33 G. 3. c. 4. where government have sent defendants out of the kingdom as being foreigners under that act, bail have often applied for an *exoneretur* to be entered, which has been always granted; except they have effects in their hands belonging to the defendant, out of which they could repay themselves should the plaintiff recover; or where the attorney had indemnified the bail and he had got a draft from the defendant on a banker in town sufficient to secure him. In these cases of aliens, therefore, an affidavit is expected, that the bail are not so indemnified. *Merrick* v. *Vaucher*, 6 D. & E. 51. *Coles* v. *Dehayne*, ib. 52.

How in cases of aliens sent abroad.

In the last case, the cause was tried, and a verdict for plaintiff; after which the court was moved for leave to enter an *exoneretur*, on the bail paying 1000l., the amount of the draft left for their indemnity, and no other effects being in their hands out of which they could pay the costs; but the court held, that as the bail had chosen to defend the action with a view of taking the chance of a verdict in their favour, they ought to pay the plaintiff's costs out of their own pocket, 6 D. & E. 246.

Bail try such actions at their own risk.

So a physical impossibility to render, as dangerous illness or the like, have been held good grounds for an

Other grounds for exoneretur; illness, &c.

Of the Surrender in Diſcharge of Bail.

exoneretur; and where a defendant was ſent abroad by government in the king's ſervice, and there unavoidably detained, ſo that he could not be rendered, it was held ſufficient.

Declaration varying from proceſs.

If plaintiff declare for a different cauſe of action than what is mentioned in proceſs, or in a different county, provided the proceedings be by ſpecial original, bail will be diſcharged.

WE HAVE HITHERTO SUPPOSED THAT THE DEFENDANT, AGREABLE TO THE CONDITION OF THE BAIL-BOND, APPEARS AT THE RETURN OF THE WRIT, BY PUTTING IN SPECIAL BAIL, CALLED BAIL TO THE ACTION, OR BAIL ABOVE, AND HAVE SHEWN HOW TO EXCEPT AGAINST, JUSTIFY, ADD TO, OPPOSE, AND PERFECT SUCH BAIL, AND ALSO HOW TO SURRENDER DEFENDANT IN DISCHARGE OF THE BAIL; BUT IN CASE THE DEFENDANT SHOULD FAIL IN THIS HIS APPEARANCE, AND NEGLECT TO PUT IN BAIL, OR TO JUSTIFY THEM IF EXCEPTED TO, IN DUE TIME; PLAINTIFF HAS TWO REMEDIES AT HIS ELECTION; THE ONE, BY GETTING THE BAIL-BOND ASSIGNED TO HIM, AND PROSECUTING THE SURETIES MENTIONED THEREIN; THE OTHER, BY PROCEEDING AGAINST THE SHERIFF, TO COMPEL HIM EITHER TO PUT IN GOOD BAIL, OR HIMSELF TO SATISFY PLAINTIFF'S DEMAND.

SECTION VII.

Of the Aſſignment of the Bail-bond, and the Proceedings thereon.

Remedy at common law if defendant did not appear.

At common law, the only regular mode of redreſs which a plaintiff had, when the defendant neglected to put in or to perfect bail above, was to proceed againſt the ſheriff, and cauſe him to be amerced.

The ſheriff might indeed have given up the bail-bond, and ſuffered plaintiff to proſecute the bail; but this was merely optional on his part; and even if he did ſo, the action could only have been brought in the name of the ſheriff, who might at any time have releaſed it, and haraſſed the plaintiff by compelling him to reſort to a court of equity. To remedy this inconvenience, the ſtatute of 4 & 5 Ann. c. 16. was paſſed for the expreſs purpoſe of

Of the Aſſignment of the Bail-bond.

of amending the law, and by the 20th ſect. thereof, "the ſheriff is bound, at the requeſt and coſt of the "plaintiff, or his attorney, *to aſſign him the bail-bond* "by indorſing the ſame, and atteſting it under his hand "and ſeal in the preſence of two or more credible wit-"neſſes, without ſtamp, provided it be ſtamped before "action is brought thereon; and if the ſecurity be for-"feited, the plaintiff, after aſſignment, may *bring an* "*action thereupon in his own name*, and the court may, "by rule, *give ſuch relief* to the plaintiff and defendant in "the original action, and to the bail upon the ſecurity, as "is agreeable to *juſtice and reaſon*; and ſuch rule of "court ſhall have the nature and effect of a defeazance "to ſuch bail-bond." How enlarged by ſtatute, ordering aſſignment of bail-bond.

The above ſtatute, by which the aſſignment of the bail-bond, and the proceedings thereon, are authoriſed and regulated, preſents three things to our conſideration: namely, the aſſignment of the bond; the action thereon; and the equitable interference of the court in giving relief therein.

(A) Of the Manner, Time, &c. of aſſigning the Bail-bond.

(B) Of the Action thereon.

(C) Of ſtaying and ſetting aſide the Proceedings.

(A) The Time, Manner, &c. of aſſigning the Bail-bond. (A)

If bail above be not duly put in, or if put in, and excepted to, they do not juſtify in the time limited by the rules of the court, and the plaintiff would obtain the bail-bond from the ſheriff, his attorney ſhould apply in the following manner: How to procure aſſignment.

If in Middleſex, to the under-ſheriff at his office in Tooke's court, Curſitor-ſtreet; or if in London, to the ſecondary of the compter where the bail-bond was taken; or if in the country, to the under-ſheriff; either of whom is bound to indorſe an aſſignment thereon, and deliver it to the plaintiff or his attorney, if applied to. In London or Middleſex pay 5s.; *in the country* 6s. 8d.

The manner in which the aſſignment is to be made, is ſhewn by the ſtatute:—"The *ſheriff*, or *other officer*, at "the Of the manner of making aſſignment.

Of the Aſſignment of the Bail-bond,

" the requeſt and coſts of the plaintiff in ſuch action or " ſuit, or his lawful attorney, ſhall aſſign to the plaintiff " in ſuch action, the bail-bond or other ſecurity taken " from ſuch bail, by *indorſing the ſame, and atteſting it* " *under his hand and ſeal, in the preſence of two or more cre-* " *dible witneſſes*, which may be done *without* any ſtamp, " provided the aſſignment ſo indorſed be duly ſtampt, " before any action is brought."

Statute compulſory on ſheriff.

The ſtatute is compulſory upon the ſheriff to aſſign the bail-bond at the requeſt of the party; but if he refuſes, no attachment will lie againſt him as it is not a contempt of the court, but he is liable to an action on the caſe; ſuch an action was brought in *Stamper* v. *Milbourne*, 7 D. & E. 122.

Of the time of making aſſignment.

The ſtatute does not mention any particular time in which it is to be aſſigned. It is neceſſary therefore to ſtay until the bail-bond be forfeited, before ſuch aſſignment is made; although no action can be brought thereon till it be forfeited.

Of the effects of ſuch aſſignment, and the caution neceſſary in taking it.

It is adviſable, however, for the plaintiff not to take an aſſignment of the bond, unleſs he is well convinced of the reſponſibility of the ſureties mentioned therein. For it is at his election either to have the bond aſſigned, or to proceed againſt the ſheriff; but when he has made ſuch election, by taking an aſſignment, he diſcharges the ſheriff, and cannot afterwards reſort to him; for the court will not, in ſuch caſe, grant him a rule upon the ſheriff to return the writ. Lord *Brooke* v. *Stone*, 1 Wil. 223. Sal. 99.

Beſides which (in B. R.) if the bail below ſhould become bail above, he cannot, after taking ſuch aſſignment, except to them. Sal. 97.

Plaintiff not compelled to take it.

The taking of the aſſignment of the bail-bond is a mere voluntary act of the plaintiff; for though the ſheriff ſhould tender it to him, he cannot be compelled to accept of it. *Rex* v. *Dawes*, Ld. Ray. 722.

Who muſt make it.

Either the high-ſheriff, or the under-ſheriff in the name of the ſheriff, muſt aſſign the bail-bond, or it will be bad. Even an under-ſheriff's clerk cannot aſſign it. *Kitſon* v. *Fagg*, Str. 60.

Where it may be made.

There is no neceſſity for the bail-bond to be aſſigned by the ſheriff in his own county; it may be aſſigned any where. *Gregſon* v. *Heather*, Str. 727. Ld. Ray. 1455. Fort. 366.

In

and the Proceedings thereon.

When plaintiff loses benefit of assignment in C. B.

In the case of *Sparrow* and *Naylor*, in the court of Common Pleas, Blac. 876. it was determined, that where the plaintiff has not declared before the essoin day of the third term inclusive, after the return of his writ, he has deserted his cause, and is out of court, and cannot afterwards take an assignment of the bail-bond; because, by the found construction of the statute 3 Ann. the suit must be depending when the bail-bond is assigned, and it was plaintiff's own fault in not declaring de bene esse.

but not in B. R.

But in B. R. the practice is otherwise; and although plaintiff does not declare within two terms after the return of the writ, (the time allowed by that court,) yet he may afterwards take an assignment of the bail-bond; and the reason is, because plaintiff is not *obliged* to declare *de bene esse*; and if he does not, and defendant neglects to put in bail, he cannot declare at all, since he cannot declare *in chief* until defendant has appeared by putting in bail. The defendant, therefore, being in fault, ought not to take advantage of his wrong. *Merryman* v. *Carpenter*, Str. 1262.

What shall not be a waiver of assignment.

Where the defendant is guilty of a neglect in not putting in bail in time, whereby the bail-bond becomes forfeited, the plaintiff may except to bail put in, in order to stay proceedings on the bail-bond, and it will not be a waiver of the assignment. Cowp. 769.

(B) Of the Action on the Bail-bond. (B)

This action is given by the stat. of Ann.

The next thing which the above-mentioned statute of Ann authorises is, the *action on the bail-bond*, to be brought by the plaintiff in his own name, as assignee of the sheriff, which remedy did not exist at common law.

"If the bail-bond, or assignment, or other security taken for bail, be forfeited, the plaintiff in such action, after such assignment made, may bring an action and suit thereupon in his own name."

How to proceed in such action.

It is to be observed, however, that before the bringing of such action, the statute directs, that the assignment so indorsed, as before directed, shall be duly *stamped*.

This stamp is a double sixpenny stamp, which is put just over the top of the assignment, and the clerk at the stamp-office writes, in red ink, the day of the month and year when the same was stamped.

Of the Assignment of the Bail-bond,

The assignment being thus completed, sue out process in the usual way; serve the bail with copy thereof, and afterwards declare against them, and proceed as in common actions, not bailable.

Of the time of bringing action on bail-bond.

In K. B.

If the arrest were in London or Middlesex, the bail-bond cannot be put in suit till four days exclusive after the return of the writ.

If the arrest were in any other city or county, not till six days exclusive *after the return of the writ. R. M. 8 Ann.*

So that if writ was returnable on the sixth *in London or Middlesex, no action can be brought on bail bond till the* eleventh; *if a country cause, not till the* fifteenth; *for the fourth or eighth day must completely expire; if Sunday be the last, it is not reckoned, in either court. 2 Str. 914. Ib. 782.*

In C. B.

No bail-bond taken in London or Middlesex by virtue of any process returnable on the first return *of any term, shall be put in suit until* after *the* fifth *day* in full term; *and that no bail-bond taken in any other city or county by virtue of such process, shall be put in suit until after the* ninth *day of full term. And no bail-bond taken in London or Middlesex by virtue of any process returnable on the* second or any other subsequent *return, shall be put in suit until after the end of* four *days* exclusive *of the return day; and no bail-bond taken in any other city or county by virtue of such last-mentioned process, shall be put in suit until after the end of* eight *days exclusive as aforesaid, upon pain of having all such proceedings on bail-bonds set aside with costs. R. Trin. 30 G. 3.*

In what court such action must be brought.

An action on a bail-bond must be brought in the *court where the bail was given. Walton* v. *Bent*, 3 Bur. 1923. 3 Wil. 348. 2 Blac. Rep. 838. *Morris* v. *Rees.*

So if the bail-bond be given in a court of a county palatine, in an action brought there, and an assignment thereof is made by the sheriff, the action on the bail-bond must be brought in that court. *Chesterton* v. *Middlehurst*, Bur. 642.

The action must be brought in the same court, even though the bail be an attorney of another court. For, *per cur.* by entering into a bail-bond the defendant has waived his privilege, whether sued jointly or severally. Bar. 117.

So that if the process on which the bail-bond was given, was issued out of the Common Pleas, the action on the bail-bond must be brought there, and not in the King's

and the Proceedings thereon.

King's Bench. Bur. 1923. and *vice versa*, Blac. Rep. 838.

If brought otherwise, proceedings will be stayed, though after plea pleaded. The reason of the above practice is founded on the construction of the 4 Ann. c. 16. Because the court wherein such action is brought, is empowered to give a general relief to the plaintiff and defendant in the original action, upon equitable terms, which no court can properly do, as they cannot judge of the merits, except that in which the original action is brought, and before which the action on the bail-bond is depending. Blac. 839. 3 Wil. 348. The reason thereof.

But this rule only holds where the action is brought by the plaintiff as assignee of the sheriff, and which is grounded on the 4 Ann. c. 6. s. 20.; for it does not extend to actions brought by the *sheriff himself* on such bond, as such actions may be brought in a different court than that where the original action was. 1 H. Blac. 631. Exception to the above rule.

But the *venue* in an action upon the bail-bond by plaintiff, as assignee of the sheriff, may be laid in any county, since the assignment may be made any where by the sheriff. *Gregson* v. *Heather*, Str. 727. Ld. Ray. 1455. In what county the venue may be laid.

In an action on a bail-bond, the defendants are not to be held to special bail, for that might occasion bail *ad infinitum*; but you must proceed therein by service of process, as in other actions not bailable; for which see *ante*, chap. 3. It is not a bailable action.

The manner in which the bail-bond was assigned, ought to be set out in the declaration, to shew that it was done pursuant to the statute; but, although not accurately stated, the omission will be aided by judgment by default. *Mifflin* v. *Morgan*, Ld. Ray. 1564. Of the declaration in such action.

Bail-bond may be sued by the executors of the assignee. *Nott* v. *Stevens*, P. Reg. 68. Executors of assignee may sue.

In an action on a bail-bond the arrest is not traversable, therefore none need be shewn; otherwise it would be a way to avoid all bail-bonds civilly taken, without exposing the party by an arrest. *Watkins* v. *Parry*, Str. 444. *Haley* v. *Fitzgerald*, Str. 643. Arrest not traversable.

But the issuing of the process is traversable; so that plaintiff may plead, that no such bill of Middlesex, &c. issued; because, if no such writ issued, the bail-bond is *ipso facto* void, and consequently the plaintiff has no ground of action. *Saxby* v. *Kirkus*, Say. 116. But the issuing of the process is.

Of the Assignment of the Bail-bond,

How far sheriff's bail are liable by the bail-bond.

There is a distinction between the extent of the liability of bail *below* and bail *above*, in an action against the *former* upon the *bail-bond*, and against the *latter* on their *recognizance*. In the latter case the bail are only liable to the extent of the *sum sworn to and costs*. *Jackson* v. *Hassell*, Doug. 330.

But in the former they are responsible for the *whole of the debt and costs*, if they do not exceed the *penalty* of the bond; and this in both courts. *Savage* and *West* cited in *Orton* v. *Vincent*, Cow. 71. *Mitchell* v. *Gibbons*, 1 H. Blac. 76. See also *ante*, Sec. 5. and post, Sec. 8. D.

(C) (C) Of staying and setting aside Proceedings on the Bail-bond.

This part of the practice authorised by 4 & 5 Ann,

It has been before observed, that the statute 4 & 5 Ann. authorises three things; 1st, The assignment of the bail-bond; 2d, The action thereon; and 3d, The equitable interference of the court to give relief to the parties. Of the two first we have already treated; it only remains to make a few observations upon the last.

which gives the court an equitable jurisdiction.

This equitable jurisdiction is given by the statute in the following words: "And the court where the action "is brought may, by rule or rules of the same court, "give such relief to the plaintiff and defendant in the "original action, and to the bail upon the said bond, or "other security taken from such bail, as is agreeable to "justice or reason; and that such rule or rules of the "said court shall have the nature and effect of a defea-"zance to such bail-bond or other security for bail."

The nature of the relief afforded is to stay the proceedings, or to set them aside.

The *nature* of this relief depends upon the circumstances of the case. If the assignment of the bail-bond has been *regularly* made, the relief granted by the court is to *stay* the proceedings; but if the assignment of the bond has been *irregular*, the relief then is to *set aside* the proceedings.

We shall therefore briefly consider—

(C. 1) *In what Cases, and upon what Terms, Proceedings on the Bail bond will be* stayed.

(C. 2) *In what Cases the Proceedings will be* set aside.

(C. 3) *In what* Manner *the Proceedings are to be stayed,* or *set aside.*

(C. 1) *In*

and the Proceedings thereon.

(C. 1) *In what Cases, and upon what Terms, the Proceedings will be stayed.* (C. 1)

The intent of the statute and the principle upon which the courts proceed in staying proceedings.

That the plaintiff may not be delayed or defeated in the prosecution of his suit, the additional remedy of proceeding on the bail-bond is given him by the statute 4 & 5 Ann. in case the defendant does not appear (that is to say, put in and perfect bail above) in due time; for if he does, the condition of the bail-bond to the sheriff is then fulfilled, and the bail below are *ipso facto* discharged.

The chief object therefore is, to enforce the defendant's appearance.

But although the defendant may have neglected to appear within the time allowed, and by reason thereof the plaintiff may have procured an assignment of the bail-bond and *regularly* brought his action thereon, yet if the defendant should be afterwards willing to put in and perfect bail in order to proceed in the original action, and to try the merits, and if the plaintiff be in no respect prejudiced thereby, it would surely be contrary both to reason and justice were the defendant to be excluded from so doing.

It was therefore, upon the principle of doing justice to all parties, that the statute authorised this equitable interference of the courts of which we are now treating.

To enumerate the particular cases in which this relief is granted, would be endless.

In what cases proceedings are stayed,

It may be taken as a general rule, that proceedings on the bail-bond (notwithstanding they may be *regular*) will be stayed in all cases *where the plaintiff can be put in as good a condition as he would have been in provided the defendant had been guilty of no laches.*

The inconveniences resulting to the plaintiff from the defendant's negligence in not perfecting bail are, the *delay* occasioned thereby in the original action, and the *costs* attending the assignment of the bail-bond and the proceedings thereon.

and upon what terms.

To remedy these inconveniences, certain terms are imposed upon the defendant, to which he must accede, as the conditions upon which the proceedings on the bail-bond are to be stayed.

Which terms usually are, that the defendant shall *perfect bail in the original action, receive a declaration, plead issuably, take short notice of trial, and pay the costs to be taxed*

Of the Assignment of the Bail-bond,

by the master incurred by the bail-bond being assigned and by the proceedings thereon.

Thus the plaintiff is reimbursed his expences, and gets to trial in the original action in as short a time as he otherwise would have done.

How, if plaintiff has lost a term, and been delayed going to trial.

But it sometimes happens that the defendant is guilty of a double neglect; first, in not putting in and perfecting bail in time, and thereby suffering the bail-bond to be proceeded upon; and then in not applying with all due diligence to get the proceedings on the bail-bond stayed. So that by reason of this delay, the plaintiff may have actually *lost a term*, or have been *hindered* from going to *trial* so early as he might have done, and therefore cannot now be put in a condition altogether so good as he would have been in, provided the defendant had been guilty of no laches.

Bail bond then stands as a security.

Still, however, the court will exercise their equitable jurisdiction in granting relief to the defendant; but in order to do the plaintiff as ample justice as possible, and to make him a kind of compensation for the loss of time, and the consequent delay in the original suit, they add, in such cases, a further condition to the terms abovementioned, namely, *that the bail-bond shall stand as a security for plaintiff's debt and costs if he recovers in the original action.*

In C B. judgment is granted on bail-bond; but not so in B. R.

In the court of Common Pleas indeed the plaintiff has *judgment* on the bail-bond to stand as a security, and execution only is stayed thereon; Bar. 85. But the court of King's Bench does not go the length of giving the plaintiff judgment, but only of permitting the bail-bond itself to stand as the security, and for the proceedings thereon to be stayed. Imp. 170. This saves the expence of the judgment.

In either case, the advantage to the plaintiff is obvious, as he thereby gains a double security; and this is always given him when, by defendant's negligence, a term, or the opportunity of trial, is lost, and the plaintiff cannot be put in as good a condition as if he had not been delayed.

How far plaintiff must quicken defendant.

It used formerly to be held, that it was incumbent on the plaintiff to quicken the defendant, and to do every thing in his power to forward the proceedings, otherwise the bail-bond would not be allowed to stand as his security.

Thus

and the Proceedings thereon.

Thus it has been refuſed, becauſe the plaintiff had not declared *de bene eſſe*, which he might have done, and had therefore himſelf not uſed his utmoſt diligence. *Ward* v. *Alderton*, P. R. 71.

He is not bound to declare de bene eſſe.

But it has been ſince determined, that plaintiff is not *bound* to declare *de bene eſſe*, and therefore his not doing ſo ſhall not be imputed to him as a laches to deprive him of the benefit of the bail-bond as a ſecurity. *Merryman* v. *Carpenter*, Str. 1262. So held by court after conſulting the Maſter. Mic. T. 1794.

But he ought to put bail-bond in ſuit with due diligence.

If, however, the delay which he complains of, has been really owing to his own negligence, the court will not permit him to take advantage thereof; as if he does not put the bail-bond in ſuit ſo early as he might have done, and defendant, when it is put in ſuit, immediately applies to ſtay the proceedings, the court will ſtay them upon the uſual terms, and payment of coſts, without granting the bail-bond as a ſecurity, becauſe the delay was occaſioned by plaintiff's own default. *Hutchinſon* v. *Hardcaſtle*, Bar. 103.

The effect of the bail-bond ſtanding as a ſecurity in B. R.

When the proceedings are thus ſtayed, and the bail-bond ſtands as a ſecurity, if the plaintiff ſucceeds in the original ſuit, and afterwards renews the action on the bail-bond, the bail cannot plead that their principal *comperuit ad diem;* but the court will give leave on motion to enter up judgment againſt them immediately. *Otway* v. *Cokayne*, Bar. 85. Nor can the bail diſcharge themſelves by a ſurrender.

In C. B.

But in C. B. the judgment (as before obſerved) is allowed in the firſt inſtance, ſo that plaintiff has afterwards nothing to do but ſue out execution.

Courts inclined to extend this relief.

Even after verdict on the bail-bond, proceedings have been ſtayed.

The inclination of the courts is to extend this equitable relief of ſtaying the proceedings, to every poſſible caſe where juſtice ſeems to call for it; inſomuch, that even after a *verdict* on the bail bond, proceedings have been ſtayed.

In C. B. defendant being arreſted in an action by an attorney for fees, entered into a bail-bond with ſureties, which, for want of bail, was aſſigned, and actions brought thereon, wherein plaintiff declared; defendant pleaded *non eſt factum*, and after verdict defendant moved for leave to file bail in the original action on payment of coſts, and conſenting that plaintiff might have judgment on the bail-bond to ſtand as a ſecurity for what plaintiff

Of the Aſſignment of the Bail-bond,

ſhould recover; and produced an affidavit, that he never, in his own ſeparate capacity, employed plaintiff as his attorney, and that he had a good defence; whereupon the rule was made abſolute. *Birch*, one, &c. v. *Graves*, Bar. 74.

The moſt uſual caſes are, where the defendant wiſhes to try the merits.

The above, therefore, are the moſt uſual caſes in which the proceedings on the bail-bond are ſtayed; namely, where the defendant in the original action wiſhes to be let in to try the merits; and ſuch are the terms upon which he is permitted ſo to do.

Other grounds for ſtaying proceedings.

But there are other grounds upon which the courts will ſtay the proceedings.

If either party die, proceedings ſtayed.

Such as the death of either the plaintiff or defendant in the original action, provided ſuch death happens previous to the time when judgment could have been obtained, had the defendant put in and perfected bail in time.

The general rule as to the terms upon which they are ſtayed in ſuch caſe.

For the rule with reſpect to the death of the *defendant* is, that where the plaintiff might have had judgment againſt the original defendant, in caſe he had been guilty of no negligence, the bail below are liable for the whole debt and coſts, to the extent of the penalty of the bail-bond, and not merely the ſum ſworn to. But where the plaintiff could not have had judgment in the original action, the proceedings may be ſtayed upon payment of coſts only. *Orton* and *others* v. *Vincent*, Cow. 71.

And with reſpect to the death of the *plaintiff*, the rule is, that if the plaintiff in the original action dies before judgment could have been recovered therein, proceedings ſhall be ſtayed. *Willoughby* v. *Rhodes*, Bar. 70. If not till after judgment might have been obtained, his executor may proceed on the bail-bond, and the bail are liable for the debt and coſts. *Nutkins*, executor, v. *Wilkin*, Bar. 96.

The reaſon thereof.

Which rules are founded upon the equitable principle already mentioned, and by which the courts are governed in ſtaying the proceedings; namely, that the plaintiff ſhall be put in as good a condition as he would have been in had the defendant been guilty of no laches.

To what extent it is carried.

Upon the ſame principle, where the capias in the original action was returnable firſt return of Hilary, and defendant had obtained time by ſeveral orders to perfect bail till the laſt day of that term, taking notice of trial for the ſittings after, but bail not being perfected, the bond

was

was aſſigned and put in ſuit, and defendant in the original action died 8th of April, whereupon the bail applied to ſtay proceedings upon payment of coſts, the defendant having died before judgment could have been obtained againſt him; a rule niſi was granted. But upon ſhewing cauſe, the rule was diſcharged, the court ſaying plaintiff had been delayed; for if defendant had perfected bail in time, plaintiff might have tried his action at the ſitting after Hilary; and by ſtatute 17 Car. 2. might have entered his judgment therein after defendant's death. *Morley* v. *Carr*, Bar. 112.

An exception thereto.

But if the plaintiff, from his own default, neglects to take an aſſignment of the bail-bond, and proceed thereon, and thereby occaſions a delay, and the defendant dies before judgment obtained on the bail-bond, the proceedings will be ſtayed thereon upon payment of coſts only.

If plaintiff has been guilty of delay in putting bail-bond in ſuit.

The original action was in Michaelmas term, and for want of bail above, the bail-bond was aſſigned in February, after which defendant died, and bail moved to ſtay proceedings, plaintiff not having got judgment on the bond. On hearing counſel, the court ordered proceedings to be ſtayed on payment of coſts, being of opinion that the matter was never carried further, than the bail-bond ſtanding as a ſecurity for what ſhould be recovered on the original trial; and if that had been the caſe, and defendant had died before the trial, the ſuit would have been at an end. The plaintiff might have proceeded more ſpeedily; and if inconvenience happens to him, it is his own laches. *Heath* v. *Aſtley*, Bar. 61. *Davenport* v. *Wall*, ib. 62.

The bankruptcy of defendant, and his certificate,

Again, if the defendant, in the original action, becomes a bankrupt, and obtains his certificate, and afterwards the bail-bond be put in ſuit againſt the bail, proceedings will be ſtayed. *Sanders* v. *Spincks*, Bar. 105.

ſometimes a ground for ſtaying proceedings.

But if the defendant in the original action did not obtain his certificate until *after* the bringing of the action upon the bail-bond, (though ſuch certificate was founded upon an act of bankruptcy *prior* to the bringing of ſuch action upon the bail-bond,) the bail-bond is *not thereby diſcharged*, although the original debt is, becauſe the action upon the bail-bond was for a *new* and *diſtinct cauſe of action*. *Cockerill* v. *Owſton*, Bur. 436.

Such

Of the Aſſignment of the Bail-bond,

Such certificate indeed would have diſcharged the proceedings depending againſt bail in an action upon the old debt, if they were *not already fixed*. *Woolley* v. *Cobb*, Bur. 244.

Plaintiff may prove his debt under the commiſſion, and yet proceed on bail-bond.

Where the defendant, in the original action, becomes a bankrupt, plaintiff may prove his debt under the commiſſion, and afterwards, provided the defendant has not obtained his certificate, and does not put in bail above, may proceed upon the bail-bond; and this, although two terms have elapſed ſince the writ was returnable.

The defendant was, on 18th July 1783, arreſted on a bill of Middleſex, returnable on Thurſday next after the Morrow of All Souls, and gave bond; he became a bankrupt before the return of the writ, and the plaintiff, 12th Auguſt, proved his debt: the defendant did not put in bail above, as he ought, four days after the return, nor did the plaintiff proceed by filing a declaration. The defendant not having obtained his certificate, plaintiff, 30th April 1784, took an aſſignment of the bond, ſued out and ſerved writ thereon, and declared 1ſt May. Defendant laid theſe facts before the court, and moved to ſet aſide the proceedings. Upon ſhewing cauſe, it was alleged, that the caſe in 2 Str. 1262. was in point; and on the part of the defendant it was contended, that the plaintiff not having delivered a declaration *within two terms*, he was out of court, and therefore ought not to take the bond, and that his having proved his debt under the commiſſion, he had waived all proceedings. But the court held, that nothing was a performance of the bond but putting in bail above, and diſcharged the rule. *Carmichael* v. *Chandler*, Imp. K. B. 174.

Although he has laid by and neglected to put bail-bond in ſuit for two terms.

Another ground of ſtaying proceedings,

Again, if through a mere miſtake of the defendant, or his attorney, the bail-bond has been put in ſuit, the court will ſtay the proceedings, in order that ſuch miſtake may be rectified.

where bail bond is aſſigned through a mere miſtake of defendant.

Defendant moved for ten days time to put in bail; and that upon putting in good bail, paying coſts, pleading the general iſſue, and taking notice of trial within term, proceedings on the bail-bond might be ſtayed. On ſhewing cauſe, it appeared that plaintiff had ſued out a *teſtatum* attachment of privilege from Middleſex into Yorkſhire, and bail was taken as in a country cauſe, and filed with the filazer of Yorkſhire, (inſtead of being filed with the prothonotary,) and in order to give defendant time to

and the Proceedings thereon.

rectify the miſtake, the rule was made abſolute. *Garnett* v. *Heaviſide*, Bar. 63.

In another caſe, the writ was returnable in Michaelmas term; bail was taken before a commiſſioner, notice thereof given, and the bail-piece was tranſmitted to defendant's agent; he incautiouſly filed it with the filazer, who as incautiouſly received it without being allowed by a judge; plaintiff laid by till Eaſter term, and then put the bond in ſuit. The court ordered the filazer to attend a judge for his *allocatur*, gave plaintiff leave to except againſt the bail, and ſtayed proceedings on the bail-bond; and it being urged, that plaintiff had loſt a trial, the court ſaid it was through his own laches. Bar. 103.

Another reaſon for ſtaying the proceedings is that of a ſurrender having been made of the defendant, which ſee *ante*, Sec. 6. A.

Of ſtaying the proceedings,

The laſt ground which I ſhall mention for ſtaying the proceedings is, upon payment of the debt and coſts.

upon payment of debt and coſts.

Proceedings on the bail-bond will be ſtayed upon the payment of the principal, intereſt, and coſts, into court, *Butler* v. *Rolls*, 3 Salk. 56.; but not after notice of trial given; unleſs it be paid within ſuch time as not to delay plaintiff from going to trial. Ib. 6 Mod. 25.

What coſts muſt be paid.

In debt on bail-bond, defendant moved to ſtay proceedings, having paid his principal's debt and his own coſts, all but forty ſhillings, which he had tendered. But the court of C. B. on conſidering precedents, held, that the coſts of the actions againſt the *principal*, and the *other bail*, muſt alſo be paid before proceedings could ſtay. *Walker* v. *Carter*, Blac. Rep. 816.

(C. 2) *In what Caſes Proceedings on the Bail bond will be* ſet aſide. (C. 2)

It has been before obſerved, that if the aſſignment of the bail-bond, and the proceedings thereon, have been *regular*, the relief granted by the court is, to *ſtay* the proceedings, which is done upon certain terms agreeable to the circumſtances of the caſe, and always upon payment of coſts; becauſe ſuch proceedings could never have been *regular* unleſs the defendant had been in fault. But if ſuch proceedings are *irregular*, the relief then granted is, to *ſet aſide* the proceedings, and the plaintiff to pay the coſts incurred by ſuch irregularity.

The

Of the Aſſignment of the Bail-bond,

Upon what grounds proceedings ſet aſide, for irregularity.

The grounds of application, therefore, to ſet aſide the proceedings, muſt be as various as the irregularities themſelves; and theſe may be either in the *writ*, or the *return*, or in the *arreſt*, or in excepting to the bail, or in the *bail-bond* itſelf, or in the *aſſignment* thereof; and which, in a great meaſure, may be collected from the different Sections in the former part of this work, under which the reſpective heads of practice are treated of.

If bail-bond be aſſigned pending a rule of court.

If a rule be obtained to ſhew cauſe, &c. "and why all proceedings in the mean time ſhould not be ſtayed," and pending ſuch rule an aſſignment of the bail-bond is taken, it will be ſet aſide, as having been made too ſoon, becauſe the proceedings are totally ſuſpended by this act of the court until ſuch rule is diſcharged. *Swayne* v. *Crammond*, 4 D. & E. 176.

If defendant died between the arreſt and return-day,

If an aſſignment be made of the bail-bond, and proceedings, even to judgment and execution againſt the bail, had thereon, where the principal died between the arreſt and the return day of the writ, court will ſet ſame aſide. *Hutchinſon* v. *Smith*, 8 Mod. 240.

or before aſſignment of the bail bond.

So if the bail-bond be aſſigned after the death of the original defendant, the court will ſtay proceedings againſt the bail. But if it appear, that plaintiff knew not of the death of the principal, they ſhall pay coſts. *Kingſton* v. *Holloway*, 1 Com. Dig. 492. 374.

If defendant has duly ſurrendered.

So if defendant has ſurrendered in diſcharge of his bail before the bringing of the action on the bail bond, it is a ground of application to ſet aſide the proceedings.

What ſurrender good.

Nor is it any objection, that the ſurrender was made after an exception againſt the bail, and without their juſtifying. *Phillimore* v. *Moore*, Bar. 117. Blac. 758. 1179. Sed Vide ante, Sec. 6. A.

(C. 3)

(C. 3) *In what Manner the Proceedings are to be ſtayed or ſet aſide.*

Proceedings to be ſtayed or ſet aſide by ſummons or motion.

The *manner* in which proceedings are ſtayed, or ſet aſide, is either by a *ſummons* before a judge, in vacation, or *motion* in court in term time.

Which ſhould be done without delay.

The ſummons ſhould be taken out, or the court be moved without delay, ſo ſoon as the action on the bail-bond is brought, and the bail are ſerved with proceſs.

In B. R. notice muſt be given to put in and perfect bail.

It muſt be grounded on an affidavit that bail are put in and juſtified. In the firſt inſtance, therefore, give notice

and the Proceedings thereon.

tice that defendant will put in and perfect bail on such a day, (which should be two days exclusive of the day given,) and plaintiff, if he thinks fit, may except to such bail without any prejudice to his action on the bail-bond. *Boughton* v. *Chaffey*, 2 Wil. 6.

Having justified, draw up rule for allowance of bail; then take out summons, or get rule nisi on an affidavit of bail having justified, "to stay proceedings on payment of costs on bail bond, and in mean time all proceedings be stayed against them;" serve summons or rule nisi, and rule of allowance of bail; then move to make rule nisi absolute, and get costs taxed and *paid*, or plaintiff may proceed.

Let the summons or motion be, *in the original action.*

In B. R. plaintiff may now except to such bail without its being a waiver.

It was formerly the practice in B. R. that if, after regular bail had been put in, plaintiff excepted thereto, it was held a waiver of proceedings on the bail-bond; so that did he *not* except to them, he might be put off with bad bail in case the proceedings on bail-bond were set aside; and *did* he except to them, he himself waived the proceedings on bail-bond; which the court deeming a great hardship, made the following rule, that—Whenever the defendant is guilty of a neglect in not putting in bail in due time, by which the bail-bond becomes forfeited, the *notice* (in case the party means to put in bail in order to stay proceedings in the bail-bond) should be, that he will put in and *perfect* bail such a day (analogous to the case where the sheriff is ruled, who, before he can discharge himself, must give notice that he will put in and perfect bail); and in that case, the plaintiff may oppose the bail in court without its being a waiver of the bail-bond. *Boldero* v. *Gray*, Cowp. 769. 18 G. 3. B. R.

What steps must be taken by defendant, when order is obtained, or rule granted.

When the judge's order is obtained, or the rule granted to stay proceedings, which is upon terms, and always that the defendant shall pay costs, to be taxed by the master, it is incumbent upon the defendant immediately to get an appointment thereon from the Master to tax the costs, and to serve a copy upon plaintiff's attorney; and when the costs are taxed, to pay the same without delay.

Notice of motion to set aside proceedings must be given.

When the court is moved to *set aside* proceedings for irregularity, proper notice thereof should be given to plaintiff's attorney; a copy of which notice, together with an affidavit of the service thereof, must be produced in court to support the motion.

Of proceeding againſt the Sheriff,

Defendant cannot afterwards plead in abatement.

After the proceedings on bail-bond are ſtayed, defendant cannot plead in abatement to the original action, but muſt plead in chief. Salk. 519.

Section VIII.

Of proceeding againſt the Sheriff, called ruling the Sheriff.

It has been before obſerved, that in caſe the defendant ſhould not appear according to the condition of the bail-bond, and put in and perfect bail above in due time, the plaintiff has two remedies at his election; the one, by getting the bail-bond aſſigned, and proſecuting the ſureties mentioned therein, which was conſidered in the laſt ſection; the other, (of which we are now about to treat,) by proceeding againſt the ſheriff to compel him either to put in good bail, or himſelf to ſatisfy plaintiff's demand.

Plaintiff cannot rule the ſheriff after aſſignment of bail-bond.

This mode of redreſs againſt the ſheriff cannot be had if plaintiff has once taken an aſſignment of the bail-bond; for by that very act he makes his election of the remedy to which he means to reſort, and thereby diſcharges the ſheriff. Whenever, therefore, the defendant fails in putting in and perfecting bail in due time, and the plaintiff is not well ſatisfied with the reſponſibility of the ſureties mentioned in the bail-bond, he muſt avoid taking an aſſignment thereof, and he will then be entitled to proceed againſt the ſheriff.

Explanation of this proceeding againſt the ſheriff.

The ſheriff has the execution of all writs and proceſs. When an action is commenced, the writ upon which the defendant is to be arreſted is directed and delivered to the ſheriff; he either makes the arreſt himſelf, or iſſues his warrant to one of his bailiffs to make it. The party being arreſted, enters into the bail-bond, (of which ſo much has been already ſaid,) conditioned for his appearance at the return of the writ, which appearance is putting in and perfecting bail above. If, therefore, upon the return of the writ, or within the time allowed by the practice of the court for that purpoſe, the defendant does not ſo appear, the plaintiff has a right to call upon the ſheriff, to know in what manner he has executed the writ delivered to him at the plaintiff's ſuit; and this is done

called ruling the Sheriff.

done by obtaining a rule of court for the ſheriff *to return the writ.* The ſheriff, having in fact, taken and arreſted the defendant, can only make his return accordingly; for otherwiſe an action on the caſe might be brought againſt him for a falſe return; he therefore returns the writ, indorſed *cepi corpus;* after which another rule is obtained for him to *bring in the body.* Being unable to comply therewith, as the defendant is at large on the bail-bond, the ſheriff is now compelled either to put in and perfect bail above to the action, which is the main object of this proceeding againſt him, and which he is permitted to do to exonerate himſelf, or he muſt himſelf anſwer the plaintiff's demand; for if he fails to bring in the body, plaintiff, at the expiration of the rule, may obtain an *attachment* againſt the ſheriff, by which he is then *fixed* for the payment of the plaintiff's debt and coſts.

The mode of proceeding againſt the ſheriff is as follows:

In B. R.

Upon the return day *of the* writ, take out a rule *from the* clerk of the rules, *to return the ſame; pay* 4s. *If in London or Middleſex it is a four-day rule; if elſewhere,* ſix days. *Serve copy of rule (if in London) on the deputy ſecondary, at the office in the Poultry, or Wood-ſtreet, where your warrant was taken out. If in Middleſex, at the ſheriff's office in Took's court, Curſitor-ſtreet. At the time of ſervice ſhew the original rule, and put upon the copy the officer's name who arreſted defendant; at the expiration of the rule, ſearch with the* cuſtos brevium, at the Treaſury-chamber, Weſtminſter-hall, *for return of writ. If it be returned cepi corpus, and bail be put in, in due time (but not otherwiſe), immediately except againſt them before the ſervice of any other rule; then, at the ſame office, get another rule on the ſheriff to bring*

In C. B.

Upon the firſt day of term, or *quarto die poſt of any other return, get a rule from the ſecondary, pay* 4s. 6d.

How to rule the ſheriff to return the writ.

Cuſtos Brevium, Brick-court, Temple.

How to rule him to bring in the body.

Carry

Of proceeding againſt the Sheriff,

bring in the body, which is, as before, a four-day rule in London or Middleſex, and a ſix-day rule elſewhere. Serve copy thereof on ſheriff, or his deputy, as before; and if the bail do not juſtify on or before the expiration of the rule, make an affidavit of the ſervice of the rule, and let counſel move for an attachment againſt the ſheriff for not bringing in the body purſuant to rule.

Carry this rule to the filazer, who will give you a rule for ſheriff to bring in the body; take that to the ſecondary, who will give you a rule peremptory to bring in the body.

How to move for an attachment againſt the ſheriff.

But if after the rule to return writ, upon ſearching at the Treaſury-chamber, no writ be found, or if, after the rule to bring in the body, no bail be put in, either by ſheriff or defendant, or if bail be put in, but do not juſtify, then move for an attachment (a) *againſt the ſheriff upon an affidavit, ſtating, in the firſt caſe, "the ſervice of the rule annexed, the ſearch with the cuſtos brevium, the term the writ was returnable, and none to be found;" and in the ſecond, "the ſervice of the rule, and that no bail has been put in for the ſaid defendant, the ſame having been ſearched for with the proper officer;" and in the third, "that the defendant did put in bail, but hath not juſtified the ſame, and the rule for bringing in the body is expired."*

(a) *By rule in B. R. Mich. 32 G. 3. it is ordered, that in future all writs ſhall be returned by the ſheriff on the day in which the rule for returning the ſame ſhall expire, and in default thereof the plaintiff ſhall be at liberty to move for an attachment on the next day.*

Get the rule, in the evening, at the clerk of the rules *for the attachment, carry it to the crown-office, and one of the clerks there will make out your attachment; pay* 13s. 4d.; *carry attachment to the coroner, with your bill of coſts, who makes out warrant thereon, and attaches ſheriff. On return of attachment, call on coroner, who will pay you the money; if he refuſe,*

Get the rule, in the evening, at the ſecondary's for attachment, make out ſame yourſelf, on 2s. 6d. *ſtampt parchment, carry it to the prothonotary's; ſigning* 1s. 4d. *ſealing* 7d.

The

called ruling the Sheriff.

refuse, get a rule at the crown-office *for him to return the writ of attachment; if not returned, make affidavit thereof, and court will grant an attachment, and direct it to be executed by two elizors, being two persons named for that purpose by the master.*

The secondary's.

Of Proceedings where Sheriff is out of Office.

How if sheriff is out of office.

When sheriff goes out of office, he must be called upon within six months afterwards to return the writ.

Formerly the proceeding could only be by distringas, as follows:

Get a rule for that purpose, (naming him as last sheriff,) serve it as above. If he return cepi corpus, sue out a distringas, (in order to compel him to bring in the body,) direct it to the present sheriffs, ordering them to distrain the late sheriff for that purpose; it is to be left at the sheriff's office for four days exclusive. Sheriff will then return it on 40*s. issues; sue out an* alias, *move to increase the issues; a side-bar rule will do. Having got the rule, serve sheriff with copy, and leave the alias writ of distringas. If not sufficient issues, then sue out a pluries, and so on till having issues to satisfy your demand; make affidavit of the several writs sued, and the returns thereon, and move the court according to* 10 G. 3. *c.* 50. *s.* 3. *for to order the issues levied from time to time to be sold, and the money arising thereby to be applied to plaintiff's costs, and surplus to be retained till defendant appear, or other purpose of the writ be answered.*

In C. B. get a rule at the secondary's, as before, for sheriff to return the writ; if he return cepi corpus, get a note of same from custos brevium, take it to the filazer for his rule to bring in the body, then take same to secondary's office, as before, who will give you a rule peremptory to bring in the body; serve copy thereof, and proceed by attachment, just as in other cases, and as above-mentioned, which is certainly more preferable than as in K. B. by distringas. Though now, by the late rule of that court, Trin. 31 G. 3. *which see opposite, the mode of proceeding in B. R. may be equally expeditious as in C. B.*

Of proceeding againſt the Sheriff, &c.

But now, by a late rule in B. R. this proceeding by diſtringas is rendered unneceſſary, ſince a much quicker remedy, by rule of court is allowed; for by rule Trin. T. 31 Geo. 3. it is ordered, that from and after the laſt day of this term, where any ſheriff, before his going out of office, ſhall arreſt any defendant, and cepi corpus ſhall be returned, he ſhall and may within the time allowed by law, be called upon to bring in the body, by a rule *for that purpoſe, notwithſtanding he may be out of office before ſuch rule ſhall be granted.*

N. B. The mode of proceeding in C. B. is the ſame as in B. R. except where the difference is pointed out as above.

Having ſhewn the general practice, as to the mode of proceeding againſt the ſheriff, we will now more particularly treat,

(A) Of ruling Sheriff to return the Writ, and how the Rule is to be ſerved.

(B) Of ruling Sheriff to bring in the Body, and what he muſt do in conſequence thereof.

(C) Of moving for an Attachment againſt Sheriff, and of the Nature and Operation thereof.

(D) In what Caſes the Attachment will be ſet aſide, or Proceedings ſtayed againſt the Sheriff.

(E) Of proceeding againſt the Coroner to return the Attachment.

(F) Of proceeding againſt Sheriff, when out of Office, to return the Writ, and bring in the Body.

(A) (A) Of ruling Sheriff to return the Writ, and how the Rule is to be ſerved.

Plaintiff cannot rule the ſheriff after an aſſignment,

If plaintiff accepts an aſſignment of bail-bond, he cannot have a rule for the ſheriff to return the writ. *Ld. Brooke v. Stone*, 1 Wil. 223. Sal. 99. 3 Sal. 57.

But

Of ruling the Sheriff to return the Writ.

But that is, provided the bond is *valid*, as the assignment thereof then amounts to a return of the writ; but if it be a *void* bond, as having been executed after the return of the writ, or otherwise, plaintiff may then have a rule upon the sheriff, as if there had been no assignment. *Ld. Brooke* v. *Stone*, 1 Wil. 223. If the bail-bond be valid; but otherwise if it be void.

A side-bar rule, for the sheriff to return the writ, having been obtained, pending an action where there was a demurrer to a plea vitiating the bail bond, court refused to discharge the rule, notwithstanding the assignment of bond to plaintiff, but only enlarged it, till by the event of the suit it was proved whether the bond was good or not. Ibid.

But where a special bailiff has been nominated by plaintiff, or his agent, the sheriff is not bound to return the writ; and should the usual peremptory rule be made against the sheriff, in such case, to return the writ, the court, on motion, will discharge it. *Hamilton* v. *Dalziel*, Blac. 952. *De Moranda* v. *Dunkin*, 4 D. & E. 119. Sheriff not bound to return the writ where a special bailiff is appointed.

In counties palatine, rule to return the writ must not be made on the chancellor of the palatinate or the like, but upon the sheriff. The chancellor only issues his mandate, the sheriff returns the writ.

A rule, calling on sheriff to return writ, must not be sued out in vacation; for if it be, though it is tested in term time, it is irregular, and an attachment grounded upon it will be set aside by the court, on motion. *The King* v. *the Sheriff of Cornwall*, 1 D. & E. 552. When rule must be sued out.

All rules upon sheriffs should be served on the under-sheriff, though the rules should be *as against* the sheriff; for on motion for an attachment against the sheriff, for not returning a writ upon an affidavit of service of the rule on the under-sheriff, *per cur.* be it so, the attachment must be against the sheriff, and the service is proper on the under-sheriff, Bar. 30. And where an under-sheriff shut himself up, and could not be personally served with a rule to return a capias, a rule was ordered, that leaving a copy at his house should be good service. *Richardson* v. *Baily*, Bar. 35. How such rule to be served.

If a person, in fact, be not the under-sheriff, but yet acts as such, rule served on him will be good, and court will afterwards grant an attachment upon affidavit of such notice. Cas. of Prac. C. B. 123. P. R. 381. *Arne* v. *Neeler*.

Of ruling the Sheriff to return the Writ.

But if a rule be obtained againſt a ſheriff, to return a writ, ſervice on the under-ſheriff's *agent* in town is not ſufficient.

Rules, however, againſt the ſheriffs of London, Middleſex, and Surry, ſeem an exception, and may be ſerved on the agents; becauſe the offices of the agents for the under-ſheriffs of thoſe counties are, in truth, conſidered as the offices of the under-ſheriffs themſelves; but if the rule were ſerved on the agent any where but at the office, the ſervice would be bad, even in the caſes of London, Middleſex, and Surry. The *King* v. *Coles*, Do. 20.

But this caſe is ſomewhat doubted, for by ſtat. 23 H. 6. c. 10. ſec. 1. ſheriffs are directed to make yearly a deputy in the courts of Chancery, King's Bench, Common Pleas, and Exchequer of record, before they return any writ, to receive all writs and warrants; and a penalty is impoſed upon omitting ſo to do. And by rule, 1654. ſec. 1. every ſheriff is directed to have his deputy in court to receive and return writs, and that each deputy yearly before Hilary term have his name and place of reſidence in London or Weſtminſter, ſet and continued up in tables in the office of the prothonotary, ſo that there does not appear any reaſon to diſtinguiſh the offices of the under-ſheriff's agents of London, Middleſex, and Surry, from thoſe of other counties, and in truth the buſineſs of under-ſheriffs, as to making out warrants and returning writs, is principally done by their agents in London. And in a caſe of the *King* v. *the Sheriff of Eſſex*, Mich. 34 G. 3. K. B. the court refuſed to ſet aſide an attachment for not returning a writ in purſuance of a rule, upon the ground of its having been ſerved upon the under-ſheriff's agent; but the affidavit whereupon the attachment was obtained, not ſtating that at the time of the ſervice the original rule was produced and ſhewn to the under-ſheriff's deputy, they ſet the attachment aſide upon payment of coſts. Notes to Rules and Orders in K. B. 318.

Form of the rule.

The form of the rule, in both courts, ſhould be, that the ſheriff ſhall do the act required, upon notice to his under-ſheriff.

Of the time allowed by the rule to return the writ.

N. B. In moſt of the caſes here cited, the rules upon the ſheriff appear to be *ſix*-day rules; the reaſon is, becauſe by R. T. 5 & 6 G. 2. ſheriffs were ordered generally to return writs, and bring in the body within *ſix* days after ſervice of rule; but afterwards, in Trin. term, 6 G. 3. the

Of ruling the Sheriff to return the Writ.

the court made a rule, "that the sheriffs of *London* and "*Middlesex* return their writs, and bring in the body "within *four* days." The country sheriff's still have *six*, that rule not affecting them. Bur. 1921.

Must be returned punctually on the last day.

And by a late rule in B. R. Mich. 32 G. 3. all writs must be returned by the sheriff on the day on which the rule for returning the same shall expire, and in default thereof, the plaintiff shall be at liberty to move for an attachment on the next day.

This rule arose out of a case of *the King* v. *the Sheriff of Surry*, where the sheriff had not returned the writ till the morning of the 7th day, although before the sitting of the court; to remedy which practice the above rule was made. 4 D. & E. 496.

How to proceed if bail below become bail above in B. R.

It has been before observed, that in B. R. when the bail below become bail above, you cannot except to them, so as to make them justify in the ordinary way; but if you do not approve of such bail, you may, in effect, compel their justification, as follows: First, enter an exception, as in other cases; then serve the sheriff with a rule to return the writ, if not already returned; and after return made, with a rule to bring in the body, which will oblige the bail to justify, or defendant to put in such bail as will.

(B) Of ruling the Sheriff to bring in the Body, and what he must do in consequence thereof. (B)

What sheriff must do when served with rule to return the writ.

Upon the rule to return the writ being properly served, the sheriff either neglects to make any return, or he must obey the rule by returning *cepi corpus*; if he does the former, plaintiff may have an attachment against the sheriff for not returning the writ pursuant to rule; for he cannot have a rule to bring in the body, till it appears by the return of the writ that he has taken the defendant; but if he returns cepi corpus, then he may sue out another rule for him to bring in the body.

A sheriff ought not to be ruled to bring in the body until the day after the expiration of the rule to return the writ. *Hutchins* v. *Hird*, 5 D. & E. 479.

Nor should he be ruled to bring in the body till the time for putting in bail has expired. *Rolfe* v. *Steele*, 2 H. Blac. 276.

What must be done before sheriff is ruled to bring in the body.

When bail above is put in, in due time, and proper notice thereof given, an exception to such bail ought to be made,

Of ruling the Sheriff to bring in the Body.

made, and notice of exception given to defendant's attorney before ſervice of the rule to bring in the body.

There muſt be an exception to the bail, if any put in,

If notice of exception be not given, a rule on the ſheriff to bring in the body cannot be ſupported, and this, although the defendant had, on his part, waived the irregularity by giving a notice of juſtification; for it is no waiver by the ſheriff. *Rogers* v. *Mapleback*, 1 H. Blac. 107. & vid. infra, *Cohn* v. *Davis*.

and that muſt be regularly made.

And this exception muſt be regularly made.

Defendant put in bail before a judge; plaintiff gave notice of exception, but did not enter the exception on the bail-piece, and for want of a juſtification in court, ſerved the ſheriff with a peremptory rule to bring in the body in ſix days; for want whereof, plaintiff moved for an attachment againſt him. The court held, that an exception in writing on the bail-piece, and notice thereof to the defendant's attorney, are both neceſſary; and that for want of the former, the bail (who had ſtood more than 20 days without exception entered) was became abſolute, and ordered proceedings againſt the ſheriff to be ſtayed. Bar. 102.

An exception to bail was regularly entered in the filazer's book, of which the defendant's attorney had *verbal* notice; but afterwards proceeded by giving notice of juſtification, and attempting to juſtify bail, who were rejected. The rule for bringing in the body having expired, and no bail being juſtified, an attachment was granted againſt the ſheriff. A rule was obtained to ſhew cauſe why this attachment ſhould not be ſet aſide, on the ground, that a *written* notice of exception was not given to defendant's attorney; and on cauſe ſhewn, *per cur.* where there are two parties, and one of them takes a ſtep, previous to which the other ought to have taken a ſtep, the former waives the obligation which the latter was under, as between themſelves; but not as relating to a third perſon. Here the waiver by the defendant, if it were one, was not a waiver by the ſheriff. The rule ought to be ſtrictly followed to prevent confuſion. *Cohn* v. *Davis*, 1 T. R. C. B. 80.

The intent of the rule to bring in the body.

The ſheriff having been ruled to return the writ, and having returned the ſame with a cepi corpus, plaintiff, as before-mentioned, ſues out a rule for him to bring in the body; the intent of which rule being to compel the ſheriff to

Of ruling the Sheriff to bring in the Body.

to put in good bail above, the ſheriff muſt put in the ſame accordingly.

If the ſheriff returns a cepi corpus, or languidus, where the defendant is at large without any bail taken, an action for a falſe return lies againſt him. Noy, 39.

What ſheriff muſt do thereon.

Upon the rule to bring in the body, it is no excuſe that the ſheriff had taken a bail-bond, and had permitted defendant to go at large. For it is at the peril of the ſheriff he takes bail, on the ſtat. H. 6. and the party is not concluded thereby; the ſheriff muſt therefore either bring in the body, or juſtify good bail in court. *Wolfe* v. *Collingwood*, 1 Wil. 262.

Muſt put in and perfect bail.

An in order to render the bail, when put in agreeable to this laſt rule, good and effectual, he muſt perfect the ſame by juſtifying.

Formerly they juſtified de bene eſſe before a judge.

There was formerly a practice of juſtifying bail de bene eſſe before a judge; and it uſed to be held, that where ſheriff was ruled to bring in the body in a certain time, juſtification before a judge within that time was ſufficient, unleſs plaintiff excepted thereto, and then it ought to be in court. *Price* v. *Street*, Bar. 102.

But now that practice is diſuſed.

But this practice of juſtifying de bene eſſe before a judge, is now diſuſed; and in the caſe of *Poole* v. *Peate*, in C. B. it is ſettled to be the practice, that ſheriff muſt not only put in bail when ruled to bring in the body, but muſt alſo *perfect* bail by juſtifying in *court*; and this, although *no exception* to ſuch bail has been made by plaintiff. 2 Blac. Rep. 1206.

Within what time ſheriff muſt juſtify.

The juſtification muſt be made within the time allowed by the rule for bringing in the body, otherwiſe an attachment may be moved for. But although the rule for bringing in the body has expired, yet if the defendant juſtifies his bail before the plaintiff moves for an attachment, the ſheriff is not liable to the attachment. *Thorold* v. *Fiſher*, 1 C. B. T. R. 9.

Rule for ſheriff to bring in the body in ſix days, which the ſheriff did not, plaintiff moved for an attachment, and had a rule to ſhew cauſe; the ſheriff ſhewed for cauſe, that bail was put in and juſtified; but it appearing, that they had not juſtified before plaintiff applied for the attachment, the court ordered, that on payment of coſts, the rule ſhould be diſcharged. *Henley* v. *Anderſon*, Bar. 80.

Of ruling the Sheriff to bring in the Body.

Defendant was arreſted laſt term, but no bail-bond taken. The ſheriff being called upon, returned a cepi; and being ſerved with a peremptory rule to bring in the body, bail was perfected in court, and the rule to bring in the body diſcharged; but the ſheriff was ordered to pay the coſts of the application, as the time for bringing in the body was expired, and the plaintiff entitled to move for an attachment. *Peeſton* v. *Tracey*, Bar. 98.

Sheriff may put in and perfect bail without defendant's conſent;

The ſheriff, when ruled to bring in the body, may put in bail for defendant without his conſent, and juſtify the ſame in order to prevent an attachment.

and this, although defendant has eſcaped; but not if he be in actual cuſtody.

In the caſe of *Macleed* v. *Marſden*, Bar. 32. the queſtion was, whether a rule to bring in the body, after cepi returned, ought to be diſcharged or not? it being ſuggeſted, on behalf of the ſheriff, that defendant was in cuſtody, and had remained in gaol ever ſince the arreſt; but the fact appeared otherwiſe, and defendant had been ſuffered to eſcape. *Per cur.* had the ſheriff ſhewn defendant to have been in actual cuſtody, the rule ought to be diſcharged; but as there is an eſcape, the rule ſhould be obeyed, otherwiſe an attachment muſt be granted. But, by conſent, the debt and coſts were to be paid in a month, with five pounds for the coſts of the motions.

How, if ſheriff go out of office between the ſervice and expiration of rule.

A ſheriff who is ruled on the laſt day of a term to bring in the body, but goes out of office before the next term, is liable to an attachment for not bringing in the body. *Meekins* v. *Smith*, 1 C. B. T. R. 629.

(C) (C) Of moving for an Attachment againſt the Sheriff, and of the Nature and Operation thereof.

When to move for attachment.

If the ſheriff diſobey the rules ſerved upon him, that is to ſay, if, upon the rule to return the writ, he makes no return thereof, or if, upon the rule to bring in the body, the intent of which is, to compel the ſheriff to put in and perfect bail, he neglects ſo to do, plaintiff may move the court for an attachment againſt him.

It is a criminal proceſs.

The attachment is a criminal proceſs; it muſt be made returnable on a general return, though the original proceſs was on a day certain. Str. 624.

How proceedings thereon entitled.

A *motion* for an attachment, therefore, in the courſe of a *civil* ſuit, ought to go on the crown ſide of the court, and the affidavits entitled, "The King againſt *the perſon*

"*to*

Of the Attachment againſt the Sheriff.

to be attached," becauſe it is not a motion *in* the cauſe, but *ariſing out* of it. *The King* v. *the Sheriff of Middleſex*, 3 D. & E. 133.

But until an attachment is moved for, the proceedings are on the civil ſide of the court, and muſt be entitled by the names of the parties.

Againſt whom it will lie.

An attachment now lies in both courts againſt the *preſent* or *late* ſheriff, either for not returning the writ, or for *not bringing in the body*; although, until the late rule of King's Bench, Trin. 31 Geo. 3. it would only lie in that court againſt the *preſent* ſheriff in the *latter* caſe; the mode of proceeding againſt the late ſheriff being by diſtringas.

When granted.

The rule to return the writ, or to bring in the body, is a ſix-day rule, except for the ſheriffs of London and Middleſex, who have only *four* days allowed them after the ſervice thereof; if not done in that time they are liable to an attachment, without further rule.

But it is to be obſerved, that this is upon the ſuppoſition, that theſe rules, calling upon the ſheriff, do not expire before the time has elapſed in which the defendant might have put in or perfected bail. For, in all theſe caſes, the ſame time ſhall be given to the ſheriff to do the act in, as would have been allowed to the defendant. For if it were otherwiſe, and by any contrivance of getting an immediate return of the writ, the rule to bring in the body ſhould expire before the time had elapſed for defendant to put in bail; the conſequence would be, that after the ſheriff was fixed, the defendant to an action on the bail-bond, might plead *comperuit ad diem*, and ſo deprive the ſheriff of his remedy. *Spicer* v. *Linnell*, Eaſt. 23 G. 3. Imp. K. B. 159.

How to be directed.

If the attachment goes againſt the preſent ſheriff, it ſhould be directed to the coroner; but if againſt the late ſheriff, it ſhould be directed to his ſucceſſor.

Of the affidavit neceſſary to ſupport the rule.

A motion for an attachment ſhould be grounded upon an affidavit, ſtating, that the defendant was ſerved *perſonally* with a copy of the rule, and that the original was ſhewn to him at the ſame time. *The King* v. *Smithies*, 3 D. & E. 351.

But if the affidavit ſhould not be full enough, and the fact was ſo, the court will allow the proſecutor to make an additional affidavit as to that fact. Ibid.

An

Of the Attachment againſt the Sheriff.

It may be moved for the laſt day of term.

An attachment againſt a ſheriff may be moved for the laſt day of term. Bur. 651. And it is abſolute in the firſt inſtance. R. Trin. 17 G. 3.

But no attachment unleſs the bail put in is excepted to.

If bail have been put in who did not juſtify in time, plaintiff cannot move for an attachment againſt ſheriff, unleſs he had regularly *excepted* to the bail. Loſt. 159.

Except ſuch bail be put in after rule ſerved.

But this muſt be underſtood to mean, where bail is put in before any rule ſerved to bring in the body; for if bail be put in after rule ſerved, bail muſt juſtify, though no exception, and it would be abſurd to except; but if plaintiff ſhould do ſo, he lets in defendant to juſtify his bail at any time within four days after exception.

The operation of the attachment.

The operation of the attachment is, the fixing of the ſheriff with payment of the debt and coſts. He muſt ſeek his remedy over, either upon the bail-bond given to him, or againſt the officer who arreſted the defendant, or his ſureties; or in London, againſt the ſecondary of the Compter, or officer who took the bail-bond, if any, or his ſureties.

How far ſheriff liable.

In the Common Pleas, the ſheriff is liable, upon an attachment, to pay the plaintiff the *whole debt* due, and coſts, *beyond the ſum ſworn to*, and indorſed on the writ, to the amount of the penalty in the bail-bond, in the ſame manner as the bail would have been, had good bail been put in. *Fowlds* v. *Mackintoſh*, 1 H. Blac. 233.

So in K. B. for it is his own neglect in not bringing in the body or putting in good bail. Trin. 1797.

(D)

(D) In what Caſes the Attachment will be ſet aſide, or Proceedings ſtayed againſt the Sheriff.

In what caſes defendant may be let in to juſtify bail, and try the cauſe, after ſheriff is fixed.

It uſed to be the received notion, that when the ſheriff was once fixed, by an attachment having regularly gone againſt him, bail could not juſtify, nor could the attachment be ſet aſide; but that the utmoſt that could be done was, for the court, upon application, to let in the defendant to a trial upon terms, provided he had merits, and in the mean time to *ſtay* the proceedings againſt the ſheriff upon the attachment. Tid. 166. Loft. 438. *Overton's* caſe, in 26 G. 3.

But the practice is now otherwiſe; for the courts are governed by the ſame principle, in letting the defendant in

Of the Attachment againſt the Sheriff.

in to try the merits of the original action after an attachment is iſſued, as they are in letting him in after the bail-bond has been aſſigned.

The rule therefore is, that whenever bail have juſtified, (although after the attachment againſt the ſheriff has iſſued,) if the plaintiff has not been delayed from going to trial, the attachment will be ſet aſide upon payment of coſts only; but if plaintiff has loſt a term, that is to ſay, a trial, then the attachment will remain in the office, and ſtand as a ſecurity to plaintiff, in caſe he ſhould obtain a verdict.

The rule to bring in the body expired on the 6th; an attachment againſt the ſheriff, for not bringing in the body, was moved for upon the uſual affidavit, and obtained on the 7th; upon the 8th defendant juſtified his bail in the cauſe, and on the ſame day moved, that the attachment ſhould be ſet aſide, upon payment of coſts, bail having juſtified, and no trial having been loſt, which was granted accordingly; and the court ſaid, that the diſtinction contended for, between the caſe of ſetting aſide an attachment when no trial had been loſt, and ſtaying proceedings on a bail-bond, under the ſame circumſtances, had no foundation. *White* v. *Dunbar*, 32 G. 3. S. P. *Hill* v. *Bolt*, 4 D. & E. 352.

The ſame practice is now eſtabliſhed in the Common Pleas. *Callan* v. *Tye*, 2 H. Blac. 235.

But upon a ſimilar application, where it appeared that a trial had been loſt, the court ordered the attachment to remain in the office as a ſecurity for the plaintiff's debt, and the defendant to conſent to go to trial at the ſittings after term. *Gravett* v. *Williams*, 4 D. & E. 352. n.

The defendant is alſo let in upon the ſame *terms*, *mutatis mutandis*, as in the caſe of ſtaying or ſetting aſide proceedings upon the bail-bond; indeed the proceedings are ſo analogous, that it may be uſeful for the reader to refer for further information on this ſubject to the 7th ſection of this chapter.

Affidavit of merits, if the party applies.

It is to be obſerved, that whenever the application to ſet aſide the attachment is made on the part of the defendant, the court will expect an affidavit of merits, but not ſo if made by the ſheriff. *The King* v. *the Sheriff of Surry*, 7 D. & E. 239.

What affidavit if ſheriff applies.

But then to prevent colluſion, although the ſheriff cannot ſwear to merits, whenever ſuch application to ſet

Of the Attachment againſt the Sheriff.

aſide the attachment comes from the ſheriff, there muſt be an affidavit that the application originates from him, and is not made in collusion with the defendant in the cauſe. Ibid.

Attachment not ſet aſide if ſheriff guilty of laches.

Again where the ſheriff has been guilty of any fault or laches, court will not ſet aſide attachment.

As not taking bail bond, but undertaking of defendant only.

As where it appeared that the ſheriff had diſcharged the defendant out of his cuſtody on his own undertaking to appear and put in bail, and had neglected to take ſuch bail-bond as is required by the ſtatute. *The King* v. *Sheriff of Surry*, 7 D. & E. 239.

Such undertaking illegal, without plaintiff's conſent.

For this is ſuch a breach of duty that the ſheriff is liable to an action for an eſcape, if bail is not put in, in due time, nor will the court relieve him from ſuch action by permitting him to put in and juſtify bail afterwards. *Fuller* v. *Preſt*, 7 D. & E. 109.

Such undertaking may be taken with the plaintiff or his attorney's conſent, but not otherwiſe, as he cannot be compelled to accept it, ſince that would be in contravention of the ſtatute 23 Hen. 6. and an encouragement to extortion. Ibid. See *ante* this Chapter, Sec. 4.

So Sheriff guilty of other neglects.

A rule was made in C. B. for an attachment againſt the ſheriff for not returning a capias; whereupon the ſheriff cauſed bail to be put in, and juſtified in court, and moved to diſcharge the rule for an attachment on payment of coſt. Rule to ſhew cauſe, which was afterwards diſcharged; it appearing that the parties had been before a judge, who had made an order, by conſent, that proceedings ſhould be ſtayed on payment of debt and coſts, to be taxed; and that plaintiff had been delayed two terms; and the counſel for the ſheriff refuſing to conſent to go before the prothonotary, on the foot of the judge's order, the court were of opinion, that the rule for the attachment ought to ſtand. *Miller* v. *Vicaridge*, Bar. 28.

But if the ſheriff, or returning officer, has done all in his power, and acted uprightly, he ſhall not be criminally puniſhed by an attachment, although the rule of court may not be obeyed.

But not if he has done all in his power, and acted uprightly.

An attachment iſſued againſt the high-bailiff of Weſtminſter for not bringing W.'s body into court purſuant to a peremptory rule, and having been examined upon interrogatories, it was referred to the prothonotary, as uſual, to examine whether he had cleared himſelf of the contempt

Of the Attachment againſt the Sheriff.

contempt or not? the prothonotary reported ſpecially, and the fact appeared, "that W. being confined in the Gatehouſe for a criminal matter, was, by leave of the judge, charged with a bailable action by a capias ad reſp. directed to the ſheriff of Middleſex, who made a mandate to the high-bailiff, who charged W. therewith in cuſtody; which W. afterwards eſcaped from the Gatehouſe, which is the priſon for the Liberty of Weſtminſter, and to which the high-bailiff is obliged to carry his priſoners within twenty-four hours after arreſt. That the high-bailiff and keeper of the Gatehouſe are appointed by, and hold their places under the dean and chapter of Weſtminſter, and both give ſecurity to them; but the keeper gives no ſecurity to the high-bailiff."—On this report the court were of opinion, that the high-bailiff had cleared himſelf of the contempt, and ordered the attachment to be diſcharged, the high-bailiff having done every thing in his power to ſecure the priſoner, and ought not to be criminally puniſhed, *reſpondeat ſuperior* extends to civil caſes only;—the proſecutor may bring his action for the eſcape. *The King* v. *Lever*, high-bailiff of Weſtminſter, Bar. 34.

No attachment if plaintiff has become irregular.

Again, no attachment ſhall iſſue againſt the ſheriff, if the plaintiff is in fault, and has been guilty of any irregularity in his proceedings.

Proceedings will be ſtayed againſt ſheriff, where plaintiff has been guilty of any irregularity, as in not giving a proper notice of exception to bail. Bar. 102. *ante* B.

How far ſheriff liable if bail, though good when taken, is afterwards inſufficient.

It is ſaid, that if the perſons taken by the ſheriff in bail-bond be good men, and pending the ſuit become inſolvent, he ſhall be excuſed; for the ſtatute obliges him to take bail, and they were good at the time he took them. 1 Lil. Abr. 511. Highmore on Bail, 49.

But, on motion to diſcharge proceedings againſt the ſheriff upon the following circumſtances, viz. that the bail to the ſheriff was good when defendant was arreſted, 4th Auguſt, and the ſheriff was obliged to take bail under the ſtatute of Henry the 6th, but the bail ſince were become inſufficient, it was denied; the court, however, enlarged the ſix-day rule to bring in the body three days further. *Champion* v. *Townſhend*, Bar. 80.

Defendant's death does not ſtay attachment, if ſheriff be in contempt.

If the defendant die after the ſheriff has been guilty of contempt, in not obeying any rule, though before the attachment

attachment actually iſſues, yet the attachment will not be ſtayed.

An attachment having been obtained againſt the ſheriff of Middleſex for not bringing in the body, in a cauſe of *Robins* v. *Hall*, a rule was afterwards obtained to ſet it aſide, becauſe the defendant in the cauſe died before the attachment iſſued, though not till after the contempt was incurred; cauſe was ſhewn this day, and the court were of opinion, that as the ſheriff was in contempt before the defendant's death, the attachment was regularly iſſued; and though the original cauſe abated by his death, yet that was no reaſon for ſetting aſide the attachment againſt the ſheriff, ſince he was in contempt before. 3 D. & E. 133.

(E) (E) Of proceeding againſt the Coroner to return the Attachment.

It has been obſerved before, that the attachment ſued out againſt the ſheriff is carried to the coroner, who ought duly to return ſame, and pay plaintiff his debt and coſts; but if the coroner does not return an attachment of contempt againſt the ſheriff, the way to compel a return is, to move for an attachment againſt the coroner, directed to elizors.

The coroner of Middleſex not having returned an attachment of contempt againſt the ſheriff, the court granted a peremptory rule (in the firſt inſtance) for an attachment againſt the coroner, directed to elizors, purſuant to the precedent of *Andrews* v. *Sharp*, Black. 911. The *King* v. *Peckham* and *Clarke*, 2 Blac. 1218.

For the more particular mode of proceeding againſt the coroner, ſee that part of the beginning of this Section, which is in *italics*.

(F) (F) Of proceeding againſt the Sheriff, when out of Office, to return the Writ, or bring in the Body.

Sheriff muſt be called upon within ſix months after he is out of office.

By the 20 Geo. 2. c. 37. ſ. 2. it is enacted, *that no ſheriff ſhall be liable to be called upon to make a return of any writ or proceſs, unleſs he be required ſo to do within ſix months after the expiration of his ſaid office.*

Unleſs

Of proceeding againſt the late Sheriff.

Unleſs he be required ſo to do] This muſt be by rule of court; for his having been requeſted by the party to return the writ, although the requeſt were made within the ſix months, is not ſufficient nor obligatory upon him. *The King* v. *Jones*, 2 D. & E. 1. Conſtruction of the above act.

Within ſix months] In this caſe, as in all others, where it is not otherwiſe expreſſed, ſix *lunar* months is meant, or ſix times 28 days.

After the expiration of his ſaid office] The day on which the old ſheriff quits his office is to be reckoned one.—So that where the defendant went out of office on the 12th February, at four o'clock in the afternoon, (there being that year 28 days only in February,) and was not ſerved with the rule to return the writ till the 30th of July following, it was held a day too late. *The King* v. *Adderley*, Do. 463.

If a ſheriff, out of office, be called upon in due time, to *return the writ*, and neglects ſo to do, the conſtant mode of proceeding againſt him, in both courts, is by *attachment*; becauſe the not returning it was a contempt of the court, and as, in ſtrictneſs, he ought to have returned it before he went out of office, this contempt was actually committed whilſt he was a ſervant of the court. The *King* v. *Adderley*, Do. 464. Attachment the conſtant mode of proceeding againſt the ſheriff to return the writ.

In all caſes, therefore, whether againſt the *preſent* or the *late* ſheriff, the mode of proceeding for *not returning the writ* is, and always was, by attachment. So in the Court of Common Pleas, the ſame practice always prevailed, in order to compel a ſheriff out of office to *bring in the body*. But it was not ſo, until lately, in the Court of King's Bench; for, before the rule of court, Trin. 31 Geo. 3. if a ſheriff had either returned the writ, with a cepi corpus, before he went out of office, or, upon being ruled to return the writ in the uſual way after he went out of office, obeyed ſuch rule by returning cepi corpus; in either caſe, plaintiff could not compel him to bring in the body, by proceeding immediately againſt the late ſheriff, by rule and attachment, but was obliged to reſort to the proceſs of diſtringas againſt his ſucceſſor, the preſent ſheriff, which was dilatory and inconvenient. But now, by the rule above-mentioned, it is ordered, that "where "any ſheriff, before his going out of office, ſhall arreſt "any defendant, and cepi corpus ſhall be returned, he "ſhall And this whether againſt the preſent or late ſheriff. And now the ſame mode is uſed to compel him to bring in the body in both courts, though formerly not ſo in B. R.

Of proceeding againſt the late Sheriff.

" ſhall and may, within the time allowed by law, be " called upon to bring in the body, by a rule for that " purpoſe, notwithſtanding he may be out of office be- " fore ſuch rule ſhall be granted."

This mode of proceeding by attachment being much preferable to the proceſs of diſtringas, the latter will, of courſe, fall into diſuſe.

The rules, &c. muſt be ſerved on the late ſheriff.

But care muſt be taken to ſerve the rules upon, and to obtain the attachment againſt the *late* and not the *preſent* ſheriff.

On the 7th of November 1783, the late ſheriffs of London were ruled to return the writ of capias ad reſpondendum; the late ſheriffs returned, the defendant taken, whoſe body they had ready. On the 13th of November a rule was ſerved on the preſent ſheriffs to bring in the body, which they did not, and an attachment was granted. Now, upon motion to ſet aſide the attachment, it appeared, that the old ſheriffs returned the writ cepi corpus; and alſo, there was returned upon the writ, thus, by the new ſheriffs: " This writ, as above indorſed, was deli- " vered to us, the under-named now ſheriffs, by the " above-named late ſheriffs at the time of their going out " of office." That therefore the rule ought to have been upon the old ſheriffs to bring in the body; upon ſhewing cauſe it was contended, that the new ſheriffs having made the indorſement upon the writ, as before ſtated, they had made themſelves anſwerable for the body; but the court held, " That the indorſement merely ſhewed how the " writ came into the hands of the preſent ſheriffs, and " therefore ſet aſide the attachment." Mich. Term 24 G. 3. *Leigh* gent. one, &c. v. *Turner*, Imp. C. B. 184.

Obſervations on the diſtringas.

As the proceſs of diſtringas, notwithſtanding the above rule, may, perhaps, be ſometimes reſorted to, a few obſervation thereon cannot be deemed wholly uſeleſs.

How long it muſt lie in the office.

The writ of diſtringas muſt always lie four days in the ſheriff's office; the teſte and return, therefore, ſhould agree therewith; ſo that the return ſhould never be made till four days after the expiration of the rule to *return the writ*. Suppoſe, therefore, ſuch rule was obtained the firſt day of Michaelmas term, November 6, it expires (being a four-day rule) on the 10th; on that day ſheriff returns cepi corpus; you then ſue out the diſtringas,

Of proceeding againſt the late Sheriff.

which may be teſted on the 6th of November, and be returnable on the 14th, (eight days after,) viz. four days after the expiration of the rule; it ſhould be put immediately into ſheriff's office, and lay there the four days; otherwiſe time will be loſt, as it muſt always lie there four days; though not neceſſarily four days before the return, ſince it may be put in on the return-day, and lay four days from that time.

The nature of the diſtringas, and how it is rendered effectual by the application of the iſſues levied, is ſufficiently explained by the following caſe:

In what way the iſſues levied thereon to be applied.

This was the caſe of a ſheriff who did not bring in the body after a return of a "cepi corpus" made by his predeceſſor; for which neglect, or refuſal, ſeveral writs of diſtringas had iſſued againſt this *ſucceeding* ſheriff. For the practice is, that if a ſheriff, in office, returns a cepi corpus, and will not bring in the body, though he remains in office, an attachment ſhall go againſt him; but if he is gone out of office, an attachment ſhall not iſſue againſt his ſucceſſor, the new ſheriff, who did not make the return of cepi corpus; but a diſtringas is the method of enforcing him to bring in the body. And this latter was the preſent caſe, viz. that theſe writs of diſtringas had iſſued againſt the ſucceeding ſheriff for not bringing in the body upon a cepi corpus, returned by a former ſheriff, ſince gone out of office; and the court was applied to on behalf of the plaintiff, that they would direct the iſſues to be ſold, and that the plaintiff ſhould be paid his coſts out of the money ariſing thereby.

It was contended on behalf of the ſheriff, againſt whom theſe writs of diſtringas had iſſued, that the act of parliament of 10 G. 3. c. 50. does not extend to writs of diſtringas in general, but only to ſuch writs of diſtringas as are iſſued againſt members of parliament, or relate to privilege of parliament; and this, chiefly, by reaſon of the title and the preamble of this act; the former is, "for the further preventing delays of juſtice by reaſon of privilege of parliament." The latter is alſo in expreſs terms confined to the inconveniences ariſing from the delay of "ſuits by reaſon of privilege of parliament."

But lord Mansfield held, that this act of parliament relates to all writs of diſtringas in general, and is not

Of proceeding againſt the late Sheriff.

confined to ſuch as concern privilege of parliament only.

The court ordered the iſſues to be ſold, and the coſts hitherto incurred by the fault of the ſheriff to be taxed, and paid to the plaintiff out of the money ariſing thereby, and the reſidue to be retained in order to anſwer the event of the ſuit. *Raban* v. *Plaiſtow*, Bur. 2726.

CHAP. V.

Of proceeding by Special Original in B. R. and by original Quare Clauſum fregit in C. B. from the Commencement of the Suit to the Declaration.

IN the introduction to this work there are four ſeveral ways pointed out of bringing actions in the courts of King's Bench and Common Pleas, in all common caſes; namely, by *bill* and by *ſpecial original*, in the former court; and in the latter, by *original* and *capias*, and by *original quare clauſum fregit* and *ſummons*. The different ways of bringing actions.

Having already ſhewn the mode of proceeding by *bill* in the King's Bench, and by *capias* in the Common Pleas, (which are the moſt uſual ways of bringing actions,) from the commencement of the cauſe until defendant is brought into court, it only remains to conſider in what manner the appearance of defendant is to be effected, when the proceedings are by *ſpecial original* in the one court, or by *original quare clauſum fregit* and *ſummons* in the other.

There are few things relating to the practice of the courts more apt to confound and perplex the ſtudent or practitioner than the doctrine of writs; and as the mode of proceeding, either by *ſpecial original* in the King's Bench, or by *original quare clauſum fregit* in the Common Pleas, is (comparatively ſpeaking) but ſeldom reſorted to, ſo it is, for the moſt part, but little underſtood.—We have already endeavoured to give the reader a general idea of its origin and meaning; and for further information thereon, refer him to the introduction to this work.

Section I.

Of the Mode of proceeding by Special Original in B. R.

Upon ſuing out original writs, a *fine* is paid to the curſitor, proportionable to the debt or damages mentioned in the præcipe (for the reaſon of this fine, and why not exacted in the Common Pleas, ſee the introduction, ſec. 2.); the damages ſhould therefore be laid at Fine paid on ſuing out originals.

as moderate a sum as can be done with safety and propriety. If the debt or damages be under 40l. nothing is paid. If,

	l.	s.	d.
From 40 pounds to 100 marks (*i. e.* 66l. 13s.)	0	6	8
From 100 marks to 100 pounds - - -	0	10	0
From 100 pounds to 200 marks - - -	0	13	4
From 133l. 6s. 8d. to 166l. 13s. 4d. - -	0	16	8
From 166l. 13s. 4d. to 200l. - - - - -	1	0	0
And for every 100 marks more - - - -	0	6	8
And for every 100 pounds more - - -	0	10	0

How to proceed.

Make out a præcipe (a) *on unstampt paper, which, if it be an action on the case, must recite the whole cause of action particularly; carry it to filazer (Mr. Adams), who will make out the capias to the proper sheriff. For the sake of expedition, you may first prepare capias yourself, reciting the whole cause of action therein, as in* præcipe; *pay filazer, for first count in præcipe,* 2s. 6d.; 1s. *for every other; the same for the counts in capias; making in all* 5s. *for first count in capias, and* 1s. *for every other; pay also* 4d. *for filing original writ; get capias sealed, pay* 7d. *Affidavit of debt to be first made, and memorandum of warrant procured, as in other cases.*

If defendant to be arrested.

If you mean to arrest defendant thereon, carry capias to proper sheriff's office; for warrant pay 2s. 4d. *in Middlesex and London, but in other counties* 2s. 6d.

If only to be served.

But if defendant is only to be served therewith, subscribe the common notice for appearance, taking care, instead of the words— "at Westminster," *to say,* "wheresoever we shall then be in England." *See ante, ch.* 3. *sec.* 1. C.

Of the alias and pluries writs.

If not taken on or served with capias, *before the return thereof, an* alias *and* pluries *may be sued out; and if defendant is not to be found in the county where capias issued, sue out a* testatum capias; *or it may be sued out in the first instance, without suing out any capias; but as it ought to be made out to warrant the testatum, the filazer must be paid for it.*

Of defendant's appearance if not held to bail.

If the defendant is not held to special bail, he must enter his appearance *in eight days* after the return *of the* capias, alias, *or* pluries, *according as the writ may be with which he is served,*

(a) The præcipe (if it be an action on the case) runs thus: Middlesex, to wit. If A. B. make you secure, then put &c. C. D. late of Westminster in the said county, yeoman, that he be before us on the morrow of All Souls, wheresoever, &c. to shew for that whereas (*here set forth the whole as if it were a count or declaration, and after the words, to the damage of the said A. B. of* 100l. *add,*) as it is said, &c.

If in debt or covenant the præcipe is shorter, the substance of the count or declaration not being recited: it is thus; Middlesex, to wit, Command C. D. late of Westminster in the said county, yeoman, that justly, &c. he render to A. B. 80l. of lawful money, &c. which he owes to and unjustly detains from him, as it is said, &c. unless, &c.

and

and not eight days after the quarto die poſt *of ſuch return. It muſt be filed with the filazer; pay* 2s. 6d.; *file, at the ſame time, the memorandum, or minute of your warrant to defend.*

If defendant does not duly appear, plaintiff may enter an appearance for him, according to the ſtatute, on affidavit of the ſervice of the writ, and ſtating therein the kind of writ, and when and where returnable, with which he was ſerved. Plaintiff may appear for him.

But if the defendant be held to ſpecial bail, he muſt put in bail before a judge, within four days after the *quarto die poſt* of the return of the writ, if the arreſt were in London or Middleſex; and *ſix* days if in any other county. But if the laſt day be a Sunday, he has all the next day to put bail in. Of putting in ſpecial bail.

Bail muſt be put in in the county where the capias iſſues. Where bail muſt be put in.

As to the mode of putting in bail, excepting thereto, adding, juſtifying, and the like, it is the ſame as in common pleas in other bailable actions; ſee ante, ch. 4. ſec. 5. The proceedings are with the filazer; but the fees are ſomewhat more. How to put in, except to, and perfect bail.

So alſo the proceedings againſt the ſheriff to rule him to return the writ or bring in the body, are ſimilar to thoſe ſtated in the laſt ſection of the laſt chapter. How to rule the ſheriff, &c.

Obſervations on the above Mode of Proceeding.

The uſual mode of proceeding in the court of King's Bench is by bill; but in particular caſes it may be *expedient*, and it is ſometimes even *neceſſary*, to ſue by ſpecial original. It is often expedient, and ſometimes neceſſary, to ſue by original.

It is *expedient* to proceed by original when the plaintiff expects defendant to be litigious, and to delay execution by writ of *error*; becauſe, when proceedings in B. R. are by *original*, the writ of error muſt, in the firſt inſtance, be made returnable in the *Houſe of Lords*, which, from the immediate expence occaſioned thereby, is often a check to ſuch a ſtep being taken; whereas, upon proceſs by *bill*, error lies immediately from the King's Bench to the *Exchequer-chamber*, and afterwards to the Houſe of Lords. When expedient.

It is *neceſſary* to proceed by *original* when there are two or more defendants, and any or either of them cannot be found ſo as to be arreſted or ſerved with proceſs; When neceſſary.

becauſe, in ſuch caſe, plaintiff cannot declare againſt thoſe defendants who have been duly ſerved or arreſted, until he has *outlawed* the others; and proceſs of outlawry only lies upon proceedings by original. See ante, ch. 3. ſec. 2. A. 5.

When ſuch defendants have been regularly outlawed, and plaintiff declares, ſuch outlawry muſt be ſuggeſted in the declaration.

Debt muſt amount to 10l.

To enable any party to proceed by ſpecial original, the debt muſt amount to 10l. Stat. 5 Geo. 2, c. 27. ſec. 5.

In what actions plaintiff may ſue by ſpecial original.

It was formerly doubted whether proceedings by original in B. R. could be had in debt or covenant; but I conceive that no ſuch doubt can at this day be entertertained, but that all perſonal actions, founded on *contract*, may be ſued in this court either by bill or original.

The reaſon of proceedings by bill being preferred.

The reaſon of the former mode being adopted is, becauſe it is not only leſs expenſive in the courſe of the proceedings, but alſo becauſe a fine, proportionable to the amount of plaintiff's demand, muſt, in the firſt inſtance, as above ſhewn, be paid to the king on proceſs by original.

How proceſs by original muſt be returnable.

All proceedings on ſpecial original muſt be before the king himſelf, whereſoever he ſhall be in England. All writs, notices, &c. uſed in the courſe of the cauſe, from the firſt to the laſt, as writs of inquiry, venire, diſtringas, &c. muſt be made returnable on a general return day, whereſoever, &c. and not "at Weſtminſter," as in proceedings by bill. See ante, Introductory Obſervations, B. 3.

Original writ, whence it iſſues.

The original writ itſelf iſſues out of Chancery, and ſhould be teſted in the king's name, at Weſtminſter, or wherever the Chancery is holden. 3 Blac. Com. 274.

How teſted.

It may be teſted at any time, even in vacation; becauſe it is preſumed, that the court of Chancery is always open. *Whitehead* v. *Buckland*, Sty. 402. *Chancy* v. *Butter*, 3 Keb. 213.

Teſte muſt be after cauſe of action.

But the teſte muſt be after the cauſe of action accrued, otherwiſe the writ is abateable. *Jones*, one, &c. v. *Burnet*, cited, 2 Bur. 967.

Muſt be 15 days between teſte and return.

There ſhould be 15 days between the teſte and return; and, ſtrictly ſpeaking, the capias ſhould not bear teſte until the quarto die poſt of the return of the original; and there ſhould be then 15 days between its teſte and return; and this indeed muſt be obſerved, if the plaintiff proceeds to outlawry; but otherwiſe, both the original

ginal and capias may be made returnable the same day. There seems no specific time limited for the return of the original, though it is generally made returnable the same term, or the next to that in which it was issued; but if not returnable for two or three terms it does not vitiate, for it is no detriment to the defendant. Dyer, 175.

No limited time for its return.

The teste of the *alias capias* should be the *quarto die post* of the return of the *capias*; teste of *pluries* the *quarto die post* of the return of *alias*, and so on; and there should always be 15 days between the teste and return of each writ. See ante, ch. 3. sec. 1. E. 6.

How the alias, &c. must be tested.

By the stat. 16 Car. 1. c. 6. s. 7. the morrow of the Ascension is a good return, although there be not 15 days between the fourth day of the said return and the essoin day of the morrow of the Holy Trinity.

Morrow of Ascension a good return.

But if the cause of action accrued in the vacation, and the teste of the capias was the last day of the preceding term, and so, *apparently*, sued out before the cause of action, yet it is regular; for in such case, the actual day of suing out the writ is to be attended to. See ante, ch. 3. sec. 1. E. 8.

Capias may bear teste last day of term, though action accrued in vacation.

Sometimes, for the sake of expedition, in proceeding to outlawry, if the instructions be carried to the cursitor within the first week of a term, and the cause of action will admit of it, (*i. e.* if it accrued early enough, for it must have accrued before the teste of the original,) he will make the original returnable on the first, or any other return of the preceding term. Tid. 14.

Sometimes original will be antedated.

If the defendant is not held to bail, he must be served with a copy of the *capias* and not of the *original*. For the process, to be served according to the statute, must be process against the person. *Peter* v. *Reignier*, Bar. 410. See ante, ch. 3. sec. 1. A.

If defendant not held to bail, he must be served with copy of capias, not of original.

There should be also subscribed a notice to appear "on a general return, wheresoever," &c. See ante, ch. 3. sec. 1. C.

With a notice to appear.

As to the time of appearing, putting in bail, and the like, see the preceding chapters.

Such is the mode of proceeding in order to bring the defendant into court by special original. We have before shewn how to effect his appearance by bill and capias. As the future proceedings, whether by bill or original, vary but little, we shall from henceforth consider them together; pointing out, in the progress of the work, such

differences as may exist between them, contenting ourselves, at present, with observing,

Plaintiff must recover 50l. to entitle him to full costs,

except in certain cases.

First, that although the expences of proceeding by special original are heavy, yet unless the plaintiff recover 50l. or upwards, he shall not, on taxing costs, be allowed any more or other costs than he would be entitled to in case he had proceeded by bill (except in such actions in which he could not proceed by bill, or in which any defendant shall be actually outlawed).

If he wishes to amend his declaration, or original writ, how he may do it.

And, secondly, That if plaintiff should find that the damages laid in the original are not sufficient to cover his demand, he may apply by summons, in the same way as in proceedings by bill, to amend his declaration; and afterwards, should judgment go by default, and a writ of error be brought, which would render it necessary to make the original correspond with the declaration, he may petition the master of the rolls, that the cursitor may be directed to amend the original accordingly; which petition is entitled in the cause, and is engrossed on a treble 6d. stamp. It is taken to the secretary's office in the Rolls, where 5s. 6d. is paid; and when answered, it is then taken to the cursitor, with the original, to be altered and re-sealed.

Want of original no error after verdict.

N. B. This is only necessary where error is brought after judgment by default; for if it be after verdict, the original need not be altered, as the want of an original cannot, in such a case, be assigned for error.

A mistake being discovered in one of the defendant's Christian names, leave was granted to amend the special capias in order that an application might be made to the master of the rolls to procure a new original. *Carr* v. *Shaw*, 7 D. & E. 299.

Section II.

Of the Mode of proceeding by original Quare Clausum Fregit and Summons in C. B.

The meaning thereof.

The original quare clausum fregit here mentioned, is precisely the same kind of writ as that on which the proceedings by capias are founded; the only difference is in the *process* which issues upon that writ, instead of its being by *capias* and *alias*, and the like, which is process against the *person*; it is by *summons* and *distringas*, which is the process against the defendant's *goods*.

Formerly,

Formerly, except in few cases, this was the only mode of compelling the defendant's appearance in civil actions, his person not being liable to an arrest. But the writ of *capias* being gradually introduced, and at length generally allowed, and being deemed the most effectual and preferable mode of proceeding, the process by *summons* and *distringas* fell almost into disuse.

It is, however, by no means taken away; and is in some cases preferable to the *capias*; namely, where the defendant cannot be met with to be arrested or served with process, at least without great delay and difficulty, and yet has goods that may be distrained; for in this case, *personal* service of the summons is not necessary; but it is sufficient for it to be left at defendant's house by the sheriff's officer, and the writ to be returned—*Notice to the defendant;* and if he does not duly appear upon the appearance-day of the return, the *distringas* issues, and afterwards an *alias*, and so on, till he does appear, or until sufficient goods have been distrained and levied to answer plaintiff's demand.

The mode of proceeding is as follows: How to proceed.

Prepare memorandum, or minute of warrant to prosecute, as in other cases. See Introductory Observations, D. 3. *Make out præcipe for the cursitor of the county where defendant has goods.* Memorandum of warrant.

Middlesex, ss. Original quare clausum fregit for A. B. against C. D. late of Westminster, mercer. Trespass at Westminster, returnable before his Majesty's justices at Westminster, on the morrow of All Souls. T. S. attorney. Præcipe for cursitor.

Take præcipe and memorandum of warrant to cursitor, who will furnish you with original signed and sealed; pay 4s. 6d. *Go to proper sheriff's office for a summons; pay* 2s. 4d.; *give it to the officer you usually employ; pay him, for summoning each defendant,* 5s. How to get original writ and summons.

Upon the appearance day of the return of the writ defendant should appear, which is done by entering appearance with the filazer of that county where writ was issued, and at the same time delivering memorandum of warrant to defend. The præcipe for appearance is— When and how defendant should appear.

Middlesex, ss. Appearance for C. D. late of Westminster, mercer, at the suit of A. B. to an original quare, and returnable on the morrow of All Souls. P. R. attorney. Præcipe for appearance.

If defendant does not appear, (which you may know by searching at the filazer's, and no appearance being entered,) apply to the sheriff to return the original, which If defendant does not appear, how to proceed by distringas.

file with the cuſtos brevium; pay 4d.; he will give you an abſtract thereof on a ſlip of paper; carry it to the ſilazer; pay 6d. If *notice* to defendant be returned on writ, make out diſtringas on a half-crown ſtampt parchment, and a præcipe for the office; pay ſilazer for ſigning it, 2s. 6d.; ſeal, 7d.; go with it to the ſheriff's office; get a warrant thereon to diſtrain defendant's goods to 40s.; give it to the ſheriff's officer you employ; pay him 10s. for levying. On the return of diſtringas, which you may get returned at the office, ſue out an *alias* in the ſame way; and then, if defendant has not appeared, move to increaſe the iſſues, either in court or in the Treaſury Chamber. The court, on the alias diſtringas, will grant a rule to levy in proportion to the amount of plaintiff's debt, for it is at their diſcretion; ſometimes, even to 40 or 50l. Carry the rule, with the *alias* writ, to ſheriff. If not ſufficient levied thereon, and defendant does not appear, ſue out a *pluries*, and move, as before, for a farther increaſe of iſſues, which the court will now grant to the amount of the debt and coſts; carry rule, as before, with *pluries* writ, to the ſheriff, who will make out his warrant accordingly. When the levy has been made, get *pluries* writ returned; and if defendant has not appeared, move to ſell the iſſues, and apply them to payment of defendant's debt and coſts, purſuant to ſtatute 10 Geo. 3. c. 50.

By alias diſtringas.

How to increaſe iſſues.

Pluries diſtringas.

How to apply the iſſues.

If defendant ſhould have appeared at any time after the paſſing of the diſtringas's, and before a rule obtained to ſell the iſſues, then move the court, under the 10 G. 3. c. 50. to ſell ſo much of the iſſues as will be ſufficient to pay plaintiff his coſts incurred by reaſon of ſuch diſtringas, and *alias* diſtringas, or as the caſe may be.

Motion in court upon 10 G. 3. c. 50.

The act of 10 Geo. 3. c. 50. extends to all writs of diſtringas in general; though, by the preamble of the ſtatute, it ſeems only to refer to ſuch as iſſue againſt members of parliament. *Raban* v. *Plaiſtow*, Bur. 2726.

That act extends to all writs of diſtringas.

The return day of a *clauſum fregit*, and the *quarto die poſt*, are both reckoned *incluſively*; nor is there any difference whether the return day be on *Sunday*, or any other day.

Whendefendant muſtappear, and how the days are reckoned.

The defendant was ſerved with a *clauſum fregit*, returnable in four weeks from Eaſter-day; the return was *Sunday* April 20th; the defendant not appearing on the Wedneſday following, the plaintiff, on the Thurſday, ſued out a *diſtringas*; on that day the defendant entered an appearance. On Friday morning the plaintiff's attorney

ney levied 40s. under the diſtringas, on the defendant's goods.

Kerby, ſerjeant, obtained a rule to ſhew cauſe, why theſe iſſues ſhould not be repaid to the defendant, with coſts, on the ground, that the return day being Sunday, the defendant had till Thurſday to appear, and as the diſttringas iſſued on that day it was irregular.

To this it was anſwered, that by the uniform practice of the court, the defendant was bound to appear *within four days of the return of the writ*, which are *incluſive* both of the *return* day and the *quarto die poſt*, and that Sunday was to be conſidered like any other return day.

The court, after conſulting the ſecondaries as to the practice, were of opinion againſt the defendant. Rule diſcharged. *Fano* v. *Coken*, 1 H. Blac. 9.

After appearance, plaintiff may declare upon this proceſs, in any county (though different from the writ) and in any cauſe of action; and may, after judgment, if neceſſary, purchaſe a *ſpecial original*, to warrant the proceedings.

☞ *Having now ſhewn the mode of bringing defendant into court, in all common caſes, whether the action be* bailable *or* not *bailable, and whether the proceedings be in the uſual way, by* bill *in the King's Bench, and* capias *in the Common Pleas, or by* ſpecial original *in the former court, and* original quare clauſum fregit and ſummons *in the latter; the next ſtep to be taken is, to ſet forth the plaintiff's charge or cauſe of action againſt defendant, fully and particularly in the* DECLARATION. *And as, from this period of the ſuit, in all the above caſes, the proceedings which hitherto have been widely different, and therefore ſeparately conſidered, are nearly ſimilar, they will hereafter be treated of under one head.*

CHAPTER VI.

Of the Declaration and its Incidents.

SEC. I. *Of the Declaration.*

(A) The Time of declaring.
(B) Declaring in Chief.
(C) Declaring *de bene esse.*
(D) Declaring by the bye.
(E) Engrossing and filing Declaration.
(F) Notice of Declaration.
(G) Declaring where one Defendant only has appeared.
(H) Declaration varying from Process.
(I) Consolidating Declarations and striking out Counts.
(K) Defects cured by Declaration.
(L) The Rule to declare.
(M) Of intitling Declarations and of the Memorandum.

SEC. II. *Of the Venue.*

SECTION I.

Of the Declaration.

Declaration, what.

THE Declaration or Count is nothing more than a statement in writing of the cause of complaint which the plaintiff has against the defendant; setting forth with a degree of accuracy the time and place, when and where, and the

the manner in which this cauſe of complaint aroſe, together with the damage or injury ſuſtained in conſequence thereof. After the declaration follow the pleadings between the parties.

Formerly the declaration and pleadings were carried on at the bar of the court *ore tenus;* afterwards the declaration was reduced into writing and delivered to defendant's attorney, who took a copy, and charged his client therewith; but much inconvenience ariſing from this, and particularly from their neglecting to return the declaration to plaintiff's attorney, the rule of court *Trin.* 12 *W.* 3. was made, whereby the practice was firſt introduced of plaintiff's attorney delivering only a copy of the declaration to defendant's attorney, and charging him for the engroſſing and duty on the back thereof. How made formerly. Origin of preſent practice.

That the defendant may not be ſubject to the caprice or negligence of his adverſary, the courts have fixed a certain limited time within which plaintiff muſt declare, or in default thereof judgment of *nonpros* may be ſigned againſt him. — For an explanation of this kind of judgment, ſee title *Judgment of Nonpros.*

(A) The Time of declaring. (A)

The time in which plaintiff muſt declare is, Time of declaring.

In B. R.	*In C. B.*
Before the end of the term next enſuing the return of the proceſs, or defendant may ſign nonpros. And this in all caſes, (except replevin,) without having given any rule to declare. 13 *Car.* 2. *ſt.* 2. *c.* 2. *ſ.* 3.	*Same as in B. R., only the defendant muſt, at the end of ſuch enſuing term after return of proceſs, or in four days afterwards, give plaintiff a rule to declare, and cannot ſign nonpros until that rule is expired: for if no ſuch rule be given, plaintiff in this court has till the eſſoin day of the third term to declare in. R. Hil.* 9 *Ann. Stewart* v. *Harding,* *P. R.* 121.

By the general rule of law a plaintiff muſt declare within twelve months after the return of the writ, or he will be out of court. But by the rules of the courts, if he do not deliver his declaration within two terms, defendant may ſign judgment of *nonpros.* If, however, no ſuch judgment be ſigned, plaintiff may ſtill deliver his declaration at any time within the year. *Worley* v. *Lee,* 2 D. & E. 123. *Penny* v. *Harvey,* 3 D. & E. 123. *Sherſon* v. *Hughes,* 5 D. & E. 36. Within two terms; or if no judgment, within the year.

It

It was formerly held, That if a declaration were not delivered by the laſt day of the ſecond term, that is, on or before the ſitting of the court the laſt day, although defendant had not ſigned *nonpros*, yet that it was at his option to receive the declaration afterwards, nor could he be compelled ſo to do. *Barnes* v. *Geering*, 12 Mod. 217.

Reaſon why no new count added after ſecond term.

And ſtill is it upon this ground, that a new count cannot be added to a declaration after the ſecond term, becauſe that would be tantamount to a new declaration, and plaintiff could not declare after two terms. *Niſbett* v. *Griffith*, Say. 97.

Rule to declare how neceſſary in both courts.

In *B. R.* plaintiff has only to the end of the ſecond term to declare in, whether called upon by rule or not; but in *C. B.* he has till the eſſoin day of the third term, if not called upon by rule. *P. R.* 121.

Two terms allowed after bail put in.

In both courts plaintiff has two terms to declare in after bail is complete.

How if a treaty between the parties.

But if there be a treaty between plaintiff and defendant, he is not obliged to declare within that time. *Walter* v. *Steward*, 3 Wilſ. 455.

Of compelling plaintiff to declare by rule.

If the defendant wiſhes to compel plaintiff to declare, he may obtain a rule for that purpoſe; and if at the expiration thereof he does not declare, he may obtain another, until ſuch rule is drawn up for him to declare *peremptorily* by a certain time, which muſt be obeyed; but plaintiff is not obliged to attend to any other than ſuch peremptory rule: it is a motion of courſe ſigned by counſel. This is the rule calling upon plaintiff to declare; but there is alſo a rule to declare, obtained by plaintiff, for further time to declare in; which ſee *poſt* (L).

Explanation of the different ways of declaring.

Formerly, when the pleadings between the parties were carried on *ore tenus* at the bar of the court, plaintiff could not declare until defendant had actually appeared in court. So indeed for a long time after the introduction of the practice of declaring and pleading by attorney, no declaration could

Of declaring in chief.

be delivered till the defendant was brought into court; that is to ſay, until common bail was filed, or appearance entered in actions not bailable, or ſpecial bail put in and perfected in bailable actions. The only way, therefore, of declaring at that time was, declaring, as it is termed, *in chief*, that is to

Of declaring *de bene eſſe*.

ſay, after the defendant has appeared. But for the ſake of expediting juſtice, it was ordered by rules of court, that plaintiff might declare immediately upon the return of the proceſs, without waiting for defendant's appearance, which was called declaring *de bene eſſe*, or *conditionally*: that is to ſay, *conditionally* until defendant had put in and perfected bail,

bail, if the action were bailable, or until he had filed common bail, or entered an appearance if the action were not bailable.

There are, therefore, now two ways of declaring, namely *in chief*, and *de bene esse*, in all actions founded upon process *already issued* against the defendant. The only two ways where process has issued.

But there is further a third way of declaring in actions wherein no process has issued, and this is called declaring *by the bye*, which can only be done when the defendant is actually in court; for he is not till then supposed to be in custody: and this mode of declaring is grounded upon the principle of the defendant being already in custody, and therefore no occasion for any fresh process to warrant the declaration. Of declaring by the bye. Meaning thereof.

We shall now proceed briefly to shew the practice in each of the above ways of declaring.

(B) Declaring in Chief. (B)

Declaring in chief is when the plaintiff declares after the defendant has appeared; and this may be either when defendant has himself appeared, or when plaintiff has appeared for him according to the statute; for until defendant is regularly brought into court, plaintiff cannot declare in chief. *Smith* v. *Painter*, 2 D. & E. 719. *Cook* v. *Raven*, 1 D. & E. 635. So in *C. B. Mathews* v. *Stone*, Bar. 242. What.

How, if Defendant has appeared.

B R.

In every cause in which special or common bail shall be filed, *and notice thereof given to the attorney for the plaintiff, a copy of the declaration shall be* delivered *to* the defendant's attorney, *who shall pay for the same according to the usual rate; but if the attorney for the defendant, or his clerk in his absence*, refuses to pay *for such copy; or if it shall happen that the* abode of the defendant's attorney be unknown *to the plaintiff's attorney, then it shall be lawful to* leave such copy with the officer of this court appointed for affiling *declarations, and* notice *thereof shall, without delay, be given to such defendant*

C. B.

If the defendant's attorney has appeared or put in bail, the declaration must be delivered *to him; whereupon he must pay for the same duty and warrant; or* on refusal *by him, or his clerk in his absence,* or if his abode be unknown, *it may be* filed *in the Prothonotary's office on payment of* 2s. *a count, or* 8d. *per sheet; and then on notice thereof to the defendant or his attorney,* (*and from the time of giving such* notice, *and not before, declaration is well delivered,*) *and on rule to plead being given, judgment for want of plea may be signed, and no plea may be received till the declaration is taken out of the office. R. T. 12 W. 3.*

Copy of declaration to be delivered to defendant's attorney. Who is to pay for same. If he refuses, or place of abode not known, copy may be be filed in the office, and notice thereof given to defendant or his attorney.

fendant or his attorney; and such declaration shall be held well delivered from the time of such notice only. R. Trin. 2 G. 2.

How, if Plaintiff has appeared for Defendant according to the Statute.

Copy of declaration to be left at the office,

and notice given to defendant or his attorney, or left at defendant's last place of abode.

What notice shall express.

In case defendant does not plead thereto, judgment may be signed.

Declaration well delivered from time of notice.

When judgment signed.

Notice of inquiry may be given to defendant, or left at his last place of abode, and held good.

In all causes, when a copy of the process is served upon any defendant or defendants, and an appearance is entered, or common bail filed for such defendant or defendants by the plaintiff's attorney pursuant to the statute, *the plaintiff's attorney in such case shall* leave a copy of the declaration in the office *with the proper officer appointed for that purpose, and likewise give* notice *thereof to the defendant or defendants, by delivering an* English *notice, written in secretary hand, to such defendant or defendants, or by leaving the same at the last or most usual place of abode of such defendant or defendants; in which* notice shall be likewise expressed the nature of the action, and at whose suit prosecuted (*a*), and the times limited by the rules of this court for such defendant or defendants to plead to such action; *and that in case such defendant or defendants do not plead to such declaration by such limited time so to be expressed in such notice, judgment will be entered against such defendant or defendants by default; and from the time of giving such notice as aforesaid, such declaration shall be deemed well delivered to such defendant or defendants, and not otherwise.*

And in case such defendant or defendants, after such notice given, do not plead by the time the rules for pleading are out, the plaintiff may, in such case, sign his judgment (*b*) *without any other or further calling for a plea, and thereon give notice of executing his writ of inquiry, either by delivering a notice in writing to such defendant or defendants, or by leaving the same at the last or most usual place of abode of such defendant or defendants; which shall be a sufficient notice to such defendant or defendants of the time of executing such writ of inquiry. R. Trin. 1 G. 2. B. R. Mich. 1 G. 2. C. B.*

For further explanation of these rules, see *post* (F), (G), *&c.*

(C) Declaring *de bene esse.*

What.

When plaintiff declares after the return of the process, but before the defendant has appeared, it is called *declaring de bene esse*, or *conditionally*; that is to say, conditionally until defendant has filed common bail in *B. R.* or entered an appearance in *C. B.* if the action be not bailable; or until he has put in and perfected bail, or (in case bail has been put in but not justified) until bail have justified, if the action be a bailable one.

(*a*) In C. B. the rule says, the notice must signify in whose office such declaration is left.

(*b*) In C. B. the rule says, that a rule to plead must be first given. See *R. Mich. 1 G. 2. C. B.*

The

The lateſt rules reſpecting this practice of declaring *de bene eſſe* are the following:—

B. R.

It is ordered, that upon all proceſs to be iſſued out of this court returnable before the laſt return *of any term where no affidavit ſhall be made and filed of the cauſe of action, purſuant to the acts of parliament for preventing vexatious arreſts, the plaintiff may file or deliver the declaration* de bene eſſe *at the return of ſuch proceſs, with notice to plead in* eight *days after the filing or delivery thereof; and if the defendant doth not file common bail and plead within the ſaid eight days, the plaintiff,* having filed common bail for ſuch defendant according to the ſaid act, may ſign judgment *for want of a plea; provided that ſuch declaration be delivered or filed, and notice thereof given* four days excluſive before the end of ſuch term, *and a rule to plead be duly entered. Rule Trinity Term* 22 *G.* 3.

Upon proceſs to be iſſued and made returnable as aforeſaid, where an affidavit ſhall be made and filed of the cauſe of action *purſuant to the ſaid act, the declaration may be filed or delivered* de bene eſſe *at the return of ſuch proceſs, with notice to plead in* four *days after ſuch filing or delivery, if the action be laid in* London *or* Middleſex, *and the defendamt lives within* 20 *miles of* London, *and in* eight *days if the action is laid in any other county, or the defendant lives above* 20 *miles from* London; *and if the defendant puts in bail, and doth not plead within ſuch times as are reſpectively before mentioned, judgment may be ſigned: provided that ſuch declaration be delivered or filed, and notice thereof given*

C. B.

Upon proceſs returnable the firſt, ſecond, or third return of any term, the declaration may be delivered de bene eſſe *at the return of the proceſs, with notice to plead, if in* London *or* Middleſex, (*and defendant lives within* 20 *miles of* London,) *in* four *days: but if the plaintiff declares in any other county, then it may be delivered* de bene eſſe, *with notice to plead within eight days after declaration delivered, either* where there is ſpecial or common bail filed. *Rule Trin.* 8 *G.* 3.

How in B. R. in actions not bailable.

How in C. B. in actions whether bailable or not.

How in B. R. in actions bailable.

four days exclusive before the end of such term, and a rule to plead be duly entered. Rule Trinity Term 22 G. 3.

It is observable that in the above rule, *Trin.* 22 *G.* 3., the words are "upon all process returnable before the *last* return "of any term;" and in rule 8 *G.* 3. in *C. B.* they are "upon "process returnable the 1st, 2d, or 3d return of any term, "*plaintiff may file or deliver declaration de bene esse*, with no- "tice to plead," &c. From which words it has been understood, that no declaration could be filed or delivered *de bene esse*, except upon process returnable *before* the *last* return of the term. Thus in a late ingenious book of practice— "Upon process returnable *the last* return of the term, the "declaration cannot be filed or delivered *de bene esse*:" and the rules of court are referred to in support of this doctrine. *Tidd.* 233. But with deference I conceive, that the operation of the above rules of court is not to confine declarations *de bene esse* to process returnable as therein mentioned, but only to regulate the time wherein defendant is *to plead* to such declarations on process so returnable. Plaintiff may declare *de bene esse* upon any process whenever returnable; but if it be not returnable before the last return of the term, the notice to plead must not be in four or eight days, as mentioned in the rules (since those rules do not extend to such declarations *de bene esse*), but the defendant will, in that case, be entitled to an imparlance, and the notice should be to plead within the first four days of the next term. Agreeable to this is the determination in the case of *Abbey* and *Martyn* in 1 *C. B. T. R.* 533. where on process returnable the *last* return of Trinity Term, a declaration was filed *de bene esse*, with notice to plead within the first four days of Michaelmas term, and it was held regular. No reason indeed is given, but it is submitted, that it might have been upon the principle above mentioned, namely, that the rules of court only govern the *time of* pleading to declarations *de bene esse*, returnable *before* the last return, and do not mean to prevent plaintiff's declaring *de bene esse* upon any process returnable upon any subsequent return, provided the notice to plead be accordingly within the first four days of the following term.

Explanation of rule Trin. 22 Geo. 3. in B. R. and 8 Geo. 3. in C. B.

At what time.

A declaration *de bene esse* must be filed or delivered before the defendant has appeared, and even before the time for his appearing or putting in bail is expired. *Fotherby* v. *Lloyd*, Bar. 342.

For declaring after appearance is called declaring in chief. And if plaintiff neglect to declare *de bene esse* before the time for defendant's appearance is out, he must first bring defendant into court by filing common bail, or entering an appearance for him according to the statute, and then declare against him in chief. *Smith* v. *Painter*, 2 D. & E. 749. That is, provided the action be not bailable; for if it be, plaintiff must then proceed against the sheriff, or upon the bail-bond.

So that the plaintiff can never deliver declarations *de bene esse* after the expiration of the time allowed to plead; and if he do, and proceed to judgment, it will be set aside. *Baker* v. *Cooper*, 6 D. & E. 548.

In *B. R.* the return day of the writ is the soonest that a declaration *de bene esse* can be filed or delivered; and where an original is returnable on the essoin day of term, declaration cannot be delivered *de bene esse* till the first day of term. *Burgh* v. *Dixon*, 14 G. 2. How soon it may be filed, &c.

But in *C. B.*, although declaration may be delivered *de bene esse* on the return day, and be good for many purposes, yet, being in favour of plaintiff to expedite his cause, it cannot be delivered so as to charge defendant with paying for the declaration till the appearance day; for the four days of grace are allowed defendant to make an end of the cause by payment of the debt or otherwise; and if this practice were to be countenanced, an attorney might delay the service of the writ till the night before the return, and charge the defendant with the costs of declaration as well as process. *Golding* v. *Grace*, Black. 750. On return day. On essoin day, how far good.

And in *B. R.* the master will not allow costs of declaration delivered under such unfair circumstances.

If a writ be returnable the last day of one term, and defendant does not justify bail until the fourth day of the next, he is not entitled to an imparlance to the third term, though plaintiff do not deliver declaration *de bene esse* before the essoin day of the second term; for no laches is imputable to plaintiff for not declaring until defendant is perfectly in court. *Rolleston* v. *Scott*, 5 D. & E. 372.

The eight days time when defendant is to plead reckons from the delivery of the declaration, be it sooner or later. *Shadwell* v. *Angel*, Burr. 55. Time for pleading how reckoned.

So in *C. B.* if a declaration is delivered *de bene esse on the* essoin day of the return, defendant is entitled to eight days time to plead (though it be a case that would otherwise require only four); if *after* the essoin day, and on or before the appearance day of the return of the writ, the defendant is entitled to four days *from* the appearance day; and if deli- In C. B.

vered after the appearance day, then to four days *after* delivery. Blac. 1243.

If declaration delivered too late, whether waiver of bail.

Although the delivery of a declaration *de bene esse* after the time expired for putting in bail is a bad delivery, yet it is not a waiver of exception to bail; but demanding a plea is; because the latter is admitting the defendant to be in court and in a condition to plead. *Lister* v. *Wainhouse*, Bar. 92.

If defendant do not plead, &c. plaintiff may sign judgment.

Where declaration is delivered *de bene esse* at the return of process, with notice for defendant to plead within eight days after such delivery, if the defendant do not file common bail and plead within such eight days, plaintiff may sign judgment for want of a plea, having first filed common bail for defendant, and a rule to plead having also been duly entered. *Shadwell* v. *Angel*, Burr. 55.

Care should be taken to *mark* the declaration accordingly that it is delivered *de bene esse*, otherwise it will be irregular. *Evans* v. *Tillam*, Bar. 257.

(D)

(D) Declaring by the Bye.

Declaring by the bye.

Declarations by the bye are not grounded on any original writ or process, but upon the defendant's being already in court, either at the suit of plaintiff himself or some other person. Now there are three ways in which a defendant may be in court: 1st, He may be in the actual custody of the marshal as a prisoner: 2d, He may have *voluntarily* come into court at the suit of any person, by having himself filed common bail and the like: or, 3d, He may have been *forced* into court by plaintiff's having filed common bail, or entered an appearance for him according to the statute.

In B. R. Who may declare by the bye.

Now in the two first cases, by the practice of the King's Bench, *any* person may deliver or file declarations against him by the bye, provided they be delivered or filed within the same term that the process against defendant (upon which he is either so in custody, or to which he has so voluntarily appeared) is returnable. *Sulyard* v. *Harris*, Burr. 2180.

And the plaintiff himself may declare by the bye against him at any time before the end of the next term after the return of the process. *Smith* v. *Muller*, 3 D. & E. 627.

But in the 3d case, where defendant has been *forced* into court, no other person except the plaintiff himself, can deliver a declaration by the bye against him. *R. Mich.* 10 G. 2. *Wallis* v. *Smith*, Cas. Temp. Hard. 207.

In C. B.

The above is the practice of the court of King's Bench: but that of the Common Pleas is otherwise; for there, in

all cases, no person can declare by the bye, except the plaintiff himself; and he must do it within the same term in which the writ is returnable. *Methwin* v. *Pople*, Cas. Prac. C. B. 6. *Dunn* v. *Hutt*, Bar. 346.

Which rule also prevails in *B. R.* when the action is by *original*. Tidd. 217.

N. B. The reason of this difference in the practice of the courts seems to be, that in *B. R.*, when defendant is actually in court, either by having filed common bail, or by putting in special bail, he is presumed to be in the custody of the marshal, ready to answer all declarations that may be brought against him by any person whatsoever; whereas in *C. B.* he is only in court *quoad* the plaintiff.

How in joint actions.

If a *joint* action be brought, one of the plaintiffs declaring severally by the bye, will be deemed as a stranger, and can only be done in *B. R.*, subject to the above rules. *Sulyard* v. *Harris*, Burr. 2181.

In actions by husband.

So in *B. R.* in an action at the suit of the baron only, a declaration may be delivered by the bye at the suit of himself and *feme*, and *vice versa*; but not so in *C. B.* *Reeks & Ux.* v. *Robins*, Bar. 337.

By executor.

So in *B. R.* upon process with an *ac etiam* at suit of plaintiff as executor or assignee, he may declare by the bye in his own right: but not so in *C. B.* unless it were a general *clausum fregit* without an *ac etiam*.

How if defendant is in court by rule of court.

But in all cases where defendant comes in by rule of court and not by process, he is not compellable to receive a declaration by the bye; as where a person by rule of court is made defendant in ejectment and files common bail, and other similar cases. Styles, 47.

A declaration by the bye pre-supposes a declaration in chief, and therefore no declaration by the bye can be delivered until plaintiff has declared in the original action; so that if plaintiff sues out a writ *qui tam*, and declares in his own name before any declaration in the *qui tam* action, it will be bad.

So if he holds defendant to bail in assumpsit, and declares in trover, as if by the bye, it is irregular. *Tetherington* v. *Golding*, 7 D. & E. 81. *Delves* v. *Strange*, 6 D. & E. 158. See cont. *Holmes* v. *Small*, Cas. Prac. C. B. 58. *Con. Philips* case, 1 Crom. 96. See *post* (E).

(E) Engrossing, filing, and delivering Declaration. (E)

The declaration should be engrossed on treble-penny stamped paper; charge engrossing 4d. per sheet, (seventy-

two words making a sheet,) beside duty, which is 3d. *per* sheet, but nothing for paper.

For the Warrant to defend, charge

In B. R.	*In C. B.*
In all actions 4d.; *and for filing common bail according to statute,* 7s. 2d.	*In debt, detinue, and trespass,* 4d.; *in other actions,* 8d.; *and for entering appearances according to statute,* 5s. 10d.; *if at suit of attorney,* 7s. 2d.

Besides which, you should indorse on declaration the time for defendant to plead thereto; and if the declaration be filed or delivered *de bene esse*, it should be indorsed accordingly; as thus, if plaintiff declare in chief:

Form of indorsement, if declaration be in chief.

The defendant is to plead hereto in four (*or eight days, or within the first four days of next* Michaelmas *term, as the case may be,*) *otherwise judgment.*

If plaintiff declare *de bene esse*, thus:

If declaration be *de bene esse.*

This declaration is filed (or delivered as the case may be) *conditionally until common bail be filed* (or an appearance entered, or bail above be put in and perfected, as the case may be); *and defendant is to plead hereto in four days,* (or eight days, or as the case may be,) *otherwise judgment.*

Indorsement not necessary if declaration be filed, but notice must be given.

But this indorsement is not necessary when the declaration is filed in the office, because in that case a notice must be given to the defendant, or left at his last usual place of abode; which notice must express the nature of the action, at whose suit, and the time allowed for pleading, as follows:

Form of Notice of Declaration.

Form of notice of declaration.

Take notice that a declaration was this day filed with the clerk of the declarations in the King's Bench office, in the Inner Temple, London, (*if in B. R.*; *or* with the Prothonotaries at their office in Tanfield Court, in the Temple, London, if in *C. B.*) *conditionally until special bail is put in and perfected,* (or until common bail be filed, or until common appearance be entered, as the case may be,) *as of this present* Michaelmas *term, against you, at the suit of the above named plaintiff, in an action of trespass on the case on several promises, to the plaintiff's damage of* 100l; *and unless you plead thereto in four days* (or as the case may be) *from the date hereof, judgment will be signed against you by default. Dated the 28th day of* January 1794.

Yours, &c.

J. S. *Attorney for plaintiff.*

To Mr. C. D., *the above defendant.*

If

If declaration be filed in chief, then the notice is as above, only omitting the words "*conditionally until bail be put in* "*and perfected.*"

How indorsed as to the time allowed for pleading.

As the time wherein defendant is to plead must be accurately indorsed on the declaration, or inserted in the notice, it is extremely material that plaintiff should be well acquainted therewith.

How, if plaintiff declare in chief in both courts.

Whenever declaration is delivered or filed in *chief*, defendant is to plead in *four* days from the delivery thereof; provided the venue be in London or Middlesex, and the defendant lives within 20 miles of London. But if the venue be not in London or Middlesex, or if the defendant does not live within 20 miles of London, then he is to plead in *eight* days, and this in both courts, whether the action be bailable or not.

How, if plaintiff declare *de bene esse* in B. R.

But whenever the declaration is delivered or filed *de bene esse*, the time of pleading is different in the two courts; for in *K. B.* if the action be *not* bailable, it is *always* eight days; but if it be bailable, then four or eight, according to the above rule.

How in C. B.

But in *C. B.* no such distinction prevails, but whether the action be bailable or not, the time for pleading is four or eight days, the same as when plaintiff declares in chief.

How, if defendant be entitled to an imparlance.

It is, however, to be remembered, that in both courts, and in all cases, if the declaration be not delivered, or notice given four days exclusive before the end of the term, defendant is entitled to an imparlance; and therefore the time for pleading is within the first four days of the next term.

See *post* Ch. VII. Sec. VI. in what case defendant is entitled to imparlance.

But it is not absolutely necessary for the notice to plead to be indorsed on declaration, or given when declaration is delivered; for if given afterwards, provided it be a proper notice as to the time allowed for pleading, it will be good. Anon. *C. B.* 2 Wil. 137.

Of filing and delivering declaration.

If the defendant's attorney be known, a copy of the declaration must be delivered to him: and if he be a country attorney, then it ought to be delivered to his agent in town: for if it be delivered to the defendant himself, or left in the office, unless the attorney refused to pay for it, it will be a bad delivery. *P. R.* 126. *White* v. *Edwards*, Ray. 1408. 8 Mod. 379.

So if the defendant's place of residence be known, it is irregular to file the declaration in the office. *Oldham* v. *Burrell*, 7 D. & E. 26.

When filed.

But if the place of abode of defendant's attorney or of defendant be not known, or if such attorney refuse to pay

for declaration, then a copy must be filed in the proper office.

So if plaintiff files common bail, or enters appearance for defendant according to the statute.

If such defendant, for whom plaintiff so appears, be a practising attorney, he must not deliver declaration to him at his chambers, but must leave it in the office. *P. R.* 128. *Heber* v. *King*.

At what time. A copy of declaration ought to be delivered or filed before nine in the evening, otherwise defendant will be entitled to an imparlance; and judgment, if signed, will be set aside. *P. R.* 123. *Bayly* v. *Dennis*.

Four days before end of term. Declaration should be delivered four days exclusive before the end of the term, (i. e.) on the eighth, if term ends on the twelfth, or defendant will be entitled to an imparlance. *P. R.* 125. *Porter* v. *Barnes*.

Not on Sunday. Delivery of a declaration on a Sunday bad, though cases may be found to the contrary. *Walker* v. *Town*, Bar. 300, *Morgan* and *Johnson*, C. B. T. R. 629.

A declaration may be delivered by the bye after payment of debt and costs in the original action, provided it be delivered of the same term in which writ is returnable. *Hand* v. *Willett*, P. R. 144.

So after a plea in abatement and entry *quod billa cassetur*; for defendant is in court during the whole term. *Miller* v. *Andrews*, 5 D. & E. 634.

(F) (F) The Notice of Declaration, and paying for same.

In all cases where declarations are left or filed at the office, a proper notice thereof must be given to defendant or his attorney; for if declaration be left in the office, and notice given to defendant's attorney, it is tantamount to a delivery of it to him. *Thomas* v. *Bushell*, Cas. Prac. C. B. 84.

How served. If not delivered to the attorney, it must be left at the last or usual place of abode of defendant.

If neither the attorney nor the defendant's last place of abode can be found, application may be made to the court, that notice left at the office may be good, unless the bail, if any, shew cause to the contrary. *Miller* v. *Parsons*, Bar. 307.

Notice has been held good when put under the door of defendant's house, which was empty and shut up; court thinking it a trick of defendant's to avoid process. *Wood* v. *Dodgson*, Bar. 278.

But

But where it was merly put under the latch of defendant's door, without its appearing that the perſon who left the notice knocked or endeavoured to open the door, it was bad. *Talbot* v. *Oldham*, Bar. 411.

If the action be againſt two or more, notice muſt be given to all the defendants, or it will be bad. *Coulſon* v. *Turnbull* and others, Bar. 246. *Kingdon* v. *Horn* and another, Bar. 293.

It muſt be ſerved before nine in the evening, and before rule to plead is given. P. R. 131. & 135. 121. *Lane* v. *Elliot*. *Gray* v. *Saunders*.

It muſt not be ſerved on a Sunday. *Morgan* v. *Johnſon*, C. B. T. R. 629.

This notice muſt be in writing. P. R. 130. *Hale* v. *Breedon*. How made.

It ought to follow the proceſs: ſo that where a perſon reſiding in *Dorcheſter* took lodgings in *London* for three or four days, and was there ſerved with proceſs, although he immediately after went home into the country, notice of declaration left for him at his lodgings was held good. P. R. 129. *Poulter* v. *Skinner*.

It ought to ſpecify technically the nature of the action, as treſpaſs, treſpaſs on the caſe upon promiſes, treſpaſs on the caſe for tort, debt, covenant, and the like, or it will be inſufficient, although, perhaps, it may deſcribe the cauſe of action ſo as to be underſtood by common people. Its contents.

As if it ſays that plaintiff declares on a note of hand; or that it is an action for work and labour done by plaintiff for defendant; though intelligible in common parlance, yet the notice is bad; becauſe the nature of the action, as debt or treſpaſs on the caſe, is not technically expreſſed. *Taylor* v. *Sherman*, Bar. 299. *Graves* v. *Wiſe*, 2 Wil. 84. *Bartholomew* v. *Golding*, Bar. 291.

It muſt ſhew the nature of the action with ſufficient certainty; ſo that merely to ſay in an action on the caſe, without mentioning whether upon contract or for tort, is not ſufficient. P. R. 131. *Parſons* v. *Smith*. Nature of action.

But it need only mention the nature of the action, for the declaration will ſhew the particulars. P. R. 133. *Skin* v. *Gwinnet*.

It ſhould further ſpecify at whoſe ſuit proſecuted, and the time allowed for pleading thereto; and that unleſs defendant plead in that time, judgment will be ſigned. At whoſe ſuit.

Notice to plead in four days when defendant is entitled to eight, bad; and judgment ſet aſide, though not ſigned till after the eight days. P. R. 135. *Braty* v. *Baldock*.

So

Dated.

So it should be properly dated; for it will be bad for want of a date. *Cromwell* v. *Goodwin*, Bar. 409. P. R. 134. *Hannaford* v. *Holman*.

For if the notice be irregular, and plaintiff signs judgment for want of a plea, defendant may set it aside on motion for such irregularity. *Graves* v. *Wise*, 2 Wil. 84. Bar. 291.

When necessary in B. R., in C. B.

In B. R. this notice is necessary in all cases; but in C. B. it has been held, that notice of a declaration being left in the office, is not necessary in bailable actions, where defendant's attorney has put in bail, for he ought to search for it; but in actions not bailable it is. P. R. 149. *Simmons* v. *Shannon*, Blac. 725. Notes to Rules and Orders, 221.

Sed Q. and *vide Simmons and Shannon*, as reported 3 Wil. 147.

How it operates on declaration.

The declaration is only well delivered from the time of the notice; and is, therefore, to be considered as of that term in which notice was given. *Field* v. *Gooding*, 1 Barn. 46.

And this, whether the declaration be in chief or *de bene esse*; for there is no distinction, notwithstanding it appears otherwise in *Gray* v. *Saunders*, Bar. 248. So that defendant has four days after notice of declaration to plead in abatement. *Hutchinson* v. *Brown*, 7 D. & E. 298.

Interlocutory judgment was set aside for defect of notice. In the term following (Michaelmas) plaintiff gave fresh notice, and for want of plea signed judgment: which second judgment was set aside on the ground that the declaration was only well delivered from the time of serving second notice; and that the writ being returnable in Easter, declaration was delivered too late, and plaintiff must begin again. *Bartholomew* v. *Goulding*, Bar. 291.

Former practice.

Formerly, therefore, when it was held, that plaintiff must declare before the end of the next term after return of process, or he would be out of court; although declaration was filed within that time, yet if the notice was not delivered until after such second term, though even before the essoin day of the third, it was held bad. *Pritchard and Lewis*, Bar. 304.

How altered.

Afterwards it was determined, that if the declaration were filed within the second term, notice given *before* the essoin day of the following term was good. *West and Radford*, Bur. 1452.

Present practice of serving notice as to time.

But the practice now is, that if the declaration be filed within the second term, notice of declaration served *on* the essoin day of the third, or indeed at any time within the 12 months from the return of writ, will be good, provided defendant has not signed judgment of *nonpros*; because plaintiff

tiff has all that time to declare in *before* he is out of court. *Worley and Lee*, 2 D. & E. 112. *Penny and Harvey*, 3 D. & E. 123.

Paying for Declaration.

Of paying for declaration.

In all cauſes depending in either court, the defendant's attorney is to receive and pay for a copy of the declaration, whether the ſame be delivered by plaintiff's attorney, or left in the office before the defendant be permitted to plead. R. 10 G. 2. K. B. 12 W. 3. C. B.

When therefore the declaration is delivered, defendant's attorney muſt pay for it; as alſo the 4*d*. for the warrant, as charged thereon: if he refuſes to pay either, plaintiff cannot ſign judgment (*Oneale* v. *Price*, 4 D. & E. 370.), but he muſt leave the declaration in the office, and proceed by giving a rule to plead, and demanding a plea, and for want of it, ſign judgment, taking care not to receive a plea till the copy of declaration is paid for.

So alſo in C. B. agreeable to the expreſs words of the rule of court, T. 12 W. 3.

So where declaration is in the firſt inſtance filed, and notice thereof given, defendant muſt take it out of office and pay for it, before plaintiff is obliged to receive his plea; and though defendant appears and tenders a plea, yet plaintiff may ſign judgment for want of declaration being taken out of office and paid for. 1 Wil. 173. *Keeling* v. *Newton*.

(G) Declaring where one Defendant only has appeared.

(G)

Of declaring againſt two, when one only has appeared.

In both courts, and in all actions, whether bailable or not, if there be two defendants againſt whom plaintiff wiſhes to declare upon a joint contract or cauſe of action, and one only appears or puts in bail, plaintiff cannot declare until the other either appears or is outlawed.

But he cannot be outlawed unleſs the proceedings were by ſpecial original: ſo that it is ſometimes uſeful to ſue by original, when it is ſuſpected that either of the defendants will not appear, or cannot be found.

In ſuch caſe, therefore, plaintiff ſhould apply to a judge for an order for time to declare againſt the defendant, (already in court,) until the other appears, or is arreſted, and puts in bail, or is outlawed, as the caſe may be.

For a declaration firſt delivered to one, and then, when the other appears, to the other, is irregular. *Knight* v. *Parker and another*, Blac. 759.

Where

Where a *latitat* was againſt two, returnable in Michaelmas term, and one appearing, plaintiff filed declaration againſt him, and took out an *alias* returnable in Hilary term, in which *both* defendants were named, and then the other defendant appeared, and plaintiff filed a new declaration againſt both as of Michaelmas term; the firſt was held to be void, and the ſecond wrong dated. *Stork* v. *Herbert and Eyton*, 1 Wil. 242.

But the court refuſed to ſtay proceedings, ſaying, plaintiff might amend as it was but a miſtake.

If one defendant has been outlawed and plaintiff declares againſt the other, it ſhall not be in the power of the latter, by pleading, to impeach the outlawry. *Symonds* v. *Parmiter*, Blac. 21.

Different on common and bailable proceſs.

On common proceſs, where the action is not bailable, though four be put in a writ, if plaintiff has a ſeparate cauſe of action againſt each, he may afterwards declare ſeverally againſt one or more of them. *Stable* v. *Aſhley*, Pull. C. B. 49.; but not ſo if the proceſs be bailable.

For if the plaintiff holds two defendants to bail on a joint action, and declares againſt them ſeverally, the court will not merely diſcharge the bail, but will ſet aſide the whole proceedings for irregularity. *Moſs* v. *Birch*, 5 D. & E. 722. where other caſes are cited. See alſo *poſt* (H).

If plaintiff has a joint and ſeparate cauſe of action againſt the four, as where the defendants are all bound in an obligation to him jointly and ſeverally, he muſt declare either againſt them all jointly or againſt each ſeverally, and cannot, if two or three appear, declare jointly againſt them only.

(H) (H) Declaration varying from Proceſs.

Of declaration varying from proceſs. See ante, Ch. 3. ſ. 1 (E) 3, 4, 5.

The chief diſtinction in caſes of declaration varying from proceſs is, whether the action be bailable or not.

If defendant be held to ſpecial bail, plaintiff muſt not declare for a different cauſe of action, or in a different capacity than mentioned in writ, otherwiſe bail will be diſcharged, and court, on motion, will order a common appearance. *Hally* v. *Tipping*, 3 Wil. 61., as if the *ac etiam* writ was in his own right, and he afterwards declared as executor.—*Ib.*

So if plaintiff ſues out a *quare clauſum fregit* and declares in trover, *Turing* v. *Jones*, K. B. Mich. T. 34 G. 3.; or if the writ be with an *ac etiam* in treſpaſs on the caſe, and declaration be in debt, or writ be in aſſumpſit and declaration in trover, *exoneretur* will be ordered. *Tetherington* v. *Golding*, 7 D. & E. 80.

But

But the court will not discharge defendant out of custody on filing common bail, on the ground of a variance between the declaration and the writ in the sum mentioned in the *ac etiam*, the declaration being only for half the sum mentioned in the writ.—*Ib.*

Formerly, indeed, he could not declare in a different county; but now, by R. Hil. 22 Geo. 3., plaintiff may declare in a different county than that named in the writ, without losing his bail.

If the action be by special original, a greater strictness is observable; and in order to prevent incongruity on the record, declaration must strictly pursue the writ. *Turing* v. *Jones*, 5 D. & E. 402.

But if the action be not bailable, and by bill of Middlesex, *latitat*, or *capias*, the process is deemed a mere summons to bring defendant into court, and plaintiff may afterwards declare for any cause of action different from or not expressed in the writ.

So he may declare in any capacity as assignee of the sheriff, executor, administrator, or even *qui tam*, or the like, though process sued out in his own right generally; because this tends to narrow rather than enlarge plaintiff's demand. *Lloyd* v. *Williams*, 3 Wil. 141.

So if the demand be still the same, though plaintiff be superfluously described as executor or administrator in process, yet he may declare in his own right.—*Ibid.*

But not if the demand be different; for if process be *qui tam*, he cannot declare generally; because there the demand is not only enlarged, but its very nature changed. *Canning* v. *Davis*, Burr. 2417. Blac. 723. 2 Wil. 392.

So if process be in a *special* character as *assignee* of a bankrupt, plaintiff cannot declare generally in his own right. *Meggs, assignee*, v. *Ford*, 25 G. 3.

Where plaintiff, by declaring different from his writ, waives his bail, and after verdict brings an action on the judgment, he shall not have bail in such action. *Crutchfield* v. *Seyward*, 2 Wil. 93.

A variance between the writ and declaration in the *ac etiam* (the one being in case on promises, and the declaration in debt) was held not material, the sum sworn to being under 40*l.* for the stat. 13 Car. 2. stat. 2. c. 2. on which the *ac etiam* is grounded, operates only where the sum is above 40*l.* *Lockwood* v. *Hill*, 1 H. B. 310.

N. B. This is a distinction little attended to.—See Introduction.

But if plaintiff sue the defendant by a wrong Christian name, and he has appeared by his right name, plaintiff may declare

declare againſt him by ſuch right name; but it muſt be a voluntary appearance; for plaintiff cannot file common bail for him by his right name and then declare. *Doo* v. *Butcher*, 3 D. & E. 611.

How to take advantage of variance.

Formerly, if there was any variance between the original writ and the declaration, the defendant might have taken advantage of it by craving oyer of the writ; but the court have now laid down a rule, that the defendant ſhall not have oyer of the writ for the purpoſe of ſetting aſide the proceedings. Upon this principle the court will not, for any ſuch variance, ſet aſide the proceedings on motion; they will only, if it be a bailable action, diſcharge that bail, otherwiſe they would be permitting the defendant to do that in a ſhorter mode, which they cannot, by the rules and practice of the court, effect in a more circuitous way. If, therefore, defendant thinks any variance between the writ and declaration fatal, he can only take advantage of it on a writ of error. *Spalding* v. *Mure*, 6 D. & E. 364.

(I)

(I) Conſolidating Declarations and ſtriking out ſuperfluous Counts.

Of conſolidating declarations.

It is a matter of diſcretion in the court to oblige plaintiff to conſolidate declarations.

But where the cauſes of action may be joined, and no good reaſon is ſhewn why they ſhould not, the court will order them to be conſolidated; and if the conduct of plaintiff ſeems oppreſſive, will even compel him to pay the coſts of the application. *Cecil* v. *Brigges*, 2 D. & E. 639.

Nor is it ſufficient to allege, that plaintiff may be ready with his witneſſes in one and not in the other cauſe, ſince he might apply to put off the trial upon that ground.—*Ibid.*

This however, uſed to be deemed a good reaſon; and the courts formerly very rarely obliged plaintiffs to conſolidate declarations upon that account. *Minot* v. *Bridge*, Str. 1178.

It was even refuſed in ejectments, although ten declarations were delivered on the ſame demiſe, for ten houſes.—*Ib.* 1149.

Though in C. B. in a ſimilar caſe they were ordered to be put into one iſſue. *Grimſton* v. *Grimſton*, Caſ. Prac. C. B. 119.

So three declarations for the ſame aſſault were ordered to be joined. P. R. 151. *Harper* v. *Woodhouſe*.

Two

Two declarations, one againſt huſband and wife, and the other againſt the wife only, cannot be conſolidated. *Swithin* v. *Vincent*, 2 Wil. 227.

Of ſtriking out ſuperfluous counts.

If the declaration contain any unneceſſary counts or ſuperfluous matter of anylength, as unneceſſary title ſet out, or the like, court, on motion, will order them to be ſtruck out; and ſometimes (if evidently put in to ſwell the declaration) with coſts of the motion.

It will appear on the face of the declaration whether the counts be unneceſſary, if defendant obtains a particular of plaintiff's demand, which he may do in almoſt every caſe; and which will ſhew plaintiff's cauſe of action, and the proper counts to recover upon.

The uſual way is, to move the court for rule to ſhew cauſe why the declaration ſhould not be referred to the maſter, or prothonatory, for him to ſtrike out the unneceſſary counts, and (if the caſe will warrant it) why plaintiff ſhould not pay coſts of the application.

But it was refuſed after time for pleading was obtained. *Wilkins* v. *Perry*, Caſ. Temp. Hard. 129.

(K) Defects in Proceſs how cured, by Declaration or otherwiſe. (K)

Of defects in proceſs cured,

Though the proceſs were wrong, if declaration be right it will ſometimes cure it.

by declaration;

As if defendant be ſued or arreſted by a wrong name, and appears or enters into bail-bond by his right name, and plaintiff afterwards declares right, court will not interpoſe. *Hole* v. *Finch*, 2 Wil. 393.

by taking it out of office;

Again, if the proceſs be in any reſpect defective, or there was any irregularity in ſervice thereof, or otherwiſe on part of plaintiff, if defendant's attorney takes declaration out of the office and pays for it, all preceding irregularity is waived; for the proceſs is only to bring defendant into court, and he cannot have declaration without coming into court. *Caſwall* v. *Martin*, Caſ. Temp. Hard. 369. *Whale* v. *Fuller*, C. B. T. R. 222.

by not applying in time.

So defects in proceſs will be cured by not applying to the court in time.

Application made the day before executing inquiry held too late. *Smith* v. *Jenks*, P. R. 127.

Certainly too late if after writ of inquiry executed. *Knight* v. *Parker*, Blac. 759.

But the ſafeſt rule is to make the application with all poſſible diligence; for ſuch objections are at beſt but little counte-

countenanced, and if the party has unneceſſarily acquieſced under them, the court will be ſtrongly inclined to deny the motion.

(L) The Rule to declare.

Of the rule to declare.

If plaintiff does not wiſh to declare within the time allowed (*viz.* before the end of the next term after return of proceſs), he muſt on the laſt day of ſuch term get a rule to declare till the firſt day of the next term, otherwiſe defendant may ſign judgment of *nonpros*: if he ſtill wants further time, he may on the firſt day of the term, get another rule to declare until the laſt day of ſuch term, and then another until the firſt day of the following term, and ſo on, taking out two in each term, until defendant chooſes to ſtop him; for he may, if he thinks fit, move the court by counſel, *that the laſt rule may be peremptory*; in which caſe, plaintiff muſt declare on or before the day mentioned therein; for the rule when ſerved, is peremptory in the firſt inſtance.

How obtained.

This rule is obtained by giving brief to counſel, annexing thereto an office copy of the laſt rule to declare; the rule is then drawn up by clerk of rules, and copy ſerved on plaintiff's attorney.

Plaintiff muſt be very careful in declaring on the day mentioned in his rule to declare, or in obtaining a freſh rule for further time, as defendant may immediately on the expiration of the time, ſign *nonpros*, without giving plaintiff any rule to declare. *Towers* v. *Powel*, C. B. T. R. 87.

When plaintiff has obtained theſe rules to declare, he ſhould ſerve copy on defendant's attorney, or ſtick it up in the office if defendant does not appear.

But ſhould he neglect ſo to do, and afterwards ſerve them before defendant had taken advantage of the irregularity by ſigning judgment, it ſhall be good and cure the defect. *Jans qui tam* v. *Hutton*, Blac. 290.

By the terms of the rule, it has no effect if defendant is a priſoner; if therefore, he be in cuſtody, and plaintiff is prevented from declaring againſt him on account of its being a joint cauſe of action, and the other defendants not having appeared nor having been yet outlawed, he muſt move the court, or apply to a judge, and ſuch rule will then be granted until the outlawry or appearance of the other defendants. *Tracy* v. *Granſton*, Bar. 396. 2 Blac. 759. Tidd. 223.

(M) Of intitling Declarations and ſpecial Memorandums. (M)

Of intitling declarations and ſpecial memorandums.

The declaration is always delivered with a memorandum of the term at the top thereof.

According to the ancient practice, the declaration was actually delivered in the ſame term in which the writ was returnable; and although in eaſe of plaintiffs the time has ſince been enlarged, ſtill the declaration ought to be intitled *as* of the term when the writ was returnable; for it is to be conſidered as delivered *nunc pro tunc*. *Smith* v. *Muller*, 3 D. & E. 626.

If cauſe of action accrues in the term.

But when the cauſe of action happens to ariſe in the very term when the declaration is intitled, care ſhould be taken to make the memorandum of a particular day in the term ſubſequent to the time when cauſe of action aroſe; for a general title of the term refers to the firſt day, and it would therefore appear as if declaration was filed before any cauſe of action accrued.

And where there are ſeveral defendants who put in bail of different terms, the declaration ſhould be intitled of the term when the laſt bail was put in. 1 Wil. 242. *Stock* v. *Herbert and another*.

Where, however, the declaration was intitled generally, and the cauſe of action appeared in declaration to have accrued on the firſt day of the term, it was, on ſpecial demurrer, held good; becauſe formerly when the practice was to declare *ore tenus*, plaintiff could not declare before the ſitting of the court; and it is poſſible that the cauſe of action might accrue on that day before the court ſat, and the declaration delivered afterwards, and the court will make any intendment againſt ſo captious an objection. *Pugh* v. *Robinſon*, 1 D. & E. 116.

When it may be amended.

But if declaration be intitled generally, and in point of fact it was delivered regularly after the action accrued, plaintiff may, on affidavit and motion, have the title of declaration amended accordingly. *Symonds* v. *Parminter*, 1 Wil. 78.

At *niſi prius* the party may ſometimes give evidence of the real time of ſuing out the writ ſo as to avoid the relation to the firſt day of term. *Morris* v. *Harwood*, Blac. 312. 320. S. C. Burr. 1241.

When defendant can inſiſt on plaintiff intitling declaration right.

So the defendant has a right to call upon plaintiff to intitle his declaration agreeable to the true time of delivering it to defendant. *Thomſon* v. *Marſhall*, 1 Wil. 304.

And this may be done in order to plead in abatement, which muſt be within four days after declaration; and therefore if it were intitled generally as of the term, and to have relation to the firſt day thereof, defendant might often be deprived of this privilege. *Wilkes* v. Earl of *Halifax*, 2 Wil. 257.

So if defendant would wiſh to plead *plene adminiſtravit*, or a tender and means to give in evidence adminiſtration of aſſets, or tender made between the firſt day of term and the ſuing out proceſs. *Smith* v. *Raydon*, 1 Wil. 39. *Winter* v. *Moreland*, 2 Barn. 125. Caſ. temp. Hard. 141.

Court ſometimes inquires into time.

On motion in arreſt of judgment, becauſe cauſe of action was laid in Eaſter term, and declaration intitled of the term generally, it was held well enough, provided bail was not filed till after cauſe of action accrued, and it was referred to ſecondary to examine when bail was filed. *Tatlow* v. *Bateman*, 2 Lev. 13.

So that on motions in arreſt of judgment, and trials at *niſi prius*, court will inquire when declaration was actually delivered; but not ſo on demurrer.

How to intitle bill againſt attorney in vacation.

If a bill be filed againſt an attorney in the vacation, the day of filing it may be inſerted in a ſpecial memorandum; as,

"Michaelmas term, &c. Be it remembered, that on the 14*th day* of December 1792, (a day after the cauſe of action accrued,) A. B. brought into the office of the clerk of the declarations of this court, according to the courſe and practice of the court, his certain bill againſt W. B. Gent., one, &c. and filed the ſame as of Michaelmas term in the 33d year of the reign, &c.; which ſaid bill follows in theſe words," &c. *Dodſworth* v. *Bowen*, 5 D. & E. 325.

Section II.

Of the Venue.

(A) Of laying the Venue.

(B) Of changing the Venue.

(C) Of bringing back the Venue by Plaintiff, and his altering his own Venue.

Trials in England being by jury, and the kingdom being divided into counties, and each county conſidered as a ſepa-

rate district or principality, it is absolutely necessary that there should be some county specified where the action is brought, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. Cow. 176.

Now this county which is laid in the declaration, in order to shew where the action is to be tried, is called the venue, *vicinetum*, it being the place *quem vicini habitant*, the jury being generally collected from the neighbouring parts of the country.

It is very material, therefore, to know in what counties actions ought to be brought, and in what cases it is in the power of either party to change the venue, in order that the action may be tried in some other county than that laid in the declaration.

(A) Of laying the Venue. (A)

Distinction as to local and transitory actions.

The grand distinction which prevails in all cases respecting the venue is, whether the action be local or transitory. It is a distinction that exists all over the world; actions transitory follow the person of the defendant; territorial suits must be discussed in the territorial tribunal. Bl. Com. 3. 384.

The question therefore is, What constitutes a local action?

A local action, what.

Wherever the cause of action necessarily must have arisen in any particular county, or wherever the parties to the suit become such by mere privity of estate, as it is called, such action is local, and must be brought in that county where the cause of action arose, or where the estate lies upon which such legal privity attached.

Definition further explained.

With respect to the first part of this definition, it may be easily understood; and it is obvious, that it must comprehend all actions where the possession of the land is to be recovered, as ejectment and the like; and also where any actual trespass or waste has been committed upon any premises; but the latter part, being a more nice and legal distinction, may require explanation: in one word, it means only such actions where the cause of action does not arise upon any deed or specific contract between the parties, but merely upon that title which the law gives the one to sue, and that responsibility which it annexes to the other in consequence of the connection between them, as landlord and tenant or the like, arising out of the lands or premises in which they are jointly interested, which is termed in law, privity of estate; whilst other actions grounded on deeds or promises, are said to be founded on privity of contract.

Thus an action of *debt* upon a leaſe for rent, &c. by the aſſignee or deviſee of the leſſor againſt the leſſee (1 Wil. 165. W. Jon. 33.), or by the leſſor (6 Mod. 194.), or his perſonal repreſentatives (Latch 197.), againſt the aſſignee of the leſſee, or againſt the executor of the leſſee in the *debet* and *detinet* (2 Lev. 80. 3 Keb. 135.); or in *covenant*, by the grantee of the reverſion againſt the aſſignee of the leſſee (Carth. 182. 3 Mod. 336. 1 Salk. 80. 6 Mod. 194.), is local, and muſt be brought where the eſtate lies, becauſe ſuch action is founded only on the privity of *eſtate*.

Actions by adminiſtrator. Quære?

So perhaps in an action by an adminiſtrator, the venue ſhould not be out of the dioceſe of the biſhop who granted him adminiſtration. *Mellor* v. *Barber*, 3 D. & E. 387. *Sed Q.?*

Tranſitory actions, what.

Such then being the criterions of a local action, it follows that a *tranſitory* action muſt be ſuch as may have ariſen in any county.

Thus in all actions of debt or covenant, (except as above-mentioned,) aſſumpſit, aſſault, ſlander, detinue, deceit, trover, and the like, where the injury might have been ſuſtained in one county as well as another, the venue may be laid in any county; becauſe it will be preſumed, unleſs the contrary is ſhewn, that the cauſe of action did ariſe in that county in which the venue is laid; otherwiſe, upon proper application to the court, as will be preſently ſhewn, it may be changed.

On bail-bond. Falſe return.

There are ſeveral actions which at firſt view might appear local, but on further conſideration are clearly tranſitory; ſuch as upon aſſignment of a bail-bond, or the like; or againſt a ſheriff for a falſe return, or an eſcape. It does not neceſſarily follow, that the cauſe of action muſt ariſe in the county where he is ſheriff; for a ſheriff may aſſign a bail-bond, or may make his return to a writ in any county, and an eſcape in one county is an eſcape every where. Str. 727. *Griffiths* v. *Walker*, 1 Wil. 336. S. C. Say. 54.

Eſcape.

Where action ariſes in two counties, plaintiff may elect. Inſtances.

Sometimes a cauſe of action ariſes partly in one county and partly in another; in which caſe, it is at the election of the plaintiff to lay the venue in either; as in caſes of carriers, or of hiring a horſe in one county to ride to another, 1 Lev. 286.; or in actions on the caſe for not repairing a wall or the like, whereby plaintiff's land was overflowed, if the wall be in one county and plaintiff's land in another, 1 Lev. 114.; or for malicioufly ſuing an execution in Middleſex, whereby plaintiff was arreſted in Dorſetſhire, Cro. Eliz. 574.; or if two conſpire in one county to indict another, and make the execution of the conſpiracy in another,

7 Co.

7 Co. 1. *Bulwer's* caſe; and the like. Mayor, &c. of *Berwick* v. *Ewart*, Blac. 1069.

So if there be matter of law or record, and matter in pais in different counties, plaintiff has his election. *Griffiths* v. *Walker*, 1 Wil. 336. *Scott* v. *Breſt*, 2 D. & E. 241.

And where the cauſe of action ariſes in two counties, the venue ſhall not be laid in a third. *Shirley* v. *Collis*, Blac. 940.

The ſame diſtinction alſo prevails where the cauſe of action ariſes beyond the ſeas. Where action ariſes abroad

All actions upon contracts, upon deeds, upon perſonal injuries, as aſſaults and the like, for injuries to perſonal property, as taking a ſhip and the like, or any other tranſitory action, though ariſing out of the realm, may be brought in this country. If tranſitory brought here.

Even an action of trover for timber cut in Ireland. Str. 614. *Dutch W. I. Comp.* v. *Hen. Van. Moſes.*

There have been inſtances indeed of local actions being brought here, as for deſtroying fiſhing-huts upon the Labrador coaſt, *Admiral Palliſer's caſe*, Cow. 181., and for pulling down the houſes of ſome ſutlers, *Captain Gambier's caſe*, Ibid. 180. But they ſeem to have been countenanced rather *ex neceſſitate rei*, leſt there ſhould be a failure of juſtice, and the injured party not able to obtain any other redreſs, than to have been ſupported upon the ſtrict principle of law. *Moſtyn* v. *Fabrigas*, Cow. 181. In ſome inſtances carried to local actions.

They ſhould be looked upon, therefore, only as exceptions to the general rule.

If a tranſitory action ariſing abroad be brought here, the venue may be laid in any county; but if it ſhould be ſuch an action as renders it neceſſary to ſtate where it aroſe, as on a deed, or bill of exchange, or taking a ſhip, or the like, the real place may be alleged; but it ſhould be followed with a videlicet and a venue correſponding with that laid in the declaration; as for inſtance, if on a bond, it ſhould be ſtated to have been made at Fort St. George in the Eaſt Indies, to wit, at London in the ward of Cheap; or if for taking a ſhip, that it was taken on the high ſeas, viz. in Cheapſide, or any other place, as a venue merely *pro formâ*. Ibid. 178, 179. How venue laid.

For if the bond be ſtated to have been made at London, and on oyer it appears dated at Fort St. George, or the like, it would be bad on demurrer. *Ibid.* 178.

If the action be really local, and the venue be not of the proper county, ſhould it appear on the face of the declaration, it would be demurrable to; or if it is proved on the trial, plaintiff will be nonſuited. of venue being wrong in local actions.

How demurrable to.

But it ſhould be a ſpecial demurrer, as a bad venue, or the want of one is cured by the ſtatute of jeofails. *Mellor* v. *Barber*, 3 D. & E. 387.

If right in body of declaration well.

Where a proper venue is laid in the body of the declaration, the venue in the margin ſhall not vitiate it: but if there be no venue in the body, then reference muſt be had to the margin; the county in the margin will help, but not hurt. *Ibid.* *Sutton* v. *Fenn*, 3 Wil. 340.

How venue;

Venue in margin, London; in declaration, Oxfordſhire; cauſe tried in Oxfordſhire; held well. *Sheers* v. *Bartlett*, Bar. 484.

if by original.

Where the proceedings are by original, the venue muſt be laid in the county where the original iſſued, or the plaintiff will loſe his bail; but not ſo if it be only a common bailable writ with an *ac etiam*.

Venue altered by act of parliament.

By different acts of parliament many actions of a tranſitory nature muſt be brought in the county where they aroſe, otherwiſe the defendant will be entitled to a verdict.

In penal actions.

Such is the ſtatute 21 Jac. 1. c. 4. which enacts, That all ſuits on penal ſtatutes ſhall be laid in their proper county.

This ſtatute extends to informations as well as actions. 4 Inſt. 172. 1 Vent. 8. 3 Inſt. 193. Cro. Car. 112. Cro. El. 737. 1 Sal. 373. Cont. 4 Mod. 159.

Conſtruction, 21 Jac. 1. c. 4.

But it does not extend to any offence created ſince that ſtatute; ſo that proſecutions on ſubſequent penal ſtatutes are not reſtrained thereby; 1 Salk. 372. by ten judges; though C. J. Holt ſaid, that he thought where any ſubſequent act gives any popular action, it ſhould be laid in the proper county, within the equity of 21 Jac. 1.

In a *qui tam* action for uſury, the venue is well laid where the offence was *completed*. *Scott* v. *Breſt*, 2 D. & E. 238.

In actions againſt juſtices, &c.

Such alſo is the ſtatute of 21 Jac. 1. c. 12. ſec. 5, whereby all actions brought againſt any juſtice, mayor, or bailiff of any city, town corporate, headborough, portrieve, conſtable, tithing-man, collector of ſubſidy, fifteenths, churchwardens, or other perſons called ſworn men, executing the office of churchwarden, or overſeer of the poor, and their deputies, or any of them, or other perſons acting in their aid, or by their command, for any thing done in their official capacity, muſt be brought in the county where the fact was committed.

Conſtruction thereof.

If an action be againſt a juſtice of peace, &c. for any thing done by colour or under pretence of his office, though not ſtrictly within the duty of his office, it comes within the act. Vaughan 114. *Daniel* v. *Wood*, 5 D. & E. 1.

But if a conſtable, under a warrant, take a man and carry him before a magiſtrate, who diſcharges him, and ſoon after,

on

on a diſpute happening, the conſtable beats him; this is not within the ſtatute, and the conſtable need not be ſued within the county. *Anon.* Str. 446.

Againſt revenue officers.

So for protection of revenue officers, the like rule is enforced by 20 G. 3. c. 70. ſ. 34. in all actions brought againſt *exciſe officers*; and by 24 G. 3. ſeſſ. 2. c. 47. ſ. 35. in all actions brought againſt *cuſtom-houſe* officers, or any acting in their aid, for any thing done by virtue of their office.

And this, if they act *bonâ fide* as officers, though illegally. *Daniel* v. *Wood*, 5 D. & E. 1.

By revenue officers.

And as a further protection, by 9 G. 2. c. 35. ſ. 26. whenever revenue officers proſecute for aſſaults committed upon them, the indictment may be tried in any county. But this only extends to aſſaults made upon them in the execution of their office. *The King* v. *Cartwright*, 4 D. & E. 490.

As provided by other ſtatutes.

This is alſo a common proviſion in other acts of parliament of a public nature, as turnpike acts, or the like.

General rule.

But where an act confers certain privileges on officers who may be ſued for things done in purſuance of that act, and a ſubſequent act impoſes new obligations on the old officers, the privileges of the former ſtatute do not attach on them in reſpect of things done under the latter: therefore toll-gate keepers ſued for acts done under 25 G. 3. c. 51. need not be ſued in the county where the fact was committed, as they muſt be under the 13 G. 3. c. 78. ſ. 81. *Bazing* v. *Skelton*, 5 D. & E. 16.

(B) Of changing the Venue. (B)

In what actions it may be changed.

Although the venue in tranſitory actions may be laid in any county, yet upon application to the court, and proper cauſe ſhewn, it will very frequently be ordered to be changed.

It is ſaid, indeed, by Lord Mansfield, that not in tranſitory only, but even in local actions, the court will order the venue to be changed where there is a *dignus vindice nodus*; but not otherwiſe by any means. Loft. 50. 3 Blac. Com. 384.

Upon what grounds.

The general grounds upon which the court will order the venue to be changed are,

1ſt, Cauſe of action ariſing elſewhere.

1ſt, When the cauſe of action ariſes in the county to which defendant moves to change the venue.

But then it muſt *wholly* ariſe there, and not elſewhere *out* of that county, nor in anywiſe in the county in which the venue is already laid.

And there muſt be an affidavit to that effect, ſtrictly ſtating, that the cauſe of action *aroſe in B, and not in A. or*

elsewhere out of B.; for if it only says, that the cause of action arose in B. and not elsewhere out of B. without particularising that it did not arise in A. it will be bad. *Allen* v. *Griffiths*, 3 D. & E. 495. Say. 77. Wil. 178.

Which must be positive, and not merely to defendant's knowledge and belief. *Belshaw* v. *Porter*, Bar. 478.

This then is the criterion; and perhaps it cannot be better illustrated than by the different modern determinations as to changing the venue in *actions* in libels.

Actions for a libel in a country newspaper; motion to change the venue into the county where it was *printed*; refused, because it was circulated elsewhere. *Pinkney* v. *Collins*, 1 D. & E. 571.

So where a libellous letter was written in Berkshire, but directed into Surry, venue laid in London, court refused to change it into Berkshire. *Cliffold* v. *Cliffold*, Ibid. 647.

Because defendant could not swear that the cause of action wholly arose in the county into which he moved venue to be changed, and *not elsewhere*.

But where a libel was both written and published in one county, as a letter written at one place and sent to another, both in the same county, the court will change the venue into that county, because the whole publication was confined within it. *Freeman* v. *Norris*, 3 D. & E. 306.

So where a libel is written in one county and not opened in another, though it passes through it, as a letter written in Yorkshire, and sent by the post into Germany, where it was opened, court ordered venue to be changed from London to Yorkshire, because defendant was warranted in his affirmation that the cause of action arose in Yorkshire, and not elsewhere within the kingdom. *Metcalf* v. *Markham*, 3 D. & E. 652.

Upon the same principle in an action for infringing a patent, the plaintiff cannot change the venue from Middlesex to any other county, where it is manifest that the substratum of the action, viz. the patent, is at *Westminster*. *Cameron* v. *Gray*, 6 D. & E. 363.

Whenever, therefore, the fact cannot be positively sworn to in the terms above-mentioned, it is a matter of course for the court to change the venue; but not otherwise.

An affidavit of one defendant will do. *Rex* v. *Read*, Bar. 482.

2d, Trial partial, or not satisfactory.

The second ground for the court changing the venue is,

When it appears upon the circumstances laid before them, that there is a probable ground to apprehend, that a fair, impartial, or at least satisfactory trial cannot be had.

And

And this may be occaſioned by local prejudices, or intereſt, or the like. *Mayor of Poole* v. *Bennett*, Str. 874. *Mylock* v. *Saladine*, Burr. 1564. *Petyt* v. *Berkley*, Cow. 510.

But it is not a motion of courſe; the court will expect proper affidavits to ſupport it. *Mayor of Briſtol* v. *Proctor*, Wil. 298. *Rex* v. *Harris*, Burr. 1333.

Upon this ground, when ſtrong reaſons are ſuggeſted, the venue is changed even in local actions, as ejectment; but the uſual way is, to take a rule to try the cauſe in the next county, and not to change the venue. 1 Wil. 77. *Mayor of Briſtol's caſe.*

3d, Special grounds, as witneſſes reſiding elſewhere.

The above are the two uſual grounds of application to change the venue; but there are many actions in which the common affidavit cannot be made, becauſe the cauſe of action is not wholly and neceſſarily confined to a ſingle county; and therefore the venue cannot be changed unleſs ſpecial cauſe is ſhewn.

Such are actions upon bonds or other ſpecialties, promiſſory notes, or bills of exchange, becauſe they are *bona notabilia* any where, *Kirk* v. *Broad*, Say. 7. *Downes* v. *Brian*, Blac. 993. 1 Wil. 41. Cont. 1 Wil. 173.; actions for *ſcandalum magnatum*, 2 Str. 807. Ld. Ray. 1418. Sal. 668.; eſcapes, Sal. 670.; falſe returns, Sal. 669.; againſt carriers, Sal. 670.; and the like tranſitory actions ariſing in more counties than one: yet it may be extremely inconvenient to the defendant to try the cauſe in the county where the venue is laid. There is, therefore, a third ground of application, namely, The exiſtence of certain ſpecial reaſons why the venue ſhould be changed elſewhere, rendering the particular caſe an exception to the general rule.

Thus where the action was on bond, and pleas *non eſt factum ſoluit poſt diem* and uſury, venue was changed from London into Lincolnſhire, on the ground that defendant's defence aroſe there, and both plaintiff and defendant's witneſſes lived there. *Foſter* v. *Taylor*, 1 D. & E. 782. *n.*

But if only defendant's witneſſes lived there and not plaintiff's, it would not be ſufficient; becauſe it might be equally convenient to plaintiff to try the action where he had laid the venue. *Fleche* v. *Godfrey*, E. 23 G. 3. B. R. cited in 1 D. & E. 782.

This, however, depends upon circumſtances; for in an action on a promiſſory note, court permitted defendant to change the venue from London to Ludlow, where note was made on a ſpecial affidavit of the nature of his defence, the number of his witneſſes, and that they reſided at Ludlow; although,

though, on a general affidavit of all his witneſſes living there, it was at firſt refuſed. *Evans* v. *Weaver*, Pull. C. B. 20.

Into what counties it can be changed.

There are certain counties into which the venue cannot be changed.

Not into Wales.

It ſeems to be the better opinion, that it cannot be changed into any county in Wales.

I ſay the better opinion; becauſe, although the queſtion has at various times been brought on, it has never been determined; but in all the caſes, it has either been granted, becauſe no cauſe has been ſhewn, or it has been denied, upon the plaintiff's undertaking to give material evidence in the county where the venue was laid, or the court have taken time to conſider the point, and have never given their judgment.

Of the firſt are the caſes of *Tindal* v. *Gwynne*, Str. 1270. *Waddington* v. *Thelwell*, Burr. 2450. *Freeman* v. *Gwynn*, Blac. 962.; and *Jones* v. *Rees*, Hil. 24 G. 3. Of the ſecond, *Pritchard* v. *Pugh*, Dougl. 262. Of the laſt, *Price* v. *Griffith*, Wil. 221.

But in one caſe it is ſaid to have been abſolutely refuſed. *Watkins* v. *Hibert*, Say. 48.

Why.

The difficulties ſeems to be, firſt, if changed into a Welch county, to whom muſt the writ of inquiry be directed in caſe of judgment by default; *per* J. Buller, in *Pritchard* and *Pugh*, Doug. 263. And if it be changed into the next adjacent Engliſh county, how can the affidavit be made, that the cauſe of action aroſe there. Burr. 2451.

N. B. I underſtand, that in caſes of judgment by default, in actions where the venue is laid in Wales, it is the practice to direct the writ of inquiry to the Welch ſheriff, and have it executed there, and not in the next Engliſh county, as where an iſſue is to be tried.

How if by conſent.

Where the venue is changed without oppoſition, the rule is, to change the venue into a Welch county; yet the cauſe is to be tried in the next adjoining Engliſh county, Blac. 962.: but the court will not change it to the next adjoining Engliſh county. *Moor* v. *Fernhaugh*, 1 Wil. 138.

Quære?

Q. Why then cannot the venue be changed into Wales; and if judgment by default, writ of inquiry directed to Welch ſheriff; if a trial, tried in the next Engliſh county?

Hardſhip of preſent practice.

At preſent, however, any plaintiff, for any trifling cauſe of action in Wales, may lay the venue in London, and compel defendant to bring all his witneſſes there, which might prove a ſerious grievance.

Not into counties palatine.

Venue not to be changed into counties palatine, Str. 807. *Richardſon* v. *Walker*, Bar. 488.; but it may into Cheſter, becauſe

becauſe the court can ſend down record by *mittimus*. Ray. 1418. 1 Wil. 222. *Price* v. *Griffiths*.

Though in a late caſe, *Marſden* v. *Bell*, Hil. 28 Geo. 3. on motion to change venue from Middleſex to Lancaſter, it was granted; but court directed, that on theſe motions to counties palatine, the words "undertaking not to aſſign "error for want of an original," be added to the common rule. Quære?

Venue not to be changed into a third county without conſent. Str. 1216. *Southouſe* v. *Boak*.

Court will not, in general, change venue into any county, whereby trial may be delayed. Not into county to delay a trial.

As into either of the three northern counties, preceding the ſpring circuit. 1 Wil. 138. *Moore* v. *Fernhaugh*.

Nor into Briſtol, there being no Lent aſſizes. Str. 1180. *Howarth* v. *Willett*.

Nor into Hull, Canterbury, &c. becauſe it is not known when an aſſize may be held there.

But in Eaſter and Trinity term, this objection does not hold; and even at other times it is ſolely in the diſcretion of the court. *Rickaby* v. *Wilſon*, Bar. 490.

Venue cannot be changed from a county at large into a city and county. *Lewis* v. *Aſkham*, Bar. 489, 490.

But it may from a county at large into the city of London. *Lutwich* v. *Eames*, Bar. 481.

If cauſe of action ariſe in Berwick, venue ſhould be in Northumberland. *Mayor of Berwick* v. *Ewat*, Blac. 1036. Burr. 834. 859.

Defendant cannot move to change the venue the laſt day of term, there being no day left to plaintiff to ſhew cauſe. *Wood* v. *Winch*, Bar. 480. *Thomeur* v. *Rand*, Ibid. 486. When a motion to change venue to be made.

Unleſs declaration was delivered ſo late that defendant could not move ſooner. *Hayward* v. *Wells*, Bar. 489.

Defendant cannot move to change the venue in any action until he has appeared. *R. Eaſt.* 24 Car. 2.

Nor after plea pleaded. Str. 858. *Dickinſon* v. *Fiſher*.

But the defendants having put in their plea after a rule for ſhewing cauſe why the venue ſhould not be changed, and before it was made abſolute, the court held, that the putting in the plea by inadvertency was no waiver of the rule, and gave defendants leave to withdraw it on payment of coſt, and made rule to change venue abſolute. *Herbert* v. *Flower*, Bar. 492.

Formerly, it was doubted whether motion could be made after defendant had obtained time to plead, and in many caſes held not; but by rule 16 Geo. 2. "any defendant may "move to change venue at any time before plea pleaded, in "all

" all such actions where the venue may be changed by " the course of the court, notwithstanding such defendant " may have applied for and obtained further time to plead " before such motion made."

But not if the order obtained be to plead issuably, rejoin *gratis*, and take short notice of trial for the first sitting in London or Middlesex; because there a trial would be lost. *Petyt* v. *Berkley*, Cow. 511. K.B. *Burgess* v. *Carter*, Ibid. C. B. Cont. *Wightman* v. *Thompson*, 1 Wil. 245.

So motion may be made after an order for time to perfect bail. *Newly* v. *Burton*, Bar. 483.

Or after an order for an imparlance. *Blackstock* v. *Payne*, Bar. 487.

If a declaration be delivered so early in term that the defendant has eight days in that term, he cannot move to change the venue the next term. *Asplin* v. *Gray*, Str. 211.

But if he has less than eight, and has not pleaded, he may. R. Mich. 1654.

If proceedings are by original, court will not change venue without defendant undertakes not to bring error for want of an original; which would otherwise be fatal.

How to be made.

No notice of motion is necessary to be given to the adverse party or his attorney.

It is moved by counsel or serjeant, as case may be; in B. R. it is absolute in first instance; but in C. B. there must be another motion to make it absolute. When rule made out,

In term time.

serve it on plaintiff's attorney, who will call and alter declaration with you.

The usual affidavit to be sworn by defendant, or one of them (if many), is as follows:

Form of affidavit.

F. B. *of, &c. the above defendant, maketh oath, and saith, That the plaintiff's cause of action (if any) arose in the county of A. and not in the county of B. as laid in the declaration, nor elsewhere out of the county of A.*

In vacation.

If in vacation, a judge's order is obtained for that purpose, on producing the usual affidavit and counsel or serjeant's hand to a brief, part of the order being, " that plaintiff be " at liberty to change the same back again on undertaking " to give evidence in the former county."

Of laying and changing the venue by privileged persons.

An attorney, when plaintiff, may lay the venue in Middlesex, because his attendance is supposed to be necessary at the courts of Westminster, and he may retain it there. *Pope* v. *Redfearn*, Burr. 2027. *Pilkington* v. *Hanlin*, Say. 153.

Attornies.

And this though he be resident in the country, *Pye* v. *Leigh*, Blac. 1065. 2 Show. 242.; and although plaintiff and defendant and all the witnesses live in the country.

The

The same privilege extends to serjeants, barristers, masters in chancery, clerks of assize, judges' clerks, and other officers of the court. 2 Show. 176. 242. Mod. 64. Str. 822. 1 Wil. 159. *Knight* v. *Barneby*, Ray. 1253. Sal. 670. *Girdler* v. *Wathews*, Bar. 484. How far it extends to them as plaintiffs.

But this privilege does not extend to them if they sue in *auter droit* as heirs, executors, or administrators. *Pope* v. *Redfearn*, marginal note, Burr. 2027.

Or if they declare as common persons; as if plaintiff does not sue by attachment, but by capias, *Welland* v. *Frument*, Bar. 479.; or by original, *Girdler* v. *Wathews*. Bar. 484.; or if he declares by attorney instead of in person. *Dent* v. *Lambert*, Bar. 479.

But it is now settled, that this privilege only extends to an attorney where he is plaintiff, and that as defendant, he has no privilege to change the venue into Middlesex. *Yeardly* v. *Roe*, 3 D. & E. 573. But not as defendants.

Because there is no necessity for an attorney to go down into the country to attend a cause where he is defendant. *Pope* v. *Redfearn*, Burr. 2028.

Though formerly it used to be held otherwise. See a variety of cases in *Pope* and *Redfearn*, when the present practice was first settled.

(C) Of bringing back the Venue by Plaintiff, and altering his own Venue. (C)

Although the defendant upon the common affidavit may change the venue, yet the plaintiff is not concluded thereby, but may move the court why the former rule for changing the venue should not be discharged, on the ground that it had been improperly removed; as where the fact sworn to by defendant could not possibly be true of the *whole* cause of action arising elsewhere.

In an action on a policy of insurance on the life of a person who had lately died in *Scotland*, venue changed on usual affidavit from *Middlesex* to *London*, but ordered back for the above reason, as the whole cause of action could not arise in *London*, the party having died in *Scotland*. *Cailland* v. *Champion*, 7 D. & E. 205.

Again, the court will suffer the plaintiff to retain his original venue, *upon his undertaking to give material evidence arising in that county.*

Formerly, indeed, it was required of plaintiff to give no other evidence except what arose there. 1 Keb. 189. 1 Sid. Of giving material evidence in county.

442. But it has since been held sufficient to give *some material* evidence only.

What amounts so that.

If, however, plaintiff upon the trial does not give some evidence of the cause of action, or part thereof, arising in the county, he must be nonsuited. *Santler* v. *Heard*, Blac. 1034.

Nor is it enough to shew that the witnesses to prove the contract resided there. *Ibid.*

Rule to pay money into court.

But it has been held a sufficient compliance with the undertaking, to prove a rule of court in Middlesex for defendant to pay money into court, though that rule was obtained after the undertaking of plaintiff to give material evidence. *Watkins* v. *Towers*, 2 D. & E. 275.

Because the payment of money into court was an admission of something due to plaintiff on the contract stated in the deed, and superseded the necessity of that proof which the plaintiff would otherwise have given; and the contract as stated was on a deed in Middlesex.

Action arising abroad.

So it is sufficient to prove, that the cause of action arose abroad; because then the fiction of law prevails with respect to the venue in such cases. *Gerard* v. *De Robeck*, 1 H. Blac. 280.

But this undertaking is absolutely necessary; for it is not merely sufficient to falsify defendant's affidavit by plaintiff's swearing that the cause of action arose where venue laid. *French* v. *Coppinger*, 1 H. Blac. 216.

What sufficient cause to bring back venue.

Although the venue has been changed into the county where cause of action arose, yet if it appears on part of plaintiff, that such county is an improper county to try it in, by reason of partiality or interest of the jury, or otherwise, the original venue shall be retained. *Slaughter* v. *Bradock*, Burr. 2447. *Petyt* v. *Berkley*, Cow. 510. Sal. 670.

What not.

But not sufficient, because witnesses live at a distance, and will not come so far. *Fogoe* v. *Gale*, 1 Wil. 162.

When plaintiff must move to bring it back.

Plaintiff must move to discharge defendant's rule for changing the venue before *replication*. *Dickinson* v. *Fisher*, Str. 858.

It will be too late after he has altered the issue and delivered it to defendant; motion to brink back the venue was, in such case, discharged, though without *costs*. —— v. *Boddington*, Mich. 20 G. 3. B. R. 1 Crom. 114.

How he can do it, by moving to amend.

Although the plaintiff may not regularly move to change the venue, he may in effect do it by moving to amend, which was done in this case by striking out Dorsetshire and inserting Middlesex. *Strond* v. *Tilley*, Str. 1162.

So in the case of *Rivett* and another v. *Cholmondeley*, though defendant had changed venue on the usual affidavit. Str. 1202.

It

It was for this reaſon that the court ſuffered plaintiff to bring back the venue after it had been changed by defendant, and the cauſe had gone down to trial, and plaintiff had been nonſuited, and the nonſuit afterwards ſet aſide and a new trial directed; and the cauſe had been down a ſecond time, and for defect of jurors, was made a *remanet*, becauſe, *per* Lord Mansfield, the plaintiff may at any time move to amend his declaration and alter the venue; and we think it an idle circuity to put him to this; and if we permit him now to bring the venue back, he does it at his peril; becauſe if he does not give material evidence in London, he muſt be nonſuited; and if it ſhould appear to be a local action by ſtatute, he muſt be nonſuited at the opening. *Bruckſhaw* v. *Hopkins*, Cow. 409.

But the caſe of ——— v. *Boddington* above cited, is later in point of time.

When alteration of venue allowed.

In an action on a remedial law, when the time had expired for bringing a new action, plaintiff allowed to alter the venue, it having been laid wrong by miſtake, though after plea pleaded and iſſue joined; but court would not have done it on a penal ſtatute, *Cook* v. *Shore*, Bar. 12.; or in a common caſe, *Bird*, executor, v. *Foſter*, Bar. 19.

CHAPTER VII.

Of the Proceedings from Declaration to Iſſue.

SEC. 1. *Of claiming Conuſance.*
SEC. 2. *Of demanding Oyer.*
SEC. 3. *Of Imparlance.*
SEC. 4. *Of pleading in Abatement.*
SEC. 5. *Of paying Money into Court.*
SEC. 6. *Of pleading in Bar.*
SEC. 7. *Of the Rule to plead.*
SEC. 8. *Of demanding a Plea.*
SEC. 9. *Of ſearching for Plea, and ſigning Judgment for Want thereof.*
SEC. 10. *Of obtaining Time to plead.*
SEC. 11. *Of moving to abide by Plea.*
SEC. 12. *Of Replying, Rejoining, &c.*
SEC. 13. *Of pleading a Tender.*
SEC. 14. *Of Plea and Notice of Set-off.*

SECTION I.

Of claiming Conuſance.

(A) Of the Nature of inferior Juriſdictions, and what Courts can demand Cognizance.
(B) In what Caſes it will be granted or refuſed.
(C) Of the Time and Manner of claiming it.

WHEN any perſon or body corporate hath the franchiſe not only of holding pleas within a particular limited juriſdiction, but alſo of the cognizance of pleas, if any ſuit belonging

belonging to such jurisdiction be brought in the courts at *Westminster*, they may be prevented from proceeding therein either by the lord of the franchise interposing by claiming cognizance of the suit, or by the defendant himself pleading to the jurisdiction of the court. 3 Bl. Com. 258.

If the grant of the transaction be *without* any words exclusive of other courts, then the lord must claim the conusance; but if it be *with* such exclusive words, then the defendant is entitled to plead to the jurisdiction. *Ibid.*

For the better understanding of this matter, it will be necessary to state the differences between inferior jurisdictions, which are of three sorts. Three sorts of inferior jurisdictions.

The first is *tenere placita*, or a privilege of holding plea, which is the lowest, and is a concurrent jurisdiction; in which case the plaintiff may proceed in the inferior court if he will; but that does not deprive the subject of having the cause tried in a superior court, if he chuses to remove it by *certiorari*, *habeas corpus*, &c., and that for good reason; for if it were otherwise, a man who comes by chance into an inferior jurisdiction, might be arrested there, and detained in gaol a long time for want of bail. 1st, Merely a privilege of holding pleas.

The second sort is *conusance of pleas;* which is by grant to some lord of the franchise, and he alone can take advantage of the privilege, neither the plaintiff nor defendant; for the defendant cannot plead it to the jurisdiction of the superior court, but the lord by his bailiff or attorney, must come in and claim it; and though the lord ought to have it, the superior court is not ousted, for the plea remains under the controul of the superior court; and day is given upon the roll there to the parties to be in the inferior court at a day certain; and the parties are commanded there, and the tenor of the record is sent, for the inferior court to proceed, and if justice is done there, it is well, but the record remains above; but if justice is not done there, as if the court will not proceed upon the day prefixed, or if the judge misbehaves himself, *&c.* the plaintiff may have a re-summons. And it is the benefit of the lords only which is considered in this matter. But these jurisdictions were hardships to the subject, and allowed by 27 H. 8. c. 24. rather for their antiquity than for any other reason; and they were detrimental to the prerogative of the crown, and therefore *certiorari's* were always allowed to prevent the grievances of these inferior jurisdictions. 2d, Conusance of pleas.

The third sort are exempt jurisdictions, as where the king grants to a city, &c. that the inhabitants shall be sued within the city, and not elsewhere; such a grant may be pleaded to the jurisdiction of the superior court, if there is a court there 3d, Exempt jurisdictions.

which can hold plea of the cauſe. No one but the defendant himſelf can take advantage of this; and if he is ſued there, he may waive his privilege, and remove the cauſe by *certiorari*, *habeas corpus*, &c. Ld. Raym. 836.

(B) (B) In what Caſes it will be granted or refuſed.

Great ſtrictneſs in mode of claiming conuſance.

As the demand of conuſance is made againſt the general juriſdiction of the king's ſuperior courts, and againſt the adminiſtration of juſtice therein; the claim is always nicely looked into, and the ſuperior courts tie them down to the ſtricteſt practice and form imaginable in demanding it.

It muſt be entered on record.

Claim of conuſance muſt be entered upon the record, and every thing ſtated with great exactneſs and preciſion, that is to take away the juriſdiction, as it may be demurred to, or the facts therein alledged controverted by pleading. *Leaſingby* v. *Smith*, 2 Wil. 409.

Allowed to univerſities.

In tranſitory actions between the ſcholars of the univerſities of Oxford and Cambridge, the Univerſity ſhall have conuſance, becauſe by their charters, confirmed by act of parliament, they ſhall have juriſdiction over the perſons of their ſcholars.

How.

The Univerſity of Cambridge claimed conuſance, and produced the certificate of the chancellor that the parties were of the Univerſity; and upon a rule to ſhew cauſe it was objected, that the claim ought to be entered upon a roll, and an affidavit to verify the certificate ſhould be produced; and of that opinion was the court, and diſcharged the rule, and then it was too late to make a new claim. *Paternoſter* v. *Graham*, Str. 810. *Vide* the caſe of *Foſter* againſt *Hexham*, 1 Ld. Raym. 427.

When.

The Univerſity is not entitled to conuſance unleſs the defendant be reſident in the Univerſity, and there muſt be an affidavit of it.

Conuſance may be demanded though the defendant be in the cuſtody of the marſhal. Ld. Raym. 135.

To what actions.

The charter of 14 H. 8. reſpecting the privileges of the Univerſity of Oxford, extends to actions ariſing in any part of England; but this does not intend that ſcholars, as plaintiffs, ſhall have the privilege of ſuing in the Univerſity in cauſes of action ariſing in any part of England; but when they are defendants this privilege extends all over England.

Reſidence neceſſary;

But then it is abſolutely neceſſary that ſuch ſcholars or members being defendants, ſhall be *reſident* in the univerſity, and the privilege extends from the higheſt members to the loweſt ſervants there *reſiding*; but the ſuperior courts conſtrue this privilege very ſtrictly, therefore it ought to be made

to appear clearly to the court that the defendant is a ſcholar reſiding.

It ſhould be certified by the chancellor, and appear upon record before the privilege can be allowed. — which muſt be certified.

The claim of conuſance is tantamount to a plea in abatement, the truth whereof muſt be verified by affidavit; this ſeems to be the reaſon why affidavits were firſt introduced in theſe motions for allowing conuſance. — Affidavit alſo neceſſary.

An affidavit ſeems neceſſary as well as the chancellor's certificate of reſidence. *Hayes* v. *Long*, 2 Wil. 312.

It is a general rule, that wherever the defendant can plead to the juriſdiction of the courts at Weſtminſter, there the franchiſe may demand conuſance, but not *vice verſa*. Carth. 11. 354.

Conuſance will not be allowed if it occaſions a failure of juſtice, 2 Vent. 363. 3 Lev. 149.; or if the action be brought againſt the perſon himſelf who claims the franchiſe, unleſs he hath alſo the power in ſuch caſe of making another judge. Hob. 87. — When not allowed.

Conuſance cannot be claimed of any action that was not in *eſſe* at the time of the grant. 14 H. 4. 20.

Conuſance won't be allowed where treſpaſs, &c. is brought againſt a foreigner who has nothing within the franchiſe, for they cannot oblige a ſtranger who has nothing to anſwer. 22 Aſſ. 83.

(C) Of the Time and Mannnr of claiming it. (C)

Conuſance muſt be claimed in the firſt inſtance, or at the firſt day the party has. Burr. Rep. 2824. — Muſt be claimed in firſt inſtance.

Conuſance of pleas refuſed to the univerſity of Oxford, becauſe neither claimed in due form nor in due time. 2 Wil. 409.

Claim of conuſance muſt be made before an imparlance, and muſt be made the firſt day the party has in court, even upon the return day of the writ, if the cauſe of action appears therein; if not, then upon the firſt day given upon the declaration. *Leaſingby* v. *Smith*, 2 Wil. 413.

Conuſance muſt be demanded before full defence is made, Raſt. Ent. 128. or imparlance prayed; for theſe are a ſubmiſſion to the juriſdiction of the ſuperior court, and the delay is a laches in the lord of the franchiſe. 3 Bl. Com. 298. — Before imparlance; or plea pleaded.

In C. B. claim of conuſance by the univerſity of Oxford was diſallowed, as coming too late after plea pleaded and replication tendering an iſſue; rule to ſhew cauſe why the claim ſhould not be allowed, was diſcharged. Bar. 346. *Wells* v. *Treborn*.

Particularities required.

In aſſault, the latitat was of Michaelmas term, but the defendant never appeared; and this term the plaintiff entered an appearance for the defendant and filed common bail, and left a declaration in the office; and now, before plea pleaded, imparlance prayed, Blackſtone exhibited a claim of conuſance by the Earl of Litchfield chancellor of the univerſity of Oxford, ſtating the charters of the univerſity, confirmed by ſtat. 13 Eliz. and alleged, that the defendant was a privileged perſon, as being a matriculated perſon, and fellow of Brazen Noſe College, where he was a maſter of arts and in holy orders; this claim was under ſeal of the chancellor's office, and was (previous to the preſent motion) entered upon record, together with a letter of attorney from the chancellor, empowering one Elderton, an attorney of this court, to appear in his name and demand the conuſance. There were alſo affidavits from the defendant himſelf and another perſon, which proved him to be, at the time of the writ ſued, and at the time of making the claim, a matriculated perſon; on reading all which, and alſo the charter of king Henry the Eighth under the great ſeal, and an exemplification of the ſtatute 13 Eliz. (which, though printed in the ſtatute-books, is only a private act,) the court granted a rule to ſhew cauſe why the cognizance ſhould not be allowed, and in the mean time all proceedings to ſtay. Blac. 454. *Kendrick* v. *Kynaſton*.

None is bound to claim conuſance until he is intended by law to have ſome legal notice of his franchiſe being entrenched upon.

What a bar to ſuch claim.

In order to bar a claim of conuſance, ſome laches or default in him ſhould be ſhewn, and that he might have claimed it ſooner after ſuch notice as above. *Rex* v. *Agar*, Burr. 2820.

The authority of an attorney continues after a claim of conuſance, but not after a writ of error brought. Ld. Raym. 896.

The principal caſes on this ſubject are. Ld. Raym. 427. 475. 836. 1338. Burr. 2824. 1 Wil. 310. 2 Wil. 406. 10 Mod. 126. Hard. 505.

Section II.

Of Demanding Oyer.

(A) Of what, and in what Caſes Oyer may be demanded.

(B) Of the Time and Manner of demanding and giving Oyer, and the Conſequence of refuſing it, &c.

(C) How the Deed muſt be ſet out on Oyer, and the Uſe of craving it.

(A) Of what, and in what Caſes Oyer may be demanded. (A)

Formerly the defendant was not bound to plead till oyer and a copy of the original writ had been given him if demanded; but it is now the ſettled practice of both courts not to grant oyer of the original, and if defendant craves oyer thereof, plaintiff may proceed without taking any notice, and ſign judgment for want of a plea. *Boats* v. *Edward*, Do. 227. *Hale* v. *Finch*, 2 Wil. 394. R. T. 19 G. 3.

No oyer of original writ.

So that all the delay which was formerly occaſioned by ſuch oyer, and by taking advantage of any variances between the writ and declaration, is at an end; and the only way in which defendant can now avail himſelf of any ſuch objection, provided he thinks it fatal, is by writ of error. *Spalding* v. *Mure*, 6 D. & E. 364.

How defendant can avail himſelf of a variance.

Still, however, in all caſes where the ends of ſubſtantial juſtice require it, oyer muſt be granted.

Whenever, therefore, either the plaintiff or defendant grounds his action or defence upon any deed, he muſt in the pleadings make a profert of that deed (or ſhew ſome ſufficient reaſon for not doing ſo), in order that the other party may crave oyer, and be able to get at the knowledge of its contents.

Whenever deed pleaded, a profert muſt be made, or reaſons ſhewn.

If a profert be made, oyer cannot be diſpenſed with, becauſe the party is ſuppoſed to have brought the deed into court, and it is abſurd to ſay, that it is out of his power to give a copy of it.

If a profert, oyer not to be diſpenſed with.

For this reaſon the party pleading a deed was often formerly in an aukward dilemma, becauſe by the old rules of law it was, in moſt caſes, abſolutely neceſſary to make a profert,

fert, although, perhaps, in point of fact, the party making it had not the deed so as to be able to give oyer of it. *Soresby* v. *Sparrow*, Str. 1126. 1 Wil. 16.

In what cases no profert required.

But the courts have of late relaxed in this strictness, and have determined, that in all cases of extreme necessity, a profert may be dispensed with.

As if the deed be in the possession of the adverse party, or has been destroyed by him; or if it be lost by time or accident, or the like, where the party cannot make a profert of the deed.

But it may be pleaded according to fact.

In all which cases, the declaration or plea shall be good without any profert, the party pleading it according to the fact. *Read* v. *Brookman*, 3 D. & E. 151.

If profert made, declaration amended.

But if by mistake, he should make a profert, he must move the court to amend the pleading, and plead it according to the fact. *Totty* v. *Nisbitt*, B. R. Trin. 1784. *Matison* v. *Atkinson*, 3 D. & E. 153. *n.*

The fact may be denied by adverse party.

The adverse party may bring the matter into question by pleading, either that it is not his deed, or that it is not lost; and the party pleading it must give evidence to support his allegation that the deed is destroyed by time or accident, or as the fact stated. *Read* v. *Brookman*, 3 D. & E. 158.

If profert is made unnecessarily, oyer shall not be given. Sal. 497. *Morris's case.*

If defendant party to deed.

Where defendant is party to an indenture himself, he ought not to demand oyer, but set it forth himself; and if he demands oyer, and plaintiff gives it him imperfectly, it is at defendant's peril. Sal. 498. and *vice versa.*

Or deed in hands of third person.

Where the bond or deed is in the hands of a third person, the court, on motion, will oblige him to give oyer and produce it. *White* v. *Earl of Montgomery*, Str. 1198. Sid. 50.

Or of defendant.

So if it be in the hands of defendant when he can have no pretence to it. *Matison* v. *Atkinson*, E. 27 G. 3. B. R. 3 D. & E. 153. *n.*

Or indenture lost, and there is a counterpart.

If an indenture be lost, and there is a counterpart, the court will compel the party to shew his counterpart, and to plead thereto, otherwise they will grant an imparlance. Cro. Jac. 426. 2 Kib. 430. Sid. 386.

Oyer of letters of administration.

Oyer may be demanded of letters of administration. *Garrard* v. *Early*, 2 Wil. 413.

Or of a policy of insurance. Rep. Temp. Hard. 243.

Not of a record.

But no one is entitled to oyer of a record. *The King* v. *Amery*, 1 D. & E. 150.

As of letters patent inrolled though pleaded with a profert, *Ibid:* or of an act of parliament. *Jeffery* v. *White*, Do. 477.

Yet

Yet in Ld. Raym. 347. 550. if defendant pleads *auter action pendent* in the same court, plaintiff may pray oyer of the record. But *Q.?*

But if oyer is granted of any instrument of record and it is set forth, although the party could not have insisted on such oyer, yet he shall be thereby intitled to take the whole instrument as part of his adversary's plea. *Jeffery* v. *White*, Do. 476. How if granted though not intitled to it.

(B) Of the Time and Manner of demanding and giving Oyer, and the Consequences of refusing it. (B)

Oyer must be demanded before the rule to plead is out. P. R. 278. 299. *Hartley* v. *Varley*, Bar. 329. When oyer to be demanded.

Or rather before the time for pleading is expired. Imp. K. B. 244.

For if defendant has eight days time to plead, he may demand oyer at any time within the eight days, though the rule to plead is out. 2 Wil. 413. *Duke of Leeds* v. *Vevers*, Bar. 268.

So it is in time if before a judge's order expires. Imp. K. B. 244. *Barber* v. *Satchwell*, Bar. 326.

In B. R. oyer may be demanded after imparlance, but not in C. B. Ld. Raym. 970. 3 Kib. 491. 2 Lev. 142.

There cannot be oyer in another term from that in which profert was made. *The King* v. *Amery*, 1 D. & E. 149. 3 Sal. 119. 1 Mod. 60. But see Lord Raym. 84.

If oyer be made after the time allowed, the other party may look upon it as a nullity and sign judgment. *Barber* v. *Satchwell*, Bar. 326. If not in time, judgment.

The party craving oyer shall, after delivery of oyer, have as much time to plead or reply, &c. as he had at the time of demanding it. *Powel* v. *Gay*, Str. 705. R. T. 5 & 6 G. 2. What time allowed to plead, &c. after oyer.

Whether the rule to plead or the like be out or not. P. R. 301. *Keedam* v. *Jackson*, Bar. 238. *Simpson* v. *Daffield*, Ibid. 254.

Wherever oyer is rightly demanded and not granted in due time, the plea is a nullity, and plaintiff may sign judgment. Ld. Raym. 347. Consequence of refusing oyer.

There is no settled time for the plaintiff to give oyer, because it is in his own delay. Since the defendant is allowed the same time to plead after oyer as he had before it was demanded, let oyer be given when it may. Ld. Raym. 969. 2 Str. 1241. Car. 361.

But when the defendant is to give oyer of a deed, he is allowed two days for that purpose exclusive of the day on What time allowed to give it in in B. R.

which it is demanded, and if Sunday is the laſt it is not reckoned: oyer demanded on the Friday evening, party has all the Monday following to give it in; judgment therefore ſigned on the Monday will be ſet aſide. *Page* v. *Divine*, 2 D. & E. 40.

In C. B. Though in C. B. two days incluſive of the day of demand has been held ſufficient time. *Blaxland* v. *Burges*, Bar. 245. S. C. Caſ. Pr. C. B. 95.

Which party to carry it to the other. The party of whom oyer is demanded muſt carry it to the oppoſite party. *Page* v. *Divine*, 2 D. & E. 40.

Denial of oyer where it ought to be granted is error; otherwiſe of granting it where it ought not. Sal. 498. Raym. 970.

Formerly oyer was demanded in court, but now it is made by one attorney of the other, by a note in writing, thus:

Manner and form of demanding oyer.

A. B. v. *C. D. in*

The defendant demands oyer and a copy of the writing obligatory mentioned in the declaration in this cauſe, and the condition thereof under written.

To Mr. T. S. plaintiff's attorney. *Yours, &c.*

Or

Plaintiff's demands oyer and copy of the deed mentioned in plea of defendant.

This need not be upon ſtamp, nor need the copy of the deed of which oyer is demanded be upon ſtamp. The party craving oyer is to pay for oyer and copy 4d. *per* ſheet; but it ſeems judgment cannot be ſigned for want of paying for oyer. Imp. K. B. 260.

(C) How the Deed muſt be ſet out on Oyer, and of the Uſe of craving Oyer.

How the deed muſt be ſet out on oyer. Defendant by craving oyer undertakes to ſet out the whole of the deed verbatim, and if he only ſet it out in part, the plea is bad: plaintiff may, therefore, in ſuch caſe ſign judgment for want of a plea, or may move the court to quaſh it, which they will do, nor ſuffer defendant to amend. *Wallace* v. *Dutcheſs of Cumberland*, 4 D. & E. 370. But vide *Weavers Company qui tam* v. *Foreſt*, Str. 1241. Bar. 327.

But where oyer is given of a record ſet out in declaration, it need not be ſet out in plea, *Symonds* v. *Parmerter*, 1 Wil. 97.

If oyer be demanded of an indenture which refers to matter indorſed, it is not a complete oyer without a copy of the indorſement alſo. 6 Mod. Caſ. 237.

To an action of debt on bond, defendant, after craving oyer, set it out truly and pleaded payment by the principal, he being a surety; plaintiff replies and put the pleas in issue, and then served defendant's attorney with a rule to abide by his pleas, and gave notice of trial; defendant returned the paper book, setting out false oyer of the bond and pleading as before; on which the plaintiffs enrolled the true condition and demurred. Consequence if purposely set out falsely.

On the day of argument, which was the last paper day of the term, defendant's counsel objected to its being argued, because it was the last paper day. But

The court, on hearing the above facts stated, directed an affidavit of them to be made, made a rule *nisi* for striking out all the pleadings of defendant, that plaintiff should have judgment, and that defendant's attorney should pay all costs; and they intimated a strong inclination to grant an attachment against him. *Farguson* v. *Mackreth*, 24 Geo. 3. B. R. 4 D. & E. 371. *n.*

If an imperfect oyer is given, defendant should not receive same by pleading over, but should still insist on want of oyer, otherwise it will be no variance. Raym. 1176. Defendant should not accept imperfect oyer.

The only way of taking advantage of a deed being improperly set forth, or of other matters contained therein, &c. is by craving oyer and setting the deed out. Of the use of craving oyer.

Declaration on bond, plea setting out the condition, which was to perform articles, defendant pleaded performance; plaintiff replied, that by the same articles it was further agreed, &c. on demurrer to replication, judgment for defendant, because plaintiff cannot alledge new matter in the articles without setting them forth on oyer. Str. 227. 2 Saund. 411.

So if declaration in an action on bail bond by the sheriff of Middlesex be in the plural number as sheriffs, whereas both make but one sheriff, oyer should be craved of the bond and condition, and it must appear on record, otherwise the court will not presume that it is a bail bond, and no advantage can be taken. Ld. Raym. 1135.

Defendant cannot plead that no such letters of administration as set forth in declaration, were ever granted to plaintiff without craving oyer thereof and setting them out in his plea. *Garrard* v. *Ealy*, 2 Wil. 413.

But although defendant may crave oyer, he is not bound to set out the deed in his plea, but may plead the general issue only, or any other plea to the merits. *Weavers Company* v. *Forest*, Str. 1241.

Section III.

Of Imparlance.

Imparlance what.

Imparlance (*licentia interloquendi*) is a further day allowed to the defendant to anſwer or plead to the charge or declaration of plaintiff.

When a day is given to plaintiff to declare, it is called *dies datus;* but when after the declaration a day is given to defendant to plead, it is called an imparlance.

Intent thereof.

The intent of an imparlance is, that defendant may conſider the nature of plaintiff's action and of his defence thereto; and alſo that he may have time to compromiſe the matter with his adverſary: it has therefore been thought to ariſe from a religious principle, agreeable to the advice given in St. Matthew, c. 5. v. 25. "agree with thine adverſary quickly, whilſt thou art in the way with him."

Origin and hiſtory.

For the origin and hiſtory of imparlance, as introduced and uſed in the courts of K. B. and C. B. ſee Boot's Treatiſe of a Suit at Law, 92. and Gilb. C. B. 42. &c.

Different kinds.

There are three kinds of imparlance:

1ſt, A common or general imparlance.
2d, A ſpecial imparlance.
3d, A general ſpecial imparlance.

Common or general imparlance.

The common or general imparlance is nothing more than a further day to plead till the next term, without ſaving or reſerving to the defendant any exceptions or advantages to be taken by him to the writ or count; it is therefore entered of courſe, and after this general imparlance, defendant cannot plead at all in abatement.

Special imparlance.

A ſpecial imparlance is a further day to plead as before, but *ſalvis exceptionibus tam ad breve quam ad narrationem;* ſo that after this imparlance, defendant may plead in abatement of the writ or count, but not to the juriſdiction of the court; and this ſpecial imparlance is granted of courſe in C. B. upon application to the prothonotary.

But by R. E. 5 Ann. in B. R. no ſpecial imparlance ſhall be allowed, without leave of the court firſt obtained.

General ſpecial imparlance.

The general ſpecial imparlance, which, in fact, is a ſtill more ſpecial one, is *(ſalvis* OMNIBUS *exceptionibus advantagiis quibuſcumque,)* after which, defendant may even plead to the juriſdiction of the court: but this ſort of imparlance can only be obtained by leave of the court on motion; and this is diſcretionary, and muſt depend on particular circumſtances, which are left to the deciſion of the court. *Grant* v. *Lord Sondes*, 2 Blac. R. 1097.

In

In caſe, therefore, defendant is entitled to an imparlance from the too late delivery of the declaration or otherwiſe, and he would wiſh to plead in abatement to the writ or count in a ſubſequent term, he ought not to ſuffer a general imparlance to be entered; but if in C. B. ſhould leave a note with the prothonotary for a ſpecial imparlance to be granted, which will be done to anſwer that purpoſe: but if defendant would plead to the juriſdiction of the court, he ought then to move the court for a general or more ſpecial imparlance, as the prothonotary cannot grant that: but this cannot be done if defendant has already appeared to the proceſs by attorney, as a plea to the juriſdiction muſt be *propriâ perſonâ*. Ibid.

How entered on record.

The imparlance is entered on the record immediately after the declaration. If a ſpecial imparlance, thus: "And "the ſaid defendant ſaving and reſerving to himſelf all and "all manner of exception as to the aforeſaid declaration "of the ſaid plaintiff, in his own proper perſon comes "and craves leave to imparle to the ſaid declaration of the "ſaid plaintiff, until on the morrow of All Souls, and it is "granted him, &c."; then follows the plea. *Ibid.*

Time for applying for imparlance.

The time for applying either to the prothonotary or the court for a ſpecial or general ſpecial imparlance is within the firſt four days of the next term, if declaration be delivered too late in the term for defendant to be obliged to plead thereto. *Grant* v. *Lord Sondes*, 2 Blac. R. 1094.

When granted or not.

If plaintiff amends his declaration and pays coſts, defendant ſhall have no imparlance. Prac. Reg. 18. *Knox* v. *Wychel.*

No imparlance after a peremptory rule to plead. Bar. 225. *Fitzwilliams* v. *Biſhop of Hereford.*

Imparlance denied where notice had been ſerved though not indorſed on the declaration. Bar. 226, 227. *Cam* v. *Gardner.*

When the defendant removes the cauſe by *habeas corpus* from an inferior court, no imparlance is allowed, though plaintiff does not declare before the eſſoin day of the next term. *Smith* v. *James*, 6 D. & E. 752. *Wood* v. *Wenman*, 1 Wil. 154.

No imparlance in real actions. Bar. 2. *Foſter* v. *Kerkley.*

No imparlance where plaintiff is prevented from declaring before the eſſoin day by an eſſoin caſt. *Rooke* v. *the Earl of Leiceſter*, 2 D. & E. 16.

In an action for words importing that plaintiff was guilty of the murder of A. B. defendant moved for an imparlance till next term, on affidavit that a proſecution was carrying on

on againſt plaintiff for his murder (committed on the high ſeas) in the court of admiralty, and he would probably be tried for the fact before Michaelmas term. The rule to ſhew cauſe made abſolute. Imparlances are in the diſcretion of the court, and it may be of ill conſequence to enter into evidence concerning this murder in the action for words before trial of the fact. *Sibſon* v. *Nivin*, Bar. 224.

Imparlance ordered, defendant being a lunatic. —— v. *Higham*, Bar. 225.

When imparlance of courſe, and what time allowed for pleading.

In both courts, if the writ be returnable before the laſt return of any term, and the declaration not filed, and notice given four days excluſive before the end of ſuch term, defendant is intitled to an imparlance. R. T. 22 G. 3.

If writ returnable laſt return.

So if the writ be returnable on the laſt return, in which caſes defendant muſt plead within the firſt four days of the next term.

Or returnable one term, and declaration not delivered till next.

But if a writ be returnable one term, and declaration not delivered before the eſſoin day of the ſecond term, the defendant is not obliged to plead in the ſame term, but is intitled to an imparlance, till the four firſt days of the next.

Provided defendant be in court.

But this is upon the ſuppoſition that the defendant is in court, by having appeared if the action be not bailable, or by having juſtified bail, if the action be bailable; for otherwiſe he is intitled to no imparlance, though the declaration be not delivered till the next term after the writ is returnable.

Not otherwiſe.

On motion for a rule to ſhew cauſe why the defendant ſhould not have time to plead till the next term. The writ was returnable the laſt day of Trinity term, when bail were put in, but did not juſtify till the fourth day of the preſent Michaelmas term. On which day they did juſtify, and on the ſame day plaintiff delivered declaration. He inſiſted that plaintiff ought to have declared *de bene eſſe*, and by not declaring before the eſſoin day of the term, defendant was intitled to an imparlance, for which he cited a caſe in 1ſt Crompton's Practice, 126. which was in point. But per Buller Juſt. as defendant had not juſtified bail, plaintiff was not compelled to declare. There is no laches imputable to him for not declaring till all the defendants are in court. He need not declare *de bene eſſe*, nor is defendant in this caſe intitled to imparlance. The caſe cited was in the common pleas, *Rolleſton* v. *Scott*, 5 D. & E. 372.

Where writ is returnable before the laſt return, and declaration delivered in due time, defendant muſt plead in four or eight days, as before mentioned. See Chap. 6. declaration (A), (B), (C). and poſt. Sec. 6. (A).

There

There are variety of old cases respecting imparlances, but most of them previous to the rules, 5 & 6 G. 2. and 22 Geo. 3. by which the times of pleading in ordinary cases are governed.

If four terms have elapsed since the delivery or filing of declaration, plaintiff must give the defendant a whole term's notice to plead, before he can sign judgment, which must be done by his giving defendant before the essoin day of the term notice of his intention to proceed the next term, by giving a rule to plead; and if defendant does not plead in the course of the term, plaintiff, having first served him with a rule to plead, may sign judgment, for the time does not extend beyond the term.

If four terms have elapsed, what notice necessary to be given.

Therefore where no proceedings were had for above a year, plaintiff two days before Hilary term gave notice of his intention to proceed on the 14th February; two days after Hilary term rule to plead was served, and on the 18th of April, in the course of same vacation, judgment signed for want of a plea, and it was held regular. *Milborne* v. *Nixon*, 2 D. & E. 40.

The same practice of a term's notice is necessary in all other stages of the proceedings, and from either party, when a year has elapsed since the last step taken.

But this only extends to voluntary delays by the plaintiff; for if the defendant has delayed the proceedings by an injunction, there is no occasion for a term's notice; and this in both courts. *Hayley* v. *Riley*, Do. 72. *Bosworth* v. *Phipps*, C. B. 11 Geo. 3. Ibid. *n.* 2 Blac. 784. *Walter* v. *Stewart*, Blac. 918.

An injunction, an exception to rule.

Although defendant be intitled to an imparlance, yet if he pleads any plea, notwithstanding it may be a nullity, plaintiff signs judgment as for want of a plea. Defendant has thereby waived his imparlance, and cannot set aside the judgment for being signed too soon. *Lockhart* v. *Mackreth*, 5 D. & E. 663.

What is a waiver of imparlance.

Section IV.

Of pleading in Abatement.

(A) Of the Time and Manner of pleading in Abatement.

(B) Of the Affidavit and Signature required in Pleas of Abatement.

(C) Of the Judgment upon a Plea in Abatement.

(D) General

(D) General Obſervations and Rules as to Pleas in Abatement.

(E) Of moving the Court to amend Declaration, and of entering the Caſſetur Billa.

Pleas in abatement are when the defendant ſhews cauſe to the court why he ought not to be impleaded, or if impleaded, not in the manner and form he now is. As theſe pleas enter not into the merits of the cauſe, but are dilatory, the law has laid certain reſtrictions upon them, as will be ſeen hereafter.

Pleas in abatement are threefold:

1*ſt*, To the juriſdiction of the court.

2*dly*, To the perſon, either of plaintiff, or of defendant.

3*dly*, To the writ and count.

But it would exceed the limits of this work, were we to enlarge upon the different kinds of pleas in abatement, and the law relating to them. We muſt therefore refer the reader for ſuch information to Gilbert's Common Pleas, from p. 187 to 250. and to Bacon's Abridg. & Com. Digeſt. tit. Abatement, and content ourſelves with laying down the general *practice* as to pleading in abatement. And firſt,

(A) (A) Of the Time and Manner of pleading in Abatement.

Within what time, and how, in B. R.

Pleas in abatement muſt be pleaded within four days after declaration delivered, or notice of declaration left in the office, provided it be delivered or notice given before the laſt four days in term; but if afterwards, ſo that defendant is not bound to plead to it that term, then he may plead in abatement within the firſt four days of the ſubſequent term, intitling his plea *as* of the precedent term in B. R. *Long* v. *Miller*, 1 Wil. 23. *Jennings* v. *Webb*, 1 D. & E. 278. or by entering a ſpecial imparlance. *Smith* v. *Miller*, 3 D. & E. 627.

By the caſe of *Doughty* v. *Laſcelles*, it ſeems abſolutely neceſſary for a ſpecial imparlance to be ſtated on the record. 4 D. & E. 520.

In C. B.

But in C. B. defendant muſt apply within the firſt four days of ſuch term to prothonotary for a ſpecial imparlance, which is granted of courſe, and then plead in abatement. *Threlkeld* v. *Goodfellow*, Bar. 224. *Napper* v. *Biddle*, Bar. 334.

Sunday reckoned.

Sunday is to be counted one of the four days, unleſs the laſt. Eaſt. 5 Ann. *Jennings* v. *Webb*, 1 D. & E. 279.

If

If it be the laſt of the four days, defendant may file plea on the fifth. *Lee* v. *Carlton*, 3 D. & E. 642.

In B. R. the four days are both inclusive, ſo that where declaration is delivered on the ſixteenth, the time for pleading in abatement expires the nineteenth. *Jennings* v. *Webb*, 1 D. & E. 278. *Harbord* v. *Perigal*, 5 D. & E. 210. Four days reckoned inclusive.

So in C. B. *Biddleſton* v. *Atcherley*, Cook Rep. 64. Imp. C. B. 260.

But the four days are to be reckoned from the ſervice of *notice* of declaration, not from the filing the declaration itſelf; and there is no diſtinction in this reſpect between a declaration in chief and *de bene eſſe*. *Hutchinſon* v. *Brown*, 7 D. & E. 298.

Plea in abatement cannot be pleaded after a general imparlance, but it may after a ſpecial one. Not to be pleaded after general imparlance.

Defendant pleaded a miſnomer in abatement after an imparlance, but it appeared on the record to be thus entered, "and A. B. who was arreſted by the name of A. C. comes," &c. which the court held tantamount to a ſpecial imparlance. Judgment for defendant. *Brewſter* v. *Capper*, Blac. 51. S. C. 1 Wil. 261.

Had the plea began, "and the ſaid A. B. who," &c. it would have been bad. *Ibid.* *Roberts* v. *Moon*, 5 D. & E. 487.

But in the caſe of *Doughty* v. *Laſcelles*, 4 D. & E. 520. ſuch a plea as that in Brewſter and Capper was held bad, and court ſaid it could only be pleaded after a ſpecial imparlance, which ſhould be ſtated on the record.

And in *Buddle* v. *Wilſon*, 6 D. & E. 369. a plea in abatement after a general imparlance was held bad.

Before plea in abatement pleaded, declaration muſt be taken out of the office, or plaintiff may ſign judgment. Declaration muſt be taken out of office.

If a plea in abatement be filed after the time allowed, or without ſpecial imparlance if requiſite, it is as no plea; and plaintiff having ſtayed till the expiration of the rule to plead, and no other plea being put in, he may ſign judgment. *Jennings* v. *Webb*, 1 D. & E. 278. *Doughty* v. *Laſcelles*, 4 D. & E. 520. In what caſes judgment may be ſigned if plea in abatement irregular.

So although no rule to plead has been regularly given, for defendant diſpenſes with the rule by pleading in abatement. *Brandon* v. *Payne*, 1 D. & E. 690.

Or even where a rule to plead has been irregularly ſerved, as if it were ſerved before delivery of declaration, for by pleading in abatement he waives the irregularity. *Ibid.*

If

If it appears on the record to be pleaded after general imparlance, it is bad on demurrer, or writ of error. 6 D & E. 369.

Muſt be filed. A plea in abatement ought to be filed, not delivered. 1 D. & E. 278.

Before 9 at night. A plea in abatement, like other pleadings and proceedings, ought to be filed before nine o'clock in the evening.

Where declaration was delivered 8th May, and plea in abatement delivered at plaintiff's houſe the 11th at *eleven* at night, plaintiff ſigned judgment, and held good. *Jennings* v. *Webb*, 1 D. & E. 278.

Cannot plead in abatement after aſſignment of bail-bond. If a man has forfeited his bail-bond, and the court in favour of him ſtay proceedings thereon, he cannot afterwards plead in abatement to the original action, but muſt plead in chief. Sal. 519.

Court will not interfere on motion in a matter pleadable in abatement. The court will refuſe to order a bail-bond to be cancelled on an affidavit of defendant that he was not the perſon, but will leave him to his plea in abatement. In this caſe, the action was brought by *Salter qui tam* v. *Shergold*, defendant entered into bail-bond by the name of Williams, which was his right name, then moved to have the bond cancelled as above, which was denied. 3 D. & E. 572.

(B) (B) Of the Affidavit and Signature requiſite.

Statute requiring affidavit. By 4 & 5 Ann. c. 16. "no dilatory plea ſhall be received "in any court of record, unleſs the party offering ſuch plea "do, by affidavit, prove the truth thereof, or ſhew ſome "probable matter to the court to induce them to believe "that the fact of ſuch dilatory plea is true."

When not neceſſary. In caſes where the matter is pleaded in abatement, which appears upon the record (as variances), there needs no affidavit, but otherwiſe there does. Ld. Raym. 1409.

So want of addition requires no affidavit, becauſe it appears on the face of the declaration. Pract. Reg. 5. *Parry* v. *Tomkin*.

Cepit in alio loco does not, nor need it be pleaded in four days, for it amounts to a plea in bar. *Bullythorpe* v. *Turner*, Bar. 353.

A dilatory plea, as a plea of commorancy, &c. to an indictment, muſt have an affidavit annexed, or it will be ſet aſide. *Rex* v. *Grainger*, Burr. 1617.

When neceſſary. Ancient demeſne formerly did not, Raym. 1418. Sed. Pract. Reg. 2 Bar. 187. cont. *Hatch* v. *Cannon*, 3 Wil. 51. and now held that this plea cannot be pleaded without leave of the court, which muſt be moved for on affidavit, and which

which affidavit must be express and particular. Doe on dem. *Rust* v. *Roe*, Burr. 1048.

A foreign plea must be put in on oath, that is, it must be sworn that it is true, or such plea is not to be received, Stile. 373. 225. But a plea to the jurisdiction need not be sworn. Carth. 402.

Plea of privilege by a serjeant must have an affidavit. Str. 738.

So a plea of privilege by the clerk of the errors. And the affidavit ought not to be generally that the plea is true, but the particular facts alledged in the plea ought to be verified by the affidavit. *Cunningham* v. *Johnson*, Say. 10.

So plea of infancy, P. R. 5. *Broadmead* v. *Star*.

So that there is another executor not named. P. R. 4. *Wilson* v. *Palmer*.

An affidavit made by attorney is sufficient. Pract. Reg. 6. *Lumley* v. *Foster*. Bar. 344. The statute requiring only probable cause to be shewn. Affidavit made by attorney sufficient.

The affidavit ought to be positive, and the words probable matter in the statute only extend to a matter of record, or to some other collateral matter, as to the truth of which there cannot be a positive affidavit. Yet where an affidavit was not positive, but from what was alledged therein it might fairly be inferred that the fact pleaded was true, it was held sufficient. *Pearce* v. *Davy*, Say. 293.

In both courts, a plea in abatement without an affidavit to support the truth of it, is no plea; and the plaintiff may sign judgment *instanter*, as if no plea had been delivered. Str. 225. Carth. 402. Judgment signed, if no affidavit or signature.

So if it be not signed when required by counsel or serjeant. P. R. 282. Anon.

(C) Of the Judgment on Plea in Abatement. (C)

In all cases when judgment is given for defendant on his plea in abatement, it is *quod breve*, or *narratio cassetur*;— Of the judgment.

But judgment for the plaintiff depends upon the circumstance of its being given upon demurrer, or upon issue joined on the plea in abatement.

In the first case it is *quod respondeat ouster*. In the last it is peremptory, *quod recuperet*. When respondeat ouster.

The reason of this distinction is, that every man is not presumed to know the matter of law, which he leaves to the judgment of the court; and therefore, where plaintiff When final. Reason of distinction.

demurs to defendant's plea, the judgment againſt defendant upon the demurrer is, that he muſt anſwer over. But every one muſt be ſenſible when he pleads a fact, whether that fact be true or falſe; and if he chooſes to put the whole weight of his cauſe upon ſuch an iſſue, when he might have pleaded *in chief* to the merits, it is an admittance that he has no other defence; and therefore, if a verdict be againſt him, the judgment ought to be *final*. *Eichorn* v. *Le Maitre*, 2 Wil. 366. 2 Blac. Rep. 368. Yelv. 112. Vent. 22. 2 Shaw. 42.

Jury to aſſeſs damages if final.

In ſuch caſe, therefore, the jury, at the trial of the iſſue in abatement, ought to aſſeſs the damages. If, however, they ſhould omit ſo to do, ſuch omiſſion can only be ſupplied by a *venire de novo* being awarded. *Ibid.* 2 Wil. 366.

Defendant pleaded miſnomer in abatement to an action of aſſumpſit. Plaintiff replied, that he is known as well by one name as the other, and thereupon iſſue was joined, and verdict for plaintiff; but the jury did not aſſeſs the damages. In ſuch caſe the court cannot order a writ of inquiry to aſſeſs damages to ſupply the omiſſion of the former jury in not aſſeſſing them, but a *venire facias de novo* muſt go, becauſe no attaint would lie againſt the jury upon the writ of inquiry, were they to give exceſſive damages, that being only an inqueſt of office; whereas an attaint would lie againſt the jury who tried the iſſue, if they had given outrageous damages. 2 Wil. 367.

If they neglect ſo to do, a venire fac. de novo to be awarded.

But this is only in ſuch actions which found in damages; for in actions where a ſpecific thing is demanded, as debt, &c. if iſſue is joined upon a fact in a plea in abatement, and verdict thereon for the plaintiff, the judgment is peremptory, *quod recuperet.*

Conſequence of wrong judgment.

If a wrong judgment be given as in chief, when it was on demurrer, and ought only to have been *reſpondeas ouſter*, it will be reverſed on error. Str. 532.

Defendant pleaded in abatement *nul tiel* perſon *in rerum natura*. Plaintiff replies, that there is, viz. at Weſtminſter, demurrer *inde* and joinder, in which he prays judgment and his damages, which, being in chief, is wrong; for it ought to be that he may anſwer over. *Anon.* B. R. 1 Wil. 302.

If plea in abatement concludes in bar, or, vice verſa, what judgment.

If defendant pleads in abatement, and concludes as in bar, that concluſion makes it a plea in bar; and in ſuch caſe judgment final is given, and not merely a *reſpondeas ouſter*. So when a plea begins in bar, though the matter be in abatement, and it concludes in abatement, yet it is a plea in bar, and thereon judgment final ſhall be given.

Vide

Vide Lord Raym. 1018. and authorities there cited; and alſo Lord Raym. 1205.

A plea of miſnomer in abatement muſt conclude with praying judgment of the bill; praying that the ſame may be quaſhed, was held ill on ſpecial demurrer. *Hixon* v. *Binns*, 3 D. & E. 185.

To a plea of miſnomer praying judgment of the *writ*, replication began, "That the *declaration* ought not to be quaſhed," and on ſpecial demurrer held good. *Sabine* v. *Johnſon*, Pull. C. B. 60.

In dilatory pleas the greateſt preciſion is required; and if the defendant do not comply with the neceſſary forms in pleading ſame, plaintiff may take advantage of it on ſpecial demurrer. *Roberts* v. *Moon*, 5 D. & E. 488.

What judgment if defendant demurs in abatement.

If defendant demurs in abatement, the court will give final judgment, becauſe there can be no demurrer in abatement; for if the matter of abatement be dehors, it muſt be pleaded; if intrinſic, the court will take notice, *ex officio*. Salk. 220. Pl. 7. 6 Mod. 198.

What time defendant has to plead after judgment.

Upon a judgment of *reſpondeas ouſter*, defendant has four days time to plead; but this is ſaid to be in the diſcretion of the court. Comb. 19.

(D) General Obſervations on pleading in Abatement. (D)

No plea in abatement after reſpondeas ouſter.

No plea in abatement ſhall be received after a *reſpondeas ouſter*, for then they might be *in infinitum*.

Plea in abatement not amendable.

Neither court will ſuffer a plea in abatement to be amended. Imp. K. B. 242. C. B. 261. P. R. 21. *Lyde* v. *Heale*.

A defendant cannot have two dilatories.

No need of venue.

In pleas in abatement which relate to the perſon, there is no neceſſity of laying a venue; for all ſuch pleas are to be tried where the action is laid. 12 Mod. 125. Carth. 363. Salk. 4. *Neale* v. *De Garay*, 7 D. & E. 143.

Bad, if wrong intitled.

Plea in abatement ſet aſide on motion, both the plea and affidavits being wrong intitled.

Defendant was ſued by the name of Finis Dinas; he pleaded in abatement that his name was Phineas, and not Finis: but both the plea and affidavit to verify it, were intitled in a cauſe betwixt Clixby plaintiff, and Finis Dinas defendant. Rule abſolute to ſet aſide the plea. *Clixby* v. *Dinas*, Bar. 348.

After plea, no exception to declaration.

After a plea in abatement, no exceptions can be taken to the declaration. Carth. 172.

Nor can advantage be taken of any errors in the declaration on a plea in abatement, for in such case the defendant ought to demur. 3 Salk. 19.

No costs in abatement.

Defendant is not entitled to costs, if he succeeds on a plea in abatement. *Barber* v. *Palmer*, 6 D. & E. 524.

(E) (E) Of moving Court to amend Declaration, and of entering *cassetur billa.*

May move court to amend declaration on misnomer pleaded.

Upon a good plea in abatement plaintiff ought either to take out a summons to amend his declaration, as in case of a misnomer being pleaded he may do upon payment of costs, and this saves the entry of the *cassetur billa*; or he must discontinue his action and begin *de novo*; but if he does not discontinue before he declares afresh, defendant may plead auter action pendent, and it will be afterwards too late to discontinue. Lord Raym. 1014. *Knight's case.*

The way to discontinue is by entering a *cassetur billa*, as follows:

Of the *cassetur billa.*

Get a roll, enter a memorandum of the term the declaration is delivered, and the plea at the foot thereof, then say (and thereupon the said plaintiff says, that he cannot deny the said exception of the said defendant above by his plea taken to his said bill, but admits the same to be true; therefore it is considered by the court of our said Lord the King here, that the said bill of the said plaintiff be quashed, &c.

Carry the roll to the clerk of the judgments, if in K. B.; to the Prothonotary in C. B. and docket same; pay 4d per *sheet in K. B. 8d. in C. B.; and the* cassetur billa *being marked thereon, carry same to clerk of treasury at Westminster to be filed, and then begin* de novo *with your action.*

After which plaintiff may begin de novo,

It seems that plaintiff may confess the plea, and enter a *cassetur breve* upon the roll, and bring a new action, without moving the court for leave, or paying costs. *Allen* v. *Maxey. Osborn* v. *Haddock*, Prac. R. 6.

or declare by the bye.

So after entering quod billa cassetur on the roll, he may, at any time during the same term in which the writ is returnable, deliver a declaration by the bye against defendant. *Miller* v. *Andrews*, 5 D. E. 634.

Section V.

Of paying Money into Court.

(A) The Meaning and Origin thereof.

(B) Of the Manner and Time of paying Money into Court.

(C) In what Actions and on what Counts Money may be paid into Court.

(D) Of the Conſequences of paying Money into Court, and the Coſts to which Plaintiff is entitled.

(E) Of bringing a further Sum into Court.

(F) Of Defendant's refuſing to pay the Coſts, and how Plaintiff is to proceed.

(A) The Meaning and Origin thereof. (A)

When the diſpute is not whether any thing at all is due to the plaintiff, but only how much; the defendant, before he pleads, is at liberty to move the court for leave to pay ſo much into court as he thinks is really due. On which the court makes an order to the following purport: "That de- "fendant ſhall have leave to bring into court the ſum he "moves to pay in; and that unleſs plaintiff accept ſuch "money in full diſcharge, with coſts to be taxed by the "maſter or prothonotary, the ſum brought in ſhall be paid "out of court to the plaintiff or his attorney, and the "amount thereof be ſtruck out of the declaration, and no "evidence given thereof upon the trial." The effect of which rule is, that if upon trial of the iſſue between the parties, the jury ſhall not aſſeſs damages to the plaintiff exceeding the ſum ſo brought into court, there muſt be a verdict for the defendant, and the plaintiff ſhall have no coſts, but ſhall pay to the defendant or his attorney coſts to be taxed, &c. But if the jury give more, then the ſaid ſum ſo paid into court goes towards ſatisfaction of the judgment, &c. *Hallet* v. *E. I. Comp.* Burr. 1120.

The firſt motion to bring money into court was in Kelyng's time, and introduced to avoid the hazard and difficulty of pleading a tender. Str. 787.

Or rather, perhaps, to prevent litigations and unneceſſary expence, by giving defendant an opportunity to ſettle plain-

tiff's demand, when he never had it in his power, or had neglected, to make any legal tender.

(B) (B) Of the Manner and Time of paying Money into Court.

How to pay money into court.

No ſum, how ſmall ſoever, can be paid into court without leave obtained on motion. But application to pay money into court requires no notice of motion, or affidavit of facts.

It is done in the manner following:

In B. R.

When there is no doubt but that money may be paid into court, give inſtructions to counſel for that purpoſe, with 10s. 6d.; *indorſe thereon, "Pleaſe to move to pay* 3l. 10s. *into court;" and on his ſigning it, carry it to the ſigner of the writs, pay the money to him, who will give receipt for ſame; pay* 2s. 4d. *beſides poundage; then carry brief and receipt to the clerk of the rules, who will draw up rule; pay* 7s.; *ſerve copy thereof on plaintiff's attorney, and at the ſame time deliver your plea.*

In C. B.

If the action be ſuch as that there can be no doubt but that money may be paid into court, and if the ſum paid in does not amount to more than 5l. *apply to the ſecondary for a treaſury rule for that purpoſe; pay* 6s.; *take it to prothonotary's, and the clerk will receive the money and put a receipt in the margin, pay* 1d. *in the pound,* 1s. 4d. *for receipt, and* 2s. *for entering plea; ſerve copy of rule on plaintiff's attorney.*

If the ſum be more than 5l. *then a ſerjeant's hand to a brief is requiſite; and if the general iſſue be pleaded, he ſigns it of courſe: take it to ſecondary as before, and proceed as above.*

But if defendant pleads other pleas than the general iſſue, give two briefs to ſerjeant with 10s. 6d. *each, one to move to plead double, and the other to pay money into court; take them to ſecondary as before, and proceed as above.*

If in vacation, get a judge's order to warrant the rule.

If the money is to be paid into court *a week after the term ended,* a judge's order is requiſite to authorize clerk of rules to draw up rule; but in this caſe there muſt be a counſel's hand to a brief for that purpoſe, as the order ſtates, that clerk of rules be at liberty ſo to do, on producing a counſel's hand for that purpoſe. Imp. B. R. 286.

How if plaintiff accepts the money.

If plaintiff accepts the money in full diſcharge, he muſt have coſts to the time the money is paid in. For which purpoſe he muſt get office-copy of the rule, and obtain an

an appointment from the maſter or prothonotary, and ſerve the ſame on defendant's attorney to tax the coſts. Formerly this was the defendant's duty, but now it is plaintiff's. *Kabell* v. *Hudſon*, 4 D. & E. 12. R. M. 31 G. 3.

And unleſs the plaintiff takes this ſtep, it is conſidered that the plaintiff intends to proceed in the action to recover a larger ſum than that paid into court. R. M. 31 G. 3.

If defendant does not pay the coſts, proceed as directed afterwards (F).

The agent's taking money out of court is the ſame as plaintiff himſelf. 1 D. & E. 711.

How if he does not.

But if the plaintiff be not ſatisfied with ſum paid in, he may ſtill take it out of the office (by carrying an office-copy of the rule to the ſigner of the writs, or prothonotary) in part payment, and may then proceed to trial; and if on the trial he does not recover a greater ſum than was paid in, he will be nonſuited, and muſt pay coſts to the defendant.

The chief clerk's fees upon paying money into court is 20*s.* for every 100*l.*; if under 10*l.*, 2*s.* R. 5 Jac. 1.

At what time money to be paid into court.

When the defendant is entitled to pay money into court, it is a matter of courſe before plea pleaded, and now even after plea it is perpetually done by obtaining a judge's order for that purpoſe. No inconvenience enſues to either party from this practice, becauſe if any expence has been incurred, that is ordered to be paid at the time of obtaining the rule. And this tends to the furtherance of juſtice; for if the defendant pays into court what is really due, the plaintiff ought in juſtice to take it. *Griffiths* v. *Williams*, 1 D. & E. 711. 1 Wil. 157. Str. 1271. 1267. Say. 316.

After regular judgment ſigned, though ſet aſide, defendant cannot have leave to bring money into court. *Burgeſs* v. *Pallamounter*, Bar. 281. *Tidmaſh* v. *Smith*, 285. P. R. 289. Caſ. of Pr. C. B. 85.

An offer made by a bill in equity to pay money, ſhall be tantamount to the money having actually been brought into court, if an action at law be afterwards had under a decree from the court of chancery. Burr. 1361.

(C) In what Actions and on what Counts Money may be paid into Court. (C)

General principle.

As to the particular caſes in which money may be paid into court, the chief diſtinction is this; That where the

ſum demanded is a ſum certain, or capable of being aſcertained by mere computation, without leaving any ſort of diſcretion to be exerciſed by the jury, the defendant may pay money into court, and have ſo much of plaintiff's demand upon him ſtruck out of the declaration; and if plaintiff will not accept thereof, he ſhall proceed at his peril. Burr. 1120.

On the contrary, where it is an action for damages for any injury ſuſtained, which damages are to be aſſeſſed by a jury, money cannot be paid in.

The above is the general rule which governs the caſes reſpecting bringing money into court.

How in particular actions.

But to be more particular, I ſhall conſider in what actions money may or may not be brought into court, agreeable to their nature, in alphabetical order.

Denied in an action of account. *Anon.*

Actions on the caſe.

Allowed in an action on a policy of aſſurance. Stat. 19 G. 2. c. 37. ſ. 7.

In a ſpecial action upon the caſe for damages done to a chaiſe let to hire by immoderately driving, not allowed. Str. 787.

Nor in an action for injuring common by burning turf. *Anon.*

Nor in an action againſt a ſheriff for a falſe return to a *fieri facias*. *Bowles* v. *Fuller*, 7 D. & E. 335.

Covenant.

Nor in covenant, unleſs for non-payment of rent. Bar. 282. 286. 289. Or where the breach is aſſigned with equal certainty. Bar. 284.

But in covenant and breach for non-payment of rent, and not repairing, &c. it was moved to bring in ſo much for the rent; and as to the other breach, that plaintiff might proceed as he thought fit; *et per Trevor*, all the judges have agreed that it is but reaſonable to allow it, that it does not differ from debt for rent; for though it be covenant, yet it is for a ſum certain. So defendant may move, that upon payment of what ſhall appear due for rent, proceedings as to that ſhall ſtay, and the court will refer it to the maſter. *Anon.* 1 Wil. 75. Salk. 596.

In covenant the breach was aſſigned in a ſum certain, viz 11*l.* for not dreſſing corn, and leave was given to bring in the money on the common rule. Bar. 284. *Walmouth* v. *Houghton*.

Not allowed to be paid in on an action of covenant *generally*, but it may upon any particular breaches aſſigned for non-payment of rent, or for an increaſed rent. Blac. Rep. 837. *Fulwell* v. *Hall*, and *Walmouth* v. *Houghton*, Bar. 284.

In

In covenant on charter-party, money paid in on two of the breaches for freight and demurrage. Burr. 1120.

In debt, you cannot bring money into court unleſs it is for non-payment of rent. Pract. Reg. C. P. 257. and even that was denied in Salk. 597. & Bar. 286. Debt.

So it was refuſed in debt for goods ſold; court ſaying they never did it in debt. Str. 890.

In debt on bond with a penalty, defendant may bring into court the principal, intereſt, and coſts due on ſuch bond, which ſhall be deemed a ſatisfaction, and the court may give judgment. 4 & 5 Ann. c. 16. ſ. 13. Debt on bonds.

Before this ſtatute defendant was obliged to bring in the whole *penalty*. Salk. 597.

This ſtatute does not extend to bonds conditioned for good behaviour, nor for performance of covenants; ſo that to ſuch bonds money cannot be brought in. *Wright* v. *Bennington*, Bar. 286. Bonds for performance of covenants.

Condition of a bond was to pay 40 *l.* by 5 *l. per annum*, and defendant had leave on the ſtatute of Anne to bring the arrears of 5 *l. per annum* into court. Str. 814. though in Str. 515. not long before it was denied. Annuity bonds.

Condition of a bond was to pay money by inſtalments, and the court gave leave for defendant to bring the money due by that inſtalment into court; but not to ſtay plaintiff from ſigning his judgment for the penalty incurred by non-payment of the inſtalment. But although plaintiff in ſuch caſe may ſign judgment for the penalty, the court will not let him take out execution until the payments become due. *Darby* v. *Wilkins*, Str. 957. But in C. B. on a bond to ſecure an annuity by inſtalments, a rule was made abſolute to ſtay proceedings on payment of the 3 *l.* the only inſtalment due, and coſts. Bar. 288. To pay money by inſtalments.

The ſtatute of the 4 & 5 Anne, which enables defendants to pay money into court on bonds, ought to have a moſt liberal conſtruction; and the courts of law and equity ought to exerciſe their own authority to extend the ſpirit and reaſon of it. It meant, that in caſes of penalties by way of ſecurity, the clear final juſtice of the caſe ſhould be attained in the courts of law. *Bonafous* v. *Rybot*, 3 Burr. 1373, 1374.

The juſt intent of a bond is to ſecure principal, intereſt, and coſts by a penalty, and ſuffer the debtor at any time to ſave the forfeiture by performing the intent. *Ibid.*

Bonds conditioned for payment of money by inſtalments are within this act. *Ibid.*

But if a bond is conditioned for payment of a groſs ſum at a certain fixed day, and by a ſubſequent agreement the debtor

debtor is allowed to pay it by inſtalments, provided that he pay it punctually, otherwiſe the agreement and defeaſance to be void; if the debtor does not pay it punctually they are void, and the groſs ſum is due to the obligee. Burr. 1374.

And unleſs the debtor pays the whole money, he cannot be relieved from the penalty. *Ibid.*

In debt on bond, with condition to account for money to be received, the court will not ſtay prooeedings upon paying the penalty into court, becauſe damages may be recovered beyond that amount; for the penalty of a bond is not the limitation of damages to be aſſeſſed by a jury. *Lord Lonſdale* v. *Church*, 2 D. & E. 388.

In debt on bond for 2400*l.* proclamation money of North Carolina, averring that it was of a certain value, court would not permit defendant to pay the 2400*l.* proclamation money into court. *Cuming* v. *Monro*, 5 D. & E. 67.

The acceptance of intereſt up beyond the time of the unpaid inſtalment is no waiver; for the obligee was entitled to receive it as part of the original debt ſecured by the bond. Burr. 1375.

Baſtardy bond. The whole penalty of a baſtardy bond may be brought into court. *Brangwin* v. *Perrot*, 2 Blac. Rep. 1190.

Debt on judgment. Original defendant obtained judgment of *non pros*, and then brought debt on that judgment for the coſts, in which he had judgment by default, and afterwards brought another action of debt on this laſt judgment, and thereon alſo ſigned judgment; which laſt judgment the original plaintiff moved to ſet aſide on bringing into court the debt and coſts of the ſecond judgment. On ſhewing cauſe againſt this rule, the court thought that he himſelf had given the firſt provocation, and had been guilty of the firſt laches, and therefore diſcharged the rule, but without coſts, directing execution to ſtay, as the money on the former judgment was paid into court, in order to diſcountenance ſuch oppreſſive proceedings. *Simpſon* v. *Stone*, 2 Blac. Rep. 785.

Action for dilapidations. In an action for dilapidation, the court refuſed to let defendant bring money into court, and ſaid it was like treſpaſs, where you cannot do it, though you may tender amends. *Squire* v. *Archer*, Str. 906.

Ejectment. In ejectment for non-payment of rent, the tenant or aſſignee may pay into court all the rent in arrear and coſts, and proceedings ſhall ceaſe. 4 G. 2. c. 28.

But before this ſtatute it was allowed by the court. Salk. 597. And the reaſon given was, becauſe the action of ejectment ſubſiſts entirely upon the rules of the court.

After

After judgment againſt caſual ejector, and before any writ of poſſeſſion executed, the court made a rule to ſtay proceedings on payment of all rents and coſts. Str. 900. *Goodtitle* v. *Holdfaſt.*

In ejectment by mortgagee, the mortgagor may bring the principal, intereſt, and coſts into court, and the court will make a rule to ſtay proceedings. Str. 413.

Proceedings on a mortgage may be ſtayed by paying mortgage-money, intereſt, and coſts, without payment of a bond. Str. 1107. *Archer* v. *Snatt.*

In replevin and avowry for rent, defendant allowed to pay it into court. Salk. 597. Replevin.

The plaintiff in replevin may pay the rent into court, for which the defendant avows. *Vernon* v. *Wynne*, 1 H. Bl. 24.

Where Serjeant Kerby ſaid, he remembered in an action of treſpaſs where the defendant had juſtified for non-payment of rent, plaintiff was permitted to pay the rent into court.

In actions on penal ſtatutes, the court on motion will give leave to pay the penalty into court with coſts. *Walker* v. *King*, Tr. 31 G. 2. & Str. 1217. *Stock* v. *Eagle*, 2 Black. 1052. Statutes penal.

If the court ſee reaſon to ſuſpect that a *qui tam* action is proſecuted merely for the iſſue money, they will on motion permit it to be paid into court, to abide the event of the ſuit. *Parker qui tam* v. *Macfarlan*, 3 D. & E. 137.

In treſpaſs, money cannot be brought into court, though amends may be tendered. Str. 906. Treſpaſs.

In an action of treſpaſs of *meſne profits*, money cannot be paid into court. *Holdfaſt* v. *Morris*, 2 Wil. 115.

In an action of treſpaſs, aſſault, and falſe impriſonment, againſt a juſtice, he may, if he has omitted to tender amends, bring money into court, purſuant to 24 G. 2.; but then it muſt appear, by the production of the previous notice to be given in ſuch caſe, and an affidavit or the like, that the action is in fact brought againſt him *as a juſtice*, for ſome miſbehaviour in his office. *Caſbourn* v. *Ball*, Blac. 859.

But even in treſpaſs there may be certain circumſtances which may induce the court to ſtay proceedings upon the defendant's reſtoring the goods ſeized, or paying the full value of them with coſts. *Pickering* v. *Truſte*, 7 D. & E. 53.

In *trover* for money, the court will give leave to bring the money declared for into court. Str. 142. Trover.

But

But trover being an action for damages, you cannot oblige the plaintiff to accept the thing itself; therefore the goods and costs cannot be brought and paid into court. *Olivant* v. *Berino*, 1 Wil. 23.

Str. 822. 1191. Goods refused to be brought in in trover;—

Note brought in.

But a note was brought in, and the court held it reasonable that goods as well as money should be so. *Tuney* v. *Clark*, Cas. of Pr. C. B. 59.

How if goods are cumbersome.

If the goods be cumbersome, though they cannot be brought into court, court will make a rule for plaintiff to shew cause why he should not accept them. *Cook* v. *Holgate*, Cas. of Pr. C. B. 130. P. R. 260.

Leave given to bring a book into court, but this was only granted on the particular circumstances of the case. For in the case of *Harding* v. *Wilkin*, court refused to grant a rule *nisi*, on motion to bring a gold watch and diamond ring into court in trover. *Harding* v. *Wilkin*, Say. 120. *Catling* v. *Bowling*, Say. 80.

General rule as to bringing goods into court in trover.

There are several contradictory cases in the books on this point; but the better opinion seems to be, that in certain cases, goods in trover may be brought into court; but it must depend on the circumstances of the case; which will be better explained by the following case, where it was held by Lord Mansfield:—"That where trover is brought for "a specific chattel of an ascertained quantity and quality, "and unattended with any circumstances that can enhance "the damages above the real value, but that its real and "ascertained value must be the sole measure of the da- "mages; there the specific thing demanded may be brought "into court: (and Mr. Justice Wilmot said, This was the "more reasonable, as this action of trover comes in the "place of the old action of detinue:) but where there is "an uncertainty either as to the quantity or quality of the "thing demanded, or that there is any tort accompanying "it that may enhance the damages above the real value of "the thing, and there is no rule whereby to estimate the "additional value, there it shall not be brought in." It is a pity, said Lord Mansfield, that a false conceit should in judicature be repeated as an argument, "The court does "not keep a warehouse." What then? What has a warehouse to do with ordering the thing to be delivered to the plaintiff? Money paid into court is payment to the plaintiff. The reason and spirit of cases make law; not the letter of particular precedents. In trover for money numbered, or in a bag, the court have ordered it to be brought in; yet the

S. P. in C. B. *Whitten* v. *Fuller*, Blac. 902.

the jury may give more in damages, they may allow intereſt (and in ſome caſes they ought).

" The reaſon holds to every other caſe, where a thing clearly remains of the ſame value; yet the jury may give damages for the detention."

" I remember its being done twice or thrice in things of ſmall value. It ought to be done to prevent vexatious litigation, which a plaintiff may be tempted to purſue, when in all events he is ſure of coſts. It ought to be done, becauſe it is the ſpecific relief."

" It ought to be done, becauſe at the trial, when the thing remains in the ſame condition, there generally is a rule " to deliver it."

" An eſtimated value is a precarious meaſure of juſtice, compared with the ſpecific thing."

" I am aware of the caſes where a laced head, a gold watch, a diamond ring, and Chineſe pictures, were refuſed to be brought in."

" But as I think " ſuch motions ought neither to be " refuſed nor granted of courſe." They muſt depend upon their own circumſtances. No injury is done the plaintiff, if the court ſhould think " he ought not to pro- " ceed for damages beyond the ſpecific thing," becauſe he may ſtill proceed for more at the peril of coſts, and ſo he ought."

But in this particular caſe, the goods were altered and their value changed; and therefore the rule refuſed. *Fiſher* v. *Price*, Bur. 1364.

General rule as to paying money into court. In what actions.

The general rule is, as the caſes above cited demonſtrate, that money can only be paid into court in actions where the damages are liquidated; ſo that even were defendant to get a judge's order for payment of money into court, where the demand was for unliquidated damages, ſuch payment would be irregular.

If paid improperly, how irregularity cured.

But if the plaintiff take the money out of court, he thereby waives the irregularity; and ſhould he proceed in the action, he cannot afterwards have a verdict, unleſs he recover more than the ſum paid in. *Griffiths* v. *Williams*, 1 D. & E. 710.

Where the plaintiff makes that kind of demand which is ſubſtantially for a ſpecific ſum of money, the defendant may pay money into court. But in torts, where it is a mere queſtion of damages, a chance, as in ſuch caſes defendant was originally in the wrong, he muſt take the event of that chance.

How a carrier may pay money into court.

Where a carrier has given notice in printed terms, that he will not be anſwerable for goods above the value of a certain

certain ſpecified ſum, unleſs paid in proportion, in an action brought againſt him for the loſs of goods above that value, (but for which he has not been paid an extraordinary price,) he may pay into court the ſum ſpecified. *Hutton* v. *Bolton.* 1 H. Bl. 299. *a.*

Muſt not bring money on ſome counts, and demur to reſt.

The court will not give defendant liberty to bring money into court on ſome of the counts in the declaration, and demur to the reſt. For the reaſon of making the rule to bring money into court is to prevent vexation, and make an end of the cauſe. *James* v. *Hoſey*, Pr. R. C. P. 256. Caſ. of Pr. C. B. 48.

But it may be brought in on ſome, and iſſue taken on others.

But money may be paid in on ſome of the counts, or on ſome of the breaches aſſigned, and plaintiff may accept the ſame, and proceed, if he thinks proper, on the other counts or breaches.

As in covenant on charter-party, where ſeveral breaches were aſſigned, money was paid in on two for freight and demurrage. *Hallet* v. *E. I. Company*, Burr. 1120. *Baillie* v. *Cazelet*, 4 D. & E. 579.

So two breaches were aſſigned in covenant amongſt others: 1*ſt*, For non-payment of rent: 2*dly*, For 5 *l.* an acre advanced rent for ploughing meadow ground; and the court allowed money to be paid into court on theſe breaches, but not generally. *Fulwell* v. *Hall*, 2 Blac. R. 837.

What defendant muſt plead.

Formerly when a rule was obtained to bring money into court, defendant muſt have pleaded the general iſſue, and could not plead double. *Buckley* v. *Warren*, P. R. 317.

Sometimes double pleas allowed.

But this ſtrictneſs has been ſince diſpenſed with. And in C. B. the court gave an adminiſtratrix leave to bring 5 *l.* 5 *s.* into court on the common rule with reſpect to the 7th and 8th counts, (there being nine,) and as to the reſt to plead the general iſſue, ſtatute of limitations, and ſet-off. *Hellier* v. *Hallet*, Bar. 286.

So leave was given to plead bankruptcy to one count, bring money into court on the common rule, and plead the general iſſue to the other counts. *Hall* v. *Lane*, Bar. 350.

So leave was granted to bring money into court on the common rule, and plead *plene adminiſtravit*, and the general iſſue to the whole. *Auſtin* v. *Roſs*, Bar. 287.

How, if ſeveral defendants.

Where there are ſeveral defendants, money cannot be paid into court by one only. By Gould, Blackſtone, and De Grey, Nares cont. *Kay* v. *Panchiman* and others, Blac. 1030.

Where one defendant ſuffers judgment by default, and a ſecond is outlawed, the third ſhall not bring money into court. *Ibid.*

(D) Of

(D) Of the Consequence of paying Money into Court, and of the Costs to which Plaintiff is entitled. (D)

To defendant.

Payment of money into court is an acknowledgment of being liable to the action. Burr. 2640. *Burrow* v. *Skinner.*

And in *Jenkins* v. *Tucker*, 1 H. Bl. 93. where there was a demurrer to evidence, Lord Loughborough said, this demurrer to evidence strikes me as being extremely absurd, since by payment of money into court, the defendant admits a cause of action, so that where money is paid into court there can be no such thing as a nonsuit.

An acknowledgment of the action.

Payment of money into court is only an acknowledgment by the defendant, that the plaintiff has a right to maintain the action, and is entitled to recover so much as the sum paid. But it does not preclude defendant from taking any objection to the action beyond that sum, although such objection, had not the money been paid in, would have been a bar to plaintiff's suit. *Cox* and another executors, &c. v. *Parry*, 1 D. & E. 464.

If plaintiff declares in *indebitatus assumpsit* on an agreement, and defendant pays money into court, he admits the agreement; that is, if the declaration is on the agreement only. But if there are other counts, as money had and received, or the like, he may pay money into court on one of those counts, and then he will not admit the validity or extent of the agreement.

Whether defendant can in any cases, and when, have money back again.

Defendant had brought money into court on the common rule; plaintiff would not accept the same, but proceeded to trial, and was nonsuited. Upon which defendant moved in the treasury, (in C. P.) that in regard as plaintiff was out of court by the nonsuit, he might have the money back, and produced the *postea*. But the judges held, that defendant, by having paid money into court, had admitted that plaintiff was entitled at all events, and therefore defendant could not have the money again. Afterwards plaintiff brought a new action, and the court made a rule that plaintiff might have the money brought in if he thought fit; but if not, that the money brought in should remain to the new action. *Lane* v. *Wilkinson*, Pr. Reg. 250. Rep. & Cases of Pract. C. P. 36. Str. 1027. *Cox* v. *Robinson.*

The like resolution in a similar case as above, and leave given for defendant to bring more money in upon the new action. *Dickins* v. *Tallowin*, Prac. Reg. 252.

Money was paid into court; plaintiff proceeded, and recovered a less sum; whereupon defendant moved, that he might

might have the money out of court towards his coſts, and it was granted. *Anon.* Bar. 280. *Rathbone* v. *Stedman*, Caſ. of Pr. C. B. 54. 117.

How, if plaintiff dies;

Money was paid into court, and before trial plaintiff died, whereupon defendant moved to have the money paid back; but the court was of opinion it ought not to be paid back. The courts have not yet gone ſo far as to order payment in ſuch caſe to the plaintiff's executor, but it ſeems reaſonable ſo to do, if the executor is willing to accept it; and after trial, it is plain, the executor is entitled to the money paid in, though a ſmaller ſum is recovered. Had plaintiff lived, and refuſed to accept the ſum paid in, and had gone to trial and been nonſuited, yet the defendant could not have had the money back out of court, plaintiff being entitled thereto at all events. *Crockay* v. *Martin*, Bar. 281. Caſ. of Pr. C. B. 129. P. R. 255.

or defendant;

So if defendant dies, court will not return money to his executors. *Knapton* v. *Drew*, Bar. 279.

or judgment arreſted;

Judgment was arreſted, and conſequently no coſts on either ſide. But the court ordered the money brought into court to be paid to the plaintiff. *Fiſher* v. *Kitchingman*, Bar. 284.

or money paid by miſtake.

Money, if paid into court, though by miſtake, is ſo far in the cuſtody of the law, that it cannot be got out in any way. It is the only exception where an action for money had and received will not lie for money paid by miſtake. *Malcolm* v. *Fullarton*, 2 D. & E. 645.

How, in caſes of executors or adminiſtrators, plaintiff or defendant.

To an action by an executor or adminiſtrator, the courts formerly would not allow defendant to pay money into court, becauſe the executor or adminiſtrator is not liable to coſts, as appears by Salk. 596. But in the caſe of *Crutchfield* v. *Scott*, Str. 796. it was held it might be done, and that the effect of it would be, not to make the executor pay, but only loſe his ſubſequent coſts.

If verdict for leſs ſum, or a nonſuit.

The general rule in all caſes is, that if the plaintiff chooſe to accept the money when it is paid into court, or even before trial, the court will give him his coſts up to the time of the defendant's paying money into court; but if he will, notwithſtanding, proceed to trial, and fail, he loſes all claim to thoſe coſts. *Kabell* v. *Hudſon*, 4 T. R. 21. *Stevenſon* & *York*, Ibid. 10.

Conſequence to plaintiff if he proceeds for further damages

If defendant pays money into court on an action properly commenced by executor or adminiſtrator, and the executor or adminiſtrator proceeds afterwards, he does it at his peril as to coſts. 3 Salk. 105.

As to coſts, if he diſcontinues.

If plaintiff proceeds in the action after he has taken the money brought in out of court, and then diſcontinues, he ſhall

ſhall not have his coſts even up to the time of bringing the money into court. *Berwick* v. *Symonds*, Say. 196.

But it is now held otherwiſe; and where money has been paid into court, and plaintiff proceeds afterwards in the ſuit, and then diſcontinues, he is intitled to all his coſts to the time of the money being ſo paid; but is liable to pay defendant his coſts from that time to the time of diſcontinuance. See the rule obtained for that purpoſe. *Hartley* and others v. *Bateſon* and others, 1 D. & E. 629. 711. Bar. 280. P. R. 255.

In what form notice to be.

The mode is, to move why the maſter ſhould not be directed to tax the coſts of the plaintiff to the time of paying the money into court, and the defendant's coſts from that time to the time of countermanding notice of trial, (i. e. the time of diſcontinuance, whenever it may be,) and why the defendant ſhould not pay the balance to plaintiff. Upon which a rule *niſi* will be granted. *Hartley* and others v. *Bateſon*, 1 D. & E. 629.

If proceeds to trial, and juror withdrawn.

If the defendant pay money into court, and the plaintiff proceed to trial when a juror is withdrawn, the plaintiff is not intitled to the coſts up to the time of paying money into court. For *per* Cur. whenever a juror is withdrawn, each party muſt pay his own coſts. And *per* Buller J. the form of the rule decides this queſtion; for it was part of the rule, that if the plaintiff would not accept of the money brought into court, with the coſts, &c. the ſaid money ſhould be ſtruck out of the declaration: then if it be ſtruck out, that is not conſidered as part of the declaration. *Stodhart* v. *Johnſon*, 3 D. & E. 657.

If verdict for exact ſum paid in.

In the caſe of *Griffiths* v. *Williams*, 1 T. R. 712. After verdict, which was for plaintiff, but only for the exact ſum defendant had paid into court, it was moved that the verdict ſhould be ſet aſide, and entered for defendant. The court made the rule abſolute, directing, that the plaintiff ſhould have coſts to the time of the money being paid into court, and that he ſhould pay the defendant the ſubſequent coſts.

But ſince this deciſion has been impeached, and in the caſe of *Stevenſon* and *Yorke*, 4 T. R. 10. where, after verdict for defendant, who had paid money into court, it was moved on the above authority, that plaintiff ſhould have his coſts up to the time of paying the money into court; it was denied, and *per* Buller; though the plaintiff was intitled to the coſts up to that time, if the application had been made before trial; yet the party came too late after trial. And that part of the caſe of *Griffiths* and *Williams* cannot be ſupported. *Kabell* v. *Hudſon*, 4 D. & E. 10.

Upon this principle, where in twelve actions on policies of inſurance againſt ſeveral defendants, they paid money

into court on each of them, but no costs were taxed by plaintiff, who afterwards entered into consolidation rule to be bound by such verdict in all as should be found in the first action, in which action he was nonsuited: it was held that he was not intitled to costs in any of the actions, not even up to the time of paying the money into court. *Burstall* v. *Horner*, 7 D. & E. 372.

If nonsuited.

If plaintiff suffers a nonsuit after payment of money into court, he is still intitled to the money paid in. Sal. 597. Cas. of Pr. C. B. 36.

Where money was paid into court to attend the event of the verdict, and plaintiff was nonsuited, it was paid back to defendant, and could not be retained in court. Subject to a new verdict. P. R. 253. *Frampton* v. *Cooke*.

But Q. Can plaintiff in such case be nonsuited? See *Jenkins* v. *Tucker*, 1 H. B. C. 93.

Exception as to executors defendants.

It is otherwise with executors and administrators; for if plaintiff be nonsuited, after they had paid money into court, it shall be returned to them, because they may be unacquainted with the assets of testor, and not know whether he owed plaintiff the money or not. Anon. Cas. of Pr. in C. B. 5.

Taking money out of court, a waiver of irregularity.

If the plaintiff takes the money out of court, he waives every irregularity on part of defendant in paying in the same. As if it be paid in after plea pleaded, or in an action purely sounding in damages, in which properly no money can be paid into court. And if upon trial, he does not recover greater damages than the sum so paid in and received, he will be nonsuited. *Griffiths* v. *Williams*, 1 D. & E. 710.

Ordinary costs of paying in and taking out, paid by defendant.

Except in cases of oppressive action.

Costs of paying money into court, and taking it out, must be paid by defendant, though the money was tendered after rule obtained to pay it in, and refused by plaintiff before it was paid in. *Cotton* v. *Perks*, P. R. 258.

Where an action is kept on foot by plaintiff in an oppressive manner, and defendant has been willing to pay the debt, and has taken out summons before a judge for that purpose, and the plaintiff has refused to accept the same, the court will suffer defendant to pay the money into court, and discharge him from the payment of costs. *Johnson* v. *Houlditch*, Bur. 578. And though defendant may have paid the money into court on the usual rule, which is on payment of costs, he may afterwards move for so much of that rule to be discharged as relates to the costs, which will be granted. *Ibid.*

Costs only allowed of the counts money paid in upon.

If a defendant pay money into court upon some of the counts only, and the plaintiff take it out, plaintiff is only intitled

intitled to the costs of those counts. For by such partial payment of money into court, defendant admits that plaintiff has a cause of action against him to a certain extent; but that he means to defend himself against the charges contained in the other counts. And the plaintiff, by taking the money out of court, precludes himself from all right to the costs upon the other counts. *Baillie* v. *Cazalet*, 4 D. & E. 579.

(E) Of bringing a farther Sum into Court. (E)

Whether defendant can afterwards pay more money in.

If defendant has paid a sum into court, they will not afterwards give him leave to pay more money into court, if issue is joined. *Swan* v. *Freeman*, Bar. 282.

Nor if plea be pleaded, S. C. Pr. R. 263. Because it may introduce tricks to try whether plaintiff will accept less than is due.

But Q. Whether it would not be allowed on payment of costs?

Where plaintiff would not accept the money brought in and was nonsuited, and afterwards brought a new action, defendant was allowed to bring in a further sum, which, together with the former, was ordered to remain in court upon the common rule on the new cause. *Dickins* v. *Tallowin*, P. R. 252.

(F) Of Defendant's refusing to pay Costs, and how Plaintiff is to proceed. (F)

How if defendant does not pay costs, when plaintiff accepted money.

If plaintiff accepts the money, and does not proceed for further damages, his attorney gets an office-copy of the rule, and obtains an appointment of the master or prothonotary, to tax the costs on the copy of the rule, and serves defendant's attorney therewith; and if, after taxation, defendant does not pay the costs, plaintiff proceeds to deliver his issue and notice of trial, as if no money had been paid in. And one shilling damages carries costs, on producing the office-copy of rule and the *allocatur*.

Plaintiff must proceed as above; for he cannot, under the rule, move for an attachment. *Scarral* v. *Horton*, P. R. 259. *Hand* v. *Dinally*, Str. 1220.

Formerly the practice was for defendant's attorney to get costs taxed, and tender plaintiff the amount; but as this was often rendered useless by plaintiff's afterwards refusing to accept the money paid in, or going for a still greater sum, a new rule of court was made, ordering plaintiff to tax

coſts as above; and in default thereof, it be conſidered that plaintiff intends to proceed in the action, to recover a larger ſum than that paid into court.

In *aſſumpſit*, the defendant brought 8*l.* into court, on the uſual terms of paying coſts to that time. The plaintiff took it out and taxed his coſts, and ſerved the defendant's attorney, and they not being paid, went on to trial, and obtained a verdict for 7*l.* 18*s.* The defendant inſiſted that he ſhould have no coſts for his ſubſequent proceedings, ſince it appeared that he was overpaid. But the court held, that as to the coſts, it was to be conſidered as if no motion had been made, the defendant not having fulfilled the terms of her own rule, in which caſe it is not uſual to grant an attachment; but the plaintiff goes on, it being only a conditional rule. They ſaid, they would make him allow upon the execution for the 8*l.* he had taken out of court, and ordered him the *poſtea*, in order to tax his whole coſts. *Hand* v. *Lady Dinely*, Str. 1220.

But proceedings of plaintiff will be ſtopt, upon the after-payment of all coſts by defendant. *Bond* v. *Jope*, Caſ. of Pr. C. B. 93.

Section VI.

Of pleading in Bar.

(A) Of the Time of pleading.
(B) Of pleading the General Iſſue.
(C) Of pleading Specially.
(D) Of pleading Double.

(A)

(A) Of the Time of pleading.

The time of pleading.

In B. R.

Upon all proceſs returnable before the laſt return of any term, if the action be unbailable, or if bailable, and not laid in London or Middleſex, or defendant does not live within twenty miles from London, he muſt plead to the declaration in eight days after delivery or filing thereof. But if the action be bailable, and laid in London or Middleſex, and defendant lives within twenty miles of London, then in four days, provided

In C. B.

Upon all proceſs returnable the 1ſt, 2d, or 3d return of any term, if the plaintiff declares in London or Middleſex, and defendant lives within twenty miles of London, defendant ſhall plead within four days after ſuch declaration delivered, with notice to plead accordingly without any imparlance. And in caſe plaintiff declares in any other county, or defendant lives above twenty miles from London, in eight days. R. Trin. 8 G. 3.

Provided

provided the declaration be delivered or filed, and notice thereof given four days exclusive before the end of the term, and a rule to plead be duly entered. R. T. 22 G. 3.

Provided such declaration be delivered four days exclusive before the end of the term.

This rule is now made to extend to the fourth return in Easter term. R. H. 35 G. 3.

And now by R. H. 35 G. 3. in C. B. Upon all process returnable the *last* return of any term, the same time for pleading is allowed as above, according as the venue and defendant's residence is, provided such declaration be filed or delivered on the day of such return, or on the day next after the same, unless such return day shall happen on a Saturday; in which case, plaintiff shall have the whole of the Monday following to file or deliver such declaration as aforesaid.

If process be returnable on or after the last return, defendant is intitled to an imparlance, of which *vide ante*, Sec. 3. tit. Imparlance.

The above rule of court, it seems, extends only to persons residing in *England*; so that where defendant, whose usual residence was in *Scotland*, was arrested while casually in *London*, it was held, that four days time to plead was sufficient; for that his residence should be deemed in *London*, where he was arrested. *Kutiff* v. *Gascoyne*, 4 D. & E. 553. *n.*

How the days are reckoned.

In K. B. the four or eight days allowed for pleading are one inclusive, and the other exclusive; but in C. B. both are inclusive. So that, in that court, if a rule to plead be given the 7th, it is out the 10th, and judgment may be signed the 11th, if demand of plea made in time.

How if two defendants, and one does not appear in time.

If the writ be against two defendants, and both are served before the return of the writ, and one of them do not appear in the same term, he must plead as of the term when he ought to have appeared. *Smith* v. *Muller*, 3 D. & E. 627.

No plea till bail perfected.

But a plea must not be filed (if it be a bailable action) before bail be perfected, as it will be a nullity; and although bail justify afterwards, it does not become a good plea, but plaintiff may sign judgment for want of a plea. *Venn* v. *Calvert*, 4 D. & E. 578.

(B) Of pleading the General Issue. (B)

Of the general issue.

Pleas in bar are of two sorts, general and special. The general is a direct negation of the charge in the declaration, and is called the general issue, the form of which must be according

according to the nature of the action, as *non assumpsit*, *nil debet*, not guilty, &c.

How general issue to be pleaded.

In B. R.	*In C. B.*
Engross it on treble penny stampt paper, and either deliver it to plaintiff's attorney or agent, or enter it in the general issue book, with the clerk of the judgments. Pay 6d.	*Engross it on treble penny stampt paper, and either deliver it to plaintiff's attorney, or file it with prothonotary. Pay filing,* 2s.

Need not be signed.

No general issue need have a counsel's or serjeant's signature to it; nor need any of the following pleas, which are tantamount to it.

Nor some other pleas.

Comperuit ad diem; nul tiel record; solvit ad diem; payment of rent; bankruptcy. 6 D. & E. 496.

And it is said that in K. B. the following need not be signed: *Son assault; plene administravit; riens per descent, per minas, per dures; ne unques* executor or administrator; *infra ætatem.* But Q. and in C. B. it seems, they must be signed. Imp. C. B. 300.

But although the above pleas need not be signed, and some of them may be tantamount to the general issue, yet they must not be entered in the general issue book, nor yet filed with the clerk of the papers, but must be delivered to the plaintiff's attorney; otherwise they will be deemed as no plea, and judgment may be signed. *Lockhart* v. *Macreth*, 5 D. & E. 663.

The distinction I take to be this: All *general issues*, strictly such, must be entered in the general issue book; all *special pleas*, which are such as require signature, must be filed with the clerk of the papers; but all such pleas as are not general issues, but only tantamount thereto, and which require no signature, should be delivered to plaintiff's attorney. Formerly a book was kept to enter such pleas, and it was called entering them on the book side; but that being discontinued, and clerk of papers being only in strictness authorized to take pleas that are signed, (R. E. 18 Car. 2.) they are delivered to the attorney who makes up the issue.

But if a special replication, signed by counsel, be put into such plea, it should be filed with the clerk of the papers, who is to make up the paper book, on a copy of the plea and declaration being delivered to him.

(C)

(C) Of pleading Specially.

Of pleading specially.

When defendant pleads specially, let the plea be signed by a counsel or serjeant.

In

In B. R.

Engroſs the plea on treble penny ſtampt paper, and file it with the clerk of the papers.

No attorney is to deliver or receive any ſpecial plea to be put into the office of the clerk of the papers, or a copy of ſuch plea, before that the ſame has been put in, and a copy thereof made by the clerk of the papers. M. 2. W. & M.

In C. B.

It may, when engroſſed on treble penny ſtampt paper, either be delivered to plaintiff's attorney, (which is the uſual way,) or filed with the prothonotary, and then plaintiff's attorney muſt take it out of the office.

How ſpecial plea to be pleaded.

All ſpecial pleas muſt have a counſel or ſerjeant's hand, except thoſe mentioned *ante* (B); and which are deemed tantamount to the general iſſue. Muſt be ſigned.

So that *non aſſumpſit infra ſex annos* muſt. Co. Rep. 41.

Or a general performance of covenants, Bar. 354. *Thompſon* v. *Atkinſon.*

If a plea which ought to be ſigned by a counſel or ſerjeant's hand, is not ſigned, plaintiff may ſign judgment; but if there be two defendants, and one pleads the general iſſue, and the other pleads ſpecially, and both are on the ſame paper, though the ſpecial plea is not ſigned, plaintiff cannot reject the general iſſue, and take judgment againſt both. If he does, the judgment is totally erroneous; and if execution be ſued, reſtitution ſhall be awarded; but then plaintiff may in ſuch caſe regularly take judgment againſt him who pleaded ſpecially. 2 Lil. Reg. 299. Otherwiſe judgment. How if two defendants plead differently.

In the King's Bench, the clerk of the papers, with whom all ſpecial pleadings are left, makes out copies thereof, ſigned with his name; and to whom the plaintiff's attorney muſt apply for a copy, in order to draw his replication thereto, unleſs the replication be of courſe, and conſiſts in a mere denial of the plea, without alleging any new matter therein, as *nul tiel* record to a plea of judgment recovered; in which caſes, the clerk of the papers draws up the replication, and delivers the paper-book to the plaintiff's attorney, with a complete iſſue. Special plea muſt be made up by clerk of papers, &c.

But if the replication is to be ſpecial, containing any new matter which muſt be ſigned by counſel, the plaintiff's attorney takes the copy of the plea away with him, paying the clerk for it, in order to get the replication drawn, which being done, ſigned by counſel, and engroſſed, is carried and filed with the clerk of the papers; and if further pleadings be had in the cauſe, the parties alternately take copies thereof from his office, and file their anſwer thereto until iſſue is joined between them.

Conſequeace otherwiſe.

Defendant, by leave of the court, pleaded *non aſſumpſit* and the ſtatute of limitations, and delivered it to the plaintiff's attorney, who made up the iſſue, and delivered it with notice of trial to the defendant's attorney, who paid for it; the plaintiff's attorney, finding afterwards it ſhould have been made up with the clerk of the papers, went and paid him his fees, made up the record, and went to trial, and the court refuſed to ſet it aſide, though the defendant made no defence; for *per* Cur. he was in the firſt fault, in not leaving the pleas in the office. *Thomſon* v. *Tiller*, Str. 1266.

(D)

(D) Of pleading Double.

Of pleading double.

In caſe defendant pleads ſeveral matters, a rule for that purpoſe muſt be drawn up and ſerved on plaintiff's attorney when the bill is filed.

Of the manner and time of pleading double.

In B. R.

This is done by giving a brief to counſel, naming your pleas, which he ſigns of courſe. Pay 10s. 6d. *Then carry it to the clerk of the rules with your plea, who will draw it up. Serve it on plaintiff's attorney.*

In C. B.

In certain caſes the rule is here obtained with as little trouble as in K. B. by giving a brief to a ſerjeant, with 10s. 6d. *naming the pleas therein. Then draw up rule with ſecondary, and ſerving copy on plaintiff's attorney.*

If no ſuch rule to plead double be taken out and ſigned, plaintiff may, notwithſtanding a double plea be delivered or filed, ſign judgment. Hil. T. 1794.

In C. B.

But there are many double pleas in C. B. not allowed upon the firſt motion; but on which a rule niſi *is only granted, and then moved again, to be made abſolute.*

In which caſes give brief to ſerjeants, to move to plead the ſeveral matters therein mentioned; upon which a rule niſi *is granted, and copy whereof is made out by the ſecondary. Serve it upon the plaintiff's attorney, and ſhew him the original rule. When cauſe is to be ſhewn give brief to ſerjeant, (having annexed an affidavit of the ſervice of the rule, and that at the ſame time the original rule was ſhewn him,) to make the rule abſolute. The plea is then ſigned by a ſerjeant, and delivered with the rule annexed. For the firſt motion pay half a guinea; to make it abſolute, one guinea; and to ſign plea half a guinea. At the ſame time it is generally moved for a day or two's time to plead, which is mentioned in the rule, otherwiſe the time, perhaps, might expire, and judgment be ſigned.*

What double pleas allowed in C. B. on firſt motion.

The double pleas allowed upon the firſt motion in C. B. are *non aſſumpſit* and *non aſſumpſit infra ſex annos*, Bar. 339; *non aſſumpſit* and a diſcharge under the inſolvent debtors' act, *ibid.* 343. In treſpaſs *non cul.* and *liberum tenementum alterius*,

alterius, ibid. 336. 340. 351. 356.; *ſolvit ad diem* and a mutual debt, *ibid.* 340.; *non aſſumpſit* to the whole, and a tender, 360.; damage feaſant, and under a demiſe to the plaintiff, Bar. 339.; damage feaſant, and for rent in arrear, *ibid.* 340.; *non aſſumpſit*, a ſet off, and a tender, as of the laſt term, *ibid.* 353. 357. 360. 366.; *non cepit*, cattle the property of another perſon, not of plaintiff, and *liberum tenementum*, ibid. 362.; *non aſſumpſit* and *plene adminiſtravit* generally, *ibid.* 348.; *plene adminiſtravit* and a ſet off, *ibid.* 347.; *ne unques executor* and *plene adminiſtravit*, ibid. 355. 365.; *non eſt factum* and *ne unques executor*, ibid. 352.; *non eſt factum* and dureſs, *ibid.* 359.; not guilty, and a general releaſe, *ibid.* 347, 348.; not guilty, and four guineas paid in ſatisfaction of all treſpaſſes to ſuch a time, *ibid.* 349.; not guilty, *ſon* aſſault, and ſatisfaction for all treſpaſſes, *ibid.* 352.; not guilty, *ſon* aſſault, and *moliter manus impoſuit*, ibid. 351, 352. 354.; not guilty, and a juſtification in treſpaſs, *ibid.* 355, 356. 365.; *non cepit* and to avow the taking, *ibid.* 365.; not guilty to the whole, and a tender of amends, *ibid.* 366. Imp. C. B. 4th edit. 301.

How, If in vacation in both courts.

If in vacation you apply for this rule in either court, get a judge's ſummons for leave to plead ſeveral matters, (naming the pleas,) who will grant an order thereon on producing a counſel or ſerjeant's hand to a brief for that purpoſe; take the judge's order to the clerk of the rules in K. B. or ſecondary in C. B. who will give you an order: either annex a copy thereof for plaintiff's attorney to the plea or ſerve him with it.

Muſt be ſigned.

All double pleas muſt be ſigned by a counſel or ſerjeant.

When motion may be made.

Motion for leave to plead double cannot be made till defendant has appeared. Bar. 331. *Benn* v. *Geary.*

After judge's order.

The courts will grant leave to plead double, pleading iſſuably and taking ſhort notice of trial after a judge's order for time to plead given. Bar. 338. *Leighton* v. *Leighton.*

After paying money into court.

After payment of money into court, defendant obtained a rule to plead double, which was ſet aſide with coſts. Plaintiff, by the rule to pay money into court, is confined to the general iſſue, and no other plea. The motion afterwards to plead double is an impoſition on the court. Bar. 339. *Buck* v. *Warren.*

After rule to plead expired.

Defendant may move to plead double after rule to plead is out, any time before judgment. Bar. 329. *King* v. *Boſwell.*

Of the origin of pleading double. 4 Ann. c. 16. ſ. 4.

By the 4 Ann. c. 16. ſ. 4. " Any defendant or tenant " in any action or ſuit, or any plaintiff in replevin, in any " court of record, with the leave of the ſame court, may " plead

" plead as many ſeveral matters as he ſhall think neceſſary " for his defence;" provided that " if any ſuch matter " ſhall, upon a demurrer joined, be judged inſufficient, " coſts ſhall be given at the diſcretion of the court; or if " a verdict ſhall be found upon any iſſue in the ſaid cauſe " for the plaintiff or demandant, coſts ſhall be alſo given " in the like manner, unleſs the judge who tried the ſaid " iſſue ſhall certify, that the ſaid defendant or tenant, or " plaintiff in replevin, had a probable cauſe to plead ſuch " matter, which, upon the ſaid iſſue, ſhall be found againſt " him."

Conſtruction of the ſtatute.

1ſt. To what actions it extends.

Upon the firſt part of this clauſe, it has been determined in both courts, that the ſtatute does not extend to *qui tam* actions; ſo that in them there can be but one plea. *Law qui tam* v. *Crowther*, 2 Wil. 21.

Nor to any action in a penal ſtatute. Bar. 15. 365. *Lookup* v. *Frederic.*

Nor to ſuits where the king is a party, unleſs for debt immediately owing on revenue, (*vide* Sect. 24.) and therefore, in *quare impedit* by the king, a rule to plead double was denied. Bar. 353. *The King* v. *the Archbiſhop of York.*

So in an information in nature of a *quo warranto*. *Rex* v. *Newland*, Say. 96.

In replevin, the court gave leave to plead double, *viz.* that plaintiff in replevin had not property, and a juſtification as a diſtreſs for rent. Bar. 338. *Bird* v. *Spinks.*

It has alſo been determined, that the ſtatute of Ann does not extend to plead double matters which ſhall have different trials, for inſtance in dower, if the defendant plead "*ne* " *unques accouple in loyal matrimonie*," and a mortgage; for the firſt matter ſhall be tried by the biſhop, and the other by a jury; and the judge cannot certify, if there was no probable cauſe. *Harding* v. *Harding*, C. B. Mich. 9 Ann. Com. Rep. 148.

Diſcretionary power in the court.

This ſtatute gives the court a diſcretionary power either to permit or refuſe ſeveral matters to be pleaded.

Formerly more ſtrict.

And formerly the courts, particularly the Common Pleas, were very ſtrict in giving ſuch leave, and expected to be even ſatisfied of the neceſſity of pleading the ſeveral matters moved for. *Crozier* v. *Starke*, Say. 28. But of late they have relaxed in this reſpect, and never refuſe, provided the pleas be not inconſiſtent, and liable to make an incongruity on the record. *Jenkins* v. *Edwards*, 5 D. & E. 98. Bar. 347.

Now only refuſed if inconſiſtent.

Inſtances thereof.

Court refuſed to grant leave to plead *non aſſumpſit* generally and a tender, *Dougal* v. *Bowman*, 2 Blac. Rep. 723. 3 Wil. 145.; or *non eſt factum* and *ſolvit poſt diem*, *Fox* v. *Chandler*,

Chandler, Blac. 905.; or *non eſt factum* and *ſolvit ad diem*, *Arnold* v. *Baas*, 993.; or *non aſſumpſit* and alienage of plaintiff, *Feron* v. *Ladd*, ibid. 1326.; or in dower, *ne unques ſeiſie* and *ne unques accouple*, *Anderſon* v. *Anderſon*, ibid. 1157. *Hillier* v. *Fletcher*, 1207.; *non aſſumpſit* and a releaſe, Bar. 328.; *non aſſumpſit* and infancy, Bar. 363.; *ſolvit ad diem* and *riens per diſſent*, ibid. 332.; *liberum tenementum* and a juſtification, *ibid.* 329.; *nil debet* and *nil habuit in tenementis*, the latter may be given in evidence, *ibid.* 333.; not guilty and *liberum tenementum*, ibid. 350.; not guilty, and that plaintiff became bankrupt, *ibid.* 360.; not guilty and a licence, Bar. 351. 364.; without affidavit, *ibid.* 357.; not guilty and a releaſe of a particular treſpaſs, *ibid.* 351.; though not guilty and a general releaſe, where an affidavit was produced, was admitted. *Ibid.* In C. B.

But not guilty and tender of amends allowed. *Martin* v. *Keſterton*, 2 Blac. R. 1093.

All of which caſes were in C. B.

In B. R. general iſſue and ſtatute of limitations allowed, Str. 678.; ſo tender and eviction, 496.; ſo *non eſt factum* and bankruptcy, 871.; ſo not guilty and the ſtatute of limitations, 889.; ſo *non eſt factum* and no requeſt made, 908.; ſo bankruptcy and *non aſſumpſit*, 1000.; but not guilty and a juſtification not allowed, 876. In B. R.

Non aſſumpſit to the whole and tender to part held inconſiſtent. *Maclellan* v. *Howard*, 4 D. & E. 194.

And on ſame principle, in a late caſe to an action on bond, *non eſt factum* and a tender to part held bad; becauſe if defendant ſucceeded on firſt plea, it would appear that there never exiſted ſuch a bond, and yet that defendant had admitted that ſomething was due on the very ſame bond, which would make an incongruity on the record. *Jenkins* v. *Edwards*, 5 D. & E. 98.

Motion to ſet plea aſide for inconſiſtency, defendant having pleaded *non eſt factum*, *ſolvit ad diem*, and *ſolvit poſt diem* after judge's order; ſome of the above caſes were cited in C. B. and alſo *Jenkins* and *Edwards* in B. R. *per* Buller, take nothing by the motion; the above caſes are in C. B.; but in this court it is otherwiſe. *Anon.*

As no affidavit is required in order to plead double, and the court does not go into the materiality of the pleas upon motion to plead ſeveral matters, and as defendant may plead as many pleas as he thinks fit, if no two of them are inconſiſtent, it might frequently happen that defendants would fill the records with a multiplicity of pleas not eſſential to their defence, and if they obtained a verdict upon 3d, Of the certificate given by the ſtatute.

one of them, plaintiff would be ſaddled with the coſts of all; to prevent which, by the ſtatute of Ann it is ordered, that the defendant ſhall himſelf pay the coſts of all ſuch iſſues as are found againſt him, unleſs the judge will certify, that there was probable cauſe to plead ſuch matter.

As to coſts of iſſues found againſt defendant.

When certificate to be made.

The certificate upon this ſtatute may be made after the trial. 2 D. & E. 237. 393.

For further information in this reſpect, ſee *poſt.* Vol. II. Chapter on Coſts.

Section VII.

Of the Rule to plead.

So careful is the law to prevent plaintiff from taking any undue advantage of defendant, by obtaining judgment againſt him unawares, that it not only allows a certain time to plead to the declaration, and obliges the plaintiff to give due notice thereof, but further it compels him to ſerve the defendant with a rule to plead; and if defendant ſtill neglects ſo to do, plaintiff muſt then make a formal demand in writing of a plea, and afterwards ſearch the office to ſee if one be put in, before he can ſign judgment; ſo that there are no leſs than three regular notices or warnings given to defendant for him to defend himſelf againſt plaintiff's charge or demand.

Having already conſidered the declaration and the notice thereof, which is the firſt warning given to defendant to plead thereto, within the time limited by the rules of the court, as before mentioned, it is only neceſſary further to treat of the rule to plead, demanding a plea, and ſearching for a plea, and of ſigning judgment for want thereof.

Of the form of rule to plead.

The rule to plead is made out on a common piece of unſtamped paper thus:

In B. R. or C. B.

A. B. againſt C. D.

Rule to plead.

1ſt March 1798. *T. S. Attorney.*

How ſerved.

Take it in K. B. to clerk of the rules, in C. B to the ſecondary, who enters it in a book kept for that purpoſe; pay 1s. 10d. *The rule expires in four days inclusive.*

How the time reckoned.

Sunday, or any holiday, is reckoned (except it happens to be the laſt day); or if it be given on the Purification, or on a Sunday, it is no day. Str. 86. *Anon.*

It may be given any time in term, or within four days after.

In

In the case of *Oxley* v. *Bridge*, Do. 67. it was held, that on a rule to plead by a particular day, that day is construed to continue till the *office open* next morning, and that defendant would be regular, if he complied with the rule before that time. But very shortly afterwards, in the case of *Haselor* and *Ansell*, Do. 197. it was adjudged, upon the report of the Master, to be the practice, that on a rule to plead, &c. in four days, although it is a common indulgence to allow defendant till the morning of the fifth, yet it is but an indulgence; and if defendant delays till that time, plaintiff may sign judgment; which was since allowed to be the practice, in *Thomson* v. *Ryall*, 4 D. & E. 195.

How, if four terms are elapsed.

If four terms are elapsed after declaration delivered, defendant must have a whole term's notice to plead, unless the cause has been stayed by injunction or privilege; in which case, no proceedings having been had in this cause for above a year, it becomes necessary for plaintiff to give a term's notice of proceeding; two days before Hilary term, plaintiff gave notice of his intention to proceed; on the 14th February, two days after Hilary term, the rule to plead was served; and on the 18th April, in the course of the same vacation, the plaintiff signed judgment, as of Hilary term, for want of a plea; which the court held regular; nor did they look upon the circumstance of the judgment being as of Hilary term of any consequence; for the rule requiring a term's notice, when no proceedings have been had in the cause, was only a rule of court, they said, introduced for the benefit of the party, the full benefit of which the defendant had had in this instance; nor would the judgment appear irregular on the record, though signed as of Hilary term. *Milbourne* v. *Nixon* and others, 2 D. & E. 40.

Where rule to plead not necessary.

Where time to plead has been given, by rule of court or judge's order, plaintiff may sign judgment at expiration thereof for want of plea, without giving any rule to plead; because, by obtaining such time, he admits himself to be in court. *Towers* v. *Powell*, 1 H. Bl. 88. *Starkie* v. *Wilkes*, Imp. K. B. 242.

It may be dispensed with.

So the defendant may dispense with a rule to plead, by pleading either in bar or abatement. *Brandon* v. *Payne*, 1 D. & E. 690.

Although such plea be a mere nullity and as no plea. *Lockhart* v. *Macreth*, 5 D. & E. 663.

Where a new rule necessary.

Otherwise, generally speaking, a rule to plead is necessary; and even if a rule has been before given, if judgment was not signed as of that term in which it expired, a new rule

rule ſhould be given to warrant the judgment, ſigned as of that term in which it is ſo ſigned. Gilb. Rep. 318. Imp. K. B. 244.

Where not.

But this is liable to ſome exceptions; for where a rule to plead has been given, and defendant obtains an order, or is bound by rule of court to plead by a certain time, as for inſtance, the firſt or ſecond day of next term, plaintiff may ſign judgment on default of defendant's pleading without giving a new rule. Rep. & Caſ. of Prac. C. P. 67. 141. *Vide* Imp. K. B. 203. *cont.*

So where plaintiff has given a rule to plead, and has been delayed from ſigning judgment by an injunction out of chancery, after the injunction has been diſſolved, he may ſign judgment without giving a new rule. Bar. 238. *Theedam* v. *Jackſon.*

If a rule to plead be entered the ſame term an amendment is made, though before ſuch amendment, it is ſufficient; otherwiſe a new rule muſt be entered. Non rule, 10 G. 2. 2 Salk. 517.

When rule ſhould be ſerved.

Rule to plead muſt not be ſerved before notice of declaration, as it would be void. *Grey* v. *Saunders*, Bar. 248. *Brandon* v. *Payne*, 1 D. & E. 696.

But it may be ſerved immediately after, whether declaration be in chief or *de bene eſſe*, even on the ſame day after notice or delivery thereof.

If a declaration is delivered *de bene eſſe*, a rule to plead may be given the ſame day before defendant appears: but if plaintiff demands a plea, in caſe the proceſs is bailable, before bail is filed, it is a waiver of the exception to the bail.

Clerk of rules will accept a rule to plead on the eſſoin day, but it cannot be entered until the firſt day of term. Imp. B. R. 244.

How if defendant dies before time expires.

Where defendant dies before the time for pleading expires, or after the rule to plead is out, but before the expiration of the time given him by a judge's order, the ſuit abates, and plaintiff cannot ſign interlocutory judgment and ſue out a *ſci. fa.* *Wallop* v. *Irwin*, B. R. 1 Wil. 315.

Section VIII.

Of demanding a Plea.

Of demanding a plea.

When defendant has put in bail or appeared in time, a plea muſt be demanded in writing of defendant's attorney, before plaintiff can ſign judgment; and this, although notice

tice to plead be indorſed on the declaration. *Nott* v. *Oldfield*, 1 Wil. 134. Bar. 276. *Eames* v. *Jew*.

In B. R. a *latitat* was returnable 22d of April, being the ſecond return, and a declaration was left in the office the 24th *de bene eſſe*; on the 26th defendant put in ſpecial bail, and gave notice thereof: and a rule to plead being entered in the office by the plaintiff's attorney, when that was out, he ſigned judgment without demanding a plea: *et per Cur.* A plea muſt be demanded in writing, wherever a rule to plead is given, and defendant files bail in time, as he has done here; and accordingly judgment was ſet aſide for irregularity, with coſts. *Ibid.* 1 Wil. 134. It muſt be in writing.

The demand is in this form, in B. R. or C. B. Form of demand.

A. againſt B.

The plaintiff demands a plea in this cauſe, otherwiſe judgment.

Your's, &c.

H. Attorney for plaintiff.

Mr. C. D. attorney for defendant.

And to be delivered to or left with defendant's attorney, or to the agent in town.

It is ſaid that it will not do on the back of the declaration, for it muſt be after the delivery of declaration, and even after rule to plead has been given. *Per* Maſter Benton, Imp. K. B. 248. How it muſt be made.

But in the caſe of the churchwardens of *Edmonton* v. *Oſborn*, 6 D. & E. 689. it was held, that a demand of a plea might be made *at the time* of delivering the declaration: the fact was, in that caſe, a demand of a plea written on a ſeparate piece of paper, annexed to the declaration, was given at the time of delivery of declaration, and held good. This, however, is doubted in Imp. K. B. 753. 6 edit. who ſays, that both Maſter Benton and Foſter agree that plaintiff is not in a condition to demand a plea, till rule to plead is entered; and that the practice of the Common Pleas is ſo.—Indeed, I am inclined to be of the ſame opinion; eſpecially as I remember the caſe of the churchwardens of *Edmonton* v. *Oſborn* was determined by a ſudden reference to the Maſter in court, in the hurry of buſineſs, on the laſt day of the term.

In B. R. ſuch demand muſt be made 24 hours before judgment can be ſigned by default; but at any time after the 24 hours from the time of the demand, judgment may be ſigned. *Dyche* v. *Burgoyne*, 1 D. & E. 454. When.

But not before time for pleading may have expired. *Bowles* v. *Edwards*, 4 D. & E. 118.

If

If a plea be demanded on a Saturday, the defendant has 24 hours to plead after demand, exclusive of Sunday. *Solomons* v. *Freeman*, 4 D. & E. 557.

And in C. B. if the rule to plead be out before demand made, judgment must not be signed within 24 hours after. *Wooden* v. *Boyntun*, 1 Bl. 50.

The defendant must be in court before the plea is demanded.

A demand of a plea, therefore, before the defendant has appeared, or plaintiff filed common bail for him, is a mere nullity; nor will filing common bail afterwards cure the irregularity. *Cook* v. *Raven*, 1 D. & E. 636. *Venn* v. *Calvert*, 4 D. & E. 578.

So that if plaintiff signs judgment for want of a plea on such an irregular demand, it will be set aside. *Ibid.*

But where defendant's attorney undertook to file common bail, and neglected so to do, and afterwards plaintiff demanded a plea, and signed judgment for want of one, although defendant was not in fact in court, and although, on the authority of *Cook* v. *Raven*, he moved to set aside the judgment, yet the court would not listen to the objection, the defendant's attorney having broken his engagement. *Giles* v. *Hutchins*, K. B. M. T. 1794.

When no occasion for demand.

Where declaration is filed *de bene esse*, and notice thereof given, if defendant does not file common bail in time, and plaintiff files it for him according to the statute, there is no need to demand plea before signing judgment. Mich. 10 G. 2.

So if defendant be in custody of the sheriff, no demand of a plea is necessary. *Rose* v. *Christfield*, 1 D. & E. 591.

Nor if pending the suit defendant gets himself removed into the custody of the court, unless he gives notice thereof to plaintiff. *Wilkinson* v. *Brown*, 6 D. & E. 524. But see. Vol. II. Proceedings against Prisoners.

When it is a waiver of bail.

The demand of a plea is a waiver of bail; care should be taken, therefore, that bail is put in and justified before plea demanded. Imp. K. B. 248.

Section IX.

Of searching for Plea, and signing Judgment for Want thereof.

Of searching for plea, &c.

Search for plea in B. R. at the clerk of the papers in the book there under plaintiff's name; if not to be found there, search with the clerk of the judgments, who keeps the general

neral iſſue book: in C. B. ſearch at the prothonotary's office in the book there, by defendant's name. When to ſearch.

If no plea to be found, and none delivered in due time, ſign judgment by default. If none found.

If defendant does not plead within time, a rule to plead having been given and expired, and a demand in writing of a plea having been made, the plaintiff may ſign judgment. Tr. 5 & 6 G. 2. When judgment may be ſigned.

But if plaintiff delays ſigning judgment, and defendant, after the rules are out, and before judgment ſigned, puts in his plea, ſuch plea muſt be accepted, nor can plaintiff then enter his judgment; if he does, it will, on motion, be ſet aſide for irregularity. *Minns* v. *Baxter*, 1 D. & E. 17. If not ſigned, whether plea may be put in.

But it ſeems now that plaintiff, although he has not ſigned judgment, may refuſe to accept any plea, if it be afterwards offered, as he may to receive the paper-book under the like circumſtances. *Thompſon* v. *Ryall*, 4 D. & E. 196.

Until of late, it was the general opinion of practiſers, that when either the plaintiff or defendant were called upon to ſpeed the proceedings of a cauſe by rule to plead, reply, &c. it was ſufficient to do the act required at any time before the adverſe party availed himſelf of the non-performance; which practice, we believe, never received the *fiat* of authority from the court, but aroſe from the indulgence of one clerk in court to another, whilſt the proceedings were carried on by them as agents for the attornies at large, and from thence was continued down, until ſome late determinations. This indulgence, however, ſeems not to have extended to the returning of paper-books, as appears by the reſolutions in matters of practice agreed upon by Mr. Secondary Liveſay and the ancient clerks in the year 1669, and which was certified as the practice by the late Maſter Benton to Lord Mansfield, upon arguing the caſe of *Haſeler* v. *Anſell*, Doug. 197. It is not poſſible to aſſign any reaſon for this diſtinction; and although there are contradictory caſes, yet now the caſe of *Haſeler* v. *Anſell*, and *Thompſon* v. *Ryall*, above cited, wherein the ſeveral caſes alluded to were referred to, have eſtabliſhed the practice to be, that if the party upon whom the rule is made, do not perform what is thereby required within the time given by the rule, the adverſe party is not bound to accept a performance of the act afterwards, but may ſign judgment. Notes on R. T. 1 G. 2. K. B. edit. 1795.

Section X.

Of obtaining Time to plead.

(A) How to be done, and in what Caſes granted.

(B) When Summons to be taken out, and of the Effect thereof.

(C) Of the Terms on which further Time is granted.

(D) What are iſſuable Pleas within a Judge's Order.

(E) Of the Conſequences of Defendant not pleading a proper Plea according to the Order.

(F) Of ſigning Judgment at the Expiration of the Order.

(A) (A) How to be done, and in what Caſes granted.

How to procure time.

If the defendant cannot be ready to plead by the time the rule expires, he may apply to a judge for a ſummons for further time, ſerve a copy thereof on plaintiff's attorney; and upon attending the judge, he will make an order agreeable to the circumſtances of the caſe; which order is alſo to be ſerved as the ſummons was.

This application muſt be made at leaſt the day previous to the expiration of the time to plead.

Amongſt fair practiſers, a conſent is generally procured.

The length of time given to defendant to plead is entirely in the diſcretion of the judge; and ſuch order is uſually granted upon terms ſo as not to delay the plaintiff.

Of the time uſually granted.

Where the cauſe of action is local, and cannot be tried but at the aſſizes, the length of time to be granted will depend entirely on the interval there is between the application and the commiſſion day of the circuit; for the judge will not extend the order ſo far as to hinder plaintiff from trying his cauſe at the then next aſſizes, if he chooſe it.

If either of the parties live in the country, and the cauſe of action is tranſitory, and to be tried in town, the ſame doctrine is held as in town cauſes, allowing for the difference of time required in notices, in order to join iſſue in them.

Further

Further time may be obtained by a ſecond ſummons, and ſo on, provided no delay is occaſioned to the plaintiff.

(B) When Summons to be taken out, and of the Effects thereof. (B)

When ſummons to be taken out, and

A ſummons for time to plead ought not to be taken out after the rule to plead is out; and if ſuch ſummons be taken out and ſerved, it is no ſtay of proceedings. Bar. 254. *Otwell* v. *Duett*, Caſ. of Pr. C. B. 137. 142.

of the effect of a judge's ſummons as to ſtaying proceedings.

If the defendant takes out a judge's ſummons for time to plead, the plaintiff cannot ſign judgment till the ſummons is diſcharged, Bar. 225. Rep. & Caſ. of P. R. C. B. 144. *Brown* v. *Godfrey*: but this is in caſe it be returnable before judgment be regularly ſigned.

For a judge's ſummons is held to be no proceeding; it ſtays nothing, *unleſs it be returnable* before the judgment be regularly ſigned; and if judgment be regularly ſigned before the ſummons for time to plead is returnable, the court will not ſet it aſide, eſpecially if defendant has no merits. *Calze* v. *Ld. Littleton*, 2 Blac. 954. But ſee *contra*, Bar. 265. *Smithſon* v. *Broughton*.

(C) Of the Terms on which it is granted. (C)

Of the terms on which time is uſually granted.

The terms uſually contained in a judge's order on ſummonſes for time to plead are theſe, "pleading iſſuably, rejoining *gratis*, taking ſhort notice of trial or inquiry (if neceſſary) within the term;" but the judge will not hold the defendant to all theſe terms and conditions, on granting the firſt order, unleſs the ſtate of the cauſe require it, or the party ſummoned before him aſk it.

If in a town cauſe (that is, a cauſe which is to be tried at the ſittings in London or Weſtminſter) the defendant applies for time to plead, the judge will not grant any orders, but upon condition that his attorney undertakes to plead an iſſuable plea; and pleading iſſuably within the order, means pleading ſuch an iſſue as the plaintiff might go to trial upon. *Foſter* v. *Snow*, Burr. 782.

When the defendant is an executor or adminiſtrator, the order will be for him not to plead any judgment, ſince the time for pleading was out, leſt he ſhould confeſs a judgment in the mean while, and plead it in bar of defendant's demand. 8 Mod. 308. Imp. K. B. 245.

(D) (D) What are iſſuable Pleas within a Judge's Order.

What an iſſuable plea or not within a judge's order.

An iſſuable plea is a plea in chief, upon which plaintiff may take iſſue, Bar. 263. and go to trial upon.

Abatement.

A plea in abatement is not ſuch a plea, becauſe it tends to delay the plaintiff. *Kilwick* v. *Maidman*, Burr. 59. *Wagſtaffe* v. *Long*, Bar. 263.

Coverture.

Proceedings had been ſtayed on the common terms of defendant pleading iſſuably, &c. ſhe had then an attorney on record, and now comes and pleads *in propriâ perſonâ*, "that Ann the wife of David Thomas, who is ſued by the name of Ann Thomas, did not undertake," &c.: it was inſiſted that this was an abuſe of the rule, tending in effect to introduce a plea of coverture; and it was moved to ſet aſide the plea, and that plaintiff might have judgment. The court ſet aſide the plea, and directed her to plead the general iſſue *non aſſumpſit* by attorney. *Conwell* v. *Thomas*, Blac. 724.

Tender.

But a plea of tender is an iſſuable plea in B. R. *Ibid.*

And now determined to be ſo in C. B. *Noone* v. *Smith*, C. B. T. R. 369.

Though it uſed to be held otherwiſe. Caſ. Prac. C. B. 134. Bar. 337. *Davenhill* v. *Barritt*.

Plea of ſtat. 23 Hen. 6.

So to an action on a bail-bond, a plea of the ſtatute 23 Hen. 6. c. 10. that the bond was taken for eaſe and favour, is an iſſuable plea within ſuch order. *Dearden* v. *Holdon*, Burr. R. 605.

Performance.

A general performance is not an iſſuable plea within a judge's order in an action of covenant. Bar. 354. *Thomſon* v. *Atkinſon*.

General iſſue and ſtatute of limitations.

The defendant may plead the general iſſue, and ſtatute of limitations, after an order to plead iſſuably in both courts. *Rucker* and another v. *Harnay*, 3 D. & E. 124. Though not long before decided otherwiſe. *Stadholme* v. *Hodgſon*, 2 D. & E. 390.

Nil debet and *nul tiel record* to an action on a judgment held iſſuable pleas by the Maſter: you may go to trial on the firſt, and give the day to produce the record the firſt day of the next term in the replication. Imp. K. B. 245.

Judgment recovered.

A judgment in C. B. no iſſuable plea in B. R. (when falſe in fact); Blac. R. 376. *Heron* v. *Heron*; and the falſity of it may be proved by affidavit, if attempt is made to ſet judgment aſide.

So in C. B. a plea of recovery in B. R. ordered to be ſet aſide, and defendant to pay coſts of the application. *Cave* v. *Aaron*, 3 Wil. 33.

Though

Though the court were not ſo ſtrongly inclined againſt ſuch plea in *Lowfield* v. *Jackſon*, 2 Wil. 117.

Judgment confeſſed ſince the order, good, if not bound in terms not to plead it.

Defendant having obtained an order for time to plead pleading an iſſuable plea, &c. pleaded in bar to plaintiff's action, (which was upon ſimple contract,) a judgment confeſſed upon a bond ſince the order for time to plead made; plaintiff moved to ſet aſide the plea, but the court were of opinion, that as there was no particular reſtraint in the order, and as the bond (whereupon the judgment was confeſſed) might have been pleaded in bar to this action, the plea muſt ſtand. *Hughes* v. *Fellet*, Bar. 330.

Demurrer.

The court of C. B. held a demurrer not to be an iſſuable rejoinder within the judge's order. *Neſbet* v. *Farmer*, Bar. 168. *Maurice* v. *Engier*, Ib. 271.

But that it might appear whether a demurrer was neceſſary or not, the court ordered plaintiff to join in demurrer, and enlarged the rule to ſet aſide the demurrer till after argument.

But it ſeems now in C. B. that a demurrer to the merits is an iſſuable plea within the meaning of an order for time to plead, *Wright* v. *Ruſſel*, 2 Blac. R. 923.; but a frivolous demurrer would not be. *Stonehouſe* v. *Veſſel*, Say. 88.

Good demurrer is an iſſuable plea:

The defendant obtained time to plead on the terms of pleading an iſſuable plea, rejoining *gratis*, and taking ſhort notice of trial. The action was on a bond conditioned to ſurrender a copyhold at the requeſt and coſts of plaintiff; plea, that the plaintiff never requeſted; replication a requeſt, and plaintiff then made up the iſſue, with a rejoinder to the country, which the defendant on delivery ſtruck out, and demurred ſo near to the aſſizes, that the plaintiff, expecting a trial, had the record made up, and actually tried the cauſe before he heard of the demurrer; and now, on motion, the court ſet aſide the verdict: for the conſtruction of theſe terms put upon the defendant, when he aſks time to plead, is not to oblige him in all events to join iſſue to the country, but only where the replication offers a fair iſſue, and affords no reaſonable cauſe of demurrer; now here the replication not ſhewing any tender of a ſurrender, does give ſuch a colour of objection as will warrant what the defendant hath done. *Dewey* v. *Sopp*, Str. 1185. *Vide* Say. 88.

Sham demurrer is not.

The defendant having obtained a judge's order upon the terms, amongſt others, of pleading an iſſuable plea, put in a ſham demurrer, and the plaintiff's attorney ſuppoſing this not to be within the order, ſigned judgment; upon which the defendant obtained a rule to ſhew cauſe why this judg-

ment should not be set aside; and on shewing cause, the plaintiff's counsel prayed, that this rule might be discharged, with costs.—*Per Cur.* There is a distinction between a real and fair demurrer and a sham one; the former is an issuable plea within the meaning of a judge's order; the latter is not, only an evasion of it: and the rule was discharged with costs. *Gray* v. *Ashton*, 4 Burr. 1788.

(E) (E) Of the Consequence of Defendant not pleading agreeable to the Judge's Order.

Of the consequence of defendant pleading a plea not within the order.

If the defendant presumes, in breach of his undertaking, to plead a dilatory plea, or such an one as plaintiff cannot argue the law or try the fact on, the plaintiff may sign judgment as if no plea had been pleaded, and give notice of executing a writ of inquiry.

Judgment may be signed.

So if he plead several pleas, one of which is not issuable, though the others are so, plaintiff may sign judgment for want of a plea. *Waterfall* v. *Glode*, 3 D. & E. 305.

Defendant, by leave, made two avowries; plaintiff obtained a judge's order for time to plead, pleading issuably, and taking notice of trial for the sitting after term, and within time demurred to the first, and pleaded in bar to the last. Defendant signed a *non pros*, for want of plaintiff's pleading issuably to both avowries, which the court held regular; but upon payment of costs, pleading issuably to both, and taking notice of trial within term, the *non pros* was set aside. Bar. 314. *Sutton* v. *Waddilove*.

But to warrant plaintiff signing judgment, the plea should appear on the face of it to be a dilatory plea; for if it goes to the substance of the action, however informal it may be drawn, or however bad in itself, plaintiff cannot treat it as a nullity and sign judgment, but should demur. *Thellupor* v. *Smith*, 5 D. & E. 152. See also *Coppin* v. *Carter*, 1 D. & E. 462.

(F) (F) Of signing Judgment at the Expiration of the Order.

Of signing judgment at expiration of the order.

If a judge gives an order for a month's time to plead to defendant, it is a lunar month, or four weeks; for a month in law is always a lunar month, except in *quare impedit*. In all temporal cases it is a lunar month; in ecclesiastical, a solar. *Talbot* v. *Linfield*, Blac. 450. *Tullet* v. *Linfield*, Burr. R. 1455.

How the time reckoned.

The

The time to plead under a judge's order is reckoned inclusive of the day of the date of the order, but exclusive of the day on which it expires. So that an order for a week's time to plead obtained on a Saturday, expires on the morning of the following Saturday: and in C. B. plaintiff may sign judgment at the opening of the office in the afternoon of that day. *Kay* v. *Whitehead*, 2 H. Bl. 35.

But in a note to that case it is said, that in B. R. plaintiff cannot sign judgment till after 24 hours have passed from that time.

Rule to plead not necessary where time has been obtained.

The defendant had an order by consent from a judge for eight days' time to plead, and at the expiration of the eight days, the plaintiff signed judgment without giving a rule to plead; *et per Cur.* the judgment is regular. Rules are only to give the parties notice when they are expected to plead; here the defendant's praying time to plead, excludes any presumption that the plaintiff has not given him such notice. *Strankie* v. *Wilkes*, Mich. 7 G. 2. in B. R. In C. B. *Towers* v. *Powell*, 1 H. Bl. 88.

Section XI.

Of moving to abide by Plea.

Use thereof.

It is a common practice, in order to gain time and get over a term, for defendant to protract plaintiff's proceedings as much as possible by special pleadings, and afterwards when the issue or paper-book is delivered, to strike them out and plead the general issue, or to strike out the *similiter* in the replication and add a demurrer: to prevent which, it is customary for plaintiff, when he suspects defendant's plea to be a sham one, to apply for a rule to compel defendant to abide by his plea pleaded, or to plead immediately some other which he will abide by, which is done in the following manner:

How to be done in term.

If you wish to get rule for defendant to plead another plea on the morrow, draw up brief for counsel to move for defendant to abide by his plea already pleaded, or plead such other as he will abide by; fee 10s. 6d.; *carry it to the clerk of the rules, who will draw up rule accordingly; pay* 5s.; *but if you want him to plead* instanter, *it is a* motion in court.

When the rule is obtained, leave copy thereof at defendant's attorney's house.

This rule may be procured immediately after defendant has pleaded, and served the very same evening.

In vacation.

In vacation a judge at chambers may make an order, that the defendant shall plead such a plea as he will stand by. Foster v. Snow, *Burr.* 782.

The form of the rule is as follows:

Tuesday next after the morrow of St. Martin, in the 36th year of King George the Third:

A. v. B. } *It is ordered, that the defendant, upon notice of this rule to be given to the attorney, shall abide by his plea, or plead such other plea peremptorily on the morrow as shall not be waived, otherwise let judgment be entered for the plaintiff upon the motion of Mr.* ——

By the Court.

Now, if orders not obeyed.

If he does not plead a new plea, proceed by making up the paper-book.

When to plead *instanter*.

The court will order defendant to plead *instanter* towards the end of the term, when otherwise there might not be sufficient time to give notice of trial.

In which case he must plead within 24 hours after rule served. *Price* v. *Hodgson*, E. 35 G. 3. Imp. K. B. 309.

But the time allowed by the common rule to plead should be expired. So also on frivolous demurrers. N. on R. 5 & 6 Geo. 2. Imp. B. R. 309.

Of the costs.

In court of B. R. costs of this motion are allowed, whether defendant abides by his plea or not.

If no new plea, the first stands.

The defendant pleaded a sham plea, and plaintiff obtained a common rule that the defendant should plead peremptorily on the morrow, and that such plea should not be waived, and served it on the defendant's attorney, who taking no notice of it, the plaintiff, after the day was out, signed judgment, which the court, on the Master's report, held to be irregular; the first plea standing, if the defendant did not lay hold of the opportunity given him of altering it, whereby the plaintiff has the benefit of his motion. *Webb* v. *Holt*, Str. 1234.

What to be pleaded after such rule or order.

After a rule to abide by a special plea, (as where defendant had pleaded judgment recovered,) or plead such other plea as defendant will abide by, he can only plead the general issue; and if he should plead any other special plea, or any double plea, as the general issue and *plea* of set-off, it will be deemed as no plea, and plaintiff may sign judgment. 1 D. & E. 693. *Hare* v. *Lloyd*; and in notes, *Prout* v. *Dewar*.

But he may, after such rule, plead the general issue, and give a notice of set-off. *Cockran* v. *Robertson*, Ibid.

Section XII.

Of Replying, Rejoining, &c.

How to reply, rejoin, &c.

In B. R.

Get a rule from the Maſter, take ſame to the clerk of the rules, who will enter it on the back of your laſt proceeding, viz. *plea, replication, &c. pay* 1s. 10d. *ſerve copy thereof on common paper on plaintiff's attorney, naming the cauſe thus:*

A. againſt B.

Monday next after, &c. to reply—entered.

If the replication, &c. is not filed or delivered, as the caſe may be, (if ſpecial, at the clerk of the papers; if to a general plea, to the attorney,) then when rule is expired, ſign judgment of non pros.

No demand is neceſſary in this court, as the ſervice of the rule is held a demand of itſelf.

In C. B.

Give a rule for that purpoſe, thus:

A. againſt B.

Rule to reply.

T. S. Attorney.

Take it to ſecondary's office, pay 1s. 10d. *then make a demand thus:*

In C. B.

A. v. B. The defendant demands a replication in this cauſe by yours.

T. S. attorney for defendant.

When the time is expired and replication not delivered, ſearch for it at prothonotary's, and if not filed there, ſign judgment of non pros.

Of the rule to reply, and when judgment may be ſigned.

There is no preciſe time fixed for replying, rejoining, ſurrejoining, rebutting, &c.; but in all theſe caſes, if the party who is to do the act is ſerved with a copy of the rule for that purpoſe, he muſt reply, &c. within *four days excluſive* after the ſervice of copy of ſuch rule; and if he does not, judgment may be ſigned; but if judgment be ſigned, or other proceedings had before that time, the ſame, on application to the court, will be ſet aſide; and Sunday, or any holiday on which the court doth not ſit, not being the laſt of thoſe four days, is to be reckoned a day within thoſe rules.

Rule to reply ſerved on the 5th, judgment cannot be ſigned till the 10th.

How if four terms have elapſed.

If a cauſe has continued four terms without any proceedings, each party ſhall have a whole term's notice to reply, rejoin, &c. (unleſs the cauſe has been ſtayed by injunction or privilege); which notice muſt be given before the eſſoin day. 2 Str. 1164.

The *notice* ſhould be, that you intend to proceed by giving a rule to reply, &c.; the rule is to be given by the Maſter the day after the term is expired, and to be entered with the clerk of rules before ſervice. Imp. K. B. 312.

When rule to be ſerved.

Rule to reply, rejoin, &c. may be given at any time in term, or within 16 days after term, except Eaſter term, and then in C. B. in 10 days.

If

How, if time wanted.

If time be wanted to reply, &c. apply for a judge's ſummons, and draw up order as in other caſes. See *ante*, Sec. 10.

No rule neceſſary when plaintiff adds ſimiliter and it is not ſtruck out.

Whenever the plaintiff adds the *ſimiliter* to the end of his replication, and delivers the iſſue, with notice of trial, to defendant's attorney, who receives the ſame, and does not ſtrike it out and demur, there is no occaſion for plaintiff to give a rule to rejoin. *Boone* v. *Eyre*, 1 H. Bl. 254.

When plaintiff may add ſimiliter.

In all caſes, when defendant's plea concludes to the country, plaintiff may add ſimiliter, and deliver iſſue with notice of trial.

If no rejoinder, plaintiff may enter judgment as for want of a plea.

If defendant do not rejoin, it is conſidered as an abandonment of the plea; plaintiff, therefore, may ſtrike out all the previous pleadings, and enter judgment as for want of a plea, not for want of a rejoinder. *Petrie* v. *Fitzroy*, 5 D. & E. 152.

Rejoinder, &c. may be refuſed after rule out.

On a rule to plead, reply, &c. in four days, if the party on whom the rule is made delay complying with it till the morning of the 5th, it ſhould ſeem that the adverſe party may refuſe to receive it and ſign judgment. *Thompſon* v. *Ryall*, 4 D. & E. 195.

It is true, as obſerved in Imp. K. B. 312. this caſe was on a paper-book not a rule to reply; but I think the principle applies to both. See fuller obſervations hereon *ante*, Sec. 9.

Section XIII.

Of the Plea of Tender.

(A) What conſtitutes a good Tender.

(B) In what Actions a Tender may be pleaded.

(C) When and how to be pleaded, and of the Conſequences of ſuch Plea to the Parties in the Suit.

(D) How Defendant may avail himſelf of a Tender, if made before Action, though by the Teſte of Writ, or Memorandum of Bill, it appears ſince.

(A)

(A) What conſtitutes a good Tender.

To whom tender to be made.

A tender may be made to any perſon in whom, either as party or privy, the right to the thing tendered is, as a tender to an executor, even before probate, if he afterwards proves

the will, or to an assignee of a bond. But it is said, that tender of amends to a bailiff, who has distrained beasts damage feasant, is not good, because, as a mere servant, he has no power to deliver the beasts. But Q. 3 Blac. Abr. 10.

Payment of a debt to the plaintiff's attorney is good payment, even after he was privately changed, and plaintiff had employed another attorney, because he ought not to have been changed without leave of the court, *Powell* v. *Little*, 1 Blac. 8.: though payment to the attorney is good; payment to his agent is not so. *Yates* v. *Freckleton*, Do. 624. Nor to the attorney's clerk, who shewed no authority but his master's order to demand it. Esp. N. P. 115.

But a tender to an attorney can only be good under particular circumstances, as where the attorney is authorized to settle the business, and writes to defendant previous to suing out writ, warning him of the action, unless he pays him the money, or the like; for a tender must be made before the writ is sued out; and though plaintiff may have generally employed any one as attorney, yet it does not follow that he may give him authority in that particular action.

How to be made.

In order to constitute a legal tender, the money should actually be shewn to the person to whom it is tendered; but this form may be dispensed with by the party to whom tender is made.

As where defendant said, he had the money in his pocket, and plaintiff answered, "You need not give yourself the trouble of offering it, for I will not take it." *Douglas* v. *Patrick*, 3 D. & E. 684.

Nor is it the business of defendant to count the money; if he tenders it in a bag, or untold, it is good; it is receiver's business to tell it. 5 Co. 115. Bull. Ni. Pri. 155.

So if he tenders a larger sum, and asks change, unless objection made at the time on that account. *Black* v. *Smith*, Peake's Cas. 88.

What a good tender.

It is generally laid down, that a tender in bank notes is not a good tender, though rendered so, if defendant offers to get cash for the notes, *Noyes* v. *Price*, Sitt. 16 G. 3. 2 Eq. Cas. Ab. 319.: but if the question were to come directly before the court, (which it never yet has,) I conceive they would be inclined to consider bank notes in such a case as money; especially during the continuance of the late acts of parliament, restraining the bank from paying in specie. See *Miller* v. *Race*, Burr. 459.

At all events, if bank notes are offered, and no objection made on that account, it is a good tender. *Wright* v. *Reed*, 3 D. & E. 554.

A receipt

A receipt cannot be inſiſted upon by the party tendering the money. *Cole* v. *Blake*, Peake 179.

(B) (B) In what Actions a Tender may be pleaded.

How in caſe of joint demands.

If A., B., and C. have a *joint* demand, and C. has a ſeparate demand on D., and D. offers A. to pay him both the debts, which A. refuſes, without objecting to the form of tender, on account of his being only entitled to the joint demand, D. may plead this tender in bar of an action of the joint demand, and ſhould ſtate it as a tender to A., B., and C. *Douglas* v. *Price*, 3 D. & E. 684.

To a *quantum meruit.*

It was formerly held, that a tender could not be pleaded to a *quantum meruit*, becauſe the demand was uncertain, *per* Holt. *Giles* v. *Hart*, Ld. Raym. 255.

But ſince determined otherwiſe on demurrer. *Johnſon* v. *Lancaſter*, Str. 576.

Stat. 4 Ann. in debt on bond.

By ſtat. 4 & 5 Ann. c. 16. ſ. 12. the plea of *ſolvit poſt diem* is given to an action on a bond; but a tender and refuſal of principal and intereſt at a ſubſequent day cannot be pleaded, as not being within the equity of the ſtatute; for ſuch conſtruction would be prejudicial, as it would empower the obligor at any time to compel the obligee to take his money without notice. *Underhill* v. *Matthews*, C. B. Bull. Ni. Pri. 171.

Stat. 21 Jac. in treſpaſs.

Tender of amends before action brought, may be pleaded to involuntary treſpaſſes, 21 Jac. 1. c. 16.; but not to voluntary ones, as taking away goods. *Bailee* v. *Vivoſh*, Str. 549.

In replevin for damage feaſant.

To an avowry for damage feaſant in replevin, tender muſt be pleaded to have been made before impounding; for it is not within the ſtatute of James I. which goes only to treſpaſs, where tender of amends may be pleaded to have been made at any time before action brought. Lutw. 1596.

If a man avow taking the cattle damage feaſant, and the plaintiff pleads tender of amends and a refuſal, he ſhall recover, on a verdict for him, damages for the detaining and not for the taking, becauſe the taking was lawful; but if the tender were before the taking, the taking is tortious: if after impounding, neither the taking nor detaining is tortious; and after the avowant has had return irreplevisable, yet if the plaintiff make ſufficient tender, he may have detinue for the detainer after. Sal. 584. 8 Co. 147. Bull. Ni. Pri. 60.

To an avowry for rent, the plaintiff may plead a tender and refuſal without bringing the money into court; becauſe if the diſtreſs were not rightfully taken, the defendant muſt

muſt anſwer the plaintiff his damages. Bull. Ni. Pri. 60. Sal. 584.

But if the diſtreſs were rightfully taken, the plaintiff cannot plead tender of rent and coſts in bar of an avowry for rent in any caſe, unleſs the diſtreſs was made of corn, graſs, &c. growing on the premiſes, and then ſuch plea is given by 11 Geo. 2. c. 19. ſ. 9. For rent.

Where defendant came into poſſeſſion of goods wrongfully, no tender is neceſſary of freight, &c. paid by him, in order to enable plaintiff to maintain his action. *Lempriere* v. *Paſley*, 2 D. & E. 485. In trover.

Sometimes particular ſtatutes authorize a tender of amends, where otherwiſe it would not have been allowable; as 11 G. 2. c. 19. ſ. 20. tender may be made for any unlawful act done by a perſon who has diſtrained for rent juſtly due. Stat. 11 G. 2.

So 17 Geo. 2. c. 38. ſ. 10. in diſtraining for money juſtly due for relief of the poor. 17 G. 2.

So 24 Geo. 2. c. 44. ſ. 24. in all actions brought againſt juſtices for any thing done in execution of their office. 24 G. 2.

But the ſtatute only means actions of tort. *Filtham* v. *Terry*, Eaſt. 13 Geo. 2. B. R.

A juſtice having pleaded tender of amends according to the above act, the plaintiff obtained a rule for the defendant to bring the money into court, for the plaintiff to take the ſame upon diſcontinuing his action. *Lawrence* v. *Cox*, Hil. 33 Geo. 2. B. R. Before a juſtice is allowed to pay money into court, on action of falſe impriſonment, it muſt appear that he is ſued as a juſtice for ſome miſbehaviour in his office, 2 Bl. R. 859. *Caſbourn* v. *Ball*; this may be by the notice and affidavit of the juſtice having been ſerved therewith. In actions againſt juſtices.

So by 23 Geo. 3. c. 70. ſ. 30. tender of amends allowed to be made and pleaded by exciſe officers for any offence committed *quâ* exciſe officers; and 24 Geo. 3. c. 70. gives like privilege to cuſtom-houſe officers. 23 G. 3.

(C) When and how to be pleaded, and of the Conſequences thereof to the Parties in the Suit. (C)

Formerly there was as much ſtrictneſs preſerved in the time of pleading a tender as in a plea in abatement, *viz.* within four days from declaration; but latterly the courts have conſidered it as a fair, honeſt, iſſuable plea, and have permitted At what time tender to be pleaded.

permitted it to be pleaded, even after judge's order for time to plead has been obtained. *Kilwick* v. *Maidman*, B. R. Burr. 59. *Moore* v. *Smith*, 1 C. B. T. R. 369.

Not after imparlance.

But yet it ſhould not ſtrictly be pleaded after an imparlance.

As of ſame term with declaration.

The plea, therefore, ſhould be pleaded as of the ſame term with declaration, unleſs the declaration be delivered or filed ſo late, that defendant is not obliged to plead to it that term, and then it may be pleaded of courſe within the firſt four days incluſive of the next term, intitled as of the preceding term; and even afterwards, under particular circumſtances, court will, on motion, ſuffer it to be pleaded as of the laſt term. Tid. 248. *Bayler* v. *Houlſton*, Bar. 351. *Smith* v. *Philips*, Ib. 354. *Browne* v. *Hagon*, Ib. 357. *Aſhberts* v. *Hughes*, Ib. 359. *Pitfield* v. *Mercy*, Ib. 362.

After demurrer.

After demurrer to declaration, plaintiff obtained judge's order and amended; defendant then moved for leave to plead tender as of laſt term, or that plaintiff might make his declaration of this term. Rule abſolute. *Roberts* v. *Hughes*, Bar. 359.

How to be pleaded.

A tender may be pleaded generally to the whole declaration; but defendant cannot plead *non aſſumpſit* to the whole, and a tender as to part. *M'Lallan* v. *Howard*, 4 D. & E. 194.

The uſual way, therefore, is to plead as to all, except the ſum tendered *non aſſumpſit*, and as to that ſum a tender.

But defendant may plead not guilty, and a tender of amends in treſpaſs. *Martin* v. *Keſiertin*, 2 Blac. 1089. *Gerring* v. *Manning*, Bar. 366.

It is not ſufficient for plea to ſtate that defendant was ready, and had always been ready to pay the debt, but it muſt ſet forth an actual tender. *French* v. *Watſon*, 2 Wil. 74.

Of the uncore prist.

Where there is no fixed time for payment, defendant ſhould not only ſhew a tender, but plead that he was always ready from the time of making the promiſe to pay, and yet is ready; and not merely from the time of making the *tender*. But where, by agreement, payment was to be at a fixed time, tender at and always ready from that time is ſufficient. *Giles* v. *Hart*, Sal. 622. *Ferrand* v. *Pearſon*, Bull. Ni. Pri. 156. *Sweatland* v. *Squire*, 2 Sal. 623.

If adminiſtrator pleads that he has been always ready ſince the death of inteſtate, it is bad. It ſhould be, that his inteſtate was at all times, during his life, from the making of promiſe, ready to pay; and that adminiſtrator had always

ways been ready ſince his death. *Clemens* v. *Reynolds*, Say. 18.

If a tender at the day of corn, or of any other goods of a periſhable kind, be pleaded, with a refuſal, there is no need to plead *uncore priſt.* 9 Rep. 79. *Peytoe*'s caſe.

So in covenant, the damages, not the debt, being the thing in demand, it need not be pleaded with an *uncore priſt.* *Carter* v. *Downiſh*, 1 Show. 137. Bull. Ni. Pri. 166.

In pleading a tender, defendant ſhould plead ſuch particulars as to ſhew that he has done all that could be done on his part to accompliſh what by his agreement he was bound to do. *Lancaſhire* v. *Killingworth*, Sal. 624.

Though a tender is made, and the plaintiff refuſes the money, yet the tender cannot be pleaded in bar of the action, either in debt or *aſſumpſit*, but in bar of the damages only; for the debtor ſhall nevertheleſs pay his debt. Lord Raym. 254. *Giles* v. *Hart.*

And there is a difference in pleading a tender in debt and *aſſumpſit*; for in debt the damages are but acceſſary, but in *aſſumpſit* they are the principal. Therefore, in debt, defendant may plead in bar of the damages; but, in *aſſumpſit*, he ought to plead always ready with a *profert in cur.* and demand judgment *de ulterioribus damnis.* *Giles* v. *Hart*, Sal. 623.

How, if freſh demand made.

But although ſuch tender and refuſal were made, yet if, at any ſubſequent period, plaintiff has made a freſh demand, and defendant has on his part refuſed to pay, the operation of the former tender is done away, and plaintiff may reply to ſuch plea of tender, the ſubſequent demand and refuſal, and if proved, be entitled to a verdict. 5 Bac. Ab. 12.

But then it muſt be proved, that the perſon who made the demand was properly authorized to receive the money. Eſp. N. P. 125.

Of the profert in curia.

A tender of money muſt be pleaded with a *profert in curia* of the money; and if the ſame be not paid into court, plaintiff may ſign judgment. *Pether* v. *Shelton*, Str. 638. *Bray* v. *Booth*, Bar. 252.

How money to be paid into court on a plea of tender.

In B. R.	*In C. B.*
The money tendered is paid to the ſigner of the writs, Meſſrs. Provoſt and Webb, who give a receipt for the ſame in the margin of the plea, which is to be ſigned by counſel, and filed with the clerk of papers.	*Money is paid to one of the prothonotaries, who gives a receipt for ſame in margin of draft of plea. Pay* 8d. per *ſheet, and* 1s. 4d. *for receipt. No rule is drawn up to pay money into court, but plea is filed.*

Of taking the money out.

Money brought into court on a plea of tender cannot be taken out by defendant, though he obtains a verdict; for it

is

is the ſame as if money had been brought in on the common rule, to ſtrike it out of the declaration. *Cox* v. *Robinſon*, Str. 1027.

After a plea of tender, and money brought into court, the court will not admit the defendant to withdraw his plea, and plead the general iſſue. *Reeves* v. *Probart*, Bar. 330.

Plaintiff may either admit the tender or not. If the latter, he ſhould not take the money out of court; for by taking it, he admits the ſame to be right, and judgment is given for defendant to go quit as to that plea. But if he admits it, and goes for further damages, on the ground that the tender was not ſufficient to cover his demand, he may take the money out of court, enter an acquittal as to the tender, or confeſs the ſame in his replication, and proceed on the general iſſue for the reſidue. *Cliff* v. *Jones*, Ld. Raym. 1774.

And if he recovers any thing beyond, though under 40*s.* he is entitled to coſts, if, together with the money paid into court on the tender, it is above 40*s.* *Heaward* v. *Hopkins*, Do. 448.

If he admits the tender, and enters an acquittal without going for further damage, he muſt pay defendant his coſts. *Hill* v. *Williams*, Bar. 357.

If plaintiff will not receive the money, but takes iſſue upon the tender, and it is found againſt him, the money is loſt for ever. Ld. Raym. 642. Co. Litt. 207. Hob. 199.

(D) How Defendant may avail himſelf of the true Time of the Tender, though ſubſequent to *Teſte* of Writ, or the like.

If a tender be in fact made before the bringing of the action, though, by the *teſte* of the writ, it may appear to have been afterwards, (as if tender in vacation and writ teſted of preceding term,) the exact time when writ in fact was ſued out may be ſhewn in pleading, or ſometimes given in evidence contrary to the *teſte*; for *fictio cedit veritati*. See *ante*, Chap. 3. Sec. 1. E. 8.

But it is ſaid, that if bill be filed on ſame day tender was made, though ſubſequent thereto, defendant cannot avail himſelf by pleading the prior tender.

A tender was made actually in the term, and before a bill filed againſt defendant; bill was afterwards filed ſame day, and a ſummons taken out before Mr. J. Buller, to intitle the bill (which was of Hilary term generally) the day it was actually filed. Mr. J. Buller ſaid, that it would not at all aſſiſt defendant; for he could not take advantage of it in

pleading, there being no fraction of a day. Hil. 30 Geo. 3. Imp. B. R. 292.

But if, by a ſpecial memorandum, defendant could avail himſelf of the tender, court will order a general one to be altered to the true day when bill was filed, or writ ſued out. C. B. *Potts* v. *Creſſwell*, Bar. 343. *Smith* v. *Key*, B. R. Str. 638.

Section XIV.

Of the Plea and Notice of Set-off.

(A) Its Origin and Nature.

(B) Of the Demands and Actions within the Statutes of Set-off.

(C) Of the Parties between whom there may be a Set-off.

(D) Of the Form of Notice of Set-off, and its Incidents.

(A) Its Origin and Nature.

(A)

No ſet-off at common law;

That croſs demands ſhould be ſet off againſt each other by deducting the leſs ſum from the greater, and the difference be deemed the ſum juſtly due, ſeems clearly agreeable to the principles of natural equity. But the *law*, for the ſake of the forms of proceeding and convenience of trial, has ſaid, that each muſt ſue and recover ſeparately in ſeparate actions.

At common law, therefore, whenever there were mutual debts unconnected, each party was driven to his ſuit.

Courts of equity alſo followed the ſame rule; for otherwiſe they would have ſtopped the courſe of law in all caſes where there was a mutual demand.

but remedied by ſtatute.

The natural ſenſe of mankind was firſt ſhocked at this in the caſe of bankrupts, and it was provided for by 4 Anne, c. 17. and 5 G. 2. c. 30. that mutual demands ſhould be balanced. Where there was no bankruptcy, the injuſtice of not ſetting off (eſpecially after the death of either party) was ſo glaring, that parliament interpoſed by 2 G. 2. c. 22. and 8 G. 2. c. 24.; but the proviſion does not go to goods or other ſpecific things wrongfully detained; and therefore neither courts of law nor equity can make the plaintiff who

ſues for ſuch goods, pay firſt what is due to the defendant, except ſo far as the goods can be conſtrued a pledge, and then the right of the plaintiff is only to redeem. Hence it is that courts of law have inclined of late years ſo much in favour of liens. See the caſe of *Green* and *Farmer*, Burr. 2220.

(B) (B) Of the Demands and Actions within the Statutes of Set-off.

Of the demands and actions within the ſtatutes of ſet-off

By the 2 Geo. 2. c. 22. "Where there are mutual debts between plaintiff and defendant, or if either ſue or be ſued as executor or adminiſtrator, where there are mutual debts between teſtator or inteſtate and the other party, one debt may be ſet againſt the other; and ſuch matters may be given in evidence on the general iſſue, or pleaded in bar, as the nature of the caſe ſhall require: ſo as at the time of pleading the general iſſue, where any ſuch debt is to be inſiſted upon in evidence, notice be given of the particular ſum or debt ſo intended to be inſiſted on, and upon what account it became due."

Stat. 8 G. 2.

In the conſtruction of this ſtatute, the then two chief juſtices, Lords Hardwicke and Eyre, differed with regard to ſetting off debts of ſuperior nature againſt inferior, and *vice verſa*, which occaſioned the 8 Geo. 2. c. 24. Blac. 871. whereby "mutual debts may be ſet off againſt each other, notwithſtanding they are of a different nature, unleſs where either of the ſaid debts ſhall accrue by reaſon of a penalty contained in any bond or ſpecialty; and in all ſuch caſes, the debt intended to be ſet off ſhall be pleaded in bar; in which ſhall be ſhewn, how much is truly and juſtly due on either ſide: and in caſe plaintiff ſhall recover, judgment ſhall be entered for no more than ſhall appear to be due after one debt ſet againſt another."

By the general iſſue mentioned in ſtatute is meant any general iſſue, (as *non eſt factum* in covenant,) according as the action may be. Bull. Ni. Pri. 181.

The remedy of ſet-off extended

As to affidavits to hold to bail.

So as to coſts and judgments.

The courts have been gradually extending this equitable remedy of ſet-off: in the outſet of a ſuit, they compel the plaintiff to make a ſet-off in the affidavit to hold to bail, and will not ſuffer him to ſwear to one ſide only of the account. So in coſts at the cloſe of the ſuit, the ſame reaſon and the ſame analogy extend to ſet off mutual judgments, and thereby narrow the greater execution, in whatever court it happens to be.

Thus in C. B. court ordered a judgment obtained in B. R. to be ſet off againſt a judgment obtained in C. B. and on payment

payment of the balance, execution to be ſtayed. *Barker* v. *Braham*, Blac. 869.

Coſts ſet off.

So in all caſes where the parties have mutual demands of coſts againſt each other, court, on motion, will order them to be ſet off. See the caſes *Schoole* v. *Noble* and others, 1 C. B. T. R. 23. *Nunez* v. *Modigliani*, Ib. 217. *O'Connor* v. *Murphy*, Ib. 657.

So coſts of one judgment may be ſet off againſt debt and coſts of another. *Thruſtout* dem. of *Barns* v. *Crafter*, Blac. 826.

Nay, ſo far have the courts exerciſed this equitable juriſdiction, that in the caſe of *Mitchell* and *Oldfield*, 4 D. & E. 123. where the plaintiff had recovered a judgment againſt defendant, and the defendant had alſo recovered in another action againſt plaintiff and another; upon a motion to ſet off the debt and coſts of the latter againſt the judgment of the former, although the one was a debt due to plaintiff alone, whereas the other was the joint debt of plaintiff and another to the defendant; and although it was obſerved, that it was not ſuch a debt as could be ſet off, yet court made the rule abſolute, on defendant's undertaking to pay plaintiff's attorney's bill in the firſt action, who had a lien on the judgment for his coſts; Ld. Kenyon ſaying, that this caſe did not depend on the ſtatutes of ſet off, but on the general juriſdiction of the court over the ſuitors in it; that it was an equitable part of their juriſdiction, and had been frequently exerciſed.

Even a ſeparate judgment ſet off againſt a joint one.

Where the debt is of an equal ſum, there the action is barred; but if it be for a leſs ſum than for what the action is brought, the defendant muſt pray to have it ſet off. Bull. Ni. Pri. 179.

A ſet-off, reducing plaintiff's demand under 40*s.*, does not affect the juriſdiction of the ſuperior courts. *Pitts* v. *Carpenter*, 1 Wil. 19. S. C. Str. 1191. *Heaward* v. *Hopkins*, Do. 448.

Juriſdiction of court not affected by ſet-off reducing debt.

Two parts of a plea of ſet-off are as two counts in a declaration, and if one part be good, a general demurrer to the whole is bad. *Dowſland* v. *Thompſon*, Blac. 910.

One part of ſet-off may be good though not another.

The ſtatutes authorizing a ſet-off only extend to actions founded on contracts either expreſs or implied, but not to torts or actions of wrong, as detinue, treſpaſs, and the like; nor to replevin, for that is not an action, but a remedy without ſuit. *Abſolom* and *Knight*, Bull. Ni. Pri. 181.

No ſet-off in actions founded on torts.

But to an avowry for rent, the tenant may plead payment of ground-rent to the original landlord, though he cannot plead a ſet-off. *Sapsford* v. *Fletcher*, 4 D. & E. 511.

Set-off must be for liquidated demands.

The debt or demand set off must be liquidated and certain.

Not damages unliquidated;

Damages, therefore, not yet recovered, cannot be set off, *Freeman* v. *Hyett*, Blac. 394.; as in action of covenant against defendant, unliquidated damages arising from the breach of other covenants to be performed by plaintiff, cannot be pleaded by way of set-off. *Howlet* v. *Strickland*, Cow. 56. *Weigall* v. *Waters*, 6 D. & E. 488.

nor penalties for breaches of agreement;

So to an action of *assumpsit*, defendant pleaded articles of agreement with a penalty, and shewed a breach whereby penalty became due, and offered to set off: on demurrer, the plea was held not within the statutes, for there may not be 5 *l.* justly due to defendant on the balance. *Nedriffe* v. *Hogan*, Burr. 1024.

For debts to be set off should be such as an *indebitatus assumpsit* will lie for. Cow. 56. *Howlett* v. *Strickland*.

Where, therefore, the sum is not by way of penalty, but as stipulated damages, then it may be set off.

unless it is by way of stipulated damages.

As if two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished in the time; such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action brought against him by the obligor who executed. *Fletcher* v. *Dyche*, 2 D. & E. 32.

Simple contract debts may be set off against specialties.

By the statute, a simple contract debt may be set off against a specialty debt, or *vice versa*; and such was the opinion of the court of B. R. even before the passing of the 8 G. 2. Bull. Ni. Pri. 179.

How to plead set-off in actions on bonds.

In debt on bond, the defendant craved oyer of the condition, which was to pay the plaintiff 10 *l. per annum* during life; and then pleaded, that the plaintiff was indebted to him 500 *l.* for money lent, &c. exceeding the yearly sums that had incurred for the annuity, and offered to set off as much, &c.; and on demurrer the plea was holden good. *Colins* v. *Colins*, Burr. 820. Bull. Ni. Pri. 180.

Real sum shewn.

But in such action on a bond, defendant must set forth in the plea what is really due on the bond, before he is entitled to set off any cross demand under 8 G. 2. c. 24. and such averment is traversable. *Symmons* v. *Knox*, 3 D & E. 65.

How far it extends to bail-bonds.

In debt on bond, defendant pleaded a greater debt in bar; upon which the plaintiff prayed to have the condition of his

his bond enrolled, which was to appear at Weſtminſter, and demurred; and it was holden, that this bond was not within the 8 G. 2. for that ſtatute relates only to bonds conditioned to pay money, and not to bail-bonds; and it was not within the ſtatute 2 G. 2. becauſe the plaintiff did not bring the action in his own right, but as truſtee for another (for he was an officer in the palace court); but if it had been given to the ſheriff, and by him aſſigned to the party, it might be otherwiſe, and then the penalty would have been conſidered as a debt, becauſe it would have depended upon the 2 G. 2. Bull. Ni. Pri. 179.

Set-off pleaded, though action brought for the debt ſet off

Defendant may plead a debt by way of ſet-off to an action brought againſt him, though he has already commenced his action againſt the plaintiff for that very debt which he ſets off, and plaintiff has, in ſuch action of defendant, paid the amount into court. *Evans* v. *Proſſer*, 3 D. & E. 186.

How ſuch plea operates in croſs actions.

A. brought an action againſt B. for 30*l.*, to which there was no ſet-off; B. brings his action againſt A. for 11*l.* due to him; A. pleads, by way of ſet-off, the very debt for which he had before brought his action: both cauſes are ſet down for trial: A.'s cauſe comes on firſt, and there being no ſet-off, he gets a verdict for the whole ſum; then B.'s cauſe comes on. A. may ſtill inſiſt upon the validity of his ſet-off, notwithſtanding he has got a verdict for the very debt ſet off; for the verdict did not annihilate or extinguiſh the debt, nor change the nature of it or the rule of law: it only amounted to concluſive evidence, and he had the ſame right to ſet it off after verdict as before. The motion was rightly and truly given at the *time* when it was given, and the mere accident of his cauſe being tried firſt ſhall make no difference, and a *remittitur* may be entered on the firſt record for ſo much; B. ought to have ſet off his leſs demand in A.'s action. *Brown* v. *Baſkerville*, Burr. 1231.

Judgment ſet off pending error.

A judgment can be pleaded by way of ſet-off, though a writ of error be pending thereon. *Reynolds* v. *Beering*, and *Evans* & *Proſſer*, 3 D. & E. 187.

Judgment ſatisfied by freſh ſecurity given.

Where a priſoner in execution is diſcharged by the conſent of his creditor, upon giving a freſh ſecurity to ſatisfy the judgment, and that ſecurity is afterwards defeated, on account of a mere informality, the judgment is ſatisfied, and cannot be ſet off againſt a demand of the priſoner. *Jacques* v. *Withy*, 1 D. & E. 557.

Debt barred by ſtatute of limitations cannot be ſet off.

A debt barred by the ſtatute of limitations cannot be ſet off: if it be pleaded in bar to the action, the plaintiff

may reply the ſtatute; and if given in evidence at the trial, on a notice of ſet-off, it may be objected to. Bull. Ni. Pri. 180.

(C) (C) Of the Parties between whom there may be a Set-off.

Of the parties between whom there may be a ſet-off.

How mutual credit may ariſe.

Mutual credit may be conſtituted, though the parties do not mean particularly to truſt each other, as if a bill of exchange, accepted by A., get into the hands of B., and B. buy goods of A., there is mutual credit between A. and B., which may be ſet off by B., though A. did not know, when he let B. have the goods, that ſuch bill was in his hands. *Hankey* v. *Smith*, 3 D. & E. 507. *n.*

Of ſet-off in caſe of bankruptcy.

By the 5 G. 2. c. 30. ſ. 28. the commiſſioners are empowered, where there has been mutual credit or mutual debts between the bankrupt and other perſons, to ſet off one debt againſt the other, and the balance only is to be claimed or paid.

But it was holden, ſince the paſſing of that act, that in an action by aſſignees of a bankrupt, defendant could not ſet off a debt due from the bankrupt. *Ryal* v. *Larkin*, 1 Wil. 155.

But this caſe was afterwards impeached, as contrary to law, juſtice, and ſenſe; and it was held, that the defendant might ſet off a debt due to him from the bankrupt, for the aſſignees are the bankrupt. *Ridout* v. *Brouch*, Cow. 134.

But where the aſſignees bring an action for a debt due to the bankrupt's eſtate, the debt to be ſet off muſt have exiſted at the time of the bankruptcy. The defendant, therefore, cannot ſet off caſh-notes iſſued by the bankrupt, payable to bearer, bearing date before his bankruptcy, unleſs he ſhews further, that ſuch notes came to his hands before the bankruptcy. *Dickſon* v. *Evans*, 6 D. & E. 57.

If an action be brought by the aſſignees for a debt accruing to them as aſſignees ſince the bankruptcy, defendant cannot ſet off a debt due to him from the bankrupt before the bankruptcy. *Ib.*

If a bankrupt, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the aſſignees may diſaffirm the contract, and recover the value of the goods in trover; but if they bring *aſſumpſit*, they affirm the contract, and then the creditor may ſet off his debt. *Smith* and others v. *Hodſon*, 4 D. & E. 211.

Where

Where the defendant lent his acceptance to the bankrupts on a bill, which did not become due till after the act of bankruptcy, and was then outſtanding in the hands of a third perſon, yet the defendant, having paid the amount after the commiſſion iſſued, and before the action brought by the aſſignees, is entitled to ſet off the ſame under the words *mutual credit*, in the 5 Geo. 2. c. 30. ſ. 28. *Ib.*

Aſſumpſit will lie for a creditor's ſhare under an order of commiſſioners for a dividend; and in ſuch action, the proceedings before the commiſſioners are concluſive evidence of the debt, and the aſſignees cannot ſet off a debt due from plaintiff to the bankrupt. *Brown* v. *Bullen*, Do. 407.

If a demand be payable at all events, though at a future day, it may be proved under a commiſſion of bankrupt againſt the debtor, or *ſet off* in an action brought by the aſſignees; but if it reſt in contingency, whether it will be paid or not, it cannot be ſo proved or *ſet off*, unleſs it be ſecured by a penalty which is forfeited at law. *Handcock* and others, aſſignees, v. *Entwiſtle*, 3 D. & E. 435.

See alſo *Grove* v. *Dubois*, 1 D. & E. 112. as to brokers with commiſſions *del credere*, proving loſſes under notices of ſet-off, or under ſtatute 5 G. 2. c. 30. in actions by aſſignees of bankrupts for premiums of inſurance.

Of ſet-off in caſes of executors, &c.

If an executor or adminiſtrator brings an action for money due to the teſtator or inteſtate, defendant may ſet off debt due from ſuch teſtator or inteſtate to himſelf.

In caſes of partners.

So if a partner or executor brings an action in his own right for money received by defendant *after* the death of the other partner or teſtator, defendant may ſet off whatever was due to him from plaintiff. *Smith* v. *Barrow*, 2 D. & E. 476.

B. appointed A. his attorney to receive rents, who, after B.'s death, received money for rent arrear in B.'s lifetime. B.'s executrix brought an action for this money in her own name, and A. gave notice to ſet off a debt due from B. to him: this was not allowed at the trial, becauſe the teſtator had never any cauſe of action againſt A., for the money was not received by A. till after B.'s death. *Shipman* v. *Thomſon*, Eaſt. 11 Geo. 2. C. B. Bull. Ni. Pri. 180.

A debt due from the plaintiff, as ſurviving partner to defendant, may be ſet off againſt a debt due from defendant to the plaintiff in his own right. *French* v. *Andrade*, 6 D. & E. 582.

Of demands in right of a man's wife.

A debt due to a man in right of his wife, cannot be set off in an action against him on his own bond. Bull Ni. Pri. 179.

A retainer in certain cases need not be set off, but may be given in evidence.

Where defendant had paid the plaintiff all the money he had received for him, except what he retained for his labour and service, he may, in an action for money had and received, give that in evidence on the general issue, without any notice of set-off; for it is not in the nature of a cross demand or mutual debt, but it is a charge which makes the sum of money received for plaintiff's use so much less. *Dale* v. *Sallett*, Burr. 2133.

In cases of factors and principals.

If a factor dealing for a principal conceals that principal, the person contracting with him hath a right to consider him as the principal, and in an action afterwards brought by the real principal, may set off any claim he may have against the factor, in answer to such demand of the principal. *George* v. *Clagett*, 7 D. & E. 359. and see *Rabone* v. *Williams*, and other cases, in the notes to the above.

(D)

(D) Of the Form of a Notice of Set-off and its Incidents.

The form of a notice of set-off.

Plea general issue.

Mr. J. M.

Of the form of the notice.

Take notice, that the said defendant C. D. intends to give in evidence at the trial of this cause, and insist, that the said plaintiff A. B. was before and at the time of the commencement of this suit against the said defendant, and still is, indebted to the said defendant in more money than is due to the said plaintiff by reason of the promises and undertakings in the declaration mentioned, to wit, at aforesaid, in the said county, in the sum of 40*l. for so much money before that time lent and advanced by the said C D. to the said A. B. at his special instance and request; and in the further sum of* 40*l. for so much money before that time paid, laid out, and expended to and for the use of the said A B. at his like special instance and request (and the like according as nature of debt may be); which said sums of money, or so much thereof as will be sufficient to answer and satisfy such demands as the said plaintiff A. B shall be able to prove against the said defendant C. D. by reason of the promises and undertakings in the said declaration mentioned, at the trial of this cause the said C. D. will give in evidence, set off and deduct against such demands of the said plaintiff, according to the form of the statute in such case made and provided. Dated, &c. Yours, &c.*

O. P. defendant's attorney.

To Mr. T. S. plaintiff's attorney.

The

The preceding notice must be written underneath the plea on the same sheet of treble penny; a copy of which must be kept by the defendant's attorney, it being necessary to prove a delivery thereof on the trial of the cause.

The debt that is set off must have been due at the commencement of the suit; it will not do to plead, that plaintiff was indebted to defendant in so much at the time of *the plea pleaded*. *Evans* v. *Prosser*, 3 D. & E. 186. When the debt set off must be due.

Though in the case of *Reynolds* v. *Beering*, 25 G. 3. Do. 112. *n.* it was not long before held the contrary; and on the same principles also was the case of *Sullivan* v. *Mountagu*, Do. 106.

Defendant pleaded the general issue, but forgot to give notice at the same time of a set-off; and upon motion, the court gave leave to withdraw the plea, in order to deliver it again with a notice of set-off. *Blackbourn* v. *Matthias*, 2 Str. 1267. General issue withdrawn and pleaded with notice.

A notice of set-off was as follows:

"Take notice, that you are indebted to me for the use and occupation of an house for a long time held and enjoyed, and now lately elapsed." *Per* Ld. Hardwicke C. J. These notices should be almost as certain as declarations; the legislature designed them to be in the nature of cross actions, and they should be expressed with great certainty, that the plaintiff might be able to make a proper defence to them. Had this been a declaration for use and occupation, it had certainly been bad; for it must have shewn the commencement and determination of it: afterwards it appeared, that the debt, designed to have been set off, was for rent reserved on lease by indenture; which not being mentioned in the notice, the chief justice said it was bad on that account also; for if this had been shewn, the plaintiff might probably have proved an eviction, or some other matter, to have avoided the demand. *Fowler* v. *Jones*, sittings at Westminster, Hil. 8 G. 2. Bull. Ni. Pri. 179. Of the certainty requisite in notice.

Motion to amend a notice of set-off, but denied. Notices of this kind are, in this respect, like notices of trial, &c. which never were amended by the court. Bar. 294. Anon. Notice of set-off not amendable:

But defendant may withdraw same, and plead *de novo*, *non assumpsit*, and a new notice. but may be withdrawn and pleaded *de novo*.

On plea or notice of set-off, plaintiff may take out summons for the particulars of defendant's demand, which he means to set off, and if such particular be not delivered by the Plaintiff may by summons know particulars of set-off.

the time limited by the order, defendant is precluded going into his ſet-off; and when delivered, he can only give evidence of the matters contained therein. See Vol. II. Index, *Bill of Particulars*.

Sometimes neceſſary to pay money into court with ſet-off.

Where the defendant's demand does not countervail plaintiff's, he ſhould, beſides ſetting off his debt, move the court wherein the action is depending, for leave to pay ſo much money into court, as, with his own demand, will be ſufficient to ſatisfy the plaintiff's: otherwiſe plaintiff will recover a verdict againſt him for the overplus.

CHAPTER VIII.

HITHERTO we have presumed, that the proceedings in the suit have gone on regularly, in order to bring some fact before a jury to be tried; but it often happens, either that the cause of action itself, as stated in the declaration, is not maintainable in point of law, or that the defence or justification set up by defendant in his plea is not a legal defence or matter which can, agreeable to the rules of law, be pleaded; or even if the cause of action, or the matter set forth in the plea, be in substance good, yet it may be informally set forth or pleaded; in all which cases, the plaintiff or defendant may object to the validity of the declaration or pleading, by way of *demurrer*, and may bring the point, which then becomes a mere question of law, to be argued before the judges in term time for their decision.

Again, a cause is frequently interrupted in its progress, and the course of the proceedings diverted, by some omission or negligence of the parties.

As the ends of justice would be defeated, were it in the power of either party, by his own laches or misconduct, to prevent his adversary from bringing the suit to a conclusion; it is therefore wisely established, by the usage and practice of the courts, that if the plaintiff or defendant omit to take, with due expedition, such steps as are required of them, the other party may still pursue his remedy, by signing judgment against the defaulter, and recovering the debt, damages, or costs, to which he may be entitled.

This omission is sometimes voluntary; and the party suffers such judgment to be signed against him, in order to save further expence, when he is conscious that the action cannot be supported, or that he has no ground of defence to it.

When this judgment is signed against the *defendant*, for want of proceeding on his part, it is called *judgment by default*; but when it is signed against the *plaintiff*, it is termed *judgment of non pros*, by reason of the plaintiff not *prosecuting* his suit; in which case, defendant is entitled to the costs he has been put to.

In both these cases, it is upon the supposition that the omission to proceed is before issue joined between the par-

ties; for whenever ſuch iſſue is joined, the plaintiff muſt proceed to trial by making up the record, giving notice of trial, and the like; and if the defendant does not appear when the cauſe is called on, the plaintiff will be entitled to a verdict: and if, after iſſue joined, the plaintiff ſhould not proceed, ſtill the defendant cannot ſign judgment of *non pros*, nor can he (except in a few caſes) carry down the record himſelf to trial; but he muſt purſue another remedy, given him by ſtatute, namely, apply to the court to enter up judgment againſt the plaintiff, as if they had proceeded to trial, and plaintiff had been nonſuited: this is called *judgment as in caſe of a nonſuit.*

Independent of theſe judgments, grounded upon the default or neglect of the parties, ſometimes the defendant *confeſſes* the plaintiff's cauſe of action to be juſt, and agrees that ſuch confeſſion ſhould be entered upon the record: this is called *judgment by confeſſion.* And ſometimes, either before or pending the action, he gives a bond, conditioned to pay the debt by inſtalments, accompanied with a warrant of attorney, which is an authority to enter up judgment againſt him, provided the condition of the bond be not fulfilled: this is called *judgment on warrant of attorney.*

There is alſo another mode of proceeding, which is out of the ordinary courſe, namely, when ſome matter of record, as a fine, judgment, act of parliament, or the like, is pleaded, and iſſue is joined upon the exiſtence of ſuch a record; in this caſe, the fact is not tried by a jury, or by oral witneſſes, but by the production of the inſtrument itſelf, and is called *trial by record.*

It is intended, in the preſent Chapter, to treat of the proceedings in each of the above caſes, under their reſpective heads.

SEC. I. *Proceedings on Demurrer.*
SEC. II. *Judgment by Default.*
SEC. III. *Judgment of Non Pros.*
SEC. IV. *Judgment as in Caſe of a Nonſuit.*
SEC. V. *Judgment by Confeſſion.*
SEC. VI. *Judgment on Warrant of Attorney.*
SEC. VII. *Trial by Record.*

Section I.

Of Proceedings on Demurrer.

(A) Of general and ſpecial Demurrers.

(B) How to proceed on Demurrer in B. R. and C. B.

(C) How when there are Iſſues to Part, and Demurrer to Part.

(D) Of waiving and withdrawing Demurrers, and amending after Argument.

(E) Further general Obſervations on Demurrers.

(A) Of general and ſpecial Demurrers. (A)

A demurrer in pleading is an admiſſion by the adverſe party of the fact charged in the count or declaration, plea, replication, &c.; but refers the law ariſing on ſuch fact to the judgment of the court. Demurrer, what.

A demurrer is either ſpecial or general. Special or general.

There were ſpecial demurrers at common law, as well as general; but ſpecial demurrers were never neceſſary, except in caſes of duplicity, and therefore ſeldom practiſed; for as the law was then taken to be on a ſpecial demurrer, the party could take advantage of no other defect, but that which was ſpecially aſſigned for cauſe of demurrer. But upon a general demurrer, he might take advantage of all defects, that of duplicity only excepted; and there was no inconvenience in ſuch practice; for the pleadings being at bar, *vivâ voce*, and the exceptions taken *ore tenus*, the cauſes of demurrer were as well known upon a general as upon a ſpecial demurrer. After the Reformation, when the practice of pleading at bar was altered, the uſe of general demurrers notwithſtanding continued; and thereby this public inconvenience followed, that the party, whoſe pleading was demurred to, came into court, not knowing what he was to argue. This inconvenience occaſioned the ſtatute 27 of Eliz. which enacted, "That after demurrer joined, the "judges ſhall proceed and give judgment, according as the "right ſhall appear, without regarding any imperfection, "defect, or want of form in any writ, return, plaint, de- "claration, or other pleading, proceſs, or cauſe of pro- "ceeding, How at common law. How altered by ſtat. 27 Eliz.

" ceeding, except thoſe only which the party demurring " ſhall ſpecially and particularly ſet down and expreſs with " his demurrer. And that upon ſuch demurrer joined and " entered, the court ſhall amend all ſuch imperfections, " defects, and wants of form, other than thoſe which the " party demurring ſhall particularly aſſign."

Special demurrer revived.

This ſtatute, in great meaſure, was reſtorative of the common law, and required, in all caſes of form, a ſpecial demurrer; but a general demurrer ſtill ſufficed for all matters of ſubſtance. However, many things, which were conſtrued to be matters of ſubſtance, ſince the making of the above ſtatute of Elizabeth, are, by ſubſequent ſtatutes, regarded but as matters of form only, and ſhall be aided, if not ſpecially demurred to. *Vide* what omiſſions and defects are ſtill aided after verdict, by the 16 & 17 Car. 2. c. 8. and other ſtatutes of jeofails.

Other ſtatutes affecting ſpecial demurrers.

Stat. 4 & 5 Anne, c. 16.

The ſtatute 4 & 5 Anne, c. 16. in furtherance of the ſtatute of Elizabeth, enacts, That no exception ſhall be taken of the following matters on a general demurrer, which before were regarded as matters of ſubſtance, and were fatal on a general demurrer, viz. " An immaterial " traverſe, default of entering pledges upon any bill or de- " claration, default of alledging of bringing into court any " bond, bill, indenture, or other deed, mentioned in the " declaration or pleading; default of alledging of the " bringing into court letters teſtamentary, or letters of " adminiſtration; the omiſſion of *vi et armis, et contra* " *pacem*, or either of them; or the want of averment of " *hoc paratus eſt verificare*, or *hoc paratus eſt verificare per* " *recordum*, or for not alledging *prout patet per recordum*, " or matters of the like nature." So that, for theſe defects, the party muſt now demur ſpecially.

A departure requires a ſpecial demurrer.

A departure, though not mentioned, has been held to be within this act; and therefore, for a departure in pleading, there muſt now be a ſpecial demurrer, though, before this ſtatute, a departure was fatal on a general demurrer.

The 4 & 5 Anne does not give any remedy upon general demurrer, but in matters of the ſame nature with thoſe which are there ſpecified. *Hodgethorn* v. *Thurlock*, Com. 306.

Statutes do not extend to pleas in abatement.

The ſtatutes 27 of Eliz. and 4 & 5 Anne, directing the judges, on demurrer joined, to give judgment according as the right ſhall appear, extend only to ſuch demurrers as go to the action, and not to demurrers to pleas in abatement. Moore, Com. 309.

Therefore

Therefore a ſpecial demurrer is never neceſſary to a plea in abatement, but a general one will do. *Watts* and *Goodman*, 1 Barn. 11.

The general rule is, that in all caſes where pleadings are demurred to, for matter of form, and for the cauſes ſpecified in the acts above mentioned, a ſpecial demurrer is requiſite; but whenever the demurrer is for matter of ſubſtance, a general demurrer is ſufficient. Rule as to general or ſpecial demurrer.

Duplicity is ſtill aided on a general demurrer; for to ſay becauſe plea is double, and wants form, is not ſufficient; it ought to ſhew in what the duplicity conſiſts. *Lamplugh* and *Shortridge*, Com. 115.

Notwithſtanding a general demurrer ſtill ſuffices for want of ſubſtance, yet, in doubtful caſes, it is beſt to ſhew the cauſe of demurrer; becauſe, on a ſpecial demurrer, any matter of ſubſtance, though not expreſsly alledged, may be taken advantage of; whereas no advantage can be taken of any matter of form on a general demurrer.

A plea may be bad on a general demurrer, though it might be helped after verdict, as *nil debet* to an action on bond. Anon. 2 Wil. 10. Plea bad on demurrer, though aided by verdict.

A demurrer, whether general or ſpecial, ought to be ſigned by a counſel in B. R. and ſerjeant in C. B. Demurrers muſt be ſigned.

(B) How to proceed on Demurrer. (B)

In B. R.

In the King's Bench, if there is a general demurrer to the declaration, *the plaintiff's attorney adds a joinder thereto, and makes up and delivers the iſſue thereupon, for which the other ſide muſt pay* 4d. per *ſheet, beſides ſtamps; if not paid for on demand, judgment may be ſigned: but if the demurrer is ſpecial, or if general, after a ſpecial plea pleaded, the ſame muſt be filed with the clerk of the papers, who makes up the demurrer book with the joinder, and gives a rule in the margin for the defendant to receive and return the ſame to plaintiff's attorney (this muſt be done in* 24 *hours, and entries be paid for); if he returns demurrer book and pays for the entries, an* incipitur *is entered on the King's Bench roll, plaintiff's attorney*

In C. B.

In the Common Pleas, when demurrer is joined, the plaintiff's attorney, in all caſes, makes up the demurrer book, and delivers it on treble penny ſtampt paper to the defendant's attorney, who pays for it at the rate of 4d. per *ſheet, beſides ſtamps; and alſo for entering his pleadings and warrant of attorney; then plaintiff's attorney enters the whole proceedings on the roll, which is got of prothonotary, and having delivered the ſame to the ſecondary, he gets a ſerjeant to move for a* concilium, *or day to argue it; and the ſecondary draws up a rule accordingly, which muſt be ſerved on defendant's attorney, and the demurrer put down for argument, and muſt be of ſame term iſſue is joined on demurrer, file warrants of attorney and docket.* How to proceed.

torney then gets a number roll and carries the same with the demurrer book to the clerk of the judgments, enters and dockets the issue, if there is one, finishes the entry on the roll, and then the same is carried to and filed at the nisi prius *office in Gray's Inn.*

When this is done, a motion is to be signed by counsel for a concilium *or day to argue the demurrer, pay* 10s. 6d. *take your roll to the clerk of the papers, who will mark it "read," pay* 1s. 6d. *and he will sign his initials on counsel's brief; then you draw up a rule with the clerk of the rules, pay* 4s. 6d. *and apply to the clerk of the papers to set down the cause, pay* 1s.

If the demurrer is to be argued, serve rule for concilium *on the attorney of the other side, (and indeed it is fair to do this in all cases whether demurrer be argued or not,) make four copies of the demurrer book on unstampt paper, plaintiff is to deliver two, viz. one to the chief justice, and the other to the senior judge, two days before the day of argument, and defendant ought to deliver two to the other two puisne judges on his part; but should he not have done so before eight in the evening of the day, two days before the argument, then deliver the other two to the other two judges* (R. M. 17 Car. 1.); *pay the clerks each* 2s. *When defendant has neglected to deliver his two books as above-mentioned, he cannot be heard on argument; so that plaintiff need only make a brief of demurrer for counsel, with one guinea fee, to move for judgment, which is done of course when called on, upon the day of argument; at which day attend and pay criers* 4s.

Go in the evening to clerk of the rules, get rule for judgment, and if the judgment be final, as if it be an action of debt, stamp the rule with docket roll at prothonotary, pay 8d. per *sheet for entries, then make a brief for serjeant to move for* concilium. *take it to secondary, who will mark the roll "read in court," pay crier* 1s. *get rule of secondary in the evening, and serve copy on defendant's attorney, and at the time when the rule is drawn up by secondary, set down with him cause for argument, then deliver copies of demurrer book to the judges, all four of which are in this court delivered by plaintiff's attorney, defendant paying for two days at least before the argument; if not paid, defendant shall not be heard by his counsel when demurrer comes on.* Mich. 6 G. 2.

If judgment be for plaintiff, proceed as in B. R. mutatis mutandis, *according as judgment be interlocutory or final Demurrer must be signed by serjeant.*

In order to compel plaintiff to go on to argument, get a rule of secondary to enter the issue, which is a four day rule, serve copy on plaintiff's attorney; if he enter the issue, and does not proceed to move for a concilium, *defendant may move and proceed to argument the same as plaintiff; if plaintiff does not enter issue agreeable to rule, sign judgment of* non pros.

with double half crown, and proceed to tax the costs; having first, if the roll be already carried into the treasury, bespoke the rule to be at the master's; but if not carried in, then enter proceedings thereon yourself; pay 3s. 6d. *to master for marking it, and take out execution.*

If demurrer be argued, and action in debt, no rule for judgment need be given; but if the judgment be only interlocutory, as if it be an action on the case or the like, then, having drawn up rule for judgment, get a treble penny stampt paper, enter memorandum thereon, get judgment signed thereon by clerk of judgments, and give notice of executing writ of inquiry, and proceed as in other cases of judgment by default.

If plaintiff refuses or neglects to enter demurrer, defendant may get a rule of secondary to compel him; and on default, he himself may enter such demurrer on record, or Q. whether he may not sign judgment; but if he wishes to have demurrer argued, then let him make up paper-book, and get a rule of master, which he gives on the book, or on a detached piece of paper, thus:

Unless the plaintiff enters the issue on record, on next after, let the same be entered on the part of defendant; enter it at clerk of rules, and serve copy when the book is delivered.

How to compel party to join in demurrer.

If the party refuses to join in demurrer, you get a rule for that purpose, as when a party neglects or refuses to reply, rejoin, &c. and then the party must do it within four days, otherwise judgment may be signed.

A demurrer is to be entered on the roll of the term in which it is joined. *Cortizos* v. *Munoz*, Bar. 328.

When issue is joined in demurrer, either party may proceed to argument. Nor need the defendant wait for a default in plaintiff, as in the case of trial by proviso; but he

may make up the demurrer-book, deliver it, and pay for entries; and having given rule to enter the issue, and procured the pleadings to be entered of record, he may move for *concilium*, and proceed to argument, as is usual for plaintiff upon the like issues. Notes to Rules and Orders, 177. edit. 1795.

Notice of executing inquiry may be given on back of demurrer.

Where the defendant demurs to the declaration, his attorney shall be obliged to accept of notice of executing the writ of inquiry, (if it is an action founding in damages,) on the back of the joinder in demurrer; and if defendant pleads such a dilatory plea as the plaintiff is obliged to demur to, defendant's attorney shall be obliged to accept of notice of executing a writ of inquiry on the back of such demurrer. Tr. 10 Geo. 1. C. B. The same rule in B. R. Vide *post*. Sec. 2. C. 2.

How paper-book to be delivered, &c.

After joinder in demurrer, plaintiff moved for a *concilium*, and afterwards delivered the paper-book the same day; which was held to be irregular, and the cause ordered to be struck out of the paper. He should have delivered the paper-book before he moved for *concilium*. *Sharpe* v. *Sharpe*, Bar. 163. But judgment cannot now be signed, for want of paying for the paper or demurrer-book. *Fuller* v. *Osborn*, 6 D. & E. 477. Imp. K. B. 322.

Of moving for *concilium*, &c.

In *assumpsit*, the defendant pleaded the general issue, and also the statute of limitations; the issue was found against him at the assizes; but as to the special plea, there was a replication, rejoinder, and sur-rejoinder; to which the defendant demurred, and the plaintiff joined in demurrer. This term the plaintiff made it a *concilium*, put it in the paper, and nobody to support the demurrer, obtained judgment: it was now moved to set aside this as irregular, the rule for the *concilium* having never been served, or any notice given of putting it in the paper. But the court held it not to be irregular, and that it was the duty of the defendant to search, since he must expect the plaintiff would proceed. Then it was moved to set it aside upon payment of costs, upon the foot of setting aside regular judgments. But the court said that was never to be done, but where the defendant was to plead to the merits, not to give him the advantage of a nicety in pleading; and if there was any ground for the demurrer, (as, in fact, there was,) he might bring a writ of error. *Forbes* v. *Lord Middleton*, Str. 1242.

Defendant must search for *concilium*; plaintiff not obliged to serve rule when defendant demurs.

Signing a *concilium* deemed a step in the cause.

If plaintiff take no step in the cause for three terms, and in the fourth sign a *concilium*, and obtain judgment in the fifth,

fifth, the ſigning of the *concilium* is taking a ſtep in the cauſe, ſo as to make it unneceſſary to give a term's notice. *Bland* v. *Darley*, 3 D. & E. 530.

(C) How to proceed when Iſſue to part, and Demurrer to part. (C)

How if iſſue to part, and demurrer to part.

Where there is an iſſue to part, and demurrer to part, you may either try the cauſe, or argue the demurrer firſt, at election. If the latter, all the proceedings are entered on the roll as in the paper-book, and you proceed as if there was no iſſue *in fact* at all.

Formerly, where there was a demurrer to part, and an iſſue upon the other part, and judgment was given for the plaintiff on the demurrer, he muſt have entered a *non pros* as to the iſſue, and proceeded to a writ of inquiry on the demurrer; but without a *non pros*, he could not have a writ of inquiry; becauſe, on the trial of the iſſue, the ſame jury would aſcertain the damages for that part of which the demurrer was. Sal. 219. pl. 6.

Where there are iſſues in fact and in law, the plaintiff may waive the iſſues in fact, and take out an inquiry upon the demurrer.

There were four counts in the declaration, *non aſſumpſit* pleaded to three, and a demurrer to the fourth. After judgment on the demurrer, the plaintiff takes out a writ of inquiry, and executes it. This was moved to be ſet aſide, there being no *nolle proſequi* on the roll; and it was inſiſted, that the plaintiff ought to take out a *venire, tam* to try the iſſue, *quam* to inquire of the damages upon the demurrer; *ſed per curiam*, that is, indeed, the courſe, where the iſſues are carried down to trial before the demurrer is determined, and in that caſe, the jury give contingent damages; but here the demurrer being determined, and the plaintiff being able to recover all he goes for upon that count, there is no reaſon why we ſhould force him to carry down the cauſe to *niſi prius*; and as to the want of a *nolle proſequi* upon the roll, he may ſupply that when he comes to enter the final judgment; if not, you will have the advantage of it upon a writ of error. The judgment upon the inquiry muſt ſtand. *Fleming* v. *Langton*, Str. 532.

Where a nolle proſequi is entered, the plaintiff need not be amerced.

In error, *è* C. B. in an action upon the caſe on ſeveral promiſes, there is judgment on demurrer as to one count, whereupon the plaintiff enters a *nolle proſequi* as to the reſt, and the defendant is put without day.

It was objected, that this is a confeſſion that the plaintiff had no cauſe of action as to thoſe counts, and therefore he ſhould be amerced *pro falſo clamore*. But Eyre J. *(ſolus)* thought

thought it agreeable to all the entries, and so the judgment was affirmed. *Davies* v. *Hoyle*, Str. 574.

Judgment when obtained, must be signed before inquiry executed.

Plaintiff obtained judgment upon arguing a demurrer in an action upon the case, and proceeded to execute a writ of inquiry, without getting judgment signed by the prothonotary; which the court held to be irregular, and set aside the writ of inquiry. *MacCarty* v. *Parminter*, Bar. 229.

(D) (D) Of waiving and withdrawing Demurrers, and amending after Argument.

General demurrer not to be waived for special, but it may vice versa.

Defendant cannot waive a general demurrer, and give a special demurrer or special plea; but he may strike out of paper-book special plea or demurrer, and return it with general issue or general demurrer. N. on R. T. 5 & 6 Geo. 2.

So a general demurrer cannot be waived, and general issue pleaded, but a special one may; and general issue with notice of set-off be afterwards pleaded.

When it may be withdrawn, and pleadings amended.

In an action against bail, court refused to give leave to withdraw a demurrer, and amend after demurrer had been argued, and the opinion of the court was known. *Saxby* v. *Kirkus*, Say. 117.

Yet after argument on special demurrer, leave has been given to amend, on payment of costs. *Luxton* v. *Robinson*, Do. 620.

After a demurrer to the defendant's plea had been argued, and the matter stood over for the judgment of the court, a rule was made to shew cause why plaintiff should not have leave to withdraw his demurrer, and to reply to the plea. No cause being shewn, rule made absolute. *Giddings* v. *Giddings*, Say. 316. So *Howell* v. *Mac Ivers*, 4 D. & E. 690.

After the demurrer was argued, and the justices had given their opinion, judgment was suspended for a week, in order to give the defendant time to move for leave to withdraw the demurrer, and amend. *Rennale* v. *Rennale*, Say. 317.

Debt against defendant, as heir on the bond of his ancestor. Plea *reins per descent*. Replication assets. Demurrer *inde*, and joinder; and the cause was set down. Then defendant moved for leave to withdraw the demurrer, and rejoin issuably, on payment of costs. On shewing cause, plaintiff insisted, that by the demurrer he had been delayed an assizes, and defendant now came too late to withdraw his demurrer, unless he would give judgment for plaintiff's security.

ſecurity. The ſerjeant for defendant urged a diffidence of his own opinion as to the validity of the pleadings, and was fearful to venture the argument; becauſe, if judgment had paſſed againſt his client on demurrer, the debt muſt be paid out of defendant's own goods; if on verdict, out of aſſets. Rule abſolute by three judges. Denton *contra*. *Hunt* v. *Puckmore*, Bar. 155.

Declaration in an action on the caſe was of two counts againſt two defendants, in ſecond count, only one of defendants was named. Defendant demurred. Plaintiff entered a *nol. proſ.* as to the laſt count; but court were of opinion that he could not enter *nol. proſ.* in that ſtage of proceedings, but they gave him leave to amend, on payment of coſts. *Drummond* v. *Dorant*, 4 D. & E. 360.

Where demurrer argued before trial of iſſue, amendment allowed, not contra.

Where the demurrer is firſt argued before any trial of the iſſues, the court will give leave to amend, as in the caſe of *Giddings*, Say. 316. But there never was an inſtance of amending an iſſue at law, after a verdict has been found on the iſſues upon facts, and contingent damages found upon the demurrer. *Robinſon* v. *Raley*, Burr. 322.

(E) General Obſervations on Demurrer. (E)

Demurrer an iſſuable plea.

A demurrer on the merits is an iſſuable plea within the judge's order. *Wright* v. *Ruſſell*, 2 Blac. R. 923. *Dewey* v. *Sopp*, Str. 1185.

Not to be amended.

If a demurrer is badly drawn, as if in a demurrer to a plea in abatement, it concludes with praying judgment of the action, inſtead of *reſpondeas ouſter*, it is a diſcontinuance, and cannot be amended without conſent of the other party. *Maynard* v. *Hopkins*, Say. 46.

Proper form of entry of judgment.

The entry of the judgment was, *ideo conſideratum eſt*, &c. and not & *quia pidetur curiæ*, &c. and for that cauſe it was reverſed. *Atwood* v. *Burr*, Sal. 402. Ld. Raym. 821. S. C.

Paper-days.

Tueſdays and Fridays in every term are called ſpecial paper-days, becauſe the court goes into the paper before they enter upon motions.

Cauſes to be argued in their turn.

All cauſes ſtanding for argument in the ſpecial paper are to come on in the ſame order in which they are there entered, and ſo to continue to ſtand till they ſhall be argued; and none to be put off, without a previous ſpecial application to the court. And all ſpecial cauſes to be ſet down by the clerk of the papers, ſhall be entered at leaſt *four days* excluſive of the day of argument. R. M. 30 G. 2.

Section II.

Of Judgment by Default.

(A) How to ſign Judgment by Default, and of the Proceedings therein.

(B) Of the Effect of ſuch Judgment, in what Caſes Plaintiff is entitled to it, and how and when to be ſet aſide.

(C) Of the Writ of Inquiry, &c.

(D) Of ſetting aſide the Inquiſition, arreſting the Judgment, and amending the Writ and Proceedings.

(A) (A) How to ſign Judgment by Default, and of the Proceedings therein.

K. B.

Get a roll from K. B. office, enter thereon the warrants of attorney and memorandum of declaration, which is ſometimes called making an incipitur *on roll; get alſo a treble penny ſtamp paper if judgment be interlocutory, and a double* 2s. 6d. *ſtamp if* final; *enter thereon an* incipitur *of the declaration being merely the memorandum and a few words of declaration; carry judgment-paper and roll to clerk of judgment, who will ſign ſame; pay* 4d. *per ſheet, and* 8d. *filing warrants of attorney.*

C. B.

Make incipitur *of declaration on ſame ſtampt paper as in K. B. and alſo warrants of attorney on roll; file them with clerk of warrants; pay in debt. treſpaſs, and detinue* 4d. *in other actions* 8d. *each. He marks judgment-paper; carry it to the prothonotary with draft of declaration, who will ſign judgment; pay him* 2s. *if declaration of ſame term and already filed: if not,* 8d. *per ſheet for declaration, and* 3s. *for judgment by confeſſion and warrant of attorney.*

If judgment be final, get the maſter in K. B. or prothonotary in C. B. to tax coſts, who will mark ſame on judgment-paper, and then ſue out execution.

But if judgment be only interlocutory, after having ſigned judgment as above directed, proceed to ſue out and execute writ of inquiry; firſt give

Notice of Inquiry;

which may be in the following form:

Take notice, that a writ of inquiry of damages in this cauſe will be executed on the day of inſtant, between the hours of and of the clock in the forenoon of the ſame day, at the

Dated the day of

1798.

Yours, &c.

T. S. Plaintiff's Attorney.

To Mr. W. H. Attorney for defendant.

If

If in Middlesex and in term *time say, at the King's Arms Tavern, Palace Yard, Westminster, in the county of Middlesex; if in* vacation, *at the sheriff's office, in Took's court, Cursitor-street, Chancery-lane, in the county of Middlesex.*

If in London, whether term or vacation, at the secondary's office, No. 10, *Grocer's Hall-court, London.*

If in the country say, will be executed at the house of A. B. commonly called or known by the name or sign of the in street, Cambridge, *in the same county.*

And in all the above cases, if you mean to attend by counsel, insert it in the notice.

As to time when notice ought to be given, and what it should contain, and the like; see post, Ch. 2. *and also Notice of Trial,* Ch. 9. Sec. 2.

Of countermanding and continuing Notice.

This notice may be countermanded if any thing should prevent execution of inquiry. Notice of countermand must be given according as the notice of trial was; if eight days notice of trial, two days notice of countermand is sufficient; but if fourteen days notice of trial, then six days notice of countermand.

The form thereof may be:

I do hereby countermand the notice of executing the writ of inquiry given you in this cause. Dated, &c.

So notice of executing inquiry may be countinued to another day upon giving notice of such continuance two days before execution.

I do hereby continue the notice of executing the writ of inquiry given in this cause to the day of next, when the same will be executed between the hours of, &c. at, &c. Dated, &c.

Of the Writ of Inquiry, making it out, and executing it.

The writ of inquiry is to be engrossed on a 3s. 6d. *stamp parchment in* B. R. *not to be signed, neither by bill nor original; sealing* 7d. *In* C. B. *to be signed by the prothonotary; pay* 1s. 4d. *for first count, and* 8d. *every other; or* 8d. *for first sheet, and* 4d. *every other; sealing* 7d. *Indorse thereon the day for which you have given notice of execution; carry it to the sheriff's office the day before it is to be executed in B. R. and in C. B. R. Hil.* 23 Geo. 3. *and sheriff will cause a jury to be returned. If you think the attendance of any witnesses necessary at the execution, sue out supœnas as in cases of trial; pay in London* 1l. 9s. 4d. *and for every witness* 4d. *In Middlesex,* 1l. 10s. 4d. *; other counties* 1l. 11s. 6d. *Attend at the day of execution.*

Of subpœnaing Witnesses.

Witnesses may be subpœna'd if they will not voluntarily attend; blank forms may be had at the stationers, and four may be put in one subpœna.

It must be engrossed on a 3s. 6d. *stamp, signed and sealed, and each witness served with a copy and paid* 1s.

In B. R. a præcipe for subpœna must be made out for the office, but no occasion for it in C. B.

If you wish to attend by counsel, give notice according to the other side, or it will not be allowed in costs; besides which it would be deemed unfair to take the other party by surprise.

When writ is returnable, call for it at the sheriff's office, who will return it with inquisition thereon.

Of final Judgment.

B. R.	*C. B.*
On the Day of Return.	
Give a rule for judgment on inquisition at the clerk of the rules, pay 1s. 10d. *it is a four day* (a) *rule, exclusive of the day it is given; and Sunday or holiday intervening is not reckoned. Give it in same manner as rule to plead: if no motion to set aside inquisition, or to arrest the judgment; when rule expires proceed to final judgment on inquisition, as in case of postea.*	*No rule necessary; but having waited* (a) *four days after return of inquiry, proceed to final judgment on inquisition, as upon postea.*
Rule not to be given till writ returnable.	

Of executing Inquiry before a Judge.

Upon particular occasions it is advisable to execute inquiry before a judge; application is made to the court upon affidavit, stating the circumstances of plaintiff and defendant, and nature of the action; it is a rule to shew cause, and if made absolute, a rule is drawn up for sheriff to summon a good jury. A common writ of inquiry is made out, directed to the sheriff, and notice is given for the sittings or assizes generally, *and not for any particular day. Writ with the rule is sent to sheriff; enter the cause with the marshal as if it were a record, same fees paid, and afterwards sheriff returns inquisition and has his usual fees; proceed to final judgment on return of inquisition as above directed.*

In vacation this may be done by an order of judge for such rule to be drawn by clerk of rules, upon a common motion paper signed by counsel being carried to him.

This indulgence is not merely confined to cases where any matter of law is likely to arise in the course of the inquiry, as is said in a late book of practice, Tidd 319. *but also where the facts are important. I have known it in an action for breach of promise of marriage where no point of law was likely to arise; but that was in a country cause: it was refused in the case of Boddington v. Boddington, which was an action for* crim. con. *the court saying, that there was little ground for such an application in a town cause, the sheriff being so much accustomed to the execution of these writs of inquiry.* K B. Trin. T. 1797.

(a) Within these four days, defendant may move to set aside inquisition, or in arrest of judgment.

(B) Of

(B) Of the Effect of Judgment by Default, in what Cases Plaintiff entitled to it, and how and when to be set aside.

Effect of judgment by default.

It was formerly held, that defendant was out of court by his default, and that to all purposes, except final judgment being given against him; so that if, after a default at the trial, and inquest had thereon, the issue was found immaterial, no repleader could be awarded. *Staple* v. *Hayden*, Salk. 216. Nor could defendant enter a suggestion on the roll, where plaintiff, in an assumpsit, only recovered 22*s.* damages. *Brampton* v. *Crabb*, Str. 46. In like manner, where plaintiff was nonsuited, he used to be held out of court for all purposes, but that of having judgment signed against him; but it has been long since the practice of the courts to set aside nonsuits, where the justice of the case requires it; so have they relaxed with respect to defendant, by considering him in court to many purposes, though judgment has been by default. *Barnay* v. *Tubb*, 2 H. Blac. 356.

In what cases judgment by default may be signed.

By the practice of the courts, there are certain stated times in which the defendant must proceed by pleading, rejoining, or the like, according as the stage of the cause may be, and which if he neglects to do, plaintiff may avail himself of the default and sign judgment; the cases, therefore, in which plaintiff is entitled to judgment by default are as numerous and various as the defaults of which the defendant may be guilty. To know whether plaintiff is justified in signing judgment by default, refer to such Chapter and Section of this work as treats of that part of the proceedings, (whether pleading, or rejoining, or the like,) in which it is conceived defendant has been guilty of any laches, and on account of which plaintiff thinks himself entitled to sign judgment.

Although defendant has pleaded, yet if he afterwards neglects to rejoin, or enter sur-rebutter. or the like, plaintiff may strike out all the pleadings, and sign judgment as for want of a plea; for such subsequent default is considered as an abandonment of the plea. *Petrie* v. *Fitzroy*, 5 D. & E. 152.

When judgment by default will be set aside for irregularity.

If judgment by default be irregularly signed, court, on motion, will set it aside; but defendant must be cautious to apply in time, and not do any thing which may be construed into a waiver of the irregularity; nor must he lie by and suffer plaintiff to take further steps in the cause.

In general, it is said, that this application must be made two days before inquiry executed; and if the irregularity be

be in the notice ſubſcribed to proceſs, it muſt be made before judgment ſigned. *Grimes* v. *Cleaver*, Bar. 255.

When defendant ſhould apply to the court.

But the beſt and ſafeſt rule is to apply in the firſt inſtance, and ſo uſe all diligence to get the error rectified by the court; otherwiſe they will ſeldom liſten to the application.

In a joint action, judgment by default, one of the defendants had no notice of writ or declaration; after inquiry executed, on motion to ſet aſide proceedings, it was urged it came too late; but *per cur.* the judgment can never be good as to him that was not ſerved; and as the judgment is joint, it muſt be ſet aſide as againſt all the defendants. *Coulſon* v. *Turnbull* and others, Prac. Reg. 237. Bar. 246.

When on payment of coſts, though no irregularity.

But if judgment by default be *regularly* ſigned, court will, any time before inquiry executed, ſet it aſide upon terms, on defendant's paying the coſts, and pleading iſſuably to ſuch action *inſtanter; Cavil* v. *Burneford* and others, Burr. 568.; and if required, taking ſhort notice of trial, *Matthews* v. *Stone*, Bar. 242.; or bringing the money into court, &c. *Welland* v. *Rock*, Bar. 243.

But this is only where defendant pleads to the *merits*, not to give him the advantage of any nicety or informality in pleading, by letting him in on a demurrer. *Forbes* v. *Lord Middleton*, Str. 1242.

Or upon the plea of the ſtatute of limitation. *Willit* v. *Atterton*, 1 Blac. 35.

Or where it contains ſpecial matter that is queſtionable, and deſigned to draw plaintiff to demur. *Wood* v. *Cleveland*, Sal. 518.

It is ſaid ſuch regular judgment will only be ſet aſide on payment of coſts, when plaintiff has not loſt a trial. *Siſted* v. *Lee*, Sal. 402.

But held otherwiſe in *Prudhoc* v. *Armſtrong*, Bar. 256.

And in general, it is expected that ſuch application be made quickly, and that there be an affidavit ſwearing to merits.

(C) (C) Of the Writ of Inquiry.

(C. 1) *In what Caſes neceſſary.*

(C. 2) *Of the Notice of Inquiry, &c.*

(C. 3) *Of the Execution thereof, &c.*

(C. 1) (C. 1) *When Writ of Inquiry is requiſite.*

Its nature.

When judgment is obtained by default, if the action be in debt, covenant, or the like, (*Thelluſſon* v. *Fletcher*, Doug. 315.)

315.) to recover any fixed ſpecified ſum, and there is no occaſion for the interference of a jury to aſcertain the amount of plaintiff's demand, it is then a *final* judgment, and plaintiff may proceed immediately to get his coſts taxed, and ſue out execution as before directed. But if the action be in aſſumpſit, or caſe, or covenant, or the like, to recover any unliquidated debt, or uncertain damages for an injury ſuſtained, it is then called interlocutory judgment; it being neceſſary, before ſuch judgment can be finally entered up, to take ſome further ſtep, in order to get ſuch debt or damages liquidated and aſſeſſed; this is done by ſuing out a writ of inquiry, directed to the ſheriff, who ſummons a jury for that purpoſe. See *ante*, Sec. I.

Judgment by default, final or interlocutory.

But a writ of inquiry is a mere inqueſt of office, to inform the conſcience of the court, who, if they pleaſe, may themſelves aſſeſs the damages. *Bruce* v. *Rawlins*, 3 Wil. 61. Doug. 316. *n.*

In what caſes writ of inquiry neceſſary.

Thus, of late years, in certain caſes, they have aſſeſſed damages, which were formerly aſſeſſed by a jury on writ of inquiry.

In actions on bills of exchange and promiſſory notes, the courts now allow the plaintiff, after judgment by default, to refer it to the maſter or prothonotary, to compute what is due for principal and intereſt; it is a rule to ſhew cauſe, granted of courſe in all ordinary caſes. *Raſhleigh* v. *Salmon*, 1 H. Blac. 252. *Andrews* v. *Blake*, Ib. 529. *Longman* v. *Fenn*, Ib. 541. *Shepherd* v. *Carter*, 4 D. & E. 275.

When in actions on bills of exchange, &c.

If, however, there be any particular circumſtances in the caſe, or any thing that renders the calculation of what may be due uncertain, this rule will not be granted; as if the bill of exchange be for ſo much *foreign* money, the value of foreign money being uncertain. *Maunſell* v. *Ld. Maſſarene*, 5 D. & E. 87.

The courts are cautious not to extend this practice too far, and refuſed the rules after judgment by default, in an action of *aſſumpſit* on a foreign judgment. *Meſſin* v. *Ld. Maſſarene*, 4 D. & E. 493.

Of the writ of inquiry when jury has omitted to aſſeſs damages at the trial.

Although at preſent we are treating of the writ of inquiry, in caſes of judgment by default, yet it may be proper to obſerve, that writs of inquiry ſometimes iſſue, even after trial and verdict, where the jury have omitted to aſſeſs the damages of plaintiff.

In caſes of demurrer upon evidence.

If, upon the trial, there is a demurrer to evidence, and the parties join in demurrer, the jury may either at the time aſſeſs damages conditionally, in caſe plaintiff has judgment on the demurrer; or they may be diſcharged, (which

is

is the usual way,) and after the demurrer is determined, plaintiff may have a writ of inquiry to assess the damages. *Darrose* v. *Newbott*, Cro. Car. 143.

When the inquiry of damages is ordered by any particular statute, and jury have omitted to assess them.

In many cases, acts of parliament direct the jury to assess damages, and applications have been frequently made for writs of inquiry to supply their omission; the granting of which depends upon the nature of the jury's inquiry, and upon the words of the particular statute. If the jury are to inquire of damages as part of their charge; that is, if, from the nature of the issue, damages are consequent and dependent upon it, then no writ of inquiry can go to supply their omission of assessing damages at the trial; because, in case they had found excessive damages, an attaint would lie against them; and therefore, if a writ of inquiry were allowed, the party might be deprived of his remedy by attaint; but where the damages are merely collateral, and not put in charge to the jury, and they are only to inquire thereof as an inquest of office, then their omission so to do may be supplied by a writ of inquiry; because, in such case, had they inquired thereof at the trial, and found excessive damages, no attaint would lie, and therefore the party loses no benefit; for no attaint lies on an inquest of office: this seems to be one leading distinction which pervades all the cases on this point. See *Kynaston* v. *the Mayor of Shrewsbury*, Cas. temp. Ld. Hard. 295. *Valentine* and *Fawcett*, Ib. 138. *Erihon* v. *Le Maitre*, 2 Wil. 368. *Bennet* v. *Hart*, Say. 214. *Cheyney's* Case, 10 Co. 118. *Herbert* v. *Waters*, Sal. 205.

How such statutes to be construed.

The other distinction arises from the particular words of the statutes; for although the damages may be a collateral matter of inquiry, yet if the statute restrains such inquiry to any particular jury, no writ of inquiry can supply their omission: such is the 17 C. 2. c. 7. concerning distresses for rent, where the same jury returned to try the issue, must inquire of the arrears of rent, &c. *Herbert* v. *Waters*, Sal. 205.: whereas by the statute of Eliz. c. 2. s. 19. relating to suits brought against overseers of the poor, for taking distresses for poor-rates, it is not confined to the same jury, but a writ of inquiry is also given. Ib. *Valentine* v. *Fawcett*, Cas. temp. Ld. Hard. 138. 2 Str. 1021.

Where defendant has confessed part of the plaintiff's charge, how damages to be assessed thereon.

If defendant, in pleading, confesses any part of plaintiff's charge, and denies the residue, and the venue is awarded as well to try the issues joined as to assess plaintiff's damages, at the trial, the verdict is only for plaintiff on the part confessed, but jury neglect to assess damages thereon, a writ of inquiry will be afterwards allowed. *Townsend* v. *Pool*, Bar. 228.

So

So if the iſſue be not well joined, and a miſ-trial has been had, and thereupon a motion is made in arreſt of judgment; yet if the defendant's plea amounts to a confeſſion, though the verdict be void, the court will give judgment upon his confeſſion, and grant a writ of inquiry to aſcertain plaintiff's damages. *Lacy* v. *Reynolds*, Cro. Eliz. 214. *Jones* v. *Bodines*, Carth. 370. where the form of the ſpecial entry on the roll in that caſe may be ſeen.

Although judgment be arreſted for miſ-trial or the like.

Wherever a party binds himſelf in a penalty for the performance of covenants, and an action is brought thereon, the plaintiff muſt proceed according to the ſtat. 8 & 9 W. 3. c. 11. ſ. 8. which is now held to be compulſory; and therefore, if defendant let's judgment go by default, plaintiff *muſt* ſuggeſt the breaches upon the roll, and iſſue a writ of inquiry as therein directed; the jury upon this writ is, by the ſtatute, to be ſummoned before the juſtice of aſſize or *niſi prius*. *Roles* v. *Roſewell*, 5 D. & E. 538. *Hardy* v. *Bern*, Ib. 636.

How plaintiff to proceed in actions on penalty for non-performance of covenants.

Where there is a demurrer to part, and judgment by default as to reſidue, plaintiff may either proceed with demurrer firſt, or may ſue out his writ of inquiry, and aſſeſs contingent damages, in caſe judgment ſhould be for him on the demurrer; but if there is an iſſue of fact, as *non aſſumpſit* to the whole, and alſo another plea of *non aſſumpſit infra ſex annos*, to which an original is replied, and iſſue on *nul tiel record* thereon found for plaintiff, he cannot execute inquiry thereon, till he has tried the firſt iſſue of *non aſſumpſit*. *Prior* v. *Iſley*, Bar. 229.

Where there is a demurrer and judgment by default, or an iſſue on ſuch judgment;

So if there be a demurrer to one count, and an iſſue on the other, plaintiff may carry down the iſſue to trial firſt, and ſue out a *venire*, *tam* to try the iſſue, *quam* to inquire of the damages on demurrer, and in that caſe, the jury gives contingent damages; or he may waive the iſſues in fact, and take out inquiry upon judgment, when obtained on demurrer; but in entering final judgment, he muſt enter a *non pros* on the roll, as to the iſſues in fact, or it will be error. *Fleming* v. *Langton*, Str. 532.

or iſſues in law and fact;

But if, in the firſt caſe, on trial of the iſſue, plaintiff be nonſuited, no contingent damages ſhall be aſſeſſed. *Snow* v. *Como*, Ib. 507.

So if, in a joint action of treſpaſs, three plead, and three let judgment go, the *venire* may iſſue *tam ad triandum*, *quam ad inquirendum*, and the ſame jury at the trial will aſſeſs the damages againſt the defaulters, and this though the three who pleaded ſhould be acquitted. *Jones* v. *Harris*, Str. 1108. For further obſervations on this head, ſee Vol. I. Ch. 8. (C).

or ſome defendants plead and others ſuffer judgment.

(C. 2) *Of*

(C. 2) *Of the Notice of Inquiry.*

What notice neceſſary.

If the venue be in London or Middleſex, and defendant lives within 40 miles of London, eight days; but if he lives above 40 miles from London, fourteen days notice, excluſive, muſt be given.

In all caſes, where the writ is executed in the country, eight days notice, excluſive, is ſufficient, Mich. 1654. *Milbourn* v. *Stephenſon*, 1 Barn. 110.; for the ſtatute 14 Geo. 2. c. 17. which requires ten days notice of trial at the aſſizes, does not extend to notices of inquiry. Tid. 320.

Where no proceedings have been had for a year, there muſt be a term's notice, the ſame as in caſes of notice of trial. *Payton* v. *Burdus*, Str. 1100. See *ante*, Vol. I. Ch. 9. Sec. 2.

Two days notice is ſufficient, when *ſhort* notice only is required. *Butler* v. *Johnſon*, Bar. 301.

The following rules will ſhew how anxious the courts have been to expedite juſtice and prevent delay:

Rules of court as to the time from which ſuch notice is to be reckoned.

Whereas by a rule of this court, made in Trinity term in the ſecond year of the reign of his majeſty king George, it was ordered; "That in all caſes, where the plaintiff concludes *ad patriam*, the defendant's attorney, or clerk in court, ſhall be bound to accept of notice of trial upon the back of the pleading, whether the ſame be delivered to the defendant's attorney or agent, or left in the proper office, where the ſame may be left by the courſe of the court. And ſuch notice of trial ſo given or left as aforeſaid, ſhall be as good and effectual as if iſſue had been actually joined."

"And whereas it appears, that notwithſtanding the ſaid rule, the plaintiffs, in divers actions and ſuits commenced in this court, are delayed; for that the defendant's attornies are not obliged to take the like notice of executing writs of inquiry:"

Where plaintiff concludes to the country and defendant neglects to join iſſue.

It is therefore hereby ordered, That in every cauſe where the plaintiff concludes *ad patriam*, and giveth notice of trial upon the back of his pleading, purſuant to the ſaid rule, if the defendant doth not join iſſue on ſuch pleading, before the rule be out, that in every ſuch caſe, after judgment obtained, the defendant's attorney ſhall be obliged to accept notice of executing a writ of inquiry, from the time that notice of trial was given on the back of ſuch pleading as aboveſaid. R. Hil. Term, 6 Geo. 1. 1719.

"And whereas the above rules have by experience been found to be of great uſe and advantage to plaintiffs, for the

" the more ſpeedy recovery of their juſt debts; but no " proviſion being made in caſes where defendants *demur* to " the plaintiff's declaration, and by that means give great " delays to plaintiffs; becauſe, by the ſaid rules, defend- " ants are not obliged, till after judgment obtained, to " accept of notice of executing a writ of inquiry:"

Where defendant demurs to declaration;

It is therefore now ordered by this court, That in all caſes where the defendant demurs to the plaintiff's declaration, the defendant's attorney, or clerk in court, ſhall be obliged to accept of notice of executing the writ of inquiry on the back of ſuch joinder in demurrer. And in caſe where the defendant pleads ſuch a dilatory plea, that the plaintiff is obliged to demur to, that in ſuch a caſe, the defendant's attorney, or clerk in court, ſhall be obliged to accept of notice of executing a writ of inquiry on the back of ſuch demurrer. R. Trin. Term, 10 Geo. 1. 1724.

or pleads a dilatory plea to which plaintiff demurs.

" Whereas great delays often happen to plaintiffs in their " ſuits in this court, by reaſon of demurrers in law by the " defendant's attorney, after the plaintiff hath tendered the " iſſue to be tried by the country, upon the plea of the ſaid " defendant pleaded, and hath delivered paper-books with " notice of trial, according to the courſe of this court; ſo " that after judgment obtained by the plaintiff upon ſuch " demurrer in law, there is not ſufficient time to give " notice of executing a writ of inquiry of damages, with- " in that term in which the judgment ſhall be ſo ob- " tained:"

Where defendant ſtrikes out ſimiliter and demurs to replication;

Therefore it is ordered for the future, That in every caſe, where the plaintiff ſhall conclude to the country upon the defendant's plea, and ſhall give notice of trial of the iſſue upon the paper-book as aforeſaid; and thereupon the defendant, to hinder the trial of the iſſue, ſhall demur in law to the replication or plea of the plaintiff, and the plaintiff ſhall join in ſuch demurrer, and thereupon ſhall obtain judgment; the attorney for the defendant ſhall be obliged to accept of notice of executing a writ of inquiry of damages, from the time of notice of trial given upon the paper-book as aforeſaid. R. Hil. Term, 8 Geo. 1. 1721.

or returns paper-book with demurrer, having ſtruck out any other pleadings.

Where iſſue is joined upon any ſpecial pleading, and the paper-book is made up and delivered with notice of trial, if the defendant return the book with a demurrer, having ſtruck out the pleadings ſubſequent to that to which he demurs, and judgment be given for the plaintiff upon the demurrer, he may, by the above rule, execute his inquiry, giving only ſo many days notice thereof (*i. e.* of the hour and place of executing it) as would have been ſufficient, had

had such notice been given when the paper-book was delivered with notice of trial. Notes on Rules, edit. 1795, p. 214.

How it should be given and what it should contain.

Notice of executing inquiry should be in writing, and drawn with a sufficient degree of certainty: 1st, As to the time when it is to be executed.

What certainty as to time of executing inquiry.

Some hour should be mentioned. *Gutton* v. *Hall*, 1 Barn. 139.

Or it will be bad, though defendant said he would make no defence. *Langstaff* v. *Lamb*, Bar. 293.

The notice should express that the writ will be executed between two certain hours. *Arnold* v. *Squire*, Say. 181.

If beyond that time, as between ten and two, held irregular. *Foster* v. *Smales*, Bar. 295. *Robinson* v. *Philips*, Ib. 296. *Le Marque* v. *Newman*, Com. 551.

Notice to execute inquiry by ten o'clock, held bad. *Isom* v. *Fowen*, Str. 1142.

So at ten, or as soon after as sheriff can attend. *Hannaford* v. *Holman*, Bar. 295.

Though a notice to execute writ at eleven was held regular, as it appeared to be executed before twelve. *Last* v. *Denny*, Bar. 302.

How that time is to be adhered to.

But when notice is given of the execution of a writ of inquiry within a certain time, it is never understood that the time is scrupulously adhered to. The sheriff may have prior business that may last beyond the hour. If the defendant's attorney, therefore, leave the place immediately after the hour is past, it will be deemed a trick, and though inquiry should be afterwards executed, it will be held regular. In one case court said the party should have stayed an hour after the time mentioned for executing it. *Anon.* 2 Barn. 214. *Williams* v. *Frith*, Doug. 198.

But the party is expected to attend punctually at the time, for if he be too late and writ be executed, it is his own laches, and cannot be cured, unless it is manifest sheriff began to execute it before the time. *Beetknife* v. Sir *Herbert Packington*, 1 Barn. 233.

What certainty as to place of executing inquiry.

2d, The notice should be certain as to *place* of executing inquiry.

The sign of the house should be mentioned, *Arnolds* v. *Squire*, Say. 181. and the street; and if more streets of that name than one, it should be particularized, *Le Marque* v. *Newman*, Com. 551.; and the county, *Lower* v. *Smith*, Bar. 300. Even where the notice was to execute writ at sheriff's office at Northampton, it was held ill; no sign or particular house being mentioned. Com. 551. Bar. 297. So at Westminster,

minſter, generally, held bad. *Kinch* v. *Haſine*, Prac. Reg. 447.

3d, The notice ſhould be correct alſo as to the names of the parties. *Naſh* v. *Harrow*, Bar. 310. What certainty as to the names of the parties.

If the inquiry is to be executed before a judge, the notice expreſſes no time, but is general for the ſittings or the aſſizes, as the caſe may be; the day and hour is left to the judge's diſcretion. Certainty as to time not neceſſary if writ to be executed before a judge.

Rule to execute inquiry before a judge was made abſolute the laſt day of term, though rule *niſi* had only been ſerved on that day.

In this caſe, notice had been previouſly given to execute writ before the ſheriff, afterwards freſh notice was ſerved to execute it before the judge; there were not eight days between the freſh notice and time of executing it, but it was held well; for as it was not executed till after the time for executing it before the ſheriff had elapſed, party could not be damnified. *Perry* v. *Cortiſoes*, 2 Barn. 122. Of ſuch notice after notice given to execute before the ſheriff.

If plaintiff appears for defendant and ſigns judgment for want of a plea, he may give notice of executing inquiry to defendant himſelf, or leave the ſame at his laſt place of abode; but if defendant has appeared by attorney, notice to defendant himſelf is bad; it muſt be ſerved on his attorney or his agent, *Moſely* v. *Sanford*, Bar. 311. and ſo in general where the attorney or agent is known. *Higgins* v. *Stewart*, Prac. Reg. 276. How notice to be ſerved, and on whom.

Notice of executing inquiry in a country cauſe may either be given to the agent in town, or the attorney in the country. *Smith* v. *Lacock*, Bar. 305. *Taſhburn* v. *Havelock*, Ib. 306. When to the party, and when to the attorney.

In a joint action notice ſhould be given to both defendants. *Kingdom* v. *Herne* and another, Prac. Reg. 443.

Notice of executing inquiry may be continued and countermanded in the ſame way, and ſubject to the ſame rules as notices of trial; for which, ſee Ch. 9. Sec. 2. Of continuing and countermanding the notice.

Notice of continuance muſt be ſerved two days before execution of writ, and can only be once continued. *Price* v. *Bambridge*, Bar. 297.

Notice of countermand muſt be *ſix* days, if a country cauſe, or if a town one and defendant lives above 40 miles from London; but otherwiſe, *two* days.

(C. 3) *Of the Execution of Inquiry*, &c. (C. 3)

Due notice having been given, and the writ of inquiry engroſſed and prepared as before directed, it ſhould be left at the ſheriff's office the day before the execution; ſuch witneſſes as are required, if unwilling to attend, may Of the execution of the writ in purſuance of the notice.

be compelled by a ſubpœna, which ſhould be procured for that purpoſe; and if either party wiſhes to attend by counſel, notice thereof ſhould be given, or it will not be allowed in coſts.

Where and by whom to be executed.

It ſhould be executed in the ſame county where the *venue* is laid.

Sheriffs or under-ſheriffs ought to execute writs of inquiry; and if the latter appoint deputies for that purpoſe, they will be liable to an attachment. *Wallace* v. *Humes*, Bar. 231.

Unleſs ſuch deputy be appointed by deputation under the ſeal of the ſheriff's office. *Davis* v. *Skyllins*, Bar. 232.

But where the writ was directed to the coroners of N. and they verbally appointed a perſon to execute it, the appointment was held no authority; but court refuſed to ſet aſide inquiſition, becauſe defendant attended execution. *Dixon* v. *Goodman*, Bar. 413.

An inquiſition taken before two under-ſheriffs extraordinary held bad, the ſheriff can only appoint one. *Denny* v. *Trapnell*, 2 Wil. 378.

If the ſworn under-ſheriff live in the ſame town, it ought to be executed before him. Ib.

Before what jury.

It ſhould be executed before a proper jury; for this reaſon, it is ordered to be left at the ſheriff's office the day before execution: formerly it was to be left two days before, but afterwards altered to one. R. Hil. 23 G. 3.

The jurymen were debtors taken out of priſon: and though the party attended, inquiſition was ſet aſide, and conduct of ſheriff reprimanded; but there is no objection to their being javelin-men. *Stainton* v. *Beadle*, 4 D. & E. 473.

Inquiſition ſet aſide, becauſe the jury was returned by the attorney for plaintiff. *Baylis* v. *Lucas*, Cow. 112.

Inquiry executed before fourteen jurors inſtead of twelve, held good; for it is but an inqueſt of office, whereon no attaint lies. *Cheſter* v. *Crowley*, Str. 1159.

How, if before a judge.

Sometimes the writ is executed before a judge; in which caſe, he is only an aſſiſtant to the ſheriff, and has no judicial power; and if the parties come to an agreement there, the way to make it effectual is to bring it to him to ſign, and afterwards move the court to have it made a rule of court. 12 Mod. 619.

On what day.

Writ of inquiry may be executed on the return-day. *Dyke* v. *Blackſton*, Ld. Ray. 1449.

But not on a Sunday. *Hoyle* v. *Lord Cornwallis*, Str. 387.

And if return-day be on Sunday, it is too late to execute it the day after. *Stanton* v. *Winch*, Caſ. Prac. C. B. 85.

When

When a defendant ſuffers judgment to go by default, he admits the cauſe of action. Wherever the demand is uncertain, as for money had and received, goods ſold, or the like, the plaintiff muſt prove the debt before the jury; but where the amount appears on the face of the record, as upon promiſſory notes, bills of exchange, or the like, the defendant admits that he is liable to that amount; the note or bill, therefore, need not be proved; but they ought to be produced on executing writ, to ſee whether or not any part has been paid. *Green* v. *Hearne*, 3 D. & E. 302.

What evidence ſhould be given.

Of producing bills, notes, &c.

In calculating intereſt or damages in general, the jury ſhould only allow up to the time of bringing the action, not of executing the writ. *Holdeſs* v. *Cornwall*, 1 Barn. 44. *Baker* v. *Bache*, Ld. Ray. 1382.

Though Holt C. J. in action of covenant for not repairing, held that caſe not to come within the rule, and that jury did right in finding damages for the premiſes having become worſe ſince the action. *Shortridge* v. *Lamplugh*, Ld. Ray. 803.

Of calculating intereſt and damages.

The jury muſt find ſome damages for plaintiff; but even if they find for defendant, plaintiff, if he moves to ſet it aſide, muſt pay coſts. *Daniel* v. *Packhurſt*, 2 Barn. 215. 223.

What damages ſhould be found.

Though the damages be *ſmall*, the inquiſition may ſtand, and in general the court will not interfere on behalf of plaintiff, except it be obviouſly unjuſt, or the jury or ſheriff miſtook in point of law. *Hayward* v. *Newton*, Str. 940. *Woodford* v. *Eades*, Str. 425. *Burges* v. *Nightingale*, Bar. 230. *Budicome* v. *Jones*, 1 Barn. 107. *Tutton* v. *Andrews*, Bar. 448.

Eſpecially if it be an action for a *tort*. *Mauricet* v. *Brecknock*, Doug. 509.

If the damages be exceſſive, defendant may move the court to ſet aſide inquiſition; but it ſhould be a ſtrong caſe for court to interpoſe. *Bruce* v. *Rawlins*, 3 Wil. 61. *Yate* v. *Swain*, Bar. 233.

If damages exceed the ſum laid in declaration, and judgment be entered accordingly, it will be error. *Chevely* v. *Morris*, Black. 1300. *Baker* v. *Bache*, Ld. Ray. 1382.

But plaintiff may enter a *remittitur* for ſurplus, and cure the defect. *Strawn* v. *Fletcher*, 2 Bar. 344.

If the ſheriff, on execution of writ, admits improper evidence, the court will ſet aſide inquiſition. *Tutton* v. *Andrews*, Bar. 448.

Of ſheriff admitting improper evidence.

Or if plaintiff produces no evidence, and yet jury gives damages. *Hill* v. *Martin*, 1 Barn. 33. *Ellis* v. *Wall*, Bar. 234.

Of the jury severing the damages in joint actions.

Where two or more defendants suffer judgment by default in an action of trespass, the jury cannot sever the damages, and find so much against one and so much against the other. *Onslow* v. *Orchard*, Str. 422.

But if one demurs and the other suffers judgment, damages may be severed, because they have severed in their plea. *Chapman* v. *House* and others, Str. 1140.

Execution of writ may be adjourned.

Execution of writ of inquiry may be adjourned, after it is entered upon; and it is the duty of the sheriff, in particular cases, to adjourn, as where any material witness on part of plaintiff is unexpectedly absent, or where any witness obstinately refuses to give evidence, or plaintiff is taken by surprise with any new defence to lessen his demand. *Coleman* v. *Mawbey*, Str. 853. *Markham* v. *Middleton*, Ib. 1259. *Mauricet* v. *Brecknock*, Ib. 509. *Hall* v. *Stone*, Ib. 515.

But in such cases of adjournment, plaintiff ought to pay the costs.

Of altering writ of inquiry before execution.

If a writ of inquiry be altered and re-sealed before the return thereof, and before it has been made use of, and afterwards executed according to due notice, such alteration shall not vitiate it. *Langley* v. *Bothwright*, Bar. 232.

Of defendant's costs if inquiry not executed.

If the writ of inquiry be not executed pursuant to notice, the defendant is entitled to his costs in both courts, in the same way as he is, if plaintiff does not proceed to trial according to notice. *Sutton* v. *Bryan*, K. B. Str. 728. *Kettle* v. *Bromsall*, C. B. Bar. 230.

Of the return of writ of inquiry.

The writ of inquiry must be returnable as the original proceedings are, whether on a general return-day, or a day certain; but should it be made otherwise, it is not an irregularity, but error; so that no advantage can be taken thereof, by motion to set aside the inquisition. *Elmes* v. *Tomlinson*, Bar. 230.

And even this error is now helped by the statute of jeofails, as it is only held to be a miscontinuance. *Coupland* v. *Frinlow*, Say. 245.

So the want of a writ of inquiry after judgment by default, is aided by the 4 & 5 Ann. c. 16. and not error. *Isles* v. *Pitt*, Ld. Ray. 1397.

Of suing out a second writ.

If a second writ of inquiry issue pending the first, and before it is returned and quashed, inquisition thereon will be set aside as irregular. *Bunting* v. *Teisdaile*, Bar. 231.

(D) (D) Of setting aside Inquisition, arresting Judgment, and amending the Proceedings.

What to be done on the return of writ.

On the day of the return of inquiry, the plaintiff gives a rule for judgment with the clerk of the rules; it expires in

in four days; Sunday, or any holiday on which the court does not ſit, is not reckoned.

Of moving in arreſt of judgment or to ſet aſide inquiſition.

Within theſe four days, defendant may move to ſet aſide the inquiſition for any irregularity, whether it be in the writ itſelf, or the notice, or the execution of writ, or the like; but it is to be obſerved, that the courts will not countenance frivolous objections; that they are anxious to expedite the ſubſtantial juſtice of the caſe; and always lean againſt motions made only for delay. See the cauſes for which inquiſition will be ſet aſide, *poſt.* tit. New Trials.

When to be moved.

Motions to ſet aſide the proceedings ſhould be made in the firſt inſtance, as ſoon as the parties are aware of the irregularity, and can apply to the court; and if, by their ſubſequent conduct, they have done any thing that can be conſtrued as a waiver of the irregularity, it cures it.

How defect cured by party attending.

Thus any defect in the notice, or the like, will be cured by the party or his attorney attending the execution of inquiry. *Yate* v. *Swaine*, Bar. 233.

So if there be any error on the declaration, if defendant means to move in arreſt of judgment, he muſt not attend execution of inquiry; but muſt rely on the defect, and move the court that interlocutory judgment be forthwith entered upon the record, agreeable to declaration delivered, and the roll be brought in to the proper office, and that defendant may have four days to move in arreſt of judgment, after the roll is brought in. *Freeland* v. *Hunt*, 2 Wil. 380.

All applications muſt be made within 4 days.

Not only the motion in arreſt of judgment, or to ſet aſide inquiſition, muſt be made within the four days above-mentioned, but alſo any application which defendant has to make to the court muſt be made within that period.

Thus it is too late afterwards to move to enter a ſuggeſtion on the record, to ſave plaintiff coſts, or the like. *Barney* v. *Tubb*, 2 H. Blac. 356.

When plaintiff may ſign final judgment.

Writ of inquiry executed on the 5th, final judgment may be entered the 9th; and *per* Buller J. even if the writ of inquiry be executed on the laſt day of the term, plaintiff has a right to ſign his judgment as of that term. Ib. 356.

But it is here obſervable, that if the plaintiff moves to ſet aſide the inquiſition, as on the ground of an evident miſcalculation of the debt or damages by the jury, or the like; as this is in his own delay, he may make the application after the four days, if final judgment has not been entered up. *M'Culloch* v. *Wilcox*, K. B. Mich. 1796.

Of amending writ of inquiry or the proceedings thereon.

A writ of inquiry is amendable; for there is the roll by which it may be amended. God. 78.

The writ ſhould purſue the declaration; but if any variance, court will give leave to amend by the record, on

payment of costs. *Conden* v. *Coubter*, Cas. Tem. Hard. 314.

One of two plaintiffs died before interlocutory judgment, but the suit went on to execution in the name of both; after this, and after a motion to set aside proceedings for irregularity, the court permitted plaintiff to suggest on the roll, the death of the deceased plaintiff, and to amend the *ca. sa.* without paying costs. *Newnham* v. *Low*, 5 D. & E. 577.

So rule granted to strike out one of defendants' name, and make the writ tally with inquisition. *Ingham* v. *Chiswell* and another, Bar. 15.

In judgment by default, the plaintiff is to make up the whole record; but if error is brought for a slip, in not making proper entries for the defendant, judgment shall stay till application to amend be made below. *French* v. *Cornelys*, Blac. 453.

Where writ of inquiry was executed, and no judgment entered up, and the writ was afterwards lost, a new writ and inquisition was ordered, upon motion, to be made out, according to the sheriff's notes, and costs to be indorsed by the Master, as appeared to have been before taxed by the commitment-book. *Bean* v. *Elton*, Str. 1077.

How to proceed if plaintiff in the action becomes bankrupt.

The bankruptcy of plaintiff does not abate the suit; if plaintiff, therefore, becomes a bankrupt, writ of inquiry may be awarded and executed, and final judgment entered up, and execution sued out in his own name, without any *scire facias* by the assignees. *Bibbins* v. *Mantel*, 2 Wil. 358. 372. *Waugh* v. *Austen*, 3 D. & E. 437.

In what cases plaintiff cannot have final judgment against defendants who have suffered.

Although letting judgment go by default is, generally speaking, a confession of the action; yet, in some cases, where a defendant suffers such judgment, and damages are found against him, upon execution of inquiry, the plaintiff cannot have execution for such damages, but judgment will be arrested.

In joint actions.

Thus, in all joint actions against two or more defendants, where one pleads, and the other lets judgment go by default; if such plea goes to the whole cause of complaint, and be found, upon trial, for defendant, and the nature of the action be such, that the justification of the one defendant necessarily takes away plaintiff's cause of action against the other; plaintiff shall not reap any benefit from his interlocutory judgment against such other defendant.

Difference between joint actions, on contract and tort.

This is the case in all joint actions against defendants upon any contract, as *assumpsit*, debt, covenant, and the like, where the demand is joint, and one cannot be convicted without the other; but not so in actions upon a *tort*,

as

as treſpaſs, or the like; for there one defendant may be guilty, and the other not: but even in treſpaſs, if the juſtification of defendant be of a nature neceſſarily to deſtroy plaintiff's cauſe of action againſt all, no judgment can be againſt the other defendant, though he is found guilty. *Biggs* v. *Benger* and another, Ld. Ray. 1372.

If three defendants, in a joint action of treſpaſs, ſuffer judgment by default, and the plaintiff executes writs of inquiry againſt them ſeparately, and takes ſeveral damages againſt them, it is irregular; and if the plaintiff enter up final judgment with thoſe ſeveral damages againſt the defendants, it would be erroneous: but the court will permit the plaintiff to ſet aſide his own proceedings before final judgment, on payment of coſts. *Mitchell* v. *Milbank* and others, 6 D. & E. 199.

After verdict on writ of inquiry, as after verdict upon iſſue joined, plaintiff cannot diſcontinue the action without defendant's conſent. *Stephens* v. *Etherick*, Carth. 86.

Of diſcontinuing after verdict on inquiry.

Section III.

Of Judgment of Non Pros.

If plaintiff does not comply with the rules and orders of the court to be obſerved on his part, by declaring, replying, ſurrejoining, or entering the iſſue in due time, when ruled ſo to do, judgment of *non pros* for ſuch his omiſſion may be ſigned, which is final.

Get a roll, enter thereon warrant of attorney for defendant only; ingroſs *non pros* thereon; alſo ingroſs ſame on a double 2*s*. 6*d*. ſtamp paper, and carry it to clerk of judgments in B. R.—prothonotary in C. B. who will ſign ſame, —pay 3*s*.

Get coſts taxed, and ſue out execution, or bring an action for the ſame, which may be done though under 40*s*.

K. B.

By a rule of court Michaelmas 1654. *ſec.* 15.

If the plaintiff declares not the ſecond term, though the defendant give no rule, yet a nonſuit may be entered at the end of the ſecond term, upon a continuance over by him dies datus, *but not the third term or after.*

And by ſtat. 13 *Car.* 2. *ſt.* 2. *c.* 2 *ſec.* 3. *That upon appearance to*

C. B.

The ſame rule as in K. B. was alſo made in this court, Michaelmas 1654. *But the practice here is now governed by a ſubſequent rule of Hil.* 9 *Ann.*

Upon all proceſs returnable, the firſt or any other return in any term, the plaintiff ſhall have liberty to the end of the next enſuing term to deliver his declaration to the defendant's attorney, or of leaving the

Of ſigning non pros for want of declaration.

to be entered in the term wherein the writ or proceſs is returnable, unleſs the plaintiff declare before the end of the term next following after appearance, that then a non-ſuit for want of a declaration may be entered againſt him, and defendant ſhall recover his coſts.

If the action be by original, defendant may ſign non pros *any time before eſſoin day of third term without a rule to declare, having entered appearance of the term writ is returnable. Imp. K. B.* 508.

the ſame in the office; and defendant's attorney having entered his appearance with the proper officer as of that term in which the proceſs is returnable, and at the end of the enſuing term, or in four days after the end thereof, having given a rule to declare in the proper office, (it is a rule with the ſecondary which expires in four days,) *and having called on the plaintiff's attorney or clerk in court, (if he can be found,) the defendant, any time in the vacation of ſuch enſuing term after the rule for declaring is out, may ſign his* non pros *for want of a declaration and not afterwards; and the plaintiff ſhall not, without leave of the court, have any longer time to declare in than as above ſaid, other than the time to be limited by the defendant's rule.*

Defendant, by the above rule, muſt ſign judgment of non pros *for not declaring in the vacation after ſecond term; he cannot wait till the third time.* Towers *v.* Powell, 1 *H. B.* 87.

The above ſtatute of 13 Car. 2. which enables the defendant to ſign a *non pros*, is not confined to caſes of defective writs, which are mentioned in the preamble of the ſtatute, but extends to all caſes in general. *Oldham* and another v. *Burrell*, 7 D. & E. 26.

If not ſigned, declaration may ſtill be delivered.

By the general rule of law, a plaintiff muſt declare within twelve months after the return of the writ, or he will be out of court. But by the rules of the courts, if he do not deliver his declaration within two terms, defendant may ſign judgment of *non pros*. If, however, no ſuch judgment be ſigned, plaintiff may ſtill deliver his declaration at any time within the year. *Worley* v. *Lee*, 2 D. & E. 112. *Penny* v. *Harvey*, 3 D. & E. 123. *Sherſon* v. *Hughes*, 5 D. & E. 36.

The defendant having ſurrendered in diſcharge of his bail in K. B. removed himſelf by *habeas corpus* to the Fleet, and plaintiff declared againſt him there, after the end of the ſecond term after the writ was returnable. A judgment of *non pros* ſigned afterwards was irregular. *Sherſon* v. *Hughes*, 5 D. & E. 35.

If treaty of compromiſe, plaintiff need not declare.

But if there be a treaty between plaintiff and defendant, he is not obliged to declare within that time. *Walker* v. *Steward*, 3 Wilſ. 455.

If a man appears at the day of the return of the process, and puts in bail, though he never was arrested, nor the process returned; yet if plaintiff does not declare within two terms, a *non pros* may be signed. Salk. 456. How if plaintiff appears without arrest or service of process.

In both courts, it seems necessary that common bail should be filed, or an appearance entered within the term in which writ is returnable, or defendant cannot sign *non pros* for want of declaration. When common bail must be filed to warrant a non pros.

See Rules above, and *Holmes* v. *White*, K. B. East. 11 G. 3. Imp K. B. 508.

For this reason, a prisoner, when superseded on filing common bail, cannot sign judgment of *non pros*, as he is not entitled to his *supersedeas* till after the second term.

But there seems to be a difference in the practice of the courts, with respect to giving the plaintiff a rule to declare before *non pros* signed; in K. B. no such rule is necessary, but in C. B. it is. When rule to declare necessary to warrant non pros.

So that in B. R. plaintiff has only to the end of the second term to declare in, whether called upon by rule or not; but in C. B. he has till the essoin-day of the third term, if not called upon by rule. P. R. 121. *Steward* v. *Harding*.

And rule to declare must be given at the end of second term, or within four days after. *Allen* v. *Milward*, Hil. 30 G. 3. And at what time to be given.

Giving rules to declare, and calling for declaration, are as necessary in signing a *non pros* in C. B. as giving rules to plead, and calling for plea, are necessary before signing judgment for want of plea in B. R.

But where the plaintiff does not declare, after having obtained time for that purpose, the defendant, at the expiration of such time, may sign judgment of *non pros*, without giving any rule to declare; upon the same principle as where time to plead has been given, no rule to plead is necessary. *Towers* v. *Powell*, 1 H. Bl. 87. And if the time to declare had been till the last day of Trinity Term, the defendant might in the vacation sign judgment of *non pros* of Trinity Term. Ib. Not necessary if plaintiff has had time to declare.

If a rule to declare be given, in C. B. it is sufficient; there is no occasion for a demand of declaration. Demand of declaration when necessary to warrant non pros.

The plaint in replevin being removed into this court by *re. fa. lo.* and defendant having given a rule to declare, he may sign judgment of *non pros*, for want of declaring without demanding a declaration. *James* v. *Moody*, 1 H. Bl. 281.

Though declaration be filed in office, yet if no notice thereof be given within two terms, defendant may sign *non pros*, Notice of declaration necessary.

pros, provided he has done nothing to waive the notice. *Anon.* 1 Barn. 362.

Of non pros for not replying &c.

Plaintiff may also be nonsuited at any other stage of the cause, as for not replying, surrejoining, or entering the issue, when ruled so to do. But if defendant sign judgment of *non pros* for not entering issue, he must do it immediately on expiration of the rule so to do; otherwise, if the roll be brought in afterwards, before such judgment actually signed, the judgment will be irregular. Therefore the defendant is bound to search in the office, whether the plaintiff has brought in the issue-roll, immediately before he signs judgment of *non pros*, even though he may have searched the day before, upon the expiration of the rule to bring in the roll. *Minus* v. *Baxter*, 1 D. & E. 16.

For not entering issue, and what defendant must do before non pros signed.

But see the case of *Thompson* v. *Ryall*, 4 D. & E. 195. also see *ante*, Ch. 7. Sec. 9.

Of a non pros in a joint action against several defendants.

In a joint action against two or more defendants, plaintiff cannot be *non prossed*, unless by all the defendants. Doug. 169. *Powell* v. *White* and others. So though two writs be served, four defendants in one writ, and three in the other: nor can they sign distinct and several judgments of *non pros*; but if plaintiff does not proceed against them, one judgment can only be signed against him. 4 Burr. 2418. *Pryce* v. *Foulks* and others.

How if they appear severally;

And although they appear severally by separate attornies, yet there must be but one joint judgment of *non pros*. Com. 74.

or plead separately.

Or if plaintiff declares against them jointly, and they sever in their pleas, one cannot enter a *non pros*, for by a *non pros* plaintiff is out of court as to all the defendants, which is the material difference between a *non pros* and a *nolle pros*. *Powell* v. *White*, Doug. 169.

How if plaintiff declares severally against them.

But the above rule only holds where the action is a joint action against them all, for wherever it can appear to be his intention to proceed against the defendants separately, judgment of *non pros* may be signed by all or any of the defendants named in the writ, if not duly proceeded against. *Butler* v. *Upton*, 2 D. & E. 258.

Thus if plaintiff declares against one of two defendants named in his writ, and does not proceed against the other, the latter may sign *non pros*.

So if plaintiff serves notice of declaration, or takes out a rule for time to declare against one only, and does not proceed against the other. *Roe* v. *Cock*, 2 D. & E. 257.

Of non pros when cause removed by habeas corpus.

If defendant removes a cause by *habeas corpus* into B. R. he cannot have a *non pros* for want of a declaration, for plaintiff is not bound to follow him, but he must declare in two terms. Imp. K. B. 469.

No

No *non pros* can be signed pending an injunction, nor after outlawry reverſed; but if the plaintiff does not declare within two terms after outlawry reverſed, the defendant may give a rule to this effect, viz. That unleſs the plaintiff declare in the cauſe within four days after notice of the rule to him or his attorney given, he ſhall pay to the defendant or his attorney, coſts to be taxed by the prothonotary. See the Rule Trin. 33 Car. 2.

How pending an injunction;

or after outlawry.

In B. R. the plaintiff's attorney was ſummoned before a judge to produce his client; and the judge made an order that unleſs he produced him within a month, the defendant ſhould, by conſent, be at liberty to ſign a *non pros*. He did not produce him within a month, and the *non pros* was ſigned; and on affidavit made that no ſuch man as the plaintiff could be found, the court, on motion, made a rule upon the attorney to pay the coſts; and afterwards, upon an affidavit that they were demanded and unpaid, the court granted an attachment againſt him. *Gyun* v. *Kirby*, Stra. 402.

If plaintiff's attorney does not produce his client, court will ſometimes order a non pros.

When a judgment of *non pres* is ſigned, plaintiff becomes liable to pay defendant the coſts he has been put to *pro falſo clamore*. An action of debt may be brought againſt him for ſuch coſts.

Of coſts of non pros.

Executors and adminiſtrators pay coſts upon being *non proſſed* for want of declaring in due time. 4 Burr. 1584.

As to executors, &c.

Where a defendant removes proceedings by *re. fa. lo.* from a country court into one of the ſuperior courts, and ſigns judgment of *non pros* in default of plaintiff's appearing, he is entitled to coſts.

When plaintiff removed by re. fa. lo.

Not indeed under ſtat. 13 Car. 2. ſt. 2. c. 2, becauſe that act is confined to actions commenced in the ſuperior courts; but under 4 Jac. 1. c. 3. whereby in all caſes wherein a party is entitled to his judgment, he is entitled to his coſts. *Davis* v. *James*, 1 D. & E. 373.

Of explanation of 13 Car. 2. & 4 Jac. 1.

Whether plaintiff, after a *non pros*, may hold defendant to bail again for ſame cauſe of action, ſee *ante*, Ch. 2. Sec. 1. (F)

Of holding defendant again to bail after non pros.

If a *non pros* is ſigned irregularly, plaintiff may proceed to judgment.

How if a non pros ſigned irregularly.

Defendant pleaded a tender, but brought no money into court; he gave a rule to reply, and for want of a replication ſigned judgment of *non pros*. Plaintiff looking on the plea as a nullity for want of the money in court, ſigned judgment after the *non pros* obtained, which the court held to be regular, and ſet aſide the *non pros*. Barn. 252.

A *non pros* may be ſet aſide for irregularity on affidavit of facts.

How to be ſet aſide.

The court refuſed to ſet aſide a *non pros* regularly obtained by defendant againſt plaintiff, who was only a common informer,

Refuſed in a qui tam action.

former, though the plaintiff offered to pay the costs. Had the plaintiff been the party really injured, it might have borne a different consideration; but the court would not exercise their discretionary power, when the plaintiff was merely a common informer. *Bennet* v. *Smith*, Burr. 401.

Set aside where demand of declaration was of country attorney.

Motion was made to set aside a *non pros* signed for want of a declaration, which had been demanded of plaintiff's attorney in the country, and not of the agent in town. It was, upon shewing cause, sworn, that the plaintiff's attorney in the country agreed it should be regular. *Per cur.* Let the *non pros* be set aside. No agreement of country attornies can vary the practice of the court. All transactions of this kind must be in town. Bar. 311.

If an action be brought upon a judgment of *non pros* which was irregular, there should not be two rules, one to set aside the judgment, and another to set aside the proceedings in the action; but the whole may be set aside in one rule. *Barlow* v. *Kaye*, 4 D. & E. 688.

Section IV.

Of Judgment as in Case of a Nonsuit.

(A) The Nature, Meaning, and Origin thereof.

(B) When to be moved for.

(C) How to be moved for.

(D) What Excuse sufficient, and of the peremptory Undertaking.

(E) In what Cases such Judgment allowed.

(F) Whether Defendant can have such Judgment, and also have Costs for Plaintiff's not proceeding to Trial.

(A) (A) The Nature and Meaning of such Judgment.

For the nature, meaning, and origin of the motion for judgment as in case of a nonsuit, see *post.* tit. Of carrying down the record by proviso.

(B) (B) When to be moved for.

At what time defendant must

In K. B.

The plaintiff is not bound to give notice of trial till the term after

C. B.

The defendant cannot apply for judgment, as in case of a nonsuit, before

after that in which issue is joined. Hall *v.* Buchanan, 2 *D.* & *E.* 734.

So that if issue be joined early enough in a term to enable the plaintiff to give notice of trial for the sittings after that term, he is not obliged to do so, nor is the defendant entitled to judgment as in case of a nonsuit, for not proceeding to trial, unless the plaintiff has in fact given notice of trial. Hunt *v.* Tremamando, 4 *D.* & *E.* 557.

But if he does give such notice and not proceed, defendant is entitled to judgment.

So, if notice of trial is given, and afterwards countermanded, plaintiff ought to give fresh notice to proceed next term; or the term after judgment may be moved for.

If an issue be joined in Trinity term, and delivered in a country cause, with notice of trial for the then next assizes; if the plaintiff does not try his cause, the defendant may move for judgment as in the case of a nonsuit in Michaelmas term (although he compel the plaintiff by rule to enter his issue in that same Michaelmas term).

If an issue be delivered so late in a country cause that the plaintiff could not give notice of trial as of Trinity term, then the defendant cannot move for judgment as in the case of a nonsuit, until Easter term following (his default not happening till Lent assizes).

before the third term after that in which issue is joined. If issue joined in Trinity, he cannot apply till Hilary term; nor will an application in Michaelmas term do, though after it is too late for plaintiff to give notice of trial in that term. Da Costa *v.* Ledstone, 2 *H. Bl.* 558. *This seems contrary to the Reporter's query in a note to* Baker *and* Newman, 1 *H. Bl.* 123. *and also to the case of* Frampton *v.* Payne, 1 *H. Bl.* 65.

give notice of trial after issue joined in K. B. and C. B.

(C) How to move for Judgment as in Case of Nonsuit. (C)

First, get rule for plaintiff to enter his issue, if it be not already done, for which see *post.* Ch. 9. Sec. 1.; if he does not comply with rule, sign judgment of *non pros*; otherwise, when the issue is entered, proceed as follows:

Make affidavit of the term when issue was joined, or notice of trial given, or the like, and that plaintiff did not proceed in pursuance thereof; or as the fact may be.

K. B.

K. B.

Give it to counsel with 10s. 6d. *and remember to have your roll in court; or if you are at Westminster before the sitting of the court, Mr. Austin will mark it in the treasury "read;" pay* 1s. 6d. *in the evening; draw up your rule, pay* 6s.; *serve copy on plaintiff's attorney, make affidavit of the service; give it to counsel with one guinea to make it absolute, which cannot be moved by him till the day after the day for shewing cause.*

If the defendant makes the rule absolute, draw up same at the clerk of the rules; pay 5s.; *then get a double* 2s. 6d. *stamp put upon the rule, bespeak the roll of Mr. Edge, so as the Master may mark the costs; pay in term time* 1s. 6d.; *in vacation* 5s. 10d. *more for the keys of the treasury; chief clerk's fee* 4s. 6d.

In this court no notice of motion necessary.

C. B.

Ingross affidavit on a 1s. 6d. *stamp paper, swear it before a judge, and then speak to Mr. Sherwood to have roll in court, pay him* 3s. 4d.; *give affidavit to a serjeant with a fee of* 10s. 6d., *and he will move for judgment as in the case of a nonsuit; in the evening draw up rule at the secondary's, pay* 5s. 6d.; *serve copy thereof on plaintiff's attorney or clerk, shew the original, and on the day for shewing cause have the affidavit of service ready; and add these words, "and at the same time shewed him the said original rule." Give affidavit to a serjeant with a guinea, to move to make the rule absolute, which if no cause shewn is of course; then draw up rule at secondary's, pay* 6s. *if of common length; take same with a double half crown stamp paper (make an* incipitur *of the declaration thereon) to the prothonotary's clerk, and he will sign judgment; pay* 7s. 4d. *then tax the costs and take out execution.*

The affidavit as the ground for such judgment for not proceeding to trial in due time, issue having been joined the last term should state, that issue had been joined early enough in the last term for the plaintiff to have tried his cause in that term. Woulfe *v.* Shells, 1 *C. B.* 282.

But in the third term a general affidavit would be sufficient, stating issue was joined in the former term. Ib.

In this court notice of motion requisite.

(D) (D) What Excuse is sufficient, and of the peremptory Undertaking.

In C. B. peremptory undertaking is of itself sufficient

In C. B. in all cases where an application is made for the first time for judgment as in the case of a nonsuit, it is sufficient in answer to such application to undertake peremptorily

remptorily to try without alledging any reaſon for not having before tried the cauſe; and whatever may have been the former practice, in future it is to be underſtood, that the firſt motion for ſuch judgment is only a mode of obtaining a peremptory undertaking. 2 C. B. 119. *Mallet* v. *Hilton*. in all caſes upon the firſt application.

So indeed in K. B. it is almoſt a matter of courſe for a peremptory undertaking to be accepted. And in K. B. almoſt a matter of courſe.

But if plaintiff has any real excuſe for not proceeding, it will be admitted, and the rule for judgment as in caſe of a nonſuit diſcharged, as where his witneſſes are abſent, or pre-prevented by illneſs from attending the trial. Bar. 316. *Jones* v. *Stephenſon*. Or when he himſelf was ill. Bar. 313. *Clark* v. *Gorrill*. What a good excuſe for not proceeding. Abſence of witneſſes.

It is a good cauſe againſt a rule for judgment as in caſe of a nonſuit, that defendant has become inſolvent ſince action brought; for it would be extremely hard if a party ſhould be obliged to proceed and put himſelf to expence, without a poſſibility of recovering either debt or coſts. *Baily* v. *Wilkinſon*, Doug. 671. But Q. as a general rule. Inſolvency of defendant.

So where the record was withdrawn in a penal action becauſe the principal witneſs refuſed to give evidence leſt he ſhould ſubject himſelf to a penalty on the ſame act, it was held a good excuſe; nor is there any difference between penal or other actions. *Raynes* v. *Spicer*, 7 D. & E. 178.

Plaintiff countermanded in due time, and told defendant's attorney that he could not go to trial, for want of a material witneſs: nevertheleſs, the next term, defendant moved for judgment as in caſe of a nonſuit; but on ſhewing cauſe, the above facts being diſcloſed, court diſcharged the rule with coſts. *Anon.* Hil. 37 G. 3.

If the cauſe is put off on a peremptory undertaking, and plaintiff ſtill does not proceed, let defendant get office-copy of rule, make affidavit of the fact, that plaintiff did not proceed to judgment according to his peremptory undertaking, and move the court for judgment thereon; it is abſolute in firſt inſtance. How if plaintiff does not proceed after peremptory undertaking.

Although plaintiff has undertaken peremptorily to proceed to trial at next aſſizes, yet defendant is not bound to attend and be prepared with witneſſes without having had freſh notice of trial. Freſh notice of trial muſt after ſuch undertaking be given.

Nor will the coſts of ſuch attendance and preparation be allowed, though he obtain judgment as in caſe of a nonſuit, on account of plaintiff's not proceeding to trial. *Iſield* v. *Weeks*, 1 C. B. 222.

Although notice has been given of a motion for judgment as in caſe of a nonſuit, for not proceeding to trial in due time after So, freſh notice in C. B. of motion for judgment for not

proceeding after such undertaking.

after issue joined, on which plaintiff enters into a peremptory undertaking to try; yet notice must also be given of the like motion for not proceeding to trial in pursuance of the undertaking. *Gooch* v. *Pearson*, 1 C. B. 527.

There is no difference between the two motions. Statute requires notice in both. Ib.

When second excuse admitted.

After peremptory undertaking, a second excuse may be shewn; and it is in the court's discretion to admit it or not. *Milton* v. *Terrill*, Bar. 315.

A term's notice not required in moving for this judgment.

In both courts, the rule of requiring a term's notice, when no proceedings have been had for a twelvemonth, does not extend to motions for judgment as in case of a nonsuit: the reason given is, that it is a rule of 13 G. 2. previous to the statute 14 G. 2. authorizing this kind of judgment. *Row* v. *Dunning*, Bar. 308. *Manley* v. *Worthey*, 2 Blac. 1223. *Doe* v. *Moses*, 5 D. & E. 634.

(E)

(E) In what Cases Judgment as in Case of a Nonsuit is allowed.

This judgment founded on stat. 14 Geo. 2. c. 17.

This proceeding is founded upon the statute 14 Geo. 2. c. 17. whereby it is enacted, that "where any issue is, or "shall be joined in any action or suit at law, in any of his "Majesty's Courts of Record at Westminster, the Court of "Great Session for the Principality of Wales, the Court "of Great Session for the County Palatine of Chester, the "Court of Common Pleas for the County Palatine of Lan-"caster, or the Court of Pleas for the County Palatine "of Durham; and the plaintiff or plaintiffs, in any such "action or suit, hath or have neglected, or shall neglect "to bring such issue on to be tried, *according to the course "and practice of the said Courts respectively*, it shall and may "be lawful for the judge or judges of the said Courts "respectively, at any time after such neglect, upon motion "made in open court (due notice having been given there-"of), to give the like judgment for the defendant or de-"fendants, in every such action or suit, *as in cases of nonsuit;* "unless the said judge or judges shall, upon just cause and "reasonable terms, allow any further time or times for the "trial of such issue; and if the plaintiff or plaintiffs shall "neglect to try such issue, within the time or times so "allowed, then and in every such case, the said judge "or judges shall proceed to give such judgment as afore-"said."

And by sec. 2. "All judgments given by virtue of this "act shall be of the like force and effect as judgments upon "nonsuit,

" nonsuit, and of no other force and effect." " Provided " also that the defendant or defendants shall, upon such " judgment, be awarded his, her, or their costs in any " action or suit, where he, she, or they would, upon non- " suit, be entitled to the same, and in no other action or " suits whatsoever." Costs of such judgment.

First, this judgment is only where plaintiff hath neglected to bring the issue on to be tried, according to the practice of the courts. Explanation of above statute.

When a plaintiff, therefore, has carried a record down for trial once, the court will not give judgment, as in case of a nonsuit, for not carrying it down a second time, even though it were made a *remanet* the first time; for the terms of the act are complied with by plaintiff's carrying record to trial once; and after that by the practice of the court, the defendant should carry down the record by proviso. *Newburn* v. *Langley*, 3 D. & E. 1. 1st, It does not extend to cases where record has been once carried down.

But this is upon the supposition, that either the action is brought on to trial, or at least every thing done to promote such trial; for if the record, when carried down, be withdrawn by plaintiff, without sufficient reason, judgment as in case of nonsuit may be had.

So that where plaintiff obtained a verdict, and afterwards a new trial was granted, defendant cannot have judgment as in case of a nonsuit, if plaintiff does not proceed a second time to trial. *Porzelius* v. *Maddocks*, C. B. 101.

Or when plaintiff was nonsuited, and afterwards nonsuit was set aside, and plaintiff neglected to go to trial again. *The King* v. *Pippett*, 1 D. & E. 492.

Because if plaintiff does not give fresh notice, and proceed to trial at the next sittings or assizes, defendant may afterwards carry record down by proviso.

In all cases, therefore, where both parties are actors, and where defendant, in the first instance, is entitled to try by proviso, defendant must still resort to trial by proviso, and cannot have judgment as in case of a nonsuit; for plaintiff is no more obliged to carry down the record than defendant, as in actions of replevin. *Jones* v. *Concannon*, 3 D. & E. 661. *Shortridge* v. *Herne*, 5 D. & E. 400. Or where either party may in first instance carry it down.

And this in both courts.

Secondly, by the words of the statute, such judgment is only to be, where defendant would, upon nonsuit, be entitled to same. Whenever, therefore, plaintiff could not be nonsuited at trial judgment as in case of nonsuit cannot be, because the case of a nonsuit does not at all exist. *Weller* v. *Joyton*, Burr. 359. 2d, Not to cases where plaintiff could not be nonsuited at the trial.

Thus when there is judgment by default against one defendant in a joint action, the other cannot nonsuit the

plaintiff at the trial, on iſſue joined by him; nor if the plaintiff neglect to proceed to trial, can he obtain judgment as in caſe of a nonſuit. *Weller* v. *Gayton*, Burr. 358. See *Harris* v. *Butterley*, Cow. 483. *Hannay* v. *Smith*, 3 D. & E. 662.

So after payment of money into court, it is ſaid that plaintiff cannot be nonſuited. But Q. And whether he cannot have judgment as in caſe of a nonſuit?

May be had on a mandamus.

Judgment as in caſe of a nonſuit may be given in a traverſe of a return to a mandamus. *Rex* v. *Mayor of Stafford*, 4 D. & E. 689. Though by 14 G. 2. c. 17. it ſeems only to extend to actions and ſuits between parties.

Or qui tam action.

In B. R. a rule *niſi* in a *qui tam* action for like judgment as in caſe of a nonſuit, was made abſolute, no cauſe being ſhewn. 1 Wil. 325. *Watſon* v. *Jackſon*.

A common informer may be nonſuited, and a *qui tam* action is within the ſtatute. Bar. 315.

Not in writ of right.

This ſtatute does not extend to a writ of right, ſo as to give coſts to the tenant on a judgment as in caſe of a nonſuit. *Newman* v. *Goodman*, 2 Blac. Rep. 1093.

How ſuch judgment to be obtained in a joint action.

In a joint action, all the defendants muſt join in the application for judgment as in caſe of a nonſuit, whether they all appear and plead, or do not all appear. *Watſon* v. *Jackſon*, Say. 22. *Jennings* v. *Wilſon*, Ib. 103.

Q. How far plaintiff on a nonſuit is out of court?

In the caſe of *King* v. *Pippett*, 3 D. & E. Buller J. ſaid, The defendant's counſel is not quite correct in ſaying, that in caſe of a nonſuit the plaintiff is out of court. I remember a caſe many years ago, where, on a motion for judgment as in caſe of a nonſuit, Lord Mansfield ſaid it was very extraordinary to ſuppoſe the plaintiff out of court when he is nonſuited; for if he is nonſuited, by miſtake of the judge, at the trial, he could not afterwards move to ſet it aſide, unleſs he were in court.

How if rule for ſuch judgment be diſcharged on a falſe affidavit.

If a rule to ſhew cauſe why there ſhould not be judgment as in caſe of a nonſuit, be diſcharged on an affidavit which contains an anſwer falſe in itſelf, the court will not afterwards open the matter on an affidavit which diſproves the contents of the former one; but if they ſaw reaſon to doubt it at the time, they would ſuſpend their judgment till the matter was inquired into. *Davis* v. *Cottle*, 3 D. & E. 405.

Of writ of error brought on ſuch judgment.

Whether a ſtay of proceedings.

The court have laid it down as a general rule, that though a writ of error may be brought on a judgment of nonſuit; yet the court will not in any caſe ſtay proceedings, or ſet aſide an execution for the coſts on that account. *Box* v. *Bennett*, 1 H. Bl. 432.

So alſo is the caſe of *Kempland* v. *Macauley*, 5 D. & E. 436.; for it is manifeſt it is only broh[illegible] delay.

There

There is no occaſion for any confeſſion of that fact, for there can be no error of which plaintiff can avail himſelf; for if the record were manifeſtly erroneous, the plaintiff, who has made default by ſuffering a nonſuit, can never have a judgment afterwards in his favour.

But in B. R. afterwards, in *Levett* v. *Perry*, 5 D. & E. 669. it ſeems otherwiſe; there, proceedings on ſuch a judgment were ſtayed; and though *Box* and *Bennett*, and *Kempland* and *Macauley*, were cited, *per Cur.* The practice not to ſtay proceedings pending a writ of error, muſt be confined to thoſe caſes where the party himſelf, his attorney or bail, declare it is brought for delay.

After rule *niſi* for judgment as in caſe of a nonſuit court will not grant rule for plaintiff to amend his declaration. *Eagles* v. *Oſbaldeſtone*, Bar. 318. Nor to diſcontinue. *Lowe* v. *Peacock*, Ib. 316.

Q. Whether after rule niſi for judgment plaintiff can amend declaration?

Though, in another caſe when iſſue was joined, and notice of trial given, but a miſtake in the declaration being diſcovered, plaintiff did not proceed. Defendant applied for judgment as in caſe of a nonſuit. The court, on ſhewing cauſe, gave leave, as the iſſue-roll was not ſtuck into the bundle, and the amendment ſmall, to amend on paying of coſts, and for not proceeding to trial. Bar. 317. *Beere* v. *Bowling*.

Executors are not liable to coſts on a judgment as in caſe of a nonſuit, under ſtatute 14 G. 2. c. 17. *Booth* and others, executors, v. *Holt*, 2 C. B. 277.

Of coſts on ſuch judgment.

(F) How Defendant can have Judgment as in Caſe of Nonſuit, and Coſts for not proceeding to Trial. (F)

Formerly, if defendant applied for, and had coſts for plaintiff's not proceeding to trial, and afterwards moved for judgment as in caſe of a nonſuit, the motion was denied; it being held, that as he had made his election of one remedy, he could not have the other. Bar. 316. *Ogle* v. *Moffit*. *Newman* v. *Goodman*, 2 Blac. 1110.

But it now ſeems ſettled in both courts, that a party having moved for judgment as in caſe of a nonſuit, has not thereby waived the coſts of not proceeding to trial; and in the Common Pleas, it is not neceſſary to apply for them by a ſeparate motion; but they may be given on the motion for judgment as in caſe of a nonſuit; or the court may make the payment of ſuch coſts the terms of diſcharging the rule for judgment as in caſe of a nonſuit, where good

reaſon is ſhewn for not proceeding to trial. *Jolliffe* v. *Morris*. 1 Puller and Boſanquet, 38. *Jordaine* v. *Sharpe*, 2 H. Bl. 280.

But in K. B. coſts for not proceeding to trial, and judgment as in caſe of nonſuit, muſt be the ſubjects of different motions. 1 Puller and Boſanquet, 38. and *Earl of Leiceſter* v. *Wooden*, Mich. 21 G. 2. K. B.

Section V.

Of Judgment by Confeſſion.

Its meaning.

It often happens that the defendant, conſcious of having no good ground of defence, confeſſes the action; which not only ſaves him the additional expence of the further proceedings by writ of inquiry, or the like, which would ultimately fall upon him; but is alſo frequently an inducement to plaintiff to indulge him with time for payment of the debt, until which time all proceedings are ſtayed; the defendant agreeing to certain terms on his part, ſuch as not to bring a writ of error, or file a bill in equity.

The form of ſuch confeſſion may be as follows:

The form thereof in caſe.

"*I confeſs this action, and that the plaintiff hath ſuſtained damages to the amount of* 50l. *beſides his coſts and charges to be taxed by the maſter (if in B. R., or by prothonotary in C. B.) and no judgment ſhall be entered up, or execution iſſued until the day of next, in default of payment of the ſum of* 25l. *being the debt in this action, together with the ſaid coſts; and that no writ of error ſhall be brought, nor any bill in equity filed; and that in caſe the plaintiff ſhall enter up his judgment in default of payment, he ſhall be at liberty to levy the ſaid* 25l. *together with the coſts taxed, and alſo ſheriff's poundage, and all other incidental charges. As witneſs,*" &c.

In debt.

If it be an action of debt, then—"*I confeſs the debt in this cauſe, and that the plaintiff hath ſuſtained damages to the amount of* 1s. *beſides his coſts and charges to be taxed, (as above,) and the debt is agreed to be paid as follows, (ſtating the days of payment,) and then as above.*"

Where to be written.

This confeſſion may be written in the margin of the declaration, or on back of inquiry, or on plain paper.

A cognovit actionem relicta verificatione, what.

This confeſſion may be before the plea pleaded; it is then merely a confeſſion of the action, or *cognovit actionem*, as it is called; but if made after plea pleaded, it is then a confeſſion of the action, with an agreement to withdraw the plea, and is termed a *cognovit actionem relictâ verificatione*; it

Form thereof.

then ſtates, *I hereby conſent to withdraw the plea pleaded in this*

this cauſe, and confeſs the action, and that the plaintiff hath ſuſtained, &c. *(as before).*

If after demurrer, thus:—*I hereby conſent to withdraw the demurrer, and that the plaintiff take judgment for the debt of* declared *on, beſides his damages and coſts,* &c.

How to proceed on a cognovit.

If judgment is to be entered up, ſign it on double half crown ſtamp, as it is final, making *incipitur* on judgment-paper; no occaſion for new roll; file warrant of attorney, if not before done; tax coſts, and ſue out execution.

How if retraxit neceſſary.

If confeſſion be after plea, a *retraxit* muſt be entered; which is done in C. B. by taking judgment-paper to prothonotary, who will ſign judgment, and mark *retraxit* thereon; but in K. B. defendant's attorney ſhould come in perſon before the maſter, to withdraw plea. Tidd, 307. Imp. C. B. 465. Ld. Ray. 345.

OBSERVATIONS.

Caution neceſſary in taking cognovit.

When a *cognovit* is given upon terms, plaintiff ſhould take care that it is expreſſed as part of the terms, that defendant ſhall bring no writ of error, or file any bill in equity; for this is not implied, but muſt be particularly mentioned. *Wade* v. *Rogers*, Blac. 780.

If no terms be expreſſed, final judgment may be immediately ſigned, and execution ſued out.

The extent and operation of a cognovit.

A *cognovit actionem*, though after plea pleaded, is, ſtrictly ſpeaking, only an acknowledgment of the count; but the party may confeſs more, if he pleaſes.

Thus in an action of debt againſt an executor, he pleaded *plene adminiſtravit*; plaintiff replied aſſets; defendant, *relictâ verificatione cognovit actionem.* Judgment was entered for plaintiff, *de bonis teſtatoris.* It was moved, that confeſſion ſhould alſo contain *he had goods ſufficient*, and that it might be added to the entry; but court refuſed, ſaying, the confeſſion naturally can extend no further than to the count, which is of the debt, not of the aſſets; yet if defendant will confeſs more, he may; there are entries both ways. *Bird* v. *Culmer*, Hob. 178.

How if only for part.

So it may be only for *part* of the cauſe of action; in which caſe plaintiff can only ſign judgment for the part confeſſed, and muſt proceed as to reſidue.

In what caſes court will interfere therein on motion.

It is clear, that where a judgment by confeſſion is given upon terms, if plaintiff proceed contrary to the terms expreſſed, the court will, on motion, interpoſe, becauſe ſuch judgment is, in effect, rendered only a conditional judgment; but it uſed to be held, that if the *cognovit* were general,

neral, and a subsequent and independent agreement was entered into between the parties, restraining its operation; although plaintiff proceeded contrary to such agreement, the court would not interfere upon motion; but put the defendant to his action upon the agreement. *Anon.* Sal. 400. Tidd, 308.

But in the case of *Hatton* v. *Young*, in C. B. Blac. 943. the court did take notice of such subsequent agreement, and set aside the judgment, as being contrary to good faith and the plaintiff's express undertaking.

How far it affects bail.

A *cognovit* by the principal, without notice to the bail, does not discharge the bail. *Hodgson* v. *Nugent*, 5 D. & E. 277.

What proper when taken from prisoner.

If a *cognovit* be taken from a prisoner, it is proper for an attorney on the part of the defendant to be present; for though, in strictness, it is not within the rule of 15 Car. 2. (see next Section), which only relates to defendants in custody of any sheriff or his officer, yet the court will interfere in such case on behalf of a prisoner. *Parkinson* v. *Caines*, 3 D. & E. 616.

When judgment is signed on a *cognovit*, a bill should first be regularly filed, provided none was filed before the *cognovit* given; but where judgment was signed, without first filing a bill, as it was done at the defendant's request to save expence, court gave leave to file the bill *nunc pro tunc*. *Walker* v. *Woolley*, 37 G. 3. Notes, 7 D. & E. 207.

So common bail should first be filed according to the statute, if defendant has not appeared himself in court; but yet where it was not filed until after the judgment signed, and after the next term from the return of the writ, which was irregular, defendant was held estopped from objecting to it by his *cognovit*; it being, in fact, filed before he made the objections. *Davis* v. *Hughes*, 7 D. & E. 206.

Section VI.

Of Judgment on Warrant of Attorney.

Another common way of settling a debt is by giving a bond conditioned to pay the amount thereof at a given time, together with a warrant of attorney, authorizing the person named therein to confess judgment for the defendant, on failure of performance of such condition.

Thus a security is given to the creditor, whilst the debtor avoids the expence of litigation, and is accommodated with time for payment of the debt.

The

The bond and warrant may be given at any time, either before or after action brought. As it is in constant practice to give these warrants, and to enter up judgments thereon, it will be proper to consider,

(A) The Validity of a Warrant of Attorney.

(B) Its Operation and Effect.

(C) The Time and Manner of entering up Judgment thereon.

(A) The Validity of a Warrant of Attorney.

The validity of the warrant.

The validity of a warrant of attorney depends upon the competency of the parties giving and receiving it, their situation at the time, and the consideration for which it is given.

It must be given by a person competent in law to do such an act.

How if given by an infant.

Thus a warrant of attorney given by an infant is absolutely void; though there may be circumstances of fraud on the part of the infant. *Saunderson* v. *Thorn*, 1 H. Blac. 75.

By a feme covert.

Or by a feme covert, except she lived and acted as a feme sole; in which case, court refused to set the warrant aside upon motion, and put her to her writ of error. *Anon.* Salk. 400.

If by an infant and another person;

If an infant join with another in giving such warrant, it is void only as to the infant. *Motteux* v. *Sir John St. Aubyn*, 2 Blac. 1133.

or to a feme covert.

So if a warrant of attorney be given to confess judgment to a feme covert, and it be confessed accordingly, it is void. *Roberts* v. *Pierson*, 2 Wil. 3.

The situation of the person giving it.

The situation of the person giving it should be considered; for if the party be in custody at the time, the following rules and cases must be attended to:

K. B.

No warrant of attorney for confessing a judgment, executed by any person in custody of any sheriff or other officer shall be of any force, unless some attorney for and on behalf of such person in custody, and expressly named by him, be present to inform him of the nature of such warrant, which attorney shall subscribe his name as a witness to the due

C. B.

If in custody, an attorney must be present.

No bailiff or sheriff's officer shall presume to exact or take from any person, being in his custody, any warrant to acknowledge a judgment but in the presence of an attorney for the defendant, which attorney shall then subscribe his name thereunto, which said warrant shall be produced when the said judgment shall be acknowledged;

due execution thereof. R. Eaſt. 15 Car. 2.

The court, by degrees, relaxed in their obſervance of this rule, and even held that if plaintiff's attorney was preſent it was ſufficient. Andrews v. Richards, 1 *Barn.* 242.

Whereupon the following rule was made:

That no warrant of attorney executed by any perſon in cuſtody of any ſheriff or other officer, for the confeſſing of judgment, ſhall be valid or of any force, unleſs there be preſent ſome attorney on the behalf of ſuch perſon in cuſtody, to be expreſsly named by him, and attending at his requeſt, to inform him of the nature and effect of ſuch warrant of attorney before the ſame is executed, which attorney ſhall ſubſcribe his name as a witneſs to the due execution thereof. 2 R. B. 4 Geo. 2.

and no attorney ſhall enter or acknowledge, or cauſe to be entered or acknowledged, any judgment by colour of any warrant gotten from any defendant being under arreſt, otherwiſe than as aforeſaid. R. 15 Geo. 2.

Every warrant of attorney for confeſſing a judgment in this court ſhall be read over by the perſon who is to execute the ſame, or by ſome other perſon to him, before the execution thereof; and if judgment ſhall be entered up upon any ſuch warrant of attorney which ſhall not be ſo read over as aforeſaid, ſuch judgment, upon motion, may be ſet aſide as irregular. R. 15 Geo. 2.

N. B. This laſt rule is now declared not to be in force. Buller J *ſaid it was abſurd, nor did prothonotary know of its ever having been acted upon.* Taylor v. Parkinſon, 2 *H. Blac.* 383.

Explanation of the above rules of court.

The above rules being intended for the protection of priſoners, and to prevent impoſitions upon them, have received a liberal conſtruction; and the courts entertain the ſame juriſdiction of the matter before as after the judgment entered upon any warrant of attorney ſo obtained, and will order ſuch warrant of attorney, and all collateral ſecurities, to be delivered up and cancelled. *Duncan* v. *Thomas*, Doug. 196.

Extend only to thoſe in cuſtody on meſne proceſs;

Theſe rules only extend to perſons in cuſtody upon *meſne* proceſs, and not to thoſe in cuſtody upon an *execution*. The reaſon is, becauſe, in the former caſe, the debt is not liquidated, and therefore, under dureſs, he may be prevailed upon to confeſs more than is really due; but in the latter, it is liquidated. *Fell* v. *Riley*, Cow. 281. *Watkins* v. *Hanbury*, Str. 1245. *Crompton* v. *Steward*, 7 D. & E. 19.

and civil proceſs;

Nor to perſons in cuſtody under criminal proceſs. *Charlton* v. *Fletcher*, 4 D. & E. 433.

and to warrants given to plaintiff himſelf;

Nor to warrants of attorney given to a third perſon, not the party, at whoſe ſuit he is in cuſtody. *Finn* v. *Hutchinſon*, Ld. Ray. 797. *Gillman* v. *Hill*, Cow. 142. *Churchy* v. *Roſſe*, 5 Mod. 144.

and in the ſame cauſe.

Nor to warrants to confeſs judgment in any other action, except in the particular cauſe whereupon he is in cuſtody. *Holcombe* v. *Wade*, Burr. 1793.

But

But these rules are not without exception; for if it could be shewn that a party, even in execution, had been prevailed upon to acknowledge a judgment for more money than was really due, the court would give relief, because cases of fraud and imposition are exceptions to all rules whatever. *Fell* v. *Riley*, Cow. 281. Some exceptions to the rules in case of persons in custody in execution.

And in general it is the safest way, and has the fairest appearance, to have defendant's attorney present when a warrant of attorney is taken from a prisoner, though in execution. *Parkinson* v. *Caines*, 3 D. & E. 618.

A defendant lodging within the rules of the Fleet, at the house of the plaintiff, who was the officer that had arrested him, and who afterwards became security to the warden, was deemed a prisoner within the meaning of the above rules of court, because the plaintiff could at any time deliver him into custody. *Warhaker* v. *Gascoigne*, Blac. 1297. What is deemed being in custody

As to the attorney required by the rules, it must be a regular admitted attorney, not a clerk. Bar. 42. *Barnes* v. *Ward*. What attorney must be present.

And he must attend as attorney for the defendant. *Ruffle* v. *Hitchcock*, Blac. 1097. And this, at defendant's desire, as being named by him for the purpose, agreeable to the above rule, 4 G. 2.; for the presence of the plaintiff's attorney is not sufficient, though the defendant consent to his acting as his attorney; also *Hutson* v. *Hutson*, 7 D. & E. 7.; but this seems a little relaxed in what fell from the court in *Crompton* v. *Steward*, 7 D. & E. 20. nor need it be an attorney of the same court in which the judgment is to be entered up. *Bland* v. *Packenham*, Str. 530. *Vilmot* v. *Barry*, Bar. 44.

But if defendant himself be an attorney, no other need attend. *Walton* v. *Stanton*, Bar. 37.

The above rule of court must be adhered to, though the warrant of attorney to confess judgment here be given in Ireland. Str. 1247. *Fitzgerald* v. *Plunkett*. Rule extends to warrants given in Ireland.

But even as to this part of the rule there may be exceptions; for the courts will not suffer their rules to be made instruments of fraud. Exceptions as to this part of rule.

If, therefore, such warrant be executed by defendant, (no attorney being present,) purposely with a view to cheat plaintiff, court will not relieve. *Gilman* v. *Hill*, Cow. 141. In cases of fraud.

The next thing to be considered is, the consideration of such warrant of attorney. The consideration of the warrant.

If given upon an usurious contract or consideration, court will, on motion, direct an issue to try the usury, and enlarge the rule to set aside the judgment in the mean time; and if the fact be so found, warrant of attorney will be vacated. *Cook* v. *Jones*, Cow. 727. *Machin* v. *Delaval*, Bar. 52. Usurious consideration bad.

The

Or if obtained by fraud.

The warrant need not be read over to the party executing it in either court, *Taylor* v. *Parkinſon*, 2 H. Bl. 383. But if ſuch warrant be obtained by fraud, court will order it to be delivered up, even before judgment entered thereon. *Duncan* v. *Thomas*, Doug. 196.

How ſuch facts ſhall be tried.

If the validity of the warrant of attorney be conteſted on the ground of forgery or the like, court will order an iſſue to try whether it were duly executed or not. Bar. 239. *Gibſon* v. Biſhop of *Bath* and *Wells*.

(B)

(B) Of the Operation and Extent of the Warrant of Attorney, and of the Revocation and Countermand thereof.

Judgment muſt be agreeable to the power.

A judgment entered under a power of attorney, muſt be warranted by that power, and conſequently a general power only warrants a general judgment and execution, not a ſpecial one. *Buxton* v. *Barden*, 1 D. & E. 80.

Caſe of debtor being diſcharged under inſolvent act.

Thus, where a defendant gave a warrant of attorney, and before judgment entered thereon, was diſcharged under the inſolvent act, whereby his perſon cannot be taken in execution, but the execution is ſpecial againſt certain goods only, plaintiff cannot afterwards enter up judgment and ſue out ſuch ſpecial execution. Ib.

His only way ſeems to be, to move the court to plead the act for the defendant, and thus the ſpecial exemption is put upon the record, and the ſpecial execution may follow. Ib.

Caſe of bankruptcy.

A bond and warrant of attorney to confeſs judgment given by a bankrupt after his bankruptcy, (who was in execution for a debt due before,) is not barred by his certificate. *Birch* v. *Sharland*, 1 D. & E. 715.

If warrant ſpecifies particular term to enter judgment.

If the warrant be to confeſs judgment of a certain term, judgment can be entered only of that term. 1 Mod. 1. But if general, it may be entered within the time mentioned, *poſt* C.

If an executor gives a warrant.

If an executor confeſſes judgment, or ſuffers judgment by default, he admits aſſets, and is eſtopped to ſay the contrary in an action on ſuch judgment, ſuggeſting a *devaſtavit*. *Skelton* v. *Hawling*, 1 Wil. 258.

A warrant of one executor is not ſufficient to enter up judgment againſt the other, becauſe it would be eſtopping the other from ſaying he is not executor; and being without his knowledge, it might ſubject him to a *devaſtavit* for the paying of other debts. Str. 20.

Such ſecurity is a ceſſet executio for a time.

If a bond and warrant of attorney be given, and condition of bond is not to pay the money till a certain day, it ſhall operate

operate as a *ceſſet executio* until that time; and if judgment be entered up, and execution iſſue before, court will ſet execution aſide, but ſuffer the judgment to ſtand. Anon. Caſ. temp. Hard. 270.

How court will interfere if not abided by.

So, though a general warrant be given, if afterwards, on a diſtinct paper not under ſeal, plaintiff engages not to enter up judgment, or take out execution till a certain day, if he breaks his agreement, court will interfere on motion. *Hatton* v. *Young*, Blac. 943.

Of the revocation of the warrant.

A man, after he has given a warrant to enter a judgment, cannot revoke it by the courſe of the court; and though he endeavour to revoke it, yet the court of K. B. will give leave to plaintiff to enter the judgment. Ld. Ray. 850.

By death of defendant.

But the death of the defendant who gave the warrant is of itſelf a countermand, 1 Vent 310.; although this is under certain reſtrictions; for if he dies before a year and a day has elapſed from the time of ſigning the warrant, the judgment may ſtill be entered either of the term in which he died, or of the preceding term if he died in vacation. *Chancy* v. *Needham*, Str. 1081. *Savill* v. *Willſhire*, Bar. 270. *Oades* v. *Woodward*, Salk. 87.

And though he be dead ſince, yet if court have granted leave to enter up judgment, they will not afterwards recall it. Ib.

So, the death of the plaintiff, for whoſe benefit and at whoſe ſuit the judgment was to be confeſſed, puts an end to the power, and judgment cannot afterwards be entered, unleſs the warrant mentions to enter judgment at the ſuit of him, his heirs, executors, or adminiſtrators, in which caſe executors, by leave of court, may enter judgment. *Wild* v. *Sands*, Str. 718. *Coles* v. *Haden*, Bar. 44.

By marriage of the perſon giving the power.

So, if a warrant of attorney be given by a feme ſole, and ſhe afterwards marry before judgment entered, it is a countermand, and judgment ſhall not be entered againſt the huſband and wife, for that would charge the huſband, *Anon.* Salk. 117.; though it ſeems as reaſonable that he ſhould be charged in this caſe as for a bond or other debt, which he is liable for during the coverture, though not after. Ib.

And in Show. 89. it is ſaid, that a bill may be filed and judgment entered againſt both.

Of the perſon to whom it is given.

But if the warrant be given to a feme ſole, marriage is no countermand, becauſe it is for the huſband's advantage, Salk. 117.; and judgment may be entered up in the name of the huſband and wife, 7 Mod. 53. *Marder* v. *Lee*, Burr. 1469.; in which latter caſe judgment was held irregular for want of an application to the court for leave to enter it up, founded upon a proper affidavit of the marriage.

What application to the court neceſſary.

(C) Of

(C) (C) Of entering up the Judgment on Warrant of Attorney.

The warrant operates according as it is ſpecial or general, as obſerved *ante* (B), but if it be in the uſual form to enter up judgment of ſuch a term, or any ſubſequent term, it then falls within the rules hereafter mentioned.

When judgment may be entered without leave, when with leave of the court.

Judgment on ſuch warrant of attorney muſt be entered within the year and day, after which it cannot be done without the leave of the court, 6 Mod. 212. *Luſhington* v. *Waller*, 1 H. Blac. 94.; for the plaintiff cannot of his own accord enter it *as* of a term when the party was alive.

Of moving the court, and of the affidavit when the party was living.

Nor will the court grant ſuch leave without an affidavit that the debt is unpaid, and the defendant is living; but if it ſtates that he was alive within the term in which the application is made, it is ſufficient, but not at a more diſtant period.

Where the plaintiff was a lunatic, court held affidavit good as to debt being unpaid, ſworn by the perſon who for the laſt three years had received the intereſt on the bond, *Coppendall* v. *Sunderland*, Bar. 42.

The reaſon ſeems to be this; death, generally ſpeaking, is a revocation of the power; judgment ought therefore to be entered up during the life of the defendant.

Why ſuch application to the court neceſſary.

This judgment may be entered up without leave any time within the year; if, therefore, the party dies within the year, judgment will appear to be entered in his lifetime; for if he dies in term, it will relate to the firſt day of term, and if in vacation, it may be entered as of the preceding term; but after the expiration of the year, judgment muſt be entered as of that term in which he has leave: it is neceſſary, therefore, that it ſhould appear to the court granting ſuch leave, that the defendant be alive; but if alive within the term it is ſufficient, becauſe judgment entered of that term will bear relation to the firſt day of the term, and though in fact entered after the party's death it will be conſiſtent. *Fuller* v. *Joſlyn*, 1 Bar. 357.

Of the relation of the judgment to the firſt day of the term.

Purchaſers not hurt thereby ſince the ſtatute of frauds.

Nor can any detriment accrue to purchaſers from this practice, ſince by the ſtatute of frauds judgments with reſpect to them refer not to the firſt day of the term, but to the time of the actual ſigning, which is marked on the roll. *Gady* v. *Woodward*, 7 Mod. 93.

But although a judgment on a warrant of attorney entered in a vacation againſt a defendant who died in the preceding term is good becauſe the judgment will relate back to the firſt day of ſuch term, yet execution cannot be ſued out upon it,

it, until it be revived againſt his repreſentatives by *ſcire facias*. 6 D. & E. 368. *Heapy* v. *Parris*.

And the relation of the judgment to the firſt day of term is ſo material, that if on that day the party who entered up judgment appears not to have had authority ſo to do, though in fact at the time he ſigned and entered up judgment he had authority, it will be bad. *Gainſborough*, executor, v. *Follyard*, Str. 1128. So the authority relates to the firſt day of term.

It frequently happens that bonds and warrants of attornies, given in vacation, become payable, and are entered up before the following term; in which caſes, as the judgment will have relation back to a day anterior to the date of the bond whereon the plaintiff muſt declare in his entry, if he ſtate it to have been made upon the day it bears date, the judgment will be erroneous; in ſuch caſe, therefore, the entry ought to ſtate the bond to have been made ſome day precedent to the firſt day of the term whereof the judgment is entered. 7 Mod. 38. Notes to Rules and Orders, 102.

Where teſtator died on ſame day judgment was ſigned, but before it was ſigned, held good, on authority of *Shelly*'s caſe and *Woodward*'s caſe, 7 Mod. 203. *Fuller* v. *Johnſon*, Caſ. tem. Hard. 158. How if teſtator died ſame day judgment ſigned.

When judgment has not been entered within a year and a day, on a warrant of attorney given with a *poſt obit* bond, and the obligee does not apply for leave to enter it, till after the death of the perſon on whoſe death it is payable, court will not grant leave without a rule to ſhew cauſe. *Luſhington* v. *Waller*, 1 H. Blac. 94. Of warrant on poſt obit bond.

On a warrant of attorney to confeſs judgment to two, it may be entered on motion for the ſurvivor. 2 Blac. 1301. *Futcher* v. *Smith*. *Todd* v. *Dodd*, 1 Wil. 312. *Still* v. *Still*, Bar. 40. cont. *Laycock* v. *Garforth*, Bar. 45. Of warrant given to two, and judgment by ſurvivor.

The courts are very cautious in granting leave to enter judgments *nunc pro tunc*, and refuſed it where the warrant was above 20 years old, upon the ground of preſumption that the debt was ſatisfied. *Flower* v. *Ld. Bolingbroke*, Str. 639.

The defendant's name in a judgment on a warrant of attorney not amendable, though both the warrant of attorney and the bill upon the file were otherwiſe. *Sale* v. *Crompton*, 1 Wil. 61. Judgment on warrants not amendable.

How to enter up the Judgment.

Judgment on a warrant of attorney is final. It is ſigned, therefore, on a double half-crown ſtamp. Common bail muſt be firſt filed, and a memorandum of warrant to enter ſuch judgment, as directed by ſtat. 25 Geo. 3. c. 80. ſec. 19. which

which may be had at the ſtationers; the warrants of attorney, and memorandum of the term judgment is ſigned, muſt be entered on roll in the uſual way.

But it is firſt neceſſary to prepare an affidavit by the plaintiff and the ſubſcribing witneſs to the warrant of attorney, that it was given for a juſt debt, that the debt is ſtill unpaid, and that ſubſcribing witneſs ſaw defendant duly ſign and execute the warrant.

Nor will the affidavit of the ſubſcribing witneſs be diſpenſed with by the court, unleſs under very ſpecial circumſtances indeed.

If judgment to be entered up in term, it is a motion of courſe ſigned by counſel; if in vacation, judge, on affidavit being brought to him, will make an order.

This is upon the ſuppoſition that the judgment be entered within a year and a day; if not, leave of the court muſt be firſt obtained as before-mentioned, and if the judgment be of above 20 years ſtanding, it is only a rule to ſhew cauſe.

Section VII.

Of Trial by Record.

Another peculiar mode of proceeding, of which we were to treat in this Chapter, is where ſome matter of record, as a fine, judgment, act of parliament, or the like, is pleaded by the one ſide, the exiſtence of which is denied by the other: iſſue is then joined upon the plea or replication, as it may happen, of *nul tiel record*, which is tried not by any witneſſes or jury, but merely by the record itſelf.

Various matters of record pleadable.

Various are the matters of record that are pleadable and to be thus tried by the record; as titles of nobility, whether earl or no earl, baron or no baron, ſhall be tried by the king's writ or patent only, which is matter of record. 6 Rep. 53. So in the caſe of an alien, whether alien friend or enemy, ſhall be tried by the league or treaty between his ſovereign and ours, for every league or treaty is of record. 9 Rep. 31. Alſo whether a manor be held in ancient demeſne or not, ſhall be tried by the record of Doomſday in the king's Exchequer. Thus alſo upon the plea of a former judgment recovered by the plaintiff againſt the defendant for the ſame cauſe of action, or of another action depending for the ſame cauſe, or of outlawry, or of *comperuit ad diem* to a bail-bond, or of any act of parliament, or, in ſhort, of any other matter of record, the general replication is *nul tiel record*, upon which the parties join iſſue, and the truth

or falſehood of ſuch iſſue is determined by the party producing or failing to produce the record in queſtion on a day given him for that purpoſe.

To a miſrecital of an act, nul tiel record proper.

If a private act of parliament be miſrecited, the adverſe party cannot demur, but muſt plead *nul tiel record*. 3 Salk. 296.

The record may be of the ſame or different court.

The record to be produced may be a record of the ſame court, or of a different court to that in which the trial is to be had.

Form of replication in both caſes.

If it be of the *ſame* court, the replication of *nul tiel record* ſhould conclude with giving a day for defendant to bring it in, becauſe the iſſue is always in ſuch caſe complete without a rejoinder; but if it be of *another* court, the replication may either conclude in the ſame way, and ſo render the iſſue complete, or with an averment, and prayer of debt or damages, which will compel the defendant to rejoin, "that there is ſuch a record," for where the record is of another court, the replication is good either way. *Sandford* v. *Rogers*, 2 Wil. 13. *Newberry* v. *Strudwick*, Bar. 335.

What day ſhould be given.

If the proceedings be by original, a general return day ſhould be given to bring in the record. If by bill, a day certain.

Plea need not be ſigned.

The plea of *nul tiel record* need not be ſigned. *Herbert* v. *Ld. Weymouth*, Blac. 816.

How defendant called to produce the record, and the conſequence of failing therein.

Where the proceeding is by original, and a general return day is given to bring in the record, the defendant ought to be called to bring in the record at the riſing of the court that day, and if he fail, the rule for judgment ſhould be "unleſs cauſe on the appearance day of that general return," and the record may be brought in on that or any intervening day; but where the proceeding is by bill, and the day given to bring in the record is a day certain, the record cannot be brought in after that day; but on that day, at the riſing of the court, defendant ought to be called to bring in the record; and if he fail, the court will appoint the day to be inſerted in the rule for judgment *niſi cauſa*. *Hopkins* v. *Knapp*, Bar. 264. *Calverac* v. *Pinkero*, Bar. 84. 343.

How, if judgment be final or interlocutory.

If the judgment upon the iſſue of *nul tiel record* be final, the rule, on failure of producing the record, ſhould be for judgment, *unleſs cauſe within four days*, that defendant may have the uſual time to move in arreſt of judgment; but where the judgment is interlocutory, it may be a *ſhorter* time, becauſe the reaſon fails, as defendant may move in arreſt of judgment after execution of inquiry, the rule for judgment, in ſuch caſe, not being given till the return of inquiry. *Hopkins* v. *Knapp*, Bar. 264.

But

If record of same court, it must be produced on oyer or demand.

But in case the judgment or record pleaded be of the *same* court, there is a much more summary way of proceeding; for upon demand made, the party so pleading the same, must give the attorney for the adverse party a note in writing of the term and number-roll whereon such judgment or matter of record is entered and filed; and in default thereof, such plea is not to be received. Imp. C. B. 345. Carth. 453. Tidd. K. B. 481.

And this whether the plea be in abatement or bar. Ib.

Judgment when peremptory or not.

If the matter of record pleaded be only pleaded in abatement, the judgment, on failure of producing the record, is not peremptory, but *respondeas ouster*. Ld. Ray. 550.

When final or interlocutory.

But if it be pleaded in bar, it is then judgment absolutely, Cro. Car. 566.; and it is either final or interlocutory, according to the nature of the action.

Nul tiel record bad, if profert made thereof in pleading.

Where a record itself is shewn to the court in pleading, the defendant cannot say *nul tiel record*; for by the *profert in curiâ*, it appears to the court that there is such a record. Co. Lit. 260. Hard. 158.

So if matter of record be mixed with matter of fact.

If the matter of record be mixed with matter of fact, and the matter of fact is put in issue as well as the matter of record, the issue should conclude to the country, and the trial be by a jury; if only the matter of record be in issue, the conclusion should be to the record. *Esplin* v. *Smallett*, Say. 208. *Whitmore* v. *Rooke*, Ib. 299.

If record produced, how it operates as an estoppel.

If upon an issue of *nul tiel record* of a judgment the record is produced, the party, and all that claim under him, are estopped to say there is no such judgment; for it is entered upon the roll, *quod habetur tale recordum*; and the party cannot say that this was not the judgment against him, but that it was another judgment. Ld. Ray. 1050. *Treviban* v. *Lawrence*.

If the record be of another court, it must be produced by certiorari and mittimus.

When the record pleaded is a record of another court, the only way of producing it is by suing out a *certiorari* from the court of chancery, for such court where the record is, to certify the record; and upon the return of *certiorari*, but not till then, the record will be sent by *mittimus* to the court where it is to be produced.

Thus, if in the Common Pleas, a record of the King's Bench be pleaded, although, in general, it is said the records of the King's Bench shall not be moved into any other court, by this means they may be removed. Cro. Car. 297. *Luttrell* v. *Lea*, 2 Saund. 344.

It may be supposed, that although this formal way of proceeding might be necessary, where an inferior court requires a record to be produced from a superior court; yet

that a more ſummary way might be adopted by a ſuperior court, who has juriſdiction over an inferior, to get a record required from the latter.

But where an attempt of that kind was made by motion in the King's Bench, for an order upon the proper officer of the court of Common Pleas to attend there with the record of that court, that it might be inſpected, upon the ground of ſaving time and expence, and of the general juriſdiction of the King's Bench over inferior courts; Lord Mansfield and the other judges refuſed; ſaying it would be wrong to go out of the eſtabliſhed rules and methods of proceeding. *Hewſon* v. *Brown*, Bur. 1034.

Court of K. B. will not interfere in a ſummary way.

If the record be in a county palatine, there ſhall be a writ to the chamberlain to certify. Clift. 148. If in an inferior court, to the proper officer; and if he refuſes, there ſhall be a rule to do it upon pain; and then if he does not certify, an attachment ſhall go. Palm. 562.

So if record be of co. pal.; or of inferior court; attachment if officers refuſe to certify.

In theſe caſes, if the inferior court certify the tenor of the record, it is ſufficient. 3 Salk. 296.

To certify tenor of record ſufficient.

How to proceed when the other ſide is to produce Record.

K. B.

When the parties join in iſſue upon nul tiel record, *the paper-book having been made up by clerk of papers and returned by the other ſide, get the maſter to mark on paper-book, "a rule to produce the record;" it is a four-day rule, and is to be entered with clerk of rules; ſerve copy on the attorney of the other ſide; get a roll; enter all the proceedings regularly thereon; docket it, and carry it to Treaſury Chamber to be filed; attend at Weſtminſter on the day given by the rule for record to be produced; beſpeak the roll at the Treaſury to be brought into court; give paper-book to one of the criers, who will call defendant to produce the record, or he will be condemned. If he does not produce it, ſecondary will mark on roll that he hath not produced the record; this is ſigning the judgment.*

If the judgment be interlocutory, give notice of inquiry, and proceed to execution.

C. B.

In this court the iſſue of nul tiel record, *as all others, is made up by the attorney himſelf.*

Enter the whole iſſue on the roll, and file warrants of attorney; take roll to prothonotary and docket it; leave it with clerk of dockets, who will carry it to Weſtminſter on the day mentioned in plea for record to be produced; party will be called by him to produce ſame; if he fails, draw up at night rule with ſecretary.

If the judgment be final, *ſuch rule is a four-day rule, at the expiration of which ſecondary certifies on the rule that no cauſe has been ſhewn; which certificate muſt be produced to the prothonotary when judgment is ſigned, which is to be on a double half-crown; tax coſts and ſue out execution; but if the judgment be interlocutory, enter* incipitur *of declaration, &c. on treble penny; carry it to prothonotary, who will ſign interlocutory judgment; then proceed to execute inquiry.*

If final, a four-day rule for judgment must be given; sign judgment on a double half-crown stamp paper; get costs taxed, and proceed to execution.

inquiry, provided notice has been already given; if not, give notice, though notice of inquiry may be given on delivery of issue, thus: "in case judgment be given for plaintiff, a writ of inquiry will be executed on such a day." *Long* v. *Lingwood, P. R.* 443.

Upon completing the issue you may give the day yourself for producing the record in the replication, provided it be four days after delivery of issue.

If the action be by original, it should be on a general return; if by bill, on a day certain. Imp. C. B. 342.

How when the Record is to be produced by yourself.

If, having declared upon a judgment, you intend to produce it on the issue of *nul tiel record*, get the roll of such judgment ready filed in the treasury; and having entered all proceedings, and docketed your roll as above, get one of the criers to bring the record of such judgment into court; which being read and compared with the issue by secondary, you may, in the evening, get a four-day rule for judgment, and proceed as above; so if it be a record produced by defendant, judgment will be entered that he has *perfected* the record.

CHAPTER IX.

Of the Proceedings from Iſſue to Trial.

SEC. I. *Of the Iſſue and Paper-Book, and of entering the Iſſue.*
SEC. II. *Of Notice of Trial and countermanding ſame, and of Coſts for not proceeding to Trial.*
SEC. III. *Of carrying down Record by Proviſo.*
SEC. IV. *Of putting off the Trial.*
SEC. V. *Of making up the Record, ſuing out Jury Proceſs, entering Cauſe for Trial, and of Remanents.*
SEC. VI. *Of Special Juries.*
SEC. VII. *Of granting a View.*
SEC. VIII. *Of examining Witneſſes on Interrogatories.*
SEC. IX. *Of the Proceſs to compel Witneſſes to appear at the Trial.*

SECTION I.

Of the Iſſue and Paper-Book.

(A) Of the Time, Manner, and Form of making up Iſſue and Paper-Books.
(B) Of ſtriking out the Pleadings, and demurring or pleading general Iſſue.
(C) Of delivering and returning Iſſue and Paper-Book.
(D) Of Variance between the Iſſue and Pleadings, and amending the ſame.
(E) Of Continuances on the Iſſue-Roll.
(F) Of entering the Iſſue.

(A) (A) Of the Time, Manner, and Form of making up Iſſue and Paper-Books.

WHENEVER the pleadings are come to that point, that neither ſide can allege any new matter, there being a direct affirmation of any fact or facts by the one party, and a denial thereof by the other, they are then ſaid to be at iſſue; and the next ſtep to be taken is to make up the iſſue, or, as it is ſometimes called, the paper-book, (which is nothing more than a copy of all the pleadings that had before paſſed between the parties,) to enter it and proceed to trial.

But this cannot be done until the pleadings are at the ſtage above-mentioned; but the defendant muſt be called upon by rules of court to rejoin, or the like, until the parties are at iſſue.

But where the plaintiff's replication concludes to the country, and it is manifeſt that defendant can only join iſſue, plaintiff need not deliver it for that purpoſe, but may himſelf add the *ſimiliter*, as it is called, and make up the iſſue, without any rule to rejoin. *Boone* v. *Eyre*, 1 H. Bl. 254.

Difference between iſſue and paper-book.

In the Common Pleas, it is always called the *iſſue*, and is made up by plaintiff's attorney. So it is in the King's Bench, when the proceedings are by original, or if by bill, when there are no ſpecial pleadings; but when the proceedings are by bill in the King's Bench, and there are ſpecial pleadings, they are then engroſſed and copied by the clerk of the papers, and it is thence called the *paper-book*.

When iſſues made up by attornies in B. R.

The caſes in which the attornies themſelves make up the iſſue in the court of King's Bench, if the proceedings are by bill, are, whenever the general iſſue is pleaded to the declaration, or ſome plea tantamount thereto, as not guilty to a new aſſignment of treſpaſs—*liberum tenementum*—*comperuit ad diem*—*nul tiel record*—and in covenant, whenever defendant pleads to the country. In every ſpecial *non eſt factum*, every *de injuriâ ſuâ propriâ to ſons aſſault demeſne*, and when there is a general demurrer to a declaration. Alſo in all repleaders, and in all iſſues and demurrers upon writs of error, *ſcire facias*, and *audita querela*. The above pleadings not being deemed *ſpecial*.

Book ſide of the office, why ſo called.

Theſe pleas were formerly entered in a *book*, kept for that purpoſe at the King's Bench office; and therefore it is ſaid, that in B. R. the attornies themſelves may always make up the iſſues, where the iſſue is to be given on the *book* ſide of the office. But now they are to be *delivered* to the oppoſite

attorney, no such book being kept, but only the general issue book, which is merely confined to general issues, strictly so called.

In all other cases in K. B. clerk of papers makes up the issue, then called, as above-mentioned, the *paper-book*.

The form of the issue in B. R. and C. B. somewhat varies, which is owing to the nature of the original jurisdiction of these two courts. The latter was established, and from its foundation intended as the court in which civil suits were to be prosecuted; but the original jurisdiction of the former was merely for criminal offences; and although by degrees it got cognizance of civil actions, yet they were deemed merely the bye-business of the court. They were entered, therefore, with a memorandum; and it is for this reason that memorandums are now used in the making up of the issues in B. R. but are never, except in particular cases, used in C. B. I say, except in particular cases, because, in all matters which are deemed the bye-business of that court, memorandums are, upon the same principle, made use of; such as proceedings by bill against their own officers, attornies, and the like.

Form of issue in B. R. and C. B.

Why different as to the memorandums.

In a word, in both courts, whenever the proceedings are by *bill*, memorandums are inserted, when by original they are omitted.

Without making any distinction, therefore, between the two courts, we need only shew in what manner to make up the issue, when the proceedings are by bill, and when by original.

The chief distinction is, when proceedings by bill, and when by original.

When the proceedings are by bill,

Intitle the issue of the term in which issue is joined, let the declaration and plea be of what term they may; as,

Michaelmas term in the 34th year of King George the Third (supposing the parties came to issue that term).

How to make up issue when proceedings are by bill.

Then make a memorandum of the term in which plaintiff first declared, which memorandum, as issue is often joined long after the declaration, varies in four cases:

In what cases the memorandum varies.

1st, When the issue is joined in the same term with the declaration.

2d, When the cause of action arises within the term in which plaintiff declares; and then the declaration must be of a particular day in that term, and the memorandum also.

3d, When the declaration is of a precedent term to the issue, being joined, but not above four terms.

4th, When the declaration is above four terms before the issue is made up.

1ſt, How when iſſue joined of the ſame term.

When iſſue is joined of the ſame term in which declaration was, it is made up as follows:

Michaelmas term in the 34th year of King George the Third (being the term iſſue was joined). *Mansfield and Way**.

Memorandum.

Middleſex, to wit; *Be it remembered, that on Saturday next after the morrow of All Souls*, (the firſt particular return of the term,) *in this ſame term*, before our lord the king at Weſtminſter comes A. B. by Thomas Smith his attorney, and brings into the court of our ſaid lord the king, before the king himſelf now here, his bill againſt C. D., being in the cuſtody of the marſhal of the marſhalſea of our ſaid lord the king, before the king himſelf, of a plea of *treſpaſs on the caſe* (or whatever the action is); *and there are pledges for the proſecution thereof, to wit, John Doe and Richard Roe*;

Declaration.

which ſaid bill follows in theſe words, to wit; *Middleſex, to wit, A. B. complains againſt C. D. being*, &c. (reciting the whole declaration, omitting the pledges at the end thereof; and then in a new line begin the plea, it being of the ſame term with the declaration).

Plea.

And the ſaid C. D. by E. F. his attorney, comes and defends the wrong and injury when, &c. (reciting verbatim the whole pleadings till iſſue joined, and then award the *venire* thus): *Therefore* (if there be more than one iſſue on defendant's plea; ſay, therefore, as well to try this iſſue as the ſaid other iſſue or iſſues above joined, let) *let a jury come before our lord the king at Weſtminſter, on —— next after fifteen days of Saint Martin*; (the laſt day of term, if the cauſe is tried the ſittings after; if in term, the firſt day of term; if in the country, the laſt day of the term;) *and who neither*, &c. *to recognize*, &c. *becauſe as well*, &c. *the ſame day is given to the ſaid parties there.*

Award of venire.

Theſe &c.'s are contractions of the writ of *venire*, the form of which, *vide* poſt under the title "Of making up the Record for Trial."

2d, How iſſue made up, if cauſe of action aroſe within the term in which iſſue is joined.

If the cauſe of action ariſes within the term in which plaintiff declares, and iſſue is joined in the ſame term, the memorandum muſt be of a particular day in term, ſo muſt the declaration alſo be intitled; and then the iſſue is made up thus:

On Friday after the morrow of St. Martin in the 34th year, &c.

Memorandum.

Eſſex, to wit; *Be it remembered, that on Saturday next after the morrow of St. Martin* (ſome day certain in term after the commencement of the action) *in the ſame term, before our lord the king at Weſtminſter, comes*, &c. (exactly as before).

3d, How, if declaration be of precedent term to that in which iſſue is joined.

If the declaration is of a precedent term to the iſſue joined, then it is made up thus:

Hilary term (the term iſſue is joined) *in the 34th year of the reign of King George the Third.*

* In B. R. being the chief clerk's name; but if in C. B. put the prothonotary's name.

Suſſex,

Suſſex, to wit; *Be it remembered, that in Michaelmas term laſt paſt,* (the term declaration is of,) *before our lord the king at Weſtminſter came A. B. by Thomas Smith his attorney, and brought into the court of our ſaid lord the king, before the king himſelf then there, his bill againſt C. D.*, &c. (as before). Memorandum.

And after the declaration, begin a new line with the imparlance, thus:

And now at this day, to wit, on Monday next after the octave of Saint Hilary (the firſt day of the term iſſue is joined, make the imparlance to the term in which iſſue was joined, let it be when it may, provided it be a different one from that wherein plaintiff declared, otherwiſe there is no need of any imparlance) *in this ſame term, to which day the ſaid C. had leave to imparle to the ſaid bill, and then to anſwer the ſame before our lord the king at Weſtminſter, comes as well the ſaid A. by his attorney aforeſaid, as the ſaid C. by Thomas Smith his attorney; and the ſaid C. defends the wrong and injury, when*, &c. (inſerting all the pleadings, and awarding *venire* as before). Imparlance.

And if the declaration is of above four terms before the iſſue is joined, then the iſſue is made up thus: 4th, How iſſue made up if declaration be above four terms before iſſue joined.

London, to wit; *Be it remembered, that heretofore, that is to ſay, in Trinity term in the 34th year of the reign of our ſovereign lord the now king, before the king himſelf at Weſtminſter came A. B.*, &c. (as above, making the imparlance to the term the iſſue is joined). Memorandum.

The above is the mode of making up the iſſue in both courts when the proceedings are by *bill*, but when the proceedings are by *original*, which they are in all common caſes in C. B., and are often by ſpecial original in B. R., the iſſue is made up exactly in the ſame form in both courts, without any memorandum, in the following manner: How to make up iſſue when proceeding by original in B. R. or C. B.

Manſfield & Way (the chief clerk's name, if in B. R.; if in C. B., the prothonotary).

Hilary term (the term in which the iſſue is joined, though the plea be delivered many terms back, make up iſſue of the ſame term in which it is joined) *in the 34th year of the reign of King George the Third.*

Middleſex, } *C. D. late of Weſtminſter in the county of Middleſex,*
to wit; } *gentleman,* (according as he is named,) *was attached* (or ſummoned, as the caſe is; and ſo on with the declaration to the end thereof).

And then begin a new line, and enter the pleadings (if there are ſpecial pleadings they ſhould be entered in order, as named in the margin of the iſſue, plea, replication, rejoinder, &c.) and the award of the *venire*, (which is always the general return-day before the trial, if for the ſittings

after term; if in term, then the first general return of the term,) observing the entry, if the issue is to be tried in the county palatine, or in case of a Welsh issue, to be tried in the adjacent English county.

Summary of what necessary to be stated.

Such are the forms of the issue in *ordinary* cases, whether the proceedings be by bill or original, from whence it appears, that all which is necessary to be stated is, 1st, The title of the term when issue was joined. 2d, A memorandum (if by bill, but if by original, it is omitted) of the term declaration was of. 3d, The declaration itself. 4th, An imparlance, provided the plea was not of the same term with the declaration, in order to avoid a discontinuance of proceedings, which imparlance is to be until the term issue is joined. 5th, The plea and replication until the issue. And 6th, the award of the *venire*.

How to make up issue in particular cases.

But in *particular* cases the issue must be made up according to the fact; as when there are two or more issues, or where one defendant lets judgment go by default, and the other pleads, or where the issue is into a county palatine, or it is a Welsh issue, or where the sheriffs are interested, and the *venire* is awarded to coroners and the like; in all which cases there are special suggestions on the issue, and particular awards of the *venire*, as may be seen by the following forms:

Forms of awards of venire.

Form of the awarding of the *Venire*.

Where two or more issues.

Where there are two or more issues joined, then after the words, "and the said plaintiff doth the like," add these: "Therefore as well to try this issue as the said other issue "above joined, the sheriff is commanded that he cause to "come here, in fifteen days of Saint Martin, twelve, &c. "by whom, &c. and who neither, &c. to recognize, &c. "because as well," &c.

If defendants plead separately.

How to make up an Issue where the Defendants plead severally.

In this case, you add to each copy of the issue the two pleas, and join the *similiter* to each, and then say: "Therefore as well to try the issue above joined against the said "John Doe, as the said other issue above joined against the "said Richard Roe, the sheriff is commanded that he cause "to come here, in," &c. (as above).

If one lets judgment go by default.

Go to the end of the plea pleaded by the defendant, and add the *similiter* thereto; then say, "And the said Richard, "in his own person, comes and defends the wrong "and injury, when, &c. and says nothing in bar or pre-

"clusion

" cluſion of the ſaid action of the ſaid John, by which the " ſaid John remains therein undefended againſt the ſaid " Richard; for which the ſaid John ought to recover againſt " the ſaid Richard his damages by reaſon of the premiſes; " but becauſe it is unknown to the court here what damages " the ſaid John hath ſuſtained by the means aforeſaid; and " becauſe it is alſo at preſent unknown to the court here, " whether the ſaid Richard will be convicted of the premiſes " upon which the above iſſue is joined between the ſaid " John and the ſaid Richard or not; and becauſe it is ne- Unica taxatio. " ceſſary and convenient, that there be but one taxation of " damages in this ſuit, therefore let the giving of judgment " in this behalf be ſtayed until the ſaid iſſue between the " ſaid John and Richard be determined; and as well to try " the iſſue above joined between the ſaid John and Richard, " as to inquire againſt the ſaid Richard what damages the " ſaid John hath ſuſtained in this behalf, the ſheriffs are " commanded that they cauſe to come here, in eight days of " the Purification, twelve, &c. by whom, &c. and who " neither, &c. becauſe as well," &c.

When the iſſue is in a *county palatine*, where the king's writs do not run, and muſt be tried by a jury of the palatinate, the record is ſent down by *mittimus* to the judges to be tried; and the award of the *venire* and *mittimus* are in the following form, with a ſuggeſtion at the beginning: " There- " fore let a jury be made thereof; and becauſe the iſſue " aforeſaid, between the parties above joined, ought to be " tried by men of the *county palatine of* Lancaſter; that is to " ſay, of the body of the ſaid county where the writ of our " ſaid lord the king doth not run, and not *elſewhere*; there- " fore to try the iſſue aforeſaid, between the parties above " joined, let the record of the plaint aforeſaid be ſent to " his majeſty's juſtices of the ſaid *county palatine of* Lan- " caſter; ſo that the ſame juſtices, by his ſaid majeſty's " writ of that county, to be duly made out, and to the " ſheriff of the ſame county directed, do command the ſaid " ſheriff that he cauſe twelve good and lawful men of the " body of the ſaid county of *Lancaſter* to come before the " juſtices at their next general ſeſſions of aſſize to be holden " for the ſaid county, after the ſaid record ſhall be delivered " to them, each of whom, &c. by whom, &c. and who " neither, &c. to recognize, &c. becauſe as well, &c. " And when the verification and iſſue aforeſaid ſhall be there " made and tried, that then the ſaid juſtices ſhall ſend the " record of the plaint aforeſaid, together with every thing " that ſhall be done thereupon before them, in his ſaid " majeſty's court, there to our ſaid lord the king at *Weſt-* " *minſter*, How if iſſue in county palatine; of the mittimus.

" *minſter*, at a certain day which the ſaid juſtices ſhall " appoint; the ſaid parties to be in the ſame court, there to " hear a judgment thereupon."

The Award of a *Venire* on a Welch *Iſſue* into the next Engliſh County, is in the following Form:

Award of venire on a Welch iſſue.

" And becauſe the iſſue aforeſaid, between the parties " above joined, ought to be tried by men of the next En- " liſh county to the ſaid county of , and not elſe- " where; and becauſe the county of is the next " Engliſh county to the ſaid county of ; therefore " let a jury of the ſaid county of come thereupon be- " fore our lord the king at *Weſtminſter*, on (ſome " return-day before the trial), and who neither, &c. to re- " cognize, &c. becauſe as well, &c. The ſame day is given to " the ſaid parties there."

In the record on a Welch iſſue, the *jurata* and *venire*, *diſtringas*, &c. are made up of the next Engliſh county into which the *venire* is awarded, as if the *venire* were laid in that county.

A Suggeſtion that one of the *Sheriffs* is intereſted, &c. by the *Eaſt-India Company*:

Suggeſtion by Eaſt India Company that one of the ſheriffs is intereſted. Venire to the other ſheriff.

" And hereupon the ſaid United Company ſay, that W. S. " and R. W. Eſqrs. are ſheriffs of *London*; and that the ſaid " W. S. one of the ſaid ſheriffs, in his own right, is pro- " prietor, and hath intereſt in and to a ſhare and proportion " of the principal ſtock of the ſaid United Company, to the " value of £. ; and is a member of the ſaid United Com- " pany, and this the ſaid United Company are ready to verify; " and for this cauſe the ſaid United Company pray a writ " to be directed to the ſaid R. W. Eſq. the other ſheriff of " *London*, to cauſe to come twelve, &c. to try the ſeveral " iſſues between the ſaid parties; and becauſe the ſaid " Francis doth not deny the aforeſaid allegation of the ſaid " United Company, but acknowledgeth the ſame, it is " granted to them, &c. Therefore let a jury," &c.

Suggeſtion that the Sheriff is of Kin to the Defendant.

Suggeſtion that ſheriff is of kin to defendant. Venire to coroner.

" And hereupon the ſaid A. B. ſays, that I. W. Eſq. is " ſheriff of the ſaid county of *E.*, and that the ſaid C. D. is " of kin to the ſaid I. W. in this; that one I. D. junior, ſon " of the ſaid C. D., married and took to wife one I. W. " who is yet alive, the daughter of the ſaid I. W. ſheriff of " the county aforeſaid; and for this cauſe he prays a writ " of our lord the king of *venire facias*, to be directed to the

" coroner of the ſaid county of *E.*, and becauſe the ſaid " C. D. doth not deny the aforeſaid allegation of the ſaid " A. B. it is granted to him, &c. Therefore it is commanded " to the *coroner* of the ſaid county of *E.* that he cauſe to " come here twelve," &c. &c.

Suggeſtion that the Sheriff and Coroner are Parties, and *Venire* to Eliſors.

" And hereupon the ſaid Anthony ſays, that A. B. and " C. D., now ſheriffs of the city of *Coventry* and county of " the ſame city, are bailiffs of the city of *Coventry* aforeſaid, " and therefore parties to the matter aforeſaid above, be- " tween him the ſaid Anthony and the ſaid Thomas, put " in iſſue, and that Simon Burton, now coroner of the ſaid " city of *Coventry* aforeſaid, and therefore likewiſe a party " to the ſaid matter above, between the ſaid Anthony and " the ſaid Thomas as aforeſaid, put in iſſue; and the ſame " Anthony prays a writ of the lord the king to be directed " to two diſcreet and indifferent perſons within the ſaid " county of the city of *Coventry* aforeſaid reſiding, by the " court here to be elected, to cauſe to come twelve free " and lawful men of the neighbourhood of *Wichen* in the " ſaid county of the city of *Coventry* aforeſaid, to try the " iſſue aforeſaid, between the parties aforeſaid above as " aforeſaid joined: and becauſe the ſaid Thomas Laurence " doth not deny the allegation aforeſaid, therefore E. H. " and A. L. (with the agent of the parties aforeſaid by the " court here elected and named) are commanded that they " cauſe to come before the lord the king at *Weſtminſter* on " next after twelve, &c. by whom, &c. and " who neither, &c. to recognize, &c. becauſe as well, &c. " The ſame day is given to the parties aforeſaid there," &c.

Suggeſtion that ſheriff and coroner are parties. Venire to eliſors.

Where Party died after one *Venire*.

" Therefore the ſheriff is commanded that he cauſe to " come before the lord the king, from the day of St. Mi- " chael, in three weeks whereſoever, &c. twelve, &c. by " whom, &c. and who neither, &c. to recognize, &c. becauſe " as well, &c. The ſame day is given to the parties afore- " ſaid, &c. Before which day, to wit, on the day of " in the year of the reign of the ſaid lord the " now king, the ſaid Theodore died, and the ſaid James " ſurvived him; and now at this day, before the ſaid lord " the king at *Weſtminſter*, comes the ſaid James and Walter " by their attornies aforeſaid, and the ſheriff aforeſaid hath " not returned the ſaid writ thereof, nor done any thing " therein:

Suggeſtion of death of party, after awarding one venire and another awarded.

" therein: therefore, as before, the ſheriff of the county " aforeſaid, is commanded that he cauſe to come before " the ſaid lord the king in the octave of St. Hilary, where- " ſoever, &c. twelve, &c. by whom, &c. The ſame day is " given to the parties aforeſaid," &c.

Verdict ſet aſide, and *Venire de novo* awarded.

Verdict ſet aſide and venire de novo awarded.

" And hereupon the record and verdict aforeſaid being " read and heard, it ſeems to the juſtices here, that the " jurors aforeſaid have miſbehaved themſelves in giving the " verdict aforeſaid, ſo that that verdict is idle and void in " law: therefore it is conſidered that the verdict aforeſaid " be held as idle and void, and had for nothing; and the " proceſs againſt the jurors firſt impanelled being omitted, " and that panel being entirely withdrawn, the ſheriff is com- " manded that he cauſe to come anew here, in the octave of " the Purification of the Bleſſed Virgin Mary, twelve, &c. " by whom, &c. and who neither, &c. to recognize, &c. " becauſe as well," &c.

How iſſue to be engroſſed, indorſed, and charged for.

Where the iſſue is made up as above directed, it muſt be engroſſed on treble 1d. *ſtampt paper; indorſe thereon the charges which are in*

B. R.	*C. B.*
4d. *per folio,* (72 *words,*) *beſides ſtamps, and entering plea,* 1s.	4d. *per folio,* (72 *words,*) *and duty entering plea, if the general iſſue,* 2s.; *if ſpecial,* 8d. *per folio.*
	If appearance entered according to ſtatute, charge it on back, which muſt be paid for.

In both courts, if declaration be delivered and not yet paid for, charge for ſame and for warrant, thus:

For declaration unpaid, ſo much.

Upon the back of the iſſue you may give notice of trial.

How iſſue to be delivered.

This iſſue is to be delivered to defendant's attorney. Formerly judgment might be ſigned if he did not pay for ſame within twenty-four hours; but now, by rule of court Hil. 35 *G.* 3. *no judgment can be ſigned on this ground, but the iſſue money remains to be taxed as part of the coſts in the cauſe.* 6 *D. & E.* 218.

Of the paper-book, how made out, &c.

If there are *ſpecial pleadings*, the clerk of the papers muſt make out the iſſue (then called the *paper-book*). Let plaintiff's attorney then deliver a copy of the declaration on unſtampt paper to the clerk of the papers (as he has only the pleadings in his office *from* the declaration); he will then make out the paper-book, which is nothing more than the pleadings at length, tranſcribed upon a treble 1 *d.* ſtampt

How charged for;

paper,

paper, with the names of the reſpective counſel who ſigned the different pleadings, &c.; but, inſtead of being a cloſe copy thereof, as the iſſue is, there are only 72 words in a ſheet. In the margin of the paper-book is a rule for defendant to receive and return it on a certain day therein mentioned, which is always four days, excluſive of the day it is delivered (charge 8 *d. per* folio for the whole, and 4 *d.* for the pleadings *from* the indorſed declaration, as alſo the ſtamps); deliver paper-book to defendant's attorney, with notice of trial indorſed, keep copy thereof. If *returned* according to rule, (for it need not now be paid for,) proceed to trial; but if not returned, ſign judgment as for want of a plea, and proceed to execute inquiry (if neceſſary); the notice of trial will ſerve for the notice of inquiry, only give notice of the time and place of executing it.

delivered; indorſed; returned;

Defendant pleaded and delivered plea to plaintiff's attorney, who made up the iſſue and delivered it to the defendant's attorney, who paid for it; but finding afterwards it ſhould have been made up with the clerk of the papers, (it being in B. R. and the pleadings ſpecial,) went and paid him his fees, then made up the record and went to trial, and the court refuſed to ſet it aſide, the defendant being in the firſt fault in not leaving the plea at the office. *Thomſon v. Tiller*, Str. 1266.

How if made up by attorney by miſtake, inſtead of clerk of papers.

(B) Of ſtriking out Pleadings, and demurring or pleading general Iſſue. (B)

Where there are ſpecial pleadings in a cauſe, and the defendant would delay the plaintiff and prevent the expence of a trial, when iſſue and the paper-book is delivered to him, he may ſcratch out the *ſimiliter* joined, and leave a demurrer to the plaintiff's replication in the office, and when the time is out, return the book, with notice thereof, in this manner:

Of ſtriking out ſimiliter and demurring.

Mr. J. M.

I have ſtruck out the rejoinder, and left a demurrer to the plaintiff's replication in the office.

Or in C. B. he may ſtrike out *ſimiliter*, and return iſſue, with notice indorſed that he will file a demurrer in the office; in which caſe plaintiff will be obliged to give a rule to rejoin. Imp. C. B. 318.

But, to prevent this trick, the plaintiff, if he is apprehenſive that the defendant's plea is dilatory or frivolous, ſhould move the court that the defendant abide by his plea, or plead another *inſtanter*, or by a certain given hour the next

How this delay to be prevented.

day. However, ſhould it be practiſed, the paper-book muſt be carried to clerk of papers to have demurrer and joinder added; it is then delivered again to the attorney, who muſt return it in 24 hours (but he need not pay for the entries as above mentioned, it is now called the demurrer-book); if not returned, judgment may be ſigned; if returned, enter an *incipitur* on the roll, move for a *concilium*, and proceed in all reſpects as in common caſes of demurrer, for which ſee *ante*, Chap. 8. Sec. 1.

Rule as to ſame, notice of trial for ſpecial iſſue ſerving for the general iſſue;

Upon delivery of any paper-book wherein an iſſue is joined, and notice of trial given on the back of the book, if the ſame be afterwards waived and the general iſſue given, the notice which was given for the trial of the ſpecial iſſue ſhall ſerve for notice of the general iſſue. N. on R. Hil. 8 Geo. 1.

or for inquiry on demurrer.

So if *ſimiliter* ſtruck out and demurrer given, and judgment given for plaintiff on the demurrer, the ſame notice which was given on the paper-book for the trial of the iſſue ſhall ſerve for writ of inquiry, only plaintiff muſt give notice of hour and place of executing writ. N. on R. Tr. 8 Geo. 1.

(C)

(C) Of delivering and returning Paper-Book.

In what time paper-book to be delivered and returned.

If made up in term or within four days after;

If a paper-book be made up and delivered in term time, or within four days excluſive after term, with a rule thereon given by the clerk of the papers for bringing the ſame book to be enrolled, and the defendant's attorney doth not within four days after the delivery thereof bring back the book and join with the plaintiff in the ſpecial iſſue or demurrer made up, or waive his ſpecial plea and give the general iſſue or demurrer to any ſpecial iſſue tendered, judgment may be ſigned and entered as if no plea had been pleaded. N. on R. Tr. 1 Geo. 2.

if not in term, but within eight days after.

But where a plea is not put in in time, ſo that a paper-book may be made and delivered in term, or within four days after, yet if it be made up and delivered within eight days after the term, the defendant's attorney ſhall be obliged to take it and return it again in four days after the delivery, or judgment may be ſigned.

If a London or Middleſex cauſe.

If a plea be pleaded in term, or in time after the term, and the paper-book is not made up and delivered within eight days excluſive after term, if it be an iſſue to be tried in London or Middleſex, or a demurrer, the other party is not bound to deliver back the book till within the firſt four days

If to be tried at the aſſizes.

of the next term; but if it be an iſſue to be tried at the aſſizes, the defendant's attorney ſhall deliver back the book within

within four days after the delivery thereof and join in the ſpecial iſſue, or give the general iſſue and take notice of trial, or elſe the plaintiff's attorney may ſign judgment by default as if the defendant had not pleaded. But in all caſes if the plaintiff's attorney accept the book after the limited time, he cannot ſign judgment.

How the four days reckoned.

The four days allowed for returning the paper-book are in all caſes, whether the iſſue be in fact or in law, to be reckoned one excluſive and the other incluſive.

Judgment ſigned if not returned in time.

If defendant do not return the paper-book on the evening of the fourth day, plaintiff may ſign judgment; it is a mere indulgence to allow him till the next morning. *Haſelar* v. *Anſel*, Doug. 197.

Although in the caſe of *Oxley* v. *Bridge*, Doug. 67. not long before it was decided *contra*; but *per* Lord Mansfield, there muſt have been particular circumſtances attending that caſe, and here the Maſter has certified the above to be the practiſe. Ib.

Plaintiff may refuſe to receive it though judgment not ſigned.

If, therefore, the rule expires on Saturday, and paper-book be not returned till Monday morning, though before the opening of the office, plaintiff may refuſe to receive it, and immediately ſign judgment. *Thomſon* v. *Ryal*, 4 T. R. 195.

To whom iſſue to be delivered.

The iſſue muſt be delivered to the attorney or agent in town, and not to the attorney in the country; after an agreement to deliver it to a country attorney, it was tendered to agent in town, who refuſed payment, and judgment was ſigned and held regular. Cooke's Rep. 94.

For ſuch agreement to deliver the iſſue in the country is void. Bar. 251. *Haſelfoot* v. *Duke*.

It is now ſettled that no judgment can be ſigned for nonpayment of iſſue-money.

It is now ſettled that the iſſue or paper-book need not be paid for at the time of delivery by following rule of court, H. 35 Geo. 3.

Rule Hil. 35 G. 3.

It is ordered, that after the firſt day of the next term no judgment ſhall be ſigned for nonpayment of iſſue-money; but that the iſſue-money ſhall remain to be taxed as part of the coſts in the cauſe. 6 D. & E. 218.

Extends to paper-books and demurrers.

Which rule has been determined to extend to paper-books and demurrer-books as well as iſſues. *Fuller* v. *Oſborne*, 6 D. & E. 477.

So that it is needleſs to inſert any of the caſes in the books reſpecting ſigning judgment for nonpayment of iſſue-money.

(D) Of Variance between Iſſue and Pleadings and amending ſame. (D)

The iſſue ſhould be intitled of the term when iſſue was joined, but the memorandum ſhould be of the term the declaration

claration was of; and if the cauſe of action aroſe any time after the firſt day of term, the memorandum ſhould not be generally of that term, *as Michaelmas term in the 30th year of the reign of King George the Third, or the like*, but of a *particular* day in term, as *of Friday next after the morrow of All Souls*; which day ſhould be a day *after* the cauſe of action actually aroſe.

How it operates as to a tender made in term.

If, therefore, defendant pleads a tender before the exhibiting of the bill, and plaintiff, in order to ouſt him of the benefit thereof, makes up paper-book with a general memorandum which relates to the firſt day of term, and would be prior to the tender; on motion upon an affidavit of the fact, court will order a ſpecial memorandum to be made. *Smith* v. *Key*, Str. 638.

Iſſue, how far amendable.

Sometimes, indeed, the iſſue is in ſuch caſes amendable. In aſſault and battery, the memorandum was generally of Michaelmas term, and the fact, on *ſon aſſault* proved, was on a day within the term, and it was held well enough; for the plaintiff need have given no evidence on this plea, unleſs to aggravate damages; and the court will not nonſuit him, becauſe it is amendable by a new bill. *Guy & ux.* v. *Kitchiner and others*, Str. 1271.

But memorandum was held not amendable to a ſpecial day in term after a plea in abatement, and demurrer and *reſpondeas ouſter* awarded. *Burgeſs* v. *Periam*, Ld. Ray. 324.

Though in the caſe of *Preſident and College of Phyſicians* v. *Salmon*, Holt C. J. ſaid, that memorandum was no part of declaration, and might be amended. Ld. Ray. 683.

Memorandum muſt not vary from pleadings.

So memorandum ſhould agree with declaration, and not ſay in a plea of debt when declaration is in a plea of covenant or the like; but in ſuch caſe memorandum is amendable. *Davis* v. *Stringer*, Carth. 354.

The words of a plea, &c. not neceſſary.

Though the words *de placito*, &c. are uſually inſerted, yet as the bill itſelf is afterwards ſet forth in *hæc verba*, they are not abſolutely neceſſary; as was determined in C. B. where, in proceedings by bill, the like memorandum is uſed, Trin. 7 & 8 Geo. 2. *Atkin* v. *Worthington un. &c.*; and in B. R. on writ of error from C. B. Mich. 11 Geo. 2. *Gooſtrey* v. *Reynolds*, Andrews 23.

If new trial obtained, the memorandums ſhould not be altered, but ſame roll ſhould be proceeded on.

In *aſſumpſit*, after verdict for plaintiff, a new trial was granted on payment of coſts and bringing the money into court, and the rule was to try the ſame iſſue. The plea roll in that action was of Eaſter term; and by the memorandum it appeared, that the bill was exhibited in Hilary term before: but on the new trial, the plaintiff did not proceed upon the ſame roll, but made up the plea roll as of Michaelmas term, and a memorandum of a bill of Trinity preceding. New trial was had, and plaintiff had a verdict again; but

but it was set aside for irregularity, the plaintiff not having tried the same cause as it now appeared to be, and had not pursued the rule for a new trial, which was to try the same issue as was tried in the first action. *Harpur* v. *Davy*, Carth. 498.

Where there has been a plea in abatement, it should be entered in issue;

If there has been a plea in abatement and judgment of *respondeas ouster*, after which the defendant pleads in chief, yet the plea in abatement ought to be entered in the issue and *nisi prius* record; for, as it is in the plea-roll, it must be mentioned in the *nisi prius* record; for otherwise it would not appear to be a trial in the same cause, and judgment would be arrested. *Dobertum* v. *Chancellor*, Ld. Raym. 329. Carth. 447. 5 Mod. 399.

but if omitted in plea-roll, it is too late to object after issue accepted.

A plea in abatement, which had been demurred to, but never deserted, nor any judgment had upon it, was omitted in the plea-roll between the declaration and the plea of *nil dicit*; and the court held that this irregularity was cured, by defendant's accepting the issue and paying for it: his objection should have been at that time, it is too late now; meaning in arrest of judgment or on motion for a new trial. *Combe* v. *Pitt*, Burr. Rep. 1682.

In case of any variance, defendant should refuse to accept issue.

If, therefore, the issue is not agreeable to the declaration, but any variance therein, defendant should refuse to accept it; for otherwise plaintiff may make up the *nisi prius* record right, and go on to trial; and, though no defence made by reason of the variance, court will not set aside verdict. *Shepley* v. *Marsh*, Str. 1131.

Of withdrawing and amending issue.

Motion to amend the issue-roll by striking out the award of the *venire facias* by *decem tales*, and awarding the common *venire facias*. But there being nothing to amend by, no rule was made. *Cartwright* v. *Gardener*, Bar. 7.

Rule was made absolute, giving plaintiff leave to deliver a new issue properly intitled; in the title of the issue already delivered, the word (George) was omitted. It stood thus: Hilary Term, 20th of King the Second. *Beaumond* v. *Stuart*, Bar. 18.

The want of a similiter was formerly held not aided or amendable. Str. 641. *Cowper* v. *Spencer*, S. C. 8 Mod. 376.

But a rule was since made absolute to amend the record after verdict, by adding the words, "And the defendant "does so likewise," at the end of the replication, instead of, &c. a prior rule having been obtained to shew cause why judgment should not be arrested for that defect; which latter rule was discharged. *Sayer* v. *Pocock*, Cow. 408. *Walker* v. *Lester*, Com. 366. *Harvey* v. *Peake*, Burr. 1793.

The issue and *nisi prius* roll may be amended by the plea-roll. *Tourville* v. *Nash*, Say. 76.

If after the iſſue is delivered to defendant, plaintiff's papers are miſlaid, court will order defendant to give him a copy to enter it by. *Wiar* v. *Smith*, Str. 414.

(E)

(E) Of the Continuances on Iſſue Roll.

Of entering continuances on the roll.

Want of continuance in the iſſue-book delivered may be entered at any time on the roll.

In a proceeding by bill in C. P. againſt a member of parliament, which was of Eaſter term, and in Trinity following he pleaded the general iſſue, whereupon iſſue was joined of that term; the paper-book of the iſſue was made up and delivered, whereby all the proceedings in the cauſe appeared to be of Trinity term, without any continuance from Eaſter to Trinity, or any *alias prout patet*, which is irregular; it was moved that the iſſue, as delivered, might be ſet aſide for irregularity: *per Cur.* this is a nice objection, it is mere matter of form; and we think the continuance, or *alias prout patet*, are not neceſſary in the iſſue-paper, it may be entered at any time upon the roll; ſo the rule to ſhew cauſe was diſcharged. *Wilkes* v. *Wood*, M. P. 2 Wil. 203.

The declaration was not delivered four days before the end of the term, defendant pleaded to the juriſdiction of the court, and (as he might by the courſe of the court) pleaded it within the firſt four days of the ſubſequent term. The clerk, to avoid the trouble of making up the poſt roll, entered it with a ſpecial imparlance as of the ſubſequent term, which ſpoiled the plea; but the clerks were ordered to make up poſt rolls, and not to uſe theſe ſpecial imparlances, which Holt C. J. ſaid were crept in of late, and were not known formerly. Salk. 367. 2 Ld. Raym. 1298.

On demurrer to a declaration, one exception was, that the action was diſcontinued becauſe the declaration was of Michaelmas term, and the plea-roll of Eaſter; and there is no continuance from Michaelmas to Hilary, and from thence to Eaſter, *ſed non alloc.* becauſe, by the courſe of the King's Bench, they never enter continuances until the plea comes in, though the declaration was delivered four terms before. *Curlewis* v. *Dudley*, Ld. Raym. 872. Salk. 179.

Though it is the practice to make up the iſſue and enter it on a roll of that term in which the plea was delivered, yet it has been held, that a plea delivered in one term may be entered as of the ſubſequent term, with an imparlance; as where,

In debt on bond, plea as to part payment and demurrer *inde*, on which defendant moved, that the action by the demurrer was diſcontinued, the plea being only to part, and therefore plaintiff ought to have taken judgment by *nil dicit* as to the reſidue. The court were going to give judgment for the defendant, when it was obſerved, that the plea was of this term, and therefore plaintiff might ſtill take his judgment by *nil dicit* for the reſidue: on which defendant alleged

alleged, that the plea delivered was of the laſt term, and therefore the record ought to have been made ſo; but the clerks certifying that it being only a plea to enter, the record might be made up either way; wherefore the court would not order it to be examined, but ſaid there was trick for trick. *Market* v. *Johnſon*, Ld. Raym. 1121. Salk. 180.

It was reſolved in Wymark's caſe, 5 Rep. 75. that the courſe of the King's Bench is, (*i. e.* in ſuits by bill,) that although the plaintiff after a bar pleaded have day to reply two or three terms, no mention ſhall be made in the roll of any imparlance or continuance; but otherwiſe between the declaration and plea in bar there, if that is of another term, for that ſhall contain the imparlance or continuance; but no ſuch entry is made upon any replication, rejoinder, &c.; wherefore they ſhall be intended, when they are generally entered of record, that they were made in the ſame term in which the bar, &c. was pleaded; and by conſequence here the plaintiff may take advantage of a condition contained in a deed pleaded by defendant with a profert *in curia* of a precedent term.

If the plea, therefore, is of two or three terms ſubſequent to the declaration, as if declaration is of Michaelmas term, plea of Eaſter, and you try the cauſe of Trinity, imparle over to the firſt day of Trinity, and make up your iſſue as of that term, for the want of a continuance-day cannot be aſſigned for error in this caſe. Stat. Jeof. 32 H. 8. c. 30. 4 & 5 Ann. c. 16. Imp. K. B. 330.

(F) Of entering the Iſſue. (F)

Of entering the iſſue.

In order to compel plaintiff's attorney to enter iſſue,

In B. R.

Get a rule from the maſter on the back of the iſſue delivered, enter it with the clerk of the rules, pay 1s. 10d. *and ſerve plaintiff's attorney with a copy, naming the cauſe*; *as* A. v. B. Friday next after the morrow of the Aſcenſion to enter the iſſue entered; *he muſt before rule is out, enter the iſſue on the roll in ſame manner as explained, poſt, Chap.* xi. *Sec.* 4.

In C. B.

Get treaſury rule from ſecondary for him to enter iſſue on record within four days after notice given, *pay* 4s 6d.; *ſerve copy thereof on plaintiff's attorney, if not docketed and carried in before rule is out, ſign* non pros.

But if plaintiff wiſhes to docket and carry in entry, let him get a roll from the prothonotary's of term in which iſſue is joined; *make out* (a)

How to compel entry of iſſue.

(a) In the Common Pleas, Michaelmas term, in the 34th year of the reign of George the Third, Middleſex to wit, Richard Tenn puts in his place T. S. his attorney, againſt John Denn, late of, &c. yeoman, in a plea of treſpaſs on the caſe.

Warrant of attorney for plaintiff.

Middleſex to wit, The ſaid John Denn puts in his place T. S. his attorney, at the ſuit of the ſaid Richard in the plea aforeſaid.

The nature of the action muſt be expreſſed on the warrant of attorney. In K. B. alſo theſe warrants are entered on the roll.

The like for defendant.

and

and file same in treasury, or defendant may sign non pros.

warrants of attorney of same term on a plain piece of parchment, file them at warrant of attorney's office, pay in debt 8d., *in case* 1s. 4d., *then take roll to prothonotary's, pay for entries* 8d. per *sheet, and docket same.*

By R. M. 5 Ann. no record of *nisi prius* can be sealed or passed at *nisi prius* office by *custos brevium* before issue be entered, or an *incipitur* thereof, and such entry with *nisi prius* record be first brought to and signed by secondary of this court, for which no fee to be paid but usual fee to clerk of court for entry of issue.

When issue ought to be entered.

Issues ought to be entered of the term they are joined; but if not entered of that term, it is no reason to set aside the verdict. Prac. Reg. 232.

At what time defendant may give rule for that purpose.

If venue in country.

If the action is laid in London or Middlesex, the defendant ought not to give a rule for the plaintiff to enter his issue the same term in which issue is joined, unless notice of trial has been given. In a country cause the plaintiff is nowise bound to enter his issue the same term it is joined. Note on Reg. Mich. 4 Ann.

If in London or Middlesex.

But, if the action is in London or Middlesex, the plaintiff must enter his issue, and bring the record into the office, within four days after notice of the rule for that purpose; and if in the country, before the continuance of that term, or judgment of *non pros* may be signed. Ibid.

How time of the rule to be reckoned.

A *non pros*, signed for want of plaintiff's entering the issue, was set aside, as irregularly signed one day before the time limited by the rule for entering the issue expired. The rule runs, "Unless plaintiff, within four days next after notice "shall cause the issue to be entered," which *excludes* the day of notice. The rule was served on Friday, and the issue-roll brought in on Tuesday following, on which day the *non pros* was signed. *Margarum* v. *Fenton*, Bar. 318.

If papers mislaid, court will compel defendant's attorney to give a copy of issue.

Plaintiff's attorney had delivered the issue, but not going on to trial, defendant's attorney gave him a rule to enter the issue, and on affidavit made by plaintiff's attorney that the papers were mislaid, the court ordered the defendant's attorney to give him a copy of the issue, in order to enable him the better to comply with the rule. *Wiar* v. *Smith*, Str. 414.

If judgment for want of entering issue, it may be by nil dicit.

If judgment is signed for want of entering the issue, or not returning the paper-book, it should be by *nil dicit*.

If no proceedings after issue entered, judg-

If plaintiff, after having entered his issue, do not try the cause, or proceed to trial thereon some time during the next term after that in which issue was joined, judgment as in case

caſe of a nonſuit may be moved for. *Baker* v. *Newman*, 1 T. B. 123. ment as in caſe of a nonſuit.

But if iſſue be joined early in term, notice of trial muſt be given in the ſame term. *Frampton* v. *Payne*, 1 T. B. 65. When to be moved for.

For the time when plaintiff ought to proceed to trial after entering iſſue, *vide* tit. Judgment as in caſe of a nonſuit.

The plaintiff had a four-day rule to bring in the iſſue-roll, which expired the 14th of June laſt; the defendant on that day ſearched in the office, and the roll not being then brought in, ſigned judgment of *non pros* the next day at twelve. The fact was, that the roll was brought in the next morning before judgment ſigned, and the judgment was held irregular for want of defendant's making another ſearch at the time he ſigned the judgment: defendant might, indeed, have ſigned judgment immediately on the firſt ſearch, but having waived that advantage, plaintiff might bring in the roll any time before judgment actually ſigned, as in caſe of a plea, and the like. *Minns* v. *Baſter*, 2 D. & E. 16. Whether if iſſue roll brought in any time before judgment actually ſigned, though not in time of the rule, judgment may be afterwards ſigned.

But now in the caſe of a plea or the like, the other ſide may refuſe to receive it after expiration of rule, though judgment not ſigned, as determined in *Thompſon* v. *Ryal*, 4 D. & E. 195. *Qu.* How far that caſe applies to entering the iſſue, or tends to invalidate the deciſion in *Minns* v. *Baſter*?

SECTION II.

Of Notice of Trial, and countermanding ſame; and of Coſts for not proceeding to Trial.

(A) What Notice is neceſſary—

1. *In Town Cauſes.*
2. *In Country Cauſes.*
3. *If under Terms to take ſhort Notice.*
4. *When no Proceedings for four Terms.*

(B) When Plaintiff is compelled to give Notice of Trial.

(C) Of the Form of the Notice, how and to whom to be given.

(D) Of continuing Notice of Trial.

(E) Of countermanding Notice of Trial.
(F) Of Costs for not proceeding to Trial.

(A)

(A) What Notice neceſſary—

1. *In Town Cauſes.*

What notice neceſſary. 1ſt, In town cauſes.

By an old rule of court in the Common Pleas, Mich. 1654, if the *venue* is in London or Middleſex, and the defendant lives within forty miles of London, there muſt be eight days notice of trial, excluſive of the day it is given; and if he lives *above* forty miles from London, there muſt be fourteen days notice excluſive.

Although by ſeveral rules of court, as Mich. 1651, and Mich. 4 Ann. and others, *due* notice of trial is ordered to be given; yet there does not appear to be any other rule ſpecifying *what* notice, except that of Mich. 1654, in C. B.; which practice has alſo been adopted in the King's Bench.

Statute 14 G. 2. c. 17. explained.

But by ſtatute 14 G. 2. c. 17. ſ. 4. it was enacted, That no cauſe whatſoever ſhall be tried at the ſittings in London or Weſtminſter where the defendant reſides above forty miles from the ſaid cities reſpectively, unleſs notice of trial in writing has been given at leaſt ten days before ſuch intended trial.

But as there are no negative words in the ſtatute, namely, that there ſhall be *no more* than ten days notice, and as before this ſtatute, defendant in ſuch caſe was entitled to fourteen, it has been held that, notwithſtanding the ſtatute, fourteen days notice muſt be given, agreeable to the former rule of court. *Bowler* v. *Jenkin*, Bar. 305. So that now, in all town cauſes, if defendant reſides within forty miles, eight days notice of trial, if above forty miles, fourteen days notice of trial muſt be given.

But in the Common Pleas, in all cauſes to be tried at Guildhall, the following rule of giving notice of trial muſt be obſerved:

New rule in C. B. as to giving notice of trial in cauſes to be tried at Guildhall.

"Whereas parties are often put to unneceſſary expence "and inconvenience by reaſon of the uncertainty of the "notice of trial for the ſittings after term at the Guildhall, "London, and likewiſe by reaſon of the late paſſing of the "records with the clerk of the treaſury, and of entering "the cauſes in the marſhal's book for the ſittings after term "in London and Middleſex: It is therefore ordered, That "in every ſuch notice of trial to be given for the ſittings after "term to be holden at the Guildhall, London, the plaintiff "ſhall ſpecify in ſuch notice whether he means to try the "cauſe at the firſt day of the ſittings or at the adjournment "day; and if the notice ſhall ſpecify that the cauſe is not

"to be tried till the adjournment day, it shall be sufficient "to give such notice eight days before the first day of the "sittings after term, where the defendant or defendants re- "side above forty miles from the said city of London; and "four days before the said first day, where the defendant "or defendants reside within that distance." R. Hil. 32 G. 3.

Fourteen days notice must be given, if defendant reside above forty miles distant as above-mentioned, although he was arrested in London and *venue* laid there, and after arrest, and before declaration, he went to Scotland, and although his attorney in London afterwards accepted declaration, and pleaded thereto. *Brind* v. *Norris*, 2 Blac. 1205. Fourteen days, if beyond forty miles.

So if defendant's abode is in Ireland, *Gorman* v. *Boyle*, Bar. 297. or in India, *Douglas* v. *Ray*, 4 D. & E. 552. If in Ireland or India.

On such notices, the distance from London is taken by computed miles, not by admeasurement, though so many may be paid for post. *Bates* v. *Pettipher*, Str. 954. *Osgood* v. *Lyon*, Ib. 1216. How distance reckoned.

But if there are several defendants, all must reside above forty miles off, for if any one reside within that distance, so long a notice is not necessary. *Per* Ash. J. in *Perry* v. *Jackson*, 4 D. & E. 520. All the defendants must so reside.

In all country causes to be tried at the assizes, ten days notice of trial at least is necessary. Statute 14 G. 2. c. 17. s. 4. 2d, In country causes what notice necessary.

As to the mode of reckoning the days, whether in town or country causes, the day of giving the notice is reckoned exclusive, and the sitting day in town, or commission day in the country, inclusive. Notice reckoned one day inclusive, one exclusive.

If the sitting day in Middlesex be the 14th, notice of trial on the 6th is good notice; and in a country cause, if commission day be the 4th March, and the February preceding has only twenty-eight days, notice on the 22d of the said February is good.

Sunday is to be reckoned as a day, unless it is the day on which the notice is given. Sunday how reckoned.

Sometimes the defendant is under terms to take short notice of trial; in which case, if it be a town cause, *two* days notice of trial must be given. *Butler* v. *Johnson*, Bar. 301. If it be a country cause, such notice shall be given four days at least before the commission day, one day exclusive, and the other exclusive. Reg. East. 30 G. 3. 3 D. & E. 660. 3d, If under terms to take short notice.

This rule of court only extends to cases where defendant is under a judge's order to take short notice.

In all causes wherein no proceedings have been had for four terms, exclusive of the term in which the last proceed- 4th, What notice where no proceedings for four terms.

ings were had, a whole term's notice of trial must be given. East. 13 G. 2. N. on R. 4 Ann.

So that where plea was delivered Hilary term 1783, and no proceedings had till 10th March 1784, when issue was delivered, and ten days notice of trial given for next assizes at Lancaster, it was said by the master, that a whole term's notice should have been given. Imp. B. R. 338.

It must be a full term's notice.

Where a term's notice is requisite, such notice must be given before the *essoin* day of the term; it is not sufficient if after essoin day, though before the first day in full term. *Bogg* v. *Rose*, Str. 1164. *Geale* v. *Chapman*, Bar. 291.

But not necessary if any proceedings had;

But if any proceedings have been had within the four terms, such notice is not necessary.

as notice of trial given, though countermanded;

As where notice of trial had been given at the end of half-a-year after issue joined, and then countermanded, there was no necessity of giving a term's notice till a year after such last notice and countermand. Str. 531. *Green* v. *Gauntlet*.

or concilium signed in the cause;

So if plaintiff take no step in the cause for three terms, and in the fourth sign a *concilium*, and obtains judgment in the fifth term, the signing a *concilium* is taking such a step as to make it unnecessary to give a term's notice. *Bland* v. *Darley*, 3 D. & E. 530.

or an order on a judge's summons.

So a judge's summons, if an order be obtained thereon, but not otherwise, is deemed a proceeding. R. East. 13 G. 2.

Nor necessary if cause delayed by defendant's request;

Again, the rule requiring a term's notice, only extends to voluntary delays by the plaintiff, and does not apply where the proceedings have been delayed at defendant's request. *Bosworth* v. *Philips*, Blac. 784. *Bland* v. *Darley*, 3 D. & E. 530.

or by injunction obtained by him;

Thus if defendant suspends the cause for a year by an injunction, and afterwards plaintiff proceeds to trial without a term's notice, and obtain a verdict, court will not set it aside. *Haley* v. *Riley*, Do. 71. *Bosworth* v. *Philips*, Blac. 784.

or by special agreement between the parties.

So if proceedings have been stayed by agreement for a limited time to enable defendant to pay the debt, on default of which plaintiff was to proceed; this is out of the rule of court, and in such case, at whatever stage of the cause the agreement might be made, the proceedings may be renewed at the expiration of the time without a term's notice, else it would, in effect, be a stay of proceedings for a whole term beyond the time agreed on. *Watkins* v. *Heydon*, Blac. 762.

(B) When

(B) When Plaintiff is compelled to give Notice of Trial. (B)

When plaintiff is compelled to give notice.

By the practice of the King's Bench, although iſſue may be joined early enough in the term for plaintiff to give notice of trial for the ſittings after or for the next aſſizes, he is not bound ſo to do; the rule being, that no notice of trial need be given until the term ſucceeding that in which iſſue was joined. *Hall* v. *Buchanan*, 2 D & E. 734.

Not till the next term after iſſue joined.

In C. B. otherwiſe.

But in the Common Pleas, plaintiff muſt give notice of trial the ſame term, if iſſue is joined early enough in the term to give ſuch notice. *Frampton* v. *Payne*, 1 H. Bl. 65.; but he has the whole of the next term after iſſue is joined to try his cauſe in. *Baker* v. *Newman*, 1 H. Bl. 123.

Nor can judgment as in caſe of nonſuit be moved for till the third term. *Da Coſta* v. *Ledſtone*, 2 H. Bl. 558.

Notice neceſſary, though day fixed for trial;

Notice of trial muſt be given by the plaintiff, notwithſtanding a ſpecial day is fixed for the trial by rule of court. *Ellis* v. *Truſtler*, Blac. 798.

or plaintiff hath undertaken peremptorily.

And although the plaintiff hath undertaken peremptorily to proceed to trial at the next aſſizes, yet it is neceſſary for him to give notice of trial: and if without ſuch notice defendant attends with his witneſſes, &c. and plaintiff does not proceed to trial, and defendant afterwards obtains judgment as in caſe of a nonſuit, he will not be allowed his coſts for attending and ſubpœnaing witneſſes and the like. *Iſfield* v. *Weeks*, 1 H. Bl. 222.

(C) Of the Form of the Notice, and to whom to be given. (C)

In (naming the court), between A. B. plaintiff, and C. D. defendant.

Of the form of the notice, how and to whom to be given;

Take notice of trial in this cauſe for the ſitting after this preſent Hilary term, to be holden at Weſtminſter-Hall in and for the county of Middleſex, (or as the caſe may be, ſpecifying if it be at the aſſizes, when and where to be holden, as for the next aſſizes to be held at in and for the county of)

Yours, &c.

To ——, defendant's attorney. *Plaintiff's attorney.*

on back of iſſue or piece of paper.

This notice may be given on the back of the iſſue, or afterwards on a ſeparate piece of paper.

No preciſe form requiſite.

There is no ſettled preciſe form of notice required. It is ſufficient if it appriſes defendant with certainty that plaintiff means to proceed to trial; it is indifferent whether he ſays, I *renew* or I *continue* the former notice, (even though the former

mer notice be a bad one and not capable of continuance,) provided there be ſufficient time, according to the rules of the court, given by the laſt notice. *Tyte* v. *Steventon*, Blac. 1298.

Not ſo ſtrict in form if on iſſue.

At the back of the iſſue was written, Take notice of trial at the next aſſizes; and, though there was no date or county or attorney's name mentioned, yet, being indorſed on the back of the iſſue, the court held it good, but that it would not be ſo on a ſeparate paper. *Henbury* v. *Roſe*, Str. 1237.

When plaintiff may give notice on the pleadings, and for what it ſhall ſerve.

If plaintiff concludes to the country on defendant's plea, he may give notice of trial on the back of the pleading, C. B. Trin. 2 Geo. 1.; and if the ſpecial plea be afterwards waived and general iſſue given, the notice which was given on the ſpecial iſſue ſhall ſerve for the trial of the general iſſue.

Notice of trial upon the iſſue ſhall ſerve for notice of executing a writ of inquiry if the book is returned with a demurrer, Hil. 8 G. 1. B. R. Hil. 6 G. 1. C. B.; but then plaintiff ought to give notice of the time and place of executing the inquiry.

To whom notice of trial to be given; to the attorney; to defendant;

Notice of trial muſt be given to defendant's attorney, or his agent, if he has appeared, or is known, *Lee* v. *Bradford*, Bar. 300.; but, if not known, it may be given to the defendant himſelf. *Harding* v. *Stafford*, Say. 133. *Higgins* v. *Stewart*, Cooke, 62.

to the agent.

If the notice of trial be given on the iſſue book, it muſt be given to the agent in town; becauſe the iſſue can be delivered no where but in town; but, if given afterwards, it may be given either to the attorney in the country or the agent in town. So may countermands of notices of trial, or notices of executing writs of inquiry, or countermands. *Taſhburn* v. *Havelock*, Bar. 306.

Attorney muſt acquaint his client thereof, or attachment will go.

Defendant moved the court for an attachment againſt his attorney for not acquainting him that he had received notice of trial, whereby plaintiff obtained a verdict without defence. It appeared, on ſhewing cauſe, that the omiſſion was owing to the neglect of the attorney's agent; but the court held *that* to be no defence for the attorney, as he is anſwerable to his client, and his agent to him; the party in this caſe ought not to be put to his action, but the matter ſhould be determined in a ſummary way. Let an attachment go. *Collins* v. *Griffin*, Bar. 37.

(D) Of continuing Notice of Trial.

Of continuing notice of trial.

By R. Mich. 1654, C. B. and N. on R. in 4 Ann. B. R. if notice of trial be given in London or Middleſex for one ſitting

ſitting, and plaintiff be not prepared to proceed, if he give notice before that ſitting that he will try it the next ſitting, that ſhall be held a convenient notice.

Its origin.

The idea of *continuing* notices of trial aroſe from the above rules; which allow a plaintiff who has given notice of trial at one ſitting, (but finds himſelf unprepared,) to give freſh notice for the next ſitting, though the intermediate time ſhould be leſs than the rules of the court require upon an original notice; but the word *continue* is not to be found in the rule, ſo that it is not a technical term, but a mere colloquial expreſſion. *Tyte* v. *Steventon*, Blac. 1299.

Its operation.

A continuance, therefore, operates as a ſhort notice of trial; for if there be time to countermand and give freſh notice, there is no occaſion for a continuance.

When continuance can be given.

Notice of trial, therefore, can only be continued in cauſes to be tried in London or Middleſex, as well, indeed, by the words of rule, as by reaſon of the thing; for in a country cauſe, if not tried at the firſt aſſizes, there is time to give freſh notice before the next. So it can only be (properly ſpeaking) from one ſitting in term to the next, or from the laſt ſitting to the ſitting after term; and not from the ſittings after term to the ſittings in the following term, as in ſuch caſe there is time to give freſh notice, Prac. Reg. 396.; but yet where ſuch notice of continuance was given, as the time was ſufficient, the word *continue* was held not to vitiate it, and therefore it was deemed good. *Boys* v. *Twiſt*, Bar. 292.

How operate as freſh notice.

No continuance a ſecond time.

The plaintiff cannot continue his notice of trial a ſecond time; that is, he ſhall give ſhort notice of trial but once. Ib. *Green* v. *Gifford*, Str. 1119.

At what time to be delivered.

Notice of continuance muſt be delivered within the ſame time as notice of countermand. Str. 1119.

There muſt therefore be two days notice of continuance, Monday for Wedneſday. *Price* v. *Bambridge*, Bar. 297.

Cannot continue after countermand.

Plaintiff's attorney gave notice as follows: I hereby countermand my notice of trial given for the ſecond ſitting within this term, and continue the ſame till the third ſitting, &c.; defendant made no defence, and moved to ſet aſide the verdict. *Per cur.*—After a notice is countermanded it cannot be continued, the verdict muſt be ſet aſide. *Smith* v. *Hoff*, Bar. 301.

A good continuance of a bad notice of trial, will not avail, though a former good notice of trial had been given.

Proper notice of trial was given and countermanded; a ſecond notice was given, but therein the name of the cauſe was omitted. The ſecond notice was afterwards continued, and the name of the cauſe inſerted in the continuance, and thereupon the cauſe was tried. The court was of opinion that

that the second notice, being bad, could not be helped by the continuance, and set aside the verdict.

The form of notice of continuance may be as follows:

Form of continuance.

Mr. ——

Take notice, that I do hereby continue the notice of trial given you in this cause for the first sittings in this present Hilary term to the second sittings in the said term. Dated day of

To Mr. —— *Yours, &c.*

Defendant's attorney. *T. S. plaintiff's attorney.*

(E)

(E) Of countermanding Notice of Trial.

Of countermanding notice of trial.

If the cause is to be tried at the sittings in London or Westminster, and defendant resides within forty miles of London or Westminster, two days notice of countermand before it is to be tried, is sufficient.

When notice must be countermanded.

But if the cause is to be tried at the sittings, and defendant does reside above forty miles, then six days notice of countermand is necessary. 14 G. 2. c. 17.

In all country causes to be tried at the assizes, six days notice of countermand is necessary. 14 G. 2. c. 17. The above is the time in both courts.

Different from the old practice.

But before the above statute of 14 G. 2. the practice as to the time of countermanding in country causes was very different. In C. B. two days before commission-day held good, *Goodright* v. *Hoblyn*, Bar. 298.; and in K. B. four days before the assizes, *Whitlock* v. *Humphreys*, Str. 849.

How the days reckoned.

The two or six days of countermand, as above, are to be reckoned one inclusive and the other exclusive. Ibid.

Not given on Sundays.

No such notice must be given on a Sunday. *Dighton* v. *Dalton*, Cook 15.

Whether Saturday for Monday good. Q.

But in C. B. notice of countermand, in a town cause, given on Saturday for the Monday was held good. *Stafford* v. *Thompson*, Pract. R. 395. But Mr. Impey, in his Practice of C. B. 331. doubts its regularity.

To whom to be given.

A countermand of notice of trial may be given to the attorney in the country. *Tashburn* v. *Havelock*, Bar. 306.

The Form of Notice of Countermand.

Form of countermand.

In the , (*mention name of court*), *A. B. plaintiff, and C. D. defendant.*

Take notice, that I do hereby countermand the notice of trial given in this cause. Dated, &c.

Yours &c. *T. S. plaintiff's attorney.*

To Mr. W. S. defendant's attorney.

After trial and verdict for plaintiff, defendant moved to set it aside for irregularity in notice of trial; but he had, since the verdict, given a rule to tax costs thereon. Gould and Nares Just. held that to be a waiver of the irregular notice; but no opinion was given thereon, as the officers of the court doubted, and judgment was given on another point. *Tyte* v. *Steventon*, Black. 1298. Q. What a waiver of irregular notice?

If plaintiff give notice of trial, and does not proceed on that notice, by going to trial accordingly, or continuing, he cannot try the cause without new notice as before, unless by consent or rule of court. R. M. 1654. When new notice necessary.

But if cause was made a *remanet*, no occasion for new notice, defendant is bound to attend till it is tried. When not.

(F) Of Costs for not proceeding to Trial. (F)

In case plaintiff gives notice of trial, and does not go to trial accordingly, the defendant upon motion shall have his costs of attendance, &c. taxed, unless the plaintiff countermand his notice in convenient time, or shew cause to be allowed by the court in excuse of such costs. N. on R. Mich. 1654. Of costs for not proceeding to trial.

If plaintiff gives notice, and does not proceed to trial, whereby costs are taxed for defendant, and afterwards gives fresh notice, (perhaps with design to put defendant to further costs,) yet the court will not stay the trial till the first costs are paid, (except in ejectment,) because the defendant has remedy for them; and if the plaintiff should not try the cause pursuant to his second notice, the defendant will again have costs, and the like remedy to obtain them. N. on R. Mich. 4 Ann.; but see the case of *Smith* v. *Lidcot*, post (N). How far court will stay proceedings on fresh notice till costs of first are paid.

If defendant enters a *ne recipiatur*, costs are to be paid, because the default is in plaintiff in not entering his cause in due time. *Duel* v. *Stow*, P. R. 406. In what cases, and by whom costs to be paid.

If both plaintiff and defendant give notice of trial, and neither go on to trial, both will be entitled to costs. *Reading* v. *Grafton*, P. R. 405.

An executor plaintiff is liable to these costs, as well as other plaintiffs. *Ogle* v. *Moffatt*, Bar. 133. Executor liable.

If a cause goes off *pro defectu juratorum*, or at a future trial defendant obtains a verdict, he shall be allowed on taxation the costs of the first attendance, &c. as either plaintiff or defendant might have prayed a tales; and this in both courts. *Sparrow* v. *Turner*, 2 Wil. 366.

But if there has been a regular countermand, no costs allowed. When costs not allowed, if a countermand.

Or

If any excuse.

Or if plaintiff can shew a reasonable excuse.

As where it appeared that one material witness was served with a subpœna, and could not attend, and another was disabled by a fall from his horse, plaintiff not being guilty of any wilful default. *Ogle* v. *Moffatt*, Bar. 133. Or that two of his witnesses were disabled by the gout. *Jones* v. *Stephenson*, Ib. 316.

Costs not allowed for a witness who set out before countermand of notice of trial which was given in time. *Hester* v. *Hall*, Bar. 307.

If cause be a remanet.

Nor where the cause is made a *remanet*, or referred, unless agreed to abide the event of reference. *Bracher* v. *Cotton*, Cook 131.

Pauper not liable.

A pauper not liable to such costs, but you may move to dispauper him. *Taylor* v. *Lowe*, Str. 983.

If defendant obtains a rule for costs for not going to trial, he shall not have a rule for judgment as in case of a nonsuit. *Ogle* v. *Moffatt*, Bar. 316.

But if any subsequent laches is made, a judgment as in case of a nonsuit may then be applied for.

How to proceed for costs for not going to trial.

If defendant wishes to move the court against plaintiff for costs for not proceeding to trial, proceed as follows:

In B. R.

Prepare affidavit, stating, "*That the action was commenced in Michaelmas term; that Hilary term issue was joined, and notice of trial given thereon for the sittings after the said term; and that plaintiff did not proceed to trial, nor countermand such notice.*"

Give brief to counsel, with affidavit annexed, to move for rule, which is granted in first instance, fee 10s. 6d. *Get rule from clerk of rules, and an appointment from master to tax the costs; if not paid on demand, made by defendant's attorney on plaintiff himself, move for an attachment (on affidavit* (a) *of*

In C. B.

Get treasury rule of secondary, or brief to serjeant, with 10s. 6d. *fee to move for rule, which is granted of course; an affidavit is not necessary in the first instance. Get appointment of prothonotary to tax costs, and serve the same with copy of rule on plaintiff's attorney. At the time of attending prothonotary, agreeable to appointment, carry an affidavit similar to that in the K. B. and proceed in the same after taxation of costs, to demand the same of plaintiff, and on refusal to make affidavit* (a) *thereof, and move for attachment for not paying costs, in pursuance of prothonotary's* allocatur;

(a) Form of Affidavit.

Form of affidavit.

A. B. of, &c. and E. F. of, &c. severally make oath, and say, and first the deponent A. B. for himself saith, That on Monday last he did personally serve the above-named plaintiff with a true copy of the rule, and the master's (or prothonotary's) allocatur thereon, hereto annexed, and at the same time shewed him the said original rule, and allocatur thereon; and that he this deponent then demanded of him the costs allowed by the master (or prothonotary) on the said rule, but that the said plaintiff did not then, nor at any time since, pay the

of such demand and refusal) for not paying costs, agreeable to the master's allocatur. *It is absolute in first instance, and when obtained, must be carried to the crown office, where attachment will be made out; your own officer will execute it; pay him one guinea.*

tur; serjeant's fee 10s. 6d. *The attachment is signed by the prothonotaries, and is made returnable on a day certain; the proceedings are by original.*

The demand of costs to be paid must be at the same time the rule is served. *Britton* v. *Dickinson*, Bar. 120.

How rule may be drawn up.

The rule may be drawn up payable to the defendant or his attorney; but if payable to both, and the money on demand is refused, the defendant and his attorney must join in the affidavit for an attachment.

By whom affidavit to be made.

When the costs are taxed, a demand must be made by the defendant, if the rule is payable to him; if to either him or his attorney, either of them may make the demand; but, in such case, both should join in the affidavit, the one swearing to the demand and refusal, and the other negativing the receipt of the money. Imp. C. B. 339.

The rule of court and master's allocatur should be affixed to affidavit, but a copy will do if sworn by the affidavit to be a true copy annexed.

The affidavit (a) for an attachment must be drawn with correctness.

What it must state.

It must state that the defendant was served personally with a rule, and that the original was shewn to him at the same time. *The King* v. *Smithies*, 3 D. & E. 351.

It must shew the day of service and demand precisely;—"on or about such a day," not sufficient. *Bretts* against *Wadham*, 2 Wil. 227.

It may be amended.

But it may be amended if insufficient. Ib.

Where court will stay proceedings, and not compel defendant to sue out attachment.

Defendant moved, that plaintiff might go on to trial without first paying the costs of a former notice. The court at first seemed to think, that defendant ought to have applied by way of attachment for the plaintiff's not paying costs; but yet, as it appeared the plaintiff was already in custody, so that the attachment would be but of little service, the court made a rule to shew cause why he should not be hindered; which was afterwards made absolute. *Smith* v. *Lidcote*, 1 Barn. 44.

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the same to this deponent; and the same now remains unpaid to this deponent. And this deponent E. F. for himself, saith, That he hath not received the said costs, or any part thereof, but the same now remains due and unpaid to this deponent.

(a) See preceding note.

In

In general attachment for not paying coſts agreeable to the maſter's allocatur is a rule abſolute in the firſt inſtance; but if it be for the payment of any balance of money, as what is found by the maſter to be due on an annuity tranſaction, or the like, it is only a rule *niſi*.

Section III.

Of carrying down the Record by Proviſo.

In what caſes to be had.

It is in general true, that the defendant in any action is not entitled to a writ of *niſi prius* unleſs the plaintiff has made default in proceeding to trial; but in every action wherein the defendant is equally an actor with the plaintiff, as in replevin, prohibition, and *quare impedit*, the defendant may ſue out a writ of *niſi prius* although plaintiff has not made ſuch default.

Why ſo called.

And this is called carrying down the record to trial by proviſo; becauſe in the *venire facias* directed to the ſheriff, there is a proviſo to the following effect: "And have there the names of the jurors and this writ; *provided* always, that if two writs ſhall thereupon come to you, one of them only you return and execute," &c.

Of the ſtatute 7 & 8 W.

By ſtat. 7 & 8 W. 3. c. 32. if any defendant be minded to bring the iſſue to trial, (when, by courſe in any of the ſaid courts, he may lawfully do the ſame by *proviſo*,) he may of the iſſuable term next preceding ſuch intended trial to be had at the next aſſizes, ſue out a new *venire facias* to the ſheriff by *proviſo*, and proſecute the ſame by writ of *habeas corpora*, or *diſtringas*, with a *niſi prius*, as though there had not been any former *venire* ſued out or returned in that cauſe, and ſo *toties quoties* as the matter ſhall require.

Formerly uſual remedy.

Formerly, therefore, trial by *proviſo* was the only way defendant had to get rid of an action if plaintiff neglected carrying the record down to trial. And this was done by obtaining a rule upon ſuch default made by plaintiff, for record to be made up by *proviſo*.

Now ſuperſeded by ſtat. 14 G. 2.

But now the old mode of trial, except in certain caſes, is ſuperſeded by the more ſummary mode of moving for judgment, as in caſe of a nonſuit: which remedy, in caſe plaintiff does not proceed to trial, according to the practice of the court, is given by ſtat. 14 Geo. 2. c. 17.

but only in certain caſes.

I ſay it is ſuperſeded, *except in certain caſes*, for the ſtatute does not extend to all caſes, but only to thoſe wherein plaintiff has been guilty of a default in not proceeding to trial, and

and wherein defendant at common law was entitled to try by *proviſo*, by reaſon of ſuch *default*.

In all caſes, therefore, where both parties are actors, and where defendant, in the firſt inſtance, is entitled to try by *proviſo*, defendant muſt ſtill reſort to trial by *proviſo*, and cannot have judgment as in caſe of a nonſuit; for in ſuch, plaintiff is no more obliged to carry down the record than defendant; as in actions of replevin. *Jones* v. *Concannon*, 3 D. & E. 661. When ſtill neceſſary, if both parties are actors;

So wherever the ſtatute has been once complied with, though a ſubſequent default ſhould be made by plaintiff, defendant muſt reſort to his common-law remedy of trial by *proviſo*. if ſtatute has been complied with,

Now the ſtatute is complied with, by the plaintiff having once carried down the record to trial. and record once carried down.

Whenever, therefore, this has been done, though the cauſe was not determined at the trial, and it may be neceſſary for the final deciſion to carry it down again, yet if plaintiff ſhould neglect ſo to do the ſecond time, defendant cannot have judgment as in caſe of a nonſuit, but muſt reſort to the trial by *proviſo*; as where plaintiff was nonſuited at the trial, but nonſuit was afterwards ſet aſide, and plaintiff neglected to go to trial again. *The King* v. *Pippet*, 1 D. & E. 492.

So where the cauſe was made a *remanet* by defendant's conſent. *Newburn* v. *Langley*, 3 D. & E. 1.

So where plaintiff obtained a verdict, but the verdict was afterwards ſet aſide. *Porzelius* v. *Maddocks*, C. B. T. R. 101.

Trials by *proviſo*, therefore, are ſtill frequently neceſſary.

To carry down the record by *proviſo*, a rule for that purpoſe muſt firſt be obtained—"*Fiat niſi prius per proviſo ſi querens fecit defaltam*," which is given by the maſter at the back of the iſſue, and entered at clerk of rules. *Dodſon* v. *Taylor*, Str. 1055. Rule for trial by proviſo.

But this rule need not be got before notice of trial is given; it is ſufficient if defendant has it any time before the trial; for the only uſe of it is, that if two records are carried down to trial, the one by plaintiff and the other by defendant, the former only ſhould be tried. *The King* v. *Pippet*, 1 D. & E. 696. When it muſt be obtained.

Indeed, in criminal trials, where the defendant carries the record by *proviſo*, no ſuch rule is obtained at all. *Ibid.* Notice in criminal caſes;

And in the caſe in Str. 1055. above cited, though nonſuit was ſet aſide in a civil cauſe for want of ſuch rule, yet it was then ſaid to be the old practice, but generally diſcon- otherwiſe in civil.

tinued. In the case of *Proude* and *Willimot*, before that period, trial was set aside for want thereof. 1 Barn. 18.

What notice of trial necessary.

If defendant proceeds by *proviso*, he must give the same notice of trial in all cases as plaintiff would have been obliged to give, R. East. 1651. *Swale* v. *Leaver*, C. B. P. R. 388.; and if after notice he does not proceed to trial, nor countermand in due time, he is liable to pay plaintiff his costs. *The King* v. *Pippet*, 1 D. & E. 696.

If both parties give notice.

If defendant gives notice of trial by *proviso*, and plaintiff also gives notice, and neither of them proceed, both shall be entitled to their respective costs. *Reading* v. *Grafton*, P. R. 305.

Court, on motion, will suffer defendant to carry down record to try issue out of chancery.

There was an issue directed by the court of Chancery, which defendant was desirous of trying, but which (it was suggested) plaintiff wished to delay; and, on that ground,

Gibbs moved, that the defendant might be at liberty to carry the record down to trial at the next assizes; observing, that by the common law defendant could not carry it down by *proviso*.

The court thought the application reasonable, and granted the rule absolute in the first instance; saying, that the plaintiff would not be damnified by it, for that if he chose to take the record down himself, the costs of this application must be paid by defendant. *Humpage* v. *Rowley*, 4 D. & E. 767.

Section IV.

Of putting off the Trial.

Trial, when it may be put off.

"There is no crime so great," said Lord Mansfield (Blac. 514.), "nor proceedings so instantaneous, but "that upon sufficient grounds the trial may be put off." But of this sufficiency the court will be first well satisfied. The most usual ground is the absence of a material witness, and even in this instance it is only allowed under particular restrictions.

Usual ground, absence of witness.

Of the affidavit in such case.

There must be an affidavit of the fact; and thereby it must appear, 1st, That the witness is really a material one for the defendant in the cause; 2d, That the party who applies has not been guilty of any neglect in procuring him; and, 3dly, That there is a reasonable expectation of his returning by the time to which the trial is prayed to be put off.

1st, The

1ſt, The mere ſwearing that the witneſs is a material witneſs, as deponent believes, without any thing further, was held inſufficient. *Gray* v. *Holton*, Bar. 437. And even where the affidavit was, "That A. B. and C. D. are ma-"terial witneſſes for defendant in this cauſe, without whoſe "evidence defendant cannot ſafely proceed to trial, as de-"fendant is adviſed and verily believes," was held bad; becauſe the belief ſeemed to go through the whole, as well to A. B. and C. D. being material witneſſes as to the other neceſſary part of the affidavit, that the party cannot ſafely make defence without their teſtimony; the former part, reſpecting A. B. and C. D. being material witneſſes, ought to be poſitively ſworn; belief as to it is not ſufficient, but as to the latter part it is. *Day* v. *Samſon*, Bar. 448.

1ſt, If muſt be ſworn witneſs is material.

The uſual way, however, now of making this part of the affidavit is, "That A. B. of, &c. is a material witneſs "for him this deponent in the ſaid cauſe, as he is adviſed, "and believes to be true, and that he cannot ſafely pro-"ceed to the trial therof without the teſtimony of him "the ſaid A. B." See form of affidavit, *poſt*, this Section.

2d, Party applying muſt have been guilty of no laches.

2d, Party muſt have been guilty of no laches.

Where it appeared that the witneſs who was ſworn to be a material witneſs went out of town or abroad, after the notice of trial was given, the court would not put off the trial for it, as the defendant might have ſubpœna'd him in time. *Bourne* v. *Church*, Bar. 442.

So court refuſed where it appeared that the defendant had conducted himſelf unfairly and been the cauſe of improper delay. *Saunders* v. *Pitman*, 1 P. & B. 33.

3d, There muſt appear reaſonable expectation of witneſs's returning in time.

3d, There muſt be reaſonable expectation of his return.

Where the witneſſes are foreigners, ſpecial ground ought to be ſhewn of the probability of their return, as the preſumption is, that they will not come back. So if they are in the army, and cannot come without ſpecial permiſſion; or, in general, if they are gone to reſide abroad, or the like, ſpecial reaſons ſhould be aſſigned why they are likely to return. *Rex* v. *D'Eon*, Blac. 515.

If a foreigner.

For the above caſes differ from the ordinary caſes of Engliſh witneſſes being accidentally gone abroad, or gone for a ſmall time only, and expected to return to their own country, their natural home and reſidence. N. Burr. 1516.

And even in thoſe caſes, if the witneſs is likely to ſtay any time, as where one was gone to the Eaſt Indies for eighteen months, court will not grant rule *niſi* on common

If gone abroad for length of time.

affidavit, but defendant must make a special case, stating the nature of the demand, and what it is the witness can prove; which, if the court do not think sufficient, they will not put off the trial. *Lord* v. *Cooke*, Blac. 436.

If any suspicion in the case.

If the usual form of affidavit is observed, and there is no special ground of suspicion, the rule goes of course; but if there be such ground, it is refused, unless the party will go into further and minuter circumstances; or if it appear that there is an affected delay, the rule is also then refused. *Rex* v. *D'Eon*, Blac. 514.

For men take such latitude to swear in the common form, that where a suspicion arises from the nature of the question, or from contrary affidavits, the court will examine into the ground upon which the delay is asked, and this both in criminal and civil cases. *Ib.* Burr. 1514.

Who may make affidavit.

It was formerly held, that defendant himself must, and that no third person could make the affidavit. *Easter* v. *Uppington*, Bar. 437.

But this strictness was afterwards dispensed with, as there were many cases where a third person could swear a witness to be a material one, and defendant himself could not; as where a factor sells goods for his principal, and employs a porter to deliver them, the factor knows the porter to be a material witness, but the principal does not. *Day* v. *Sampson*, Bar. 448.

But generally speaking defendant must make affidavit.

When motion to be made.

The motion for putting off the trial ought to be made two days at least before the day of trial. *Bourne* v. *Church*, Bar. 442. *Sellon* v. *Chamberlayne*, Bar. 444. *Roberts* v. *Kilsborough*, Bar. 438.

Exception to rule.

But when it appeared the fact of the witness being material, did not come to defendant's knowledge time enough to move two days before the last day appointed for trial, it was put off, though cause was called on and made a *remanet* by consent. *Hart* v. *Whitlock*, Bar. 452.

To what time trial generally put off.

The usual practice is for the trial to be put off till the next term, and not for a longer period; when plaintiff must apply again, if he finds it necessary. *Stratford* v. *Marshall*, Bar. 440.

In the above case, indeed, it was put off for a longer time, on affidavit that defendant would not return before; but there is a note saying, that the common practice was otherwise.

Affidavits read, though not taken before commissioner.

On motion to put off a trial, the court suffered affidavits to be read taken before a vice-consul abroad. Such affidavits are constantly received and read at the council board; nor

is

is it reasonable to expect that such sort of affidavits should be taken before commissioners. *Corish* v. *Kennedy*, Bar. 466.

But in other cases, if justice requires it, the court will put off the trial.

Trial put off because attorney was ill.

Trial was put off because the attorney for defendant was so ill as not to be able to attend. *Hayley* v. *Grant*, Say. 63.

How to proceed in obtaining rule to put off trial.

In K. B. it does not seem absolutely necessary to give notice of the intended motion, as it is merely a rule to shew cause, but it is the best way to do so. In C. B. notice and affidavit of service is necessary.

Notice may be to the following effect:

In *A. B. defendant, against C. D. plaintiff.*

Form of notice of motion.

Take notice, that this honourable court will be moved on *next, or to-morrow, as the case may be, or so soon after as counsel can be heard, that the trial of this cause may be put off until next term, on account of the absence of a material witness on behalf of defendant. Yours, &c.*

Then prepare affidavit (which should be made by defendant, unless abroad or under special circumstances) as follows:

In the *A. B. plaintiff, and R. D. defendant.*

Form of affidavit.

T. S. of, &c. the defendant in this cause, maketh oath, and saith, that issue was joined in this cause this present Hilary term, and that notice of trial was given for the last sittings within the said term: And this deponent further saith, that R. W. late of, &c. is a material witness for him this deponent in the said cause, as he is advised, and believes to be true; and that he cannot safely proceed to the trial thereof without the testimony of him the said R. W.: And this deponent further saith, that he hath endeavoured to find the said R. W.; that he hath been to the house of the said R. W. and was informed that he was gone to Norwich in the county of Norfolk, and that he this deponent hath sent there for the purpose of subpœnaing him; but that the said R. W. is gone from thence, as this deponent hath heard, and verily believes to be true; and that he this deponent cannot get any information where the said R. W. is, but is informed, that he will be at home in two months; and that he this deponent expects to be able to procure the presence of the said R. W. within the first sittings of next Easter term.

Having obtained rule *nisi*, serve copy on plaintiff's attorney, shewing the original rule; and if no cause shewn, make rule absolute in usual way, on affidavit of such service.

Section V.

Of making up the Record, ſuing out Jury Proceſs, entering Cauſe for Trial, and of Remanets.

(A) Of making up the Record for Trial, and paſſing ſame.

(B) Of ſuing out Jury Proceſs, *Venire, Diſtringas, Habeas Corpora Juratorum,* &c.

(C) Of entering Cauſe for Trial.

(D) Of the Cauſe being made a *Remanet.*

(A) (A) Of making up the Record for Trial, and paſſing ſame.

Of making up record for trial.

The *niſi prius* roll, or record, contains all the pleadings *verbatim*, awards of jury proceſs, and other things in the courſe of the cauſe, engroſſed on parchment, with a double half-crown ſtamp; it is now made up by the attorney, though formerly by the clerks in court.

The *niſi prius* record is made up in the following manner:

How niſi prius record made up.

If a country cauſe.

In B. R.

(When by bill.)

(a) *Pleas before our Lord the King at Weſtminſter, of* Michaelmas *term (the term in which iſſue is joined) in the 37th year of the reign of our Sovereign Lord George the Third, by the grace of God, &c. and in the year of our Lord* 1797.

Roll 410. *Mansfield & Way.*

The number of the roll got, at time of entering iſſue; for which ſee ante, Sec. 2. (D) of this Chapter.

Buckinghamſhire, to wit. Be it remembered, &c. (copy the memorandum and the whole iſſue from the iſſue or paper book verbatim *to the end of the award of the* venire, *and day given, &c. then enter another* placita *in this manner):*

For the reaſon why in B. R. there is a ſecond

Pleas before our Lord the King at Weſtminſter, of the term of Saint

In C. B.

(When againſt indifferent perſons not privileged,) prothonotaries' names.

Pleas at Weſtminſter before Sir James Eyre knight, and his companions, juſtices of our Lord the King of the Bench, of Hilary term in the 37th year of the reign of our Sovereign Lord George the Third, by the grace, &c.

Roll 350.

Buckinghamſhire, C. L. late of &c. gentleman, was attached to anſwer R. R. of a plea, &c. and whereupon the ſaid R. complaineth, that whereas, &c. (to the end of the iſſue and award of venire).

In this court the placita *is written but once, at the beginning, unleſs*

(a) Theſe are called the *placita*, and in every record to be made up there muſt be two, the one preceding the iſſue which is to be of that term in which the iſſue is joined, the other of the term the cauſe is to be tried; but if the cauſe is to be tried of the ſame term in which iſſue is joined, then the two placitas are to be of that term.

Saint Hilary (the term the cauſe is to be tried) in the 37th year of the reign of our Sovereign Lord George the Third, by the grace, &c. and in the year of our Lord 1797.

Buckinghamſhire, to wit. The jury between A. B. by his attorney, plaintiff, and C. D. defendant, of a plea of treſpaſs on the caſe, (or as the cauſe of action may be,) is reſpited before our Lord the King at Weſtminſter, until (a)

unleſs his Majeſty's juſtices aſſigned to hold the aſſizes in the county aforeſaid, ſhall firſt come on (the day of aſſizes) at (the place where holden) in the ſaid county, according to the form of the ſtatute in that caſe made and provided for default of the jurors, becauſe none of them did appear; therefore let the ſheriff have the bodies of the ſaid jurors to make the ſaid jury between the parties aforeſaid at the ſame place: And be it known, that the writ of our ſaid Lord the King in this caſe upon record, was delivered to the under-ſheriff of the county aforeſaid, the day of (the laſt day of the term the laſt placita *was of) in this ſame term, before our Lord the King at Weſtminſter, to be executed according to law at his peril.*

leſs on a change * *or death of the chief juſtice, or an old record, in which caſe a ſecond* placita *is written of the term in which the cauſe is to be tried; therefore a ſpace for ſuch* placita *ſhould be left.*

placita, and not in C. B. See Appendix N.

to wit. The jury between R. R. plaintiff and C. L. late of &c. gentleman, in a plea of (as the caſe may be), is reſpited here until (a)

unleſs our Lord the King's juſtices aſſigned to take the aſſizes in the county aforeſaid, by form of the ſtatute in ſuch caſe made and provided, ſhall come before, on (the day of the aſſizes) at (the place where to be holden) in the county aforeſaid, for default of the jurors, becauſe none came; therefore let the ſheriff have the bodies of the ſeveral perſons mentioned in the panel annexed to the writ of habeas corpora juratorum: *And be it known, that the juſtices here in this ſame court in this term, delivered a writ thereupon to the deputy of the ſheriff of the county aforeſaid, to be executed in due form of law, &c.*

(a) The return of the diſtringas in B. R. and habeas corpora juratorum in C. B. and which ſhould be the next return after day of trial.

If the cauſe is a town cauſe, to be tried either at Weſtminſter Hall or Guildhall, record is ſame *mutatis mutandis*, only *jurata* will be as follows:

How niſi prius record made up, if a town cauſe.

In B. R.

Middleſex, to wit. The jury between A. B. plaintiff and C. D. defendant,

In C. B.

Middleſex. to wit. The jury between R. R. plaintiff, and C. L. late

* Form of *placita* on the removal of the chief juſtice in term: Pleas at Weſtminſter before Sir James Eyre knight, and his brethren, juſtices of his Majeſty's court of Common Bench, in fifteen days of Eaſter, in three weeks from the day of Eaſter, and in one month from the day of Eaſter; and before Sir Henry Gould knight, and ——— Heath knight, juſtices of the ſaid court, from the day of Eaſter, in five weeks in Eaſter term in the 37th year of the reign of our Sovereign Lord George the Third, by the grace of God, of Great Britain, France, and Ireland, King. Defender of the Faith, &c.

defendant, in a plea of *is respited before our Lord the King at Westminster until, &c. (the return of* distringas,) *unless the right honourable Lloyd Lord Kenyon, his Majesty's chief justice assigned to hold pleas before the King himself, shall first come, on* *(the day of the sittings), at Westminster Hall in the said county, according to the form of the statute in that case made and provided for default of the jurors, because none of them did appear.*

In a town cause, the sciendum *at the end of the* jurata *is omitted in B. R.*

late of *, &c. gentleman, in a plea of* *, are respited here until in fifteen days of the day of Easter, (return of* hab. corp. jur.) *unless Sir James Eyre, the King's chief justice of the bench here assigned by form of the statute in such case, shall come before, on Tuesday the* *day of* *(the day of the sittings), at Westminster in the great Hall of Pleas there, commonly called Westminster Hall, in the said county of Middlesex, for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the several persons mentioned in the panel annexed to the writ of* habeas corpora juratorum: *And be it known, that the justices here in this same court in this term, delivered a writ thereupon to the deputy of the sheriff of the county aforesaid, to be executed, &c.*

If the trial is in London instead of Westminster Hall, say, the Guildhall of the city of London aforesaid, &c.

How nisi prius record made up when proceedings by original in B. R. or by bill in C. B.

When the suit is in B. R. by original there is no memorandum at the beginning, as when by bill (for the reason of which, see *ante*, p. 389); so that the record in such case is similar to the common way in the court of Common Pleas; and when the suit in C. B. is by bill, as against officers, privileged persons, &c. the record is then made up like the records in the King's Bench, (when by bill,) beginning with a memorandum.

(A. 1)

(A. 1) *Of passing the Record.*

Of passing the record.

In B. R.

When the record is engrossed, you make an incipitur *of the issue on a King's Bench roll, by entering thereon the term issue is joined with warrants of attorney for plaintiff and defendant, and part of memorandum of issue: this is done in pursuance of R. Mich. 5 Ann. then take the record roll and the draft of the issue to the clerk of the judgments in the King's Bench office, who will enter the issue and mark the roll record and issue paper; to*

In C. B.

When the nisi prius *record is prepared, it must be carried with warrants of attorney to clerk, who will mark it, then to the prothonotaries' office, who will sign record, for which pay* 1s. *and* 2s. *a count for entering issue, or* 8d. *per sheet if special, and no entries paid for; the clerk will give you a roll to enter pleadings thereon to be done at a future period; then go to the clerk of the treasury at the chief justice's chambers, who will*

to whom is paid for entering the iſſue, if it does not exceed ten ſheets, 3s. 6d. *and for every ſix more* 1s.

If the iſſue ſhould be of an old term, and entries not paid for, get number-roll of Mr. Edge, term iſſue is joined, make out docket for entry, and docket ſame with the clerk of the judgments.

The record being ready to be ſealed, it muſt be carried to the niſi prius *office, where it is examined, ſealed, and paſſed; for which is paid* 7s. 6d. *for the firſt eight ſheets, and* 7s. *for every eight ſheets after, and* 6d. *to the ſealer; and on a country cauſe, if above three weeks from the end of term,* 2s. *for judge's warrant.*

If at the aſſizes, the iſſue is entered the ſame as before, and record is paſſed at the ſame office with the clerk of the circuit in which the cauſe is to be tried; get the venire *returned in town with the under-ſheriff, and then ſend it down and enter it for trial as directed* poſt (C).

No record of niſi prius *for trial of any iſſue at the aſſizes ſhall be ſealed after the end of three weeks after the iſſuable terms. Trin.* 31 *Car.* 2.

will examine and ſee that the jurata *is rightly entered, and ſeal the record; pay at ſittings* 1s. *at aſſizes* 6s.; *alſo* 2s. *for firſt three ſheets, and* 4d. *every other ſheet, and* 2s. 2d. *for ſeal, and* 2s. *for a judge's warrant, if it be three weeks after term.*

The clerk of the treaſury, by Reg. Hil. 2 & 3 *Ja.* 2. *ſhall not ſign or ſeal any record of* niſi prius *unleſs the ſame ſhall be firſt ſigned or ſtamped by the clerk of the warrants; and the record is not to be ſigned before the iſſue is entered. Mich.* 1654.

Records of niſi prius *for trials at the aſſizes ſhall be ſigned by the reſpective prothonotaries, and ſigned and ſealed by the clerk of the treaſury, within three weeks after the end of the iſſuable terms. Trin.* 29 *Car.* 2.

But now by a judge's order, for which you pay 2*s.* the record may be ſealed at any time before the aſſizes.

All the pleadings in the cauſe muſt be regularly entered on *niſi prius* record, the ſame as in iſſue or paper book; ſo that if there has been judgment of *reſpondeas ouſter* in a plea of abatement, and defendant pleaded over, or if proceedings on a demurrer, they muſt be all ſet forth; for which ſee *ante*, Sect. 1. of this Chapter. Ld. Raym. 329.

All pleadings muſt be entered on record.

If there are ſeveral defendants, and they ſever in plea, plaintiff may, if he pleaſe, enter a *nol. proſ.* as one defendant, at any time before the record is ſent down to be tried. *Greeves* v. *Rolls*, Sal. 457.

If ſeveral defendants, and they ſever, a nol. proſ. may be entered;

So if one plead bankruptcy, and the other a different plea, plaintiff may enter *nol. proſ.* as to the bankrupt, and proceed to final judgment againſt the other. *Noke and another* v. *Ingham*, 1 Wil. 89.

ſo if one plead bankruptcy.

If

If one die, it must be suggested on record.

If one of the defendants die after issue joined and before trial, it must be suggested on the roll by 8 & 9 W. 3. c. 11. s. 7. But if properly suggested on the plea roll, though not so accurately set forth on *nisi prius* record, it is enough. See *Far* v. *Denn*, Burr. 363.

How if there be a variance between issue and nisi prius record.

If there be a variance between the issue book delivered in paper, and the record of *nisi prius*, it ought to be mentioned or objected to at the trial; for if the cause be tried, the court on that account will not set aside the verdict: and if the record of *nisi prius* had been wrong, the court would have amended it by the roll, after a verdict and defence made. *Leeman* v. *Allen*, 2 Will. 160.

If the record of *nisi prius* agrees with the declaration delivered, a variation from the issue is not material. *Sheply* v. *Marsh*, Str. 1131. and 2 Wil. 160.

Though but a few years before it seems to have been held otherwise.

No defence was made at trial because of a variance (in issue delivered on a promissory note, the name of the indorser was omitted, though inserted on the record of *nisi prius*). Rule absolute to set aside the verdict. *Wreathock* v. *Bingham*, Bar. 476.

The *similiter* was left out in the issue delivered, though inserted in the record of *nisi prius* verdict without defence; and on a rule to set aside for the variance, the court were of opinion, that no statute of jeofails extends to it, it is a material variance, and defendant relied on it. Rule to set it aside absolute. *Rye* v. *Crossman*, Bar. 476. So where it was left out in record of *nisi prius*. *Cooper* v. *Spencer*, Str. 641.

(B)

(B) Of suing out Jury Process, *Venire*, &c.

Of suing out jury process. Intention thereof.

The intent of the *venire* and jury process is to procure a jury to try the matter in issue between the parties. The writs are directed to the sheriff, commanding him to cause a jury to come at the time and place therein mentioned.

Whence a jury formerly came;

Formerly, indeed, the jury were obliged to be collected from the very hundred or neighbourhood where the cause of action arose *de vicineto*, as it is called.

how altered by statute.

But, by the statute 4 & 5 Ann. c. 16. the *venire* is to be awarded of the body of the proper county where the issue is triable in civil actions (excepting upon penal statutes); and by 24 G. 2. c. 18. it is extended to actions and informations on penal statutes also.

So

So that now the jury may come from any part of the county where the cauſe is to be tried.

By R. E. 1651. ſheriffs are ordered upon the return of every *venire facias* to cauſe ſufficient ſummons to be given unto all jurymen that are by them returned upon any juries for the preventing of *tales*.

By 7 W. 3. ſheriffs are to ſummon jurors ſix days before they are required to ſerve, or liable to forfeit 10*l.* by 4 & 5 W. & M. c. 24.

The 7 W. 3. and 3 G. 2. c. 25. direct how conſtables are to make returns of liſts of perſons liable to ſerve on juries.

When the record is engroſſed, proceed as follows:

In B. R.

The plaintiff's attorney muſt make out writs of venire facias *and* diſtringas, *which are on a* 2s. 6d. *ſtamp each, and may be had at any law ſtationer's ready printed, price* 2s. 8d. *Theſe writs are not to be ſigned. Pay ſealing at ſeal office,* 7d. *each.*

If the cauſe be tried in London or Middleſex, venire *is to be teſted the firſt return of term in which cauſe is to be tried, and returned ſome return-day before trial; the* diſtringas *muſt be teſted on the return-day of the* venire, *and returnable the next return-day after trial. If at aſſizes,* venire *muſt be teſted the firſt return-day preceding the aſſizes, and returnable the laſt day of that term; the* diſtringas *muſt be teſted on the return-day of* venire, *and returnable the firſt return of the next term after the aſſizes.*

If in London or Middleſex, the venire *is taken out by plaintiff's attorney in order to be allowed him in coſts, but never uſed or ſealed. In London, carry* diſtringas *to one of the compters; pay ſheriff for returning it* 4s. 4d. *if common;* 4s. 8d. *if ſpecial. In Middleſex, carry ſame to the ſheriff's office in Took's court; pay there returning* 14s. 8d. *If in a country cauſe,* venire *is returned by*

In C. B.

How to proceed in ſuing out jury proceſs in both courts.

The plaintiff's attorney muſt make out writs of venire facias *and* habeas corpora, *which are on a* 2s. 6d. *ſtamp each, and may be had at any law ſtationer's, price* 2s. 8d. *The* venire *is ſigned by prothonotary; pay him* 1s. 4d. *The* habeas corpora *is ſigned by the clerk of the* habeas corporas; *pay, when in London or Middleſex,* 2s.; *if at the aſſizes,* 1s. 9d. *No* præcipe *is made for the office on theſe writs.*

How the writs are to be teſted, &c.

If cauſe not tried at time mentioned in habeas corpora, *you make out a new writ. If you carry the old writ to the officer you ſave* 1s. 1d. *Pay ſealing at ſeal office,* 7d. *each.*

If cauſe to be tried in London or Middleſex in term, venire *is to be teſted the firſt return of term in which cauſe is to be tried, and returned ſome return-day before trial; the* habeas corpora *muſt be teſted on the return-day of the* venire, *and returnable the next return-day after trial. If after term,* teſte *of* venire *may be firſt day of term, and returnable laſt general return-day; and* teſte *of* habeas corpora *an* quarto die poſt *of return-day of* venire, *and returnable firſt general return after cauſe tried. If at aſſizes,* venire *muſt be teſted the firſt return-day of the term preceding the aſſizes, and returnable the*

by ſheriff's deputy in town, and the diſtringas *by the under-ſheriff in the country.*

the laſt day of that term; the habeas corpora *muſt be teſted on the return-day of* venire, *and returnable the firſt return of the next term after the aſſizes.*

If in London or Middleſex, the venire *is taken out by plaintiff's attorney in order to be allowed him in coſts, but never ſigned, ſealed, or uſed. In London, carry* habeas corpora *to one of the compters; pay ſheriff for returning it* 4s. 6d. *In Middleſex, carry ſame to the ſheriff's office in Took's court; pay there returning* 12s. *If in a country cauſe,* venire *is returned by ſheriff's deputy in town, and the* diſtringas *by the under-ſheriff in the country.*

The forms of the ſeveral writs are as follow:

In B. R.

Form of venire. *George the Third, by the grace of God, of Great Britain, France, and Ireland King, Defender of of the Faith, &c. to the ſheriff of Middleſex, greeting: We command you, that you cauſe to come before us at Weſtminſter, on next after (ſome return-day before the day of trial, if a country cauſe, the laſt day of the term) twelve free and lawful men of the body of your county, each of whom has ten pounds by the year of lands, tenements, or rents, at the leaſt, by whom the truth of the matter may be the better known, and who are nowiſe of kin either to A. B. the plaintiff, or to C. D. the defendant, (the parties muſt be deſcribed as in the pleadings,) to make a certain jury of the county between the parties aforeſaid, of a plea of treſpaſs on the caſe, (or whatever the action is,) becauſe as well the ſaid C. D. as the ſaid A. B. between whom the matter in variance is, have put themſelves upon that jury; and have there then the names of the jurors, and this*

In C. B.

George the Third, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c. to the ſheriff of Eſſex, greeting: We command you, that you cauſe to come before our juſtices at Weſtminſter, on the Morrow of the Purification of the Bleſſed Virgin Mary, twelve free and lawful men of the body of your county, each of whom has ten pounds of lands, tenements, or rents by the year, at leaſt, by whom the truth of the matter may be better known, and who are in nowiſe of kin either to A. B. the plaintiff, or to C. D. late of, &c. or to E. F. late of, &c. (if the defendant be declared againſt with an alias dict. *or as an executor or adminiſtrator, he muſt be here deſcribed, as in the pleadings,) to make a certain jury of the county between the parties aforeſaid, in a plea of (as the caſe may be), becauſe as well the ſaid C. D. and E. F. (the party who firſt takes the iſſue) as the ſaid A. B. between whom the matter in variance*

this writ. Witneſs, Lloyd Lord Kenyon, at Weſtminſter, day of (the firſt day of the term) in the 37th year of our reign.

Manſfield & Way.

riance is, have put themſelves upon the jury; and have there the names of the jurors, and this writ. Witneſs, Sir James Eyre knight, at Weſtminſter, the 23d day of January in the 37th year of our reign.

(Prothonotary's Name.)

How if ſheriff be intereſted.

If there are two ſheriffs, and one is a party or intereſted, by being related to either of the parties, or the like, *venire* ſhould be awarded to the other only; or if both are intereſted, or there be only one ſheriff, then to the coroner of the county; and if both ſheriff and coroner are intereſted, then the *venire* ſhould be awarded to eliſors, two perſons choſen by the maſter in K. B. or prothonotary in C. B. (upon motion in court) for that purpoſe. *Holland* v. *Heron*, Bar. 465.

But in theſe caſes there is a ſpecial ſuggeſtion and award of the *venire* on the iſſue, ſo that it is only following the ſame in making up the record. *Vide*, Of the Iſſue, Sect. 1. of this Chapter.

How if Welch iſſue.

If it be a Welch iſſue, and award of *venire* into next Engliſh county, the *jurata*, *venire*, and *diſtringas* are the ſame as in common caſes.

How if record carried down by proviſo.

If the defendant carries down the cauſe by proviſo, the writ runs thus: "And have here the names of the jurors, "and this writ;" provided always, that if two writs ſhall thereupon come to you, that you only return one of them to our ſaid court before us, if in B. R. or to our ſaid juſtices at Weſtminſter, if in C. B. at the time aforeſaid.

In B. R.

The form of a diſtringas juratores *is as follows:*

George the Third, &c. to the ſheriff of Middleſex, greeting: We command you, that you diſtrain (a) *the bodies of the ſeveral perſons named in the panel hereunto annexed, jurors ſummoned in our court before us, between A. B. plaintiff, and C. D. defendant, by all their lands and chattels in your bailiwick, ſo that neither they, nor any one of them, do intermeddle therewith, until you ſhall have other command in that behalf; and that you anſwer to us for the iſſues of the ſame, ſo that you*

In C. B.

The form of a habeas corpora juratorum *is thus:*

George the Third, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c. to the ſheriff of M. greeting: We command you, that you have before our juſtices at Weſtminſter, from the day of Eaſter in fifteen days, (the next return after the trial,) or before the right honourable Sir James Eyre knight, our chief juſtice aſſigned to hold pleas in our court of the Bench, by force of the ſtatute in that caſe provided, if he ſhall come before, on the

Form of diſtringas in B. R. and habeas corpora juratorum in C. B. If cauſe at Weſtminſter.

(a) If it is a ſpecial jury, here ſay, A. B. of, &c. C. D. &c. (and ſo on, going through the maſter's or prothonotary's liſt exactly,) merchants, jurors ſummoned, &c.

you have their bodies before us at Westminster, on (the first return-day after the trial), or before our right trusty and well-beloved Lloyd Lord Kenyon, our chief justice, assigned to hold pleas in our court before us, if he shall first come, on the day of (the day of trial), at Westminster Hall in the county of Middlesex aforesaid, according to the form of the statute in such case made and provided, to make a certain jury between the said parties, of a plea of trespass on the case, and to hear their judgments of many defaults; and have you there the names of the jurors, and this writ. Witness, Lloyd Lord Kenyon, at Westminster, the day of (the return-day of the venire) *in the 37th year of our reign.*

Mansfield & Way.

the day of (the day of the fittings), at Westminster Hall in your county, the bodies of several persons named in the panel annexed to this writ, jurors, summoned in our court, before our justices at Westminster, between A. B. plaintiff, and C. D. late of, &c. and E. F. late of, &c. of a plea of taking and unjustly detaining cattle, (as the case is,) to make that jury, and have there this writ. Witness, Sir James Eyre knight, at Westminster, the 12th day of February in the 37th year of our reign.

(Prothonotary's name.)

If in London; If in London, the *distringas* or *habeas corpora* run thus: "At the Guildhall of the city of London aforesaid."

or at assizes. If at the assizes, thus: "Or before our justices assigned to hold "the assizes in your county, if they shall first come on (the "commission-day), at (place where assizes held) in your "county, according," &c.

If action by original in B.R. If the action is by original in B.R. you make the *venire* and *distringas* returnable *ubicunq.* or "wheresoever we "shall then be in England;" put in the defendant's addition, and leave out the word "then," at the conclusion of the writ.

How on traverse of inquisition out of Chancery. Upon the traverse of an inquisition sent out of Chancery to be tried in B.R. the *venire facias* must be made returnable on a general return-day, not on a day certain. *Rex* v. *Roberts*, 1 Wil. 77.

Distringas amendable; The *distringas* is amendable; the *distringas* in debt was *de placito*, with a blank, and after verdict held amendable, Ld. Raym. 1143. the *venire facias* being right.

So habeas corpora juratorum; Motion to amend the writ of *habeas corpora juratorum*, after the trial, returnable on Wednesday next after eight days of the Purification, instead of Wednesday in fifteen days of Easter; and on shewing cause, the rule was made absolute for the amendment. *Waldo* v. *Harrison*, Bar. 5.

So jurata in record of nisi prius amendable. The writ of *habeas corpora juratorum* being wrong, in the day of *nisi prius* had been ordered to be amended; and afterwards

wards it was moved to amend the *jurata* in the record of *nisi prius*. The court were of opinion, that as the writ was amendable by the ſtatute 5 Geo. and was amended, and the day of *niſi prius* thereby rightly appointed, the *jurata*, which is not an award of the court, but only to annex the proceedings, and is wrong by miſpriſion of the clerk, ought to be amended and made agreeable to the writ; and the amendment was ordered. *Ib.*

At what time they ought to be amended:

The cauſe was at iſſue, and the record of *niſi prius*, *habeas corpora*, and *jurata* were all made up for trial at a certain ſitting; but the cauſe not coming on to be tried at that day, the plaintiff's attorney ought to have altered the record of *niſi prius* writ and *jurata* for a future day of ſitting, but neglected ſo to do, or to reſeal the ſame, although he was appriſed thereof; ſo the cauſe was tried at a future day, and it appeared, upon the face of the *jurata*, &c. that the cauſe was tried after the day of *niſi prius* mentioned therein, and there was a verdict for the plaintiff; and now plaintiff moved to amend the *habeas corpora* and the *jurata*, and the defendant moved to ſet aſide the verdict. But, on ſhewing cauſe, the whole court were clearly of opinion, that the trial was *coram non judice*, and diſcharged the rule for an amendment, but were of opinion, that they ought *ex officio* to order a *venire de novo* to be awarded; which was ordered accordingly. *Crowder* v. *Rooke*, 2 Wil. 144.

too late after verdict;

but a venire de novo will be awarded.

If a fair and impartial trial cannot be had in the county where *venue* is laid, court may be moved not to change the *venue*, but to award the *venire* into another county; which is done by the party entering a ſuggeſtion on the roll, wherein ſhould be ſuggeſted, upon the record, the facts, proving that ſuch impartial trial could not be had otherwiſe. *Rex* v. *Harris*, Burr. 1332.

In ſome caſes, though venue not changed, venire will be ordered to be awarded into another county.

It is uſual alſo, in ſuch caſes, to change the *venue*. See tit. *Venue*.

(B. 1) *Of Jury Proceſs in Counties Palatine.* (B. 1)

When a cauſe of action ariſes in a county palatine, and the *venue* is laid there, the trial muſt be had by a jury of the palatinate; but as the king's writ does not run there, the record is ſent by a writ of *mittimus* to the juſtices of the county palatine, commanding them to cauſe a jury to be ſummoned to try the iſſue between the parties, and to return the ſame, when tried, to the courts at Weſtminſter, for the parties to hear judgment thereon.

Of jury proceſs in county palatine.

Record ſent by mittimus.

In this caſe there is always a ſpecial ſuggeſtion on the iſſue, and ſpecial award of the *mittimus* (See *ante*, Sect. 1. of this

Suggeſtion for that purpoſe.

this Chapter); the *mittimus* itself, which is the only writ sued out here, is now sent, (the record being passed in same manner as other records are,) and is in the following form:

Form of mittimus to a county palatine.

George the Third, &c. to our justices of our county palatine of Chester, greeting: The tenor of a certain record before us at Westminster, between A. B. plaintiff, and C. D. defendant, in a plea of trespass on the case, we send you inclosed herein, commanding that you, (having inspected the same,) by our writ of our said county, do command the sheriff of the same county, that he cause twelve free and lawful men of the body of the county, to come before you at your next session after this writ shall be delivered to you, each of whom having 10l. *a year at least of lands, tenements, or rents, by whom the truth of the matter may be the better known and inquired into, and who are in nowise related either to the said A. or to the aforesaid C. to recognize and make a jury of the county between the said parties in the plea aforesaid, because as well the said A. as the said C. between whom the said controversy is, have put themselves upon that jury; and also that you make such further process against the said jurors so to be impanelled, between the said parties as are in this behalf used and commonly made, according to the law and custom of the said county, until the issue aforesaid between the said parties shall be fully tried; and when the verification and issue aforesaid shall be there made and tried before you, then do you send the record of the said plaint, together with every thing that shall then and there be done before you therein, and also this writ before us at Westminster at a certain day which you shall appoint to the said parties to be there to hear judgment thereupon. Witness Lloyd Lord Kenyon, &c.* Mansfield & Way.

The venire and habeas corpora are made out there.

This writ is signed with Messrs. Provost and Webb, and sealed.

Signing 1s. 8d. seal 7d.

What actions to be tried in county palatine, and to what regulations subject.

Although all local actions arising in a county palatine must be tried there, yet such trial is subject to the same exceptions and regulations as in other counties; as if an impartial trial cannot be had, the *venire* may go to the next English county, where the King's writ run. Vide *King* v. *Amery*, 1 D. & E. 366.

How far cause of action must arise there.

It is observable, that there is no instance, except that of the *King* and *Johnson*, where the court has ever sent a record by *mittimus* to be tried in a county palatine where the fact did not arise there; and Mr. Just. Buller said in the above case, he very much doubted the power of the court to do it.

It is not quite clear when the doctrine of sending records by *mittimus* into county palatine was first taken up, but in 11 W. 3. (12 Mod. 313.) the court expressly said, that they could not order a trial in the county palatine of Lancaster, and therefore they sent the record to be tried in Yorkshire, as being the next county.

Wherever the cause of action arises in Wales, and the *venue* laid in any county there, it has been before observed, that the *venire* is awarded into the next English county. See Sec. 1. of this Chapter.

As to the meaning of the expreſſion of the next Engliſh county, it is ſufficiently explained in Plow. 200. where the reaſon given for directing the *venue* to the ſheriff of Hereford was, becauſe the town of Cardiff was in the county of Glamorgan in Wales, *where a ſheriff of this kingdom of England cannot intermeddle.* From this reaſon it is manifeſt, that it muſt be the next Engliſh county where the king's writ of *venire* runs. That is the only way of accounting for the Welch cauſes having always been tried in the next Engliſh county where the *venire* runs, and not in Cheſter, though, in fact, that is nearer to Wales. *Per* Buller J. in the caſe of *The King* v. *Amery*, 1 D. & E. 368.

(C) Of entering Cauſe for Trial.

(C)

Of entering cauſes for trial;

If the cauſe is to be tried in London or Middleſex,

in London or Middleſex;

In B. R.

It muſt be entered in the marſhal's book at Lord Kenyon's chambers in Serjeants-Inn, Chancery-lane; pay 11s. 8d.; *at which time the record, with the* diſtringas *and pannel annexed, muſt be left with marſhal.*

In C. B.

It muſt be ſet down with the chief juſtice's marſhal; pay 13s. 9d. *leave the record and hab. cor. jur. with pannel annexed with him.*

At ſittings in term;

If to be tried at the ſittings in term, it muſt be entered

Two days excluſive before the day of ſuch ſitting.

Two days incluſive of the day on which it is entered before ſuch ſitting.

at ſittings after term.

If to be tried at the ſittings after term, it muſt be entered, and the record delivered to the marſhal.

If in Middleſex, the firſt day of the ſitting after term.

If in London, two days before the adjournment-day in London. Id.

Whether in Middleſex or London, two days at leaſt before the adjournment-day. Hil. 32 *G.* 3.

Of the ne recipiatur.

If the cauſes be not entered in proper time, defendant may enter a *ne recipiatur*, or marſhal may refuſe to receive them.

A *ne recipiatur* may be entered in C. B. after eight o'clock in the evening of the ſecond day preceding the adjournment-day. Hil. 32 G. 3.

And if it be a ſpecial jury cauſe, the rule for a ſpecial jury muſt be drawn up, and the cauſe marked as a ſpecial jury in the marſhal's book of cauſes before the adjournment-day after each term. R. Trin. 30 Geo. 3.

If plaintiff be hindered from trying his cauſe by the defendant's entering a *recipiatur*, the plaintiff may try it at the next ſitting, if in London or Middleſex, upon giving notice to the defendant or his attorney, on the day of the ſitting on which it ſhould have been tried, before the riſing of the court. R. Mich. 4 Ann.

A *ne recipiatur* ſhall be allowed to be entered for the ſittings at *niſi prius* after every term, unleſs the records of *niſi prius* and the writs be made up and brought into court on or before the ſittings reſpectively. Hil. 8 Geo. 1. C. B.

Every cauſe to be tried at *niſi prius* in London and Middleſex, ſhall be tried in the order in which it was entered, beginning with *remanets*; unleſs it ſhall be made out to the ſatisfaction of the judge in open court, that there is reaſonable cauſe to the contrary; who, thereupon, will make out ſuch order for the trial of the cauſe ſo put off as to him ſhall ſeem juſt; notice to be given by the clerk of *niſi prius*. Mich. 17 Geo. 2. B. R. The ſame in C. B. Hil. 14 Geo. 2.

If to be tried at aſſizes.

If the cauſe is to be tried at the aſſizes,

In B. R.	*In C. B.*
After having paſſed the record as before, and having got the venire *returned in town with the under-ſheriff, ſend* diſtringas *and* venire *into the country with the record, carry the writ and record to the judge's marſhal at the judge's lodgings at the aſſize town, and there enter them together, pay* 4s. 8d.	*Having paſſed the record, as in the other caſes, and got* venire *returned, ſend it with the record into the country, the ſheriff will return the* habeas corpora juratorum *in the country, take them all to judge's marſhal at aſſize town, and have them entered.*

In every cauſe to be tried at the aſſizes the writ and record ſhall be entered together, and no record ſhall be received without the writ. T. 10 & 11 Geo. 2.

All country cauſes muſt be entered before the ſitting of the court, on the day after the commiſſion-day, except in Norfolk and Yorkſhire; in which counties they may be entered any time before the ſitting of the court on the ſecond day after the commiſſion-day. R. H. 14 Geo. 2.

But by R. H. 32 Geo. 3. in Norfolk and Norwich ſuch writs and records muſt be delivered to and entered with the marſhal before the firſt ſitting of the court on the day next after the commiſſion-day.

A liſt of the cauſes when entered ſhall be made by the marſhal and fixed up in ſome public place in the *niſi prius* court, there to remain during the whole time of the aſſizes. R. H. 14 G. 2.

(D) Of

(D) Of the Cauſe being made a *Remanet*. (D)

How, if the cauſe be made a *remanet* in town. How, if cauſe made a remanet in town.

In B. R.

If the cauſe is not tried the day of the ſitting, it is then made a remanet *by the marſhal, of courſe he alters the* jurata, *pay him* 5s. *get the* diſtringas, *alter the return to the day of the next ſitting, (if it be a proper return-day,) if not, the next day; re-ſeal it, pay* 1s. *annex it to the record again, as there is no occaſion for the ſheriff to return a new pannel, nor is there occaſion for a new ſtamp.*

In C B.

If the cauſe is not tried the day of the ſitting, you muſt apply to the marſhal to get it made a remanet, *pay him* 4s.; *get your* habeas co-pora juratorum, *and alter the return to the next return-day after the next ſittings, and re-ſeal it, pay* 1d.; *annex it to the record again, and get the clerk of the treaſury, Mr. Jefferies, to alter the* jurata *to the ſame return as the* habeas corpora juratorum; *there is no occaſion to have a new pannel returned, nor a new ſtamp.*

How, if a *remanet* in the country. In the country.

If the cauſe is made a *remanet* at aſſizes, application muſt be made to the aſſociate for the record, to which are annexed the *venire*, *diſtringas*, and pannel; make the proper alterations in the returns and day of the ſittings therein; then carry the record to the *niſi prius* office to be re-ſealed, and the *venire* and *diſtringas* to the ſeal office, where is paid for re-ſealing each one penny; annex them together, and leave them again with the aſſociate, to whom is paid 5*s.* for making it a *remanet*.

Whenever cauſe is a *remanet*, it is abſolutely neceſſary to alter the *jurata*. See the caſe of *Crowder* v. *Rooke*, before cited. 2 *Wil.* 144.

By R. E. 33 Geo. 3. it is ordered, that the writs of *diſtringas* and the records in cauſes, which ſtand over from one ſitting to another, be regularly re-ſealed previous to the ſitting to which they ſtand over, or in default thereof the cauſes be not tried.

It is now ſettled in both courts, (though formerly otherwiſe,) that in all caſes, where a cauſe goes down to trial, and goes off upon any occaſion without the fault, contrivance, or management of the parties, and is afterwards brought down again to trial, the coſts of ſuch former abortive going to trial ſhall be taxed and allowed to the party finally prevailing, in the ſame manner as if the cauſe had gone off upon a *remanet*. *Burchall* v. *Bellamy*, Burr. 2693. Before it was confined to the ſingle caſe of a *remanet*. How as to coſts in caſe of remanet, or the cauſe going off on other grounds.

And on trials by *proviſo*, where plaintiff and defendant both carry down the record at the ſame time, the trial ſhall On what record to proceed when trial by proviſo.

be on the plaintiff's record, if he enters it with the marſhal; but if he refuſes or omits to enter it, defendant may proceed on his record.

Section VI.

Of Special Juries.

Introduction of ſpecial juries.

Special juries were originally introduced in trials at bar, when the cauſes were of too great nicety for the diſcuſſion of ordinary freeholders, or where the ſheriff was ſuſpected of partiality, though not upon ſuch apparent cauſe as to warrant an exception to him. 3 Blac. Com. 357.

And indeed before the ſtatute of 3 Geo. 2. as appears by the preamble, it was doubted whether ſpecial juries could be had in any common cauſe at *niſi prius* without conſent.

Now to be had in any caſe; but unleſs judge certifies, coſts not allowed.

Now, indeed, it may be had in all caſes; but unleſs the judge at the trial be of opinion that it is a cauſe of ſufficient importance to warrant a ſpecial jury, he will not certify, and the party will not be allowed the *extra* coſts thereof, though he have a verdict.

Stat. 3 Geo. 2. c. 25. as to ſpecial juries.

By the 3 Geo. 2. c. 25. ſ. 15. "Whereas ſome doubt "hath been conceived, touching the power of his Majeſty's "courts of law at Weſtminſter, to appoint juries to be ſtruck "before the clerk of the crown, maſter of the office, pro-"thonotaries, or other proper officer of ſuch reſpective "courts, for the trial of iſſues depending in the ſaid courts, "without the conſent of the proſecutor or parties concerned "in the proſecution or ſuit then depending, unleſs ſuch "iſſues are to be tried at the bar of the ſaid courts; Be it "declared and enacted by the authority aforeſaid, that it "ſhall and may be lawful to and for his Majeſty's courts of "King's Bench, Common Pleas, and Exchequer at Weſt-"minſter reſpectively, upon motion made on behalf of his "Majeſty, his heirs or ſucceſſors, or on motion of any "proſecutor or defendant in any indictment, or information "for any miſdemeanor, or information in the nature of a "*quo warranto*, depending, or to be brought or proſecuted "in the ſaid court of King's Bench, or in any information "depending or to be brought or proſecuted in the ſaid court "of Exchequer, or on the motion of any plaintiff or plain-"tiffs, defendant or defendants, in any action, cauſe, or "ſuit whatſoever depending or to be brought and carried "on in the ſaid courts of King's Bench, Common Pleas, "and Exchequer, or in any of them; and the ſaid courts

" are hereby reſpectively authorized and required, upon mo-
" tion as aforeſaid, in any of the caſes before-mentioned, to
" order and appoint a jury to be ſtruck before the proper
" officer of each reſpective court, for the trial of any iſſue
" joined in any of the ſaid caſes, and triable by a jury of
" twelve men, in ſuch manner as ſpecial juries have been,
" and are uſually ſtruck in ſuch courts reſpectively, upon
" trials at bar had in the ſaid courts; which ſaid jury, ſo
" ſtruck as aforeſaid, ſhall be the jury returned for the trial
" of the ſaid iſſue."

Stat. 24 Geo. 2. c. 18. As to ſpecial juries, and judge certifying.

By the 24 Geo. 2. c. 18. " The perſon or party who ſhall
" apply for a ſpecial jury, ſhall not only bear and pay the
" fees for ſtriking ſuch jury, but ſhall alſo pay and diſcharge
" all the expences occaſioned by the trial of the cauſe by
" ſuch ſpecial jury; and ſhall not have any other or further
" allowance for the ſame, upon taxation of coſts, than ſuch
" perſon or party would be entitled unto in caſe the cauſe
" had been tried by a common jury, unleſs the judge, be-
" fore whom the cauſe is tried, ſhall, immediately after the
" trial, certify in open court, under his hand, upon the back
" of the record, that the ſame was a cauſe proper to be
" tried by a ſpecial jury."

And, by the ſame ſtatute, " No perſon that ſhall ſerve
" upon a ſpecial jury, or be returned, ſhall be allowed, or
" take for ſuch ſerving on any ſuch jury, more than the
" judge who tries the cauſe ſhall think reaſonable, not ex-
" ceeding 1*l.* 1*s.* excepting cauſes where a view hath been
" directed."

How to get ſpecial jury.

If a ſpecial jury is required, get counſel's ſignature to brief indorſed, To move for ſpecial jury; it is a matter of courſe, pay 10*s.* 6*d. go for rule thereon at clerk of rules in B. R. or ſecondary in C. B. and then get appointment from the maſter in B. R. or prothonotary in C. B. to nominate the forty-eight; ſerve copy on attorney of the other ſide, and alſo on the ſheriff; pay maſter or prothonotary and ſheriff two guineas each; then clerk will make out copies for each party, pay* 2*s.* 6*d. in B. R.* 5*s. in C. B. When you are ready to ſtrike, procure another appointment from the maſter or prothonotary; ſerve copy of rule again, with the ſecond appointment on the oppoſite attorney; attend accordingly on maſter or prothonotary, who will ſtrike out twenty-four,* i. e. *twelve on each ſide, plaintiff firſt objecting; and the other twenty-four will be ſpecially named in* diſtringas, *or* habeas corpora juratorum.

It is generally ſettled between the parties who ſhall ſue out the diſtringas, *or* habeas corpora juratorum. *It ſeems, however, that in C. B. the party whoſe ſpecial jury it is ſhould, in ſtrictneſs, ſue out* habeas corpora juratorum; *but in B. R. the plaintiff muſt do it, notwithſtanding it is defendant's ſpecial jury.*

On a motion for a ſpecial jury, no notice of the motion or affidavit of the facts is neceſſary.

Of the operation of the stat. 3 Geo. 2. and 24 Geo. 2.

It may be here observed, that the statute 3 Geo. 2. which is for the regulation of juries merely, gives the subject a liberty of having a special jury in all cases whatever, which before that statute was only granted under certain circumstances. This general licence being too often abused, the 24 Geo. 2. afterwards enacts, That no costs of such special jury shall be allowed, unless the judge certifies; but the manner in which that special jury is to be returned, and the other incidents relating to them, remain just the same as before the passing of that act: For the statute of 3 Geo. 2. which specifically directs in what way juries are to be returned, and the like, does not extend to special juries. The method, therefore, of proceeding by special juries is in no respect altered, but must be in the same form and in the same manner as before the act. See the case of *The King* v. *Perry*, 5 D. & E. 463.

In what time special jury should be moved for.

In C. B.

Motion in C. B. for a special jury, as of course; but, before the rule was drawn up, the secondary doubting, prayed the direction of the court; and it appearing that common jury process had been awarded, issued, and returned, and that the cause stood as a *remanet* in the chief justice's paper, the court refused to grant a special jury; though, in the country causes between assizes and assizes, the practice is otherwise. Bar. 461. *Dobson* v. *Stevens*.

So after a *venire facias* and return filed, the court held the motion for a special jury too late. *Clarke* v. *Sheppard*, Bar. 488.

After a common jury returned in Middlesex, and the cause made a *remanet* by consent, at the sitting after last term, defendant moved for a special jury, offering to take notice of trial for the second sitting in this term, and obtained a rule to shew cause, which was discharged. *Per Cur.* this has been done between assizes and assizes, but we cannot delay plaintiff in this case, without consent. Death or other accident may happen. Bar. 449. *Cross* v. *Skipwith*.

Rule in B. R.

It is observable, that the above cases are in the Common Pleas, for in King's Bench the time is fixed by a late rule of court, Trinity term 30 Geo. 3. 1790; whereby it is ordered, That no cause for the future be tried by a special jury, unless the rule for such special jury be drawn up, and the cause marked, as a special jury, in the marshal's book of causes, before the adjournment-day after each term: If either of the parties shall neglect to attend the master or prothonotary striking a special jury, the master or prothonotary, on behalf of the absent party, shall strike out twelve names. Trin. 8 W. 3. 2 Lil. Pract. Reg. 122, 123. 1 Sal. 405.

How maſter may proceed ex parte to ſtrike ſpecial jury.

Court was moved for directions to the maſter to ſtrike out twenty-four of the ſpecial jury *ex parte*, in caſe the defendant and his agents ſhould omit to attend the maſter's next appointment. The motion was founded on an affidavit of three appointments having been made, and their declining to ſtrike out *till a day ſhould be appointed for the trial.* The ſpecial jury had been nominated in laſt term, but the twenty-four had not been ſtruck out by the parties, and the cauſe was not then tried, but was intended to be tried at the ſittings after this term. The defendant's attorney attended the maſter's third appointment to ſtrike out, but declined doing it, for the reaſon above-mentioned. Lord Mansfield was clear the maſter might do it without any direction from the court, and declined giving him any in particular; but had no doubt he might do it now juſt as if he had proceeded laſt term, and that it was right for him to act as uſual, unleſs there ſhould appear any particular reaſon to the contrary. *Rex* v. *Hart*, Cow. 412.

Same jury may ſerve, though ſheriff changed.

It is no reaſon why the ſame jury ſhould not ſerve for the trial of a cauſe, which has been already ſtruck for a former intended trial, merely becauſe there had been a change of ſheriffs in the mean time. *Ibid.*

So held alſo in C. B.

If after a ſpecial jury ſtruck, the cauſe goes off for default of jurors, no new jury can be ſtruck, but the cauſe muſt be tried by the jury firſt appointed.

The King v. *Perry and others*, Mich. 5 D. & E. 453. This was an information for a libel. A ſpecial jury had been moved for, and ſtruck in the uſual manner. The information went down to trial; on calling over the ſpecial jury, only part appeared. No tales was prayed by either party, and the cauſe was made a *remanet*. In this term, Wood moved for a new ſpecial jury. On the day appointed before the maſter for ſtriking it, the defendant's attorney did not attend, and it was ſtruck *ex parte*. Erſkine afterwards moved for a rule to ſhew cauſe why Mr. Wood's motion for a new ſpecial jury ſhould not be diſcharged, on the ground that defendant wiſhed for the firſt ſpecial jury, and that he was entitled to have them by the cauſe. Bearcroft ſhewed cauſe, inſiſting, that it was a rule of courſe to ſtrike a new ſpecial jury; the ſame jury was not to attend aſſize after aſſize; that there was an end of the original *venire* and *diſtringas*, and a new one ſhould now iſſue. But Mr. J. Buller read a MS. caſe of *The King* v. *Franklin*, which was an information for the libel called the Craftſman; when this very queſtion was ſolemnly argued, and the court determined that the ſame jury ought to try the cauſe, and that neither party could inſiſt upon a new ſpecial jury, but that an *alias diſtringas* to the firſt jury ſhould iſſue.

He also mentioned the form of the *distringas*, as a reason why it should be the same jury; for, when the twenty-four are struck out of the forty-eight, and a *distringas* issues, the *distringas* is returned, with the names of the jury specially inserted, they are put on the record; and how can they afterwards be got rid of? an *alias distringas* must therefore go, and the cause be tried by them. See the above case, where the subject is fully entered into.

An action of covenant upon a charter-party was tried at the bar in Middlesex, by a special jury of the citizens of London, who all consented to be sworn, and waived any privilege as citizens of London, in not being obliged to go out of the city to serve on juries. *Lockyer* v. *E. I. Company*, 2 Wil. 136.

Section VII.

Of granting a View.

Authorized by stat. 4 & 5 Ann. and 3 Geo. 2.

The practice of granting a view is founded upon the statutes 4 & 5 Ann. c. 16. s. 8. and 3 Geo. 2. c. 25.

By the first of these it is enacted, "That in any actions "brought in her Majesty's courts of record at Westminster, "where it shall appear to the court that it will be proper and "necessary that the jurors who are to try the issues in any "such actions should have the view of the messuages, lands, "or place in question, in order to their better understanding "the evidence that will be given upon the trials of such "issues in every such case, the respective courts, in which "such actions shall be depending, may order special writs "of *distringas* or *habeas corpora* to issue; by which the sheriff, or such other officer to whom the said writs shall be directed, shall be commanded to have six out of the first twelve of the jurors named in such writs, or some greater number of them, at the place in question, some convenient time before the trial, who then and there shall have the matter in question shewn to them, by the persons in the said writs named to be appointed by the court; and the said sheriff, or other officer who is to execute the said writs, shall, by a special return upon the same, certify that the view hath been had, according to the command of the said writs."

4 & 5 Ann. c. 16.

Special writs of distringas and habeas corpora to issue for that purpose.

3 Geo. 2. c. 25. s. 14.

And by 3 Geo. 2. c. 25. s. 14. "Where a view shall be "allowed in any cause; in such case six of the jurors named "in such pannel, or more, who shall be mutually consented "to by the parties or their agents on both sides, or if they "cannot

" cannot agree, ſhall be named by the proper officer of the " reſpective courts of King's Bench, Common Pleas, Ex- " chequer at Weſtminſter, or the Grand Seſſion in Wales, " or the counties palatine for the cauſes in their reſpective " courts; or, if need be, by a judge of the reſpective courts " where the cauſe is depending, or by the judge or judges " before whom the cauſe ſhall be brought on to trial reſpec- " tively, ſhall have the view, and ſhall be firſt ſworn, or " ſuch of them as appear upon the jury to try the ſaid cauſe, " before any drawing as aforeſaid; and ſo many only ſhall " be drawn, to be added to the viewers who appear, as " ſhall, after all defaulters and challenges allowed, make up " the number of twelve, to be ſworn for the trial of ſuch " cauſe."

The 4th of Ann. does not extend to criminal caſes, ſo that in them there can be no rule for a view without conſent.

As the above ſtatutes are clearly and fully explained, and the whole doctrine of granting views ſettled and laid down in 1 Burr. 253. I ſhall content myſelf with reciting at length what that reporter has ſaid upon the ſubject.

Former inconvenience from abuſe of this privilege.

Great inconvenience had ariſen from the abuſe of views, and their being perverted into means of delay, to the intolerable hindrance of juſtice. Some late inſtances ſhewed the miſchief in a glaring light; and the example being once ſet, there was no doubt it would be followed.

Views formerly granted of courſe, and ſuppoſed that ſix of the firſt twelve muſt be viewers;

After the 4 & 5 Ann. c. 16. ſ. 8. views were granted upon motions of courſe; and upon this act, and 3 G. 2. c. 25. ſ. 14. a motion prevailed, " That ſix of the firſt " twelve upon the pannel muſt view and appear at the trial; " if they did not, there could be no trial, and the cauſe " muſt go off."

productive of delay.

Where either party wiſhed delay or vexation, he moved for a view. A thouſand accidents might prevent a view, or ſix of the firſt twelve from attending the view, or their attending the trial: he who wiſhed them not to attend, might, by various ways, bring it about. Where a defendant in poſſeſſion was well liked, and the plaintiff a ſtranger, or unpopular, gentlemen of themſelves found excuſes, eſpecially if the view was troubleſome and at a diſtance. Cauſes in ſeveral counties had, at a great expence, been repeatedly carried down and put off, either becauſe there was no view, or becauſe ſix of the firſt twelve did not attend the view, or did not attend the trial; though twelve viewers ſhould appear at the trial, yet, according to the notion which prevailed, if ſix of the firſt twelve upon the pannel were not among them, the cauſe could not be tried.

The

How abuſes remedied.

The tendency of this abuſe to delay, the vexatious expence, and the obſtruction of juſtice, was ſo manifeſt, that the court thought it their duty to conſider of a remedy: and at Mich. term 1757, and at other times, Lord Mansfield informed the bar to the following effect: "That they had "conferred together upon the abuſe of views, and conſi- "dered of a remedy in the power of the court."

How the matter ſtood before the ſtatute of Ann.

Before the 4 & 5 Ann. c. 16. ſ. 8. there could be no view till after the cauſe had been brought on to trial. If the court ſaw the queſtion involved in obſcurity which might be cleared up by a view, the cauſe was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the court, or judge at the trial, "that the nature of the queſ- "tion made a view not only proper and neceſſary;" for the judges at the aſſizes were not to give way to the delay and expence of a view, unleſs they ſaw that the cauſe could not be underſtood without one. However, it often happened, in fact, that, upon the deſire of either party, cauſes were put off for want of a view, upon ſpecious allegations from the nature of the queſtion, "that a view was proper," without going into the proof, ſo as to be able to judge whether the evidence might not be underſtood without it.

Why that ſtatute enacted.

This circuity occaſioned delay and expence; to prevent which, the 4 & 5 Ann. c. 16. ſ. 8. empowered the courts at Weſtminſter to grant a view in the firſt inſtance previous to the trial.

As a view might be of uſe, and, in this ſhape, was attended with no delay, and but little expence, it became the practice to grant them of courſe upon the motion of either party.

How 3 G. 2. conſtrued.

The 3 G. 2. c. 25. ſ. 14. provides, "That, where a "view ſhall be allowed, the jurors who have had the view "ſhall be firſt ſworn (or ſuch of them as ſhall appear) be- "fore any drawing;" which means in appoſition to ſuch other jurors as are to be drawn by ballot; and not to eſtabliſh, "that ſix at leaſt of the firſt twelve ſhall be ſworn."

This ſtrict conſtruction cauſe of abuſe.

Upon a ſtrict conſtruction of theſe two acts in practice, the abuſe, which is now grown into an intolerable grievance, has ariſen. Nothing can be plainer than the 4 & 5 Ann. c. 16. ſ. 8. The courts are not bound to grant a view of courſe; the act only ſays, "they may order it where it "ſhall appear to them that it will be proper and ne- "ceſſary."

Real conſtruction of 4 & 5 Ann. that it is diſcretionary in court to grant view.

It is infinitely better that a cauſe ſhould be tried upon a view had by any twelve, than by ſix of the firſt twelve; or by

by any ſix, or by fewer than ſix; or even without any view at all, than that the trial ſhould be delayed from year to year, perhaps for ever. It can never be proper or neceſſary to grant a view which is aſked and uſed for ſo unjuſt a purpoſe.

Abſurdity and inconvenience of the viewers neceſſarily being ſix of the firſt twelve.

There have been inſtances of great cauſes put off for years; and though even nine, ten, or eleven viewers have attended, yet upon objection, "that they were not ſix of "the firſt twelve," the cauſe has been put off, and a view moved for again, as of courſe, by the party who had availed himſelf of ſo glaring a chicane.

We are all clearly of opinion, that the act of parliament meant a view ſhould not be granted, unleſs the court was ſatisfied that it was proper and neceſſary.

How remedied, by the court being extremely ſtrict in granting a view without party entering into conſent-rule, that trial ſhall not be delayed.

The abuſe to which they are now perverted makes this caution our indiſpenſable duty; and therefore, upon every motion for a view, we will hear both parties, and examine upon all the circumſtances which ſhall be laid before us on both ſides into the propriety and neceſſity of the motion; unleſs the party who applies will conſent to and move it, upon terms which ſhall prevent an unfair uſe being made of it, to the prejudice of the other ſide, and the obſtruction of juſtice.

Lord Mansfield having made this declaration, his Lordſhip deſired the gentlemen of the bar to think of it; and if any objections ſhould occur, to mention them.

The expedient propoſed by the court was univerſally approved.

Firſt inſtance of this practice.

The firſt inſtance happened in Hilary term 1757, in a great cauſe between *Pierce* and *The Earl of Faulconberg* and others; which was an iſſue out of Chancery often tried at Durham by ſpecial juries, and now ordered to be tried at bar by ſpecial jury from Yorkſhire. (See the rule at large, together with the addition of the conſent, part *infra*, pa. 453, 454.)

Another inſtance ſhewing the utility thereof.

Subſequent to this was the cauſe of *The Earl of Darlington* v. *George Bowes* Eſq.; which was an iſſue out of Chancery, and had been thrice carried down to be tried at Durham, (where there are aſſizes only once a year,) at a great expence, and every time put off by the defendant, upon objections on account of the view. Once nine viewers appeared; but they were not ſix of the firſt twelve. Another time, only four viewers appeared at the aſſizes. In 1757, a view was granted by mutual conſent upon terms; but, by an accident (of a fall from his horſe) the judge of aſſize was prevented from trying it. The defendant Bowes moved in Trinity term 1758 for a view, but refuſed to renew his former conſent, or to come into any terms; inſiſting, that by law he was entitled to a view of courſe. The plaintiff had

had likewiſe moved for a view, conſenting to the terms: both motions were adjourned to the laſt day of the ſame Trinity term 1758; when the court, upon all the circumſtances, rejected the defendant's motion, unleſs he ſhould conſent (within a week) to the terms propoſed;—he would not conſent. The cauſe came on to be tried at Durham, without a view, before Mr. Baron Smythe. It happened many of the jurors had viewed upon ſome of the former occaſions; a verdict was given for the plaintiff to the ſatisfaction of the judge. The defendant moved the court of Chancery for a new trial, becauſe he had been refuſed a view, and becauſe it might be fit to have another trial before his inheritance was bound: Mr. Baron Smythe certified, "that he was ſatisfied with the verdict;" and alſo, "that "a view was totally unneceſſary, there being no diſpute "concerning the locality, diſcrimination, or limits of the "premiſes, but merely a queſtion, To whom certain lands "belonged?" The court of Chancery thought proper to grant another trial; but approved of denying a view, unleſs he renewed his conſent, and made it part of the order for a new trial, "that he ſhould conſent to the terms." It was again tried before Mr. Juſtice Bathurſt, and a verdict was found for the plaintiff to his ſatisfaction. The defendant moved the court of Chancery for a new trial, which was refuſed.

Had not the court put a check to granting views from time to time as of courſe, a rich defendant, conſcious that the merits were againſt him, might, from pique or humour, or litigiouſneſs, have kept off the cauſe as long as he lived for want of a view, upon a queſtion where a view could not be of the leaſt utility.

This new regulation of the mode of granting views fully approved.

The wiſdom and fitneſs of what the court had done to regulate views was ſo fully manifeſted upon the occaſion of this cauſe, and appeared to be ſo well juſtified by the authority given them by the act of parliament, and by every principle of juſtice and convenience, that no party has ever ſince moved for a view without conſenting to the terms. And it is found in experience that views are now regularly had, and a competent number of viewers appeared at the trial. A view is not aſked now, except in caſes where it may probably be of uſe: and, as the non-attendance of viewers can now gratify neither party, both concur in wiſhing the duty performed.

The rule that was made in the firſt inſtance that happened after the expedient was propoſed by the court, and was received with general approbation, as is above mentioned, was drawn up in the following words:

Saturday

Saturday next after fifteen days of Saint Hilary, in the 30th year of King George the Second. *Pierce* Esq. v. *Earl Faulconberg* and others: Form of rule entered into between the parties.

" By consent of counsel on both sides, it is ordered, That " there issue a *distringas juratores*, to be directed to the she- " riff of the county of York; in which shall be contained a " clause, commanding the said sheriff to have six or more of " the first twelve of the jurors to be impannelled and re- " turned, to try the issue between the parties at the place in " question, before the time of the trial of the said issue, to " wit, upon, &c.; and that B. R. on the part of the " plaintiff, and T. W. on the part of the defendants, shall " attend on the same day, and shew the matters in question " to the said six or more of the first twelve of the said " jurors; and that the expences of taking the said view " shall be equally borne by both parties, and no evidence " shall be given on either side at the time of taking thereof."

" And by the like consent, it is further ordered, That " in case no view shall be had, or if a view shall be had by " any of the said jurors, (whether they shall happen to be " any of the twelve jurors who shall be first named in the " said writ or not,) yet the said trial shall proceed, and no " objection shall be made on either side, either for want of " a view, or that a view was not had by any of the twelve " jurors first named, or for that it was not had by any par- " ticular number of the jurors named in the said writ, or for " want of a proper return to the said writ. The consent as to terms, no delay shall be occasioned.

" On the motion of Mr. Morton, of counsel for the plain- " tiff; and Mr. Gould, of counsel for the defendants."

The cause was tried at the bar on the 7th of May 1757, and a full jury of viewers appeared.

The above-recited rule was for a view to be had by a special jury, and was made absolute at once, being consented to by both parties: But during the remainder of the same term (of Hilary 1757), and also during the three following terms (of Easter, Trinity, and Michaelmas 1757), the court, upon proper affidavits, granted like rules *(mutatis mutandis)* in cases that were to be tried by common juries, making them only " to shew cause," not absolute in the first instance. The next term (Hilary 1758) they made some of them " to shew cause," others absolute in the first instance, but none without proper affidavits. Soon after, *viz.* in Trinity term 1758, they made all these rules absolute in the first instance; some upon affidavit, others as of course; since which time they are become motions of course, without affidavit, a counsel's mere signature being sufficient.

This regulation came into common practice; first, as a rule to shew cause; afterwards granted in first instance; now mere motions of course.

The

The form of them is as follows:

If the trial is to be by a ſpecial jury, the rule runs thus:

Form of rule, &c. in ſpecial cauſes.

"It is ordered, That there iſſue a writ of *diſtringas* "*juratores*, &c. &c. taking thereof" (in the words of the firſt clauſe of the above-recited rule between *Pierce* and *Lord Faulconberg* and others). The additional clauſe is expreſſed in theſe terms: "The plaintiff (or the defendant, *viz.* the party who prays the view) conſenting, that in caſe "no view ſhall be had, or if a view ſhall be had by any of "the ſaid jurors, whether they ſhall happen to be any of "the twelve jurors who ſhall be firſt named in the ſaid writ "or not, yet the ſaid trial ſhall proceed, and no objection "ſhall be made on either ſide on account thereof, or for "want of a proper return to the ſaid writ."

Form of rule, &c. in common jury cauſes.

The rule for a view, where the cauſe is to be tried by a common jury, could not continue the ſame ſince the balloting act (3 G. 2. c. 25.) as it was before, nor could it be exactly like that for views by ſpecial juries (by reaſon of the particular directions given by the 14th ſection of the balloting act); but it uſed to run much like it, only *mutatis mutandis*. The preſent form (ſince that act) is this: "It is "ordered, That there iſſue a writ of *diſtringas juratores*, to "be directed to the ſheriff of the county of Y. in which "ſhall be contained a clauſe, commanding the ſaid ſheriff to "have ſix or ſome greater number of the jurors to be im-"pannelled and returned, to try the iſſue between the par-"ties, who ſhall be mutually conſented to by the ſaid parties, "or their agents, at the place in queſtion, before the time "of the trial of the ſaid iſſue, to wit, upon, &c. and that "R. R. on the part of the plaintiff, and T. W. on the part "of the defendant, ſhall attend on the ſame day, and ſhew "the matters in queſtion to the ſaid ſix, or ſome greater "number of the ſaid jurors, who ſhall be mutually con-"ſented to as aforeſaid; and that the expences of taking "the ſaid view ſhall be equally borne by both parties; and "no evidence ſhall be given on either ſide at the time of "taking thereof."

The additional clauſe, now added to this rule, is in theſe words: "The plaintiff, or the defendant," (the party at whoſe inſtance the rule is prayed,) "conſenting, that in "caſe no view ſhall be had, or if a view ſhall be had by any "of the jurors, whether they ſhall happen to be ſix or any "particular number of the jurors, who ſhall be ſo mutually "conſented to as aforeſaid, yet the trial ſhall proceed, and "no objection ſhall be made on either ſide on account "thereof, or for want of a proper return to the ſaid writ." 1 Burr. 253 to 258.

In

In the Common Pleas the method is the same, except that, instead of the *distringas juratores* for a view, their process is the *habeas corpora juratorum*.

In C. B. Same practice, only habeas corpora juratorum instead of distringas.

As to the mode of obtaining the rule, give brief to counsel with 10s. 6d. *his signature is enough. Apply to the attorney on the other side for the name and place of abode, &c. of his shewer. Carry brief, with sufficient instructions as to time and place of meeting, &c. to clerk of rules, who will prepare rule. Serve copy on the attorney of the other side. Carry the original rule to sheriff's office; and, if it be a special jury, leave the names of jury at the same time; if a common jury, there is no occasion, as he knows them by the pannel: He will summon the jury agreeable to the rule.*

Mode of obtaining a view in term.

In vacation this is done by a judge's order, counsel having signed brief, as before.

In vacation.

After the merits of the cause had been determined at the assizes by a special jury, after a trial of twenty hours, defendant moved to set aside the verdict, upon affidavit that plaintiff's shewer, at a view pursuant to a rule of court previous to the trial, had misbehaved himself, by telling the viewers, This place is called Abrahall's Yat, and this Conygree-hill (which were not the places in question); and saying, These cottages pay Mr. Symons 5*d.* or 6*d.* a-year rent; defendant insisting, that nothing more than the place in question, which was one single cottage, should have been shewn to the viewers. Upon hearing counsel on both sides, the court discharged the rule; being of opinion, that on a view the shewers may shew marks, boundaries, &c. to enlighten the viewers; and may say to them, These are the places which on the trial we shall adapt our evidence to. The jury could have no light from looking at the cottage only. The question to be tried was, Whether it stood within Mr. Symons' manor, or not? Had an ancient man been produced to the viewers, and he had acquainted them that he had known the place many years, and given an account of the boundary, &c. this would have been improper, because it is giving evidence before the trial. *Goodtitle on demise of Symons* v. *Clark*, Bar. 457.

Of the conduct of the shewers who attend the viewers on the view.

Section VIII.

Of examining Witnesses on Interrogatories.

It is sometimes necessary to apply to the court for leave to examine witnesses on interrogatories; as if they are about to leave the kingdom before the trial, and not likely to return in

When necessary to examine witnesses on interrogatories.

in time, or the like; in which case, the party would be deprived of the benefit of their testimony.

Ground of application.

This application to the court is founded upon an affidavit, that such person is a material witness, without whose testimony you cannot proceed to trial, and that he is on such a day going to the East Indies (or the like); it is a rule to shew cause, which afterwards must be made absolute, in the usual way.

How leave obtained in term;

in vacation.

If in vacation, it is done by judge's order.

Other side must consent;

As this is not strictly consistent with the rules of legal evidence, it is a matter *ex gratiâ*, and can only be done with the consent of the other party.

if not, how court will relieve.

If, however, the request is reasonable and equitable, and justice is not likely to be administered without it, though the courts of law cannot immediately compel the other side to consent, yet they will prevent them from gaining any advantage by such obstinacy, and assist the party applying, by putting off the trial from time to time, until such consent be gained, or the material witness returns, or a bill in equity may be filed, or the like. *Fairly* v. *Newnham*, Do. 420.

This mode of examination allowed where witnesses live out of the reach of process;

Upon the same principle, if witnesses live out of the reach of the process of the courts, and cannot be compelled to attend, upon application of the court to have them examined before commissioners, specially appointed and approved of by the opposite party, and that such depositions should be read at the trial, if the other side will not consent, court will put off the trial for ever. *Mostyn* v. *Fabrigas*, Cow. 174.

by writ of dedimus.

In such examinations, a writ of *dedimus potestatum* issues, which is annexed to the interrogatories, and the commissioners certify the answers under their seals.

But if the attendance of witnesses can be procured, depositions must not be read.

But if the party can procure the attendance of such witness at the trial, his depositions must not be read. *How* v. *Alloni*, 12 Mod. 493.

As if a witness going to sea be examined by interrogatories before a judge, and the trial comes on before he is gone, his deposition shall not be read, but he must appear; for the rule, in such case, is made on a supposal of his absence. Sal. 691. Anon.

How to proceed when rule obtained.

When the rule is made absolute, a copy thereof must be served on the attorney of the other side, together with a notice of the time and place such witness is to be examined, and also a copy of the interrogatories to be administered to him. The other side may then also draw up interrogatories, by way of cross examination of such witness, and send them to the judge's chambers. The witness, at the time appointed, is taken to the judge's chambers, and is examined by the judge's clerk, and sworn upon the interrogatories on both sides, after which the clerk makes out copies of

of the depositions. The interrogatories must be signed by counsel, fee 1l. 1s. *and engrossed on a twelve penny stamp parchment. The depositions are afterwards produced, and read at the trial.*

The form of interrogatories for the examination of a witness.

Form of interrogatories for plaintiff;

Interrogatories for the plaintiff. } *Interrogatories to be administered to E. F. a witness to be produced, sworn, and examined on the part and behalf of A. B. plaintiff, in a certain cause, now depending in the court of our lord the King, before the King himself, against C. D. defendant therein, before Sir Francis Buller baronet, one of his Majesty's justices of the court of King's Bench, pursuant to a rule of the said court made, on next, after in the 34th year of the reign of King George the Third: (or, if an order, say, pursuant to an order of the said Francis Buller, made the day of)*

Imprimis, *Do you know the parties, plaintiff and defendant, in the title of these interrogatories named, or either of them, and which of them, and how long have you known them, either, or which of them? Declare.*

Secondly, *Do you, &c. (and so on, putting the questions necessary for his evidence).*

Lastly, *Do you know of any other matter or thing, or can you say any thing touching the matter in question in this cause, that may tend to the benefit and advantage of the complainant in this cause, besides what you have been interrogated thereto? Declare the same fully and at large, as if you had been particularly interrogated thereto.*

for defendant;

Interrogatories for the defendant. } *Interrogatories to be administered, &c. (as before).*

Great nicety is required in drawing interrogatories; and particular care must be taken, that the questions are not too leading.

Form of interrogatories for the cross examination of the same witness.

for cross examination of witnesses.

Interrogatories to be administered to and examined on the part and behalf of A. B. plaintiff, in a certain cause now depending in, &c. as before, against C. D. defendant therein, by way of cross examination to certain interrogatories to be administered to the said E. F. on behalf of the said plaintiff, before Sir Francis Buller, &c. as before, pursuant to a certain rule, &c. as before.

Section IX.

Of compelling Witneſſes to appear at the Trial.

(A) Of the Proceſs for that Purpoſe, and its Incidents.

(B) Of the Expences of Witneſſes, and how paid.

(C) Of the Remedy againſt them in caſe of Diſobedience.

(A) (A) Of the Proceſs for that Purpoſe, and its Incidents.

Of the proceſs to compel appearance of witneſſes.

As it is incumbent upon the parties in the ſuit to prove by evidence the matter in iſſue between them, and as the witneſſes, who alone can prove the material facts, may be either inimical, or at leaſt indifferent to the cauſe, or unwilling to attend, it is obviouſly neceſſary for the adminiſtration of juſtice, and the inveſtigation of truth, that there ſhould be ſome compulſory proceſs to bring in ſuch unwilling witneſſes under the terrors of puniſhment, in caſe of diſobedience.

By ſubpœna.

This proceſs, in both courts, is by writ of *ſubpœna ad teſtificandum*; the form whereof being ſomewhat different in the two courts, is as follows:

Form of ſubpœna for aſſizes. Four witneſſes may be put in one ſubpœna.

In B. R.

George the Third, &c. to A. B. C. D. E. F. and G. H. greeting: We command you, that, all and ſingular buſineſſes and excuſes being laid aſide, you, and every of you, be, and appear in your proper perſons before our juſtices aſſigned to hold the aſſizes in and for the county of Surrey, according to the form of the ſtatute, &c. on Wedneſday, the fifth day of July next, (the day of the aſſizes,) by nine of the clock of the forenoon of that day, at Guildford in the ſaid county, then and there to teſtify all and ſingular thoſe things which you and either of you know, in a certain action now in our court before us depending, between J. B. plaintiff, and T. I. defendant, (if by

In C. B.

George the Third, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c. to A. B. C. D. E. F. and G. H. greeting: We command and firmly enjoin you, and each of you, that, laying all other matters aſide, and notwithſtanding any excuſe, you be in your proper perſons before our juſtices at the aſſizes, to be held at in the county of on the firſt day of Auguſt (the firſt day of the aſſizes) next enſuing, to certify and ſpeak the truth in a certain matter of controverſy pending undetermined in our court, before our juſtices at Weſtminſter, between J. B. plaintiff, and T. I. late of , in the ſaid county of gentleman,

by original, add his addition,) of a plea of treſpaſs on the caſe (or whatever the action is) on the part of the plaintiff, (or defendant, if his witneſſes,) at the aforeſaid day, to be tried by a jury of the county; and this you, nor any of you, are in nowiſe to omit, under the penalty of each of you of 100l. *Witneſs, &c. Mansfield & Way.*

If at the ſittings in Weſtminſter, ſay, before our right truſty and well-beloved Lloyd Lord Kenyon, our chief juſtice aſſigned to hold pleas in our court before us, on Monday the 24th of June next, (the day of the ſitting,) by nine of the clock in the forenoon of that day, at Weſtminſter Hall in the county of Middleſex (or if in London, ſay, at the Guildhall of the city of London). Blank writs may be bought at the ſtationer's.

You pay for ſigning the ſubpœna 1s. 8d. *ſealing* 7d. *and then you take out a ſubpœna-ticket for each witneſs to the following purport, and ſerve each witneſs with a copy; pay him* 1s.

To Mr.

By virtue of a writ of ſubpœna to you directed, and herewith ſhewn unto you, you are commanded perſonally to be and appear before Lloyd Lord Kenyon, chief juſtice of his Majeſty's court of King's Bench, on Monday the fifteenth day of July inſtant, by eight of the clock of the forenoon of the ſame day, at Weſtminſter Hall in the county of Middleſex, to teſtify the truth, according to your knowledge, in a certain cauſe now depending, and there to be tried, between I. B. Eſq. plaintiff, and T. I. defendant, in a plea of treſpaſs on the caſe on the part of the defendant; and hereof you are not to fail, upon pain of one hundred pounds. Dated the 10th of July in the thirty-fourth year

gentleman, defendant, in a plea of treſpaſs (as the action is), and this you are not to omit, nor is any one of you to omit, under the penalty of each of you of 100l. *Witneſs, Sir James Eyre knight, at Weſtminſter, the day of in the 37th year of our reign.*

Prothonotary.

Teſte it the laſt day of term.

If the trial be to be had in London, you ſay, before Sir James Eyre, our chief juſtice of the court of King's Bench, at Guildhall, London, on (the day of the ſittings), to teſtify, &c.

For trial at Weſtminſter and London.

If in Middleſex, thus: Before Sir James Eyre knight, our chief juſtice of the Bench at Weſtminſter, in the great hall of pleas there, called Weſtminſter Hall, to teſtify, &c.

When the ſubpœna is filled up, the duty whereof is 2s. *carry it to the proper prothonotary to be ſigned, for which you pay* 1s. *and to the ſeal-office to be ſealed, for which you pay* 7d. *and then you make out tickets for each of the witneſſes, in the following form: Serve each witneſs with a copy.*

How ſubpœna filled up, &c.

Subpœna-ticket how to be ſerved.

Mr.

By virtue of a writ of ſubpœna to you directed, and herewith ſhewn unto you, you are commanded perſonally to be and appear before his Majeſty's juſtices of aſſize (or the chief juſtice, as before directed, according as the caſe is) on the day of by of the clock in the forenoon of the ſame day, to teſtify the truth, according to your knowledge, in a certain cauſe now depending, and there to be tried, between A. B. plaintiff and C. D. late of in the county of gentleman, defendant, in a plea of treſpaſs (as the action is) on the part of the plaintiff, (or the defendant, if at his inſtance ſubpœnaed); and hereof you are not

Form of ticket.

year of the reign of our sovereign lord George the Third, king of Great Britain, &c. in the year of our Lord 1798.

By the Court.

T. S. attorney for defendant.

to fail, upon pain of one hundred pounds. Dated the day of in the year of our Lord 1798, *and in the year of the reign of our sovereign lord George the Third, king of Great Britain, &c.*

J. R. Attorney.

Of subpœna duces tecum.

If any person has in his possession any writings, deeds, books of accounts, or other things which it may be necessary to produce on the trial of the cause, or on the execution of the inquiry, he should be served with a *subpœna duces tecum*, commanding him to bring with him, and produce the same at the trial of the cause, or execution of the inquiry: which subpœna is like the former, only you insert a clause, after mentioning the place of trial or inquiry, to the following effect:

Form thereof.

"*And also that you bring with you and produce at the time and place aforesaid, a certain deed or instrument in writing, bearing date, &c. (describe the thing to be produced,) then and there to testify and shew all and singular those things which you or either of you know, or the said deed or instrument doth import, of and concerning a certain action now in our court, before us depending, &c. It is signed and sealed as before.*

How far obligatory.

But an attorney is not obliged to obey a subpœna with a *duces tecum* of papers belonging to his client, served upon him to found a prosecution by indictment against his client for forging them. *Rex* v. *Dixon*, Burr. 1637.

When a notice only to produce papers, &c. will do.

But if the requisite papers, letters, &c. are in possession of the plaintiff or defendant, or the respective attornies in the cause, a common written notice to produce them will be sufficient.

How witness in custody to be brought up.

If the witness be in custody, he must be brought up by *habeas corpus ad testificandum.*

Make an affidavit,

Affidavit to obtain habeas corpus.

That A. B. now a prisoner for debt, in custody of , is, and will be, a material witness for this deponent in the trial of this cause. And this deponent further saith, that he is advised, and verily believes, that he cannot safely proceed to the trial thereof, without the testimony of the said A. B.

Swear affidavit before a judge, who will grant his fiat for habeas corpus. *Ingross writ of* habeas corpus *on* 5 s. *stump parchment, get judge's name indorsed thereon: It must be signed and sealed as subpœna; then leave it at marshal's or gaoler's, in whose custody witness is; and, at same time, tender his reasonable charges for bringing him up, otherwise he is not bound so to do.*

The

The *habeas corpus* cannot be obtained either by motion in court, or before a judge, without an affidavit made by the party applying, that the witneſs is a material one. *The King* v. *Layer*, Fort. 396. *Rex* v. *Burbage*, Burr. 1440. Neceſſity thereof.

And it muſt be ſigned by a judge, or it is nugatory. *Rex* v. *Roddam*, Cowp. 672. Habeas corpus how ſigned.

The court will not grant a *habeas corpus ad teſtificandum* to bring up a priſoner of war, it muſt be done by an order from the ſecretary of ſtate; or he may be examined on interrogatories. *Furly* v. *Newnham*, Do. 420. Who may or who may not be brought up by habeas corpus; priſoners of war;

Sailors on board a ſhip cannot be brought up by *habeas corpus* againſt their conſent as priſoners; but on affidavit that they have been ſerved with ſubpœnas, and are willing to attend, judge will grant an *habeas corpus* to the commander of the ſhip to bring them up. *Rex* v. *Roddam*, Cowp. 672. ſailors;

It was formerly held, that a priſoner in execution could not be brought up to give evidence by *habeas corpus*, as it would operate as an eſcape in the warden or marſhal. Comb. 17. 48. *Burdus* v. *Shorter*, Bar. 222. priſoners in execution.

But in the *King* v. *Burbage*, Burr. 1440. on ſuch a motion it is ſaid that lord Mansfield agreed, that in general a *habeas corpus ad teſtificandum* will lie to remove a perſon in execution to be a witneſs; but refuſed *that* application, thinking it, under the circumſtances of the caſe, a mere contrivance.

Witneſſes ought to have a reaſonable time to put their own affairs in ſuch order, that their attendance upon the court may be of as little prejudice to themſelves as poſſible: and the court of B. R. held, that notice at two in the afternoon in the city to attend the ſittings that evening at Weſtminſter, was too ſhort a time. *Hammond* v. *Stewart*, Str. 510. Reaſonable time muſt be allowed witneſſes for their attendance.

But if the witneſs happens to be in court at the trial, a ſubpœna ticket then ſerved upon him is ſufficient. Cowp. 845. But if in court, he may be then ſerved with ſubpœna.

And this, although he is defendant's attorney, and his evidence is againſt his client.

If the defendant's attorney, who is a ſubſcribing witneſs to an agreement upon which the plaintiff brings his ejectment, refuſe to give evidence of his atteſtation, &c. upon ſervice of a ſubpœna upon him in court for that purpoſe, the court, out of which the record iſſues, will grant an attachment againſt him. *Doe* on dem. *Jupp* v. *Andrews*, Cowp. 845. Even though defendant's attorney.

Service of a ſubpœna ſhould be perſonal ſervice, otherwiſe the court will not grant an attachment, though perhaps an action might lie. *Smalt* v. *Whitmill*, Str. 1054. Subpœna muſt be perſonally ſerved.

(B) Of the Expences of Witneſſes, and how paid.

Expences muſt be tendered.

No witneſs is obliged to attend, unleſs his reaſonable expences are tendered him by the party wanting his teſtimony.

Quantum thereof;

The quantum of theſe expences muſt be governed by the circumſtances of the caſe.

Two guineas for a witneſs to come from Cheſter to Guildhall held not ſufficient. *Chapman* v. *Pointon*, Str. 1150.

muſt be ſufficient.

There ſhould be enough tendered to cover the whole expences of the journey, and of the neceſſary ſtay at the place of trial. *Fuller* v. *Prentice*, 1 C. B. T. R. 49.

When tender muſt be made.

The tender of expences muſt be made when the ſubpœna is ſerved. *Ibid.*

Conſequence of neglecting it.

For even if without ſuch tender being made, the witneſs attends at the trial, and his expences are there tendered, it is not good; but he may refuſe to give teſtimony. *Bowles* v. *Johnſon*, Blac. 36.

For a perſon not properly ſubpœnaed, is to be looked upon only as a ſtander-by; and it is no contempt of the court for a ſtander-by to be refuſed to be examined.—*Ibid.*

When a ſubpœna is ſerved on a witneſs in London, a ſhilling is uſually given; but if he is at any diſtance, and muſt reaſonably incur expence to attend the trial, it ſhould be tendered him.

For in no caſe is a witneſs obliged to truſt to the court allowing him more when he comes to be ſworn; perhaps the party may not call him, and then it may be difficult for him to get home again. Str. 1150.

Contingent loſſes not allowed in coſts.

Any contingent loſſes which witneſſes may ſuffer by obeying the ſubpœna, cannot be allowed on the taxation of coſts. *Thelluſſon* v. *Staples*, Do. 438.

(C) Of the Remedy againſt Witneſſes in caſe of Diſobedience.

Two modes, by attachment and by action;

If the witneſs be properly ſerved with the ſubpœna, and his expences tendered, and he refuſes to appear and give evidence on the trial, there are two remedies at the election of the party; the one a criminal proceeding by attachment, the other a civil proceeding by action.

by attachment;

The remedy by attachment is a modern proceeding; the C. J. in 22 G. 2. ſaid he remembered the firſt motion for them: and it was a long time after the court of King's Bench had adopted this mode, that the court of Common Pleas

Pleas would accede to it. *Huffe* v. *Towke*, Bar. 33. *Chapman* v. *Pointon*, Str. 1150.

But in 25 G. 2. *Friend* v. *Hope*, Bar. 36. a rule to ſhew cauſe why an attachment ſhould not iſſue, was granted in C. B. and would have been made abſolute had not the ſubpœna been irregularly ſerved; and now both courts give this remedy by attachment, but proceed therein with great caution, expecting to be well ſatisfied of the ſubpœna having been properly ſerved, and expences tendered, and the like. *Fuller* v. *Prentice*, 1 C. B. T. R. 49. *Bowles* v. *Johnſon*, B. R. Blac. 36.

An attachment was granted againſt a bailiff for refuſing to make an affidavit of the ſervice of a ſubpœna upon a witneſs; which affidavit was neceſſary in order to found a motion for an attachment againſt him for his non-appearance; for a bailiff is in a very different ſituation from another man, being an officer of the court. *The King* v. *Rudge*, Blac. 432.

As to the civil proceeding by action, it may either be an action upon the caſe for damages, or the party may reſort to his remedy under the ſtat. 5 Eliz. c. 9. ſ. 12. which gives a penalty of 10*l.*; and alſo ſuch further recompence to the party grieved, as the judge of the court out of which the proceſs iſſued ſhall award. This further recompence, therefore, muſt be aſſeſſed by the court; and upon that aſſeſſment an action of debt may be brought. So an action of debt may be brought for the 10*l.* penalty. *Pearſon* v. *Iles*, Do. 556. by action.

CHAP. X.

Of Trial and its Incidents.

SEC. 1. *Of Trials at Bar.*
SEC. 2. *Of preparing Briefs, and attending Trials.*
SEC. 3. *Of challenging the Jury and of Taleſmen.*
SEC. 4. *Of nonſuiting at the Trial.*
SEC. 5. *Of References at the Trial.*
SEC. 6. *Of Demurrers to Evidence, and of Bills of Exception.*
SEC. 7. *Of Verdicts and Caſes reſerved.*
SEC. 8. *Of Judge's Certificates for Coſts.*

SECTION I.

Of Trials at Bar.

Formerly the uſual mode of trial.

FORMERLY all trials were had at *the bar* of the court in actions which were firſt commenced there; but this ſeldom happened, except in matters of conſequence, as trifling ſuits were brought and determined in the court baron, hundred, or county court.

How fell into diſuſe;

But when it became the uſage to bring actions of any trivial nature in the courts of Weſtminſter, it was found to be an intolerable burden to compel the parties' witneſſes and jurors to come from the diſtant parts of the kingdom to try ſuch ſuits. A practice, therefore, very early obtained of *continuing* the cauſe from term to term in the court above, provided the juſtices in eyre did not previouſly come into the county where the cauſe of action aroſe: and if it happended that they arrived there within that interval, then the cauſe was removed from the juriſdiction of the juſtices at Weſtminſter to that of the juſtices in eyre; afterwards the juſtices in eyre were ſuperſeded by the juſtices of aſſize, to whom, by ſtatute of 13 Edw. 1. a power was given to try all common cauſes; and now, by virtue of the commiſſion of *niſi prius*, as it is called, all common cauſes are tried at the aſſizes in the country, and at the ſittings at London and Weſtminſter. For an explanation of this, ſee Introduction.

by continuing cauſe till juſtices of eyre come into the county.

Juſtices of eyre ſuperſeded by juſtices of aſſize.

Thus

Thus trials at bar fell into diſuſe, except in caſes of difficulty and importance, and the terms were appropriated to legal arguments, and the multiplicity of buſineſs brought forward in the courts by motion. Trials at bar only continued in caſes of difficulty.

A trial at bar (which is a trial in term time before all the judges of the court) can only now be obtained by motion in court, and affidavit of the nature and intricacy of the cauſe: if obtained, it muſt be by ſpecial jury. The day of trial is appointed by the court; the cauſe is ſet down with the clerk of the papers in B. R. or ſecondary in C. B. and the record delivered to them. Trial at bar what, and how obtained.

The granting of a trial at bar is entirely in the diſcretion of the court; and ſuch a trial ought not to be granted without good reaſon, becauſe it is very expenſive to the parties, and the buſineſs of the other ſuitors is thereby delayed. Neither the length of a cauſe nor the value of the matter in queſtion is a ſufficient ground for granting a trial at bar; and in order to obtain one upon the account of difficulty, it is not ſufficient to ſay generally in an affidavit, that the cauſe is expected to be difficult; but the particular difficulty which is expected to ariſe ought to be pointed out, that the court may judge whether it be ſufficient for the granting of a trial at bar. *Rex* v. *Burgeſſes of Carmarthen*, Say. 79. In diſcretion of court to grant it; what ſufficient ground for it; when moved for by affidavit;

All queſtions concerning trials at bar muſt depend on their own circumſtances; and the general rule to go by is the judgment which the court ſhall form on the nature of the iſſues and their dependencies. *The King* v. *Amery*, 1 D. & E. 366.

But if a judge of the court or maſter in chancery be a party to the ſuit, there ſhall be a trial at bar upon motion, without any affidavit. *Morton* v. *Hopkins*, 1 Sid. 407. when no affidavit neceſſary;

As a trial at bar is a matter of favour, the court may impoſe what terms they pleaſe on the party applying; as that he ſhall receive only *niſi prius* coſts and pay bar coſts, or the like. *Holmes* v. *Browne*, Do. 426. terms impoſed on granting it;

A trial at bar is not allowed by the court to be in an iſſuable term, unleſs the crown is actually concerned in the intereſt. And. 271. 237. N. on R. Mic. 4 Ann. *Corporation of London* v. *Lynn*, 1 C. B. T. R. 206. *Denn* v. *Lord Cadogan* and Others, Burr. 273. whether allowed in an iſſuable term;

A cauſe cannot be tried at bar where the action is laid in London, by reaſon of their charter, 2 Sal. 644.; becauſe the granting a trial at bar when the venue is laid in London, would be contrary to a charter by which the citizens are exempted from ſerving as jurors out of this city. Str. 356. or if venue be in London;

Unleſs

Unleſs the citizens wave their privilege, and conſent to be ſworn as jurymen; in which caſe ſuch trial may be had. *Locker* v. *E. I. Company*, 2 Wilſ. 136.

or if in county palatine;

Q. Whether an action depending in a court of a county palatine can be tried at bar; and whether the court of B. R. can compel the inhabitants of the county palatine to attend as jurors on ſuch trial? *Gally* v. *Clegg*, Say. 47. *The King* v. *Amery*, 1 D. & E. 366.

not granted the ſame term it is moved for;

Nor will it be granted the ſame term it is moved for. Cooke's Rep. 66. It muſt be moved one term to be tried the next.

nor till iſſue joined;

The court will not grant a trial at bar till iſſue is joined; becauſe it would be *infra dignitatem* to grant it till they knew whether the iſſue joined would be a matter of difficulty or not. *Caſe of the Borough of Chriſt Church*, Str. 696.

except in ejectment.

But an ejectment cauſe is an exception to this rule; in which, as iſſue is ſeldom joined till the term is over, it would, in general, be too late to apply for ſuch trial after it is joined. Anon. Say. 155.

Trial at bar muſt be moved for in court.

Trial at bar muſt be moved by the court; but yet the plaintiff is at liberty to countermand the notice of trial, and to prevent the cauſe being tried on that day; which if he does, it cannot be again brought to trial, unleſs ſome day be appointed by the court.

Of countermanding notice.

Of obtaining a ſecond rule.

A ſecond rule cannot be made for a trial at bar between the ſame parties in the ſame term; nor can it be in an iſſuable term. *Cautillon* v. *Lord Montgomery*, Fitzgib. 267.

How many days notice of trial neceſſary.

A trial at bar was put off becauſe the jury were not ſummoned in proper time. Six days notice, *per* Foſter, ought, at leaſt, to be given. *Rex* v. *Owen*, Say. 30.

How to be entered for trial.

The plaintiff's attorney muſt, before the eſſoin day of the term in which the cauſe is appointed to be tried, give notice to the chief prothonotary, or his ſecondary, of the day on which the cauſe is to be tried, that the ſame may be put down in the court book; and in caſe of neglect, and without motion and ſpecial direction of the court, ſuch cauſe ſhall not be tried that term. Hil. 6 Ann. in C. B.

Of delivering copies of iſſue to the judges.

On trials at bar, the lord chief juſtice, and other judges, are to have copies of the iſſues in ſuch cauſes delivered to them four days before the time appointed for trial. Mich. 3 G. 2.

New trial after trial at bar.

Of late years, new trials have been granted after trials at bar as well as after trials at *niſi prius*. *Bright* v. *Eynon*, Burr. 395.

How if the jury do not attend the trial. Of the decem tales, &c.

On a day appointed for a trial at bar, only nine of the jury appeared; plaintiff prayed for a *decem tales*: by the courſe of the court, the trial could not have come on again until

Michaelmas term; this being Eaſter term, and the next an iſſuable term, wherein no trials at bar are allowed. As this would have been a great expence and delay to the parties, the court ordered a *decem tales*, and although this was on the Saturday, they ordered it to be returnable on the Monday following (though there had never been before an inſtance of it). *Denn* v. *Cadogan*, Burr. 273.

N. B. At common law, where a ſufficient number of jurymen did not appear, a writ of *decem tales*, *octo tales*, and the like, was iſſued to the ſheriff, which was for a ſupply of *ſuch* men as were wanting; and this muſt ſtill be done at a trial at bar, if the jurors make default. But at the aſſizes, or *niſi prius*, by ſtat. 35 Hen. 8. c. 6. and other ſubſequent ſtatutes, the judge is empowered, at the prayer of either party, to award a *tales de circumſtantibus* of perſons preſent in court. 3 Blac. Com. 364.

Section II.

Of preparing Briefs, and attending at Trial.

Having taken every preparatory ſtep for bringing on the cauſe to trial, nothing remains but to deliver briefs to counſel, and attend at the time appointed.

Of the brief.

The brief ſhould contain an abſtract of the pleadings, a clear ſtatement of the client's caſe, and a proper arrangement of the proofs, with the names of the witneſſes.

The grand rule to be obſerved in the drawing of briefs is conciſeneſs with perſpicuity.

Of the attendance of the parties.

When the cauſe is in the paper for trial it is the duty of the plaintiff and defendant's attorney to attend the court, to ſee how the cauſes go off; to take care that their counſel and witneſſes have early notice when the cauſe is coming on, that they may be ready to diſcharge their reſpective duties.

How, if attorney abſent.

If the plaintiff's attorney is abſent when cauſe is called on, the cauſe may be ſtruck out of the paper, by order of the court, and he or his client be ſubjected to pay the coſts of the day, for not trying cauſe according to notice, or he may be nonſuited.

If defendant's attorney is abſent, his client will loſe the benefit of his defence, and be ſubject to coſts.

No excuſe for non-attendance.

The court will ſcarcely admit an excuſe for the abſence of plaintiff's or defendant's attorney, when their duty requires them to be preſent. They are allowed in their bill for their attendance while the cauſe is in the paper, and till tried, and it is expected and preſumed by the court that they do attend.

Section III.

Of challenging the Jury, and of Tales Men.

Of challenging the jury.

When the cauſe is called on, the record is handed to the judge to peruſe, that he may ſee the pleadings, and what iſſues the parties are to maintain and prove, while the jury is being ſworn; at this time, therefore, it is neceſſary to attend to the names of the jury as they are called over, and before they are ſworn, or to object to the former jury being ſworn, which is generally done in common cauſes, if there be any perſon upon the jury that is exceptionable.

Either party may challenge.

For either party has a right, upon good cauſe ſhewn, to *challenge* the jury, as it is called.

Two ſorts of challenges.

Now challenges are of two ſorts, either to the array or to the polls.

Challenge to the array, what.

Challenges to the array are, when an exception is made to the whole pannel in which the jury are *arrayed* or ſet in order, by the ſheriff in his return to the jury proceſs, and they may be made upon account of partiality, or ſome default in the ſheriff or under-ſheriff: As if the under-ſheriff is attorney in the cauſe, and returns the jury, it is good cauſe of challenge to the array. *Baylis* v. *Lucas*, Cowp. 112. Or if the ſheriff be party to the ſuit, or intereſted therein, or the like. Alſo, though there be no perſonal objection againſt the ſheriff, yet if he arrays the pannel at the nomination, or under the direction of either party, this is good cauſe of challenge to the array. But challenges to the array ſeldom happen; becauſe, 1ſt, The ſame reaſons, generally ſpeaking, that are ſufficient to quaſh the array, would be good grounds at the time of awarding the *venire* to direct it to the coroners or eliſors, as before-mentioned, page 433. upon a proper ſuggeſtion being made on the record, as in Appendix N. And 2dly, Becauſe ſuch reaſons as would quaſh the array, would alſo be good grounds for a motion for a new trial. Cowp. 112.

Grounds thereof.

Challenge to the poll, what.

Challenges to the polls (in *capita*) are exceptions to particular jurors. The ground of ſuch challenges are reduced, by Lord Coke, to four. 1ſt, *Propter honoris reſpectum*: As if a lord of parliament be impannelled on a jury, he may be challenged by either party, or may challenge himſelf. 2d, *Propter defectum*: As if a juryman be an alien born, or a ſlave, or bondman, or a minor, or, which is the principal deficiency, has not a ſufficient eſtate * to qualify him to be a juror.

Grounds thereof.

1ſt, Propter honoris reſpectum.

2d, Propter defectum.

* By 4 & 5 W. & M. c. 24. ſ. 15. all jurors (except ſtrangers upon trials per medietatem linguæ) who are to be returned for trials of iſſues in any of the ſuperior

a juror. 3d, *Propter delictum*: As if he has been guilty of any crime or misdemeanor that affects his credit and renders him infamous; as for a conviction of treason, felony, perjury, or conspiracy; or if he hath received judgment of pillory, or been branded or whipped; or if he be outlawed or excommunicated. 4th, *Propter affectum*; which, as it is the most general cause of challenge, I mention it last. This may be either a *principal* challenge, or to the favour. A principal challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favour: As that a juror is of kin to either party; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him: All these are principal causes of challenge, which, if true, cannot be over-ruled; for jurors must be *omni exceptione majores*. Challenges to the favour are where the party hath no principal challenge, but objects only some probable circumstances of suspicion, as acquaintance, and the like, the validity of which must be left to the determination of triors, whose office it is to decide whether the juror be favourable or unfavourable. The triors, in case the first man called be challenged, are two indifferent persons named by the court; and, if they try one man and find him indifferent, he shall be sworn, and then he and the two others shall try the next; and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest.

3d, Propter delictum.

4th, Propter affectum.

Principal challenge.

Challenge to the favour.

A juror may himself be examined on oath of *voir dire veritatem dicere*, with regard to such causes of challenge as are not to his dishonour or discredit; but not with regard to any crime, or any thing which tends to his disgrace or disadvantage. 3 Blac. Com. 363, 364. See also Burr. 1856.

Of examining a challenged juror on the voir dire.

But this practice, of assigning particular reasons for challenges, and of the same being canvassed by triors, as above-

How this practice now disused;

---

superior courts, or general quarter sessions, must have in their own name, or in trust for them within the same county, 10l. by the year at least, above re-prizes of freehold or copyhold lands or tenements, or of ancient demesne, or in rents, or in all or any of them, in fee-simple, fee-tail, or for the life of themselves or some other person; and in Wales 6l.

But tales men only 5l. Sec. 18.

By 3 G. 2. c. 16. qualification extended to persons having estates in possession, in land in their own right, of the yearly value of 20l. and upwards, above the reserved rent, the same being held by lease for five hundred years, or for ninety-nine years, determinable on lives.

mentioned, is become in a great measure obsolete, since the
since 3 G. 2. c. 25. statute 3 Geo. 2. c. 25. which directs the mode of returning jurors in all common causes; for as, by the provision of that statute, there are generally a sufficient number of jurymen attending, the clerk at *nisi prius* or associate will, upon an intimation from either party, refrain from calling any person objected to without any reason being assigned.

Of the tales de circumstantibus

If, however, by means of challenges or excuses, or non-attendance of the jurors, a sufficient number should not appear at the trial, either party may pray a *tales*; which is a supply of *such* men as are summoned upon the first pannel, in order to make up the deficiency. This was formerly done by a writ of *decem tales*, *octo tales*, and the like, directed to the sheriff, returnable at an early day, when the cause was again called on. But by stat. 35 H. 8. c. 6. and other subsequent statutes, the judge is empowered to award a *tales de circumstantibus*. This, however, is in a great measure rendered useless, by the stat. of 3 G. 2. c. 25.; for as there are always a sufficient number of common jurymen returned, a *tales de circumstantibus* is not wanted in common causes. And if a *tales* is prayed in special jury causes, which is generally done, for it is very rare that twelve special jurymen attend, they are taken from among those who attend on the common jury. In such cases, however, they are deemed *tales de circumstantibus*, (and not improperly, though perhaps not strictly so, according to the original construction of the term,) and are afterwards so recorded in the *postea*.

Upon all issues prosecuted by the king's officer, as in cases of information and the like, a warrant for the *tales* must be signed by the king's attorney-general, and if no such warrant procured, the cause must go off *pro defectu juratorum*. It must be signed by the attorney-general, though tried in a county palatine. *Rex* v. *Lambe*, Burr. 2171.

Of the mode of returning a common jury,

As we have already shewn how a special jury is struck and returned, I shall just briefly point out the mode of returning common juries, which will render what has been said more clear and comprehensible.

according to 3 G. 2. c. 25.

A common jury is one returned by the sheriff, according to the directions of the stat. 3 Geo. 2. c. 25. which appoints, that the sheriff or officer shall not return a separate pannel for every separate cause, as formerly, but one and the same pannel for every cause to be tried at the same assizes, containing not less than forty-eight, nor more than seventy-two, jurors; and that their names, being written on tickets, shall be put into a box or glass, and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless absent,

abſent, challenged, or excuſed, or unleſs a previous view of the meſſuages, lands, or place in queſtion ſhall have been thought neceſſary by the court; in which caſe, ſix or more of the jurors returned, to be agreed on by the parties, or named by a judge, or other proper officer of the court, ſhall be appointed by ſpecial writ of *habeas corpora* or *diſtringas*, to have the matters in queſtion ſhewn to them by two perſons named in the writ; and then ſuch of the jury as have had the view, or ſo many of them as appear, ſhall be ſworn on the inqueſt, previous to any other jurors. Theſe acts are well calculated to reſtrain any ſuſpicion of partiality in the ſheriff, or any tampering with the jurors, when returned. 3 Blac. Com. 358.

How, if there has been a view.

All the names of the jurors muſt be drawn out of the box; and if another perſon, whoſe name is not in the box, anſwers to a name called, and by perſonating another juryman is ſworn, the verdict will be ſet aſide, as being a verdict only of eleven; for it is not a matter of challenge, nor is the defect cured by ſtat. 32 Hen. 8. *Norman* v. *Beaumont*, Bar. 453. *Ruſſel* v. *Ball*, Ib. 455.

If one juryman perſonates another, verdict will be ſet aſide.

Such is the mode of obtaining a proper unexceptionable jury for the trial of the cauſe; and whenever twelve of the perſons impannelled and not objected to, appear, or the number be made up by tales men, they are then *ſworn* well and truly to try the iſſue joined between the parties, and a true verdict to give according to the evidence. Hence they are called a jury, *jurata*, and jurors, *juratores*. See 3 Blac. Com. c. 23.

Section IV.

Of nonſuiting at the Trial.

When the jury are ſworn, it becomes the duty of the plaintiff's counſel to enter upon his caſe; and it is incumbent upon him not only to prove by evidence *every fact* that is neceſſary to ſupport it, but the facts, when proved, muſt be ſuch as in point of law are ſufficient to maintain an action: for if he fails in either of theſe reſpects, he will, under the direction of the judge, be nonſuited; nor will the defendant have occaſion to go into the merits of his defence; whereupon the crier is ordered to call the plaintiff; and if neither he, nor any one for him, appears, he is then ſaid to be nonſuited; the jurors are diſcharged; the action is at an end; and the defendant recovers his coſts.

Of a nonſuit at the trial, what.

For

For by the old law no verdict could be given in the abſence of the parties; and, therefore, when the jury returned to the bar to deliver their verdict, the plaintiff was bound to appear in court in order to anſwer the amercement, to which he was formerly liable if he failed in his ſuit. And though this amercement is diſuſed, yet the form in the pleadings ſtill continues the ſame, and his appearance in court in perſon, or by attorney, is as neceſſary now as formerly, before the jury can deliver their verdict.

But the plaintiff, if he pleaſes, may ſuffer a nonſuit at any time before the verdict be given, though after the full diſcuſſion of the cauſe, and the ſumming up of the judge in defendant's favour.

When therefore a plaintiff, or his counſel, imagines that ſufficient evidence has not been given to maintain the iſſue on his part, and apprehending the verdict likely to go againſt him, it is uſual for him to be voluntarily nonſuited by withdrawing himſelf; and he has his advantage in this, rather than ſuffer a verdict to be given againſt him upon the merits; for after a judgment of nonſuit, he may bring another action upon the very ſelf ſame ground of complaint; which he cannot do after a verdict againſt him upon the merits.

Advantages in certain caſes of a nonſuit;

But if once he ſuffers the jury to pronounce their verdict, he cannot prevent its being recorded and elect to be nonſuited.

muſt be before verdict pronounced.

In an iſſue out of Chancery, on a motion for a new trial, becauſe the defendant had produced evidence by ſurpriſe, which the plaintiff, if prepared, could have anſwered; one main reaſon for denying the motion was, that the plaintiff ſuffered a verdict to be given when he might have been nonſuited; which I mention as a caution in caſes of the like kind. Bull. Ni. Pri. 326. *Richards* v. *Syms*.

No nonſuit if neither ſide appear,

At *niſi prius* the cauſe was called and jury ſworn; but counſel, attornies, parties, or witneſſes appeared on either ſide. *Per* Pratt, C. J. the only way is, to diſcharge the jury; for no body has a right to demand the plaintiff but the defendant; and, therefore defendant not demanding him, I cannot order him to be called. *Arnold* v. *Johnſon*, Str. 267.

Nor can a plaintiff be nonſuited at the trial againſt his conſent. But if he inſiſts upon his right to appear when called, the judge muſt direct the jury to find a verdict againſt him. *Watkins* v. *Tower*, 2 D. & E. 280.

Cauſe cannot be adjourned after jury ſworn.

After a jury is ſworn and charged with the evidence, they cannot be adjourned; nor can the cauſe, even upon the petition and conſent of both parties, be adjourned by the judge

judge at *nisi prius* for difficulty into bank. *Dawson* v. *Howard* Ld. Raym. 129.

In what cases plaintiff will be nonsuited;

If plaintiff, upon defendant's moving to change the venue, undertakes to give material evidence in the county of A. in order to retain his venue where he lays it, and afterwards at the trial gives no material evidence in that county, but fails therein, he must be nonsuited; and if the jury should give a verdict for him, the same will be set aside, and a nonsuit entered. *Santler* v. *Heard*, C. P. 2 Blac. Rep. 1031.

if on undertaking to retain venue, he does not give material evidence agreeable thereto.

No nonsuit in joint action, where one defendant has let judgment go by default;

Where there is judgment by default against one defendant in a joint action, the other cannot nonsuit the plaintiff at the trial on issue joined by him; nor if the plaintiff neglect to proceed to trial, can he obtain judgment, as in case of a nonsuit. *Weller* v. *Goyton*, Burr. 358.

plaintiff need only give evidence to affect the rest.

In trespass against several, if any suffer judgment by default, the plaintiff need only give evidence to affect the rest; and it is matter for the jury whether the trespass proved be the same as that confessed; but the plaintiff cannot be nonsuited. *Harris* v. *Batterley*, Cowp. 483.

Of the nonsuit where record carried down by proviso.

In all causes where both parties are actors, as prohibition, replevin, &c. if defendant carries down record by *proviso*, and the plaintiff does not appear, on whom the proof of the issue lies, the cause cannot be tried on defendant's record and a verdict entered, but plaintiff should be called and nonsuited. If a verdict be obtained, it will afterwards be set aside; and it will then be too late to enter a nonsuit, for it cannot be recorded in bank, but must be done by the judge at *nisi prius*. *Gardner* v. *Davis*, B. R. 1 Wils. 300. *Hicks* v. *Young*, C. B. Bar. 458.

After nonsuit, costs must be paid before second action proceeded in.

After a nonsuit, the court will stay proceedings in a second action between the same parties for the same cause, until the costs of the nonsuit are paid, notwithstanding plaintiff be a prisoner at the time of bringing the second action, and sue *in forma pauperis*. *Weston* v. *Withers*, 2 D. & E. 511. *Moulton* qui tam v. *Bingham*, Ib. *n*. *Baldwin* v. *Richards*, Ib. *n*.

Formerly nonsuit could not be set aside.

Formerly it was held, that a nonsuit could not be set aside though occasioned by the mistake of the judge. *Hartly* v. *Atkinson*, Bar. 317. *Love* v. *Day*, Bar. 311.

Settled practice now otherwise.

But in the case of *Sadler* v. *Evans*, Burr. 1986. the court were unanimous both upon principles and authorities, that where a judge at *nisi prius* nonsuits the plaintiff and is mistaken, the court, upon motion, may set aside the nonsuit.

And this is now the settled practice in both courts.

In what case court will not set it aside.

The court will not set aside a nonsuit voluntarily suffered by plaintiff, and give him leave to reply *de novo*, so as to put the issue on another footingt han hebefore had done. *Hutchinson* v. *Brice*, Burr. 2692.

Section V.

Of References at Nisi Prius.

How reference made, and what done in consequence thereof.

It often happens at the time of trial, that causes are referred by consent to arbitration; for which purpose an order of *nisi prius* is drawn up, by the associate, if at the assizes, and by clerk of *nisi prius*, if at the sittings,

Witnesses to to be sworn.

The respective attornies should set down the names of the witnesses proposed to be examined on the reference, and deliver the same to the crier, who will swear them at the bar of the court; for which he is paid 2*s*. each witness. If the witnesses are not sworn in court, they must attend a judge to be sworn.

How plaintiff's attorney to proceed.

When plaintiff's attorney wishes to proceed on the reference, let him procure the order of *nisi prius* from the proper officer as above, and get the arbitrator to appoint a time and place for the parties to meet, (which should be in writing,) then annex a true copy thereof to a copy of the order of *nisi prius*, and serve both on the defendant's attorney (as may be afterwards necessary to make affidavit of such service); the attornies on both sides should deliver to the arbitrator short briefs of their client's case, with the names of the witnesses sworn to be examined, and all necessary papers, &c.

The arbitrator may adjourn from time to time, so as he makes his award within the time limited in the order.

How to enlarge time by consent.

If he does not make his award in the time, the time may be enlarged by consent, but not without; and in order to obtain such an enlargement, it is first necessary to make the order of *nisi prius* a rule of court, which is a motion of course; after which, briefs must be given to counsel, the one to move, and the other to consent to such enlargement; clerk of rules will then draw up rule, for which pay 6*s*.; plaintiff's attorney must serve copy thereof on defendant's attorney, a new appointment fixed by the arbitrator, and a service thereof made as above.

When the award is made, the arbitrator's attorney should give notice to the attorney on each side, that the award is ready for delivery, and that the respective parties may have their part on paying for the same.

If

If the party in whoſe favour the award is made, accept his part thereof, and the other againſt whom it is given, refuſes to accept his, a tender thereof ſhould be made; and upon affidavit of ſuch tender and refuſal, a rule may be obtained to make the order of *niſi prius* a rule of court, and a copy thereof ſerved on the refractory party. If this rule be diſobeyed, upon affidavit of perſonal ſervice of a copy thereof and diſobedience thereto, an attachment will be granted.

If the party does accept the award, but refuſes to obey it, make the order of *niſi prius* a rule of court; make a copy of ſuch rule and of the award, ſerve them on the other party, and at the ſame time demand the money awarded; which, if refuſed, make affidavit of the facts, and move for an attachment.

To the party in whoſe favour the award is made, coſts are of courſe given as to the ſuit, provided the coſts were to abide the event; therefore get an appointment from the maſter on the rule, which ſerve on the other attorney, and get ſame taxed accordingly; annex a copy of the maſter's allocatur to the copy of the rule and the award, ſerve the copies perſonally on the other party, and at the ſame time ſhew the original order and award; if not complied with, move as above for attachment or affidavit of the ſervice of the rule and allocatur for coſts and the demand of the money; and alſo an affidavit of the due execution of the award made by one of the witneſſes.

The rule for the attachment is carried to the crown-office in the Temple, and the attachment there beſpoke; when obtained, a warrant thereon is got from the office of the ſheriff of the county wherein the party to be attached reſides, and executed accordingly.

Under the general term *coſts* in a reference by order of *niſi prius*, only the coſts of the *ſuit* are included, and not the coſts of the *reference*. So that the arbitrator has no power to give the coſts of the award, unleſs under a ſpecial proviſion inſerted in the order of *niſi prius*; but both parties muſt pay the latter coſts between them, and this in both courts. *Bradley* v. *Tunſtow*, 1 P. & B. 35.

Of references at niſi prius, where verdict is taken for ſecurity.

If bail has been given in the cauſe propoſed to be referred, it is the ſafeſt way for plaintiff to take a verdict for any certain ſum, ſubject to the reference; for otherwiſe the bail will be diſcharged. This, therefore, is frequently done; and the plaintiff, after the award is made in his favour, has the election to proceed either to execution upon the verdict, or by attachment upon the award. But as in the latter caſe he cannot ſue out an attachment, ſo in the former he cannot

enter up judgment without leave of the court; the neceſſary ſteps, therefore, to ground ſuch application are, in both caſes, nearly the ſame.

After the award is made, let the coſts be taxed and the rule and award copied, a ſervice of copy thereof and a perſonal demand of the ſum awarded, with the coſts made; and upon affidavit of ſuch ſervice with the maſter's *allocatur* a copy of the award, and demand of the money, the court may be moved.

If plaintiff means to proceed on the verdict, he ſhould give a rule for judgment in the uſual way; he may then move the court, that the *poſtea* may be delivered to plaintiff, and that he may be at liberty to ſign judgment and take out execution for the money awarded and coſts; and that the maſter may tax the coſts of that application. A rule *niſi* is granted, and if no cauſe ſhewn, made abſolute upon affidavit of ſervice in the uſual way.

Upon this rule the marſhal or aſſociate will deliver the *poſtea*; which get ſtamped; then ſign judgment with the maſter, who will tax the coſts, and proceed to execution for the ſum awarded, and coſts, but no more.

If the award be for a leſs ſum than the verdict, the plaintiff may levy the equitable coſts out of the exceſs. Imp. B. R. 690.

At the election of plaintiff, to proceed on verdict or award.

If a rule be made at *niſi prius* to refer a matter to the three foremen of the jury, and that the plaintiff ſhall have a verdict for his ſecurity, after the award made, the plaintiff may either enter up judgment on the verdict, or have an attachment for not obeying the rule of court, it being in his election which way he will execute the award; and this was affirmed to be the conſtant practice. Tourton and Gould (in the abſence of the Chief Juſtice) doubted of it, becauſe the verdict ſtood ſtill on record. To which it was anſwered, there could not be a judgment entered on ſuch verdict without leave of the court, and the attachment was granted. *Hall* v. *Miſter*, Salk. 84.

If he proceeds on verdict, there muſt ſtill be verdict of due execution of award, and the like.

Verdict for plaintiff for ſecurity. Reference by rule to three of the jurors. Award in plaintiff's favour, rule obtained to ſhew cauſe why the *poſtea* ſhould not be delivered to plaintiff, to take out execution for the money awarded. Objection by defendant, that no affidavit was produced of the due execution of the award, or of a demand of the money; which the court held to be as neceſſary as if the motion had been for an attachment; and the rule was diſcharged. *Read* v. *Garnett*, Bar. 58.

9 & 10 W. 3. does not extend to awards made

The 9 & 10 W. 3. c. 15. ſ. 2. which limits the time of complaining againſt awards to the laſt day of the next term after

after the award made, extends not to such as are made in pursuance of a rule of *nisi prius*, but only where the submission is by obligation; and nothing is a ground within that statute for the court to set aside an award, but manifest corruption in the arbitrators: We will not unravel the matter, and examine into the justice and reasonableness of what is awarded. *Per Cur.* in *Anderson* v. *Exeter*, Str. 301. So *Lucas* and *Wilson*, Burr. 701. under references at nisi prius.

It has been settled of late years, that an attachment for non-performance of an award is only in the nature of a civil execution, and therefore the party cannot be apprehended thereon on a Sunday, though there is a case in 1 Atk. 58. to the contrary. Attachment only a civil execution. Party not to be taken on Sunday.

So a person in custody upon such an attachment, is entitled to be discharged under the Lords' act. *The King* v. *Myers*, 1 D. & E. 266. Cowp. 136. Party may be discharged on Lords' Act.

But see further on this head, tit. *Arbitration*, vol. II.

Section VI.

Of Bills of Exception, and Demurrers to Evidence.

Nothing can be more important to the ends of justice than that certain rules should be established and adhered to, with respect to the admissibility or inadmissibility of evidence upon the trial of a cause; but inasmuch as, from the nice and complicated nature of such rules, the best of judges may be sometimes liable to err, by rejecting, or allowing improperly, any particular species of testimony; the law has provided for the benefit of the subject a remedy in this respect, by enabling the injured party to bring the question in dispute before the same court, or some other tribunal, for their decision on the propriety or impropriety of the judge's admitting or rejecting such evidence; and this may be done according to the circumstances of the case, either by bill of exceptions, or by demurrer to evidence. Use and meaning thereof.

If the judge at *nisi prius* either in his directions or decisions mis-states the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal a *bill of exceptions*, stating the point wherein he is supposed to err: And this he is obliged to seal, by statute Westm. 2. 13 Edw. 1. c. 31. or if he refuses so to do, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: And if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. Bills of exceptions, what.

The bill of exceptions is no part of the record till after judgment. The cauſe proceeds, and judgment is given as if there was no bill of exceptions. It is carried into a court of error, and there annexed to the record; if it had been part of the record there would be no occaſion to ſend for the judge to acknowledge his ſeal; when that is done it is for the firſt time annexed to the record. Being for the benefit of the party who tenders it, and remaining in his poſſeſſion, it is in his breaſt to employ it or not. Regularly it ought to be tendered at the time of the trial, and ſealed by the judge in court; and though the practice is to allow the counſel to tender it afterwards, and ſome expence may ariſe to the parties before it is ſettled, yet this is not in a regular courſe of proceeding upon which coſts can be incurred. The court of error may allow coſts thereon, but not the court below. *Gardner* v. *Baillie*, 1 P. & B. 32.

A bill of exceptions, therefore, is in the nature of an appeal; examinable, not in the court out of which the record iſſues for the trial at *niſi prius*, but in the next immediate ſuperior court, upon a writ of error, after judgment given in the court below. But a *demurrer to evidence* ſhall be determined by the court out of which the record is ſent. This happens where a record or other matter is produced in evidence, concerning the legal conſequences of which, there ariſes a doubt in law; in which caſe, the adverſe party may, if he pleaſes, demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the ſufficiency of them all in point of law, to maintain or overthrow the iſſue, which draws the queſtion of law from the cognizance of the jury, to be decided (as it ought) by the court. 3 Blac. Com. 372.

Demurrer to evidence, what.

2. Whether the defendant can demur to the evidence after having paid money into court? *Jenkins* v. *Tucker*, 1 H. Bl. 90.

How fell into diſuſe.

Such, indeed, formerly were the uſual modes of redreſs; but of late years, ſince the extenſion of the diſcretionary power of the court in granting new trials, queſtions of miſdirections of judges at *niſi prius*, and the like, have been brought before the court, and canvaſſed in the ſhape of motions for new trials; and bills of exceptions and demurrers to evidence are now very rarely reſorted to.

For which reaſon, I ſhall here content myſelf with referring my reader, as well for further information on the ſubject, as alſo for the reſpective forms of a bill of exceptions and demurrer to evidence, to Buller's *Niſi Prius*, 313 to 320, and the following caſes: *Money and others* v. *Leach*, Burr. 1692. *Symers and another* v. *Regem*, Cowp. 500. *Da-*

vies v. *Pierce*, 2 D. & E. 53. and *Gibſon and Johnſon* v. *Hunter*, 2 H. Bl. 198. where there is a modern precedent of a demurrer to evidence and joinder.

Section VII.

Of Verdicts and Caſes reſerved.

(A) Of General Verdicts.
(B) Of Special Verdicts.
(C) Of Caſes reſerved.

(A) Of General Verdicts. (A)

A verdict (*vere dictum, quaſi dictum veritatis*, Co. Lit. 226.) is the anſwer of a jury given to the court concerning the matter of fact, in any cauſe committed to their trial and examination. A verdict, what:

In ancient times, if the jury (in civil cauſes) were not unanimous in their opinion, the majority might give a verdict, and judgment was given *ex dicto majoris partis juratorum*; nay, jurors might even bring in a verdict upon their belief only. Reeve's Hiſt. 2. 268. Formerly given by majority of jurors;

But, in the reign of Edward III. this practice was exploded; certainty and unanimity became requiſite. It was held by the court, that a verdict from eleven jurors was no verdict at all; and, though a particular precedent of a former judge was urged, Thorpe, one of the juſtices, ſaid, that it was no example for them to follow, for that judge had been greatly cenſured for it. And it was ſaid by the Bench, that the juſtices ought to have carried the jurors about with them in carts till they were agreed. From this period, therefore, it has ever been held, that jurors muſt be unanimous in their verdict. Reeve's Hiſt. 3. 100. afterwards made neceſſary to be unanimous.

There are two kinds of verdicts, general and ſpecial, or, as it is ſometimes called, a verdict *at large*. Two kinds of verdicts.

A general verdict is when the jury find generally for the plaintiff or defendant, without alleging any ſpecial matter, but merely affirming or negativing the iſſues joined between the parties. General verdict, what.

As in an action upon promiſes, wherein defendant pleaded the general iſſue *non aſſumpſit*; the jury, by a general verdict, if they find for plaintiff, are ſuppoſed to ſay, That defendant did undertake and promiſe, &c. if for defendant, That he did not undertake and promiſe, and the like; always following the words of the ſeveral iſſues.

Sometimes a general verdict is given for plaintiff upon ſome of the iſſues, and for defendant upon the other iſſues; in which caſe, the foreman of the jury mentions the iſſues, which they find for each reſpectively, and the verdict is ſtill recorded in the words of the iſſues, affirming or negativing them as they have been reſpectively found.

Of public and privy verdicts.

A verdict may alſo be either public or privy. Public, if given in open court; privy, if given out of court before any of the judges; in which caſe, it muſt afterwards be confirmed in open court, and a jury may, if they think fit, vary from it, ſo that it is tantamount to no verdict. In criminal caſes, a privy verdict cannot be given. 3 Blac. Com. 377.

N. B. When the judge adjourns to his own lodgings, and there receives the verdict, this is a public, not a privy verdict.

Verdicts, how recorded.

The verdict, when found, is to be indorſed on the record, which forms what is called the *poſtea*; of which hereafter.

Of the poſtea.

If the trial be at the ſittings in London or Middleſex, the *poſtea* is immediately delivered to the party obtaining the verdict, who makes the proper indorſement; but, if tried at the aſſizes, the aſſociate keeps the record, and indorſes the *poſtea*, and afterwards delivers it to the party.

Much might be here ſaid upon the effect and operation of general verdicts, in what caſes they may be altered or amended; when they ſhall be deemed bad from the miſbehaviour of the jurors, or of the parties; when inefficient in point of law, by being found on immaterial iſſues, or by not finding all that was in iſſue, or the like: But as the firſt of theſe points comes more immediately into conſideration under the head of *poſtea*, and the other two under the heads of motions for new trials, and in arreſt of judgment, I muſt refer the reader to thoſe ſections in the next chapter.

(B) Of Special Verdicts.

Special verdict, what.

If there ariſe in the caſe any difficult matter of law, the jury, for the ſake of better information, and to avoid the danger of having their verdicts attainted, will find a ſpecial verdict, which is grounded on the ſtat. Weſtm. 2. 13 Edw. 1. c. 30. ſ. 2.; and herein they ſtate the naked facts as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court ſhall be of opinion, that the plaintiff had cauſe of action, they then find for the plaintiff; if otherwiſe, then for the defendant. This is entered at length on the record, and afterwards argued and determined at the court at Weſtminſter,

minſter, from whence the iſſue came to be tried; if neither party be diſſatisfied with the judgment of the court, they may carry it up to the dernier reſort, the Houſe of Lords, by writ of error.

A ſpecial verdict ſhould be drawn with as much conciſeneſs as the nature of the caſe will admit.

In finding ſpecial verdicts where the points are ſingle and not complicated, and no ſpecial concluſion, the counſel (if required) do ſubſcribe the points in queſtion, and agree to amend the omiſſion of miſtakes in the meſne conveyance according to the truth, to bring the point in queſtion to judgment.

The unneceſſary finding of deeds in *hæc verba*, where the queſtion reſts not upon them, but are only derivation of title, ſhould be ſpared, and found ſhortly according to the ſubſtance they bear in reference to the deed, as feoffment, leaſe, grant, &c. R. M. 1654. ſ. 20.

In B. R.

When a ſpecial verdict is found, it is drawn and ſettled by the counſel on each ſide from the notes taken at the trial, who reſpectively ſign the ſame; plaintiff's attorney having firſt got his counſel to peruſe and ſign it, and then given it to the defendant's attorney for the like purpoſe; it is then left with clerk of niſi prius, *or aſſociate, who makes out copies for each party; the roll is then completed by the verdict being entered thereon, and docketed, and filed; a* concilium *is moved for, a rule got thereon from clerk of rules, and carried to the clerk of papers, who enters the cauſe for argument, and a copy of rule is ſerved on defendant's attorney.*

The cauſe ought ſtrictly to be ſet down within the firſt four days of the term, but leave of the court may be obtained for that purpoſe afterwards, for they are not ſo rigid as to the time of ſetting down ſpecial verdicts as they are with reſpect to ſpecial caſes. Books muſt be delivered to the judges, containing the whole record and ſpecial verdict, two days before argument:

In C. B.

How to proceed to get ſpecial verdict argued.

When a ſpecial verdict is found, it is ſettled and ſigned by two ſerjeants, and left with the aſſociate, who makes out copies for each party; plaintiff's attorney then carries it to prothonotary's; the clerk will make out ſix copies of the proceedings, with the ſpecial verdict, four for the judges and two for the ſerjeants; three of theſe copies are for defendant's attorney, who muſt pay for ſame; if he refuſes, plaintiff's attorney may deliver the four to the judges, and defendant's counſel will not be heard on argument. Let it then be entered on the roll; move for concilium; *carry roll to ſecondary's, and let it be in court; ſecondary will mark roll, and draw up rule for* concilium; *and will alſo ſet the cauſe down for argument; copy of rule muſt be ſerved on the attorney of the other ſide.*

When judgment given, draw up rule for judgment, and tax coſts as in other caſes.

The books muſt be delivered to judges one week at leaſt before the day of argument, two by plaintiff's attorney to the two ſenior judges, and

ment: Plaintiff's attorney delivers two (to the Chief and senior judge) and defendant's attorney, two to the other two judges. The proceedings as to getting the special verdict argued, being the same as on demurrer.

Be the verdict in whose favour it may, the rule of court is drawn up and costs taxed immediately, without a rule being given for judgment, and execution may issue thereon. But the other party may have a rule to be present at the taxing of costs, as in other cases. Imp. B. R. 385.

and two by defendant's attorney to the other two judges.

But if either attorney neglects to deliver books on his part, the other may deliver them three days before argument, and shall be paid for same by the opposite attorney on demand, or be shall be allowed these in his costs; or if no costs taxed, he may compel payment by attachment. Rule East. 27 Car. 2.

The rule formerly extended to demurrers also; but a subsequent rule of 6 G. 2. Reg. 3. has altered the time of delivering the demurrer books to two days before argument; but this old rule of Car. 2. still holds good as to special verdicts; which makes a difference in the practice of the two courts in this respect.

(C)

(C) Of Cases reserved.

Cases reserved introduced instead of special verdicts.

Formerly when any serious legal doubts arose at the trial, special verdicts were the only mode in which the point could be formally brought before the court for their determination; but in later times a more easy and expeditious method is adopted; instead of the jury finding a special verdict, and the matter at large being set forth upon the record, they give a verdict generally for the plaintiff, subject, nevertheless, to the opinion of the court above, on a special case stated under the direction of the judge and the advocates on both sides.

Special case no part of the record.

This does not constitute a part of the record, and is attended with less expence than the finding of a special verdict. On the other hand, it has this disadvantage, that as nothing appears on the record but the general verdict, it cannot, like the latter be removed by writ of error, so as finally to await the determination of the lords in parliament. If, therefore, the matter in question be of such moment and nicety as to induce either party to think it may be advisable to carry it to the *dernier resort*, in case the judgment of the court should be unfavourable to him, be must not consent to take a case, but must bring it on in the shape of a special verdict.

By whom postea kept till cause determined.

The *postea*, when a case is reserved, remains in the hands of the clerk of *nisi prius*, or associate, till the matter is determined, and a verdict is then entered accordingly.

The

The attornies get the special case settled and signed by the counsel or serjeants, it is then carried to the associate, who makes out copies for the parties; a concilium *is moved for; the rule served on the attorney of the other side, and proceed to set case down, to deliver books, and to go on to argument in same way as in special verdicts.*

How to proceed to get case argued.

All special cases must now be put in the paper for argument within the first four days of the term after the trial, and the courts have of late grown strict in this respect. Special verdicts may be set down afterwards.

Before the *concilium* is moved for, the case ought to be accurately settled as to dates and every other particular, so as not to trouble the court with any further application after it is set down in the paper. Formerly, indeed, the court themselves used to order demurrers or cases to be set down for argument according as upon inspection they found them deserving; but of late years they have trusted this to the discretion of counsel, upon whose signature only *conciliums* are granted of course.

In a case for the opinion of the court, the facts proved at the trial ought to be stated, and not the evidence of facts only. *Palmer* v. *Johnson*, 2 Wilf. 163.

When a case is reserved at *nisi prius* for the opinion of the court, which is a practice introduced in lieu of a special verdict, the verdict ought always to be for the plaintiff; and the rule of *nisi prius* ought to be to the following effect: That if the court should be of opinion for the defendant, that then judgment of nonsuit should be entered, otherwise the defendant could have no remedy in case of the plaintiff's death. *Moyse* v. *Cockfedge*, Bar. 460.

Section VIII.

Of Certificates for Costs.

Some certificate must be obtained at the trial.

Of the several statutes respecting costs, there are some of which the party can only take advantage by getting the judge to certify at the back of the record at the time of trial. It is, therefore, highly necessary to know in what cases this application should be made, and to be cautious not to lose the opportunity, which only offers itself at this stage of the suit.

Thus for the costs of special jury.

And first, in the common case of special juries, the charges thereof will not be allowed, unless the judge certifies at the trial; for by 24 G. 2. the party moving for the special jury shall pay the whole expence, and not be allowed it, unless the judge before whom the cause is tried, *shall, immediately after trial, certify* in open court, under his hand, upon

upon the back of the record, that the same was a cause proper to be tried by a special jury.

So in all cases of assault and battery, where costs under 40 s. certificate that battery was proved, or freehold came into question, must be at the trial. Stat. 22 & 23 Car. 2.

So in all cases of assaults and battery, where the damages are under 40*s.* the plaintiff, in order to get his full costs, must at the trial get the judge to certify, that an assault *and battery* was proved, or that the freehold or title to the land was chiefly in question; for the words of the statute 22 & 23 Car. 2. c. 9. are, "That in all actions of trespass, assault, "and battery, and other personal actions wherein the judge "*at the trial* of the cause shall not find and certify under his "hand upon the back of the record, that an assault and "battery was sufficiently proved, or that the freehold or "title of the land mentioned in the plaintiff's declaration "was chiefly in question; the plaintiff, in case the jury shall "find damages under the value of forty shillings, shall not "recover more costs than the damages so found shall amount "unto."

No certificate is necessary where the defendant admits a battery by justifying it, but only where it does not appear on the record that a battery was committed. *Smith* v. *Edge*, 6 D. & E. 564. *Redredge* v. *Palmer*, 2 H. Bl. 2.

In an action for mesne profits, if the judge does not certify, and damages under 40*s.* costs not allowed. *Doe* v. *Davis*, 6 D. & E. 594.

So certificates that trespass was wilful. 8 & 9 W. 3. c. 11.

So a certificate according to the stat. 8 & 9 W. 3. c. 11. that the trespass was wilful and malicious, in order to give plaintiff his full costs where damages are found under 40*s.*, must be made in court, or it is void. And the judge has no discretion, but is bound to certify where it appears that the trespass, however trifling, was committed after notice. *Reynolds* v. *Edwards*, 6 D. & E. 11.

So for double costs in actions against justices. &c. where verdict is for them.

Again, in all actions brought against justices, mayors, churchwardens, parish officers, constables, &c. where, if a verdict pass for them, or plaintiff be nonsuited, double costs are given, by the statutes 7 Jac. 1. c. 5. & 21 Jac. 1. c. 12. in such case, the judge should certify at the trial that they were acting in the execution of their office, or make an allowance of double costs upon the record.

So where verdict is against them.

In like manner, in actions against justices, where, by statute 24 G. 2. c. 44. plaintiff is entitled to double costs, if a verdict pass for him, and the judges certify, that the injury was wilfully and maliciously committed, the judge should certify to that effect at the trial in open court, on the back of the record.

Where not necessary.

But where there is a special verdict, and it appears by the facts found, that defendant was acting as justice, &c. no certificate is necessary. *Rann* v. *Pickins*, Do. 308.

What certificates for costs need not be till after trial.

But there are some statutes respecting costs, where a certificate is necessary, but need not be obtained till after the trial of the cause.

Those under 43 Eliz. c. 6.

Such is the case with respect to the certificate upon the 43 Eliz. c. 6. which enacts, "That if upon any action personal, not being for any title or interest of lands, nor "concerning the freehold or inheritance of any lands, nor "for any battery, it shall appear to the judge, that the debt "or damages to be recovered be under 40*s.* and so signified and set down by him, the plaintiff shall have no "more costs than damages."

It has been held, that this certificate may be obtained after the trial. *Holland* v. *Gore*, Say. on Costs, 18.

To what actions that statute extends.

This statute extends to all personal actions not particularly excepted; even to an action of trespass *vi et armis* for beating plaintiff's dog. *Dand* v. *Sexton*, 3 D. & E. 37.

So certificates under 4 & 5 Anne, of probable cause, to plead certain pleas.

So a certificate, according to the 4 & 5 Anne, c. 16. s. 6. may be granted after the trial, the words being, "That if a "verdict shall be found upon any issue in the said cause, for "plaintiff or demandant, (meaning where there are double "pleas,) costs shall be given in like manner, unless the judge "certify the defendant, or tenant, or plaintiff in replevin, "had probable cause to plead such matter, which upon the "said issue shall be found against him," &c.

Consequence of neglecting to get certificate at trial, when statute requires it.

In all the above cases, therefore, where the judge should certify at the trial, it is of importance to obtain such certificate, as it will afterwards be too late, and it cannot be cured by any motion in court, grounded on any affidavit, praying leave to enter a suggestion on the record. *Grindley* v. *Holloway*, Do. 307.

CHAP. XI.

Of Proceedings from Trial to Execution.

SEC. 1. *Of the Poſtea and Rule for Judgment.*

SEC. 2. *Of new Trials.*

SEC. 3. *Of arreſting the Judgment.*

SEC. 4. *Of taxing Coſts, and ſigning final Judgment.*

SEC. 5. *Of docketing Entries and Judgments.*

SECTION I.

Of the Poſtea and Rule for Judgment.

If ſpecial verdict, how to proceed has been ſhewn ante, ſect. 7. ch. 10.

IF the verdict of the jury be a ſpecial verdict, or if there be a caſe reſerved at the trial for the opinion of the court, we have already ſhewn how to proceed, in the ſeventh ſection of the laſt chapter; but if it be a *general* verdict, whether a ſpecial jury cauſe or not, the proceedings are as follow:

In B. R.

How to proceed to judgment on a general verdict.

If it be a trial at the ſittings, the aſſociate, immediately after the verdict is given, makes a minute thereof, and delivers the poſtea, *with* diſtringas *and pannel annexed, to the attorney, whoſe client has obtained the verdict, and he takes care to indorſe the* poſtea *properly.*

As to the poſtea.

If at ſittings.

If at aſſizes.

But if it be a trial at the aſſizes, the aſſociate keeps the record till the next term, and in the interim, indorſes the poſtea, *for which a fee is paid at the trial*

As to the rule for judgment.

The next thing to be done, is to take out a rule for judgment on the poſtea.

This may be given upon the return-day of the diſtringas, *ſo if proceedings be by original, unleſs ſuch return-day be a Sunday.*

It is written on a ſlip of paper thus: A. v. B. *rule for judgment on*

In C. B.

In this court, the aſſociate keeps the record, and indorſes poſtea thereon, whether it be tried at aſſizes or at the ſittings.

If the cauſe is tried in term, he will deliver ſame about the fifth day after term; if in vacation, it may be had in the firſt week of the ſubſequent term.

There is no rule given for judgment in this court, but you muſt wait the ſame time, four days excluſive, as in K. B. which is allowed the other ſide to move for a new trial, or in arreſt of judgment. When the time is expired, the poſtea *having been got from the aſſociate, get it ſtamped at ſtamp-office with a double half-crown ſtamp; then carry it to the prothonotary, with papers in the cauſe, who will ſign final judgment, and tax coſts.*

When judgment is ſigned, or coſts

on postea, *or on inquiry (if it be after writ of inquiry). Dated,*

T. S. plaintiff's attorney.

There is a four-day rule, exclusive of the day it is given. If Sunday or a dies non *intervenes, it is no day, for four whole court-days are allowed.*

Pending this rule, the other side may move for a new trial, or in arrest of judgment. If no such step is likely to be taken, let the attorney, who hath obtained the postea *in the meantime, get it stamped with a double half-crown stamp at the stamp-office Then carry same to clerk of common bails, at the King's Bench Office, who will mark the same* deliberatur, *as it is called, thus:* Delivered of record, such a day and year, *and sign his name; pay* 6d. *for entering.*

costs taxed on postea *or inquiry, the record or inquisition must be delivered to the clerk of the judgments for him to keep, nor can it be taken out of the office afterwards, without leave of court on motion. R. Trin. 13 G. 2.*

N. B. If it be writ of inquiry, there is no *postea* or any thing stamped; but the double half-crown stamp is for the master to sign final judgment on.

When rule on postea *or inquiry is out, carry same, with papers in cause, to the master in B. R. and prothonotary in C. B. who will sign final judgment and tax costs; for which see* post, *Sec.* 4. How to sign final judgment.

The rule for judgment ought not to be entered before the day in bank, and is not necessary, if the plaintiff be nonsuited; for, in that case, judgment may be entered immediately after the day in bank. N. on R. E. 5 G. 2. Rule for judgment, when to be entered.

The *postea* is as a return of the judge before whom the cause is tried, of what was done therein; it is indorsed on the back of the *nisi prius* record, and is a continuation of the proceedings from the *distringas*; it has its name from the word *postea*, AFTERWARDS, being the first word of the subject-matter indorsed. Postea, its purpose, and why so called.

The form of a *postea*, in a special jury cause where a *tales* was prayed, and which, by leaving out the *tales* part, may be converted into a *postea* on a common jury cause, is as follows: Form of postea.

Afterwards, (that is to say,) on the day, and at the place within mentioned, before the right honourable Lloyd Lord Kenyon, the chief justice within written, Roger Kenyon, Esq. being associated unto him, according to the form of the statute in that case made and provided, came the within-

within named A. B. by his attorney within contained, and the within-named C. D. although solemnly required, came not, but made default; therefore let the jury, whereof mention is within made, be accepted of againſt him by his default; and the jurors of that jury being ſummoned, ſome of them, (that is to ſay,) [here name only the jurors that appear on the pannel,] *and becauſe the reſidue of the jurors of the ſame jury do not appear, therefore other perſons, of thoſe ſtanding by the court by the ſheriff of the county aforeſaid, at the requeſt of the ſaid A and by the command of the ſaid chief juſtice, (if in London or Middleſex, if at the aſſizes, then by the command of the ſaid juſtices,) are now newly ſet down, whoſe names are affiled in the within written pannel, according to the form of the ſtatute in that caſe made and provided, which ſaid jurors, ſo newly ſet down, (that is to ſay,) K. L. of, &c. haberdaſher,* (naming the reſt of the tales men,) *being required, came, who, together with the ſaid other jurors, before impannelled and ſworn to declare the truth of the within contents, being elected, tried, and ſworn upon their oath, ſay, That the ſaid C. D. did undertake and promiſe, in ſuch manner and form as the ſaid A. hath within complained againſt him; and they aſſeſs the damages of the ſaid A. B. by reaſon of the not performing the promiſes and undertakings within written, beſides his expences and coſts laid out by him in this behalf, to* 12*l. and for thoſe coſts and charges to* 40*s. therefore, &c. Imp. B. R.* 372.

How if judge dies after aſſizes and before term.

In caſe the judge of aſſize die after verdict, and before the day in bank, the clerk of aſſize returns the *poſtea* with a ſpecial entry. Salk. 671.

Of altering and amending the *Poſtea*.

Poſtea amended by judge's notes, in what caſes.

If the aſſociate makes a miſtake by marking wrong damages on the *poſtea*, and the notes of the judge before whom the cauſe was tried are otherwiſe, the *poſtea*, on motion, may be amended by the judge's notes. *Newcomb* v. *Green*, 1 Wilſ. 33.

If verdict general, and not entered on all the iſſues.

So if there be a verdict for plaintiff generally, and he omits to enter up the verdict on all the iſſues, court, on motion, will amend the *poſtea*; and as it is a mere ſlip, ſuch amendment may be after error brought. *Petrie* v. *Hannay*, 3 D. & E. 659.

If verdict entered generally when one count is bad, provided no evidence given on that count;

but not if evidence was given thereon.

Again, if a general verdict and entire damages be entered when one of the counts is bad in law, and no evidence was given at the trial on ſuch bad count, the *poſtea* may, on motion, be amended by the judge's notes. *Eddowes* v. *Hopkins*, Do. 376.

I ſay where no evidence was given at the trial on ſuch bad count; for this diſtinction was taken *per* Buller, Juſt. in ſame caſe. If there was only evidence at the trial upon ſuch of the counts as are good and conſiſtent, a general verdict might be altered from the judge's notes, and entered on thoſe

those counts; but if there was any evidence which applied to the other bad or inconsistent counts, (as for instance, in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict,) there the *postea* cannot be amended, because it is impossible for the judge to say on which of the counts the jury have found the damages, or how they had apportioned them. In such case, therefore, the only remedy is, by awarding a *venire de novo*.

In the case of *Grant* v. *Astle*, Do. 730. Lord Mansfield said, he exceedingly lamented that ever so inconvenient and ill-founded a rule should have been established, as that where there are several counts and entire damages, and one count is bad and the others not, this should be fatal, upon the fictitious reasoning that the jury had assessed damages on all, though, in truth, they never thought of the different counts, but the verdict was so taken from the inadvertence of counsel in the hurry of *nisi prius*. And what makes this rule appear more absurd is, that it is does not hold in the case of criminal prosecutions; for when there is a general verdict of *guilty* on an indictment consisting of several counts, if any one of them is good, that is held sufficient: but in civil cases the rule is now settled, and the court have gone as far as they can in allowing verdicts in such cases to be amended.

This distinction disapproved of by Lord Mansfield.

In further confirmation of this being the settled rule, is the case of *Holt* v. *Scholefield*, 6 D. & E. 693. where Mr. J. Lawrence made the same distinction. There indeed they not only refused leave to amend, but would not grant a *venire de novo*, and judgment was arrested.

The court will not amend the *postea* by increasing the damages given by the jury, although all the jurymen join in an affidavit, stating their intention to have been to give the plaintiff such increased sum, and that they conceived the verdict was calculated to give him such. Such things should be explained at the trial. *Jackson* v. *Williamson*, 2 D. & E. 281.

Postea not amended to increase damages;

Nor will the court alter a verdict, unless it clearly appears on the face of it, that the alteration would be agreeable to the intention of the jury. Where, therefore, a jury bring in a verdict contrary to the notes or direction of a judge, the proper remedy is to move for a new trial. *Spencer* v. *Goter*, 1 H. Bl. 78.

nor verdict altered contrary to apparent intention of jury.

Where a verdict was given for a greater sum than the amount of the damages laid in the declaration, court will suffer amendment to be made by plaintiff, entering a *remittitur* of the *extra* sum; and this even after error is brought, on

If verdict be for greater sum than laid in declaration, remittitur may be entered.

payment of costs, (notwithstanding the case of *Sandiford* v. *Bean*, Hil. 13 Geo. 3.) 1 C. B. T. R. 643.

At what time such amendment must be moved for;

An amendment of the *postea* must be moved for before judgment; it cannot be amended afterwards on error being brought; though the court may even then award a *venire de novo*. *Grant* v. *Astle*, Do. 730.

whilst record is in court.

As long as the record remains in court, amendments may be made; and though error is brought in the house of lords, the record still remains in B. R. only a transcript thereof being sent to the house of lords.

Postea lost, and a new one ordered.

On a motion for a new trial, the *postea* was brought into court, and after a new trial had been denied, the *postea* could not be found; and the court, on debate, ordered a new one to be made out from the record above and the associates notes. *Dayrell* v. *Bridge*, Str. 1264.

Section II.

Of new Trials.

(A) Their Nature, Origin, and Utility.
(B) When and how to be moved for.
(C) In what Actions and Cases granted.
(D) Of the Costs in case of new Trial.
(E) How to proceed if new Trial granted.
(F) Of the motion for a *venire facias de novo*, and the Difference between them and Motions for new Trial.

(A) (A) Of the Nature, Origin, and Utility of New Trials.

The nature, origin, and utility of new trials.

It has been observed, that four days from the return of the *distringas*, are allowed to move the court for a new trial, or in arrest of judgment.

No one, therefore, can have final judgment obtained against him by surprise.

We shall first treat of new trials, because a motion in arrest of judgment may be made after a new trial has been moved for and refused, but not *vice versa*.

Difference between the grounds for new trial and in arrest of judgment.

Causes of suspending the judgment by granting a new trial, are wholly *extrinsic*, arising from matter foreign to or *dehors* the record: whereas arrests of judgments arise upon *intrinsic* causes appearing upon the face of the record.

Trials

Trials by jury in civil cauſes, ſaid Lord Mansfield, could not ſubſiſt now without a power ſomewhere to grant new trials. Utility of new trials.

If an erroneous judgment be given in point of law, there are many ways to review and ſet it right.

Where a court judges of fact upon depoſitions in writing, their ſentence or decree may many ways be reviewed and ſet right.

But a general verdict can only be ſet right by a new trial; which is no more than having the cauſe more deliberately conſidered by another jury, when there is a reaſonable doubt, or perhaps a certainty that juſtice has not been done.

The writ of attaint is now a mere ſound in every caſe; in many it does not pretend to be a remedy. Writ of attaint out of uſe;

There are numberleſs caſes of falſe verdicts without corruption or bad intention of the jurors; they may have heard too much of the matter before the trial, and imbibed prejudices without knowing it; the cauſe may be intricate; the examination may be ſo long as to diſtract and confound their attention. if not the ineffi-cacy thereof.

Moſt general verdicts include legal conſequences as well as propoſitions of fact: in drawing theſe conſequences the jury may miſtake, and infer directly contrary to law.

The parties may be ſurpriſed by a caſe falſely made at the trial, which they had no reaſon to expect; and therefore could not come prepared to anſwer.

If unjuſt verdicts obtained under theſe and a thouſand like circumſtances were to be concluſive for ever, the determination of civil property in this method of trial, would be very precarious and unſatisfactory. It is abſolutely neceſſary to juſtice, that there ſhould, upon many occaſions, be opportunities of re-conſidering the cauſe by a new trial; and it is done in a way very favourable to the parties for whom the wrong verdict is given; it is upon payment of coſts. Whereas, in other caſes where a wrong judgment is reverſed, coſts are paid as if the right judgment had been given in the firſt inſtance. New trials neceſſary to juſtice. How coſts paid in ſuch caſes.

It is not true, "That no new trials were granted before "1655," as has been ſaid in Style 466. When new trial firſt granted.

The reaſon why this matter cannot be traced further back is, "That the old report books do not give any accounts of "determinations made by the court upon motions."

Indeed for a good while after this time, the granting of new trials was holden to a degree of ſtrictneſs ſo intolerable, that it drove the parties into a court of equity, to have, in effect, a new trial at law of a mere legal queſtion; becauſe the verdict in juſtice, under all the circumſtances, ought not Court formerly ſtrict therein;

to conclude; and many bills have been retained upon this ground, and the queſtion tried over again at law under the direction of a court of equity; and, therefore, of late years the courts of law have gone more liberally into the granting of new trials, according to the circumſtances of the reſpective caſes; and the rule laid down by Lord Parker in the caſe of the *Queen* againſt the *Corporation of Helſton*, H. 12 Ann. B. R. (ſee Lucas's Reports 202.) ſeems to be the beſt general rule that can be laid down on this ſubject, *viz.* "doing "juſtice to the party;" or, in other words, "attaining the "juſtice of the caſe."

gradually more relaxed.

Reaſons for granting new trial.

The reaſons for granting a new trial muſt be collected from the whole evidence, and from the nature of the caſe conſidered under all its circumſtances.

This power may be exerciſed at much leſs expence of time and money, therefore more beneficially for the ſubject, by the court of common law where the cauſe has been tried.

(B) (B) When and how to move for new Trial.

At what time to be moved for;

If the party againſt whom a verdict is obtained on trial, or judgment on inquiry of damages, wiſhes for a new trial or inquiſition, he muſt move for the ſame within the four days, and the motion muſt be made in the court, ſupported by an affidavit of facts.

and how.

It is a rule to ſhew cauſe; and though no notice thereof neceſſary in B. R. it is fair practice to give it, that the other ſide may be aware on what ground the motion is made. In C. B. notice of motion muſt be given.

How the four days reckoned:

In B. R. the four days for motions for new trials are inclusive; if the firſt day of term be the twenty-firſt, the 24th is the laſt day of moving. *Burt* v. *Barlow*, Do. 171. Bar. 445.

not after the four days in C. B.

So in C. B. a motion for a new trial cannot be made after the four days expired, though before judgment entered, unleſs the foundation of the motion be ſome matter diſcovered after that time. *Willis* v. *Bennett*, Bar. 443.

What done on making the motion.

On motion for a new trial, the uſual way is, to grant a rule to ſhew cauſe; and then the puiſne judge of the court ſpeaks to the judge who tried the cauſe, (if of another court,) and obtains a report from him of the trial, and alſo a ſignification of his ſentiments on it; if the judge declares himſelf ſatisfied with the verdict, it hath been uſual not to grant a new trial on account of its being a verdict againſt evidence; on the other hand, if he declares himſelf diſſatisfied with the verdict, it is pretty much of courſe to grant it.

The

The court, under very particular circumstances, will permit a new trial to be moved for after the four days are expired. *Birt* v. *Barlow*, Do. 171.

In B. R. in very particular cases, new trial moved for after the four days.

So in criminal cases. *The King* v. *Gough*, Do. 797.

If on motion for a new trial the court are divided in opinion, no rule is made; the party who obtained the verdict is at liberty to sign final judgment. *Cartledge* v. *Eyles* Baronet, Bar. 442.

How, if court divided.

A new trial may be granted a second time, if the reasons for granting it are sufficient. *Per Cur.* in *Goodwin* v. *Gibbons*, one, &c. Burr. 2108. It must depend upon the circumstances of the case.

New trial granted second time,

But where there are two contrary verdicts, and the latter is satisfactory to the court, the losing party is not entitled by any rule of practice to a *third* trial. *Parker* v. *Ansel*, Blac. 963.

except where two contrary verdicts.

But if on a second trial the jury find the same verdict as the former jury did, and the court are of opinion the verdict is against law, they will grant a third trial. *Tindal* v. *Brown*, 1 D. & E. 167.

Third trial sometimes granted.

So, if they think the verdict clearly against evidence, a third trial will be granted. *Wilson* v. *Brough*, East. 24 G. 3. B. R.

If a new trial or inquisition be denied, the party may afterwards move on a similar affidavit to arrest the judgment; but if a motion in arrest of judgment be first made, and refused, you cannot afterwards move for a new trial. So it is of an inquiry; after motion in arrest of judgment, defendant cannot move for a new writ. Salk. Rep. 647.

After motion refused for new trial, motion in arrest of judgment may be made, but not vice versa.

Where, from any defect in the evidence or otherwise, it is contended on the trial that plaintiff should be non-suited, but the judge directs the contrary, and a verdict is found for him, care should be taken at the time to reserve a liberty for the defendant to enter a nonsuit, if the court above should be of opinion that the verdict cannot be sustained, otherwise they can only set aside the verdict, and grant a new trial. *Griffiths* v. *Brome*, 6 D. & E. 66.

(C) In what Actions and Cases granted. (C)

In granting new trials, the court knows no limitations, (except in some particular cases,) but will either grant or refuse a new trial, as it will tend to the advancement of justice. 6 D. & E. 638.

It may be granted in misdemeanors, but not in offences of a higher class. *Ibid.*

No new trial allowed in a writ of right, except the verdict be flagrantly wrong. *Tyssen* v. *Clarke*, Blac. 941.

Not in writ of right.

In ejectment feldom.

In ejectment, the courts will feldom grant a new trial where the verdict is for the defendant, becauſe the plaintiff may bring a new ejectment; but, where it is for the plaintiff, a new trial is often granted, for the conſequence of not granting a new trial is the alteration of the poſſeſſion of the premiſes. *Goodtitle* v. *Clayton*, Burr. 2224. *Wright* v. *Littler*, Burr. 1244.

Not in penal actions, except in caſe of miſdirection.

The courts never grant a new trial in penal actions. *Jervois* v. *Hall*, 1 Wilſ. 17. *Fonereau* v. ——, 3 Wilſ. 59. and the caſe in 2 Keb. 226. held bad law, except upon the ground of miſdirection by the judge. *Wilſon* v. *Raſtal*, 4 D. & E. 753.

Nor in actions for malicious proſecution.

Nor in an action for malicious proſecution, if verdict for defendant, though againſt evidence and judge's direction. *Norris* v. *Tyler*, Cowp. 37.

How in caſes of information;

A new trial may be granted in an information in nature of a *qua warranto*, although denied in the caſe of *The King* v. *Bennet*, 1 Str. 101. the court ſaying, that of late years a *quo warranto* information had been conſidered merely in the nature of a civil proceeding, and that there were ſeveral inſtances ſince the caſe in Strange, in which a new trial had been granted. *The King* v. *Francis*, 2 D. & E. 484.

In a joint action where one is acquitted;

If in an action againſt two, one be acquitted and the other found guilty, that defendant can have no new trial. *Parker* v. *Godlin*, Str. 814.

But in the caſe of *The King* v. *Mawbey* and others, where ſeveral defendants were tried at the ſame time for a miſdemeanor, ſome of whom were acquitted and ſome convicted, the court granted a new trial as to thoſe convicted, thinking the conviction improper. 6 D. & E. 638.

where money is paid into court;

No new trial granted in any action where defendant has paid money into court, that being an acknowledgment of the action. *Burrough* v. *Skinner*, Burr. 2639.

where by agreement parties in ſeveral actions were to be bound by verdict in one;

Where, in ſeveral actions of a ſimilar nature, it is agreed between the parties that they ſhall be bound by a verdict in one of the cauſes, it means ſuch a verdict as the court thinks ought to ſtand as a *final* determination of the matter, and therefore does not prevent defendant from moving for a new trial, after a verdict in one of the cauſes for plaintiff. *Hodſon* v. *Richardſon*, Burr. 1477.

where there is a bill of exception.

When there is a bill of exceptions, a new trial ſhall not be moved for on the point of law contained therein. *Fabrigas* v. *Moſtyn*, Black. 929.

For the bill of exceptions is ordained by the legiſlature to be in nature of a writ of error. It would be unbecoming, therefore, in the court to ſtop it *in tranſitu*, unleſs the party will waive the bill of exceptions.

Value

Value and importance are not of themſelves ſufficient grounds for granting a new trial, unleſs there be alſo ſome doubt in the queſtion, though they frequently weigh in obtaining a rule to ſhew cauſe why there ſhould not be a new trial. *Vernon* v. *Hankey*, 2 D. & E. 113.

What grounds for new trial.

Value and importance, how for.

Where verdicts have been given contrary to evidence, or where there hath been no evidence at all to ſupport ſuch verdicts, the court hath granted new trials; but if there hath been a contrariety of evidence on both ſides, the courts have never granted new trials, notwithſtanding the judge (before whom the cauſe was tried) hath been of opinion that the ſtrength and weight of evidence was againſt the verdict. 1 Wilſ. 22. Anon. *Swain* v. *Hall*, 3 Wilſ. 47.

Of verdicts contrary to evidence, or where only contradictory evidence.

But the court will not look with eagle's eyes to ſee whether the evidence applies exactly or not to the caſe, when they can ſee that plaintiff has obtained a verdict for ſuch damages as he is entitled to in conſcience and equity. *Slater* v. *Baker*, 2 Wilſ. 362. *Wilkinſon* v. *Payne*, 4 D. & E. 468. *Aylett* v. *Lowe*, Blac. 1221.

If juſtice be not done to the parties;

For, though the ground of a verdict for the plaintiff be wrong, yet if no injuſtice be done to the defendant, or if the plaintiff can, by another form of action, recover as much, the court will not grant a new trial; but otherwiſe, where injuſtice is done him by it; and if it be not clear, the plaintiff may recover as much by another form of action. 4 Burr. 936.

It does not follow, by neceſſary conſequence, that there muſt always be a new trial granted in all caſes whatever, where the verdict is contrary to evidence; for it is poſſible that it may ſtill be on the ſide of the real juſtice and equity of the caſe. *Ibid.*

If juſtice done, court will try to ſupport verdict.

The court will not grant a new trial, even where the jury have found for the defendant, againſt evidence, if the plaintiff appears to have received no real injury, and the damages (if the verdict had been for the plaintiff) would have been but a mere triſle. *Burton* v. *Thompſon*, Burr. 664.

For, after a verdict on the honeſt and juſt ſide of the cauſe, the court will ſupport it, if poſſible, and not grant a new trial. *Goſlin* v. *Wilcock*, C. B. 2 Wilſ. 302.

Nor will the court ever grant a new trial, when they clearly ſee the merits have been fairly and fully tried. *Sampſon* v. *Appleyard*, 3 Wilſ. 273.

No new trial where merits fairly tried,

Although the weight of the evidence may be certified by the judge to have been againſt the verdict, yet a new trial will be denied, if the nature of the action, the value of the matter in diſpute, and other circumſtances of the caſe, war-

though the weight of evidence againſt the verdict.

rant ſuch denial. For a new trial ought to be granted to attain real juſtice, but not to gratify litigious paſſions upon every point of *ſummum jus*. *Farewell* v. *Chaffey*, Burr. 53.

In which laſt caſe, a variety of caſes are cited, in all of which the verdicts were againſt evidence, and the ſtrict rule of law, or obtained through ſurpriſe: But the court would not give a ſecond chance of ſucceſs to a hard action, or an unconſcionable defence.

No affidavits admiſſible.

Nor will the court admit affidavits to explain evidence given at a trial, in order to found motions for a new trial thereon. *Hanſon* v. *Parker*, 1 Wilſ. 257.

No new trial, merely becauſe the verdict is a hard one.

Where the verdict is neither againſt evidence nor law, though it be a hard one, no new trial will be granted. *Hankey* v. *Trotman*, Blac. 1.

In what caſes on affidavits of jurymen.

The court will, under circumſtances, grant new trials on the affidavits of jurymen, that the verdict was taken contrary to their meaning, but they are very cautious how they do this, as it may be of dangerous tendency.

Where, after a general verdict on both iſſues was given for defendant, eight of the jurymen ſtated on affidavit, that they meant their verdict to have been for plaintiff on one iſſue, and the court were ſatisfied that would have been right, though they were doubtful what to do, not liking to ſend the parties to a new trial; they at length deſired the counſel to move why the verdict ſhould not be amended and ſet right according to the truth of the finding, but no cauſe was ſhewn. *Cogan* v. *Ebden*, Burr. 385.

Even in criminal caſe.

New trial granted defendant in a criminal caſe upon the reports of the judge, and affidavits of the whole jury, that the verdict was taken contrary to their meaning, and to the judge's direction in point of law. *Rex* v. *Simmons*, 1 Wilſ. 329.

A juryman's affidavit, with regard to his ſentiments in point of law at the trial, ought not to be admitted, whatever may be the caſe of his affidavit, tending to rectify a miſtake. *Rex* v. *Almon*, Burr. 2686. *Rex* v. *Thirkell*, Burr. 1696.

In what caſes, in order to throw new light on the queſtion;

After a full trial by a competent jury, if no freſh light can be thrown in, a new trial ſhall not be granted, though the verdict might be contrary to the ſenſe and meaning of the parties. *Camden* v. *Cowley*, Blac. 418.

or introduce new evidence, or the like;

There are caſes where the court will grant new trials, notwithſtanding there was evidence on both ſides; as where all the light hath not been let in at the trial which might and ought to have been, as for want of all the ſubſcribing witneſſes to a releaſe, ſet up by defendant, being called and examined. *Norris* v. *Freeman*, 3 Wilſ. 38.

The

The court will not grant a new trial to let the party into a defence of which he was appriſed at the firſt trial. *Vernon* v. *Hankey*, 2 D. & E. 113.

Nor for want of evidence which he might then have produced. *Cooke* v. *Berry*, 1 Wilſ 98.

A new trial ſhall not be granted becauſe the counſel thought it prudent to omit evidence which they had in their briefs, and might have offered in mitigation of damages; nor becauſe another jury, in a cauſe nearly ſimilar, gave a different verdict. *Spong* v. *Hog*, Blac. 802.

Not granted to give the defendant an opportunity of proving the illegality of a policy which was not illegal on the face of it, for he ſhould have ſhewn it on the trial. *Giſt* v. *Maſon*, 1 T. R. 84.

But diſcovery of new evidence by the attorney of defendant executor (then abſent from England), though in the actual cuſtody of the attorney himſelf, yet not known by him ſo to be, is a ground for a new trial. *Broadhead* v. *Marſhall*, Blac. 955.

A new trial will not be granted on account of a miſtake by a witneſs in giving his evidence, *Huiſt* v. *Keldon*, Say. 27.; although by affidavit he confirms it to be a miſtake; and had it not been made, the verdict would have been different. — or where witneſs made a miſtake in his evidence;

But where a verdict is manifeſtly againſt equity, and obtained againſt defendant from inadvertence in not being prepared with evidence, court will grant new trial. — or verdict obtained by inadvertence;

A verdict upon a trial was for plaintiff, ſubject to the opinion of the court, upon this queſtion, "Whether defendants, being ſheriff's officers, (and who juſtified under a *fi. fa.*) ought upon the trial to have produced and proved a "copy of the judgment on which the *fi. fa.* iſſued?" The court were of opinion, that the action being by a ſtranger to the original ſuit, the judgment ought to have been proved, and a copy produced; but *aliter* if the action had been by the perſon againſt whom the *fi. fa.* iſſued; therefore the plaintiff's verdict ſtood. But in this caſe the court gave defendants leave to move for a new trial; which was granted, becauſe plaintiff had brought this action under a fraudulent bill of ſale. And Lord Mansfield ſaid, the verdict ariſes from a ſlip and inadvertence, and is againſt law and juſtice; the plaintiff has no merits; the bill of ſale was fraudulent; plaintiff's ſon (againſt whom *fi. fa.* iſſued) remained in poſſeſſion; the recovery is manifeſtly contrary to reaſon and juſtice. *Martyn* v. *Podger* and others, Burr. 2631.

The *venire facias* was awarded by miſtake returnable on the morrow of the Aſcenſion inſtead of eight days of the Purification. — or where venire facias wrong awarded, or the like;

rification. The defendants, though their witneſſes attended the aſſizes, made no defence at the trial, but confeſſed leaſe, entry, and *ouſter*, and ſuffered plaintiff to take a verdict, relying on the miſtake in awarding the *venire*, returnable at a day ſubſequent to the aſſize; till after which return and default made by the jurors, there could be no *niſi prius*. The jury proceſs was made returnable at a proper day; and, on motion, the court held the variance material on the authority of two caſes cited by the plaintiff's counſel. *Baſtard & al.* againſt *Bartlett*, Trin. 3 G. 2. *Dale* v. *Holmes*, Mich. 4 G. 2. in B. R. verdict ſet aſide on payment of coſts. *Woden* v. *Saunders*, Bar. 460.

or for irregularity in not giving notice of trial;

Want of due notice is a proper ground for a motion for a new trial; but the defendant is precluded if he appear at the trial and make defence. Salk. 646.

or for variance between iſſue and record;

Though the iſſue delivered varied from the record of *niſi prius*, court refuſed a new trial. *Mather* v. *Brinker*, 2 Wil. 243.

or for unfairly keeping out of the way witneſſes;

A material witneſs for defendant concealed himſelf in the plaintiff's houſe to avoid being ſerved with a ſubpœna: by which the plaintiff obtained a verdict, but the court ſet it aſide without coſts, it being unreaſonable for the plaintiff to carry the cauſe down to trial when ſhe knew the defendant could not make a defence. *Montpeſſon* v. *Randle*, Hil. 20 G. 2. Bull. Ni. Pri. 328.

or where ſheriff admits improper evidence;

If the ſheriff, on the execution of the writ of inquiry, admits improper evidence to be given whereby the damages are leſſened, the court will ſet aſide the inquiſition, and give plaintiff leave to execute a new writ of inquiry. Bar. 448. *Tutton* v. *Andrews*.

or witneſſes afterwards diſcovered incompetent;

An objection to the competency of witneſſes diſcovered after a trial, is not a ſufficient ground of itſelf for granting a new trial, but it may have ſome weight with the court where the party applying appears to have merits. *Turner and another* v. *Peart*, 1 D. & E. 717.

or where a ſyſtem of perjury appears;

A new trial granted after a very ſtrict ſcrutiny upon the ground, that the whole was a fiction ſupported by perjury, which defendant could not be prepared to anſwer; that ſince the trial many circumſtances had been diſcovered to *detect* the iniquity, and to ſhew the ſubornation of the witneſſes. *Fabrilius* v. *Cock*, Burr. 1772.

or any tricks uſed;

If a party obtain a verdict by any trick or unfair unconſcionable advantage, court will grant a new trial, and even ſubject him to payment of coſts. *Anderſon* v. *George*, Burr. 353.

If

If the under-sheriff were attorney in the cause, and returned the pannel of jurors, new trial will be granted. *Boylis* v. *Lucas*, Cowp. 112. — or pannelled returned by improper officer;

A new trial was granted, because the foreman of the jury had declared, that the plaintiff should never have a verdict. Salk. 645. S. P. Sir *G. Wynn* v. *Bishop of Bangor*, Com. 601. — or partiality avowed by jury;

A verdict was set aside because one person answered to another's name, and was sworn a juror. *Norman* v. *Beaumont*, Bar. 453. *Wrey* v. *Thorn*, Ibid. 454. — or any juror artfully personated;

A juror on the principal pannel was challenged, and afterwards sworn on the tales by a wrong name; and though no fault was found with the verdict, yet the court granted a new trial. *Parker* v. *Thornton*, Str. 629. Raym. 1410. — or sworn after being challenged;

Where the jury drew lots, verdict was set aside; though according to evidence and costs, abided the event. *Hall* v. *Cove*, Str. 642. *Philips* v. *Fowler*, Com. 525. — or where jury drew lots;

If it could be proved by any other than a juryman, that a verdict was owing to chance, as by jurymen tossing up and the like, it would be set aside; but not so if the jurors voted how it ought to be, and seven were on one side and five of the other; because, in such case, nothing was determined by chance, the five jurors might ultimately be convinced by the seven: but if they only acquiesced in the finding of the verdict, that is sufficient; and they shall not afterwards be suffered to deny such acquiescence. *Lawrence* v. *Boswell*, Say. 100. — where verdict was the effect of chance, by jury tossing up, or the like;

Upon a motion to set aside a verdict upon the affidavit of two jurors, who swore, that the jury, being divided in their opinion, tossed up, and the plaintiff's friends won; agreeable to *Hall* v. *Cove*, Str. 642. *Per* Lord Mansfield, C. J. the court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor; but in every such case the court must derive their knowledge from some other source, such as somebody having seen the transaction through a window, or the like. Rule refused. *Vasie* v. *Delaval*, 1 D. & E. 11. — how this must be shewn.

So a mere subsequent confession of a juryman to the defendant's attorney, that the jury drew lots which six of them should determine the verdict, no ground for a new trial. *Aylett* v. *Jewel*, Blac. 1299.

The courts will grant a new trial for misdirection of the judge who tried the cause in point of evidence. *How* v. *Strode*, 2 Wil. 273. *Russel* v. *Palmer*, 2 Wil. 328. — New trial for misdirection of the judge;

After a nonsuit by order of the judge at *nisi prius*, improperly, the court granted a new trial without costs. 3 Wil. 146.

Buscall

Buſeall v. *Hogg.* Ibid. 338. *Reckham* v. *Jeſſup.* *Rice* v. *Shute*, Burr. 2612.

but how far court will exerciſe their diſcretion in this reſpect.

An application for a new trial is an application to the diſcretion of the court, who ought to exerciſe that diſcretion in ſuch a manner as will beſt anſwer the ends of juſtice.

Where a new trial therefore is moved for on the ground of a miſdirection in point of law, if the court ſee that juſtice has been done between the parties, they will not ſet aſide the verdict, nor enter into a diſcuſſion of the queſtion of law. *Edmondſon* v. *Machell*, 2 D. & E. 4.

New trial granted, judge refuſing to let defendant *executrix* give evidence generally of payment of debts, &c. on a ſpecial *plene adminiſtravit*, ſetting out judgment debts, and more aſſets than ſufficient for thoſe debts being proved in her hands. *Smedly* v. *Hill*, Blac. 1105.

The court will grant a new trial in a penal action, on account of a miſtake or miſdirection of the judge. *Wilſon* v. *Raſtal*, 4 T. R. 753.

New trial for exceſſive damages when granted.

There is no doubt but that the court has the power of taking the opinion of a ſecond jury in any caſe where the damages are exceſſive; but all ſuch queſtions depend on their own circumſtances, on which the court will exerciſe their diſcretion. *Ducker* v. *Wood*, 1 D. & E. 277.

But they will be very cautious how they overthrow verdicts.

Inquiſition when ſet aſide on that account.

The court will not ſet aſide any inquiſition on a writ of inquiry for exceſſive damages, unleſs the caſe be groſs and the damages enormous, if the action be for a tort or treſpaſs. *Bruce* v. *Rawlins*, 3 Wil. 63.

Exceſſive damages were given on a writ of inquiry for a militia-man againſt his colonel, who had ordered him twenty laſhes; but the court would not ſet it aſide becauſe the colonel had acted arbitrarily *malo animo*, and was well able to pay them. *Benſon* v. *Sir Thomas Frederick*, Burr. 1846.

How in torts.

In perſonal *torts* the court will ſeldom grant a new trial for exceſſive damages. *Gilbert* v. *Burtenſhaw*, Cowp. 230. *Fabrigas* v. *Moſtyn*, Blac. 929.

But if the damages be outrageous they will. *Sharpe* v. *Brice*, Blac. 942.

Damages muſt be flagrantly exceſſive.

They muſt, however, be ſo flagrantly exceſſive as to afford an internal evidence of the prejudice and partiality of the jury; and outrageouſly diſproportionate either to the wrong received, or to the ſituation and circumſtances of either the plaintiff or defendant.

The court will not grant a new trial in an action for *crim. con.* merely becauſe the damages appear exceſſive. *Duberly*

berly v. *Gunning*, 4 T. R. 651. where the ſubject is fully diſcuſſed.

In an action for maliciouſly indicting plaintiff for perjury, 400*l.* damages not exceſſive. *Ibid.*

The plaintiff, a baronet and a member of parliament, recovered 10,000*l.* damages in an action on the caſe for a malicious proſecution, *viz.* indicting and trying him for felony at the Old Bailey. The court, on motion for a new trial on account of exceſſive damages, refuſed to grant it. Sir *Alexander Leith* v. *Pope*, Blac. 1327.

If ſome damages given again, no third trial.

If a new trial be granted for exceſſive damages, and the ſame damages are given again, the court will never grant a third trial. *Chambers* v. *Robinſon*, Str 692.

New trials refuſed in various actions for aſſaults and impriſonments, on the ground of exceſſive damages. *Leman* v. *Allen*, 2 Wil. 160. *Huckle* v. *Money*, Ibid. 205. *Beardmore* v. *Carrington*, Ibid. 244. *Ducker* v. *Wood*, 1 D. & E. 277.

So for debauching plaintiff's daughter. *Tullidge* v. *Wade*, 3 Wil. 18.

No new trial in tort for ſmallneſs of damages;

It is a general rule, that the court will not ſet aſide a verdict in an action for a tort on account of the ſmallneſs of the damages. *Mauricet* v. *Brecknock*, Do. 509. *Barker* v. Sir *Wolſton Dixie*, Str. 1051.

except in certain caſes.

Unleſs it ariſes from a miſtake in point of law of the ſheriff, as in *Markham* v. *Middleton*, Str. 1259; or of the jury, as in *Woodford* v. *Eades*, Str. 425.

General principle reſpecting new trials on the ground of damages.

The principle is this, that the conſtitution has referred the deciſion of the queſtion of damages to the jury; that the court ought not to ſet up their own judgment againſt that of the jury, eſpecially in caſes where the damages depend upon mere ſentiment and opinion, and there is no rule by which they can be aſcertained. It is different, indeed, where damages depend in any-wiſe upon calculation, for the court have then ſome medium by which they are enabled to correct any miſtake of the jury. *Duberly* v. *Gunning*, 4 D. & E. 658.

(D) Of the Coſts in caſe of new Trial.

(D)

Of the coſts in caſes of new trial.

A new trial is ſeldom granted but upon payment of coſts; but this is in the diſcretion of the court.

Where a plaintiff refuſes to be nonſuited contrary to the opinion of the judge, a new trial (if granted) ſhall be without coſts. So where a plaintiff ſubmits to a nonſuit in compliance with the erroneous opinion of a judge, the nonſuit ſhall be ſet aſide without coſts. *Pochin* v. *Pawley*, Blac. 670. *Buſcall* v. *Hogg*, 3 Wil. 146. *Rackham* v. *Jeſſup*, Ibid. 338.

Where a new trial has been granted, and nothing was said in the rule concerning the costs of the first, although the same party succeed on the second trial, he shall not have the costs of the first. *Mason v. Skurray*, Do. 430.

So where a case is reserved, and, from the insufficient statement of it, it is necessary to send it down to a second trial, and nothing is said respecting the costs, the party succeeding on such second trial is not entitled to the costs of the first. *Hankey and others* v. *Smith and others*, 3 D. & E. 507.

(E) (E) How to proceed if new Trial granted.

How to proceed if new trial granted.

If verdict is set aside, and new trial granted, draw up rule, serve it, and pay costs immediately, if part of the rule; if not paid, the other side may move to enter up judgment and take out execution.

In B. R.

Nisi prius *record need not be re-ingrossed if no* postea *indorsed; but if it is, the officer (the signer of writs) will not pass the old record again.*

If a new trial be granted, the return in the jurata *must be altered the same as in case of* remanents, *and the record must be passed again, and a new* venire *and* distringas *sued out and returned, notice of trial given, and cause again set down; but no new entries are made or paid for.*

In C. B.

Nisi prius *record need not be ingrossed a-new; but* jurata *altered as to return. If tried in same term, record need not be re-sealed, nor any new* venire *or* habeas corpus; *but otherwise, if not tried in same term. Let a new* placita *be added to the record of the term in which the cause is to be tried.*

How if plaintiff does not proceed to second trial.

If after a new trial granted, plaintiff does not proceed to try it again, defendant may move for judgment as in case of a nonsuit. *Fabrilius* v. *Cock*, Burr. 1771.

Same record, &c. must be carried to trial.

There was a verdict and new trial granted, and then the record of *nisi prius* was made up, with an appearance and plea of a different term from the former record, and verdict again for the plaintiff, which on motion was set aside, it not being the same issue that was directed to be tried again; and though a new trial was granted, yet it ought to be upon the old plea. *Harper* v. *Davy*, B. R. Raym. 510. Carth. 498.

No amendment suffered.

After a new trial granted, no amendment will be allowed in the record. *Parker* v. *Ansel*, Blac. 920.

Because the intent of new trials is to submit the same questions to the consideration of another jury, but by amendments the question would be varied.

Defendant,

Defendant, after a verdict againſt him, obtained a rule for a new trial, which, after argument, on a ſubſequent day was diſcharged. He then pleaded a plea *puis darrein* continuance entitled of the term generally, and the court refuſed to order a ſpecial memorandum of the day when it was filed under theſe circumſtances. *Lovell* v. *Eaſtaff*, 3 T. R. 554.

Of pleading puis darrein continuance afterwards.

(F) Of the *Venire Facias de novo*, and the Difference between that and Motion for new Trials. (F)

Care ſhould be taken not to confound motions for a *venire facias de novo* with motions for new trials; they agree, indeed, in ſome things, but they differ in many: They agree in this, that in both caſes a *venire facias de novo* muſt be awarded, and that the court may or may not grant either of them; but they differ firſt in this, that a *venire facias de novo* is the *antient* proceeding of the common law; a new trial is only a *modern* invention. The firſt is as antient as the law, when attaints were in uſe; but motions for new trials are of later date. The judgment in attaint being very ſevere, and the puniſhment exceſſive hard, to avoid that ſeverity it was thought better to proceed in a milder way; motions, therefore, for new trials were introduced. They likewiſe differ in this reſpect, that new trials are generally granted where a general verdict is found; a *venire facias de novo* upon a ſpecial verdict. But the moſt material difference between them is, that a *venire facias de novo* muſt be granted upon matter appearing *upon* the record; but a new trial may be granted upon things *out* of it. If the record be never ſo right, if the verdict appear to be contrary to the evidence given at the trial, or if it appear the judge has given wrong directions, a new trial will be granted. But it is otherwiſe as to a *venire facias de novo*, which can only be granted in one or other of theſe two caſes: As, 1ſt, If it appear upon the face of the verdict, that the verdict is ſo imperfect that no judgment can be given upon it; 2dly, Where it appears that the jury ought to have found other facts differently: and it cannot be granted in any other caſe. 1 Wil. 55. *Witham* v. *Lewis*.

Of the difference between motions for new trial, and venire facias de novo.

Again:—A new trial is moved for on the part of defendant, upon the ground that juſtice has not been done him; a *venire de novo* is moved for on the part of plaintiff, in order to correct any error in the *poſtea* or verdict, when it cannot be done by amending the *poſtea* from the judge's notes, or the like. Such as if a general verdict be given in an action of ſlander, where ſome of the counts in the declaration are bad, and others good; there the *poſtea* cannot be amended and

entered only on the good counts, becauſe it would be impoſſible for the judge to ſay on which of the counts the jury had found the damages, or how they had apportioned them. The only remedy, therefore, in ſuch caſe, is by awarding a *venire de novo*, which muſt be by moving the court for that purpoſe. *Eddowes* v. *Hopkins*, Do. 378.

But this was refuſed in *Holt* v. *Scholefield*, 6 D. & E. 691.

So if final judgment has been obtained, after which it is too late to amend, in ſuch a caſe, a *venire de novo* may be moved for. *Grant* v. *Aſtle*, Do. 722.

The effect of a *venire de novo* is ſending the cauſe back to have damages aſſeſſed, only on that count on which, in point of law, he is entitled to recover. *Ibid.*

So where iſſue is joined on a matter of fact, pleaded in abatement and found for plaintiff, and jury omit aſſeſſing damages, a *venire de novo* ſhall be awarded; for where a man may have an attaint, there no damages ſhall be aſſeſſed by the court, if they be not found by the jury. 4 Leon. 245. Godb. 207. And, as in this caſe, if outrageous damages had been given, an attaint would lie, a *venire de novo* muſt go. *Eichorn* v. *La Maitne*, 2 Wil. 368.

In an action of debt, for a penalty on breach of articles of agreement, the jury ought, agreeable to the ſtat. of 8 & 9 W. 3. to aſſeſs the damages on the breach aſſigned; which, if not done, it is a defective verdict, as plaintiff cannot take judgment on the whole penalty, a *venire facias de novo* therefore will be awarded. *Drage* v. *Brand*, 2 Wil. 377.

Thus, in all caſes of defective verdicts on the part of plaintiff, a *venire de novo* is moved for.

So, if a doubt ariſes from an ambiguous and unuſual word in the verdict, the court will lean in favour of a *venire de novo;* and this the rather, becauſe in favour of a defendant, though the verdict be full, the court may grant a new trial. A *venire de novo* awarded on the verdict, guilty of printing and publiſhing *only*. *Rex* v. *Woodfall*, Burr. 2669.

A court of error may award a *venire de novo*. *Grant* v. *Aſtle*, Do. 722.

Section III.

Of arreſting the Judgment.

(A) When and how to move in Arreſt of Judgment.

(B) Of the Nature of an Arreſt of Judgment, and to what Courts and Caſes it extends.

(C) Of

(C) Of the Grounds of arresting the Judgment.

(D) Of awarding a Repleader.

(A) When and how to move in arrest of Judgment. (A)

The defendant, within the four days, has liberty to move the court in arrest of judgment. When and how to move in arrest of judgment.

In B. R. a motion in arrest of judgment may be made at any time before judgment entered up, *Taylor* v. *Whitehead*, Do. 745. and even after a rule for a new trial has been discharged. In B. R.

But in C. B. motion in arrest of judgment must be made before or upon the appearance-day of the *habeas corpora juratorum*. *Lyte* v. *Rivers*, Bar. 445. In C. B.

And if it is moved on the last day of term, notice of the motion must be given, and an affidavit of service of notice, or court will not grant the usual rule to stay judgment. *Camp* v. *Gale*, Bar. 247. If on last day of term:

But otherwise, in common cases no notice is necessary in either court, nor affidavit, to ground motion on; but a rule must be obtained to bring the *postea* or inquisition into court, which must be marked by clerk of papers in K. B. and secondary in C. B. It is a motion of course, and rule got at clerk of rules office in B. R. or secondary's in C. B. what is to be done on such motion;

Or if inquisition be still in sheriff's hands, give him notice to produce it, and make affidavit of service of notice. if on inquisition.

The purport of the rule of court is, that the entry of the final judgment be stayed until the court be moved on behalf of plaintiff, and shall otherwise order; notice of the rule is to be given to plaintiff, his attorney, or agent. Plaintiff afterwards gives notice, in usual way, to defendant's attorney when he means to move the court to discharge the rule. He serves copy of notice, and makes affidavit thereof. Purport of the rule.

If afterwards the rule is discharged, he then draws up the rule, serves copy on defendant's attorney, and proceeds to tax costs.

But if judgment be arrested, defendant's attorney then draws up rule, and serves copy on plaintiff's attorney, and each party pays his own costs. Cow. 407.

Defendant had moved in arrest of judgment, and obtained the common rule, which is, that the entry of judgment be stayed till the court be moved on behalf of the plaintiff, and shall otherwise order; of which motion defendant had no-

tice. Counsel for plaintiff admitted the objection in point of law, and prayed that an entry be made on the roll, as the adjudication of the court, that judgment be arrested, which was ordered. For till this entry be made, the plaintiff can neither bring error, nor maintain a new action, as the rule leaves the action pending pleadable in bar to a new action. *Bulling* v. *Rogers*, Bar. 278.

(B) (B) Of the Nature of an Arrest of Judgment, and to what Courts and Cases it extends.

Causes of arresting judgment must be on the face of record;

Arrests of judgment arise from intrinsic causes appearing upon the face of the record; for a judgment can never be arrested, but for that which appears upon the face of the record itself. *Packey* v. *Harrison*, Raym. 232.

for if record be only deficient, error must be brought, and diminution alleged.

Thus, if an infant brings an action by guardian, and no warrant for him to appear by guardian is entered on record, judgment will not be arrested; but error must be brought, and diminution alleged and certified, and judgment will be reversed. *Ibid.*

How far power of inferior courts in this respect.

An inferior court may set aside an interlocutory judgment, in two cases; *viz.* For irregularity, and to let in a trial of the merits, even though the judgment were regular.

So they may set aside a verdict for irregularity, but they are not trusted with a power to set aside verdicts upon the *merits*. *Rex* v. *Peters*, Burr. 572.

No arresting judgment after judgment on demurrer;

After judgment on demurrer, there can be no motion to arrest the judgment, as the court will not suffer any one to tell them that the judgment they gave, on mature deliberation, is wrong.

otherwise, after judgment by default.

But otherwise, in case of judgment by default; for that is not given in so solemn a manner; or, if the fault arises on the writ of inquiry, or verdict, for there the party cannot allege it before. *Edwards and Blunt*, Str. 425.

How on convictions.

When a conviction is removed by *certiorari*, no notice can be made in arrest of judgment, unless the defendant be personally present. *The King* v. *Spraggs*, Blac. 209.

(C) (C) Of the Grounds of arresting the Judgment.

Cause of arresting judgment must be good ground of demurrer, but not *è converso*;

It is a general and invariable rule, with regard to arrests of judgment upon matter of law, "that whatever is alleged in "arrest of judgment, must be such matter as would, upon "demurrer, have been sufficient to overturn the action or "plea." But this rule will not hold *è converso*; *viz.* That every

every thing that may be alleged as cauſe of demurrer, will be good in arreſt of judgment; becauſe now, many omiſſions and defects, if not taken advantage of in time, are cured by the ſtatutes of jeofails, or by a verdict.

for many defects are cured by ſtatutes of jeofails.

Thus, after a verdict where defendant's name was put in the count inſtead of plaintiff's, judgment will not be arreſted; becauſe, by ſtat. 16 & 17 Car. 2. c. 8. judgment ſhall not be ſtayed after a verdict, by reaſon of miſtaking the name of plaintiff or defendant in pleading. *Richards* v. *Simonds*, Blac. 40.

So where iſſue was local, and not tried in right place; *Maitland* v. *Taylor*, Ld. Raym. 1212.; or an iſſue is miſjoined, Str. 641. *Harvey* v. *Peake*, Burr. 1793.

But if there be no iſſue at all, as where *ſimiliter* was wanted, it is bad. *Cooper* v. *Spencer*, Str. 641.

But record may be amended and *ſimiliter* added.

The ſtatutes of jeofails relating to caſes after verdicts are, 32 Hen. 8. c. 30.; 18 Eliz. c. 14.; 21 Jac. 1. c. 13.; and 16 Car. 2. c. 8.; which laſt has been called the Omnipotent Act from its extenſive operation, and the ſtudent may there find the various defects and omiſſions a verdict cures.

Alſo by a verdict.

So omiſſions are often cured by the verdict itſelf.

In what caſes the court will arreſt judgment after verdict.

The court are extremely cautious how they arreſt the judgment after verdict. They will not intend any thing to overturn it: they will over-rule objections, which they would have liſtened to on demurrer. *Wyſton* v. *Mann*, Burr. 1725.

Every thing neceſſary ſuppoſed to be proved;

They will even ſuppoſe every thing proved at the trial which was neceſſary to be proved, unleſs the contrary could be made to appear on the record. *Bull* v. *Steward*, 1 Wil. 255.

though omitted to be ſtated on the record.

Thus if a declaration or plea omits to ſtate ſome particular circumſtance, without proving of which at the trial, it is impoſſible to ſupport the action or defence, this omiſſion ſhall be aided by a verdict; as if in an action of treſpaſs the declaration doth not allege that the treſpaſs was committed on any certain day; or if the defendant juſtifies by preſcribing for a right of common for his cattle, and does not plead that his cattle were levant and couchant on the land. Though either of theſe defects might be good cauſe to demur to the declaration or plea, yet if the adverſe party omits to take advantage of ſuch omiſſion in due time, but takes iſſue and has a verdict againſt him, theſe exceptions cannot after verdict be moved in arreſt of judgment; for the verdict aſcertains thoſe facts which before, from the inaccuracy of the pleadings, might be dubious; ſince the law will not ſuppoſe that a jury under the inſpection of a judge, would find a

verdict for the plaintiff or defendant unleſs he had proved thoſe circumſtances, without which his general allegation is defective. Blac. Com. 394.

So in ejectment, though declaration does not ſtate in what vill lands lie; but afterwards ſays that defendant, at B. aforeſaid, ejected him, &c., it ſhall be intended after verdict, that the lands lay at B. *Goodright* v. *Strother*, Blac. 706.

Thus a title,

Thus a verdict will cure a title defectively ſet forth; but it will not cure a defective title. *Engliſh* v. *Burnell*, 2 Wil. 261.

if defectively ſet forth, is cured, but not a defective title.

The rule is this, where the plaintiff has ſtated his title or ground of action defectively or inaccurately, ſince to entitle him to recover, all circumſtances neceſſary in form or ſubſtance to complete the title ſo imperfectly ſtated muſt be proved at the trial; it is a fair preſumption after a verdict, that they were proved: but that where the plaintiff totally omits to ſtate his title or cauſe of action, it need not be proved at the trial; and therefore there is no room for preſumption. *Ruſhton* v. *Aſpinale*, Do. 683.

Cauſes therefore muſt be ſtronger than mere cauſes of demurrer.

We find, therefore, that exceptions moved in arreſt of judgment muſt be much more material and glaring than ſuch as will maintain a demurrer, or, in other words, that many inaccuracies and omiſſions, which would be fatal if early obſerved, are cured by a ſubſequent verdict, and not ſuffered in the laſt ſtage of a cauſe to unravel the whole proceedings. 3 Blac. Com. 394.

But for manifeſt defects on the face of the record, judgment will be arreſted; as if plaintiff be ſuch as cannot maintain the action;

But if the thing omitted be eſſential to the action or defence, as if the plaintiff does not merely ſtate his title in a defective manner, but ſets forth a title that is totally defective in itſelf, *Engliſh* v. *Burnell*, 2 Wil. 258. Salk. 365. Or if the action be brought by plaintiffs who from the face of the record cannot in law maintain it; as where treſpaſs was brought by A. and B. for breaking the houſe of A. and taking the goods of A. and B. *Maddox and another* v. *Taylor*, Raym. 1382. Or where plaintiff declared as adminiſtrator of an executor when adminiſtration *de bonis non* ought to have been taken out, *Baſtard* v. *Jutſham*, Barr. 444. Or if defendants in the action be ſuch againſt whom the action cannot be maintained, as where one obligor only was ſued on a joint bond, and it appeared ſuch in declaration. *Horner* v. *Moor*, Burr. 2614.

or defendant ſuch as cannot be ſued.

In all ſuch caſes judgment muſt be arreſted.

So in treſpaſs for taking divers goods, not ſaying what goods; after verdict and damages for plaintiff, judgment was arreſted. *Wyat* v. *Effington*, Raym. 1410. Str. 637.

If

If there should be in the declaration different causes of action which cannot be joined, or plaintiff should sue in different capacities himself, or against defendant in different rights, judgment will be arrested. If different causes of action which cannot be joined.

The general rule is, where the same plea and the same judgment will do for all the counts, they may be joined. *Mast* v. *Goodson*, 3 Wil. 352. *Brown* v. *Dixon*, 1 D. & E. 276.

Where there are two counts, and the supposed cause of action in one of them not actionable, and *entire* damages are given, the court cannot pronounce judgment on the record, but on motion it will be arrested: as in slander, if on a general verdict, the words in any one count are not actionable. *Onslow* v. *Horne*, 3 Wil. 185.

It is of great consequence to plaintiff to take care what verdict he takes if there be any count in his declaration doubtful in point of law, since the jury may assess entire or distinct damages on all the counts; if the former, and any one is bad, judgment will be arrested; but if the latter, judgment may be given upon any good count. *Onslow* v. *Horne*, 3 Wil. 185. Plaintiff should be careful how he records a general verdict with intire damages; why.

Where one count appears bad, and the verdict is entered generally on all the counts, the court must reverse the judgment *in toto*, since they cannot see on which of the counts the damages were given: But not so if the damages were assessed severally; so that where the plaintiffs who were assignees of A. and B., two bankrupts under separate commissions, brought an action against defendant for a joint debt due from him to both the bankrupts, and for separate debts due to each, and having obtained a verdict not in a gross sum, but the damages assessed severally upon the respective counts; the court afterwards, on motion in arrest of judgment, arrested the judgment on the counts for the separate debts due to each bankrupt, but suffered plaintiffs to enter it up on the counts for the joint debts. *Handcock and others, Assignees, &c.* v. *Haywood*, 3 D. & E. 434. If damages assessed severally, not such danger.

If plaintiff take a verdict on one particular count, and that count afterwards proves a bad one, he cannot resort to another, but must be bound by his election, and judgment will be arrested. *Holloway* v. *Bennet*, 3 D. & E. 448. How if he elects a count, and that is bad.

So judgment will be arrested, if it appears that there was no writ or process to give the court jurisdiction, but proceedings have been carried on by consent; If cause brought on by consent;

The plaintiff's goods distrained were not replevied, but, by consent of the attornies on both sides, remained in the distrainor's hands, and without any writ of *re. fa. lo.* or appearance in this court, plaintiff declared; defendants avowed: without process, &c. court will afterwards arrest judgment.

avowed: and after long special pleadings, and after trial of the issues at the assizes, and a verdict for plaintiff, the avowants moved to set aside all the proceedings, and the rule for that purpose was made absolute; the court held the agreement to be void; a fraud upon the revenue and officers, and an abuse of the court and the bar, that they had no jurisdiction, and consequently could not give judgment. *Richardson* v. *Frank*, Bar. 451.

So if there was a plea in abatement, and it is not entered on record.

Formerly if on a plea in abatement, a *respondeas ouster* was awarded, and afterwards defendant pleaded in chief, and there was a verdict for plaintiff; yet if the plea in abatement had not been entered on the *nisi prius* record, judgment was arrested; for, it being entered on the plea roll (which was in court) it must be mentioned in the *nisi prius* roll, otherwise it does not appear that it was a verdict in the same cause. Carth. 447. 5 Mod. 399. Raym. 329. But such an irregularity seems now to be cured by defendant's accepting the issue, and going on to trial. *Combe* v. *Pitt*, Burr. 1682.

The above cases are after verdict.

Thus we have endeavoured to shew the lengths which the courts will go to support a verdict, and the necessity they are under in certain cases of arresting the judgment. It may be proper here to observe, that this anxiety of the courts only extends to judgments after verdicts, and not to judgments by default. Whenever, therefore, a motion is made to set aside an inquisition, the court will not *intend any thing* in support thereof. But the objection is considered as coming before the court exactly as if it were upon demurrer, and not like the cases of objections to judgments after verdict. For *per* Lord Mansfield, the true distinction as to supplying such defects is, whether the objection be made after a verdict or not. *Collins* v. *Gibbs*, Burr. 899.

Of arresting judgment after judgment by default.

After judgments by default, court not so strict in arresting judgment;

though to such cases statutes of jeofails are extended.

With respect, however, to all such omissions or defects as are cured by the different statutes of jeofails after verdicts, they are also equally cured by judgments of confession or default; provided there be an original writ or bill, and warrant of attorney duly filed. 4 & 5 Ann. c. 16. s. 2.

Where defendant means to arrest judgment for default in declaration, he should not attend inquiry.

If defendant wishes to take advantage of any fatal mistake in declaration by moving in arrest of judgment, he must not, after having suffered judgment by default, attend the execution of writ of inquiry, and cross-examine plaintiff's witnesses, or the like, but he must rely on the mistake. *Freeland* v. *Hunt*, 2 Wil. 380.

How he ought to move.

If he does rely on the mistake, he may afterwards move, that interlocutory judgment be forthwith entered upon record, agreeable to the declaration delivered, and the roll be brought into the proper office; and that defendant may have four

four days to move in arreſt of judgment after roll is brought in. *Ibid.*

In treſpaſs, where one let judgment go by default, and the other juſtified, and on trial was acquitted, and damages were aſſeſſed againſt the defendant by default, judgment was arreſted.

Treſpaſs againſt two; A. let judgment go by default; B. juſtified, and on trial had a verdict; but damages were aſſeſſed againſt A. at the trial. On motion, in arreſt of judgment, it was inſiſted, the rule ought to be diſcharged, becauſe a tort differs from a contract; for in covenant againſt two, if one pleads a plea that goes to the whole, and on iſſue joined it be found for him; and the other lets interlocutory judgment go by default; the plaintiff cannot have final judgment againſt him, according to 1 Lev. 63. But ſays that caſe, in treſpaſs one defendant may be guilty, and the other not: But held, that if in a plea perſonal againſt divers, one pleads in bar to parcel, or which extends only to him that pleads it; and the other pleads a plea that goes to the whole; the laſt ſhall be tried firſt, becauſe it goes to the whole, and the other ſhall have the advantage of it; for in perſonal actions, the diſcharge of one is the diſcharge of both; and no judgment can be given againſt the other defendant, becauſe it appears the plaintiff had no cauſe of action. Judgment arreſted. *Biggs* v. *Bengor*, Raym. 1372.

So where ſeparate damages were aſſeſſed on inquiry.

In treſpaſs againſt two, there was judgment by default; and on the inquiry, ſeparate damages were aſſeſſed, 20 *l.* againſt one, and one penny againſt the other; and judgment was arreſted, for damages cannot be ſevered where the treſpaſs is confeſſed, as by letting judgment go by default. *Onſlow* v. *Orchard*, Str. 422.

(D) Of awarding a Repleader.

A repleader, what.

If by any miſtake or inadvertence in the pleadings, the iſſue be joined on a fact totally immaterial or inſufficient to determine the right, ſo that the court upon the finding cannot know for whom the judgment ought to be given; as if in an action on the caſe in *aſſumpſit* againſt an executor as executor, he pleads that he himſelf (inſtead of the teſtator) made no ſuch promiſe; 2 Vent. 196.; or if in action of debt on bond conditioned to pay money on or before a certain day, the defendant pleads payment *on* the day; which iſſue, if found for the plaintiff, would be inconcluſive, as the money might have been paid before; *Tryon* v. *Carter*, Str. 994., and the like. In theſe caſes the court will, after a verdict, award a repleader. "*Quia videtur curiæ quod placitum præ-*
"*dictum et exitum ſuperinde junctum eſt minus ſufficiens in lege,*
"*ideo dictum eſt partibus quod replacitent.*"

But if it appears from the whole record, that nothing material can poſſibly be pleaded in any ſhape whatever, and that a repleader would be fruitleſs, it will not be awarded. *Rex* v. *Philips*, Burr. 301.

The conſequence of a repleader, &c.

Whenever a repleader is granted, the pleadings muſt begin *de novo* at that ſtage of them, whether it be the plea, replication, or rejoinder, wherein there appears to have been the firſt defect or deviation from the regular courſe. 3 Blac. Com. 395.

No repleader is allowed before trial; *Staple* v. *Haden*, Salk. 579. If denied where it ſhould be granted, or granted where it ſhould be denied, it is error. *Ibid.* No coſts to be allowed on either ſide, for both parties are in fault, to ſuffer an immaterial or inſufficient iſſue to be joined. *Ibid.* A repleader cannot be awarded after a default. *Ibid.* See the form of a repleader, Lut. 1622.

Section IV.

Of taxing Coſts and ſigning final Judgment.

Rule for judgment having been given;

We have already ſhewn, in the firſt ſection of this Chapter, how to give rule for judgment on the *poſtea* or inquiſition, and at the expiration thereof, to carry the ſame, with the neceſſary papers, to the Maſter in B. R. and prothonotary in C. B. to get the coſts taxed, and final judgment ſigned thereon.

how to tax coſts.

Of the attendance of the parties.

If the party, againſt whom a verdict is obtained by trial or inquiry, wiſhes to be preſent on taxing coſts, and diſtruſts the attorney on the other ſide, fearful leſt he ſhould not give notice thereof, which it is uſual for fair practitioners to do, let him get rule from clerk of rules in B. R. or ſecondary in C. B. to be preſented at taxing coſts; pay 4*s*. It muſt be ſerved on the attorney of the other ſide, and ſhould be taken out and ſerved before time for ſigning judgment is out, or execution may iſſue againſt the party. If final judgment is not ſigned, and party takes out and ſerves rule to be preſent, &c. after rule for judgment is out, the attorney is not obliged to give him more than a few hours notice of taxing coſts; but if taken out, and ſerved before rule for judgment is expired, attorney on the other ſide muſt give twenty-four hours notice when he intends to tax coſts.

Of taking out rule to attend taxation.

When and how rule to be ſerved.

Of the notice of taxation, to be given in conſequence thereof.

Of the affidavit for allowance of extra expences.

If, upon the taxation of coſts, you want to be allowed any extra expences, you muſt make an affidavit of the facts, ſtating the diſtances the witneſſes came, the charges you were put to, and the particular circumſtances.

In

In country causes, such affidavit is generally made, and sent up to the attorney in London, who must carry same to clerk of rules in B. R. and secondary in C. B., and file them there, and pay him 8*d. per* sheet for a copy to be made ut for the Master. Amongst fair practisers also, a copy is sent to the opposite attorney; for which pay 4*d. per* sheet. How made in country causes.

When costs are taxed, which are called costs *de incremento*, final judgment is then said to be signed upon the *postea* or inquisition, and execution may be sued out. Taxed costs are costs de incremento. Final judgment is now said to be signed.

Section V.

Of docketing Entries and Judgments.

But it is further necessary to enter the judgment and docket the same; which is done, by carrying the *postea* or inquisition, with the Master's *allocatur* thereon, to Westminster to the treasury, and leaving it there. The clerk enters the judgment thereon; pays 2*s.* for *postea;* 1*s.* 6*d.* for inquiry. This, however, is upon the supposition that the roll has been already carried in after issue was joined, and before trial, in manner as shewn in the first Section of the ninth Chapter; for if not, it must be now carried in and filed, as of the term issue was joined, and the judgment entered thereon and docketed. Of docketing the judgment: how to be done.

By rule in K. B. *East.* 17 *Jac.* 1. all judgments for sums amounting to 20*l.* are to be regularly docketed; by the attorney making a note on parchment or paper, containing the names of the parties, the debt and damages recovered, and the term and roll where such judgment shall be entered, and delivering it to the proper officer, who is to register the same in a book kept for the purpose. And by rule *East.* 1657, the defendants names in all judgments to be entered, shall be entered in a remembrance or docket alphabetically, for the better finding out such judgments.

If plaintiff has obtained judgment otherwise than by verdict, as by default, or confession upon a suit by original, his attorney ought to make out a *præcipe* for an original, returnable on the first return of that term in which judgment is, (whether it be final or interlocutory judgment, in case of actions founding in damages,) to warrant the judgment, in case a writ of error should be brought; which *præcipe* must be carried to the cursitor of the county where the action is laid on or before the essoin-day of the subsequent term; otherwise, by an order in Chancery, he cannot make out an original writ of a return past after that time, without special warrant How original to be obtained, in case of judgment by default by original, in order to prevent error.

warrant from the Lord Chancellor, Lord Keeper, or Master of the Rolls. *Vide* Lord Clarendon's Orders in Chancery.

Which original is to be returned and filed.

The original writ in such case being made out, the plaintiff's attorney returns it of course, and then files it with the *custos brevium*; and he must also file a warrant of attorney, both for himself and for defendant, if he appeared by attorney. This is necessary to prevent writ of error. See 4 & 5 Ann. c. 12. s. 2.

Of the entry-roll, and docketing same;

Whenever issue is joined between the parties, an entry of all the pleadings should then regularly be made upon a roll, which should be carried in and filed of that term in which issue is so joined.

often neglected till after judgment;

This, however, is for the most part now neglected to be done; and the attorney for the plaintiff proceeds on to trial, postponing the entry of his pleadings till after he has obtained judgment, and often to a much later period, when he enters and dockets all the pleadings and judgments in various causes, in which he may for some time past have been concerned.

unless he is compelled to enter issue.

It often happens indeed, as may be seen *ante*, chap. 9. sect. 1. that the plaintiff is obliged to make this entry by a rule to enter the issue, and if not so compelled, it is always advisable to carry in the roll, and docket the same, soon after judgment is obtained.

The way to proceed is as follows:

How to proceed in carrying in rolls and docketing entries.

In B. R.

Get roll from the clerk appointed(a) *to deliver out rolls, now Mr. Adams of Lincoln's-Inn, stationer, who stamps it about the middle. A little below this you begin your entry; first, the term in which issue was joined.*

Hitherto of the term of 37 Geo. 3. 1798.

Witness, Lloyd Lord Kenyon. Then enter warrants of attorney(b). *London, ss. A. B. puts in his place Thomas*

In C. B.

Get a roll from the prothonotary's office, of the term in which the issue is joined; make out the warrants of attorney of the same term, on a plain piece of parchment, thus: In the Common Pleas. Michaelmas term, in the 37th year of the reign of George the Third.

Middlesex, to wit. Richard Fenn puts in his place T. S. his attorney, against John Denn, late of,

(a) No rolls to be received or allowed for by the clerk of the treasury, unless marked by the person appointed by the chief justice to deliver out rolls. Trin. 12 Geo. 2. 1738.

(b) Warrants of attorney to be entered on the roll at the beginning of the cause, otherwise the roll not to be received or filed. R. E. 4 Jac. 2. They are supposed to be filed at the commencement of the action. 1 Ld. Raym. 509. The rule of 5 Ann. 1706, for delivery over to the opposite attorney the warrant, is now obsolete, and the practice is for plaintiff's attorney to enter them on the roll as above.

Thomas Smith his attorney, against C. D. in a plea of trespass on the case (or of debt, or as the case may be).

London, ss. The said C. D. puts in his place Joseph Allen his attorney, at the suit of the said A. B. in the plea aforesaid.

Then go on with the memorandum and copy of the issue thus:

London, ss. Be it remembered, that (here enter the whole issue thereon).

Having thus completed the entry of the issue, the roll is ready to be carried in.

But, for the better finding of the roll when carried in, a docket must be made, and left with the clerk of the judgments, who enters the same in alphabetical order, by the defendant's surname, in a book kept by him for that purpose.

But before you make out the docket, you must get a number for your roll (or if more rolls than one, numbers for each). This number, if you apply for it of the same term in which your issue is entered, may be had of the clerk of the judgments, King's Bench office; but if your issue is of a preceding term, then you get it from the nisi prius *office, for which you pay* 4s. 8d.; *you then make out your docket paper, and carry the roll to the clerk of the judgments, and he enters it. The docket is merely a slip of paper, on which is written a minute of the issue or judgment, as thus:*

The entry of Thomas Smith gentleman, of Hilary term 37 Geo. 3. *Middlesex. Issue joined in debt, between A. B. plaintiff, and C. D. defendant, on a plea of* nil debet. *Roll.* 485.

Or if on judgment by default, Norfolk. Judgment by default in case between A. B. plaintiff, and C. D. defendant. Roll. 486.

Or, of, &c. yeoman, in a plea of trespass on the case.

Middlesex, to wit. The said John Denn puts in his place J. A. his attorney, at the suit of the said Richard, in the plea aforesaid.

Take it to the warrant of attorney office and file it, pay 8d. *in debt, case* 1s. 4d.; *then take the roll to the prothonotary's, with the entries thereon complete, if you have signed final judgment; if not, as far as you have gone in the cause: If the entry of the issue or demurrer be paid for before, you pay nothing, if not,* 8d. per *sheet; then the clerk will give you the docket roll to enter the causes; if the action be in trespass, the prothonotary's clerk pays for bringing in the roll* 4d. per *sheet.*

The form of the docket is as in B. R.

Or, London. Judgment by nil dicit, *between A. B. plaintiff, and C. D. defendant, for* 100l. *debt, and* 63s. *damages. Roll.* 487.

Varying the docket as the case is, and if more entries than one to be made, having got numbers for the rolls accordingly, make out docket of them all on one paper.

Take docket paper with the roll to clerk of judgments, who will mark roll, to whom you pay 3s. *for docketing; then carry roll to the clerk of the treasury, who will file same in treasury.*

If the roll be not carried in and filed as of the term issue is joined, then you will have to pay a post terminum 4s. 8d. *and* 1s. *more for the docket.*

If this be done at proper time before trial, there is nothing to do after judgment, but to carry postea *or inquisition, with Master's* allocatur, *to the treasury, and leave it there for clerk to enter judgment thereon.*

Attornies shall bring in the rolls of every Trinity, Michaelmas, and Hilary terms, and file the same before the essoin-day of the subsequent term, and the rolls of Easter before the first day of Trinity term following. Mich. 5 *Ann.*

But the custos brevium, *in indulgence of the clerk, attends the day but one before every term to receive and file the rolls. He used formerly to attend the day before Trinity term for that purpose; but now he attends the day but one before Trinity.*

But clerk will charge you a post diem *one day before the term begins, if your roll be not filed in time.*

The several and respective officers of this court shall deliver in all their rolls of Trinity, Michaelmas, and Hilary terms to the clerk of the essoins, before the essoin day of the several terms following, and their rolls of Easter upon or before the first day of Trinity following; and the officer who shall not bring in or send all his rolls of the several terms at these times, shall pay to the clerk of the essoins 12d. *for every roll brought in after.*

Plea rolls are to be brought in in three weeks after the end of the term following, or if after, 12d. *to be paid. Pasch.* 3 *W. & M.*

New roll ordered, old one being lost.

On motion, a new roll was ordered to be filed, the former being lost; for there being a docket of it made before it was lost, it could be no deceit on purchasers. *Evans* v. *Thomas*, Str. 833.

All

All iſſues and judgments ought to be entered on the rolls, in a fair hand, with a large margin of an inch at leaſt, and a convenient ſpace left at the top (about ten inches) for binding up the ſame, and like ſpace at the bottom, that the writing be not rubbed out. How to be ingroſſed.

The iſſues may be entered on both ſides the roll, but ſhould not come too near the bottom, where the roll muſt be numbered, &c.

When the judgment roll is made out, the ſame ought to be filed in the treaſury of the court. Judgment-roll to be filed in treaſury.

A neglect of entering judgment, and a loſs of the roll, having been ſufficiently ſhewn to the court, a rule was made, "That the clerk of the judgments ſhall ſign a new roll, "whereon is entered the judgment ſigned in this cauſe, in "Michaelmas term 1729; and that the ſame be numbered "as roll 256, and filed amongſt the rolls of that term, a "ſpecial entry being firſt made, expreſſing the day of dock-"eting the ſame." And it is further ordered, "That this "judgment ſhall not be made uſe of againſt the adminiſtra-"tor of the defendant." Form of rule for new roll.

Note; Lord Mansfield intimated, that it very much concerned the chief clerk to take care that judgments be actually entered up upon the roll in due time, and docketed; for that after he has received his fees for making ſuch entry, he would be liable to an action upon the caſe, to be brought by a purchaſer who ſhould have become liable to it, and had ſearched the roll without finding it entered up. And he ſaid, that the attorney who had undertaken to do this, and neglected it, would be liable indeed to the chief clerk; but ſtill the chief clerk would be liable to the purchaſer who had ſuffered by this neglect. *Douglas* v. *Yallop*, Burr. 722. Chief clerk reſponſible if judgment not entered after he has been paid for ſame.

N. B. The preſent courſe is for the attorney for the plaintiff to undertake to make this entry upon the roll: for doing which the chief clerk (who is entitled to 8d. *per* ſheet) allows him 5d. *per* ſheet: ſo that the attorney in this caſe acts as one of the clerks of the chief clerk, which would render the chief clerk liable to the party's action, though the attorney would be anſwerable over to him (in fact the attornies are very apt to be negligent in bringing in theſe entry-rolls).

The ſtatute 4 & 5 *W. & M. c.* 20. *intitled,* "*An act for the* "*better diſcovery of judgments in the courts of King's Bench, Common* "*Pleas, and Exchequer at Weſtminſter,*" *provides firſt, in what manner and at what time judgments ſhall be docketed by the reſpective officers in books for that purpoſe, that the ſame may be ſearched for by any one paying for the ſame; and upon neglect of the officers in ſuch caſe, gives the penalty of* 100*l., half to the party grieved, and the other half to any one who ſhall ſue for the ſame, &c.* By ſtatute of 4 & 5 W. & M. no judgment not docketed ſhall affect purchaſers, &c.

And,

And by sec. 3. No judgment not docketed and entered in the books as aforesaid, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, and administrators in their administration of their ancestors, testators, or intestates estates.

N. B. This only relates to freehold lands.

And by sec. 4. gives the clerks of the judgments four-pence over and above their usual fees, for their trouble.

And by 29 Car. 2. c. 3. officers signing judgments shall enter the day of signing the same, and such judgments shall not bind the lands in the hands of a bonâ fide *purchaser, but only from the time of actually signing the same, nor the goods in the hands of a stranger or purchaser, but only from the actual delivery of the writ of execution to the sheriff.*

Before these statutes the judgment having relation back to the first day of the term of which, or as of which it was given, became a charge upon a moiety of the real and the whole of the personal property of which the defendant was seised or possessed at that time.

Motion to set aside the docket of a judgment as void by 4 & 5 W. & M. denied, there appearing no fraud, but that the roll was accidentally mislaid.

Judgment was signed in Hilary 1733, but by omission of plaintiff's agent, the roll was not docketed and carried in till June 1737, and the true day of docketing was marked upon the docket by the clerk of the essoins. M. who pretended to be a purchaser of defendant's estate for valuable consideration in January 1736, without notice of this judgment, moved and had a rule to shew cause why the docket should not be set aside as void by the stat. 4 & 5 W. & M. On shewing cause it appeared, that the judgment was for a *bonâ fide* debt; that the roll was accidentally lost, and omitted to be carried in; but the true time of docketing appeared to be fairly entered without fraud; and an *elegit* upon this judgment, appeared to be executed 1735, and that M. had notice thereof, who seemed upon the affidavits to be a colourable purchaser to assist defendant. *Per Cur.* the true time of docketing not being concealed, and no fraud appearing on part of the plaintiff, we will interpose; M. may bring his ejectment and take what advantage he can. It appeared that M. had not made search for judgments against defendant till after his purchase. Rule discharged. Bar. 261. *Wait* v. *Garth.*

Judgment by confession upon a warrant of attorney may be entered in vacation as of the term precedent, though defendant died in vacation.

Defendant gave a warrant of attorney to confess judgment, and died within a year after, in time of vacation, before the essoin day of the subsequent term, which was Easter. The attorney, after his death, entered up the judgment as of the precedent term, Hilary, but did not bring in the roll before the essoin day of Easter term; and, on motion to set it aside, the court held the judgment to be regularly signed as of the precedent term, as the party died in the vacation, and it was a good judgment of such precedent term, though it

would not affect purchasers, but from the time of signing; but as the roll was not brought in and docketed before the essoin day of the subsequent term, it was irregular. For *per Cur.* by the course and practice of the court, all the rolls of Hilary ought to be brought in before the essoin day of Easter term, and made part of the bundle of Hilary; and it is for this reason that what is done in vacation is looked upon as the act of the term preceding; and there cannot be a *post terminum* roll received without leave upon motion, which the court does not grant, but when it appears that no one will be prejudiced: for if this were to be allowed, the statute of frauds, and the statute of King William for docketing judgments, would be frustrated; and therefore they disallowed the filing it. *Odes* and *Woodward*, Salk. 87.

But roll ought to be brought in before essoin-day of subsequent term.

Post terminum roll cannot be filed without leave of court.

If defendant has a freehold or leasehold estate in Middlesex or York, you may register the judgment, which will affect them from the day of registering.

Of registering judgments in Middlesex and York.

A memorial to be registered pursuant to the statute, &c.

Form of memorial.

Of a judgment in his Majesty's court of King's Bench of Trinity term in the 37th year of the reign of King George the Third, between John Cox plaintiff, and Richard Fenn defendant, in a plea of debt for 1000*l. and* 63*s. damages. Roll*, 50.

I do hereby certify, that judgment was signed in the above cause the 9th day of June 1798. *Robert Foster.*

W. H. clerk to J. S. of, &c gentleman, maketh oath, and saith, that he was present, and did see Robert Foster Esquire, secondary of the court of King's Bench, sign the certificate of the judgment in the memorial above mentioned.

Ingross this memorial and certificate on a piece of parchment with a treble 6*d. stamp thereon, carry it to the master of the King's Bench office, and he will, on seeing your* postea, *inquisition, or judgment-paper, subscribe the certificate; swear the affidavit before a master in Chancery, or a judge of the court where the judgment was obtained; and when done, file it with the registrar in Bell-yard; pay the master* 1*s. oath* 1*s. and* 5*s. filing.*

N. B. The clerk of the dockets may certify in the absence of the master or his deputy.

CHAP. XII.

Of Execution.

(A) The Nature and different Kinds of Execution.

(B) When, by whom, and againſt whom to be ſued out; and herein of joint and ſeveral Executions.

(C) Into what Places Execution may go; and herein of the *teſtatum* Writs.

(D) Of the *Teſte* and Return of the Writs of Execution, and of amending the ſame.

(E) Of the Mode of executing the ſeveral Writs of *Ca. Sa.*, *Fi. Fa.*, and *Elegit*.

(F) Of the Lien for Rent on Goods taken in Execution.

(G) Of iſſuing a ſecond Writ of Execution.

(H) Of the Sheriff's Poundage, Fees, &c.

(I) Of ſuperſeding Execution by Writ of Error, or otherwiſe.

(K) Of entering Satisfaction on the Roll.

(A) (A) Of the Nature and different Kinds of Execution.

Execution what.

IF the regular judgment of the court after the deciſion of the ſuit be not ſuſpended, ſuperſeded, or reverſed, the next and laſt ſtep is, the *execution* of that judgment, or putting the ſentence of the law in force. This, indeed, is the grand object of the ſuit.

Executio eſt fructus et finis legis;
Proſecutio legis eſt gravis vexatio;
Executio legis coronat opus. Co. Lit. 289.

Hence execution is ſometimes emphatically called the *life* of the law.

How inforced.

Execution of a judgment is inforced by the party who has obtained the judgment ſuing out a certain writ, founded upon and ſuitable to the action in which the judgment has been given, and directed to the ſheriff of the proper county,

which writ is supposed to be granted at the request of the party entitled thereto, for the purpose of affording him satisfaction of the judgment so obtained by him.

Writs of execution, therefore, differ according to the nature of the action, namely, whether it be *real, mixed*, or *personal*. But as this volume of Practice has been merely confined to the prosecuting of suits in *personal* actions, we shall at present treat only of the execution of judgments obtained in such suits. Different writs.

There are three sorts of execution generally in use for obtaining satisfaction of judgments in personal actions, either of which the party at his election may adopt, but he cannot pursue two sorts at one and the same time. Three sorts of execution in personal actions.

The highest of these is a *capias ad satisfaciendum*, the second an *elegit*, and the third a *fieri facias*; the first being against the person of the defendant, the second against his goods and lands, the third against his goods only.

The *capias ad satisfaciendum* is a writ directed to the sheriff, commanding him to apprehend the defendant, and by virtue thereof he is deprived of his liberty, till he makes the satisfaction awarded: For neither the sheriff nor court can admit him to bail; and, therefore, when he is once in custody upon this writ, no other sort of execution can be sued by the plaintiff against his property; for the maxim of the law is, *corpus humanum non recipit æstimationem*. But if he should happen to die, while charged in execution upon this writ, the plaintiff may, by the 21 Jac. 1. c. 24. after his death sue out other execution against his lands, goods, or chattels, at his election. Of the capias ad satisfaciendum.

A *capias ad satisfaciendum*, by the common law, lay only in trespasses *vi et armis*, being a direct and wilful wrong, and wherein the *capias ad respondendum* was the immediate process upon the original writ. But several statutes having given the process of *capias ad respondendum*, as the mesne process upon the original writ in other personal actions, than those committed *vi et armis*, the *capias ad satisfaciendum* has become an executory process in them also, it being held as a rule, that where a *capias* lies in process before judgment, it will lie in execution upon the judgment itself. So in all actions by *bill* in B. R. a *capias ad satisfaciendum* lies in execution by the course of the court; for the bill, and its subsequent process, the *latitat* and *capias*, are, in their nature and consequence, of the force, validity, and effect of a *capias ad respondendum*.

The *elegit*, so called because it is in the election of the plaintiff to sue it out or not, was given as process of execution by the statute Westm. 2. c. 18. By this writ the sheriff is commanded to take and deliver to the plain- Of the elegit.

tiff the defendant's goods and chattels upon reaſonable appraiſement and price (except his oxen and beaſts of the plough); and if his goods and chattels are not ſufficient to ſatisfy the debt or damages awarded, then the moiety of his lands and tenements, which he had at the time of the judgment given, is alſo to be delivered, until out of the rents, iſſues, and profits thereof, the debts and damages are levied, or till the defendant's term therein be expired, as if he be only tenant for life or in tail.

Of the fieri facias.

The *fieri facias*, which is an old common law proceſs of execution, is alſo a writ directed to the ſheriff, commanding him, that he cauſe to be made of the *goods and chattels* of the defendant, the debt or damages recovered, and give the amount thereof to the plaintiff. This writ, and another writ called a *levari facias*, which commanded the ſheriff to *levy or make of the lands* (i. e. *of the iſſues, rents, and profits thereof*) *and chattels of the defendant, the ſum recovered*, were the only common law proceſs of execution. But when the ſtat. Weſtm. 2. gave the *elegit*, the *levari facias* fell into diſuſe, and was ſeldom ſued out, unleſs againſt eccleſiaſtics, after return made by the ſheriff, that the defendant was *clericus beneficiatus nullum habens laicum feodum*; and then it was directed to the ordinary or biſhop, who thereupon ſent forth a ſequeſtration of the profits of the clerk's benefice, directed to the churchwardens, &c. to gather up the ſame, and pay them over to him that had the judgment till the debt was paid. But the general mode now is to ſue out a *fieri facias* or *bonis eccleſiaſticis*, which is ſent to the regiſtrar of the dioceſe, who will make out a ſequeſtration, the plaintiff firſt giving ſecurity by bond to the biſhop.

Theſe writs lay for coſts of nonſuit, &c.

All the above writs may alſo be ſued out as proceſs of execution for coſts obtained by the defendant againſt the plaintiff, if he is nonſuited, nonproſſed, &c.

Theſe writs ſpecify the nature of the action, and the judgment recovered; and differ in the return of them, as the action may be, by *bill* or *original*. For all of which forms, ſee the Books of Entries. The forms of them are printed with blanks, and *ca. ſa.*'s and *fi. fa.*'s may be had at the ſtationers, neither of which need be ſigned, but they muſt be ſealed.

(B) (B) When, by whom, and againſt whom Execution ought to iſſue; and herein of joint and ſeveral Executions.

When execution ſhould iſſue.

Execution ought to be ſued out within a year and a day after the judgment, to be computed from the time of ſigning the judgment. *Sympſon* v. *Fray*, Bar. 197.

The

The year to be reckoned by calendar months, and not by the terms. *Winter* v. *Lightbound*, Str. 301. How the time to be reckoned.

Formerly no delay was allowed, though execution was ſtayed by injunction out of Chancery. *Ibid.* Or by any written agreement between the parties. *Thompſon* v. *Briſtow*, Bar. 205. Exceptions to rule:

But it has ſince been decided, that where the whole delay has ariſen from the part of the defendant by bills in Chancery for injunctions, and by obtaining time for payment, &c. execution may iſſue after the year without any *ſcire facias*, for that the *ſcire facias* was only intended to prevent ſurpriſe. *Michell* v. *Cue*, Burr. 660. When delayed by injunctions, &c.

So if the delay be occaſioned by writ of error, though for many years, yet execution may iſſue immediately upon affirmance of the judgment without a *ſcire facias*. *Winter* v. *Lightbound*, Str. 301. or by writ of error:

If, however, without any ſuch cauſes, execution be not ſued out within the year and day, the judgment muſt be revived by *ſcire facias*, and judgment obtained thereon, before execution can iſſue. Otherwiſe ſcire facias neceſſary.

But the writ need not be actually *executed* within that period. For if the *fi. fa.*, *ca. ſa.*, or *elegit* be but ſued out and returned within the year, continuances may be entered upon the roll from term to term, to the time of the execution, which may be at any time after the year, and as good as if the judgment had been revived by *ſcire facias*. *Aires* v. *Hardreſs*, Str. 100. If writ ſued out, returned, and continued, though not executed, it is ſufficient.

The writ, in ſuch caſe, muſt be returned and filed, for the mere ſuing out and continuing it on the roll will not be ſufficient. *Player* v. *Baldwin*, 2 Wil. 82. Bar. 213.

One ſort of writ, ſo ſued out and returned, will ſupport the awarding of a different kind of writ afterwards. Thus a *ca. ſa.* may iſſue after the year, upon a *fi. fa.* having been properly ſued out, returned, and continued. *Ibid.* One ſort of writ, ſo returned, will ſupport a different ſort afterwards ſued out.

The writ of *capias ad ſatisfaciendum* does not lie againſt *peers of the realm or their wives, or peers of Scotland, or members of parliament* (except upon a ſtatute merchant, purſuant to the ſtatute of 11 Edw. 1. or ſtatute ſtaple, according to the 27 Ed. 3. or on a recognizance in nature of a ſtatute ſtaple, upon the 23 Hen. 8. c. 6.). Againſt whom the writs lie.

Nor againſt the king's ſervants. So that a junior clerk of the kitchen to the king, who had been taken in execution, was on motion diſcharged. *Bartlett* v. *Hobbes*, 5 D. & E. 686.

Nor againſt *executors or adminiſtrators* for the debt of the teſtator or inteſtate, except a *devaſtavit* is returned, and then a *ca. ſa.* lies againſt their perſons, or a *fi. fa.* againſt their goods.

An *elegit* lies againſt the peers of the realm, as well as others; and alſo againſt executors and adminiſtrators, upon a *devaſtavit* returned.

So does a *fieri facias*.

In caſe of death, where the action is ſingle.

If the plaintiff die before execution, it cannot iſſue till *ſcire facias* ſued out by his repreſentative, and judgment thereon; after which, ſuch repreſentative will be entitled to the money. Cro. Eliz. 459.

So, if defendant die before execution, *ſcire facias* muſt iſſue againſt his repreſentative; and after judgment thereon execution may go againſt the goods of the deceaſed in his hands.

But if A. recovers judgment againſt B. and B. dies in the vacation within the year, A. may ſue a *fieri facias* as of the precedent term, and levy the goods of B. in the hands of his executors. *Odes* v. *Woodward*, Ray. 849.

If an adminiſtrator *durante minoritate* recover judgment, and afterwards the executor comes of age, he may have a *ſcire facias* on this recovery. Law of Ex. 7.

In caſes of baron and feme.

Where baron and feme recover land and damages, and baron diss, the feme ſhall have execution of damages. *Ibid.* 8.

So if baron and feme recover judgment in right of the feme, and ſhe dies, baron ſhall have execution. *Ibid.* 10.

If baron and feme executrix obtain judgment, and the feme dies, the baron cannot have execution, but adminiſtrator *de bonis non*. So, if they obtain judgment on a *ſcire facias*. Cro. Car. 464. *Anon.*

In an action againſt a feme covert only, to which ſhe pleads coverture and verdict for defendant, a writ of *fieri facias* for the coſts, directing the ſheriff to levy and pay them to defendant *and her huſband*, would be irregular; it being a maxim, that a perſon not a party to the record cannot be benefited nor charged by the proceſs without a *ſcire facias*: But the wife might have had proceſs in her own name, becauſe the plaintiff having declared againſt her as ſole, he was concluded from denying it. *Wortley* v. *Rayner*, Do. 617.

If baron and feme are taken in execution, the feme ſhall not be diſcharged. Bar. 203. *Berriman* v. *Gilbert & Ux.* But if the feme only is taken, ſhe ſhall be diſcharged. Bar. 207. *Rownſon & Ux.* v. *Williamſon*, Pract. Reg. 208. But if baron and feme are taken in execution, and the baron eſcape, unleſs the plaintiff will retake the baron, the feme ſhall be diſcharged. 1 Vent. 51. *Jackſon* v. *Gabree.*

In trover, if there is judgment and execution againſt baron and feme, the court will not diſcharge the feme, unleſs there

is

is fraud or collusion between plaintiff and the husband to keep her in custody. Str. 1167. *Pitts* v. *Meller*. So in battery by defendant's wife of plaintiff's wife, the court will not discharge the wife who is only in execution, if it appears there is no design to screen the husband. Str. 1237. *Finch* v. *Duddin*, Wil. 149. Though said, in Cro. Car. 513. that if judgment be recovered against baron and feme for the contract, nay, even for the personal misbehaviour of the feme during her overture, a *capias* shall issue against baron only.

If judgment is recovered against baron and feme for the debt of *feme dum sola*, a *capias* may issue to take both baron and feme in execution. Bar. 203. But if an action is brought originally against *feme dum sola*, and pending the suit she marries, a *capias* shall be awarded against her only, and not against baron. Cro. Jac. 323. *Doyley* v. *White*.

Action against baron and feme, for debt contracted by her *dum sola*; after judgment against them, the bail rendered them both to prison in discharge of bail, and on motion she was discharged. 3 Wil. 124. But where judgment and execution are against husband and wife, she shall not be discharged, but only where she is in custody upon mesne process; and when *husband* and *wife* are rendered in discharge of bail after judgment against them, they are in the same situation as if bail had never been put in; and not being charged in execution, the wife must be discharged out of prison. *Ibid.*

Execution may issue against one partner, in which case the partnership-goods are taken and sold, and the sheriff must pay over to the other partner or partners a share of the produce proportioned to his or their share in the partnership-effects. *Eddie* v. *Davidson*, Do. 650. Com. 217. Sal. 392. In case of partners.

In popular actions, there shall be but one execution for king and party. Law of Ex. 63. In popular actions.

If the action be against two or more, and judgment recovered against all, execution must go against all, and not against part only, and the same kind of execution must go against all. In joint actions.

For a separate *ca. sa.* against one defendant, on a joint judgment against two cannot be supported. *Clarke* v. *Clement and another*, 6 D. & E. 525.

If two be bound *jointly* and *severally* to A. and A. sue them *jointly*, A. may have a *capias* against them both, and the death or escape of one shall not discharge the other. But A. cannot have a *capias* against one, and another kind of execution against the other; because, though they be two several persons, yet they make but one debtor, when A. sues them jointly. But if A. sues them *severally*, he may sever them in

their kinds of execution; though if once a ſatisfaction be had of one, or againſt the ſheriff for an eſcape of one, the other may be relieved by an *audita querela*. Hob. 59.

Verdict againſt *four* defendants, judgment by default againſt the *fifth*, error brought in the name of the fifth only; and on motion, the court gave leave to take out execution againſt the other *four*. Bar. 202. *Maſon* v. *Symmonds and others*.

Judgment in treſpaſs againſt *four*, execution muſt be againſt all; and if they bring error, and one dies, by which the writ of error abates, then plaintiff may ſue execution againſt the ſurviving three, ſuggeſting the death of the fourth on record, but need not ſue a previous *ſcire facias*: for that is only neceſſary when a new party to the judgment is to be benefited or charged by the execution. Salk. 319. *Howard* v. *Pitt*, Show. 404.

How, if one plaintiff or defendant dies.

Where there are ſeveral plaintiffs or defendants, and one of them dies, execution may be ſued by or againſt the ſurvivors, upon ſuggeſtion of the death made upon the roll. *Withers* v. *Harris*, Ray. 808.

(C) (C) Into what Places Execution may go, and herein of the *teſtatum* Writs.

Where capias ſatisfaciendum ſhould iſſue, and of the teſtatum capias ſatisfaciendum.

The writ of *capias ad ſatisfaciendum* muſt be iſſued in the county where the venue is laid; and if the defendant cannot be found there, a *teſtatum capias ad ſatisfaciendum* may be iſſued into any other county. Theſe writs may both iſſue the ſame day, and be ſealed together; but it is neceſſary that a *ca. ſa.* be ſued out to ground the *teſtatum*. The court, however, will not inquire ſtrictly into the time when the original *ca. ſa.* iſſued, if it be but afterwards returned and entered on the roll.

Of the fieri facias and teſtatum.

So it is alſo with reſpect to the writ of *fieri facias* and *teſtatum fieri facias*.

What neceſſary to ſupport teſtatum.

They are generally both ſued out together, and the *fi. fa.* is left with the ſheriff for a return of *nulla bona*.

For if a *teſtatum fieri facias* be ſued out without any original *fieri facias* having iſſued, it will be ſet aſide for irregularity. *Brand* v. *Mears*, 3 D. & E. 388.

Unleſs ſuch original *fi. fa.* be afterwards produced and entered on the roll. *Ibid.*

And then it will do, though error be brought. *Ibid.*

So the court will not ſet aſide a *teſtatum capias ad ſatisfaciendum* ſued out without an original *capias*, though a writ of error has been brought, if a *capias ad ſatisfaciendum* be after-

afterwards ſued out, returned, and entered on the roll. *Milſtead* v. *Coppard*, 5 D. & E. 272.

If a *fieri facias* be ſued out, (when it ſhould have been a *teſtatum fieri facias*,) without any other *fieri facias* having originally iſſued, and the plaintiff afterwards ſues out an original *fieri facias*, the court will permit the party to amend the former on paying the coſts, though error brought. *Cowperthwaite* v. *Owen*, 3 D. & E. 657. How fieri facias may be amended and converted into teſtatum.

As to the *elegit*, a man may award on the roll as many *elegits* as he pleaſes, and execute all or any at his pleaſure; but it is ſaid, if he awards an *elegit* in one county, extends the lands upon the writ, and afterwards files it, he is barred, and cannot ſue out an *elegit* into another county, but an *actual writ* muſt be ſued out, returned, and filed before an award can be entered on the roll. Imp. B. R. 5 edit. 396. Where elegit ſhould iſſue.

It is not neceſſary to inſert the form of a *teſtatum* in a *teſtatum writ*, ſo as that it may appear from the writ itſelf to be a *teſtatum*. Rules and Orders B. R. and C. B. vol. 2. 79. Pract. Reg. 210. 212. But there muſt be an award of a *teſtatum* upon the roll. *Oates* v. *Foreſt*, Bar. 197. How far neceſſary to appear a teſtatum in the writ.

Judgment in B. R. a *fieri facias* into London, returned *nulla bona*, and a *teſtatum* into Montgomeryſhire, to which the ſheriff returned, that the writ of our lord the king does not run into Wales but at the king's ſuit, or where he is concerned. *Per. cur.* On a judgment in this court, execution may be awarded into Wales or a county palatine. Cro. Jac. 484. Cro. El. 445.—Lands in Wales are pleadable here. *Hetley*, 18. 20, 21. 2 Bulſ. 54. 156.—If the writ did not run there, yet the ſheriff, being an officer of the court, ought not to queſtion it, but to make return of the execution of it. And the court accordingly ordered the ſheriff, upon a penalty, to return the writ, as he ſhould ſtand by it: ſaying, that ſheriffs in Wales ought to execute judicial writs, for the court has none to write to there as in counties palatine, where they write to the chancellor or chamberlain, or warden of the cinque ports. An *elegit* may be executed in Wales, and why not a *fieri facias?* If it could not, the party would be without remedy; for he cannot bring an action there upon this judgment; and he cannot outlaw the defendant, becauſe this is on a bill of debt againſt an executor. *Draper* v. *Blainey*, 1 Lev. 291. Ray. 206. 2 Saund. 193. 2 Keb. 649. 657. 724. Of iſſuing writs of execution into Wales.

Motion to have reſtitution of goods levied by a *fieri facias* out of B. R. in the county palatine of Cheſter, denied. *Per cur.* Executions may well iſſue out of this court, to the county palatine, on a judgment originally given here. 1 Lev. 256. *Anon.* into county palatin.

(D) (D) Of the *Teſte* and Return of the Writs of Execution, and of amending the ſame.

Of the teſte, if iſſued out of term; if in term.

If the writ of *capias ſatisfaciendum* or *fieri facias* be iſſued out of term, let the *teſte* be the laſt day of the term; if iſſued in term, *teſte* the writ the firſt day of the term (although the judgment is not ſigned till four days after).

Though teſte before judgment, it may be good.

Execution may be good though the writ bear *teſte* before the judgment ſigned; for the writ of execution, if ſued out in vacation, may bear *teſte* of the precedent term, even of the firſt day of that term, and judgment perhaps not ſigned till later in term, or in the vacation. *Parſons and Gill*, Com. 117.

Of the return, if by bill or original.

If the proceedings are by bill, execution muſt be made out returnable on a day certain; if by original, on a general return-day.

Of the days between teſte and return.

There need not be fifteen days between the *teſte* and return of any *capias ſatisfaciendum* or *fieri facias*; 13 Car. 2. c. 2. ſ. 7., except to fix bail, or in outlawry.

And then, if the proceedings are by original, there muſt. Bar. 76. But if proceedings be by bill, there need be only eight days between *teſte* and return of *capias ſatisfaciendum* to charge the bail. Sal. 602. Ray. 1177.

If returnable on a general return when it ought to have been a day certain, bad.

In proceeding by bill *capias ſatisfaciendum* returnable on a general return-day, and not a day certain, as it ought to have been, was quaſhed, and defendant ordered to be diſcharged by ſuperſedeas, with coſts, defendant conſenting to bring no action. *Per. cur.* Defendant cannot take advantage of this matter by writ of error, and if he could it would be unreaſonable to keep him in cuſtody till the determination thereof. *Walker* v. *Harges*, Bar. 413.

So was a *fieri facias* quaſhed for ſame reaſon. *Furtado* v. *Miller*, Bar. 213.

If teſted out of term, void.

If a writ of execution bear *teſte* out of term, it is void; but the ſheriff is juſtifiable, and yet ſhall not be liable to an action for an eſcape. Sal. 700. *Shirley* v. *Wright*.

If capias ſatisfaciendum returnable out of term, only voidable.

A *capias ſatisfaciendum* made returnable at a day which falls out of term would not be void, though liable to be ſet aſide on motion; nor can ſuch a defect in it be taken advantage of by bail upon a general demurrer to a *ſcire facias* brought againſt them. *Campbell* v. *Cumming*, Bar. 1187.

How alias writs to be teſted.

In all continued writs, the *alias* muſt be teſted the day the former writ was returnable. *Touchin's caſe*, Sal. 699.

Writ of execution returnable two terms from the teſte is well, not ſo in meſne proceſs.

In meſne proceſs, if a term be omitted, the writ is void in all actions perſonal, and the ſheriff ſhall not be charged, for the cauſe is diſcontinued and out of court by the intermiſſion; and by not having a day in court by the return of the writ as he

he ought, the party may be at great prejudice by reaſon of the impriſonment in the mean time. But in *executions*, a *capias ſatisfaciendum* omitting a term is not void, for the party is not to have a day in court, his cauſe is at an end, and he muſt be in priſon whether the writ be returned or not; nor is it neceſſary it ſhould be returned. *Shirley* v. *Wright*, Sal. 700. Ld. Ray. 775.

Ca. ſa. to fix bail muſt not be returnable pending error.

If a *capias ſatisfaciendum* is returnable pending a writ of error, it is no regular foundation for proceeding againſt the bail. *Deriſley* v. *Deland*, Bar. 83.

How writs of execution may be amended; and by what.

A writ of execution executed may be amended by the record of the judgment; as where after a *capias ſatisfaciendum* executed, it was moved to amend the writ by the record of the judgment, making the defendant's name *Edmund* inſtead of *Edward*, and rule afterwards made abſolute. *Brown* v. *Hammond*, Bar. 10.

So a *capias ſatisfaciendum* may be amended in the return after it has been executed, by making it returnable *before our juſtices*, inſtead of *before us*. *Hunt* v. *Kendrick*, 2 Blac. Rep. 836. The way to amend it is by motion to amend it by the award of the writ upon the roll.

A writ of *capias ſatisfaciendum* was amended after defendant taken in execution by altering the ſum in the writ, and ſtriking out part to which he was not liable. *Larouche* v. *Waſbrough*, 2 D. & E. 737.

There muſt be ſomething to amend by.

Motion to quaſh *capias ſatisfaciendum* and diſcharge defendants, becauſe judgment is upon a record in Wilts, and *capias ſatisfaciendum* directed to London, and no *teſtatum*. It was acknowledged, that a *teſtatum* was the uſual courſe, but that there was no occaſion to inſert it in the writ, though it muſt appear in the record, and when that is made up, proceedings will be regular; but the court was of opinion that the writ muſt be quaſhed with coſts, no roll being yet made up to amend by, and defendant was diſcharged, undertaking to bring no action. *Allen* v. *Allen*, Blac. 694. B. R.

(E) Of the Mode of executing the ſeveral Writs. (E)

(E. 1) *Of* Capias ad ſatisfaciendum.
(E. 2) *Of* Fieri Facias.
(E. 3) *Of* Elegit.

(E. 1) *Of executing the* Capias ad ſatisfaciendum. (E. 1)

Capias ſatisfaciendum, the higheſt writ of execution.

The firſt ſpecies of execution is by writ of *capias ad ſatisfaciendum*, which is a writ of the higheſt nature, inaſmuch as it deprives a man of his liberty, till he makes the ſatisfaction awarded;

awarded; and therefore when a man is once taken in execution by the sheriff on this writ, no other process can be sued against his lands or goods, except by stat. 21 Jac. 1. c. 24. in case of defendant's death.

Operation of writ:

By this writ the sheriff is directed to take the body of the defendant and have him at Westminster on a day therein named, to make the plaintiff a satisfaction for his demand; and if he does not then make satisfaction, he must remain in custody till he does.

how sheriff must act thereon;

On the writ of *capias ad satisfaciendum* the sheriff cannot take bail, nor can he return that the party was rescued, for he may take the *posse comitatus;* and therefore if he returns that the party was rescued, an action lies against him for the escape, or a new *capias* against the party, for an ineffectual execution is as none. 2 Blac. Abr. 351.

and keep defendant in close custody.

When the defendant is once in custody upon this process, he is to be kept *in arctâ & salvâ custodiâ;* and if he be afterwards seen at large, it is an escape, and the plaintiff may have an action thereupon for his whole debt. For, though upon arrests, and what is called mesne process, being such as intervenes between the commencement and end of a suit, the sheriff, till the statute 8 & 9 W. 3. c. 27. might have indulged the defendant as he pleased, so as he produced him in court to answer the plaintiff at the return of the writ; yet, upon a taking in execution, he could never give any indulgence, for in that case, confinement is the whole of the debtor's punishment, and of the satisfaction made to the creditor.

How, if capias satisfaciendum be against several.

If a *capias satisfaciendum* be against two or more, the sheriff may take the bodies of all in execution. 5 Rep. 86. 11 Rep. *Godfrey's case.*

Sheriff must not break defendant's house open to take him,

On this writ, the sheriff may not break open any man's house to arrest him, but in all cases when the door is open he may enter to make execution of the body. But yet, in favour of executions, which are the life of the law, and especially in cases of great necessity, or where the safety of the king and commonwealth are concerned, the general case is excepted: When the writ is at the suit of the king, then the sheriff or his officer, after request to have the door opened and refusal, may break open the house to take the body. 5 Co. 91. 2 Show. 87. pl. 78. But he ought first to signify the cause of his coming, and request the owners to open the door. 5 Co. 91. Cro. Eliz. 908. 4 Leon. 41. pl. 111. Cro. Eliz. 909. *Ibid.* 714. pl. 17.

except at the king's suit;

But he may another man's, if defendant hid there.

But a man's house is no protection for another, therefore the sheriff may break it open to take him. Fof. Cr. L. 319.

In

In debt on a judgment, the defendant pleaded that he was taken in execution by *capias ſatisfaciendum* on that judgment, and had paid the money to the ſheriff; and it was held to be no plea, becauſe, though he does pay it to the ſheriff, yet the ſheriff may be inſolvent, or may die and leave no aſſets, and then the party will be never the better. Freem. Rep. 842. And ſo it was held in Baker's caſe, who pleaded payment to the marſhal being in execution, and held to be no plea. Lutw. 587. 12 Mod. 385. And in 12 Mod. 230. the ſheriff hath no power to receive money of the defendant upon a *capias*, for his buſineſs is only to execute his writ. And if in ſuch caſe the defendant pays the ſheriff, and he afterwards becomes inſolvent, and does not pay the plaintiff, ſuch payment ſhall not excuſe the defendant. *Per* Holt, C. J.

Sheriff muſt not receive the money from defendant, but only take his body.

Payment to ſheriff not good;

But payment to the plaintiff's attorney upon record would be good, for that is payment to the plaintiff himſelf. *Morton's caſe*, 2 Show. 138.

but otherwiſe to plaintiff's attorney.

Defendant, arreſted by a *capias ſatisfaciendum*, paid the money to the ſheriff's officers before the return. Defendant delivered to the ſheriff a *fieri facias* againſt the plaintiff, upon which the ſheriff levied the ſum therein expreſſed, out of the money in his hands, by the *capias ſatisfaciendum*, and upon being called upon to return the *capias ſatisfaciendum*, made the return thereof to the above effect, which the court held inſufficient; and accordingly ordered him to pay the money paid to him upon the *capias ſatisfaciendum* to the plaintiff, deducting his poundage. *Staple* v. *Bird*, Bar. 214.

Sheriff cannot return that money was paid to him under capias ſatisfaciendum, and afterwards levied on another execution, whilſt in his hands.

(E. 2) *Of executing the* Fieri Facias. (E. 2)

The next ſpecies of execution is againſt the goods and chattels of the defendant, and is called a writ of *fieri facias*, from the words in it where the ſheriff is commanded *quod fieri faciat de bonis*, that he cauſe to be made of the goods and chattels of the defendant the ſum or debt recovered.

Fieri facias, why ſo called.

By a *fieri facias* the ſheriff may take all goods and chattels of the defendant which he might formerly take upon the *levari facias*; for the *fieri facias* includes the *levari facias*. 2 Inſt. 394.

What may or may not be ſeized under a fieri facias.

So he may take and ſell an annuity of 40*l.* *per annum* granted by the king for years, to be paid by the receiver of the court, for it is in the nature of a rent-charge. R. 2 Cro. 79.

So he may extend or ſell a term for years. 8 Co. 171. A.

So he may cut down and ſell corn growing on the land, for the leſſee has an intereſt in it. *Poole's caſe*, 1 Salk. 368.

So utenſils for trade erected by the defendant, though fixed to the land, as coppers, fats, pavements, &c. *Ibid.*

And after ſale, the defendant ſhall not have his term again, though the plaintiff be ſatisfied his debt by the profits. Mo. 873.

So if goods are taken in execution at the ſuit of B, and the ſheriff returns *nulla bona*, they ſhall be afterwards taken at the ſuit of C.; for the property is not veſted in B. nor in the ſheriff. *Underwood* v. *Mordant*, 2 Ver. 238.

But the ſheriff, upon a *fieri facias*, cannot take things fixed to the freehold, as doors, windows, &c. Com. Dig. tit. Execution.

Nor furnaces, coppers, &c. fixed. Dub. 1 Rol. 891. l. 50. R. cont. 1 Salk. 368. if erected by the defendant for the uſe of his trade. *Vide ſupra.*

Nor hearths, chimney-pieces, &c. put up by the defendant for the uſe of the houſe, and not for his trade. 1 Sal. 368.

So the ſheriff cannot take goods in pledge. Com. Dig. tit. Execution (C. 3).

Or demiſed to another. *Ibid.*

Nor goods taken and in cuſtody of the ſheriff upon a former execution. *Bachurſt* v. *Clinkard*, Show. Rep. 173. *Letchmere* v. *Thorowgood*, 3 Mod. 236.

Nothing can be taken in execution that cannot be ſold, as deeds, writings, &c. *Francis* v. *Naſh*, Caſes temp. Hardw. 53.

Bank notes, &c. cannot be taken in execution. *Ibid.*

It is laid down, in *the King* v. *Deane*, 2 Show. 88. that if a ſheriff on a *fieri facias* ſell a leaſe or term of a houſe, he cannot and muſt not put the perſon out of poſſeſſion, and the vendee in, but the vendee muſt bring his ejectment. But this, perhaps, may not be ſo ſettled a point as to extend to all caſes; for *per* Mr. Juſtice Buller, in the caſe of *Taylor* and *Cole*, 3 D. & E. 298. "It ſeems to me, that where "there is a tenant in poſſeſſion, and the execution is againſt "the landlord whoſe term is to be ſold, the tenant cannot be "turned out of poſſeſſion; but that is very different from the "caſe where the debtor himſelf is in poſſeſſion; in ſuch caſe, "I incline to think that the ſheriff may turn him out of poſ- "ſeſſion. However, I give no opinion on that at preſent, "becauſe it is not neceſſary to the deciſion of this caſe."

How far ſheriff, on ſale of a term, can turn tenant out of poſſeſſion.

If

If a plaintiff cannot find ſufficient effects of the defendant to ſatisfy his judgment, the court will order the ſheriff to retain, for the uſe of the plaintiff, money which he has levied in another action at the ſuit of the defendant. *Armiſtead* v. *Philpot*, Do. 231.

Money levied by ſheriff for defendant may be ſometimes retained for plaintiff.

The ſheriff is bound at his peril to take only the goods of the defendant; for, if he take goods of a ſtranger, he is liable to an action in trover or treſpaſs. Keb. 693. Therefore, if he doubts whether the goods ſhewn him are the defendant's, he may ſummon a jury *de bene eſſe* to ſatisfy himſelf whether the goods belong to the defendant or not; this will juſtify him in returning, that the defendant has no goods within his bailiwick, and mitigates damages in an action of treſpaſs, if the goods ſeized ſhould not happen to be the defendant's. Dalt. 146. Do. 40.

Sheriff muſt be cautious to take the goods of the right perſon;

This proceeding by the ſheriff is a kind of inqueſt of office; it is merely to indemnify the ſheriff in making his return to the writ; but it does not bind the right between the litigating parties. The court therefore will not interfere by ſetting aſide ſuch inquiſition. *Roberts* v. *Thomas*, 6 D. & E. 88.

If on a *fieri facias* againſt A. a bailiff takes the goods of B., treſpaſs lies againſt the ſheriff. *Ackworth* v. *Kempe*, Do. 40.

Treſpaſs will lie againſt the high ſheriff for the bailiff's taking the goods of A. inſtead of B. under a *fieri facias*. *Sanderſon* v. *Baker*, Blac. 832. S. C. 3 Wil. 309.

otherwiſe liable to an action.

If the ſheriff have a *fieri facias* againſt a man's goods, and before execution he pay him the money, in this caſe he cannot do execution after; and if he do, treſpaſs lies: nor can he deliver them to the plaintiff in ſatisfaction of the debt, but he muſt return to the court the execution of his writ. Cro. Eliz. 504. Noy, 56. Dalt. 529.

On fieri facias defendant may pay ſheriff the money;

If the defendant tenders the debt, it is a wrong for the ſheriff to ſell the goods. 1 Keb. 655.

or tender it;

If the ſheriff levy the money and give it to the plaintiff, though he never made any return to the court, it is good enough, 4 Rep. 64., for the end of the execution is anſwered.

Payment to a ſheriff on a *fieri facias* is a good plea, becauſe he hath authority to levy the debt. 2 Lev. 203. *Taylor* v. *Bekon*. 2 Jon. 97. Skin. 665. 5 Mod. 296.

and ſuch payment is a good plea.

Sheriff on a *fieri facias* levied the debt; the defendant brought a bill in Chancery, and got an injunction to ſtay the money in the ſheriff's hands; the plaintiff and his attorney (both priſoners in the Fleet) moved the court againſt the ſheriff to return the writ; the ſheriff prayed the direction

Though ſheriff receives injunction from Chancery to retain the money levied, he muſt ſtill return the writ.

of the court; for if he return the writ he must pay the money, and then he shall be committed by the Chancery for breach of injunction; and if not, then the K. B. will amerse him. The court took no notice, but ordered a return, or they would commit him; nor would they any way assist him. 8 Mod. 315. *Wilson* v. *Aldridge*.

From what time goods bound.

Formerly from teste of writ;

This writ, at the common law, bound the defendant's goods from the *teste* of the writ; so that any sale after that was void, because the goods from the time of the *teste* were attendant to answer the execution; for the execution at common law being only the goods, if they had not allowed the goods to be bound, as if the party had transferred them, they thought every execution might be avoided by sale; and it was presumed, that the sheriff should execute such writs immediately, and that there would be notice in the neighbourhood, that they might not be deceived; but the goods were not bound by the judgment, because the judgment was in force for a whole year; and it would be hard that none against whom judgment was pronounced, should buy or sell within that time: but men abused the notion of the retrospect of the goods being bound by the *teste* of the writ to make sales uncertain, for they took out writs one under the other without delivering them to the sheriff; by which they bound the goods of their debtors, and consequently made their sales and commerce uncertain: To prevent which, the statute of frauds and perjuries binds the goods only from the delivery of the writs to the sheriff, enacting, "That no writ "of execution shall bind the property of the goods but from "the time of its delivery to the sheriff, under-sheriff, or "coroners; who, upon receipt thereof, (without fee,) shall "indorse on the back thereof the day of the month and "year when they received it;" 29 Car. 2. c. 3., made perpetual by 1 Jac. c. 17. s. 5.; which was no more than restoring the old law, which supposed the writ to be delivered to the sheriff immediately from the *teste*. 8 Co. 171. Cro. Jac. 451. Cro. Eliz. 174. Sid. 271.

not from judgment;

but this introduced abuses;

to prevent which, by stat. 29 Car. 2. c. 3. goods now bound from delivery of writ to sheriff.

But this is only intended as to strangers.

This must be intended as to strangers who might have a title to the goods between the *teste* of the writ and delivery thereof to the sheriff; but as to the party himself, his executors and administrators, the goods, since the statute as before, are bound from the *teste*. 2 Vent. 218. Comb. 33. 2 Show. 485. 6 Mod. 225.

If two writs of same date be delivered, which is to be executed first?

If two writs of *fieri facias* bear *teste* the same day, the sheriff at common law, and now, since the statute, is bound to execute that which was first delivered to him; Salk. 320. Carth.

Carth. 419.; therefore the time ought to be marked when the sheriff receives those writs in office.

Where two writs of *fieri facias* against the same defendant are delivered to a sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure was first made under the subsequent execution; and if the person claiming under the second execution pay the sheriff the amount of the debt under the first execution for his security, the court will not compel the sheriff to refund that money on motion. *Hutchinson* v. *Johnston*, 1 D. & E. 729.

In an action against the sheriff for a false return to a *fieri facias*, the plaintiff delivered a writ of execution to the sheriff, under which his officer levied the debt, and made a bill of sale; then the sheriff discovered a former execution in the office, and returned *nulla bona*: on this case the defendant obtained a verdict. *Rybot* v. *Peckham*, 1 D. & E. 731. n.

The property of the goods is vested by the delivery of the *fieri facias*, and an extent afterwards for the king comes too late, and that on the statute of frauds, Comb. 123.; for when a judgment is once executed, the goods are *in custodia legis*, and neither exchequer-process or assignment from commissioners of bankrupts will touch them. *Letchmere* v. *Thorowgood*, 3 Mod. 236.

An extent too late after delivery of fieri facias.

If goods be taken in execution on a *fieri facias* against the king's debtor, and before they are sold an extent come at the king's suit, grounded on a bond debt tested after the delivery of the *fieri facias* to the sheriff, these goods cannot be taken upon the extent. *Rorke* v. *Dayrell*, 4 D. & E. 402. Do. 415. Ray. 307.

Under particular circumstances and in special cases (but not as a general rule) the court will interfere in favour of the sheriff so far as to enlarge the time upon his own application for his making a return to a writ of *fieri facias*, when there is a reasonable doubt whether the goods seized are not covered by an extent issued since the *fieri facias*. *Wells* v. *Pickman*, 7 D. & E. 174.

An extent cannot be antedated, but must bear *teste* at the day it issues, though it be out of term. *Rex* v. *Mann*, Str. 749.

An extent cannot be antedated.

If A. indebted to B. and C., after being sued to judgment and execution by B., go to C. and voluntarily give him a warrant of attorney to confess judgment; on which judgment is immediately entered, and execution levied on the same day on which B. would have been entitled to execution, and had threatened to sue it out; the preference so given by A. to C. is not unlawful nor fraudulent within the meaning

Of fraudulent executions by giving preferences, and the like, and of the effect thereof.

ing of the ſtat. 13 El. c. 5. *Holbird* v. *Anderſon*, 5 D. & E. 235.

A firſt *fieri facias* executed fraudulently, a ſecond *fieri facias*, at the ſuit of another, executed afterwards ſhall ſtand and be preferred; and the matter was properly left to a jury. *Bradley* v. *Wyndham*, Wil. 44.

Of the power of ſheriff in making execution under fieri facias; as to breaking open cheſts, &c.

By this writ the ſheriff is commanded to levy the debt of the goods and chattels of the defendant; and he is therefore indemnified as far as he acts neceſſarily in order to the taking of the goods; and therefore if he breaks open a cheſt in which goods are locked up, or a barn not adjoining to a dwelling-houſe, which is made for the conſervation of goods only, he is indemnified by the writ; but he is not by the writ authorized to break the dwelling-houſe, which is built for the protection of the man and his family. Sid. 189. Keb. 698. 2 Show. 87. Palm. 54. If he gets into the houſe, the doors being open, there begins the execution; for the reſt of the houſe is only for the protection of the goods, and therefore he may enter and finiſh the execution of his writ. But though the ſheriff be a treſpaſſer in the execution of the proceſs, yet when the writ is ſerved and the money levied, the plaintiff ſhall have the benefit of it, and the party is left to his remedy againſt the ſheriff. Browne, 50.; 5 Co. 91.; 3 Inſt. 162.; Mod. 668.; Yelv. 28.; Cro. Eliz. 908.; Dalt. 350. But the protection of a man's houſe, as before hath been ſaid, extends only to himſelf and family; for if a ſtranger, to elude the execution, receives the defendant's goods into his houſe, the ſheriff's authority ſhall reach them; becauſe a deſign to elude the law ſhall not be protected by the law; the ſheriff might ſeize him in the ſtranger's houſe, becauſe the defendant's leaving his own houſe has waived the benefit of the law. 5 Co. 93.: Sid. 186. The protection of a man in his own houſe was very agreeable to the ancient law, becauſe in perſonal contracts they did only ſubject their chattels and not their perſons nor freeholds; and though afterwards, by ſubſequent laws, the freehold and perſon were made liable to execution, yet they have not taken away the privilege a man had by common law to defend his own houſe, which ſtill continues, unleſs where the execution is by *habere facias ſeiſinam* or *poſſeſſionem*.

breaking open houſes to get at goods;

only protected in a man's own houſe.

What property in the goods is veſted in ſheriff by the ſeizure.

By virtue of this writ, the ſheriff, on the ſeizure of the goods, hath ſuch a property in them, that he can maintain treſpaſs or trover; for he has the goods to ſell that he may have the money in court; and therefore when he once ſeizes them, he has the property in them for that purpoſe. Sid. 438. pl. 3.; Vent. 52, 53.; Mod. 30. pl. 75.; 2 Saund. 47.;

Lev.

Lev. 282. 2 Vent. 218. Salk. 222. Vent. 52. And if the defendant dies after the writ delivered to the ſheriff, he may execute the ſame on the goods in the hands of the executor or adminiſtrator of the deceaſed; 3 Wil. 399.; Comb. 33.; 2 Ld. Raym. 808. 850. 1073.; 12 Mod. 130. 241.; becauſe the ſheriff was entitled to ſeize them from the time of the writ. How he may execute writ if defendant dies.

The ſheriff that begun the execution ſhall end it, though he is out of office. Salk. 323. Same ſheriff who begun ſhall finiſh execution.

If plaintiff dies, execution does not abate; but ſheriff muſt go on to execute his writ. Salk. 322. 6 Mod. 290. It does not abate by plaintiff's death.

So if defendant dies at any time ſubſequent to the day to which the judgment has relation, though prior to the actual day when ſuch judgment was ſigned, execution may go againſt his goods without a *ſcire facias*. Thus where a judgment is ſigned in any part of the term, or the ſubſequent vacation, it relates back to the firſt day of the term, and notwithſtanding the death of the defendant before judgment actually ſigned, execution will be good teſted the firſt day of the term. *Bragner* v. *Langmead*, 7 D. & E. 20. But if the execution bears *teſte* poſterior to defendant's death, it is irregular. *Ibid.* *Heapy* v. *Parris*, 6 D. & E. 368.

When a ſheriff takes goods in execution, he may ſell them at any rate, if defendant refuſes to pay the debt; Vent. 7.; and they may be ſold to the plaintiff, though not actually delivered to him. Comb. 452. But he is to ſell them for ready money, becauſe he is immediately charged to the party for whom the ſale was. 6 Mod. 83. *Morley* v. *Staker*. Of ſheriff's authority as to ſelling the goods, and how he ought to act therein;

The ſheriff cannot detain the goods on an execution in his own hands, and ſatisfy the debt of his proper money; but he ought to ſell them upon a *venditioni exponas*, and may return, on his ſo doing, that they remain in his hands for want of buyers; for the law requires of ſheriffs a ſtrict execution and obſervance of the writs directed to them. Noy. 107. Lutw. 589. *Langdon* v. *Wallis*. Neither ought the goods to be delivered to the plaintiff in ſatisfaction of his debt, but ought to be ſold. 2 Vent. 95. muſt ſell them, or attempt ſo to do; cannot keep them himſelf, or let plaintiff have them.

If the ſheriff returns that he has goods to the value of 72*l.* which remain in his hands for want of buyers, it is no eſtoppel, but that he may ſell them for leſs; for it appearing on the return that they are not ſold, but that they remain in ſpecie in his hands, the value cannot be ſo ſet, but that it may be altered between that and the ſale; therefore if on the *venditioni exponas* it appears that he has ſold thoſe goods for leſs, the plaintiff may have a new execution for his debt. Cro. Eliz. 598. Cro. Jac. 515. Godb. 276. If he returns that goods remain in his hands, &c. to a certain value, he may afterwards ſell them for leſs;

but he must not value them too high.

Yet if the sheriff values them so high as none will buy them at that rate, he must take them himself. 2 Show. 89. *The King* v. *Bird.*

No appraisement on fieri facias.

On a *fieri facias* there need no appraisement, but on an *elegit* there must. *Beeley* v. *Sampson*, 2 Vent. 95.

If he levies more than debt, he may keep surplus till demanded.

If *fieri facias* be awarded to the sheriff to levy 20*l.* and he sells to the value of 40*l.* and returns the *fieri facias* with 20*l.* in court, he may detain the surplusage until demand made of it; for he is not bound to search out the defendant. Noy. 69. He ought not to take more than will satisfy. *Ibid.*

An action of debt or assumpsit lies against sheriff for money levied.

If the sheriff levies the money upon a *fieri facias*, though he makes no return upon the writ, yet an action of debt, account, or *assumpsit* lies against him and his executors, because it is a debt in the sheriff by the levying the money; and the defendant, by the sheriff's levying the money upon him, can, on a *scire facias* to have execution, plead this in bar, or upon a second *fieri facias*, relieve himself by an *audita querela;* for the lien of the judgment is discharged by the sheriff's executing the writ, and if the plaintiff had not this action against the sheriff, he would be remediless. Sir W. Jones, 430. Rol. Abr. 598. 921.

What returns sheriff may make to fieri facias, nulla bona, &c.

The sheriff to this writ may return *nulla bona*, and that the defendant is a beneficed clerk, having no lay fee, and that he is rector or vicar of the parish church of B. Offic. Brev. 97. Dalt. 219. Sid. 278.

That goods remain in his hands for want of buyers.

The sheriff may return on this writ, that the goods remained in his hands for want of buyers, and this return is good, because the sheriff is directed to levy the money from the goods, which implies an authority to sell them; yet he may not be able to find buyers, and therefore, such return is to be allowed. Yelv. 44. Sid. 438. 2 Saund. 47. Mod. 751. Vent. 52.

Sheriff compelled to sell by venditioni exponas;

If the sheriff delays or refuses to sell, the legal and proper mode of compelling a sale is by writ of *venditioni exponas*, upon which he must return the money into court. *Cameron* v. *Reynolds*, Cowp. 406.

need not make bill of sale at appraised value.

The sheriff is not obliged to execute a bill of sale at an appraised value, though he has even promised so to do. *Ibid.*

Sheriff answerable for returned value.

The sheriff is bound for the returned cost or value of the goods, though they are afterwards rescued. Ld. Ray. 1075.

How, if sheriff goes out of office before goods sold.

It was formerly held, that if a sheriff takes goods in execution by virtue of a *fieri facias*, and is out of office before they are sold, that in such case he could not sell and deliver the money to the party, because his authority determined with his office; but that he ought to deliver such money over

over to the new ſheriff (as he doth the priſoners), and return, that thereupon a *venditioni exponas* may be awarded to the new ſheriff. But ſince it hath been held, that though a new ſheriff is made, yet the old may ſell the goods ſo by him levied; but if he return the writ, that the goods are in his hands *pro defectu emptorum*, in ſuch caſe a *diſtringas* ſhall go to him, to deliver them over to the new ſheriff, and after that a *venditioni exponas*. 3 Salk. 323. It ſeems that a ſheriff may ſell goods after he is out of office, without a *venditioni exponas*. Ld. Ray. 1073.

But where a *fieri facias* comes to a ſheriff, and he goes out of office before it is executed, his ſucceſſor may execute it, becauſe ſuch writ is general, and not directed to any particular ſheriff by name; but it is otherwiſe, if directed to a ſheriff by name. So note the difference between general writs to the ſheriff, and ſpecial writs to a ſheriff by name. 3 Salk. 147.

Sheriff may return nulla bona, if property were an annuity not properly regiſtered.

Where a perſon, againſt whom a writ of *fieri facias* is taken out, is in poſſeſſion of goods under a deed which was given in conſideration of an antecedent debt, and a ſmall annuity payable from thenceforth, the ſheriff is warranted in returning *nulla bona*, if it appear that the memorial of ſuch annuity was not regiſtered according to the directions of the annuity act, 17 G. 3. c. 26. ſ. 1. for in that caſe the deed is abſolutely void. *Creſsley* v. *Arkwright*, 2 D. & E. 603.

When court will ſtay goods in ſheriff's hands till diſpute decided.

The court will not ſtay goods taken by *fieri facias* in the hands of the ſheriff, till a diſpute concerning the property of them is decided, unleſs for the protection and at the requeſt of the ſheriff. *Shaw* v. *Tunbridge*, Blac. 1064.

When the defendant's goods are ſeized on a *fieri facias*, the debt is diſcharged. *Ibid.*

(E. 3) *Of executing the* Elegit. (E. 3)

Introduction of elegit;

At common law, there was no execution which gave poſſeſſion of the lands of a debtor; the only ſatisfaction was either againſt his goods and chattels by *fieri facias*, or againſt the rent and profits of the land by *levari facias*. But by the 13 Edw. 1. c. 18. it was ordained, "That where a debt is "recovered or acknowledged in the king's court, or damages "awarded, it ſhall be in the *election* of him that ſueth to have "a *fieri facias* unto the ſheriff to levy the debt upon the "lands and chattels of the debtor, *or* that the ſheriff ſhall "deliver to him all the chattels of the debtor (ſaving his "oxen and beaſts of his plough) and the one-half of the "land, until the debt be levied upon a reaſonable price or "extent; and if he be put out of the land, he ſhall recover "it again by writ of *novel ſeiſin*, and after that by writ of "*re-diſſeiſin*, if need be."

Why so called; From this *election*, which the party has, the writ of *elegit* derives its name; and the entry is *Quod elegit sibi executionem fieri de omnibus catallis & medietate terræ.*

how sheriff to act thereon; Upon this writ the sheriff is to impanel a jury, who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same; and also to inquire as to his lands and tenements: And upon such inquisition, the sheriff is to deliver all the goods and chattels (except the beasts of the plough), and the moiety of the lands to the party, and must return his writ, in order to record such inquisition in that court out of which the *elegit* issued.

must take an inquest. And this cannot be done by the sheriff without an inquest; for the words of the statute are, "upon a reasonable price "or extent," which must be found such by the oaths of twelve men, as is laid down and admitted by all the books which treat of this subject. 2 Inst. 396. Co. Lit. 389. Dy. 100. 5 Co. 74.

How moiety of lands to be set out and delivered; When the jury have found the seisin and value of the land, the sheriff, and not the jury, is to set and deliver a moiety there of to the plaintiff by metes and bounds, not an undivided moiety. *Sparrow and Matterjack*, Cro. Car. 314.

If, therefore, upon an *elegit* the sheriff delivereth a moiety of an house without metes and bounds, such return is ill, and shall be quashed for uncertainty. Carth. 453. *Pullen* v. *Birbeck.*

But if there be several closes, or manors, or farms, or tenements, the sheriff is not bound to deliver a moiety of every particular close, or farm, or manor, or the like, but only certain tenements, making in *value* a moiety of the whole. *Den* v. *The Earl of Abingdon*, Do. 473.

But the sheriff ought to deliver a moiety only, for if he delivers more, it will be void, and plaintiff shall have a new execution. Ld. Ray. 718. *Pullen* v. *Birbeck.* *Berry* v. *Wheeler*, 1 Sid. 91. *Earl of Stamford* v. *Hobart*, *Ibid.* 239. 2 Salk. 564. *Putten* v. *Purbeck.*

Inquisition must be certain, &c. The inquisition ought to find the lands with *certainty*, and to shew the place and county where they lie, and where the inquisition is taken. Dyer, 208. And if the defendant be joint tenant, or tenant in common, it ought to be mentioned in the return. Hut. 16. Brownl. 38.

Sheriff cannot give possession, but ejectment must be brought. The sheriff cannot give actual possession of lands on an *elegit*, but only deliver seisure, to enable the plaintiff to maintain an ejectment, whereby he may get into possession. *Jefferson* v. *Dawson*, 3 Keb. 243. *Den, Lessee of Taylor*, v. *The Earl of Abingdon*, Do. 473.

If sufficient goods, lands must not be taken. But it is to be observed, that although by this statute the lands of a debtor are made liable, as well as his personal estate,

eſtate, yet if the creditor takes out an *elegit*, and it appears to the ſheriff that there are goods and chattels ſufficient of the debtor's to ſatisfy the debt, he ought not to extend the lands. 2 Inſt. 395.

But an *elegit* executed upon goods only is not in effect as a *fieri facias*, for the *fieri facias* is executed by ſale by the ſheriff, but an *elegit* by the appraiſement of the goods by a jury and delivery to the party. *Glaſcock* v. *Morgan*, Sid. 184. Lev. 92. Keb. 105. 261. 465. *Pullen* v. *Birbeck*, Ray. 718.

Difference between elegit and fieri facias as to goods.

If, therefore, a writ of error be afterwards brought, and the judgment reverſed, the goods in *ſpecie* ſhall be reſtored, and not the value; but upon a *fieri facias*, the value, and not the goods, in ſpecie. *Glaſcock* v. *Morgan*, Lev. 92. 5 Co. 90. *Goodyere* v. *Ince*, Cro. Jac. 246.

and in their operation.

The ſheriff cannot deliver a leaſe upon an *elegit* at another value than what the jury had found it at; and the ſale made by him is as good as if made in market overt. Brownl. 38.

Sheriff muſt abide by valuation of jury.

When the inquiſition is taken by the ſheriff, it ſhall be returned and filed. Dy. 100.

Inquiſition muſt be returned and filed;

And it ſhall not afterwards be avoided upon any ſurmiſe of more than a moiety having been extended, or that it was extended, or at an under-value. 2 Inſt. 396. 2 Chan. Caſ. 183.

not eaſily avoided afterwards;

But, before the filing thereof, court may examine it; and if they find fraud, partiality, or the like, may ſtop the filing and award a new *elegit*. 2 Inſt. 396.

but court will inquire into it.

Generally ſpeaking, all tenements as well as lands of defendant may be extended on an *elegit*, as a rent or rent-charge, or the like. *Wootton* v. *Shirt*, Cro. Eliz. 742. Moor, 32.

What may be extended on an elegit;

So a term for years, 2 Inſt. 398.; or it may be ſold as goods, for it is perſonalty; but if extended, there ſhall be no other benefit than as a common extent. 1 Brownl. 38. *Fleetwood*'s *caſe*, 8 Co. 171. So lands in ancient demeſne, Hob. 47.; or before in execution upon a ſtatute, *Fulwood*'s *caſe*, 4 Co. 65.; or which are liable to incumbrances by *ceſtui que* truſts. Stat. 25 C. 2. c. 3. ſ. 10.

But not copyhold lands, 1 Roll. 888. 1.; nor a term for years of copyhold lands made by the licence of the lord, *Ibid.*; nor a bare rent ſeck, Cro. Eliz. 66. *Walſal* v. *Heath*; *Heydon*'s *caſe*, 3 Co. 9.; nor the glebe lands of a parſon or vicar, Jenk. 207.; nor a tenement which cannot be granted over, as the office of a filazer, being an office of truſt. Dy. 6, 7.

not copyhold lands, &c.

If A and B. recover ſeveral judgments againſt C., and A. ſues out an *elegit*, and has a moiety of C.'s lands delivered to him, and then B. ſues out an *elegit*, the ſheriff can only extend a moiety of the remaining lands. *Huit* v. *Cogan*, Cro. Eliz. 483.

How ſheriff to execute different elegits ſued out.

But if A. has two judgments againſt C., and in the ſame term takes out two *elegits*; on the one he may have a moiety of the whole, and on the other the other moiety, and is not

How, if at ſuit of ſame plaintiff.

reſtrained on the latter to a moiety of the moiety; for in judgment of law the whole term is but one day. *The Attorney General* v. *Andrew*, Hard. 23.

How, if fieri facias delivered at ſame time.

If a *fieri facias* and *elegit* be delivered at the ſame time with an extent at a common perſon's ſuit, the *fieri facias* and *elegit* ſhall take place, becauſe the goods ſhall be attendant to ſatisfy, in the firſt place, the judgment of the ſuperior court. Brok. 97. 1 Brown. 38.

(F) (F) Of the Lien for Rent upon Goods taken in Execution.

This lien created by ſtatute 8 Ann. c. 14.

By the 8 Ann. c. 14. "No goods or chattels whatſoever, "lying or being in and upon any meſſuage, lands, or tene- "ments which ſhall be leaſed for life, years, at will, or other- "wiſe, ſhall be liable to be taken by virtue of any execution "on any pretence whatſoever, unleſs the party at whoſe ſuit "the execution is ſued ſhall, before the removal of ſuch "goods from off the ſaid premiſes by virtue of execution or "extent, pay to the landlord of the ſaid premiſes, or his bai- "liff, all ſuch ſum or ſums of money as are or ſhall be due "for rent for the ſaid premiſes at the time of taking ſuch "goods or chattels by virtue of ſuch execution, *provided the* only for one year's rent. "*ſaid arrears of rent do not amount to more than one year's* "*rent;* and in caſe the ſaid arrears ſhall exceed one year's "rent, then the ſaid party at whoſe ſuit the ſaid execution "is ſued out, paying the ſaid landlord or his bailiff one "year's rent, may proceed to execute his judgment as he "might have done before the making of this act; and the "ſheriff or other officer is hereby empowered and required "to levy and pay to the plaintiff, as well the money ſo paid "for rent as the execution-money."

Different deciſions on ſtatute; as to notice; to what rent entitled; not extend to ground landlord.

It has been adjudged, 1ſt, That there muſt be a demand made, and notice given to the ſheriff by the landlord, before removal of the goods, or an action will not lie for him; Str. 97. *Waring* v. *Dewbery:* 2d, That the landlord is entitled to his whole rent without deduction of poundage; Str. 643. *Gore* v. *Goſton:* 3d, That a ground landlord, where there is an execution againſt the under-leſſee, is not within the act; Str. 787. *Bennet's caſe:* 4th, That after a landlord has had one year's rent paid, and there comes in another execution, he ſhall not have another year's rent paid; Str. 1024. That action lies by executor of landlord for it. *Dodd* v. *Saxby:* and 5th, That an action lies upon it by an executor or an adminiſtrator of landlord againſt a bailiff or ſheriff for removing the goods off the premiſes, after notice, before the landlord was paid his year's rent. *Palgrave* v. *Wyndham*, Str. 212.

But

But where goods were taken, and the money levied before adminiſtration taken out, it was held, that as the execution was executed he came too late; Str. 97. 214. Forteſc. Rep. 460.; this means that the goods were actually ſold. But Powis, Juſtice, ſeemed to be of opinion to the contrary, who held, that the adminiſtration ſhould have relation to the death of the inteſtate, becauſe by the eccleſiaſtical law it is not to be granted within fourteen days of an inteſtate's death; which the other juſtices denied, and ſaid, that relations, being fictitious, ought not to hold place againſt the right of ſtrangers. Gilb. Eq. Rep. 223, 224. When too late for lien to operate.

If the goods ſeized are not removed or ſold by the ſheriff ſo as to transfer the property therein, but defendant pays the debt, though the landlord has given notice and demanded rent, yet he is not entitled in ſuch caſe. Landlord not entitled if defendant pays debt, and goods not ſeized.

Upon the equity of this ſtatute it hath been held, that under a commiſſion of bankrupt, which is in the nature of a ſtatute execution, the landlord ſhall be allowed his arrears of rent to the ſame amount in preference to other creditors, even though he hath neglected to diſtrain while the goods remained on the premiſes, which he is otherwiſe entitled to do for his entire rent, be the *quantum* what it may. 1 Atk. 103. Upon the equity of the ſtatute, ſame lien allowed under command of bankrupt.

A bill of ſale held to be a removal of goods taken by a *fieri facias*, and a year's rent muſt be paid the landlord out of the money levied by the ſheriff. *Weſt* v. *Hedges*, Bar. 211. So allowed under a bill of ſale.

Inſtead of bringing an action againſt the ſheriff, &c. when the goods are ſold after notice, the beſt way for the landlord is to move the court, that he may have reſtitution to the amount of the goods which the ſheriff has ſold, if they amount to leſs than a year's rent; or if they amount to more, to have ſo much as will ſatisfy a year's rent. What beſt remedy for landlord in this caſe.

Motion to have rent paid to the landlord out of the money levied. On ſhewing cauſe it appeared, that the ſheriff's warrant on the execution, after it was ſealed, had been altered, and a new bailiff's name inſerted. *Per. cur.* The warrant being altered, no goods are taken in execution thereby. Let the bailiff and attorney, privy to the alteration, ſhew cauſe why an attachment ſhould not iſſue againſt them. *Hann* v. *Capel*, Bar. 199. How if ſheriff's warrant altered.

In an action againſt the ſheriff for taking goods without leaving a year's rent, the declaration needs not ſtate all the particulars of the demiſe; but if it does, and they are not proved as ſtated, there ſhall be a nonſuit. *Briſtow* v. *Wright*, Do. 665. What declaration need ſtate in an action againſt the ſheriff in this caſe.

If an extent comes in, the landlord cannot claim his rent, although diſtreſs taken the day before. Bunb. 269. pl. 345.; ſo an extent or an outlawry, although he had diſtrained three How landlord's claim affected by extent,

days previous to the entry and motion to be paid, under ſtat. 8 Ann. denied. Bunb. 5. pl. 5. If a diſtreſs be taken 29th October, and an extent dated 4th November, and corn, &c. ſeized, the landlord cannot have his rent, for no property was diveſted by the diſtreſs, and they were in the landlord's hands by way of pledge; Bunb. 42. Vent. 37. 2 Saund. 47.; but an attachment was refuſed, although a contempt to oppoſe the extent.

or diſtreſs.

How extent ſhall prevail againſt a diſtreſs.

An immediate extent againſt the king's debtor teſted after a diſtreſs for rent juſtly due to the landlord, with notice to the tenant, being the king's debtor, and appraiſement of the goods and chattels, but before ſale, ſhall prevail againſt the diſtreſs. *The King* v. *Cotton*, Eſq. Parker's Rep. 112.

(G) (G) Of iſſuing a ſecond Writ of Execution, and of retaking Defendant after his Eſcape or Diſcharge.

When a ſecond writ may iſſue;

There ought not to be two executions exiſting at the ſame time; but if one writ proves ineffectual another may be ſued out.

Thus if a *fieri facias* be iſſued, and the ſheriff only levies part of the debt or damages recovered, the party may have either a *capias ad ſatisfaciendum*, or another *fieri facias*, or an *elegit* for the reſidue.

but the firſt writ ſhould be returned.

In ſuch caſe the ſheriff ſhould return the firſt *fieri facias* and the levy thereon, which ought to be recited in the *ca. ſa.* Salk. 218. Cro. Eliz. 344.; but if nothing be levied on the *fieri facias*, there is no neceſſity to recite the ſheriff's return in the *ca. ſa.*, or its having been iſſued.

After a ca. ſa. there can be no fieri facias or elegit;

But if a *capias ad ſatisfaciendum* firſt iſſue, and the body be taken, there cannot afterwards be a *fieri facias* or *elegit*, for the body is deemed the higheſt ſatisfaction the plaintiff can have.

except in caſe of defendant's death.

And by the common law, if defendant died in execution upon this writ, plaintiff had no further remedy; but now by ſtat. 21 Jac. 1. c. 24. plaintiff may after his death, ſue out execution againſt his lands, goods, or chattels at his election.

So if lands extended on elegit, no other writ afterwards; but if only goods levied, a ca. ſa. or fi. fa. may go.

So with reſpect to the *elegit*, if the *lands* are extended upon an *elegit*, the plaintiff is for ever barred from having another execution; but if he levies on the goods only, and the ſheriff returns *nihil* as to the lands, a *ca. ſa.* may iſſue for the reſidue, or a *fieri facias;* for the election is not complete unleſs the plaintiff has ſome benefit from the land; for the taking out the writ is not an actual election, but only in order to an election: and if there be no lands there is nothing to chooſe, and conſequently no election; and it was ſaid, that an *elegit* where

where there are no lands, is but in effect a common *fieri facias*. *Bacon* v *Peck*, Str. 226.

Rule in cases of execution.

For the rule is, that although the body and goods may eventually be taken into execution, or land and goods, yet that the body and land too cannot, upon any judgment between ſubject and ſubject, by the courſe of the common law.

In judgments upon a ſtatute, &c. body, lands, and goods are rendered liable together. Keb. 60.

If party eſcapes on fi. fa. only part levied; other writs may go;

but plaintiff muſt not mark it for part only and then ſue out other writs.

Inſtance of this in an annuity caſe.

In the caſe of *Howell* and *Hanforth*, C. B. Blac. 845. the court inclined ſtrongly to think, that though at common law if the ſheriff only levies part of the debt on a *fieri facias* marked for the whole, the plaintiff may have ſubſequent writs till the whole is levied; yet a plaintiff ſhall not mark it for part, and afterwards ſue out ſubſequent writs for the reſidue, which would tend to great oppreſſion.

The above was the caſe with an annuity-bond with warrant of attorney to confeſs judgment; on failure of a quarterly payment, judgment was entered up, and *fieri facias* ſued out, marked to levy only 20 *l.* (the quarterly payment); afterwards on failure of another payment, another *fieri facias* was iſſued; but it was moved to ſet it aſide on the ground of irregularity for want of a *ſcire facias* under ſtat. 8 & 9 W. 3. In which caſe the court pronounced this rule, "That on "payment by the defendant of the arrears due on the an- "nuity and coſts, the *fieri facias* be ſet aſide; but the judg- "ment to ſtand as a ſecurity for future arrears, with liberty "to apply to the court from time to time to ſue out freſh "executions thereon." 2 Blac. 845.

Rule for taking out execution in judgment on annuity bond.

No ſecond writ ought to iſſue before the return of the firſt. *Coppendale* v. *Debonaire*, Bar. 213. *Snape* v. *Hancock*, *Ibid.* 198.

Firſt writ muſt be returned before ſecond iſſues.

If a party taken on a *ca. ſa.* eſcapes or is reſcued, though the ſheriff is hereby liable, becauſe he ought to have taken the *poſſe comitatus*, yet the plaintiff ſhall not be compelled to take his remedy againſt the ſheriff, but may ſue out another *ca. ſa.* or, if the firſt *capias* be not returned or filed, any other ſpecies of execution. Law of Exec. 117. Cro. Car. 40. 455.

If party eſcapes on ca. ſa. another may iſſue.

If the plaintiff conſent to diſcharge one of ſeveral defendants taken on a joint *ca. ſa.*, he cannot afterwards retake him, nor take any of the others: for in a joint action againſt two, a ſeparate *ca. ſa* againſt one defendant, cannot be ſupported. *Clark* v. *Clement and another*, 6 D. & E. 525. Nor does it make any difference, that ſuch defendant promiſed to render himſelf. *Ibid.*

So

So committitur must be abandoned before a second is entered.

So plaintiff must give notice of his having abandoned a former *committitur* which is erroneous, before he enters a second, rectifying the mistake. *Topping* v. *Ryan*, 1 D. & E. 227.

(H) Of the Sheriff's Fees, Poundage, &c.

No fees at common law.

By the common law, no fees whatever were allowed to sheriffs; but this, instead of being advantageous to the subject, proved only oppressive; it opened the door to extortion: And to such an height did the evil gradually rise, that the legislature found it necessary to interfere, and to regulate the demands of sheriffs, by appointing certain fixed sums to be taken in cases of execution.

How introduced by statute.

29 Eliz. c. 4. (a) It is said, that the printed statute book is wrong, and that by the parliament-roll, it is the 28th, and in an action reciting it as 28th, it was held well. Salk. 331. But it is usually brought as upon the 29th, 2 D. & E. 148. and held well. Blac. 2103.

The first statute to this effect is the 29 (a) Eliz. c. 4. whereby it is enacted, "That it shall not be lawful to or "for any sheriff, under-sheriff, bailiffs of franchises or liber- "ties, nor for any of their or either of their officers, ministers, "servants, bailiffs, or deputies, nor for any of them, by reason "or colour of their or either of their office or offices, to have, "receive, or take of any person or persons whatsoever, di- "rectly or indirectly, for the serving and executing of any "extent or *execution upon the body, lands, goods, or chattels* of "any person or persons whatsoever, more, or other consi- "deration or recompence, than in this present act is and "shall be limited and appointed (which shall be lawful to "be had, received, and taken); that is to say, *twelve-pence "of and for every twenty shillings, where the sum exceedeth not "one hundred pounds, and six-pence of and for every twenty shil- "lings being over and above the said sum of one hundred pounds that "he or they shall so levy, or extend and deliver in execution, or take "the body in execution*, for by virtue and force of any such extent "or execution whatsoever, upon pain and penalty that all and "every sheriff, under-sheriff, bailiff of franchises and liberties, "their and every of their ministers, servants, officers, bailiffs, "or deputies, which at any time after the said first day of "May now next ensuing, shall directly or indirectly do the "contrary, shall lose and forfeit to the party grieved his "*treble damages*, and shall forfeit the sum of *forty pounds* of "good English money for every time, that he, they, or any "of them shall do the contrary; the one moiety thereof to be "to our sovereign Lady the Queen, her heirs and successors, "and the other moiety thereof to the party or parties that "will sue for the same by any plaint, action, suit, bill, or in- "formation, wherein no essoin, wager of law, or protection "shall be allowed.

The poundage allowed.

Penalty for offending against the statute.

Statute does not extend to towns corporate.

"Provided always, that this act, or any thing therein con- "tained, shall not extend to any fees to be taken or had for "any

" any execution *within any city or town corporate* (a), any thing " above-mentioned to the contrary thereof notwithſtanding."

It was determined, that this ſtatute did not extend to real execution, but only to executions in *perſonal* actions; and it was doubted whether the ſheriff was entitled to any fees for executing an *elegit*, as it was difficult how to aſcertain the fees. *Peacock* v. *Harris*, Salk. 332.

Statute only extends ro perſonal actions.

Qu. Whether it extended to elegits?

But by a ſubſequent ſtatute of 3 Geo. 1. c. 15. ſ. 16. the fees for executing writs of *elegit*, and of *habere facias poſſeſſionem aut ſeiſinam*, are regulated; *viz.* " The ſum of twelve-pence " for every twenty ſhillings of the yearly value of any manor, " meſſuage, lands, tenements, and hereditaments whereof " poſſeſſion or ſeiſin ſhall be given, where the whole ex- " ceedeth not the yearly value of one hundred pounds, and " the ſum of ſix-pence only for every twenty ſhillings *per* " *annum* over and above the ſaid yearly value of one hundred " pounds."

But by 3 G. 1. c. 15. fees are allowed for executing elegits.

And by the 8 Geo. 1. c. 25. ſ. 5. a like fee is given on executing an *extent & liberate*.

and by 8 G. 1. c. 25. for executing extents.

It was alſo reſolved, that, by the 29 Eliz. c. 4., the ſheriff, upon a *capias ad ſatisfaciendum*, was entitled to his fees upon the whole debt. *Peacock* v. *Harris*, Salk. 332.

By 29 Eliz. on ca. ſa. ſheriff was entitled to fees on the whole debt.

But inſtead of taking poundage on the ſum really due, ſheriffs, in actions on judgments, ſtatutes, and recognizances, and the like, uſed to retain for their fees poundage to the full amount of the ſum for which ſuch judgments or ſecurities were given, and which poundage often far exceeded even the debt due to the plaintiff.

Abuſes introduced thereby.

To remedy which, the 3 Geo. 1. c. 15. ſ. 17. after reciting the grievance, enacts, " That poundage ſhall not be taken for " executing any *capias ſatisfaciendum* upon any judgment, &c. " for any greater ſum than the real debt *bonâ fide* due " and claimed by the plaintiff amounts to, which ſum the " plaintiff is obliged to mark and ſpecify on the back of the " writ, before it be delivered to the ſheriff: And, in caſe " the ſheriff ſhall take more, he is guilty of extortion; and " for each offence ſhall forfeit to the party grieved treble " damages, and double the ſum ſo extorted, to be or- " dered by the court which iſſued the writ, in a ſummary " way; and alſo 200 *l.*, one-half to the king, the other to " the proſecutor in any court at Weſtminſter, provided ſuch " ſuit be commenced within two years."

How remedied by 3 G. 1. c. 15; whereby poundage is only to be taken for the ſum really due, and marked on writ: Penalty for taking more; and remedy to party.

The ſtatute of 29 Eliz. c. 4. does not extend to the crown. *Lake* v. *Turner*, Burr. 1983. But it was held, that an action

29 Eliz. does not extend to the crown;

(a) This only intends execution founded on judgments given in thoſe courts where both judgment and execution are within a limited juriſdiction; but where the judgment is in *Weſtminſter Hall*, though the execution be in a *city or town corporate*, fees are allowed, and the bailiff of the liberty, not the ſheriff of the county, is entitled to them. Salk. 331. Dalt. 527. Latch. 19. 52.

So

not formerly to actions on bail bondss in revenue cases.

brought in the Exchequer by the ſheriffs of London, upon a bail bond taken by them in their own names, for the appearance of a defendant taken up upon an Exchequer proceſs on the proſecution of the king's attorney-general on behalf of the crown, for cuſtom-houſe penalties and forfeitures, and a *teſtatum capias ad ſatisfaciendum* to the ſheriff of Hertfordſhire againſt the bail, could not be conſidered as the ſuit of the crown, though averred to be for the benefit, and on the behalf, and at the expence of the crown, but that the ſheriff who executed it was entitled to his poundage. *Lake* v. *Turner*, Blac. 1983.

But by 7 Geo. 3. c. 29. it was extended to ſuch caſes.

Soon after this deciſion, poundage in ſuch caſes was expreſsly taken away by ſtatute 7 Geo. 3. c. 39.; which enacts, "That the act of 29 Eliz. c. 4. ſhall not extend to allow any "ſheriff, &c. any poundage for taking the body of any per"ſon in execution upon any proceſs at the ſuit of any ſhe"riff, or other officer or miniſter of the crown, upon any "bail-bond entered into for the appearance of any perſon "proſecuted, either for any duties due or payable to his "majeſty, his heirs or ſucceſſors, or for any penalty inflicted "by any act of parliament, made or to be made, for the "preventing the clandeſtine running or receiving any cuſ"tomable or prohibited goods; or in any caſe whatſoever, "where the ſheriff or officer executing ſuch proceſs would "not be entitled to poundage, if the proceedings were or "had been carried on directly in the name of the crown."

The chief of the above ſtatutes are 29 Eliz.

The above are the different ſtatutes by which the fees of ſheriffs are regulated; the chief of which, as relating to perſonal actions, is the 29th Eliz.

Action lies thereon againſt ſheriff.

Upon this ſtatute an action will lie againſt the *ſheriff*, if he or his officer take more than is allowed. *Woodgate* v. *Knatchbull*, 2 D. & E. 158.

Conſtruction thereof.

By the act, it appears clearly to have been the intention of the legiſlature that the ſheriff ſhould be paid in proportion to the ſum levied, and that the ſheriff ſhould only levy what is really due.

How expences of levy to be paid;

in common actions;

in actions for penalties.

In actions on ſimple contracts, and judgments for a debt certain, the expences of levying muſt be paid by the plaintiff, and not by the defendant. If, therefore, the judgment be for 200 *l.* the ſheriff is at liberty to raiſe that ſum, and no more, and the expences of levying muſt be paid out of the debt. But if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independent of the expences of the execution; and in thoſe caſes, the defendant is the party injured, by the ſheriff's taking more than he ought. *Ibid.*

Sheriff only entitled to poundage.

In ſtrictneſs of law, the ſheriff is not entitled to take any more than what is allowed by the ſtatute.

No allowance for auctions, &c.

It is his duty to obey the orders of the court, to ſeize and ſell the goods immediately; he cannot be allowed the expence

pence of an auctioneer, or even the levy-fee of a guinea (a); but the ſheriff and the court are bound by the act of parliament.

(a) It ſeems to have been for a long time the practice to take this fee. Blac. 1102.

If the plaintiff chooſe to have an auction, he muſt defray the expence out of his own debt to be levied; there is no colour to charge the defendant with it: the ſheriff can only levy on the defendant that ſum which is given by the judgment of the court; and if the defendant wiſh to have an auction, he muſt pay for it out of his pocket; it ſhould make no part of the ſheriff's account. *Woodgate* v. *Knatchbull*, 2 D & E. 157.

How auction expences to be paid.

If, therefore, it appears by the ſheriff's return of a writ of execution that greater fees have been taken by the levy than are allowed by the ſtatute, the *ſheriff* is liable to an action on the ſtatute for treble damages at the ſuit of the party grieved. *Ibid.*

Sheriff liable to action, if it appears by return of writ that too much has been taken by him;

An action on the caſe is for this purpoſe the proper action. *King* v. *Marſack*, 6 D. & E. 771.

Or an action of debt may be brought by any common informer againſt the officer guilty of the extortion for the 40*l.* penalty. *Savage* v. *Smith*, Blac. 1101.

or to a qui tam action.

The ſtatute ſhould be accurately ſet out, at leaſt ſo much as is ſtated. When the declaration ſtated it, lands, goods, *and* chattels, inſtead of *or* chattels, it was held a fatal variance in arreſt of judgment. *King* v. *Marſack*, 6 D. & E. 771.

In this action if the plaintiff ſets out the judgment on which the writ was founded, he muſt alſo prove it. *Qu.* Whether it is neceſſary to be ſet out? *Ibid.* 1104.

When the party grieved recovers treble damages in this action, he is alſo entitled to his coſts. *Tyte* v. *Glode*, 7 D. & E. 267.

If a ſheriff levy under a *fieri facias*, he is entitled to poundage, though the parties compromiſe before he ſells any of the defendant's goods, notwithſtanding the words of the ſtatute are allowing poundage on the ſum, which the ſheriff levies or extends and delivers in execution: and if after ſuch a compromiſe either party rule the ſheriff to return the writ, the court will diſcharge that rule with coſts, to be paid by the party obtaining it. *Alchin* v. *Well*, 5 D. & E. 470.

Though parties compromiſe, ſheriff entitled to poundage if he levies under fieri facias.

An under-ſheriff cannot refuſe to execute proceſs till he has his fees; if he does, the plaintiff may bring an action againſt him for not doing his duty, or may pay him his fees, and then indict him for extortion; but the court will not relieve on motion. *Heſcott's caſe*, Salk. 331. S. P. 330. 332.

Sheriff cannot inſiſt on his fees before execution.

The ſheriff may maintain an action for his fees, for the law admitting him to take it, makes it a duty. Ld. Raym. 1212. *Brockwell* v. *Lock*, Salk. 331.

Action lies for ſheriff's fees.

(I) (I) Of ſuperſeding Execution by Writ of Error, or otherwiſe.

Allowance of error, ſuperſedeas;

The *allowance* of a writ of error is of itſelf a *ſuperſedeas* to an execution, without any notice. *Jaques* v. *Nixon*, 1 D. & E. 280.

uſe of ſervice thereof.

The *ſervice* of the allowance is only material to bring the party into contempt, if he proceeds to ſue out execution afterwards. *Ibid.* *Hannot* v. *Farettes*, Bar. 376.

When bail in error (if required) muſt be put in.

But although it is an immediate *ſuperſedeas*, yet if it be a caſe where bail in error is required, ſuch bail muſt be put in within four days after the allowance, or plaintiff may take out execution.

This is upon the ſuppoſition that the allowance of the writ of error is not ſerved till final judgment be actually ſigned; for there is no opportunity of putting in bail before judgment is ſigned. *Ibid.*

But it frequently happens, that a writ of error is ſued out, and the allowance ſerved before judgment is ſigned, leſt execution ſhould iſſue inſtantly. This makes no difference, for it only operates as an allowance from the time of ſigning judgment. *Ibid.*

So that where a writ of error was ſued out and allowed on the 31ſt May, and on the ſame day a copy of the allowance was ſerved on the plaintiff's attorney, and final judgment was ſigned on the 14th June, and execution ſued out on the ſame day, within four days after which bail in error was put in; it was held well, and a *ſuperſedeas* to the execution, which was therefore ſet aſide. *Ibid.*

And the court have gone ſo far in ſupport of the practice of ſuing out the writ of error before judgment, that if a writ of error is ſued out, and the plaintiff will not ſign judgment till after the return of the writ, in order to avoid the effect of it, and then ſues out execution, the court will ſet the execution aſide. *Ibid.* *Aird* v. *Eaſtmead*, Bar. 260.

If therefore the writ of error be allowed after judgment actually ſigned, and bail in error be required, ſuch bail muſt be put in within four days from the allowance; but if it be allowed before judgment ſigned, then bail muſt be put in within four days after the ſigning of the judgment; for the writ of error, though allowed before, can have no effect till the judgment is actually ſigned; nor can bail, till then, juſtify. *Doe* v. *Bracebridge*, 1 D. & E. 280. n.

If a party, after the allowance of a writ of error, and before the expiration of the four days for putting in bail, takes

out execution, he does it at his peril; for if the writ of error be regularly followed up, the execution will be ſet aſide; but if no bail be put in, the execution will ſtand, and the writ of error will become an abſolute nullity. *Lane* v. *Bacchus*, 2 D. & E. 44.

If a writ of error be not returned and ſigned by the chief juſtice, it becomes ineffectual by his death; but execution cannot be taken out without leave of the court. *Cramborne* v. *Quennel*, Bar. 201. *Olorenſhaw* v. *Stanyforth*; *Hayes* v. *Thornton*, Ibid.

Writ of error muſt be returned and ſigned by chief juſtice.

The general practice uſed to be, that if the writ of error was returnable the ſame term of which judgment was, that it operated as a *ſuperſedeas*, although judgment might be ſigned in the following vacation, as it would ſtill be a judgment of the precedent term; but if the judgment was not ſigned till the ſubſequent term, and was therefore of a different term from the writ of error, that then the writ was deemed ſpent, and execution might iſſue. So that a plaintiff, when a writ of error was ſued out, had only to wait till ſuch ſubſequent term before he ſigned judgment, and by that means render the writ of error of no avail. *Warwick* v. *Figg*, Bar. 196. *Cook* v. *Horrock*, Ibid. 197. *White* v. *Morgan*, Ibid. 198.

Former practice as to writ of error being ſuperſedeas when ſued out before judgment, and judgment not ſigned till ſubſequent term.

But this was a practice not to be encouraged; and the court will now ſet aſide ſuch execution. 1 D. & E. 280.

But now diſallowed.

Joint action againſt ſeveral defendants—damages 20*l.* againſt four of them on trial, and 5*s.* againſt one defendant who had let judgment go by default; writ of error brought by the four in the name of the one who was not obliged to find bail, becauſe it was by default; and on motion for leave to take out execution againſt the four notwithſtanding ſuch writ of error, the rule was made abſolute on affidavit of ſervice. *Maſon* v. *Symmonds and others*, Bar. 202.

In what caſes writ of error will or will not operate as a ſuperſedeas.

Where a *ca. ſa.* is returnable againſt the principal on a particular day, before which a writ of error is allowed and ſerved, that operates as a *ſuperſedeas* to any proceeding againſt the bail, though the *ca. ſa.* has lain four days in the office before the allowance of the writ of error. *Perry* v. *Campbell*, 3 D. & E. 390.

Allowance of a writ of error on a judgment by *nil dicit* is ſo entirely a *ſuperſedeas* to a ſubſequent writ of execution, and all proceedings againſt the bail as well as againſt the principal, that all may be ſet aſide upon motion. *Dudley* v. *Stokes*, Blac. 1183.

If plaintiff recover a judgment againſt two defendants in B. R., and one of them bring a writ of error in *Cam. Scacc.* the plaintiff cannot charge the other defendant in execution till the record be remitted into the court of B. R. notwithſtanding

ſtanding the writ of error might have been quaſhed immediately, becauſe not brought by both defendants. In ſuch a caſe, where the judgment was affirmed in *Cam. Scacc.* and coſts given of the writ of error, and both the defendants were taken under a writ of execution on the whole ſum, including the coſts of the writ of error as well as the original ſum recovered, the court permitted the plaintiff to amend his writ of execution as to the defendant who did not join in the writ of error, by deducting the coſts thereof, and altering it to the original ſum recovered. *Laroche* v. *Waſhbrough*, 2 D. & E. 737.

How, if it appear that it was only brought for delay;

The court of C. B. laid it down as a general rule, that they will in no caſe ſtay proceedings or ſet aſide an execution on account of a writ of error being brought on a judgment of nonſuit, which evidently muſt be for the purpoſe of delay and vexation. *Box* v. *Bennett*, 1 H. Bl. 432.

So in *Kempland* v. *Macaulay*, 4 D. & E. 436. in K. B. But the latter court have ſince determined otherwiſe in *Levett* v. *Perry*, 5 D. & E. 669. and declared, that the practice not to ſtay proceedings pending a writ of error muſt be confined to thoſe caſes where the party himſelf, his attorney, or bail declare, that the writ of error is only brought for delay.

Indeed both courts have determined, that where it manifeſtly appears that the writ of error is brought for delay, they will not ſtay proceedings in any action on the judgment, nor ſet aſide any execution that may have iſſued, even ſince the allowance of ſuch writ of error. *Entwiſtle* v. *Shepherd*, 2 D. & E. 78.; *Carter* v. *Roberts*; *Butt* v. *Mow*, *Ibid.* n. in B. R.; and *Mitchell* v. *Wheeler*, 2 C. B. T. R. 30.; and *Goodin* v. *Hammond*, *Ibid.* in C. B.

But this ſhould appear from the confeſſion of the parties themſelves, or the admiſſion of the attorney of the party. *Pool* v. *Charnock*, 3 D. & E. 79. *Mitchell and Wheeler*, 2 H. Bl. 30.

Though expreſſions equivalent to ſuch declaration have been held ſufficient; *Maſterman* v. *Grant*, 5 D. & E. 715.; but now a mere offer by the plaintiff to the defendant's attorney to waive the judgment if he would point out any error which was refuſed, was held not ſufficient cauſe to ſtay proceedings, though plaintiff ſwore that the writ of error was brought for delay. *Chriſtie* v. *Richardſon*, 3 D. & E. 78.

Nor is it ſufficient becauſe the defendant ſuffered the judgment to be affirmed in the Exchequer Chamber without any objection; for *non conſtat*, but that there may be error on the record, and litigated in the Houſe of Lords. *Harriſon* v. *Grote*, 6 D. & E. 400.

But

But in all these questions the court will exercise their discretion, as they must depend upon their own circumstances.

So if a writ of error be sued out against *good faith;* as where the defendant's attorney had undertaken that the debt should be paid if the plaintiff's attorney would give time, which the latter had agreed to, provided *no delay* was intended by the other side; and after this agreement defendant brought a writ of error. Though execution be taken out after the allowance thereof, court will not set such execution aside; but as the writ of error is strictly a supersedeas, the plaintiff ought regularly to move to quash it. *Oates* v. *West*, 2 D. & E. 183. or if brought against good faith.

If a writ of execution is delivered to the sheriff, and the defendant becomes a bankrupt before it is executed, the execution is thereby superseded, and the goods not bound by the delivery; for the property ceases to be in the bankrupt from the time of the act of bankruptcy committed. Ld. Ray. 252. *Smallcomb* v. *Cross and another.* In what case bankruptcy of defendant operates as a supersedeas.

But *trespass* will not lie by the assignees of a bankrupt against a sheriff for taking the goods of a bankrupt in execution after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sells them after the issuing of the commission, and after a provisional assignment, and notice from the provisional assignee not to sell. *Smith* v. *Milles*, 1 D. & E. 475.

An execution against the *goods* of a bankrupt taken out after his certificate is signed by the creditors, and before it is allowed by the chancellor, for a debt existing previous to the bankruptcy, is valid; for the statute 5 Geo. 2. c. 30. extends only to executions against the *person* of the bankrupt.

(K) Of entering Satisfaction on the Roll.

Such are the methods which the law has pointed out for the execution of judgments in personal actions; and when the plaintiff's demand is satisfied, either by the voluntary payment of the defendant, or by any compulsory process, or otherwise, satisfaction ought to be entered on the record, that the defendant may not be liable to be hereafter harassed a second time on the same account. Use thereof.

In B. R.

The party, or his attorney, making satisfaction, should demand of the party satisfied, a

In C. B.

When a judgment is satisfied in vacation time, the plaintiff should execute a warrant of attorney

warrant or authority, directed to some attorney of the same court wherein the judgment is recovered, authorising such attorney to enter up satisfaction upon the roll, which may be made out in the following form, on a slip of paper or parchment:

How to be entered.

Trinity term, 34 Geo. 3.

Middlesex, ss. Satisfaction is acknowledged between A. B. plaintiff, and C. D. defendant, in a plea of debt for 100*l. and* 63*s. costs.*

How in C. B. in vacation.

Judgment entered of Hilary term, 34 Geo. 3. Roll. 492.

T. S. attorney for the plaintiff,
15th June 1794.

This satisfaction-piece must be taken to the clerk of the judgments, and he will make an entry thereof in his book of remembrances, and deliver the same over to the clerk of the treasury, who will enter the same on the roll, for which is paid in term 3*s., in vacation something more.*

Form of entry.

The entry is to the following effect:

Afterwards, to wit, [on some return-day in the term; if by original, on a general return-day; if by bill, on a day certain,] in the twentieth year of the reign of our Sovereign Lord George the Third, now king of Great Britain, &c. at Westminster, cometh the aforesaid A. B. by his attorney aforesaid, [or by I. M. his attorney, in this behalf,] and acknowledgeth himself to be satisfied by the said C. D. of the debt and damages, costs and charges aforesaid, &c.

How to be entered in C. B. in term time.

torney to two attornies of the court, or either of them, or to any other attorney of the same court, authorising such attorney to acknowledge such satisfaction on record. Application must then be made to the clerk of the judgments, who will prepare a fiat, and attend with the attorney before a judge of the court, and get it signed; and then the clerk of the judgments will enter the same at the foot of the judgment, for which he will take 1*l.* 7*s.* 8*d. which includes all the fees. But if the judgment is above ten years standing, he will take* 5*s. more, as an extra fee due to the clerk of the treasury.*

The entry in this court is as follows:

Afterwards, that is to say, on the day of in the year of the reign of George the Third, now king of Great Britain, &c. cometh the said [plaintiff] by A. B. his attorney, constituted by special warrant to him in that behalf directed, before one of the justices of his majesty's court of the Bench, at his chambers in Serjeant's Inn, Chancery-lane, London, and acknowledgeth that he is satisfied of the debt and damages aforesaid; therefore let the said (defendant) of the debt and damages aforesaid, be acquitted, &c.

If satisfaction is acknowledged in term time, you apply to the clerk of the treasury, who will carry the roll into court, and the secondary will enter satisfaction thereon, for which you pay 1*s.* per cent. *for the poor's box,* 2*s. to the prothonotary, and* 1*s. to the secondary.*

THUS

THUS have we endeavoured to trace, ſtep by ſtep, the various proceedings in a ſuit, from its commencement to its concluſion, in all common *perſonal* actions where the parties are not entitled to any privilege, to which alone this volume relates.

Although it cannot but be acknowledged that, from the formalities and niceties of the practice, delay is ſometimes perhaps unneceſſarily occaſioned in the conduct of a ſuit, and thereby a degree of inconvenience reſults to the injured party; yet all who take a full and comprehenſive view of the ſubject muſt agree, with the learned and elegant commentator on our laws, that "This care and circumſpection in the law,—in providing no man's right ſhall be affected by any legal proceeding without giving him previous notice, and yet that the debtor ſhall not by receiving ſuch notice take occaſion to eſcape from juſtice; in requiring that every complaint be accurately and preciſely aſcertained in writing, and be as pointedly and exactly anſwered; in clearly ſtating the queſtion, either of law or of fact; in deliberately reſolving the former after full argumentative diſcuſſion, and indiſputably fixing the latter by a diligent and impartial trial; in correcting ſuch errors as may have ariſen in either of thoſe modes of deciſion, from accident, miſtake, or ſurpriſe; and in finally enforcing the judgment, when nothing can be alleged to impeach it; this anxiety, to maintain and reſtore to every individual the enjoyment of his civil rights, without intrenching upon thoſe of any other individual in the nation, this parental ſolicitude, which pervades our whole legal conſtitution, is the genuine offſpring of that ſpirit of equal liberty which is the ſingular felicity of Engliſhmen." 3 Blac. Com. 423.

INDEX

TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

Abatement.

PLEA in abatement, what. 270
Their different kinds. ib.

Of the Time and Manner of pleading in Abatement. 270

Within four days. 271
How reckoned. ib.
Not to be pleaded after general imparlance. ib.
Declaration must be first taken out of office. ib.
In what cases judgment may be signed, if plea in abatement irregular. ib.
The plea must be filed. 272
By what hour ib.
Cannot plead in abatement after assignment of bail-bond. ib.
Court will not interfere on motion, in a matter pleadable in abatement. ib.

Of the Affidavit and Signature.

Affidavit required by 4 and 5 Anne. 272
When necessary, or not. ib.
By whom to be made. 273
Judgment signed for want of affidavit or signature. 273

Of the Judgment on Plea in Abatement.

When of *respondeas ouster*. 273
When final. ib.
Reason of distinction. ib.
Jury to assess damages, if final. 274
Or *venire facias de novo* awarded. ib.
Consequences of wrong judgment. ib.
What judgment, if plea in abatement concludes in bar, or *vice versâ*. ib.
What judgment, if defendant demurs in abatement. 275
What time defendant has to plead after judgment. ib.
No plea in abatement after judgment of *respondeas ouster*. ib.
Plea in abatement not amendable. ib.
If wrong intitled, bad. ib.
After plea, no exception to declaration. ib.
No need of *venue* to such plea. ib.
No costs in abatement. 276
If a misnomer be pleaded, plaintiff may move the court to amend declaration. ib.

On a plea in abatement, plaintiff may discontinue, and enter *cassetur billa.* ib.
The form of entry, &c. ib.
He may afterwards bring a new action. ib.
Or declare by the bye. ib.
Where there has been a plea in abatement, it should be entered in issue. 401
If omitted in plea-roll, how cured. ib.

Ac etiam.

History of the introduction thereof in process, and reason thereof. Introd. xxxv, lvi
Of the *ac etiam* in actions against bail on their recognizance. 81
If writ with an *ac etiam*, plaintiff must not declare for a different cause of action than mentioned in writ, or he will lose the bail. 236
See *Declaration.*

Action.

An action, what. Introd. lxxiii
Of the several ways of bringing actions in the courts of K. B. and C. B. ib. lxxiv
In all common cases, either by bill or by special original. ib.
What is meant by *common* cases. ib.
Of the proceedings by bill, and an explanation thereof. ib.
A view of the ancient and modern mode of proceeding by bill. ib. lxxv
Of the bill of Middlesex and latitat. ib.
Characteristics of the original bill, or bill in trespass. ib. lxxvi
Of proceedings by *special* original. ib. lxxvii
Of the ways of bringing actions in B. R. in *particular* cases. ib. lxxviii
Of the several ways of bringing actions in the court of Common Pleas in *common* cases. ib.
By original and *capias.* ib. lxxix
By original, *quare clausum fregit*, and summons. Introd. lxxix
Of the several ways of bringing actions in C. B. in *particular* cases. ib. lxxx
Actions are either personal, real, or mixed. 33
Personal actions are either *ex contractu* or *ex delicto.* ib.
In what cases actions are bailable. 32
See *Bail.*

Of the Mode of proceeding in Actions where Common Bail only is required, from the Commencement of the Suit to the Declaration. 62

See *Process.*

Of the Mode of proceeding in bailable Actions, from the Commencement of the Suit to the Declaration. 104

Actions, local or transitory. See *Venue.*

Affidavit.

Of the affidavit to hold to bail. 104
Directed by stat. 12 G. 1. ib.
Of the degree of *certainty* requisite in the affidavit. 105
As to the actual existence of the debt. ib.
As to the description of the cause of action. 108
As to the language in which the affidavit is drawn. 109
Particular exceptions with respect to this certainty in cases of executors, &c. ib.
By whom the affidavit ought to be made. 110
Before whom to be made. ib.
How to be stamped, and of joining several defendants, or causes of action, in one affidavit. 112
Of the title, jurat, and time of filing affidavit. ib.
Of counter, supplementary, and cross affidavits. 113
Affidavits read on motion to put off trial, though not taken before a commissioner. 420

Alias Writs.

Of ſuing them out in actions not bailable. See *Proceſs*.

Allowance.

Of bail. See *Bail*.
Of writ of error. See *Execution*.

Amendment.

How far the courts will amend proceſs. 99
Or the appearance of defendant. 100
Or the bail-piece. 146
Or ſpecial original and declaration.
No amendment of plea in abatement. 276
Of amending declaration on miſnomer pleaded. 275
Notice of ſet-off not amendable. 329
Iſſue how far amendable. 401
Diſtringas amendable. 430
So *habeas corpora juratorum* ib.
So *jurata* in *niſi prius* record. ib.
At what time they ought to be amended. 431
Too late after verdict. ib.
But a *venire de novo* will be awarded. ib.
Of amendment of *poſtea*. 482
No amendment ſuffered after new trial granted. 494
Of amending writs of execution. See *Execution*.

Annuity.

If not properly regiſtered, may be returned by ſheriff as *nulla bona*. 531
How to take out execution upon judgment on an annuity. 537

Appeal.

Hiſtory of different courts of. Introd. xxviii

Appearance.

Of the appearance-day, or *quarto die poſt*. 11
Appearance formerly in perſon. 91
How afterwards by attorney. ib. 93
Of defendant's appearing according to proceſs, in actions not bailable. 63. 91
Hiſtory of common appearance in C. B. Introd. lxi
How defendant is to appear in the reſpective courts. 91
See alſo *Attorney*. 100
Of the time of appearing. 95
Of appearance in actions againſt huſband and wife. ib.
How far defendant liable to a penalty for not appearing. 96
Of plaintiff's appearing for defendant, according to ſtatute. 97
How he is to appear. ib.
When he is to appear. 98
Appearance, if entered by wrong name, how far court will amend. 100
Of attornies undertaking to appear. 94
How far defects are cured by appearance. 100

Arbitration.

Concerning arbitration under references at *niſi prius*. See *References* at *niſi prius*. 466

[For the general doctrine of Arbitration, ſee Vol. II.]

Arreſt.

Hiſtory of the origin and gradual introduction thereof. Introd. Sec. iv.
What. 121
How to be made. ib.
By whom, and when to be made. 122
As to franchiſes, liberties, &c. ib.

Of particular times and places when and where the defendant is privileged from arreſt, as witneſſes, clergymen, &c. 123
Of particular perſons exempt therefrom, as ambaſſadors, &c. See *Bail.* 45
Of the conſequence of arreſting any perſon not liable to be arreſted. 57
Of the remedy, and diſcharge of ſuch perſon. ib.
Of the ſheriff's fees upon an arreſt. 124
Of the defendant being reſcued after an arreſt. 125
If a perſon be arreſted after the writ is returnable, the officer cannot legally detain him, though for the ſhorteſt time, till the writ be continued. 123

Arreſt of Judgment.

See *Judgment.* 496

Aſſizes.

Hiſtory thereof. Introd. xii
And of trials at *niſi prius.* ib. lxv

Aſſociate.

Origin and nature of office. Introd. lxx

Attachment.

Hiſtory of attachment to compel appearance. Introd. xlvii
Againſt the ſheriff for not returning the writ, or bringing in body. See *Sheriff.* 202
Againſt witneſſes for diſobeying ſubpœna. See *Subpœna.* 466
For not paying coſts for not proceeding to trial. 416
Attachment for non-performance of an award, only a civil execution. 485
Reaſon why in declaration in C. B. defendant is ſometimes ſaid to be attached and ſometimes ſummoned. Introd. lxiii

Attaint.

Writ of attaint out of uſe, by introduction of new trials. 483
See *Trial,* New.

Attorney, and Warrant of Attorney.

Of the practice of proſecuting and defending ſuits by attorney. 14
Formerly carried on in perſon. ib.
How attornies introduced. 15
Conſequences of their introduction. 16
Who may now appoint an attorney. ib.
Of the warrant of attorney to proſecute and defend. 17
Its uſes. ib.
Of filing the ſame, &c. ib.
Want of warrant, when aided. 18
Practice of appointing by warrant much diſuſed. ib.
Attornies anſwerable, if they truſt to a forged power of attorney. ib.
Of the memorandum, or minute of the warrant, to proſecute or defend, agreeable to 25 Geo. 3. c. 80. 19
The ſtatute ſet out. ib.

Of the Clerkſhip of Attornies. 21
Of the ſervice requiſite. ib.
Of the affidavit of the contract. ib.
Of the duty paid on the articles. 22
Of the ſtamp. ib.
Of inrolling and regiſtering indenture. ib.
Of the payment of duty and affidavit thereof. ib.
Of ſervice to the maſter's agent. 23
Not to take a clerk if employed as clerk to another. ib.

Of

Of the Admiſſion of Attornies. 23
Of the notice requiſite before admiſſion. ib.
Of the oath and examination. 24
Of ſuffering others to act in their name. ib.
Of acting as agent to one not qualified. ib.
Of attorney of one court acting in the name of an attorney of another court. ib.
Of entering their names in proper offices. ib.

Of taking out Certificate. 25
Penalty for acting without it. ib.

Of delivering and taxing Attornies' Bills. 25
Of the coſts of taxation. 26

General Obſervations relating to Attornies. 26
Courts ſtrict in enforcing the rules reſpecting them. ib.
Of refunding part of the premium. 26
Of changing the attorney in the cauſe. 27
Attornies formerly practiſed in K. B. by clerks in court. ib.
Of the action for an attorney's bill. ib.
How bill to be firſt delivered. ib.
What kind of buſineſs brings it within the ſtatute. ib.
Buſineſs at quarter ſeſſions. ib.
Not for conveyancing. 28
Agency bills, how liable to be taxed. ib.
But need not be delivered a month previous to action. ib.
Attornies not liable to court of Conſcience for Middleſex. ib.
Barriſter not to be an attorney. ib.
Attornies, how far under controul of the courts. ib.
Their lien on papers, judgments, &c. ib.
In K. B. general. 29
In C. B. limited. 29
How far favoured in this reſpect. 28
It extends to money levied by ſheriff. 29
How parties may compromiſe without interference of attornies. 28
Papers, how to be procured from attornies by order of court. 29
[See further Vol. II. *Of Proceedings by and againſt Attornies.*]
Of appearing by attorney. 93
Who may appear by attorney. ib.
When attornies are compelled to appear for defendant. ib.
Agreeable to their undertaking or the like. ib.
Of the privilege of attornies in laying the *venue*. See *Venue*.
Authority of attorney continues after claim of conuſance, but not after error brought. 260
Warrants of attorney, how to be entered on roll. n. 506

Attorney, Judgment on Warrant of. 374

The Validity of a Warrant of Attorney. 375
If given by an infant. ib.
By *feme covert*. ib.
By an infant and another. ib.
To a *feme covert*. ib.
How if the perſon giving it be in cuſtody. ib.
An attorney muſt then be preſent. ib.
Conſtruction of rules of court in that reſpect. 376
To what perſons and to what kind of cuſtody it extends. ib.
What attorney muſt be preſent. 377
Rule extends to warrants given in Ireland. ib.
Exceptions in caſes of fraud. ib.
Of the conſideration of the warrant. ib.
If uſurious, or obtained by fraud, bad. ib.
How ſuch facts to be tried. 378

Of

Of the Operation and Extent of the Warrant of Attorney, and of the Revocation and Countermand thereof. 378
Judgment muſt be agreeable to the power. ib.
How in caſe of debtor diſcharged under the inſolvent act. ib.
Or in caſe of bankruptcy. ib.
How if it ſpecifies particular term to enter judgment. ib.
If an executor gives a warrant. ib.
Warrant is a *ceſſet executio* for the time. ib.
Court will interfere if it is not abided by. 379
Of the *revocation* of the warrant. ib.
By death. ib.
By marriage of either party. ib.
In which caſe application to the court neceſſary. ib.

Of entering up Judgment on Warrant of Attorney. 380
When judgment may be entered without leave, when with leave of the court. ib.
Of moving the court, and of the affidavit, when party was living. ib.
Why ſuch application neceſſary. ib.
Of the relation of the judgment to the firſt day of term. ib.
Purchaſers not hurt thereby ſince the ſtatute of frauds. ib.
So the authority relates to the firſt day of the term. 381
How if teſtator died ſame day judgment ſigned. ib.
Of warrant on *poſt obit* bond. ib.
Of warrant given to two, and judgment by ſurvivor. ib.
Judgments on warrants not amendable. ib.
How to enter up judgment on warrant of attorney, and of moving the court for that purpoſe. ib.
Of the affidavit neceſſary in ſuch caſe. 382

Aula Regia.
Hiſtory thereof. Introd. vi

Bail.
Hiſtory of bail in civil actions, and of the difference between common and ſpecial bail. Introd. Sec. v.

In what Caſes Special or Common Bail is required. 32

Where the Action is for a Debt or Demand of Money due. 34
It muſt amount to 10*l.* ib.
If *cauſe of action* is 10*l.* it is ſufficient as in trover. ib.
Sometimes common bail in trover though cauſe of action is 10*l.* ib.
There muſt be an oath of the amount—poſitive. 35
Where mutual dealings the balance only is the debt. ib.

Where the Action is for Damages unliquidated. 35
As in actions on the caſe, treſpaſs, *vi et armis*, &c. ib.
In what caſes judges order obtained to hold to bail. ib.
How in actions on agreements without any penalty. 36

Where the Action is founded on a Penalty. ib.
To what amount bail ſhould be taken in ſuch caſe. 37
How far court will interfere. ib.
How in actions on bonds for performance of covenants. 38
General rule as to ſuch actions. ib.

Where the Action is founded on a Judgment recovered. 38
No bail where there was bail in the original action. ib.

Except

Except defendant was discharged on a common appearance, because plaintiff declared for a different cause of action than mentioned in the writ. 39
Where the original cause of action was under 10*l.* but by the judgment and costs amounted to above that sum, defendant may be held to bail in both courts. 40
The courts formerly differed. ib.
So also where original action was for unliquidated damages, but by judgment they are above 10*l.* ib.
So where action is brought on judgment of nonsuit or nonpros, *bail allowed.* ib.
So on a judgment pending writ of error, if no bail in original action. ib.
Common bail only on judgments in foreign courts. 41
Special bail on judgment in inferior courts. ib.
Special bail only allowed once in actions on judgments. ib.
How if defendant be superseded. ib.
Or become bankrupt. ib.

Where the Action is on a penal Statute.

No bail except authorized by statute, or the action be on a remedial statute. 41

Where it is a second Action for the same Cause pending the first or otherwise. 42

Formerly no bail in a second action after a nonpros or nonsuit, but now otherwise. ib.
But not in B. R. if nonsuit were upon the merits. ib.
Of arresting defendant in a second action after discontinuance of the first. 43
Under what circumstances allowed before discontinuance. ib.
Plaintiff may arrest defendant without discontinuing, if in the former action defendant was not held to bail. 44
Or if defendant was discharged out of custody for a defect in the warrant, or something not owing to default of plaintiff. 44
Or by means of deceiving plaintiff by giving him a bad draft and promising him immediate payment, or the like. ib.
So if the cause be referred, defendant may be arrested on the award, though bail in the original action. ib.

Where the Action is removed from inferior Courts.

Of the former practice, and how altered and settled by 19 *Geo.* 3. *c.* 70. 44

Of Defendants sued in Auter Droit.

No bail in such actions. 45
As heirs, executors, bail, assignees, &c. except in certain cases. ib.
So no bail where the defendant is privileged from arrest either by legal incapacity, as feme coverts, except under certain circumstances. 46
When minors may be arrested and held to special bail. 47
In what cases feme coverts may be arrested. ib.
No bail if defendant privileged by reason of the dignity of his station. 48
As the royal family and servants, and what servants. ib.
Ambassadors, ministers, and their servants. ib.
Regulations as to registering such servants. 49, 50
They must be domestic servants. ib.
Which must be sworn to. ib.
Privilege extends to foreign servants of ministers. ib.
Exception as to traders. 50
Peers and peeresses. ib.
Who deemed such, 51
Not to peeresses by marriage who afterwards marry commoners. ib.
Nor to the son of a peer. ib.

Nor

Nor to their ſervants. 51
Members of parliament, to what extent and in what caſes. ib.
So to perſons privileged by reaſon of the peculiar nature of their profeſſion or office. ib.
As attornies and officers of the court. 52
Where perſons are protected in certain caſes, and to a certain amount, bail muſt be accordingly. ib.
How as to ſoldiers, ſailors, and volunteers. ib.
How if defendant lives in *Wales*. 53
What particular circumſtances ſometimes exempt perſons from being held to ſpecial bail who would be otherwiſe liable. 54
In what caſes a certificated bankrupt is exempt. 55
Or inſolvent debtors and fugitives. 56. 60
Or where defendant has obtained a ſuperſedeas in a prior action for the ſame cauſe. 56
Or where the action is brought for an illegal conſideration. 57
Of the conſequences of arreſting any perſon not liable to be arreſted, and of their remedy and mode of obtaining their diſcharge. ib.
Of the remedy by action. 58
Of the remedy by application to the court, and in what caſes they will grant ſuch diſcharge, or put defendants to their plea. 59

Of filing Common Bail. 92

When to be filed, and how the time is reckoned. 95
Of the mode of proceeding when common bail only is required, ſee *Proceſs*.

Of Bail to the Sheriff, or Bail below. 127

The general meaning of this bail, and how given to the ſheriff. ib.
It is at ſheriff's riſk to let defendant go without bail. 128
Form of bail-bond. ib.
What ſum to be taken for. 129
How far bail liable thereon. 180
How if defendant's attorney undertakes, &c. to put in bail. 137

The Statute of 23 *Hen.* 6. *conſidered.*

The reaſon and nature thereof. 129
It is a public ſtatute. 130
To what perſons and caſes it extends. ib.
As to promiſes, undertakings, and agreements entered into by officers. ib.
How far the ſheriff is compellable to take bail, and of the number and qualification of the ſureties. 132
Of the nature of the ſecurity how to be made, to whom, with the form of the condition of the bond. 133
What variations in point of form will vitiate the bond. 135
Of the operation of the bail-bond ſo far as it affects the plaintiff. 136
Of proceeding againſt the ſheriff for acting contrary to the ſtatutes. ib.

Of Bail to the Action, or Bail above. 137

What it is. ib.
The nature of the undertaking of the bail. ib.
Of the extent of their liability. 146
May be put in againſt defendant's conſent. 137

When and how Bail above to be put in Town. 138

If defendant arreſted in *London* or *Middleſex*. ib.
If arreſted elſewhere. ib.
If held to bail by judge's order. 140
Notice of bail having been put in to be given—form thereof. 140
When neceſſary, and what it ſhould contain. 147

Of

Of the Time and Manner of putting in Bail before a Commissioner in the Country. 141

Of the notice in such case. 142
When necessary, and what it should contain. 147
How the time reckoned for putting in bail in town. 143
How in the country. 144
If writ returnable first return of term in country cause, defendant has eight days after *quarto die post.* 143
Of excepting to country bail. 144
Of transmitting the bail-piece. ib.
Of filling up the bail-piece. 146
How far amendable. ib.
Of the origin of bail *de bene esse*, and the old practice in this respect. 148

Of accepting Bail, and filing the Bail-piece. 148

Of excepting to Bail. 150
Of the time of excepting. ib.
Of the manner of excepting, and of the notice thereof. 151
Of the grounds of exception. 152
What shall be deemed a waiver of exception. ib.

Of justifying and adding Bail. 153
When and how to justify in court. 154
How if bail are to be added. ib.
How to put in bail and justify at the same time. 155
Of justifying by consent at judge's chambers. ib.
How to justify bail taken in the country before commissioner. ib.
When bail must justify. 156
How the four days allowed to justify after exception are reckoned. ib.
When bail must be added. ib.
When added bail must justify. ib.
Where bail are to justify. 157
Of the affidavit of justification in country causes, and when to be sent up. 158
How defendant in custody may get discharged. 158
If arrested in vacation, bail may be put in, and justified at judge's chambers. ib.
They must justify at the place mentioned in notice. ib.
When further time will be allowed for justifying. ib.

Of the Notice of Justification. 159
What time requisite. ib.
What it should contain. ib.
How it must be served. 160
Bail must become such before notice to justify. ib.

Of opposing Bail, and what are Grounds of Opposition. 160
Of the *exoneretur*, and of striking the bail out of the bail-piece. 162
Of the *allowance* of the bail. 163
Of the *surrender* in discharge of bail. 164
How to surrender defendant when at large. 165
How when in custody. 166
Mode of treating the subject in this work. ib.
The time of making such surrender, and what is necessary to be done before the making thereof. 167
Formerly no surrender before return of writ, but now otherwise. ib.
Not after return before bail above be put in. ib.
Which may be put in without defendant's consent. 168
How to surrender if bail-bond assigned. 169
Or if bail be excepted to. ib.
Or if sheriff has been ruled to bring in body. ib.
No need now for them in such cases to justify before they render. ib.
Render not good if bail put in surreptitiously. ib.
Or if bail were rejected on justifying. ib.

But

But a surrender may be made by bail which have been excepted to, and have not justified, although other bail have been added, and one of the added bail rejected. 168
Of the power of the bail to take their principal to render him. 170
Of the necessary steps to be taken after the surrender. 171
Of giving notice thereof. ib.
Of paying the fees. ib.
Of entering *exoneretur*. ib.
Of the *reddidit se*. 172
How to get *exoneretur* if bail-piece lost. ib.
Of the *committitur*, and the use thereof. ib.
Of circumstances which discharge the bail without any render, as in cases of bankrupts. 173
Or defendant being made a peer. ib.
Or an alien ordered abroad. ib.
Or if declaration varies from process in cause of action, bail will be discharged. ib.

Bail-bond.

Of the assignment thereof and proceedings thereon. 174
What remedy at common law. ib.
How enlarged by statute 4 and 5 *Ann.* c. 16. 175
How to procure the assignment. ib.
Of the manner of making it. ib.
Of the time of making it. 176
Of the effect thereof, and caution necessary in taking it. ib.
Who must make assignment. ib.
Where it may be made. ib.
When plaintiff loses benefit thereof in C. B. by not declaring in time. 177
But not so in B. R. ib.
What shall not be a waiver of assignment. ib.

Of the Action on the Assignment of Bail-bond. 177
How given by stat. of *Ann.* ib.
How to proceed therein. 177
At what time to be brought if the arrest were in *London*. 178
If it were in the country. ib.
In what court to be brought. ib.
In what county venue to be. 179
Not a bailable action. ib.
Of the declaration in the action. ib.
Executors of assignees may sue. ib.
Arrest not traversable. ib.
Issuing of process is. ib.
How far sheriffs bail liable by the bail-bond. 180

Of staying and setting aside Proceedings on Bail-bond. 180
Court derives their jurisdiction in this respect from stat. of *Ann.* ib.
Nature of relief afforded. ib.
In what *cases and upon what terms* proceedings will be *stayed*. 181
How if plaintiff has lost a term and been delayed in the suit. 182
Of bail-bond standing as a security. ib.
Difference in this respect in C. B. and B. R. ib.
How far plaintiff must quicken defendant by declaring *de bene esse*, and the like. ib.
Bail-bond to be put in suit with due diligence. 183
The effect of bail-bond standing as a security. ib.
Even after verdict on bail-bond proceedings have been stayed. ib.
Other grounds for staying proceedings besides letting in defendant to try the merits. 184
If either party die, proceedings stayed. ib.
Terms on which they are stayed. ib.
Why and to what extent. ib.
Exception thereto from laches of plaintiff in not putting bail-bond in suit in due time. 185
So bankruptcy and certificate of defendant sometimes ground to stay proceedings. ib.
So where bail-bond was assigned through mistake. 186

Pro-

Proceedings will be ſtayed upon payment of debt and coſts. 187
What coſts to be paid. ib.
In *what caſes* proceedings on the *bail-bond* will be *ſet aſide*. ib.
For any irregularity. 188
If bail-bond be aſſigned pending rule of court. ib.
If defendant died between arreſt and return day. ib.
Or before aſſignment. ib.
If defendant has duly ſurrendered, what ſurrender in ſuch caſe is good. ib.
In *what manner* proceedings are to be ſtayed or ſet aſide. ib.
By ſummons or motion. ib.
How ſummons to be intitled. 189
In B. R. notice to juſtify muſt be given, and plaintiff may except, without its being a waiver to proceedings on bail-bond. ib.
What ſteps to be taken when order or rule granted. ib.
Notice of motion to be given. ib.
Defendant cannot afterwards plead in abatement. ib.

Bankrupt.

In what caſes certificated bankrupt exempt from being held to bail. 55
How to get diſcharged if improperly arreſted. 57
Bankruptcy and certificate ſometimes ground to ſtay proceedings on bail-bond. 185
Plaintiff may prove his debt under commiſſion, and yet proceed on bail-bond, though he has neglected to put bail-bond in ſuit two terms. ib.
Of ſet-off in caſes of bankruptcy. 326
In what caſe bankruptcy of defendant operates as a ſuperſedeas. 545
Treſpaſs will not lie for taking bankrupt's goods, though he ſells them after notice, from proviſional aſſignee. ib.
How far execution againſt the goods of a bankrupt after his certificate is good. 545

Bar. See *Pleas.*

Bar, trial at. See *Trial.* 456

Baron and Feme.

How proceſs to be ſerved in actions againſt huſband and wife. 90
Of appearance in actions againſt huſband and wife. 95
Huſband muſt appear for both. ib.
If wife appear without him it is not void, but plaintiff cannot proceed. ib.
Of execution in caſes of judgments by or againſt *baron and feme*. 516

Bill of Exceptions.

What. 469
Not now much in uſe. ib.
Where there is a bill of exceptions, no new trial on the point of law contained therein. ib.

Bill of Middleſex.

Hiſtory of proceedings by bill. Introd. xxxviii
Why ſo called. ib.
Form thereof. 70
Of the *teſtatum* bill, or *latitat*. ib.
Not to be ſerved out of county. 77
Of the teſte and return. 81
When to be conſidered the commencement of a ſuit, or as proceſs. 83, 84
In what caſes the original bill is neceſſary. 87

Brief.

Of preparing briefs, &c. for trial. See *Trial.* 459

Capias.

History of process by *capias*. Introd. xlviii. lv
Capias ad respondendum. See *Process*.
Capias ad satisfaciendum. See *Execution*.

Case, Special.

Introduced instead of special verdicts. 474
Special case no part of the record. ib.
By whom *postea* kept till the matter is determined. ib.
How to proceed to get case argued. 475
What it should state. ib.
If case stated insufficiently, cause must be sometimes sent down to second trial. ib.
Of the costs in such case. ib.

Cassetur Billa.

How to be entered, and form thereof. 276

Certificate.

Of judge's certificate for costs, some to be obtained at the trial. 475
In what cases this must be done. ib.
In what cases certificate may be obtained after trial. 476
Consequences of neglecting to get certificate at trial, when statute requires it. 477

Challenge. See *Jury*.

Chancery.

History of court of. Introd. xxi

Cinque Ports.

Of suing out process there in actions not bailable. See *Process*. 78

Cognovit. See *Confession*.

Common Pleas.

Origin of. Introd. xv

Committitur.

See *Bail*. 172
If a *committitur* be erroneous, it must be abandoned before a second can be entered rectifying the mistake. 537

Confession, Judgment by.

Its meaning. 372
Form thereof in case. ib.
——— in debt. ib.
Where to be written. ib.
A *cognovit actionem relicta verificatione*, what. ib.
Form thereof. ib.
How to proceed thereon. 373
How if *retraxit* necessary. ib.
Caution necessary in taking *cognovit*. ib.
Extent and operation of *cognovit*. ib.
How if only for part. ib.
When court will interfere therein on motion. ib.
How far it affects bail. 374
What proper to be done when *cognovit* taken from a prisoner. ib.

Consolidating Actions.

It is a matter of discretion in court. 238
Upon what grounds, and to what extent, it will be granted. ib.
See *Declaration*.

Continuances.

Of the continuances on iſſue roll. 402
Hiſtory and meaning thereof. Introd. lxxi
How formerly entered on plea roll. ib.
Of the ancient continuance roll in C. B. and when aboliſhed. ib. lxxi

Conuſance.

Of claiming conuſance. 256
Of the nature of inferior juriſdictions, and what courts can demand conuſance. ib.
Strictneſs in mode of claiming conuſance. 258
How allowed to the univerſities. ib.
Defendant muſt be reſident there. ib.
In what actions it is allowed them. ib.
Affidavit neceſſary to be had. ib.
When conuſance will not be allowed. 259
It muſt be claimed in the firſt inſtance. ib.
Before imparlance. ib.
Or plea pleaded. ib.
What is a bar to ſuch claim. 260
Authority of attorney continues afterwards.

Coroner.

Of proceeding againſt him to return attachment iſſued againſt the ſheriff. 206
When venire and jury proceſs to be directed to him. 429

Coſts.

For not proceeding to trial. See *Trial.* 413
How in caſes of remanets or cauſe going off on other grounds. 435
Of coſts in caſes of new trials. See *Trial.* 493
Of taxing coſts. 504

Countermand.

Of notice of trial. See *Trial.* 412

County Court.

Hiſtory thereof. Introd. Sec. i.

County Palatine.

Of ſerving proceſs there. 78
Latitat extends there. ib.
What actions tried there. 432
How cauſe of action muſt ariſe there. ib.
How records ſent down by *mittimus* and the like. See *Jury Proceſs.* 431

Court Leet and Baron.

Hiſtory of. Introd. iii

Debts mutual.

See *Set-off.*

Decennaries.

Hiſtory of. Introd. Sec. i.

Declaration.

Meaning thereof. 220
Formerly made *ore tenus.* 221
Of the time of declaring. ib.
How if a treaty between the parties. 222

Of the different ways of declaring; in chief, *de bene esse*, by the bye. 222
Of compelling plaintiff to declare by rule. ib.

Of declaring in Chief. 223

Meaning thereof. ib.
Copy of declaration to be delivered to defendant's attorney. ib.
Who must pay for the same. ib.
If he refuses, or place of abode not known, copy may be filed in the office, and notice thereof given to defendant or his attorney. ib.

How if Plaintiff has appeared for Defendant according to Statute. 224

Copy of declaration to be left at office, and notice given to defendant or his attorney, or left at defendant's last place of abode. ib.
If he does not plead thereto, judgment may be signed. ib.
Declaration well delivered from time of notice. See *post*. ib.
When judgment signed, notice of inquiry how to be given. ib.

Of declaring de bene esse. 224

How in B. R. in actions not bailable. 225
How in B. R. in bailable actions. ib.
How in C. B. ib.
In what cases and at what time plaintiff may so declare. 226
How soon it may be filed. 227
Declaration *de bene esse* should be marked, or if no bail put in, it is a waiver of bail. 228
Declaration how to be ingrossed, charged for, and indorsed. 230
Indorsement not necessary if declaration filed. ib.
Form of notice of declaration. ib.
When defendant is to plead to declaration. 227

Of the Time *of declaring.* 221

Within two terms, or if no judgment within the year. ib.

Of declaring by the Bye.

Introduction thereof. Introd. lv
Meaning thereof. 228
In what cases plaintiff can so declare. ib.
Who may declare by the bye. ib.
How in joint actions. ib.
In actions by husband and wife. 224
In actions by executor. ib.
How if defendant is in court by rule of court. ib.
Declaration by the bye presupposes a declaration in chief. 229
In what cases such declaration in chief must be first delivered. ib.
In what time plaintiff must declare by the bye. 228
When if action be by special original. 229
Difference in the practice between the two courts. ib.
In what cases such declaration may be delivered. 232

Of engrossing, indorsing, filing, and delivering Declarations. 229

How to be engrossed. ib.
How to be indorsed. 230
If in chief. ib.
If *de bene esse*. ib.
When indorsement not necessary. ib.
Form of notice of declaration. ib.
How indorsed as to the time allowed for pleading. 231
Time of pleading if plaintiff declare in chief. ib.
If *de bene esse*. ib.
If entitled to an imparlance. ib.
In what cases declaration to be filed, and when delivered. ib.
And within what time. 232
Four days before end of term. ib.
Declaration may be delivered by the bye after payment of debt and costs in original action. 232
And after plea in abatement and entry *quod billa cassetur*. ib.

Of the Notice of Declaration. 232

Necessity thereof. ib.
How to be served. ib.

And

And when. 233
How, if several defendants. ib.
How to be made. ib.
What it should contain. ib.
As to the nature of action. ib.
At whose suit. ib.
It should be properly dated. 234
When necessary in B. R. and C. B. ib.
How it operates on declaration. ib.
Only well delivered from time of notice. ib.
What was the former practice, and how now altered, as to time of declaring and notice thereof. ib.

Of paying for Declaration. 235

Of declaring against two defendants when one only has appeared. 235
Different on common and bailable process. ib.

Of Declaration varying from Process. 236

How far plaintiff may declare for different cause of action, or in a different right, or in another county from that named in process. ib.
Of the consequence thereof. ib.
In what cases bail lost thereby. ib.
A variance in the *ac etiam* and declaration, if sum sworn to be under 40*l.*, is of no consequence. 237
How to take advantage of variance. 238

Of consolidating Declarations, and striking out superfluous Counts. 238

In what cases it will be ordered. ib.
A matter of discretion in the court. ib.
How to move for this purpose. ib.
Defects in process, how cured by declaration, and taking same out of office, or by not taking advantage of them in time. 239

Of the Rule to declare. 240

Meaning thereof. ib.
How obtained. 240
How to be observed. ib.
How, if served before *non pros*, it cures defect. ib.
Such rule has no effect, if defendant be a prisoner. ib.

Of intitling Declarations, and of Special Memorandums. 241

Declaration ought to be intitled as of the term writ was returnable. ib.
If cause of action accrues in term, memorandum should be special ib.
Where cause of action appeared to have accrued the first day of term, a general memorandum was held good. ib.
When memorandum may be amended. ib.
When defendant can insist on plaintiff's intitling declaration right. ib.
Court sometimes inquires into the real time of suing out writ. ib.
Form of memorandum to a bill filed in vacation against an attorney. ib.

Default, Judgment by.

How to sign judgment by default. 342
Form of notice of inquiry. ib.
Countermanding and continuing it. 343
Making out and executing inquiry. ib.
Subpœnaing witnesses. ib.
Signing final judgment. 344
Of executing inquiry before a judge. ib.

Of the Effect of Judgment by Default; in what Cases Plaintiff entitled to it, and how and when to be set aside. 345

In what cases judgment by default may be signed. ib.
Not allowed for non-payment of issue money, or demurrer book. 399

When set aside for irregularity. 345
At what time application to set it aside to be made. 346
When on payment of costs, though no irregularity. ib.

Of the Writ of Inquiry. 346

Its nature. ib.
In what cases necessary. 347
When or not in actions or bills of exchange, &c. ib.
When the jury have omitted to assess damages at the trial. 347
When on demurrer to evidence. ib.
When the inquiry of damages is ordered by statute, and jury have omitted to assess them. 340
How such statutes to be construed. ib.
Of assessing damages where defendant has confessed part of plaintiff's charge. ib.
How if judgment be arrested for mistrial or the like. 349
How plaintiff to proceed in actions on penalty for non-performance of covenants. ib.
How where demurrer to part, and judgment by default. ib.
Where issue on part, and judgment by default. ib.
Where issues in law and fact. ib.
Where some defendants plead and others suffer judgment. ib.

Of the Notice of Inquiry.

What notice necessary. 350
How the time of the notice to be reckoned. ib.
How where plaintiff concludes to the country, and defendant neglects to join issue. ib.
When defendant demurs to declaration. 351
Or pleads a plea to which plaintiff demurs. ib.
Where defendant strikes out *similiter*, and demurs to replication. ib.
Or returns paper-book with demurrer, having struck out pleadings. ib.
How notice should be given, and what it should contain. 352
What certainty as to *time* of executing inquiry. 352
How the time to be abided by. ib.
Certainty as to *place* of executing inquiry. ib.
Certainty as to *names* of parties. 353
Of the notice of writ to be executed before a judge. ib.
If after notice given to execute before a sheriff. ib.
Of the *service* of the notice. ib.
When to the party, and when to the attorney. ib.
Of continuing and countermanding it, and at what time. ib.

Of the Execution of Inquiry. 353

Where and by whom to be executed. ib.
Before what jury. ib.
How if before a judge. ib.
On what day. ib.
Of the *evidence* to be given. 354
Of interest and damages, how calculated and what should be allowed. ib.
Of improper evidence being admitted. ib.
Of the jury severing the damages. 355
Of adjourning execution of writ. ib.
Of altering writ before execution. ib.
Of defendant's costs of inquiry not executed. ib.
Of the return of writ of inquiry. ib.
Of suing out a second writ. ib.

Of setting aside Inquisition, arresting Judgment, and amending the Proceedings. 356

Of the rule for judgment on return of writ. ib.
Of moving in arrest of judgment, or to set aside inquisition. 357
When to be moved on account of irregularity. ib.
How irregularity cured by party attending execution of inquiry. ib.
Within what time motion in arrest of judgment to be made, or to set aside inquisition. ib.

When

When plaintiff may ſign final judgment. 357
Of amending writ of inquiry, or the proceedings thereon. ib.
How to proceed with inquiry if plaintiff becomes a bankrupt. 358
In what caſes plaintiff cannot have final judgment, even againſt defendants who have ſuffered judgment by default, in joint actions. ib.
Difference herein between joint actions on contracts and tort. ib.
Of diſcontinuing after verdict and inquiry. 359

Defects in Proceſs.

How cured, by appearing. 99
——— by declaration. 239

Deliberatur.

To be marked on *poſtea.* 478

Demurrer.

Meaning thereof. 333
Demurrer, ſpecial or general. ib.
How at common law. ib.
How altered by ſtat. 27 Eliz. ib.
Special demurrer revived. 334
Other ſtatutes affecting ſpecial demurrers. ib.
A departure requires ſpecial demurrer. ib.
Statutes do not extend to pleas in abatement. ib.
Rule as to general or ſpecial demurrer. 335
Plea bad on demurrer, though aided by verdict. ib.
Demurrers muſt be ſigned. ib.

How to proceed on Demurrer. ib.

How to compel party to join in demurrer, and proceed to argument. 337
Notice of executing inquiry may be given on back of demurrer. 338
How paper-book to be delivered. ib.
Of moving for *concilium*, &c. ib.
Defendant muſt ſearch for *concilium*, plaintiff not obliged to ſerve rule when defendant demurs. ib.
Signing a *concilium* deemed a proceeding in the cauſe. ib.

How to proceed, when Iſſue to Part and Demurrer to Part. 339

Where there are iſſues in fact and in law, plaintiff may waive the iſſues in fact, and take out an inquiry upon the demurrer. ib.
Where a *nolle pros* is entered, plaintiff need not be amerced. ib.
Judgment, when obtained, muſt be ſigned before inquiry executed. 340

Of waiving and withdrawing Demurrers, and amending after Argument. 340

General demurrer not to be waived for ſpecial, but it may *vice verſâ.* ib.
When demurrer may be withdrawn, and pleadings amended. ib.
Where demurrer argued before trial of iſſue, amendment allowed, not *contra.* 341
Demurrer on merits an iſſuable plea. ib.
But not a ſpecial demurrer, 7 D. & E. 530
Not to be amended. ib.
Proper form of entry of judgment. 345
Paper-days, Tueſdays and Fridays. ib.
Cauſes to be argued in their turn. ib.

Demurrer to Evidence.

What. 470
How grew out of uſe. ib.

Dies datus prece Partium.

Hiſtory and meaning thereof. Introd. lxiv

Dies non Juridici.

What days are deemed *dies non*, and what may or may not be done on ſuch days. 11 to 14

Diſtringas.

Hiſtory of proceſs by *diſtringas*. Introd. xlvii
How entered on *niſi prius* roll. ib. lxxi
How to proceed by *diſtringas* on an original *quare clauſum fregit*. 217
Of the *alias* and *pluries*. ib.
Of the 10 Geo. 3. c. 50. which extends to all *diſtringas's*. ib.
How return of *diſtringas* ſhould be in making up iſſue, &c. 423
Form of *diſtringas*. 429
For ſuing out iame, &c. See *Jury Proceſs*
Diſtringas, how amendable. 450

Docket.

Of docketing entries and judgment. 505
How judgment to be docketed. ib.
Of obtaining original in caſe judgment by default to prevent error. ib
Of the entry-roll, and docketing ſame. ib.
Often neglected until after judgment, unleſs compelled to enter iſſue. ib.
How to proceed in carrying in rolls and docketing entries. ib.
New roll ordered, old one being loſt ib.
How to be ingroſſed. 509
Judgment-roll to be filed in treaſury. ib.
Form of rule for new roll. 509
How chief clerk reſponſible, if judgment not entered. ib.
No judgment not docketed ſhall affect purchaſers, by ſtat. 4 & 5 W. & M. ib.
Motion to ſet aſide docket of a judgment as void by 4 & 5 W. & M. denied, there appearing no fraud, but that the roll was accidentally miſlaid. 510
Judgment by confeſſion, upon a warrant of attorney, may be entered in vacation, as of the term precedent, though defendant died in vacation. ib.
Roll ought to be brought in before eſſoin-day of ſubſequent term. 511
Poſt terminum roll cannot be filed without leave of court. ib.
Of regiſtering judgments in Middleſex and York. ib.
Form of memorial. ib.

Elegit.

Of the writ of *elegit*, and of executing the ſame. See *Execution*.

Eliſors.

What. 429
When *venire*, &c. awarded to them. 395. ib.

Entries.

Of docketing entries, &c. See *Docket*.

Error.

Want of original, no error after verdict. 216
Writ of error, how it operates as a *ſuperſedeas*, in caſes of execution. See *Execution*. 542

[See Vol. II. tit. *Error*.]

Eſcape

Escape Warrant.

May be executed on a *dies non.* 12

Essoin.

Essoin-day, its derivation. 4
Of the different kinds of essoin. ib.
When and how often allowed. ib.
Of the proceedings thereon. ib.
Of the fourcher by essoin. 5
Essoining nearly exploded. 6
In what cases now allowed, and how to proceed thereon. ib.
Courts still open on essoin day. ib.
Essoin-day first day of term. 7
When judgments relate thereto. ib.
A writ well sued out between essoin-day and *quarto die post.* ib.

Exception.

Day of exception, what. 7
Exception to bail. See *Bail.*

Exchequer.

History of court of. Introd. ix
Exchequer-chamber. ib. xxviii

Execution.

Of the Nature and different Kinds of Execution.

Execution, what. 512
How enforced. ib.
Different writs. 513
Three sorts of execution in personal actions. ib.
Capias satisfaciendum, fieri facias, and *elegit.* ib.
These writs lay for costs of nonsuit 514

When, by whom, and against whom Execution ought to issue; and herein of joint and several Executions. 514

When execution should issue. ib.
How the time to be reckoned. 515
Exceptions to rule. ib.
When delayed by injunction. ib.
Or writ of error. ib.
Otherwise *scire facias* necessary. ib.
If writ sued out, returned, and continued, though not executed, it is sufficient. ib.
One sort of writ so returned, will support a different sort sued out afterwards. ib.
Against whom the writs lie. ib.
How in case of death, where the action is single. 516
In cases of baron and feme. ib.
In case of partners. 517
In popular actions. ib.
In joint actions. ib.
How, if one plaintiff or defendant dies. 518

Into what Places Execution may go, and herein of the Testatum Writs.

Where *capias satisfaciendum* should go, and of the *testatum capias satisfaciendum* 518
Of the *fieri facias,* and *testatum fieri facias.* ib.
What necessary to support *testatum* writ. ib.
How *fieri facias* may be amended and converted into *testatum.* 519
Where *elegit* should issue. ib.
How far necessary to appear a *testatum* in writ. ib.
Of issuing writs of execution into Wales. ib.
Into counties palatine. ib.

Of the Teste, and Return of Writs of Execution, and amending same.

Of the *teste,* if issued out of term. 520
If in term. ib.
Though *teste* before judgment, it may be good. ib.

Of the return, if by bill or original. 520
Of the days between *teste* and return. ib.
If returnable on general return, when it ought to be a day certain, bad. ib.
If tested out of term, void. ib.
If *capias satisfaciendum* returnable out of term only, voidable. ib.
How *alias* writs to be tested. ib.
Writs of execution returnable two terms from *teste*, well, not so in mesne process. ib.
Capias satisfaciendum to fix bail must not be returnable pending error. 521
How writs of execution may be amended, and by what. ib.
There must be something to amend by. ib.

Of executing the Capias ad satisfaciendum.

Capias satisfaciendum the highest writ. 521
Operation thereof. 522
How sheriff must act thereon. ib.
Must keep defendant in close custody. ib.
How, if *capias satisfaciendum* be against several. ib.
Sheriff must not break defendant's house open to take him. ib.
Except at the king's suit. ib.
But he may another man's, if defendant hid there. ib.
Sheriff must not receive the money from defendant, but must take his body. 523
Payment to sheriff not good. ib.
Otherwise to plaintiff's attorney. ib.
Sheriff cannot return that money was paid to him, and afterwards levied under another execution, whilst in his hands. ib.

Of executing the Fieri Facias. 523
Fieri facias, why so called. ib.
What may or may not be seized under a *fieri facias*. ib.
How far sheriff, on sale of a term, can turn tenant out of possession. 524
Money levied by sheriff for defendant may be sometimes retained for plaintiff. 525
Sheriff must be cautious to take the goods of the right person, or liable to an action. ib.
On *fieri facias* defendant may pay sheriff the money. ib.
Or tender it. ib.
And such payment is a good plea. ib.
Though sheriff receives injunction from Chancery to retain the money levied, he must still return the writ. ib.
From what time the goods are bound. 526
Formerly from *teste* of writ. ib.
Now from delivery of writ to sheriff, by stat. 29 Car. 2. ib.
This is only intended as to strangers. ib.
If two writs of same date be delivered, which is to be executed first. ib.
An extent too late after delivery of *fieri facias*. 527
Extent cannot be *ante*-dated. ib.
Of fraudulent executions, by giving preference, and the like, and of the effect thereof. ib.
Of the power of sheriff in making execution under *fieri facias*. 528
As to breaking open chests, houses, &c. ib.
What property in the goods is vested in sheriff by seizure. ib.
How he may execute writ, if defendant dies. 529
Same sheriff who began shall finish execution. ib.
It does not abate by plaintiff's death. ib.
Of sheriff's authority as to selling the goods and how he ought to act therein. ib.
Must sell them, or attempt it. ib.
Cannot keep them himself. ib.
Or let plaintiff have them. ib.

Though

Though he returns goods, remain in his hands at a certain value, he may afterwards ſell them for leſs. 529
But he muſt not value them too high. 530
No appraiſement on *fieri facias*. ib.
If he levies more than debt, he may keep ſurplus till demanded. ib.
An action of debt or *aſſumpſit* lies againſt ſheriff for money levied. ib.
What *returns* ſheriff may make to *fieri facias*. ib.
Nulla bona. ib.
That goods remain on hands for want of buyers. ib.
Sheriff compelled to ſell by *venditioni exponas*. ib.
Need not make bill of ſale at appraiſed value. ib.
Sheriff anſwerable for returned value. ib.
How, if ſheriff goes out of office before goods ſold. ib.
Sheriff may return *nulla bona*, if property were an annuity not properly regiſtered. 531
When court will ſtay goods in ſheriff's hand till diſpute decided. ib.

Of executing the Elegit.

Introduction of *elegit*. 531
Why ſo called. ib.
How ſheriff to act thereon. ib.
Muſt take an inqueſt. ib.
How moiety of lands to be ſet out and delivered. ib.
Inquiſition muſt be certain. ib.
Sheriff cannot give poſſeſſion, but ejectment muſt be brought. ib.
If ſufficient goods, lands muſt not be taken. ib.
Difference between *elegit* and *fieri facias* as to goods. 533
And in their operation. ib.
Sheriff muſt abide by valuation of jury. ib.
Inquiſition muſt be returned and filed. ib.
Not eaſily avoided afterwards. ib.
Court will inquire into it. ib.
What may be extended on an *elegit*. 533
Not copyhold lands. ib.
How ſheriff to execute different *elegits* ſued out. ib.
How, if at ſuit of ſame plaintiff. ib.
How, if *fieri facias* delivered at ſame time. 534

Of the Lien for Rent upon Goods taken in Execution.

Lien created by ſtat. 4 Ann. 534
Only for one year's rent. ib.
Different deciſions on ſtat. ib.
As to notice. ib.
As to what rent entitled. ib.
Not extend to ground landlord. ib.
Action lies by executor of landlord for it. ib.
When too late for lien to operate. 535
Landlord not entitled, if defendant pays debt, and goods not ſeized. ib.
Upon the equity of the ſtatute, ſame lien allowed under commiſſion of bankrupt. ib.
So allowed under a bill of ſale. ib.
What the beſt remedy for landlord in this caſe. ib.
How, if ſheriff's warrant altered. ib.
What declaration need ſtate in an action againſt the ſheriff in this caſe. ib.
How landlord's claim affected, by extent. ib.
Or diſtreſs. ib.
How extent ſhall prevail againſt a diſtreſs. 536

Of iſſuing a ſecond Writ of Execution.

When a ſecond writ may iſſue. 536
The firſt writ ſhould be returned. ib.
After a *capias ſatisfaciendum* there can be no *fieri facias* or *elegit*. ib.
Except in caſe of defendant's death. ib.
So, if lands extended on *elegit*, no other writ afterwards; but if only goods levied, a *capias ſatisfaciendum*, or *fieri facias* may go. ib.

Rule

Rule in cases of execution, as to body and lands not being liable. 537
If party escapes on *capias satisfaciendum*, another may issue. ib.
If on *fieri facias*, only part levied, other writs may go. ib.
But plaintiff must not mark it for part only, and then sue out other writs. ib.
Instance of this in an annuity case. ib.
Rule for taking out execution in judgment on annuity-bond. ib.
First writ must be returned before second issues. ib.
If party escapes on *ca. sa.* another may issue. ib.
Committitur must be abandoned before a second issues. ib.
But if discharged by plaintiff's consent, he cannot be retaken. ib.
So in a joint action. ib.

Of the Sheriff's Fees, Poundage, &c.

No fees at common law. 538
How introduced by stat. ib.
Of the 29 Eliz. c. 4. ib.
Penalty for offending against the statute. ib.
The poundage allowed. ib.
Statute does not extend to towns corporate. ib.
Explanation thereof. ib. *n.*
It only extends to personal actions. 539
Q. Whether it extends to *elegits?* ib.
But by 3 G. 1. c. 15. fees are allowed for executing *elegits*. ib.
And by 8 G. 1. c. 25. for executing extents. ib.
By 29 Eliz. on *ca. sa.* sheriff was entitled to fees on the whole debt. ib.
Abuses introduced thereby. ib.
How remedied by 3 G. 1. c. 15. ib.
Whereby poundage only to be taken for the sum due and marked on writ. ib.
Penalty for taking more. ib.
Remedy to party. ib.
29 Eliz. does not extend to the crown. 539
Nor formerly to actions on bail-bonds in revenue cases. 540
But now otherwise by 7 G. 3. c. 29. ib.
The chief of the above statutes is 29 Eliz. ib.
Action lies thereon against sheriff. ib.
Construction thereof. ib.
How expences of levy to be paid. ib.
In common actions. ib.
In actions for penalties. ib.
Sheriff only entitled to poundage. ib.
No allowance for auctions, &c. ib.
How such things to be paid for. ib.
Sheriff liable to action by party, if it appears he has taken too much. 541
Or to a *qui tam* action for the penalty. ib.
Though parties compromise, sheriff entitled to poundage if he levies under *fi fa.* ib.
Sheriff cannot insist on his fees before execution. ib.
Action lies for sheriff's fees. ib.

Of superseding Execution by Writ of Error, or otherwise.

Allowance of error, *supersedeas.* 542
Use of service thereof. ib.
When bail in error, if required, must be put in. ib.
Writ of error must be returned and signed by chief justice. 543
Former practice as to writ of error being *supersedeas* when sued out before judgment, and judgment not signed till subsequent term. ib.
But now disallowed. ib.
In what cases writ of error will or will not operate as a *supersedeas*. ib.
How, if it appear that it was brought only for delay. 544
Or if brought against good faith. ib.
In what case bankruptcy of defendant operates as a *supersedeas*. 545

Exoneretur.

Exoneretur. 546

Of the *exoneretur* and striking bail out of bail-piece.
Fieri facias. See *Execution.* 513

Eyre, Justices in.

History of. Introd. xi

Feudal System.

History of. Introd. iv

Fines.

History of fines payable on originals. Introd. xl

General Issue.

See *Plea* and *Pleading.*

Habeas corpora juratorum.

Return of *habeas corpora juratorum* in making up issue. 423
Form thereof. See *Jury Process.* 429
Habeas corpora juratorum amendable. 430

Imparlance.

History of imparlance-roll. Introd. lxiv
Imparlance, what. 266
Intent and origin thereof. ib.
Different kinds thereof. ib.
Common or general imparlance. ib.
Special imparlance. ib.
General special imparlance. ib.
How entered on record. 267

Of the Time for applying for Imparlance. ib.

When granted or not. ib.

When imparlance of course, and what time allowed for pleading. 268
If writ returnable last return. ib.
Or returnable one term, and declaration not delivered till next. ib.
Provided defendant be in court. ib.
But not otherwise. ib.
If four terms have elapsed, a term's notice necessary to be given. 269
An injunction, an exception to the rule. ib.
What is a waiver of imparlance. ib.

Injunction.

Where proceedings have been delayed by injunction though for four terms, a term's notice is not necessary. ib.

Insolvent Debtor.

How far liable to arrest. 56
How to get discharged from arrest. 60

Interrogatories.

When necessary to examine witnesses on interrogatories. 447
Ground of application. 448
How leave obtained. ib.
Must be by consent. ib.
How court will relieve if consent withheld. ib.
This mode of examination allowed where witnesses live out of reach of process, by writ of *dedimus.* ib.
If the attendance of witnesses can be procured, depositions must not be read. ib.
How to proceed when rule obtained. ib.
Form of interrogatories for plaintiff and defendant. 449
For cross examination. ib.

Irregularities.

In proceſs, how cured. 99
When to be complained of. 102
Diſtinction between a mere irregularity in the mode or time of proceeding, and a defect in the proceedings themſelves. ib.

Iſſue and Paper-book.

Iſſue, what. 387
How made up. ib.
Difference between iſſue and paper-book. 388
When iſſue made up by attornies in K. B. ib.
Book-ſide of the office, why ſo called. 294
Form of iſſue in B. R. and C. B. 389
Why different as to the memorandums. ib.
Chief diſtinction, when proceedings by bill, when by original. ib.
How to make up iſſue when proceedings by bill. ib.
In what caſes the memorandum varies. ib.
1ſt, How when iſſue joined of the ſame term with declaration. 390
2d, How when cauſe of action ariſes within the term iſſue is joined. ib.
3d, How if declaration be of precedent term to that in which iſſue is joined. ib.
4th, How if declaration be above four terms before iſſue joined. 391
How to make up iſſue when proceedings by original in B. R. or C. B. ib.
How to make iſſue in particular caſes. 392
Different forms of awards of *venire*, where two or more iſſues. ib.
If defendants plead ſeparately. ib.
If in joint action one lets judgment go by default. 393
If iſſue in county palatine. ib.
If on a Welch iſſue. 394
Suggeſtion by Eaſt India Company that ſheriff is intereſted. 394
That he is of kin to defendant. ib.
That ſheriff and coroner are parties. 395
That party died after *venire* iſſued. ib.
Verdict ſet aſide, and *venire de novo* awarded. 396
How iſſue to be engroſſed, indorſed, and charged for. ib.
How to be delivered. ib.
Paper-book how made out, &c. ib.
How charged for. ib.
How delivered, indorſed, returned, and paid for. 397
How if made up by attorney by miſtake inſtead of clerk of papers. ib.

Of ſtriking out Pleadings and demurring, or pleading General Iſſue. 397
How this delay to be prevented. ib.
How ſpecial plea or demurrer ſtruck out, and a general one pleaded. ib.
Rule as to ſame, notice of trial for ſpecial iſſue ſerving for general iſſue. 398
Or for inquiry on demurrer. ib.

Of delivering and returning Iſſues and Paper-books.

In what time to be delivered and returned. 398
If made up in term or within four days after. ib.
If not in term, but within eight days after. ib.
If a London or Middleſex cauſe. ib.
If to be tried at the aſſizes. ib.
How the time to be reckoned. 399
Judgment ſigned, if not returned in time. ib.
Plaintiff may refuſe to receive it, if judgment not ſigned. ib.
To whom iſſue to be delivered. ib.
No judgment can be ſigned for non-payment of iſſue-money. ib.
Rule extends to paper-books and demurrers. ib.

Of

Of Variance between Iſſue and Pleadings, and amending ſame.

Of the memorandum, when it ſhould be ſpecial. 400
How it operates as to a tender made in term. ib.
Iſſue how far amendable. ib.
Memorandum muſt not vary from pleadings. ib.
The words *de placito*, &c. not neceſſary. ib.
If new trial obtained, the memorandum ſhould not be altered, but ſame roll ſhould be proceeded on. ib.
Where there has been a plea in abatement it ſhould be entered on the iſſue. 401
But if omitted on plea roll, it is too late to object after iſſue accepted. ib.
In caſe of any variance, defendant ſhould refuſe to accept iſſue. ib.
Of withdrawing and amending the iſſue. ib.
When new iſſue may be delivered. ib.
Want of *ſimiliter* may be amended after verdict. ib.
Iſſue and *niſi prius* roll amended by plea roll. ib.
Defendant ordered to give plaintiff copy of iſſue to enter it by. 402

Of the Continuances on Iſſue Roll.

Of entering continuances on the roll. 402
Want of continuances in iſſue roll delivered, may at any time be entered on roll. ib.
How entry of continuances is avoided by imparling over from the term in which declaration is to the term in which plea is. 403

Of entering the Iſſue. 403

How to compel entry of iſſue. ib.
When iſſue ought to be entered. ib.
At what time defendant may give rule for that purpoſe. 404
If venue in country. 404
If in *London* or *Middleſex*. ib.
How time of the rule to be reckoned. ib.
If papers miſlaid, court will compel defendant's attorney to give a copy of iſſue. ib.
If judgment for want of entering iſſue, it may be by *nil dicit*. ib.
If no proceedings after iſſue entered, there may be judgment as in caſe of a nonſuit. ib.
When to be moved for. ib.
Whether if iſſue roll brought in any time before judgment actually ſigned, though not in the time of the rule, judgment may be afterwards ſigned. 405

Judgment, Arreſt of.

When and how to move in Arreſt of Judgment. 496

How if moved on laſt day of the term. 497
What to be done on ſuch motion. ib.
Of the rule to bring in *poſtea*. ib.
Or if inquiſition, notice to produce it. ib.
Purport of the rule if obtained. ib.
How to get ſame diſcharged. ib.
If judgment be arreſted, rule drawn up and ſerved, and each party pays his own coſts. ib.
And entry of the adjudication of the court muſt be made on the roll, before plaintiff can either bring error or maintain a new action. 498
For till then the action is pending and pleadable in bar to a new action. ib.

Of the Nature of an Arreſt of Judgment, and to what Courts and Caſes it extends. 498

Cauſes of arreſting judgment muſt be on the face of record. ib.
If it be only deficient, error muſt be brought, and diminution alleged. ib.

Of the power of inferior courts in this reſpect. 498
No arreſting judgment after judgment on demurrer. ib.
Otherwiſe after judgment by default. ib.
How on convictions removed by *certiorari*. ib.

Of the Grounds of arreſting Judgment. 498

Cauſe of arreſting judgment muſt be good ground of demurrer, but not *è converſo*. ib.
For many defects are cured by ſtatutes of jeofails. 499
Alſo by verdict. ib.
In what caſes court will arreſt judgment after verdict. ib.
Every thing neceſſary ſuppoſed to be proved. ib.
Though omitted to be ſtated on record. ib.
Thus a title defectively ſet forth is cured, but not a defective title. 500
Cauſes therefore muſt be ſtronger than mere cauſes of demurrer. ib.
But for manifeſt defects on the face of the record judgment will be arreſted. ib.
As if plaintiff be ſuch as cannot maintain the action. ib.
Or defendant ſuch as cannot be ſued. ib.
Or if different cauſes of action which cannot be joined. 501
Plaintiff ſhould be careful how he records a general verdict with entire damages. ib.
If damages aſſeſſed ſeverally not ſuch danger. ib.
How if he elects a count, and that is bad. ib.
If cauſe brought on by conſent without proceſs, &c. court will afterwards arreſt judgment. ib.
So if there was a plea in abatement, and not entered on record. 502
Of arreſting judgment after judgment by default. ib.
Court not ſo ſtrict. 502
Statutes of jeofails extend to ſuch caſes. ib.
Where defendant means to move in arreſt of judgment for default in declaration, he ſhould not attend inquiry. ib.
How he ought to move. ib.
In treſpaſs, where one let judgment go by default, and the other juſtified, and on trial was acquitted, and damages were aſſeſſed againſt defendant by default, judgment was arreſted. 503
So where ſeparate damages were aſſeſſed on inquiry. ib.

Judgment, Final.

How to be ſigned. 478
Of taxing coſts and ſigning final judgment. 504
Of the rule to attend taxation, notice of taxation, &c. ib.
Of the affidavit for allowance of extra coſts and expences. ib.

Judgment, Rule for.

When to be given. 478
A four-day rule excluſive of the day it is given. ib.
What may be done by the oppoſite ſide pending the rule. ib.
When rule for judgment to be entered. ib.

Of docketing Judgments.

See *Docket*. 505

Of regiſtering Judgments.

See *Docket*. 511

Of Judgment-Roll.

See *Docket*. 500

Jurata.

In *niſi prius* record amendable. 401

Jurisdiction.

Origin thereof in respective courts. Introd. i

Jury.

Origin of trial by jury. Introd. Sec. i
Whence a jury formerly came, and the like. See *Jury Process.* 426
Of challenging the jury. 460
Either party may challenge. ib.
Two sorts of challenge. ib.
Challenge to the array, what. ib.
Grounds thereof. ib.
Challenges to the poll, what. ib.
Grounds thereof. ib.
1. *Propter honoris effectum.* ib.
2. *Propter defectum.* ib.
3. *Propter delictum.* 461
4. *Propter affectum.* ib.
Principal challenge, what. ib.
Challenge to the favour, what. ib.
Of examining a challenged juror on the *voir dire.* ib.
How this practice now disused. ib.
Of the *tales de circumstantibus.* 462
Of the mode of returning a common jury, according to 3 Geo. 2. ib.
How if there has been a *view.* 463
If one juryman personates another, verdict will be set aside. ib.

Jury Process.

Of suing out jury process. 426
Intent thereof. ib.
Whence a jury formerly came. ib.
How altered by statute. ib.
How to proceed in suing out *venire, distringas,* and *hab. cor.* 427
How the writs are to be respectively tested, &c. ib.
Form of *venire.* 428
How if sheriff interested. 429
How if *Welch* issue. ib.
If record carried down by proviso. ib.
Various forms of special *venire's* and suggestions. See *Issue.* 392
History of *distringas* and *hab. cor. jur.* Introd. lxix
Form of *distringas* and *hab. cor. jur.* 429
If in *London.* ib.
If at assizes. ib.
If by original in B. R. 430
How if on traverse of inquisition out of Chancery. ib.
Distringas amendable. ib.
So *hab. cor. jur.* ib.
So *jurat* in *ni. pri.* record. ib.
At what time to be amended. 431
Venire ordered into another county though *venue* not changed. ib.
Venire de novo awarded when jury process was irregular. ib.

Of Jury Process in Counties Palatine.

Record sent by *mittimus.* 431
Suggestion for that purpose. ib.
Form of *mittimus.* 432
Venire and *hab. cor.* made out there. ib.
What actions to be tried in counties palatine, and to what regulations subject. ib.
How far cause of action must arise there. ib.
When the doctrine of sending records by *mittimus* first taken up. ib.
When action arises in *Wales,* what is meant by next *English* county. 433

Jury, Special. See *Special Jury.*

Justicies.

History of writs of Introd. vi

Latitat.

History of, introduction thereof. Introd. xxxix
Form thereof. 65

How

How to be sued out, served, &c. See *Process.* 70
Runs into *Wales.* 78
And to counties palatine. ib.
How sued out in actions bailable. 116

Law Proceedings.

Formerly in Latin; when altered. Introd. lxv

Local Actions.

See *Venue.*

Memorandum.

Memorandum to a declaration, how it should be. 241
To a bill filed against attorney in vacation. ib.
Why different as to memorandums in issue in B. R. and C. B. See *Issue.* 388
Memorandum of warrant, when necessary to be had, &c. 17. 20

Mittimus.

Explanation thereof, when used, form thereof, and the like. See *Jury Process.* 431

Money paid into Court.

The meaning and origin of paying money into court. 277
Of the *manner and time* of paying it, in term and vacation. 278
How to pay money into court. ib.
If a week after the term. ib.
How, if plaintiff accepts the money. 279
How, if he does not. ib.
When it must be paid in. ib.

In what Actions Money may or may not be paid into Court.

The general rule in this respect. 279
In actions of account. 280
Actions on the case. ib.
Covenant. ib.
Debt. 281
—— on bonds. ib.
—— for payment of money. ib.
—— on bonds for performance of covenants. ib.
—— on annuity bonds. ib.
—— on bonds. ib.
—— for paying money by instalments. ib.
—— bastardy bonds. 282
Debt on judgments. ib.
In actions for dilapidations. ib.
Ejectment. ib.
Replevin. ib.
Statutes penal. ib.
Trespass. ib.
Trover in various instances. ib.
General rule. 285
If money paid into court improperly, how irregularity cured. ib.
How a carrier may pay money into court. ib.
Money must not be brought in on some counts, and a demurrer to the rest. 286
But it may on some, and issue taken on others. ib.
What defendant must plead when he pays money into court. ib.
In what cases he may plead double. ib.
Of paying money into court where there are several defendants. ib.

Of the Consequence of paying Money into Court. 287

Of the consequence to defendant. ib.
It is an acknowledgment of the action. ib.
Whether the defendant can in any case, and when, have the money back again. ib.
How, if plaintiff dies. 288

Or

Or defendant dies. 288
Or judgment arrested: ib.
Or money paid by miſtake. ib.
Or in caſes of plaintiff or defedant being executor or adminiſtrator. ib.
Conſequence, as to coſts, if verdict for a leſs ſum than paid in, or a nonſuit. ib.
Though plaintiff be an executor or adminiſtrator. ib.
How, if plaintiff takes money out and diſcontinues. ib.
Form of notice for taking coſts in ſuch caſe. 289
How, if plaintiff proceeds to trial, and juror be withdrawn. ib.
Or if verdict be for the exact ſum paid in. ib.
Or plaintiff be nonſuited. ib.
Exception as to defendants when executors. ib.
Taking money out of court is a waiver of any irregularity by defendant in paying it in. ib.
Ordinary coſts of paying in and taking out paid by defendant. ib.
Except in caſes of oppreſſive action. ib.
Coſts only allowed of the counts money is paid upon. ib.

Of bringing a further Sum into Court.

In what caſes, and under what circumſtances, defendant may pay more money into court. 291.

Of Defendant's refuſing to pay Coſts, and how Plaintiff is to proceed. 291

Plaintiff muſt proceed as if no money had been paid in, but he cannot have an attachment. ib.
But, upon the after-payment of all coſts, proceedings will be ſtopt. 292

Mutual Debts.

See *Set-off.*

Ne recipiatur.

In caſes of eſſoins, 7
See *Trial.* 433
Ne recipiatur in entering cauſe for trial. ib.

New Trial.

See *Trial.* 482

Niſi Prius.

Hiſtory of trials at *niſi prius.* Introd. lxviii
See *Record.*

Nolle Proſequi.

If ſeveral defendants, and they ſever in plea, a *nol. proſ.* as to one may be entered. 362. 425
So if one plead bankruptcy. ib.

Non Omittas Writs.

Of ſuing them out in actions not bailable. *See Proceſs.*

Non-proſs.

If plaintiff does not declare in time, defendant may ſign *non-proſs.* 359

Non-proſs, Judgment of.

Meaning thereof. 359
Of ſigning *non-proſs* for want of declaration. ib.
When to be ſigned and how. ib.
If not ſigned, declaration may ſtill be delivered. 360
Where treaty of compromiſe, plaintiff need not declare. ib.
How if defendant appears without arreſt or ſervice of proceſs. 361

When common bail must be signed to warrant a *non-pros.* 361
When rule to declare necessary to warrant a *non-pros.* ib.
When rule to be given. ib.
When not necessary. ib.
Demand of declaration, when necessary to warrant *non-pros.* ib.
Notice of declaration necessary. ib.
Of *non-pros* for not replying, &c. 362
For not entering issue. ib.
What defendant must do before *non-pros* signed. ib
Of a *non-pros* in a joint action against several defendants. ib.
How if they appear severally. ib.
Or plead separately. ib.
Or if plaintiff declares separately against them. ib.
Of *non-pros* when cause removed by *habeas corpus.* ib.
Of *non-pros* pending an injunction. 363
After outlawry. ib.
Non-pros ordered, plaintiff's attorney not producing his client. ib.
Of costs of *non pros.* ib.
As to executors, &c. ib.
When plaint removed by *re. fa. lo.* ib.
Of explanation of 13 Car. 2. and 4 Jac. 1. as to costs. ib.
Of holding defendant again to bail after *non-pros.* ib.
How if *non-pros* signed irregularly. ib.
Of setting aside *non-pros.* ib.
Refused in a *qui tam* action. ib.
Granted where demand of declaration was of country attorney. ib.
What rules necessary in applications to set aside *non-pros* and actions brought thereon. 364
[For *non-pros* in replevin, see *Replevin*, Vol. II.]

Non-prossing Writ of Error.

See *Error*, Vol. II.

Non-pros, Costs of.

See *Costs*, Vol. II.

Nonsuit.

Of nonsuiting at the trial. 463
What it is, and advantages thereof. ib.
Must be before verdict pronounced. 464
No nonsuit, if neither side appear. ib.
Cause cannot be adjourned after jury sworn. ib.
In what cases plaintiff will be nonsuited. 465
If on undertaking to retain *venue* he does not give evidence agreeable to the rule. ib.
No nonsuit in joint action, where one defendant has let judgment go by default. ib.
Plaintiff need only give evidence to affect the rest. ib.
Of the nonsuit, where record carried down by proviso. ib.
After nonsuit, costs must be paid before second action proceeded in. ib.
Formerly, nonsuit could not be set aside. ib.
But now otherwise. ib.
In what cases court will not set it aside. 466

Nonsuit, Judgment as in Case of.

If no proceedings after issue entered, judgment as in case of nonsuit may be moved for. 404
When to be moved for. ib.
If new trial granted, and plaintiff does not proceed, judgment as in case of nonsuit may be moved for. 494
The nature and meaning of such judgment. 364
When to be moved for, and herein when notice of trial must be given in both courts after issue joined. ib.

How to be moved for, and of the affidavit in such case. 365

What Excuse is sufficient; and of the peremptory Undertaking. 365

Peremptory undertaking admitted of course in C. B. and almost so in K. B. 366
Excuses for not proceeding to trial. 367
Absence of witnesses; insolvency of defendant. ib.
How if plaintiff does not proceed after peremptory undertaking. ib.
Fresh notice of trial must be given. ib.
In C. B. fresh notice of motion for judgment is necessary. ib.
When second excuse admitted. 368
A term's notice not required in moving for this judgment, though no proceedings for a year. ib.

In what Cases Judgment of Nonsuit allowed, or not. 368

Stat. 14 Geo. 2. c. 17. on which this judgment is grounded, explained. ib.
It does not extend to cases where record has been once carried down. 369
Or where either party may in first instance carry it down. ib.
Nor to cases where plaintiff could not be nonsuited at trial. ib.
But it may be had on a *mandamus*. ib.
Or in a *qui tam* action. ib.
But not in writ of right. ib.
How to be obtained in joint actions. ib.
How far plaintiff on a nonsuit is out of court. ib.
How if rule for such judgment be discharged on a false affidavit. ib.
Of writs of error brought on such judgment. ib.
How far a stay of proceeding. ib.
Whether plaintiff can amend proceedings after rule *nisi* for this judgment. 371
Of costs on such judgment. 371

Of Defendant having Judgment as in Case of a Nonsuit, and also Costs, for not proceeding to Trial. 371

How to proceed in such cases, and whether by one motion or two. ib.

Nonsuit in Replevin.

See *Replevin*, Vol. II.

Nonsuit, Costs of.

See *Costs*, Vol. II.

Notice.

Form of notice to appear. 72
How notice to appear to be inserted in copy of process, and how to be filled up, with names, dates, &c. ib.
In what cases necessary. 74
As to the action being under or above 10 *l.* ib.
Notice of bail being put in, how to be given. See *Bail.*
Notice of declaration. See *Declaration.*
What notice necessary, when no proceedings for four terms. 269
Notice of trial. See *Trial.* 405

Ore tenus.

Ancient mode of pleading by. Introd. lxiii.
And when *ore tenus* pleadings were introduced. ib.

Original, Special.

History of the origin of proceedings in B. R. by special original. Introd. xl.

Of the mode of proceeding by original in K. B. 211
Explanation thereof. ib.
Of the fine paid on suing out writ. ib.
How to proceed. 212
If defendant to be arrested. ib.
If only to be served. ib.
Of the *alias* and *capias* writs. ib.
Of defendant's appearance, if not held to bail. ib.
Plaintiff may appear for him. 213
Of putting in special bail. ib.
In what county bail must be put in. ib.
How to put in, except to, and perfect bail. ib.
How to rule the sheriff, &c. ib.
Often expedient, and sometimes necessary, to sue by original. ib.
When expedient. ib.
When necessary. ib.
Debt must amount to 10*l.* 214
In what actions plaintiff may sue by special original. ib.
The reason of proceedings by bill being preferred. ib.
How process by original must be returnable. ib.
Whence original writ issues. ib.
How tested. ib.
Teste must be after cause of action. ib.
Must be fifteen days between *teste* and return. ib.
No limited time for return. 215
How the *alias*, &c. must be tested. ib.
Morrow of Ascension a good return. ib.
Capias may bear *teste* last day of term, though action accrued in vacation. ib.
Sometimes original may be *antedated*. ib.
If defendant not held to bail, he must be served with copy of *capias*, not of original. ib.
With a notice to appear. ib.
Plaintiff must recover 50*l.* to entitle him to full costs. 216
Except in certain cases. ib.
How to amend declaration or original writ. 216
Want of original no error after verdict. ib.
How *nisi prius* record made up, when proceedings by original. ib.
How original to be obtained, in case of judgment by default by original, to prevent error. 505
Which is to be returned and filed. ib.
Formerly doubted whether original would lie in K. B. in debt. Introd. xxxvii.

Oyer.

Not now allowed of the original writ. 87. 261
Whenever deed pleaded, profert must be made, or reason shewn. 261
If a profert, *oyer* not to be dispensed with. ib.
In what cases no profert required. 262
But the pleadings may be according to the fact. ib.
Or declaration may be amended, and profert struck out. ib.
Which fact may be denied by the adverse party. ib.
Oyer not given; if profert made unnecessarily. ib.
So, if defendant be party to the deed. ib.
How, if deed be in the hands of a third person. ib.
Or in defendant's possession. ib.
Or lost, *and there is a counterpart*. ib.
Oyer of letters of administration. ib.
But not of a record. ib.
How, if granted, though not entitled to it. 263

Of the Time and Manner of demanding and giving Oyer, and the Consequences of refusing it. 263

When *oyer* to be demand. ib.
If not in time, it is a nullity, and judgment may be signed. ib.

What

What time allowed to plead, &c. after *oyer*. 263
Conſequence of refuſing *oyer*. ib.
What time allowed to give *oyer* in. ib.
Which party to carry it to the other. 264
Manner and form of demanding *oyer*. ib.

How the Deed muſt be ſet out on Oyer, and of the Uſe of craving Oyer. 264

The whole muſt be ſet out. ib.
Unleſs ſet out in declaration, ib.
Conſequence, if purpoſely ſet out falſely. 265
Defendant ſhould not accept imperfect *oyer*. ib.
Of the uſe of craving *oyer*. ib.

Oyer and Terminer.

Conſtruction of that. ſtat. Edw. 1. Introd. lxx.

Paper-book.

See *Iſſue*. 387

Paper-days.

Tueſdays and Fridays. 341
Cauſes argued in turn. ib.

Parliament.

Hiſtory of it as a court of appeal. Introd. xx.

Placita.

Reaſon thereof, and difference therein in the two courts. Introd. lxxii.
Form thereof on removing of C. J. in term. 423 *n*.

Plea and *Pleading.*

Of pleading in abatement. See *Abatement*. 270

Of pleading in Bar.

Of the Time of pleading.

Within what time defendant ſhould plead to declaration. 292.
If plaintiff declare in chief. ib.
If *de bene eſſe*. ib.
If defendant entitled to imparlance. ib.
See *Imparlance*.
If defendant's reſidence in Scotland, but arreſted in England. 293
How the time for pleading is reckoned. ib. 227
Conſequence of defendant not pleading in time. 228
If four terms are elapſed, term's notice neceſſary to be given. 301
How, if two defendants, and one does not appear in time. 293
No plea in a bailable action before bail perfected. ib.

Of pleading the General Iſſue.

General iſſue, what. 293
How to be pleaded. ib.
Need not be ſigned. ib.
What pleas tantamount thereto. ib.
Comperuit ad diem, nul tiel record, ſolvit ad diem, need not be ſigned. ib.
How ſuch pleas muſt be delivered, not entered nor filed. 294
Diſtinction as to theſe pleas. ib.

Of pleading ſpecially.

How ſpecial plea to be pleaded. 295
Muſt be ſigned. ib.
Otherwiſe judgment. ib.
How, if two defendants, one pleads general iſſue, and the other a ſpecial plea not ſigned. ib.
Special plea muſt be made up by clerk of papers. ib.

Consequence otherwise. 295
How to proceed as to replication. ib.

Of pleading double.

Rule for that purpose. 296
Of the manner and time of pleading double in B. R. in C. B. ib.
Judgment may be signed if no rule. ib.
What double pleas in C. B. allowed on first motion. ib.
How to apply for rule, &c. to plead double in vacation. 297
Double pleas must be signed. ib.
Motion to plead double not to be made till defendant has appeared. ib.
It may, after judge's order. ib.
Not after payment of money into court. ib.
It may, after rule to plead expired. ib.
The origin of pleading double, 4 Ann. c. 16. ib.
Construction of the statute. 298
To what actions it extends. ib.
Discretionary power in the court. ib.
Formerly more strict, now only refused if pleas inconsistent. ib.
What pleas bad on that ground. ib.
In K. B. and in C. B. 299
Of the certificate given by the statute, as to costs of issues found against defendant. 299
When certificate to be made. 333
[See further, Vol. II. *Costs.*]

Of the Rule to plead.

Meaning thereof. 300
Of the form thereof. ib.
How to be served. ib.
How the time reckoned. ib.
How, if four terms are elapsed. 301
Where rule to plead not necessary. ib.
How it may be dispensed with. ib.
Where a new rule necessary, or not. 302
When rule should be served. ib.
How, if defendant die before time expires. 302
Not necessary after a judge's order for further time. 311

Of demanding a Plea.

Necessity thereof. 302
How to be made in writing. ib.
Form thereof. 303
Whether good, made on back of declaration. ib.
When to be made. ib.
When no occasion for demand. 304
When it is a waiver of bail. ib.

Of searching for Plea, and signing Judgment for want thereof.

Where and when to search. 304
If none found, when judgment may be signed. 305
Whether plea may be afterwards put in, if judgment not signed. ib.
Whether it extends to replications and other pleadings. ib.

Of procuring Time to plead.

How to procure time. 306
In what cases granted. ib.
Of the length of time usually allowed. ib.
When the summons is to be taken out. 307
The effect thereof, as to staying proceedings. ib.
Of the terms on which time is granted. ib.
If defendant is an executor or administrator. ib.
What are issuable pleas within a judge's order. 308
As to pleas in abatement. ib.
Coverture. ib.
Tender. ib.
Plea of stat. 23 H. 6. ib.
Performance. ib.
General issue, and statute of limitations. ib.
Judgment recovered. ib.
Judgment confessed. ib.

Demurrer

Demurrer general. 308
But defendant cannot put in a special demurrer, 7 D. & E. 530
Of the consequence of defendant's pleading a plea not within the order. 310
Judgment may be signed. ib.
Of signing judgment at the expiration of the order. ib.
How the time reckoned. ib.
Rule to plead not necessary. 311
When time has been obtained. ib.

Of moving to abide by the Plea.

Use thereof. 311
How to be done in term. ib.
In vacation. 312
How, if order not obeyed. ib.
When to plead *instanter*. ib.
Of the costs. ib.
If no new plea, the first stands. ib.
What to be pleaded after such rule or order. ib.

Pledges.

History of, to prosecute. Introd. xlviii
Introduction and reason thereof. ib. ib. xlix
Difference of practice in the two courts respecting them. ib. l
Introduction of fictitious pledges. ib. li

Pluries Writs.

In actions not bailable. See *Process.*

Pone.

Writ of, history thereof. Introd. xlvi

Postea.

Use and operation thereof. Introd. lxxiii
Its purposes, and why so called. 479
Verdict recorded thereon. ib.
By whom. ib.
To whom *postea* delivered: 478
By whom *postea* kept till special case determined. ib.
After trial at sittings, *postea* delivered to attorney, who indorses verdict thereon. ib.
After trial at assizes, *postea* kept by associate till the next term, and he indorses it. ib.
Of the rule for judgment on *postea*. See *Judgment*, Rule for.
How *postea* to be got stamped. ib.
Of the *deliberatur* to be marked thereon. ib.
Form of *postea*. 479
Of the special entry thereon, if judge dies after assize and before term. 480
Of the rule to bring *postea* into court on moving to arrest the judgment. 497

Of altering and amending the Postea.

In what cases amended by judge's notes. 480
If wrong damages by mistake marked thereon. ib.
If verdict general and not entered on all the issues. ib.
If verdict entered generally when one count is bad, provided no evidence given on that count. ib.
But not if evidence was given thereon. ib.
This distinction disapproved of by Lord *Mansfield*. 481
Postea not amended to increase damages. ib.
Nor verdict altered contrary to apparent intention of jury. ib.
If verdict be for greater sum than laid in declaration, *remittitur* may be entered. ib.
At what time amendment to *postea* to be moved for. 482
Whilst record is in court. ib.
Postea lost, a new one ordered. ib.

Præcipe.

History of origin thereof. Introd. xlv
The nature, use, and form thereof in suing out process in actions not bailable. 68
How entered by filazer in C. B. 69

Privilege from Arrest.

See *Arrest.*

Process.

History of process in K. B. Introd. Sec. ii.
History of process in C. B. Introd. Sec. iii.
History of the process by bill. Introd. xxxviii

Of the Process in Actions where Common Bail only is required. 62

How regulated by different statutes 12 Geo. 1. 2 Geo. 2. and 5 Geo. 2. ib.
The process and its incidents, with a copy of which defendant is to be served. ib.
The forms of the different kinds of process. 65
How to sue out process in both courts. 68
Of suing out bill of *Middlesex*, *latitat*, *capias*, &c. 70
With the *alias's*, *pluries*, and *non omittas's*. 71
How *pluries* writs to be continued. ib.
Copy of process to be served. 72

Of the Notice to appear to be inserted in the Copy of Process. 72

Intent and form thereof. ib.
How to be filled up with names, day of appearance, &c. ib.
In what cases necessary, 74
How process to be indorsed with the attorney's name. 76

Of the nature and extent of process. 77
Bill of *Middlesex* not to be served out of county. ib.
Latitat may be served in any. 78
Runs into *Wales*. ib.
And to counties palatine. ib.

How Process to be directed. 78

Of filling up the Process with Names of Parties, Cause of Action, &c. 79
Of the description of plaintiff therein. ib.
And of the character in which he sues, &c. ib.
Of the description and number of defendants. 80
When only four in a writ. ib.
How cause of action to be expressed in process. 81
How if against bail on recognizance. ib.

Of the Teste and Return of Process. 81

Bad if a term intervene. 83
Or if tested in a wrong year. ib.
No need of filazer's name to *capias*. ib.
How subsequent and former process, as an *alias* and *pluries* writ, should agree. ib.
At what time bill of *Middlesex*, *latitat*, or *capias* may issue. ib.
When to be considered as commencement of the suit, or as process. ib.
How far the exact time of suing out the writ may be shewn contrary to the *teste*, and what shall be deemed the commencement of the suit. ib.
Of pleading the *latitat* and *capias*, and in what cases an original bill or writ is necessary. 87
When the return of the writ should be proved. ib.

Of the Service of Copy of Process on Defendant. 88

What kind of copy of process should be served. ib.

By

By whom it ſhould be ſerved, as in liberties and the like. 89
Of the manner in which proceſs is to be ſerved. ib.
Of the time when it is to be ſerved. 90
Of the places where it is to be ſerved. ib.
How if proceſs be againſt ſeveral defendants. ib.
How if againſt huſband and wife. ib.
Of the puniſhment of defendant if he treats proceſs with contempt. 91
Of defendant's appearance according to proceſs. ib.

Of Defects and Irregularities in Proceſs. 99
How far the courts will amend proceſs. ib.
How defects or irregularities in proceſs cured. 100
Whether by defendant's appearance. ib.
Or by plaintiff's appearing according to ſtatute. 101
Or by accepting declaration. ib.
How defects or irregularities in proceſs to be taken off. ib.
At what time to be complained off. 102

Of the Proceſs or Writs in Bailable Actions. 115
How to ſue them out. ib.
Officer muſt ſet down day and year of ſigning writs. 119
Cuſtos brevium muſt mark them. ib.
What action will lie, if void proceſs be ſued out. ib.
Defects in proceſs, how cured by declaration. 101
Or by not applying in time. ib.

Profert.

When to be made. 261
When to be diſpenſed with. ib.
See *Oyer*.

Proviſo, Trial by.

In what caſes to be had. 416
Why ſo called. ib.
Of the ſtat. 7 & 8 W. ib.
Formerly uſual remedy. ib.
Now ſuperſeded by 14 Geo. 2. ib.
But not in all caſes. ib.
When trial by proviſo ſtill neceſſary. 417
If both parties are actors. ib.
If record once carried down. ib.
Though cauſe made a *remanet*. ib.
Or verdict had and ſet aſide. ib.
Rule for trial by proviſo. ib.
When to be obtained. ib.
No rule in criminal caſes. ib.
Otherwiſe in civil. ib.
What notice of trial neceſſary. 418
How, if both parties give notice. ib.
Court on motion will ſuffer defendant to carry down record to try iſſue out of Chancery. ib.
Of the *venire* and jury proceſs when cauſe carried down by proviſo. 429
On what record to proceed when both parties carry it down by proviſo. 435
Of the nonſuit where record carried down by proviſo. 465

Quare clauſum fregit.

Hiſtory of proceſs by ſummons and diſtreſs. Introd. xlvi
Of proceeding by original *quare clauſum fregit* in C. B. 216
The meaning thereof. ib.
How to proceed therein. ib.
Memorandum of warrant. 217
Præcipe for *curſitor*. ib.
How to get original writ and ſummons. ib.
When and how defendant ſhould appear. ib.
Præcipe for appearance. ib.
If defendant does not appear, how to proceed by *diſtringas*. ib.
By *alias diſtringas*. 218

How to increase issues. 218
Of the *pluries distringas*. ib.
How to apply the issues. ib.
Of the motion in court upon 10 G. 3. c. 50. ib.
Which extends to all writs of *distringas*. ib.
When defendant must appear, and how the days are reckoned. ib.
After appearance, proceedings as in other cases. 219

Qui tam Actions.

See *Actions, Penal*, Vol. II.

Recognizance, Proceedings on, against Bail.

See *Bail*, Vol. II.

Record, Courts of, and not of.

See Introd. Sec. i.

Record.

Of making up record for trial. 422
How *nisi prius* record made up, if a country cause. ib.
Of the return of *distringas* and *hab. corp. jurat.* 423
How record made up in town cause. ib.
How, when proceedings by original in B. R., or by bill in C. B. 424

Of passing the Record. 424

All pleadings must be entered on record. 425
If several defendants, and they sever, a *nol. prof.* may be entered. ib.
So if one plead bankruptcy. ib.
If one die, it must be suggested on record. ib.
How, if there be a variance between issue and *nisi prius* record. ib.
See *Issue*. 339

Record, Trial by.

What matters of record pleadable. 382
Nul tiel record proper to a misrecital of an act of parliament. 383
The record may be of the same or different court. ib.
Form of replication in both cases. ib.
What day given to bring in record. ib.
Plea need not be signed. ib.
Consequence of failing in producing record. ib.
When produced on *oyer* or demand. 384
When judgment is peremptory or interlocutory. ib.
Nul tiel record bad, if *profert* made. ib.
How if matter of record be mixed with matter of fact. ib.
Of the operation of the record when produced. ib.
When to be produced by *certiorari* and *mittimus*, if record of another court. ib.
Court of K. B. will not interfere in a summary way. 385
How if record be of county palatine or inferior court. ib.
Certifying tenor of record sufficient. ib.
How to proceed when the other side is to produce the record. ib.
How when the record is to be produced by yourself. ib.

Reference at Nisi Prius.

How made, and what done in consequence thereof. 466
How to enlarge time by consent. ib.
What to be done when the award is made. 467
How if party refuses to obey it. ib.
How as to costs. ib.
Of references at *nisi prius*, where verdict is taken for security. ib.

Reason

Reason thereof, and how to proceed. 468
Where award made, plaintiff may at his election proceed on verdict or award. ib.
If plaintiff proceeds on verdict, there must still be affidavit of due execution of award, &c. ib.
Stat. of 9 & 10 W. does not extend to awards made under references at *nisi prius*. ib.
Attachment only a civil execution. 469
The party ought not to be taken on Sunday. ib.
Party may be discharged on Lords' act. ib.

Registering Judgments.

See *Docket*. 511

Rejoinder.

See *Replication*.

Relicta Verificatione.

See *Confession*.

Remanet.

How, if cause made *remanet* in town. 435
How, if in the country. ib.
What to be done in consequence thereof, as to altering *jurata*, &c. ib.
How as to costs in case of *remanet*, or the cause going off on other grounds. ib.

Remittitur Damna.

If verdict be for greater sum than laid in declaration, *remittitur* may be entered. 481

Render.

In discharge of bail. See *Bail*.

Repleader.

A repleader, what. 503
Of awarding a repleader. ib.
Consequences thereof. 504

Replication, Rejoinder, &c.

How to reply, rejoin, &c. 295. 313
When. 313
Of the rule to reply, and when judgment may be signed. ib.
How, if four terms elapsed. ib.
When rule to be served. ib.
How, if further time wanted. ib.
No rule necessary when plaintiff adds *similiter*, and it is not struck out. 314
When plaintiff may add *similiter*. ib.
If no rejoinder, plaintiff may enter judgment as for want of a plea. ib.
Rejoinder may be refused after rule out, though judgment not signed. ib.
Whether replication, rejoinder, &c. may be filed or delivered after time out, but not before judgment signed. 305

Rescue.

Of defendant being rescued after an arrest. 134

Retorna Brevium Day.

See *Terms* and *Returns*.

Retraxit.

See *Confession*.

Return.

Of the *teſte* and returns of proceſs. 81
How far *capias* muſt have 15 days between *teſte* and return. ib.

Reviving Judgmemt.

See *Scire Facias*, Vol. II.

Rolls.

See *Docket, Entries.*

Rule to plead.

See *Plea* and *Pleading.* 300

Rule to reply, rejoin, &c.

See *Replication.* 313

Rule for Judgment.

See *Judgment.* 478

Sailor.

How far protected as to arreſts. 52

Satisfaction.

Of entering ſatisfaction on the roll. 545
Uſe thereof. ib.
How to be entered. 546
Form of entry. ib.

Scire Facias.

When neceſſary to revive judgment. 515

N. B. The general doctrine of *ſcire facias* is treated of in the Second Volume.

Service of Proceſs.

See *Proceſs.* 88

Set-off.

No ſet-off at common law. 321
How given by ſtatute. ib.
Of the demands and actions within the ſtatute of ſet-off. 322
Remedy of ſet-off extended. ib.
In affidavits to hold to bail. ib.
So as to coſts and judgments which are now on motion ſet off one againſt another, and execution ſtayed, as payment of balance. 323
A ſeparate judgment ſet off againſt a joint one. ib.
Juriſdiction of court not affected by ſet-off reducing debt. ib.
One part of ſet-off may be good, though not another. ib.
No ſet-off in actions founded on torts. ib.
But to an avowry for rent tenant may plead payment of ground-rent. ib.
Set-off muſt be for liquidated demands. 324
Not for damages unliquidated. ib.
Nor for penalties for breaches of agreement, unleſs by way of ſtipulated damages. ib.
Simple contract debts ſet off againſt ſpecialties. ib.
How to plead ſet-off in actions on bonds. ib.
Real ſum due muſt be ſhewn. ib.
How far it extends to bail-bonds. ib.
Set-off pleaded though action brought for the debt ſet off. 325
How ſuch plea operates in croſs actions. ib.
Judgment ſet off pending error. ib.
Judgment ſatisfied by freſh ſecurity given, and cannot be ſet off. ib.
Debt barred by ſtatute of limitation cannot be ſet off. ib.
Of the parties between whom there may be a ſet-off. 326
How mutual credit may ariſe. ib.

Of

Of set-off in case of bankruptcy. 326
In cases of executors. 327
In cases of partners. ib.
Of demands in right of a man's wife. 328
A retainer in certain cases need not be set off, but may be given in evidence. ib.
Of set-off in cases of factors and principals. ib.
Form of notice of set-off. ib.
Debt set off must be due at commencement of suit. 329
General issue withdrawn and pleaded with notice of set-off. ib.
Of the certainty requisite in such notice. ib.
Notice of set-off not amendable. ib.
But may be withdrawn, and pleaded *de novo*. ib.
Plaintiff may by summons know particulars of set-off. ib.
When necessary to pay money into court on pleading set-off. 330

Sheriff.

His fees upon an arrest. 124
As to his conduct in making an arrest, &c. See *Arrest*. 121
He may let defendant go without bail at his own risk. 128
Of his taking the bail-bond, and the like. See *Bail*. 127
Of the statute 23 Hen. 6. ib.
See *Bail*.

Of ruling the Sheriff to return the Writ. 190
Explanation of this mode of proceeding. ib.
How to rule the sheriff to return the writ. 191
Cannot rule sheriff after assignment of bail-bond. 194
Provided it be a valid one; otherwise if it be void. 195
Court will enlarge the rule till question on validity of assignment be determined. ib.
Sheriff not bound to return writ when special bail appointed. 195
When rule to return writ must be sued out. ib.
How to be served. 196
How original rule to be produced and shewn. ib.
Form thereof. ib.
Of the time allowed thereby to return writ. ib.
Must be returned punctually on the last day. 197
How to proceed if bail below become bail above in B. R. ib.
What sheriff must do on such rule. ib.

Of ruling Sheriff to bring in the Body.
What must first be done. 197
Exception must be made to bail if put in. 198
And that must be done regularly. ib.
The intent of the rule to bring in the body. ib.
Sheriff not to be ruled to bring in the body till the day after expiration of the rule to return writ. 197
What sheriff must do thereon. 199
Must put in and perfect bail. ib.
Formerly they justified *de bene esse* before a judge, but now otherwise. ib.
Within what time sheriff must justify. ib.
He may put in and perfect bail without defendant's consent. 200
Although defendant has escaped. ib.
But not if he be in actual custody. ib.
Sheriff must bring in the body, though he goes out of office before expiration of rule. ib.

Of moving for an Attachment against the Sheriff, and of the Nature and Operation thereof. 200
It is a criminal process. ib.
How to be moved for. 192

When

When to be moved for. 200
Formerly motion for an attachment was on the crown side, and intitled *The King*, &c. but now until the attachment *issues*, it should be intitled in the *cause* on the *civil* side. Wood and Webb, 3 D. & E. 352.

[See the practice settled by the late cases, in Vol. II. of this work, Ch. XVII. Sec. vi.]

Against whom attachment will lie. 201
When granted. ib.
How to be directed. ib.
Of the affidavit necessary to support the rule. ib.
It may be moved for on last day of term. 202
No attachment unless the bail put in is excepted to. ib.
Except they be put in after rule served. ib.
The operation of the attachment. ib.
How far sheriff liable. ib.
In what cases the attachment will be set aside, or proceedings stayed against the sheriff. ib.
When defendant may be let in, to justify and try the cause after sheriff is fixed. ib.
Of the terms in such cases, and of the attachment standing as security. 203
Same principle governs as in staying proceeding on bail-bond. ib.
Affidavit of merits expected. ib.
Attachment not set aside if sheriff has been in fault. 204
Or if he neglect to apply to court in due time. ib.
Or to perfect bail before he moves to set it aside. ib.
No attachment if plaintiff has been irregular. 205
How far sheriff liable on deficiency of bail who were good when first taken. ib.
Defendant's death does not stay attachment if sheriff be in contempt. ib.
Of proceeding against the *coroner* to return the attachment. 206
Of proceeding against the sheriff *when out of office* to return the writ or bring in the body. ib.
Must be called upon within six months by 20 Geo. 2. c. 37. ib.
Construction of that act. 207
Attachment, the usual mode of proceeding now in both courts. ib.
Formerly in B. R. proceedings were by *distringas*. ib.
The rules must be served on the late sheriff. 208
Mode of proceeding by *distringas*. ib.
How the issues to be applied. 209

Of the Duty and Conduct of Sheriff in making Execution, and of his Fees, &c.

See *Execution*.

Soldier.

How far protected as to arrests. 52

Special Jury.

Introduction of special juries. 436
Now to be had in any case, but unless judge certifies, costs not allowed. ib.
Of the statute 3 Geo. 2. c. 25. and 24 Geo. 2. c. 18. ib.
Of their operation. 438
How to get special jury. 437
When to be moved for, or it will be too late. 438
How in C. B. ib.
How in B. R. ib.
How master may proceed *ex parte* to strike special jury. 439
Same jury may serve though sheriff changed. ib.
If after a special jury struck the cause goes off for default of jurors, no new jury can be struck, but the cause must be tried by the jury first appointed. ib.

Subpœna.

The proceſs to compel witneſſes to appear at trial. 450
Form of ſubpœna. ib.
Four witneſſes may be put in. ib.
How to be teſted. 451
How filled up. ib.
Subpœna ticket, how ſerved. ib.
Form of ticket. ib.
Of ſubpœna *duces tecum*. 452
Form thereof. ib.
How far obligatory. ib.
When a notice only to produce papers is ſufficient. ib.
How witneſs in cuſtody to be brought up. ib.
Affidavit to obtain *habeas corpus*. ib.
Neceſſity thereof. 453
Habeas corpus, how ſigned. ib.
Who may or not be brought up thereby. ib.
Priſoners of war. ib
Sailors. ib.
Priſoners in execution. ib.
Reaſonable time allowed witneſſes for their attendance. ib.
If in court he may be then ſerved with ſubpœna. ib.
Even though defendant's attorney. ib.
Subpœna muſt be perſonally ſerved. ib.

Of the Expences of Witneſſes.

Expences muſt be tendered. 454
Muſt be ſufficient. ib.
When tender muſt be made. ib.
Conſequence of neglecting it. ib.
Contingent loſſes not allowed in coſts. ib.

Of the Remedy againſt Witneſſes in Caſes of Diſobedience.

Two modes by attachment and action. 454
How by attachment. ib.
How by action. 455

Suggeſtion on Record.

If one of defendants die after iſſue, and before trial, how it is to be ſuggeſted on record. 395
When there is a ſpecial ſuggeſtion in *venire* and jury proceſs. 394

See (for forms thereof) *Iſſue*. 392

Summons.

Hiſtory of proceedings by ſummons and *diſtringas*. Introd. xlvi
So taken out to know particulars of defendant's ſet-off. 329

Superſedeas.

See *Execution*. 543

Surrejoinder.

See *Replication*.

Surrender.

In diſcharge of bail. See *Bail*.

Tales de Circumſtantibus. 462

See *Jury*.

Tales, octo Decem, &c. 461

Tender.

To whom tender to be made. 314
How to be made. 315
What a good tender. ib.
In what actions a tender may be pleaded. 316

How,

How, in case of joint demands. 316
Pleadable to a *quantum meruit*. ib.
Not in debt on bond. ib.
Nor to voluntary trespasses. ib.
But otherwise to involuntary ones. ib.
So in replevin for damage-feasant. ib.
How to an avowry for rent. 317
How in trover. ib.
Often allowed by particular statutes. ib.
In actions against justices. ib.

When and how to be pleaded, and of the Consequences thereof to the Parties in the Suit. 317

At what time to be pleaded. ib.
Not after imparlance. 318
As of same term with declaration. ib.
After demurrer. ib.
How to be pleaded. ib.
Of the *uncore prist*. ib.
How, if fresh demand made. 319
It must be with a profert of the money. ib.
How money to be paid into court on such plea. ib.
Of taking the money out. ib.
How, as to the costs. 320
After money brought in, defendant cannot withdraw his plea and plead general issue. ib.
How plaintiff to act, according as he admits the tender or not. ib.

How Defendant may avail himself of the true Time of the Tender, though subsequent to Teste of Writ, or the like. 320

The exact time of suing out writ may be shewn in pleading. ib.
How, if tender made same day bill filed, though before filing thereof. ib.
General memorandum altered according to true time of filing bill. 321

Terms and Returns.

A table of the terms and returns. 30
Terms, what. 1
Their derivation, origin, &c. 2
Fixed and moveable. ib.
Issuable terms. ib.
Of the particular days in the terms. 3
Which deemed the first day in term, ib.
Term deemed as one day, except in particular cases. ib.
Returns, how regulated formerly. 7
How altered by subsequent statutes. 8
General returns. 9
Particular returns. ib.
When and how respectively used. ib.
What writs returnable on general returns. 10
What on particular returns. 11
Of the *teste* and return of process. 89

Teste of Writs.

When there should be fifteen days between *teste* and return. 81
Of the *teste* and return of the different process. ib.
Of the *teste* and return of writs in proceedings by special original. See *Original*. 214
Teste and return of writs of execution. See *Execution*. 520

Time.

When process to be served. 90
How time reckoned for filing common bail and entering appearance. 95
When defects and irregularities in process to be complained of. 102
How reckoned for putting in bail above, in town and country. 143

Of

Of the time of excepting to bail. 150
Of declaring. See *Declaration.*
Of pleading. See *Pleading.*
How time reckoned under judge's orders, and the like. 310

Transitory Actions.

See *Venue.*

Trespass on the Case.

History thereof and process therein. Introd. xxxiii

Trial, Notice of.

What notice necessary in town causes. 405
New rule in C. B. as to city causes. 406
Statute 14 G. 2. c. 17. explained. ib.
How governed by defendant's residence. ib.
Fourteen days, if beyond forty miles. 407
Or abroad in Ireland or India. ib.
All defendants must be so resident. ib.
How distance computed. ib.
What notice necessary in country causes. ib.
How notice reckoned. ib.
Sunday, how reckoned. ib.
What notice; if under terms to take short notice. ib.
A term's notice where no proceedings for four terms. 408
But not, if any proceedings have been had. ib.
What shall be deemed a proceeding. ib.
Nor if cause delayed by defendant's request. ib.
Or by injunction. ib.
Or by special agreement. ib.

When Plaintiff is compelled to give Notice of Trial.

In B. R. not till next term after issue joined. 409
In C. B. otherwise. ib.
Notice necessary, though day fixed for trial. ib.
Or plaintiff has undertaken peremptorily. ib.

Of the Form of the Notice, and to whom to be given. 409
May be given on piece of paper, or on back of issue. ib.
No precise form requisite. ib.
Not so strict in form, if on issue. ib.
When plaintiff may give notice on the pleadings, and for what it shall serve. 410
To whom notice to be given. ib.
When to defendant's attorney. ib.
When to defendant himself. ib.
When to his agent. ib.
Attorney must acquaint his client thereof, or attachment will go. ib.

Of continuing Notice of Trial.

Its origin. 410
Its operation. 411
When continuance can be given. ib.
How operate as fresh notice. ib.
No continuance a second time. ib.
At what time to be delivered. ib.
Cannot continue after countermand. ib.
A good continuance of a bad notice of trial will not avail, though a former good notice of trial had been given. ib.
Form of continuance. 412

Of countermanding Notice of Trial.

When to be countermanded. 412
Different from the old practice, ib.
How the days reckoned. ib.
Not given on Sundays. ib.

Whether Saturday for Monday good. 412
To whom to be given. ib.
Form of countermand. ib.
What a waiver of an irregular notice. 413
When new notice neceſſary, or not. ib.
Not if cauſe made a removal. ib.

Of Coſts for not proceeding to Trial. 413
How far court will ſtay proceedings on freſh notice till coſts of firſt are paid. ib.
In what caſes, and by whom coſts to be paid. ib.
Executor liable. ib.
When coſts not allowed, if a countermand. ib.
If any reaſonable excuſe. 414
If cauſe be a *remanet*. ib.
A pauper not liable. ib.
How to proceed for coſts for not going to trial. ib.
Form of affidavit. ib. *n.*
How the rule may be drawn up. 415
By whom affidavit to be made. ib.
What it muſt ſtate. ib.
May be amended. ib.
Where court will ſtay proceedings till coſts of former notice paid, and not compel defendant to ſue out attachment. ib.
Attachment for coſts, abſolute in firſt inſtance. ib.

Of carrying down the Record by Proviſo. 416
See *Proviſo*.

Of putting off the Trial.
When it may be put off. 418
Abſence of witneſs uſual ground. ib.
Of the affidavit in ſuch caſe. ib.
What it muſt contain. ib.
It muſt be ſworn witneſs is material. 419
Party muſt have been guilty of no laches. ib.
There muſt be a reaſonable expectation of his return, if abroad. 419
How, if gone abroad for any length of time. ib.
How, if any ſuſpicion in the caſe, who may make the affidavit. 420
When motion to be made. ib.
Two days before trial. ib.
Exception thereto. ib.
To what time trial generally put off. ib.
Affidavits read, though not taken before a commiſſioner. ib.
For what other cauſes trial will be put off. 421
Illneſs of attorney. ib.
How to proceed in obtaining rule to put off trial. ib.
Form of notice of motion. ib.
Form of affidavit. ib.
How to proceed thereon. ib.

Of entering Cauſe for Trial.
If in London or Middleſex. 433
In term, or after term. ib.
Of the *ne recipiatur*. ib.
When to be entered in London or country cauſes. ib.
How cauſes, when entered, to be tried in order. 434
At what time cauſes to be entered at aſſizes. ib.
Longer time allowed in Norfolk and Yorkſhire. ib.
Liſt of cauſes when entered, to be ſtuck up in court. ib.

Trials at Bar.
Formerly, the uſual mode of trial. 456
How fell into diſuſe. ib.
Only continued in caſes of difficulty. 457
What, and how obtained. ib.
Diſcretion of court to grant it. ib.
What ſufficient ground for it. ib.
When moved for by affidavit. ib.
When no affidavit neceſſary. ib.

Terms impoſed on granting it. 457
Whether allowed in iſſuable terms. ib.
Or if venue be in London. ib.
Or in county palatine. 458
Not granted the ſame term moved for. ib.
Nor till iſſue joined. ib.
Except in ejectment. ib.
Muſt be moved for in court. ib.
Of countermanding notice. ib.
Of obtaining a ſecond rule. ib.
How many days notice of trial neceſſary. ib.
How to be entered for trial. ib.
Of delivering copies of iſſue to judges. ib.
New trial after trial at bar. ib.
How, if jury do not attend trial. ib.
Of the *decem tales*, &c. ib.

Of preparing Briefs and attending at Trial.

Of the brief. 459
Of the attendance of the parties. ib.
How, if attorney abſent. ib.
No excuſe for non-attendance. ib.

New Trial.

The nature and origin of new trials. 482
Difference between the grounds for new trial, and in arreſt of judgment. ib.
Utility of new trials. 483
Writ of attaint out of uſe. ib.
Beſides which, it is inefficacious. ib.
New trials neceſſary to juſtice. ib.
How coſts paid in ſuch caſes. ib.
When firſt new trial granted. ib.
Court formerly ſtrict therein. ib.
Gradually became more relaxed. 484
Reaſons for granting new trial. ib.

When and how to move for new Trial. 484

At what time to be moved for. ib.
How. ib.
How the time is reckoned. ib.
Muſt not be moved for afterwards, except under ſpecial circumſtances. 484
What to be done, if motion granted, as to getting judge's report, and the like. ib.
If court divided on the motion, verdict ſtands. 485
New trial granted a ſecond time. ib.
Or even a third. ib.
Except where two contrary verdicts have been given. ib.
After motion refuſed for new trial, motion in arreſt of judgment may be made, but not *vice verſa*. ib.

In what Actions and Caſes granted.

Allowed after trials at bar. 458
Not in writ of right. 485
Seldom in ejectment. 486
Not in penal actions, except in caſes of miſdirection. ib.
Nor in actions for malicious proſecution. ib.
How, in caſes of information. ib.
Not in a joint action where one is acquitted. ib.
Nor where money has been paid into court. ib.
New trial, though the parties in ſeveral actions were to be bound by agreement, by verdict in one. ib.
How, where there is a bill of exceptions. ib.

Of the Grounds for new Trial. 487

Value and importance, how far. ib.
If verdict be contrary to evidence, or where only contradictory evidence. ib.
If juſtice be not done to the parties. ib.
Otherwiſe court will try to ſupport the verdict. ib.
No new trial where merits fairly tried. ib.
Though the weight of evidence againſt the verdict. ib.
No affidavits admiſſible to explain evidence. 488

No new trial, merely becauſe the verdict is a hard one. 488
In what caſes granted on affidavits of jurymen that verdict was taken contrary to their meaning. ib.
But not, if no new light can be thrown on the queſtion. ib.
How far granted to let in new evidence, or the like. ib.
Or where witneſs made a miſtake in his evidence. 489
Or verdict was obtained by inadvertence. ib.
Or *venire facias* was wrong awarded, or the like. ib.
Or for irregularity in not giving notice of trial. 490
Or for variance between iſſue and record. ib.
Or for unfairly keeping witneſſes out of the way. ib.
Or where ſheriff on inquiry admitted improper evidence. ib.
Or witneſſes afterwards diſcovered to be incompetent, ib.
Or where a ſyſtem of perjury appears. ib.
Or any tricks uſed. ib.
Or pannel returned by improper officer. 491
Or partiality avowed by jury. ib.
Or any juror artfully perſonated. ib.
Or ſworn after being challenged. ib.
Or where jury drew lots. ib.
Or toſſed up, or the like. ib.
But this muſt be ſhewn by other evidence than the mere affidavit of ſome of the jurymen. ib.
Or by their confeſſion. ib.
New trial granted for miſdirection of the judge. ib.
How far court will exerciſe their diſcretion in this reſpect. 492
Granted in penal actions in caſes of miſdirection. ib.
When new trial granted for exceſſive damages. ib.
Or inquiſition ſet aſide on that account. ib.
Seldom in perſonal torts. ib.
Unleſs the damages be flagrantly exceſſive. ib.
Inſtances thereof. 492
If the ſame damages be given again, no third trial allowed. 493
Refuſed for exceſſive damages, in various inſtances of aſſaults, &c. ib.
No new trials in torts for ſmallneſs of damages. ib.
Unleſs it ariſes from a miſtake in the jury or ſheriff in point of law. ib.
General principle reſpecting new trials, on the ground of damages. ib.

Of the Coſts in caſe of a new Trial.

Seldom granted but upon payment of coſts; but this is diſcretionary. 493
How in caſes of nonſuit at trial, and afterwards new trial. ib.
How, if nothing ſaid in rule about coſts. 494
How, if cauſe ſent again to trial from inſufficiency of ſtatement of ſpecial caſe. ib.

How to proceed if new Trial granted.

Of the drawing up the rule, altering return in *jurata*, &c. 494
If plaintiff does not proceed to ſecond trial, judgment may be moved for, as in caſe of a nonſuit. ib.
Same record, &c. muſt be carried to ſecond trial. ib.
Memorandum ſhould not be altered, but ſame roll proceeded on. ib.
No amendment allowed after new trial granted. ib.
Of pleading *puis darrein* continuance afterwards. 495

Variance.

Declaration varying from proceſs. 236
See *Declaration*.
Variance in the *ac etiam* between writ and declaration, no conſequence if ſum ſworn to be under 40*l*. 237

How

How to take advantage of variance. 238
How, if variance between iſſue and *niſi prius* record. 401
As want of *ſimiliter*. ib.

Venditioni exponas.

See *Execution*. 530

Venire facias.

Hiſtory and origin thereof. Introd. lxix.
How awarded and entered. ib. lxxi
See *Jury Proceſs*.
Sometimes awarded into another county, though *venue* not changed.
For forms of ſpecial *venires*, See iſſue. 392

Venire facias de novo.

To be awarded, if jury do not aſſeſs damages on final judgment in plea of abatement. 495
Awarded, when jury proceſs was irregular. 431
If verdict be entered generally, and one count is bad, provided evidence was given thereon, *poſtea* cannot be amended, but a *venire de novo* will be awarded. 496
Of the difference between *venire facias de novo* and motions for new trial. ib.
Of the effect thereof. ib.
In what caſes a *venire facias de novo* will be awarded. ib.
Court of error may award it. ib.

Venue.

The meaning thereof. 242

Of laying the Venue. ib.

Diſtinction as to local and tranſitory actions. 243
A local action, what. 243
Inſtances thereof. ib.
Q. As to actions by adminiſtrator. 244
Tranſitory action, what. ib.
Of actions on bail-bond. ib.
For falſe return. ib.
For eſcape. ib.
Where action ariſes in two counties, plaintiff may elect. ib.
But the venue not to be laid in a third. 245
Where the action ariſes abroad. ib.
In what caſes venue may be laid here. ib.
In what manner venue to be laid in ſuch foreign actions. ib.
Conſequences of venue being wrong in local actions. ib.
When cauſe of demurrer. 246
When ground for nonſuit. ib.
If it be right in body of declaration, held well. ib.
Venue, if proceedings by ſpecial original, muſt agree therewith, or bail will be loſt. ib.
Venue confined by certain acts of parliament. ib.
So in penal actions. ib.
Conſtruction of 21 Jac. 1. c. 4. ib.
So in actions againſt juſtices, &c. ib.
Conſtruction of 21 Jac. 1. c. 12. ib.
So againſt revenue and other officers by different ſtatutes. 247
Conſtruction of thoſe ſtatutes. ib.
General rule in ſuch caſes. ib.

Of changing the Venue.

In what actions it may be changed. 247
Upon what grounds. ib.
When becauſe cauſe of action aroſe elſewhere. ib.
When becauſe trial would be partial or unſatisfactory. 248
When upon other ſpecial grounds, as witneſſes reſiding elſewhere. 249
Into *what counties* it may or may not be changed. 250
Not into Wales. ib.
Except by conſent. ib.

Hardſhip

Hardſhip thereof. 250
Nor into counties palatine. ib.
Nor into diſtant counties when no aſſize is to be held, and trial be delayed. 251
When from a county into a city and county, and the like. ib.
When the motion to change the venue muſt be made. ib.
How to be made. 252
Of the form of the neceſſary affidavit. ib.

Of bringing back the Venue by Plaintiff, and of his altering his own Venue. 253

On what terms venue may be brought back. ib.
What amounts to giving ſuch material evidence as the terms require. 254
Rule to pay money into court held ſufficient in Middleſex. ib.
So if it be proved that the action aroſe abroad. ib.
It is a ground to bring back the venue, that trial would be partial where it is changed to. ib.
But not, becauſe witneſſes live at a diſtance. ib.
At what time plaintiff muſt move to bring it back. ib.
How plaintiff may in effect change his own venue by moving to amend. ib.
When ſuch alteration allowed. 255
Within what time plaintiff muſt alter it. ib.
How to be brought back in vacation. 252

Of laying and changing Venue by privileged Perſons.

By attornies. 252
How far it extends to them as plaintiffs. 253
It does not extend to them when defendants. ib.

Verdicts.

A verdict, what. 471
Formerly given by majority of jurors. ib.
Afterwards made neceſſary for jury to be unanimous. ib.
Two kinds of verdicts, general and ſpecial. ib.
General verdict, what. 472
Of public and privy verdicts. ib.
Verdict at judges lodgings a public verdict. ib.
Verdicts how recorded. ib.
See *Poſtea.*

Of Special Verdicts.

Special verdict, what. 472
How to be drawn. ib.
How it ſhould be found. ib.
How to proceed to get it argued. 473

Of altering and amending the Verdict.

See *Of altering and amending the Poſtea,* under title *Poſtea.* 480

View.

Of granting a view. 440
Of the ſtatutes 4 & 5 Ann. and 3 Geo. 2. ib.
Hiſtory of the ancient practice, and of the introduction and uſe of the modern practice. 441
Of the conſent rule, how introduced, and form thereof.
Of the alteration in the practice as to obtaining the rule. 444
Now a motion of courſe to get a view granted. 445
Form of rule in ſpecial and common jury cauſes. 446
How to obtain a view. ib.
Of the conduct of the ſhewers. ib.
How to return common jury where there has been a view. 463

Voir

Voir Dire.

Of examining a challenged juror on the *voir dire*. 461

Undertaking, by Attorney. 93

Wager of Law.

Hiſtory and meaning thereof. Introd. xiii

Wales.

To what extent parties living there are privileged from arreſt. 52
Latitat runs there. 78
How jury proceſs to be in caſe of a Welch iſſue. 394
What is the meaning of the expreſſion, the next Engliſh county. 433
Of iſſuing writs of execution into Wales. 519

Warrant.

The nature of a warrant for an arreſt. 119
Of directing, filling up, dating, executing, &c. the warrant. 119

Warrant of Attorney.

See *Attorney*.

Wittenagemote.

Hiſtory of. Introd. iii

Witneſſes.

Of compelling them to attend at trial, of their expences, and of remedy againſt them in caſe of diſobedience. See *Subpœna*.

Writs.

As proceſs in actions not bailable. See *Proceſs*. 62
In actions bailable. See *Proceſs*. 115
Writs of execution. See *Execution*.
Writs vicontiel. Introd. vi

END OF THE FIRST VOLUME.