Practice common-placed:

OR, THE

RULES and CASES

OF

PRACTICE

IN THE COURTS OF

King's Bench and Common Pleas,

METHODICALLY ARRANGED.

IN TWO VOLUMES.

By GEORGE CROMPTON, Esquire,
of the INNER TEMPLE.

VOLUME THE SECOND.

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M. DCC. LXXX.

Of Priſoners.

Of Proceedings againſt Priſoners.

FORMERLY, by the practice of the reſpective courts, when a defendant was arreſted upon *meſne proceſs*, and for want of *bail* was committed to gaol, unleſs the plaintiff, before the end of two terms after the arreſt, cauſed the defendant, by writ of *habeas corpus*, to be removed, to be charged with a declaration: ſuch priſoner upon *common bail*, or appearance by attorney, was diſcharged from his impriſonment.

But by 4 & 5 *W. & M. c.* 21. it is enacted, "That where any defendant, or defendants, be taken, or charged in cuſtody, at the ſuit of any perſon or perſons, upon any *writ* * *or writs*, out of any of the ſaid courts at *Weſtminſter*, and impriſoned, or detained in priſon, for want of ſureties for their appearance to the ſame, the plaintiff or plaintiffs, in ſuch writ or writs, ſhall and may, by virtue of the ſaid act, *before the end of the next term after ſuch writ or proceſs ſhall be returnable*, declare againſt ſuch priſoner or priſoners, in the reſpective court or courts out of which the writ or writs ſhall iſſue, whereupon the ſaid priſoner or priſoners ſhall be taken and impriſoned, or charged in cuſtody; and ſhall and may cauſe a true copy thereof to be delivered to

* But if the *ac etiam* of the writ be debt, you cannot declare in caſe on that writ, *per* all the officers; becauſe the ſtatute ſays, you ſhall declare on ſuch writ. *Sed quære?*

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ſuch priſoner or priſoners, or to the gaoler or keeper of the priſon or gaol, in whoſe cuſtody ſuch priſoner ſhall be or remain; to which declaration or declarations, the ſaid priſoner or priſoners ſhall appear and plead; and if ſuch priſoner or priſoners ſhall not appear and plead to the ſame, the plaintiff or plaintiffs, in ſuch caſes, ſhall have judgment, in ſuch manner as if the priſoner or priſoners had appeared in the ſaid reſpective courts, and refuſed to anſwer or plead to ſuch declaration."

And by ſect. 3. it is further enacted, "That in all declarations againſt any priſoner or priſoners, detained in priſon by virtue of any writ or proceſs iſſued out of the court of *King's Bench*, it ſhall be alledged in cuſtody of what ſheriff, bailiff, or ſteward of any franchiſe, or other perſon, having the return and execution of writs, ſuch priſoner or priſoners ſhall be at the time of ſuch declaration, by virtue of the proceſs of the ſaid court, at the ſuit of the plaintiffs, which allegation ſhall be as good and effectual, to all intents and purpoſes, as if ſuch priſoner or priſoners were in the cuſtody of the *marſhal of the marſhalſea* of our ſovereign lord, *&c.*"

A priſoner in cuſtody, on a criminal account, cannot be charged with a *civil action*, without leave of the court. *Salk.* 354.

A perſon attainted, even of high treaſon, may be charged with a *civil action*, by leave of the court. *Ramſden and another* v. *Macdonald*, 1 *Wilſ.* 217.

A priſoner, on a charge of felony, may be charged with a *latitat*. *Daintree* v. *Juſtice*, *Hil.* 9 *Geo.* 3.

The court will not give leave to charge a priſoner with an action, who has a pardon upon condition of tranſportation, becauſe it would defeat the effect of the pardon, and render the priſoner incapable of performing the condition on which he was pardoned. Ld. *Raym.* 848.

A priſoner, committed for a *contempt*, cannot be charged with a declaration, without leave of the court. *Pract. Reg.* 325.

But

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But if he accepts a declaration, and ſuffers plaintiff to take judgment, he has no remedy. *Rules and Orders* K. B. and *C. B.* 2 *volume* 31.

One in cuſtody, on an *attachment*, cannot *be charged in execution*, without leave. *Pract. Reg.* 825.

Of the Rules concerning Priſoners.

UPON the foregoing ſtatute the judges of *B. R.* made the following rules. *Eaſter*, 5 *W. & M.*

1. That no copy of a declaration be delivered to any priſoner in cuſtody, before the day of the return of the proceſs upon which the defendant was taken or charged in cuſtody.

2. That no rule be given, for the defendant in cuſtody to appear and plead to any declaration againſt him, until an affidavit be filed with the clerk of the rules, of the delivering a copy of ſuch declaration, and of the time when, and the perſon to whom, the ſaid copy was delivered; and that the defendant was arreſted, or charged in cuſtody, by proceſs out of this court, returnable before the delivery of ſuch copy; and that the time of filing ſuch affidavit be entered upon the affidavit by the clerk of the rules; and that a copy of ſuch affidavit be produced to the prothonotary or ſecondary before the ſigning the judgment.

3. If a copy of the declaration be delivered againſt ſuch defendant, before "one month of *Eaſter*," or, "the morrow of *All Souls*," and affidavit be made thereof and filed; and the defendant doth not appear before the end of ten days after *Eaſter* and *Michaelmas* term reſpectively, judgment may be entered againſt him, if rules have been given; but if he doth appear before the end of ten days after the term, he ſhall imparl until the next term [unleſs the action be in *London* or *Middleſex*] and the defendant be in priſon within forty miles of *London* or *Weſtminſter*; then, though he doth appear before the expiration of ten days after the end of the term, he ſhall plead two days before the eſſoign day of the next term, and in default thereof [rules for pleading having been given] judgment may be entered againſt him as aforeſaid.

4. If a copy of the declaration be delivered againſt ſuch defendant, on or before "one month of *Eaſter*," in *Eaſter* term, or "the morrow of *All Souls*," in *Michaelmas* term, or in *Hilary*, or *Trinity* term; and thereupon the plaintiff gives a rule to appear and anſwer; then if the defendant appears two days before the eſſoign day of the next term, he ſhall imparl until the ſaid next term; but if he doth not appear within that time, judgment ſhall be given againſt him.

5. If a writ be returnable in any term, and a copy of the declaration has been delivered before the eſſoign day of the

Of the Rules concerning Priſoners.

UPON the foregoing ſtatute the judges of *C. B.* made the following rules. *Eaſt.* 5 *W. & M.*

1. No copy of a declaration ſhall be delivered to any priſoner, until after the proceſs, upon which ſuch priſoner ſhall be taken or charged in cuſtody, be returnable.

2. No rule ſhall be given for the defendant, in cuſtody, to appear and plead to any declaration againſt him, until an affidavit be filed, with the proper ſecondary, of the delivery of the copy of ſuch declaration, and of the time when, and the perſon to whom, the ſaid copy was delivered; and a copy of the ſaid affidavit ſhall be produced to the prothonotary before judgment ſigned, together with a certificate from the proper officer, that no appearance is entered with him.

3. If a copy of a declaration be delivered before *menſem Paſchæ* or *craſtinum animarum*, and affidavit thereof made and filed; and the defendant doth not enter his appearance with the proper officer within ten days after *Eaſter* or *Michaelmas* term reſpectively, judgment may be entered againſt him upon ſuch certificate, if rules have been given; but if he does not enter his appearance, as aforeſaid, within ten days after ſuch term, he ſhall imparl until the next term, unleſs the action be in *London* or *Middleſex*, and the defendant be in priſon within forty miles of the cities of *London* or *Weſtminſter*, and then, though the priſoner doth appear within ten days after the end of the term, he ſhall plead two days before the eſſoign day of the next term; and in default thereof, rules having been given, judgment may be entered againſt him as aforeſaid.

4. If the copy of the declaration be delivered on or after *menſem Paſchæ* in *Eaſter* term, or *craſtinum animarum* in *Michaelmas* term, or in *Hilary* term, or in *Trinity*, and the plaintiff ſhall thereupon give a rule to appear and plead; if the defendant enters his appearance two days preceding the eſſoign day of the next term, he ſhall imparl until the next term; but if he ſhall not appear within that time, judgment may be entered againſt him as aforeſaid.

5. If the writ be returnable in one term, and a copy of the declaration be delivered before the eſſoign day of the

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next term, the plaintiff, in ſuch next term, may give rules to appear and plead; and if the defendant does not appear and plead, upon the expiration of the rules, judgment ſhall be given againſt him.

6. If the declaration be not filed before the end of the next term, after the writ or proceſs by which the priſoner was taken or charged in cuſtody, is returnable, and affidavit made and filed in manner as aforeſaid, before the end of forty days next, after ſuch term, the priſoner ſhall be diſcharged by common bail ſigned by one of the juſtices of this court.

7. If any gaoler or keeper of a priſon, having received a copy of a declaration againſt any priſoner in his cuſtody, ſhall ſuppreſs the ſame, and not deliver it forthwith unto ſuch priſoner, an attachment ſhall be iſſued againſt him.

Of Proceeding againſt Priſoners in Cuſtody of the Sheriff, *&c.* at the Suit of the Party.

Upon being arreſted, if the defendant cannot find *bail*, but goes to priſon, and does not remove himſelf by *habeas corpus*, or the plaintiff does not remove him by *habeas corpus* into the cuſtody of the *marſhal*, the plaintiff may, under this *ſtatute of king William*, declare againſt him in the cuſtody of the ſheriff or bailiff where the priſoner is; and if the ſuit is by *bill* or *latitat*, he muſt expreſs in his declaration in whoſe cuſtody he is, by virtue of the ſaid proceſs, at the ſuit of the plaintiff, which ſhall be as effectual as if the priſoner was in cuſtody of the *marſhal*.

If the priſoner was arreſted, and in cuſtody at the ſuit of the plaintiff, there is no need of an *affidavit* on delivering the declaration, [as there muſt be when he is already in cuſtody at the ſuit of another] becauſe there was one on the writ. *Rules and orders* K. B. *and* C. B. 2 *vol.* 144.

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next term, the plaintiff, in ſuch declaration, may give a rule to appear; and if the defendant doth not enter his appearance, and plead by the time the rules are out, judgment may be entered againſt him.

6. If the declaration be not entered, or left in the office, before the end of the next term, after the return of the writ or proceſs, [by which the defendant ſhall be taken or charged in cuſtody] and an affidavit made and filed in manner aforeſaid, before the end of twenty days after ſuch term [*Eaſter* term excepted, and within ten days after *Eaſter* term] the priſoner ſhall be diſcharged, upon entering his appearance with the proper officer, by writ of *ſuperſedeas* made by him according to the ancient practice of this court.

7. If any gaoler, or keeper of any priſon, having received a copy of a declaration againſt any priſoner in his cuſtody, ſhall ſuppreſs the ſame, or not deliver it forthwith to ſuch priſoner, an attachment ſhall be entered againſt him.

Of Proceeding againſt Priſoners in Cuſtody of the Sheriff, *&c.* at the Suit of the Party.

IF the defendant, upon being arreſted, cannot find bail, but goes to priſon, and does not remove himſelf by *habeas corpus*, or the plaintiff does not remove him by *habeas corpus*, into the cuſtody of the warden of the *Fleet*, the plaintiff may, under the above ſtatute of king *William*, declare againſt him in the cuſtody of the ſheriff or bailiff where the priſoner is.

The ſame in this court. *Pract. Reg.* 330.

Of Proceeding againſt Priſoners in Cuſtody of the Sheriff, &c. at the Suit of the Party.

BY *Reg. Trin.* 2 *Geo.* 1. If a perſon arreſted or committed, by virtue of any proceſs of this court, to the cuſtody of any ſheriff, or other officer whatſoever, at the ſuit of any plaintiff, and ſhall ſo remain in cuſtody by *two terms*, and the plaintiff ſhall not declare againſt ſuch defendant within that time, ſuch defendant, after the end of the ſecond term, after ſuch impriſonment, ſhall be diſcharged out of the priſon where he ſhall be ſo detained, upon filing *common bail* ſigned by one of the juſtices of this court, without any notice to be given to the plaintiff or his attorney.

Note—Within the above rule, the term in which the writ whereon the defendant was arreſted is returnable, altho' it be not returnable till the laſt day of the term, is *one* of the *two terms*.

So is the term wherein the defendant was committed, although not committed till the laſt day of a vacation.

Maſter Benton thought, that if the defendant did not ſuperſede himſelf till the *third term*, and filed *common bail* as of that term, yet he was not obliged to accept a declaration. *Sed quære*, If common bail ſhould not be filed as of the ſecond term? and *vide the practice of* C. B.

Mr. *Cowper*, *clerk of the rules in* B. R. had ſome doubt, whether a priſoner, *ſuperſeded on filing common bail* might not ſign a *non-pros* as ſoon as common bail filed; becauſe the plaintiff had not declared *within the two terms*; but this ſeems impoſſible: though *quære*, If he may not ſign it at the end of the *two terms* after bail filed?

The court will never grant the plaintiff a rule for further time to declare againſt a priſoner.

But where, in a writ againſt *three*, one was arreſted and lay in gaol, and the other two abſconded, the court refuſed to diſcharge the priſoner, ſaying, the defendant arreſted muſt appear for all, or lie in gaol till the other two are outlawed.

But then the plaintiff muſt move, in the ſecond term, for time to declare againſt him in cuſtody. *Laſt.* 12 *Geo.* 3.

The

Of Proceeding againſt Priſoners in Cuſtody of the Sheriff, &c. at the Suit of the Party.

IF defendant be committed to priſon, by proceſs out of this court, or *habeas corpus*, the priſoner entering his appearance, and giving a rule to declare, the plaintiff not declaring before the end of the next term after the commitment, the defendant to be diſcharged by *ſuperſedeas* in the end of the next term, and liberty for the plaintiff to declare, upon that appearance, the next term after that at fartheſt. *Reg. M.* 1654.

If the plaintiff does not remove the defendant to the *Fleet*, and the priſoner enter his appearance, he may be diſcharged by *ſuperſedeas* in the end of the third term after the arreſt, and the plaintiff may declare upon ſuch appearance the term following, but not after.

But if ſuch priſoner cauſe an appearance to be entered for him by attorney, and cauſe notice thereof to be given to the plaintiff, or his attorney; and if oath thereof be made in writing, and filed in court, unleſs the plaintiff declares againſt him in the term after ſuch appearance, he may be diſcharged by *ſuperſedeas*, ſo as oath be made by the attorney for defendant, that no declaration had been delivered or tendered to him. And the plaintiff may declare againſt him the term next after ſuch appearance entered, but not afterwards. *Reg. H.* 14, 15 *Car.* 2.

In this court, upon a *ſuperſedeas* for want of declaring within the *two terms*, *common bail* muſt be filed of the term the *ſuperſedeas* iſſues. By *Reg.* 14, 15 *Car.* 2.

And by the ſame rule, the plaintiff may deliver a declaration any time before the *eſſoign day* of the *ſecond term* after the term in which the *ſuperſedeas* iſſued, or appearance was entered, and the attorney appearing for him is bound to accept a declaration.

The ſame in this court. *Pract. Reg.* 327.

But where in an action againſt *two*, and one defendant was committed to the *Fleet*, charged with the action, for want of *bail*; and the other abſconded, ſo that plaintiff was not able to bring him into court by arreſt, and therefore took out proceſs of *outlawry* againſt him, which, unavoidably, over-run the time for declaring, *viz.* the *two terms*. The court thought it reaſonable, as the plaintiff could not declare againſt the other, he neither being outlawed, nor in court, to allow a further time to declare. *Barnes* 401.

More

Of Proceeding againſt Priſoners in Cuſtody of the Sheriff, &c. at the Suit of the Party.

The court refuſed to diſcharge a *priſoner* out of cuſtody, for want of proceeding againſt him *within two terms*, a miſtake having ariſen from two perſons being of the ſame ſurname. *Loft* 274.

A writ was returnable the firſt return of *Michaelmas term*, and the defendant was arreſted in *Trinity vacation*, and the declaration was delivered in *Hilary term*, and held bad, for the plaintiff ſhould have declared before the end of *Michaelmas term*. Pitt *v.* Yalden, Eaſt. 7 Geo. 3. B. R. Burr. 4 *pt.* 2060.

In *Hutchins* v. *Kenrick*. Burr. 4 *pt.* 1048. The court held, that a defendant *priſoner*, although ſuperſedable, but not actually ſuperſeded, if found in cuſtody, may be charged with a *declaration*. *Vide* the oppoſite caſe.

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More than two terms had expired after the priſoner's being in cuſtody, and before the plaintiff declared; and, on motion that the priſoner might be diſcharged by *ſuperſedeas*, the plaintiff having neglected to declare *within the two terms*. On ſhewing cauſe, it appeared by affidavits, that there had been a treaty of accommodation between the plaintiff and the defendant, and that breaking off, then the plaintiff declared, and the court held, that while a treaty ſubſiſts between plaintiff and defendant a *priſoner*, the plaintiff is not obliged to declare within the *two terms*, according to the practice, for it is for the priſoner's benefit, that the plaintiff liſtens to propoſals of accommodation. 3 *Wilſ.* 455.

The plaintiff not having declared againſt the defendant, a *priſoner*, before the end of the *ſecond term*, the defendant took out a *judge*'s ſummons for a *ſuperſedeas*, 28*th of Oct.* and the plaintiff's agent had time to write to his client; and not being able to ſhew cauſe againſt it, a *ſuperſedeas* was ordered on the 11*th* of *November*, but could not be ſealed that night; but on the 13*th* was ſent into the country. The plaintiff, after the ſummons ſerved, *viz.* 1ſt of *November*, charged defendant in cuſtody with a declaration, and on the 13th ſigned judgment, ſent down a *teſtatum cap. ad ſat.* and charged him in execution. The court held the plaintiff's proceedings, ſubſequent to the time of the defendant's being *ſuperſedable* and having applied for a *ſuperſedeas*, to be irregular, and ſet aſide the *ca. ſa.* with coſts, upon defendant's conſenting not to bring an action. *Webb* v. *Dorwell*, *Barnes* 400.

The plaintiff had *two* different cauſes of action againſt the defendant, one as *adminiſtrator*, the other as *aſſignee*.—— Defendant was arreſted at the plaintiff's ſuit as *adminiſtrator*; but in the title of the affidavit for bail, *adminiſtrator* was omitted, though put in the writ. Defendant remained in cuſtody for want of bail, and the plaintiff did not declare as *adminiſtrator*, agreeable to his writ, but made a new affidavit of his other demand, as aſſignee, and delivered a de-

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If a priſoner on *meſne proceſs* eſcape, and is retaken on an eſcape warrant, and in cuſtody of the ſheriff, &c. the plaintiff muſt declare againſt him within *two terms* after taken on the eſcape warrant. *Reg.* 6 *Anne.*

If a defendant is in the cuſtody of the *ſheriff*, and the plaintiff has declared againſt him as in ſuch cuſtody, he may notwithſtanding, if he thinks proper, remove the defendant into the cuſtody of the *marſhal* by *habeas corpus cum cauſa ad faciendum et recipiendum*; for the act 4 & 5 *W.* & *M.* was only made for the eaſe and benefit of plaintiffs, to ſave them the trouble and expence of ſuing out an *habeas corpus* to bring the defendant into court, and does not take away the plaintiff's *common law* right to remove him. *Dr. Betteſworth* v. *Bell*, Eſq. Burr. 4 *pt.* 1875.

But note, ſuch *hab. corp.* muſt be teſted in term, though it may be returnable *immediate.*

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a declaration in the country gaol, indorſed for bail. And the rule to ſhew cauſe, why a *ſuperſedeas*, &c. in the firſt cauſe was made abſolute, the affidavit being a nullity; but the arreſt, in the ſecond cauſe, was held not to be void. *Barnes* 391.

But where the plaintiff arreſted defendant as *executrix*, and afterwards finding the action wrong as *executrix*, made a new affidavit for bail, and charged the defendant with a new declaration in her own right; and, upon defendant's moving for a common appearance and *ſuperſedeas*, the court held, that if there had been *two* different cauſes of action, the ſecond declaration would have been a good charge; but there being but one and the ſame cauſe of action, the proceedings were irregular, and made the rule abſolute to ſet aſide the proceedings. *Barnes* 391.

The ſame in this court. 1 *Barnes* 285.

If priſoner eſcapes, his recaption ſhall be looked on as the time of the render from whence the plaintiff is to proceed. *Barnes* 382.

Motion to ſtay proceedings upon a declaration delivered againſt a priſoner in a county gaol, the declaration not having been entered in the *prothonotary's office* before delivered. *Per cur.* It is ſufficient to enter the declaration any time before giving a rule to plead. *Barnes* 372.

Of Proceeding againſt Priſoners in Cuſtody of the Sheriff, &c. under a prior Commitment.

WHERE a perſon has cauſe of action againſt a priſoner, already in cuſtody of the *ſheriff*, &c. he may, inſtead of removing ſuch priſoner into court, charge him with *proceſs* in the cuſtody of the ſheriff, &c. But if he would remove him into court, he muſt take out an *habeas corpus ad reſpondendum*.

If the cauſe of action is not *bailable*, or under 10 *l.* the defendant, *priſoner*, muſt be ſerved with a copy of proceſs, and the plaintiff may file *common bail* for him, and proceed as in other caſes.

But if the cauſe of action is above 10 *l.* and the plaintiff would hold him to *bail*, *an affidavit muſt be made thereof, and filed with the clerk of the rules.*

The method of charging a defendant, priſoner, in cuſtody of the *ſheriff*, &c. is this, the plaintiff makes three copies of a declaration, one on treble penny ſtampt parchment, called the *bill*, which muſt be filed with the clerk of the declarations.—The ſecond on treble penny ſtampt paper, to deliver to the priſoner himſelf, or leave with the gaoler or turnkey of the priſon.—And the third on like paper, to be filed with the *clerk of the rules*, to which muſt be annexed an *affidavit* of the delivery of the one to the *priſoner or turnkey*, of which *declaration and affidavit* he will make an office copy on ſtamps, or the plaintiff's attorney may do it for expedition himſelf; but then he muſt take it to *the clerk of the rules*, to be marked, when he files the original declaration and affidavit, and pay for the ſame according to the length.

The clerk of the rules will enter a rule for the defendant to appear and plead on the office-copy of the declaration, after which [if he fail ſo to do in due time] a demand of a plea being made, judgment may be ſigned againſt him; and if he does appear and plead, the proceedings then are the ſame as in other caſes.

Of Proceeding againſt Priſoners in Cuſtody of the Sheriff, &c. under a prior Commitment.

THE ſame in this court.

If the cauſe of action is not *bailable*, or under 10 *l.* the defendant, priſoner, muſt be ſerved with a copy of a *common capias*; and the plaintiff may, on affidavit of ſervice, enter an appearance for him, according to the ſtatute. 2 *Barnes* 314.

But if the cauſe of action is *bailable*, and above 10 *l.* the proceſs to be ſued out by the plaintiff, againſt the defendant, priſoner, is a *ſpecial capias*, and a warrant thereon muſt be lodged with the gaoler, in order to detain him.

In this court the declaration muſt be filed with the *prothonotary*, and a copy thereof ſerved on the priſoner, or left with the goaler or turnkey.

The plaintiff muſt declare within *two terms*.

Where a defendant was ſerved with a copy of proceſs, but, before declaration delivered, became a priſoner in the *Fleet*, and the plaintiff entered an appearance for him, purſuant to the ſtatute, and left a declaration in the office, and gave him notice of it. The court ſet aſide the proceedings, and held, that the declaration ought to have been delivered at the *Fleet*. Barnes 392.

The

Of Proceeding againſt Priſoners in Cuſtody of the Sheriff, &c. under a prior Commitment.

If the defendant is in the cuſtody of the *ſheriff*, there muſt be an *affidavit* of the delivery of the declaration filed *with the clerk of the rules*, which muſt be filed before the end of *twenty days* after the end of the ſecond term after the return of the proceſs.

The ſame, though the defendant removes himſelf from one gaol to another. *Att. Pract.* 337.

But if he is in the cuſtody of the *marſhal*, no ſuch affidavit is neceſſary.

Of Proceeding againſt Priſoners in Cuſtody of the Sheriff, &c. under a prior Commitment.

The ſame in this court. The *affidavit* muſt be filed with the *prothonotary*; but if *Eaſter term* is the ſecond term, ſuch *affidavit* muſt be filed in ten days after, &c.

But if he was arreſted at your ſuit, no ſuch affidavit is neceſſary, becauſe there was one on the writ. But if the declaration is a new charge, there muſt be an *affidavit*. Rules and Orders *K. B.* and *C. B.* 2 Vol. 144. Pract. Reg. 330.

Of Proceeding againſt Priſoners in the Cuſtody of *the Marſhal.*

IF any defendant ſhall be committed to the cuſtody of the *marſhal*, or ſhall be charged in cuſtody of the *marſhal*, or arreſted or committed by virtue of any proceſs of this court, to the cuſtody of any ſheriff, or other officer whatſoever, at the ſuit of any plaintiff, and ſhall ſo remain in cuſtody *by two terms*, and the plaintiff ſhall not declare againſt ſuch defendant within that time, ſuch defendant, after the end of the ſecond term after ſuch impriſonment, ſhall be diſcharged out of the priſon where he ſhall be ſo detained, upon filing *common bail*, ſigned by one of the juſtices of this court, without any notice to be given to the plaintiff, or his attorney. *Reg.* 2 *Geo.* 1.

Note, Within the above rule, the term in which the writ, whereon the defendant was arreſted, is returnable, although not returnable until the laſt day of the term, is to be accounted as one of the *two terms*; as is alſo the term wherein the defendant was committed to the cuſtody of the *marſhal*, although not committed till the laſt day of a vacation.

If a perſon has cauſe of action againſt a defendant, *priſoner* in the cuſtody of the *marſhal*, he may charge ſuch defendant in cuſtody, by delivering a *declaration.*

But, "for preventing the detainer of priſoners, charged by *declarations*, in the cuſtody of the *marſhal of the marſhalſea* of this court, where the cauſe of action againſt ſuch priſoners does not amount to 10 *l. and upwards*—It is ordered, That, from and after the laſt day of this term, no declaration, whereby any priſoner ſhall be charged in the cuſtody of the marſhal, ſhall be ſufficient cauſe of detaining ſuch priſoner in cuſtody, unleſs an *affidavit*, that the plaintiff's cauſe of action againſt ſuch priſoner does amount to 10 *l.* or upwards, ſhall be firſt made and filed with the *clerk of the rules of this court, and the ſum ſpecified in ſuch affidavit ſhall be indorſed by him upon ſuch declaration*, before the leaving thereof, with the turnkey. *Eaſt.* 15 *Geo.* 2.

If the priſoner was arreſted, and in cuſtody, at the ſuit of the plaintiff, there is no need of an *affidavit* on delivering the declaration, becauſe there was one on the writ; but if the declaration is a new charge, there muſt be a new affidavit. *Rules and Orders, K. B. and C. B.* 2 *Vol.* 144.

Proceſs may be ſerved on a man in cuſtody of the *marſhal*, having ſurrendered himſelf to take the benefit of the act

Of Proceeding againſt Priſoners in the Cuſtody of the *Warden of the Fleet*.

IF any defendant ſhall render himſelf or be rendered to the *Fleet priſon*, in diſcharge of his bail, at the ſuit of any plaintiff, where no declaration has been delivered, unleſs the plaintiff ſhall declare againſt ſuch defendant *within two terms* after ſuch render, ſuch defendant may be diſcharged out of cuſtody by *ſuperſedeas*, to be allowed by one of the juſtices of this court, if cauſe be not ſhewn to the contrary by the plaintiff or his attorney, upon notice to either of them given by the defendant's attorney or agent, and affidavit made of ſuch notice. *Reg.* 8 *Geo.* 1.

If a perſon has cauſe of action againſt a defendant, priſoner in the *Fleet*, the plaintiff may charge ſuch priſoner in cuſtody, by delivering a *declaration*.

But "for preventing the detainer of priſoners charged by *declarations* delivered at the *Fleet priſon*, where the cauſe of action againſt ſuch priſoners does not amount to 10 *l.* it is ordered, that no copy of a declaration delivered at the *Fleet priſon*, againſt any priſoner there, ſhall be ſufficient charge to hold ſuch priſoner to bail, or to retain ſuch priſoner in cuſtody for want of bail, unleſs an *affidavit*, that the plaintiff's cauſe of action amounts to 10 *l.* or upwards, be firſt made and filed in the *prothonotary's office*, *and an indorſement made by the ſaid prothonotary, or his deputy, upon ſuch copy of a declaration, ſignifying the ſum of money ſpecified in ſuch affidavit*; for which ſum, ſo indorſed, bail ſhall be required, and no more. *Hil.* 8 *Geo.* 2.

In explanation of the above rule, it has been adjudged, that if a defendant, arreſted by proceſs iſſuing out of the court of *King's Bench*, and in cuſtody for want of bail, remove himſelf, by *habeas corpus*, *to the Fleet priſon*, and the plaintiff charges him in the *Fleet* with a copy of a *declaration*, he is not obliged to make and annex an *affidavit*, as by the above rule is directed, in regard there was an affi-

Of Proceeding againſt Priſoners in the Cuſtody of the *Marſhal*.

act for relief of inſolvent debtors. *Pry* v. *Lawford.* 3 *Geo.* 2.

From what is ſaid, it may be collected, That where the defendant is in the cuſtody of the *marſhal*, under a *former commitment*, you may deliver a declaration, and not ſerve him with proceſs, whether the cauſe of action requires *bail or not*; but if the action requires bail, there muſt be an *affidavit filed with the clerk of the rules*, according to *Reg.* 15 *Geo.* 2. elſe it is no cauſe of detainer, if he ſhould be *ſuperſeded* in other actions againſt him: But then, as in all caſes where the cauſe of action does not require bail, *common bail* muſt be filed in thoſe actions, on being ſuperſeded in ſuch actions as require *bail*.

To charge a priſoner, in cuſtody of the *marſhal*, in vacation time, [inſtead of the old method of ſuing out an *hab. corp. ad reſpond.* teſted as of the laſt term] the plaintiff muſt *file a bill as of the preceding term*, and then to deliver to or leave for the defendant in cuſtody, a *copy of the declaration as of the preceding term*, and make an affidavit of the delivery thereof. *Burr.* 4 *pt.* 1052.

And ſo in term time, and the defendant is a priſoner in cuſtody of the *marſhal*, you ingroſs and file a *bill*, and deliver a copy of *the declaration thereon* to the priſoner himſelf, or leave the ſame with the turnkey, and give a rule to plead, demand a plea, and proceed as in other caſes.

In this court, a *bill* muſt always be filed againſt a *priſoner*; and for want of it, he is intitled to a *ſuperſedeas*, although he has pleaded.

Of Proceeding againſt Priſoners in the Cuſtody of the *Warden of the Fleet*.

davit made of the debt, when the plaintiff took out the proceſs upon which the defendant was arreſted. But if a declaration comes in as a new charge againſt a priſoner in cuſtody at the ſuit of another plaintiff, there the above rule muſt be obſerved. *Rep. & Caſ. of Pract. C. B.* 144. *Barnes* 72. *Pract. Reg. C. P.* 330.

If any perſon hath cauſe of action *againſt a priſoner committed to the Fleet*, after filing a declaration with the proper officer, he may deliver a copy to the *defendant* or *turnkey*; and, after rule given to plead, *to be out in eight days after delivery of declaration*; and affidavit being made of the delivery, the plaintiff may ſign judgment, as if the defendant had been charged at the bar of the *Common Pleas* [*or Exchequer*] with ſuch action. 8 & 9 *W.* 3. *c.* 27.

A priſoner, ſurrendering as a *fugitive*, cannot be charged with a declaration under this act, becauſe *not committed*. Pract. Reg. 126. 1 Barnes 281.

But it ſeems he may be arreſted. *Ibid.*

To charge a priſoner in the cuſtody of the *Fleet*, in vacation time, the plaintiff draws his declaration as of the preceding term, gets it ſtamped by the prothonotary, and delivers or leaves it with the clerk of the papers.

To charge a priſoner in term time, the plaintiff draws his declaration, gets it ſtamped by the prothonotary, and delivers or leaves it with the clerk of the papers at the *Fleet*.

When the defendant is a priſoner in the *Fleet*, the declaration muſt be entered with the *prothonotary*, before the delivery of the declaration to the defendant; but if the defendant is in any other priſon, it need not be ſo entered before the delivery, but it is ſufficient to file it any time before a rule is given thereon to appear and plead.

And *note*—That when the defendant is in the *Fleet*, the *original* declaration, indorſed by the *prothonotary*, ſhould be left at the *Fleet*, and not a copy thereof. Whereas, when the defendant is in *another gaol*, the *original declaration* is filed with the *prothonotary*, and a copy thereof delivered to the defendant. *Pract. Reg.* 331. 1 *Barnes* 315.

Of Proceeding againſt Priſoners in the Cuſtody of the *Marſhal.*

A priſoner once *ſuperſedeable* is alſo ſo with reſpect to the plaintiff himſelf in that cauſe, but not as to *third* perſons; for by them, ſo long as he is in *actual cuſtody*, he may be charged as a *priſoner*. Burr. 4 pt. 1048.

Of Proceeding againſt Priſoners in the Cuſtody of the *Warden of the Fleet*.

If a *capias* is returned *non eſt invent.* againſt a *priſoner in the Fleet*, he muſt appear *on an habeas corpus ad reſpondendum*, as well at the ſuit of a ſtranger as at his ſuit whereon he is impriſoned, and receive a declaration. *Mich.* 1654. *f.* 13.

After an irregular declaration againſt a priſoner, the plaintiff cannot declare *de novo*, unleſs the priſoner is in cuſtody at another perſon's ſuit. *Pract. Reg.* 328.

It is ſaid in *Pract. Reg.* 328. to be the conſtant practice, to have *four entire* law days, after the *two terms*, to deliver declarations againſt priſoners, and give a rule to plead. So, where the declaration was delivered on *Monday* the *fifth day after the term*, it was held well. But *quære*, as to this practice.

But where a declaration is irregularly delivered, the *priſoner* muſt complain thereof before judgment. *Pract. Reg.* 329.

Of Proceeding againſt Priſoners removing themſelves when charged with Proceſs.

IF a priſoner in the *Marſhalſea*, on *meſne proceſs*, removes himſelf to the *Fleet*, before the plaintiff has declared againſt him, the plaintiff then muſt declare in *C. B.* and cannot proceed further in *B. R.* unleſs he brings the defendant back there by *habeas corpus ad reſpondendum*. Att. Prac. 332, 341.

But if a priſoner in the cuſtody of the *marſhal*, after being charged with a declaration in *B. R.* removes himſelf to the *Fleet*, the plaintiff muſt proceed to judgment in *B. R.* and then bring the defendant back by *habeas corpus ad ſatisfaciendum* to be charged in execution in *B. R.* Att. Prac. 832.

And *note*—That, if upon the defendant's removal from *B. R.* to *C. B.* before the plaintiff has declared the plaintiff does not declare within the *two terms*, the defendant's application for a *ſuperſedeas* muſt be made to *C. B.*

But if he removes, after being charged with a declaration, [and not brought back by *habeas corpus*] then, for want of not being charged in execution in due time, *&c.* he muſt apply for a *ſuperſedeas* to *B. R.* Barnes 384, 5.

If two writs of *habeas corpus* iſſue out of *B. R.* and the other out of *C. B.* Where the perſon is in a gaol, the writ which is firſt ſerved ſhall have the body; and the priſoner may afterwards, by another writ, remove himſelf into the other court, but then he muſt plead firſt.

A priſoner, ſurrendered by *bail*, was ſuperſeded, becauſe charged in the ſame court after he had removed himſelf. *Stra.* 1153.

Of Proceeding againſt Priſoners removing themſelves when charged with Proceſs.

IF a priſoner in the *Fleet* removes himſelf to the *Marſhalſea*, before the plaintiff has declared, the plaintiff muſt declare in *B. R.* and cannot proceed further in *C. B.* unleſs he brings the defendant back by *habeas corpus ad reſpondendum.*

And if a priſoner in the *Fleet*, charged with a declaration in *C. B.* removes himſelf afterwards to the *Marſhalſea*, the plaintiff muſt proceed to judgment in *C. B.* and then carry him back by *habeas corpus ad ſatisfaciendum*, to charge him in the *Fleet.*

And *note*—That if, upon the defendant's removal from *C. B.* to *B. R.* before the plaintiff has declared, the plaintiff does not declare within *the two terms*, the defendant's application for a *ſuperſedeas* muſt be to *B. R.*

But if he removes, after being charged with a declaration [and not brought back by *habeas corpus*] then for want of being charged in execution in due time, *&c.* he muſt apply for a *ſuperſedeas* to *C. B.* Barnes 384, 5.

Motion for a *ſuperſedeas* for want of a declaration in *C. B.* within *two terms.* Defendant committed to the *Fleet* (charged *inter al'* with a *bill of Middleſex* at the plaintiff's ſuit) before declaration delivered; and afterwards the plaintiff delivered a declaration in the *King's Bench*, at the *Fleet*, and not a *declaration* in *C. B.* which declaration being delivered after the defendant had removed to the *Fleet*, as a declaration of the *King's Bench*, the court held as null and void, and made the rule abſolute. *Barnes* 402.

Of the Rule to appear and plead, and when a Defendant, Priſoner, muſt plead.

IF the defendant is in the cuſtody of *ſheriff*, a rule to appear and plead muſt not be given before *affidavit* filed of the delivery of the declaration; which *affidavit* muſt be filed *within twenty days*, *with the clerk of the rules*, after the end of the ſecond term after the return of proceſs. *Reg.* 5 *W. & M.*

But if the defendant is in cuſtody of the *marſhal*, no *affidavit* of delivery is neceſſary, but a rule to plead may be given of courſe; and if the declaration is delivered *four days*, excluſive, before the end of the term, and rule given, and plea demanded [which muſt be done on the back of the declaration] the defendant muſt plead as of that term. *Reg. Eaſt.* 5 *W. & M.*

But if the *bill* is not filed, and copy delivered, *four days*, excluſive, before the end of the term, the defendant may *imparl* till next term. The ſame.

If proceſs is returnable the firſt day of *Eaſter* or *Michaelmas term*, and declaration delivered before *menſ. Eaſt.* or, *the morrow of All Souls*; and affidavit thereof filed, the defendant muſt appear before the end of *ten days after Eaſter* or *Michaelmas term*; and if he appears within that time he may imparl till the next term, unleſs the action is in *London* or *Middleſex*, *and the defendant is in priſon within forty miles of London*, and then, though he appears within that time, he muſt plead *two days* before the eſſoign day of that term. *Reg. Eaſt.* 5 *W. & M.*

If a copy of a declaration is delivered on or after *menſ. Paſ.* or, *morrow of All Souls*, or, in *Hilary or Trinity terms*, and rules given; if the defendant appears before the eſſoign day of the *next term*, he ſhall *imparl* till the next term; but if he does not appear within that time, the plaintiff is entitled to judgment. *Reg. Eaſt.* 5 *W. & M.*

If the declaration is delivered before the eſſoign day of the next term after the return of the writ, the plaintiff, in ſuch next term may give rules, and the defendant muſt appear, and plead on or before the expiration of the rules. *Eaſt.* 5 *W. & M.*

After defendant, a *priſoner*, has appeared, the proceedings are the ſame as in other caſes.

Notice of trial to a *turnkey* is good, in the caſe of a *priſoner* defendant. *Stra.* 248.

Of the Rule to appear and plead, and when a Defendant, Priſoner, muſt plead.

THE ſame in this court. But if *Eaſter term* is the ſecond term, then the *affidavit* of delivery muſt be filed *within ten days*.

If the defendant is in the *Fleet*, the rule to plead is out in *eight days*. *Hil.* 14, 15 *Car.* 2. [incluſive.]

If the defendant is in a *common gaol*, and the declaration is delivered before the eſſoign day of the term, the rule is out in *four days*.

If a declaration is delivered to a priſoner the laſt day but one of term, he muſt plead two days before the eſſoign day of the next term. *Barnes* 224.

In *Eaſter* and *Michaelmas* terms, if the declaration is delivered before the *morrow of All Souls*, or *menſ. Paſch.* the rules to plead are out in *ten days after the term*, except the action is in *London* or *Middleſex*, *and the defendant in priſon within forty miles of London*, as in *B. R.*—And if delivered after thoſe days, the rules are out in *two days* next preceding the *eſſoign day* of the ſubſequent term.

And in *Hilary* and *Trinity terms*, if the declaration is delivered on or after the eſſoign day of the term, the rules to plead are out *two days* before the eſſoign day of the ſubſequent term. But if defendant appears within the time he may *imparle*, as in *B. R.* Reg. Eaſt. 5 W. & M. 1 Barnes 150.

The ſame in this court. *Eaſt.* 5 *W.* & *M.*

If a *priſoner* appears in perſon, he is bound to pay for the *iſſue-book* upon the delivery thereof, otherwiſe if he appears by attorney. 2 *Wil.* 11.

In *C. B.* ten days notice, excluſive of the day of ſuch notice, muſt be given to defendant (being actually in the *Fleet*) of the time of trial. *Reg. Hil.* 14, 15 *Car.* 2,

Of

Of Judgment againſt Priſoners, and of charging them in Execution.

IF the plaintiff does not proceed to *trial or judgment* within *three terms* after declaration delivered, ſuch defendant ſhall be diſcharged out of cuſtody, on filing *common bail*, notice being firſt given to the plaintiff, or his attorney, and an affidavit thereof made, if the plaintiff or his attorney does not attend and ſhew cauſe againſt the diſcharge. *Trin.* 2 *Geo.* 1.—The term in which the declaration is delivered is one.

So for want of getting a *demurrer* argued within the third term.

Vide the oppoſite caſe.

The defendant, though not in cuſtody, upon being taken, but ſurrendered himſelf in diſcharge of his bail, is ſuperſedeable within the above mentioned rule, and its conſtruction and the practice of the court; and the time runs from notice of the defendant's being in cuſtody.

After judgment obtained againſt a defendant, *priſoner*, he muſt be charged in *Execution* within *two terms*—the term wherein judgment to be obtained to be reckoned as one—the defendant may obtain his diſcharge in like manner as for not proceeding to *trial or judgment*. *Reg. Tr.* 2 *Geo.* 1.

Of Judgment againſt Priſoners, and of charging them in Execution.

THE ſame in this court. *Reg. Eaſt.* 8 *Geo.* 1.

Or within *three* terms after the render, the defendant having appeared.

Or within *three terms* after *recaption*, or coming again into priſon; for that time ſhall be looked on as the time of the render. *Barnes* 382.

So, for want of getting *demurrer* argued within the third term. *Barnes* 383.

The defendant was diſcharged out of cuſtody by *ſuperſedeas*, on entering a *common appearance*, for want of plaintiff's proceeding to judgment within *three* terms after declaration delivered. Plaintiff afterwards obtained judgment, and defendant, being taken in execution, moved to be diſcharged, inſiſting, that after a *ſuperſedeas* his perſon was free, and could not be again detained by proceſs in the ſame action. *Per cur.* After conſulting all the judges in this caſe, the defendant having been diſcharged by *ſuperſedeas* before judgment, he is not finally diſcharged, but after judgment is ſubject to be taken in execution.—But where a defendant is *ſuperſeded* after judgment, for want of being charged in execution within *two terms after judgment obtained*, his perſon cannot afterwards be taken in execution. *Barnes* 376.

The ſame this court. *Reg. E.* 8 *Geo.* 1.

On ſhewing cauſe why defendant ſhould not be diſcharged by *ſuperſedeas*, the plaintiff having neglected to charge him in cuſtody within the two terms, it appeared, that the plaintiff's attorney had taken out a *ca. ſa.* but directed it to the ſheriff of *Exeter*, inſtead of *Devon*, which being ſent back, he got it reſealed, and ſent it in time to an attorney, with directions to charge defendant in execution; but it arrived too late to charge the defendant in time; and it appearing, that there was no intention to oppreſs, and the delay ariſing entirely from an accident, the court diſcharged the rule. *Barnes* 380.

The plaintiff ſhall have every day in the ſecond term to charge a priſoner. 2 *Wil.* 380.

The

Of Judgment againſt Priſoners, and of charging them in Execution.

The defendant, a priſoner, applied to be diſcharged by *ſuperſedeas*, for want of being charged in execution within two terms after judgment. The plaintiff excuſed himſelf by the delivery of a *ca. ſa.* to the gaoler within due time. But the court held that to be inſufficient. The *ca. ſa.* ought to have been delivered to the ſheriff, and the ſheriff's warrant to the gaoler. *Barnes* 389.

Within two terms after final judgment, plaintiff, inſtead of charging the defendant in execution, charged him with a declaration in an action of debt on the judgment. The court held this declaration vexatious, and no cauſe againſt a *ſuperſedeas:* rule for *ſuperſedeas* made abſolute. *Barnes* 390.

The writ of enquiry being ſet aſide, becauſe not executed before a perſon properly deputed by the ſheriff, defendant applied for a *ſuperſedeas* for want of plaintiff's proceeding to final judgment within three terms after the declaration, and obtained a rule to ſhew cauſe, which was made abſolute. *Barnes* 384.

On motion for *ſuperſedeas* for want of proceeding to judgment within *three terms* after declaration delivered, and cauſe ſhewn, it was contended, that the judgment, though not ſigned till the *Michaelmas vacation*, (*Michaelmas* being the third term) was a judgment of *Michaelmas* term, which was ſufficient to prevent a *ſuperſedeas*. *Per cur.* The three terms are always taken to be incluſive of that term whereof the declaration is, and unleſs plaintiff proceeds to ſign final judgment *within the third term*, he is too late. Rule abſolute for *ſuperſedeas*. Barnes 379.

The defendant was brought into court by *hab. corp. ad ſat.* to be charged in execution, which being objected to, becauſe a judge had before made an order for a *ſuperſedeas* which was lodged with the warden, and allowed and appearance entered: but as defendant had not ſerved the order, nor allowed the *ſuperſedeas* till after *habeas corpus* was lodged with the warden, the court held, that he muſt be charged, and that he might apply afterwards as adviſed. The plaintiff may proceed at his peril. *Barnes* 379.

Plaintiffs obtained interlocutory judgment by *nil dicit*, in an action of *aſſumpſit*, and ſued out a writ of enquiry; but, before the ſame was executed, became *bankrupt*, and proceeded to *final judgment* againſt defendant, a priſoner, [which was regular] in *Michaelmas term*. The *aſſignees*

Of Judgment againſt Priſoners, and of charging them in Execution.

then brought a *ſcire facias* againſt him returnable the firſt return of *Hil.* to ſhew cauſe why they ſhould not have execution of that judgment; to which *ſcire facias* the defendant pleaded the whole matter ſtated, and the bankruptcy of the plaintiffs in bar; to which the *aſſignees* demurred, and had judgment in *Eaſter term*; and then the defendant moved, that he might be diſcharged by *ſuperſedeas*, the plaintiff not having charged him in execution in *Hilary term*. But *per cur.* The *bankrupts* could not charge the defendant in execution in laſt *Hilary term*, becauſe the *aſſignees* were entitled to the benefit of the judgment, and had then brought a *ſcire facias* upon it. And if defendant had any lands, (which he may have for any thing we know) the *aſſignees* may, perhaps, chooſe an *elegit* againſt his lands, and not charge his perſon. Whereupon the rule, to ſhew why defendant ſhould not be diſcharged by *ſuperſedeas*, was diſcharged, the *aſſignees* having proceeded with due diligence. 2 *Wilſ.* 378.

A priſoner who is *ſuperſedeable* in one action, at the ſuit of *A.* but not ſuperſeded, may be charged in execution in another action, at the ſuit of *A. Barnes ad finem* 500. *Pract. Reg.* 332.

If defendant, priſoner, brings a writ of error, no need to charge him in execution the ſecond term after the judgment. 2 *Wilſ.* 380.

The defendant, in *Michaelmas* term, was ſurrendered in diſcharge of his bail; and afterwards, without giving any notice to the plaintiff, was removed to the *Fleet*. The plaintiff, in *Hilary* term, charged him in execution as a priſoner in *B. R.* and afterwards defendant moved for a *ſuperſedeas*, that charge in the court, where he was not a priſoner, ſignifying nothing; and ſo two terms were elapſed. The plaintiff inſiſted, he was in no default, not having notice of his removal; and that theſe removals do not appear upon the *committitur book*, where the charge in execution is to be made. But the court granted a *ſuperſedeas*; for the plaintiff, they ſaid, ſhould have demanded to ſee the priſoner; and if not produced, would have known where to find him, and bring him back, by *habeas corpus*, to charge him. *Filkes* v. *Allen*. *Stra.* 1153.

Of Judgment againſt Priſoners, and of charging them in Execution.

If the defendant, a priſoner, is in the *King's Bench priſon*, in order to charge him in execution, the plaintiff muſt get a rule from *the clerk of the rules*, and ſerve the *marſhal* with a copy, on which he will write his acknowledgment of the defendant's being in his cuſtody, then enter *committitur* in the *marſhal's book*, and file it. *Note on Reg. Tr.* 2 *Geo.* 1.

Upon motion to *ſuperſede* the defendant, as not being charged in execution in two terms, the court held that the *committitur* muſt be actually entered on record, before the end of the ſecond term; and that there is no extenſion of of the time to the continuance day after term; nor was it ſufficient, that there was an entry in the *marſhal's book* in time. *Stra.* 1215.

A *committitur* in execution was entered in the marſhal's book, but no *committitur* piece was filed; nor was the *committitur* entered on record within two terms. Rule made abſolute for diſcharging defendant on the authority of the above caſe of *Unwin* v. *Kerchoffe*. Stra. 1215. as it ought to have been actually entered on *record* before the end of the ſecond term. *Totterell* v. *Philby*. *Burr.* 4 *pt.* 1841.

If the defendant, a priſoner, is in the cuſtody of a *ſheriff*, a *ca. ſa.* muſt be ſued out, and the warrant thereon lodged with the gaoler.

If a priſoner ſurrender, after judgment in diſcharge of *bail*, he muſt be charged in execution in two terms after *render*, except a *writ of error* is brought, or there is an *injunction*. Att. Practt. 341. *Note on* Reg. Tr. 2 Geo. 1.

But quære as to *injunction*, and vide the *Att. Practt.* 371. And *Salk.* 322. Where, by *injunction* out of *Chancery*, the defendant ſtayed the plaintiff's execution a year and upwards. The *injunction* being diſſolved, the plaintiff took out execution without a *ſcire facias*; and this was referred to the court, for irregularity. The plaintiff inſiſted, that he was ſtopped by the act of the defendant; and that, if the defendant had ſuſpended it by a writ of error ſo long, he had been at liberty to take out execution without a *ſci. fa.* *Sed per cur.* We cannot take notice of *Chancery* injunctions; and you might have taken out a writ of execution, and continued it by *vicecomes non miſit breve*. A *ſuperſedeas quia improvide* was awarded. *Booth & Booth.*

Of Judgment againſt Priſoners, and of charging them in Execution.

If the priſoner is in the *Fleet*, you make out an *habeas corpus ad ſatisfaciendum*, get it ſigned by the *prothonotary*, and backed by a judge; and then carry it to the *clerk of the papers at the Fleet*, four days before the return; and the defendant muſt be brought into court, to be committed in execution.

If a defendant be brought into court, upon a *habeas corpus ad ſatisfaciendum*, he can be charged in execution upon that judgment only, on which the *habeas corpus ad ſatisfaciendum* iſſued: And if there be ſeveral judgments on which he is to be charged in execution, there muſt be a writ of *habeas corpus* on each judgment.

An *habeas corpus ad ſatisfaciendum* in one cauſe only; and three judgment rolls were produced in this, and two other cauſes, by the attorney for the plaintiffs, who deſired that the defendant might be charged in execution in all three. But by the judges in the *Treaſury*, the defendant can only be charged in that cauſe, wherein the *habeas corpus* is brought. There muſt be an *habeas corpus* on every judgment. *Barnes* 223.

The ſame in this court; and if the *ca. ſa.* be delivered to the gaoler, inſtead of the ſheriff, it is well. 2 *Barnes* 308.

The ſame as to *injunction*. Pract. Reg. 377. ſed quære?

Of Judgment againſt Priſoners, and of charging them in Execution.

Where a priſoner is diſcharged for want of proceeding to judgment, he may afterwards be taken in *execution*; but otherwiſe, if diſcharged for want of being charged in execution. *Att. Pract.* 295. *Pract. Reg.* 333. 2 *Vol. Rules and Orders* 135. 6.

A priſoner diſcharged upon an inſolvent act, and afterwards arreſted for a debt exceeding the ſum limited in the act, ſhall not be diſcharged on common bail. Ld. *Raym.* 1088.

If the defendant is diſcharged by the *lord's act*, he cannot be retaken on execution, or new action. 1 *Barnes* 271.

A priſoner on a *capias utlagatum*, diſcharged on an inſolvent debtor's act, cannot be taken again on a new *capias utlagatum*. 1 Barnes 278.

An action on the caſe lies againſt an attorney, for neglecting to charge a priſoner in execution in due time. Vide the caſe of *Ruſſell* v. *Palmer*, an *Att. C. B.* 2 *Wil.* 325. And the caſe of *Pitt* v. *Yalden* *Burr.* 4 *pt.* 2060.

So if the defendant, priſoner, obtains a *ſuperſedeas* for want of plaintiff's declaring within the two terms. *Ibid.*

Defendant being a priſoner in the *Fleet*, at the plaintiff's ſuit, brought a *writ of error*, and thereupon judgment was reverſed, and *ſuperſedeas* iſſued to diſcharge her out of cuſtody; but before ſhe could get the *ſuperſedeas* allowed, the plaintiff charged her with a *new declaration*; whereupon ſhe moved to be diſcharged, and the court held, that as defendant was detained a priſoner at the plaintiff's ſuit only, and not at any other perſon's, ſhe could not regularly be charged with the ſecond declaration, after reverſal of the firſt judgment, whereon ſhe had been wrongfully detained; and therefore ordered defendant to be diſcharged. *Peachy* v. *Bowes*, ſpinſter. *Barnes* 368.

But where afterwards the plaintiff cauſed her to be arreſted and held to bail for the former cauſe of action, and ſhe moved to be diſcharged on a common appearance, *two judges* held, that as the ſecond declaration was no charge, ſhe had the benefit of her *ſuperſedeas*; and that after the judgment was reverſed and annulled, the plaintiff had a right to bring a *new action*, and hold her to bail. But the other *two judges* were of opinion, that after the defendant had been diſcharged by rule of court, as to the ſecond declaration, ſhe ought now to be diſcharged on entering a *com-*

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mon appearance; and that the rule of court amounts to the ſame thing as a *ſuperſedeas*. The court being divided no rule was made. *Sherwin* v. *Bowes*, ſpinſter. *Barnes* 429. Though in the book the names of the plaintiffs are different, it appears clearly from the report to have been the ſame parties in both caſes.

Of a Priſoner's obtaining a *Superſedeas*.

TO diſcharge a priſoner in any caſe, whether for want of declaring*, neglecting to proceed to judgment, or not charging him in execution, his attorney muſt take out a *judge's ſummons*, to ſhew cauſe why defendant ſhould not be diſcharged, for want of charging him (or whatever the caſe is) in due time, and ſerve the ſame on the oppoſite party; and if the plaintiff's attorney do not attend thereon, or conſent to an order being made, the defendant's attorney muſt make an affidavit of the ſervice of the ſummons, and his attendance at the time therein appointed; whereupon the judge will make an order for the defendant's diſcharge, on filing *common bail*.

If the priſoner is in the cuſtody of the *marſhal* of the *King's Bench*, he muſt get a certificate from the *clerk of the common bails*, that *common bail* was filed with him, by order of one of the *judges*, on producing which certificate to the *marſhal*, he will diſcharge him without a *ſuperſedeas*.

But if the priſoner is in the cuſtody of a *ſheriff*, &c. he muſt ſue out a *writ of ſuperſedeas*; for ſigning of which at the office, the *bail-piece*, ſigned by one of the judges, is a warrant to the officer with whom you leave it, and he delivers it over to the clerk of the *common bails* to be filed.

But in the *Common Pleas* in all caſes, whether the defendant is in the *Fleet*, or in cuſtody of the *ſheriff*, a *ſuperſedeas* iſſues, to be allowed by a *judge* to diſcharge him out of cuſtody. *Reg. E.* 8 *G.* 1.

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* But in order to diſcharge a priſoner, for want of declaring according to the rule, 2 *Geo.* 1. you muſt alſo obtain a certificate from *the clerk of the declarations*, if in *B.R.* that no *bill* is filed in his office againſt the defendant; and a certificate of the cauſes wherewith he ſtands charged, *from the clerk of the papers of the King's Bench priſon*, if in cuſtody of the *marſhal*; *and from the gaoler or turnkey*, if in cuſtody of *ſheriff or other officer*.

Of

Of Priſoners removing themſelves by *Habeas Corpus* from the Priſons of inferior Courts into the *King's Bench or Fleet Priſons.*

A Priſoner in the priſon of an inferior court, will often ſue out an *habeas corpus cum cauſâ*, in order to turn himſelf over to the *King's Bench* or *Fleet priſon.*

But if it be returned upon any *certiorari*, or *corpus cum cauſâ*, that the priſoner is condemned by judgment, he ſhall be remanded, and remain in priſon, without being let to bail againſt the will of the plaintiffs, unleſs ſatisfaction be made them of the ſums adjudged. 2 *Hen.* 5. *ſtat.* 1. *c.* 2.

A defendant brought into court by *habeas corpus*, directed to the ſheriff of *G.* prayed to be committed to the *Fleet*, with the cauſes mentioned in the return; which were firſt, a detainer for want of ſureties, by a warrant from a juſtice of the peace, for leaving a baſtard child, whereby a pariſh became chargeable with its maintenance. — 2dly. An *excommunicato capiendo* iſſued out of *Chancery*, returnable in the *King's Bench.* And 3dly, With *Exchequer* proceſs on a recognizance forfeited at the ſeſſions. — The court remanded the priſoner, being of opinion, that as to the two firſt cauſes of detainer, they had no juriſdiction; but as to the third cauſe, the court inclined to think, that as it was not on an *extent*, the defendant might have been committed therewith abſtractedly conſidered. *Barnes* 223.

A defendant was taken in execution in the admiralty court, and wanting to procure his liberty, gets a perſon to whom he was indebted to ſue out an *habeas corpus ad reſpondendum*, in order to be turned over to the *Marſhalſea*: And being thereby brought into court, it was moved, that he might be committed to the *Marſhalſea. Sed per cur.* Tho' upon an *habeas corpus ad ſubjiciendum*, this court, upon a charge of treaſon or felony, would have turned the defendant over to the marſhal; or if a bill had been filed againſt him, ſo that he had been in the cuſtody of the marſhal before; but yet, in this caſe, the court cannot do it, becauſe there is no plea in this court, at this time, depending againſt him: and it cannot be, becauſe he is not *in cuſtodiâ mareſcalli.* And he was remanded by the whole court. *Dowler* v. *Keite.* Ld. *Raym.* 789. *Salk.* 351.

So in Dr. *Watſon*'s caſe, who being arreſted upon an *Excommunicato capiendo*, after an excommunication in the *Spiritual Court*, for nonpayment of coſts, in a ſuit in which he was condemned, was brought into *B. R.* by *hab. corp.*

Of Priſoners removing themſelves by *Habeas Corpus* from the Priſons of inferior Courts into the *King's Bench or Fleet Priſons.*

ad reſp. J. S. de placito debiti, &c. And on motion to be committed, he was remanded, becauſe no ſuit was depending here againſt him, the bill of *Middleſex* not being returnable till next term. *Ibid.*

If a priſoner in the *Compter* be removed into the *King's Bench*, upon an *hab. corp. ad reſp.* and intending to go over into the *Fleet*, procures ſome friend to bring an *habeas corpus* to remove him; he ſhall not be removed thither, till he has anſwered to the cauſe here; and he ſhall not compel the plaintiff to follow after a prolling defendant; and ſo *vice verſa* of the *Common Pleas*. Each court ſhall retain the defendant in which he is firſt attached; and after he has anſwered there, you may carry him where you will. *Salk.* 350.

Actions having been entered in *B. R.* againſt one in cuſtody of a ſheriff, upon a *ne exeat regno*, an *habeas corpus* was ſaid might be granted, although ſtrongly objected to, becauſe the writ of *ne exeat regno* commands the ſheriff to take ſecurity, and tranſmit it into *Chancery*. *Sed per cur.* The *habeas corpus* ought to be granted: The *King's Bench* may receive and judge of the ſecurity taken; and he ought to remain there; and that they may then grant a *ſuperſedeas*. *Nailor's* caſe. Ld. Raym. 696.

The defendant was brought to the bar by *habeas corpus*, returnable in one month from the day of St. *Michael*, to be committed to the *Fleet*; and the court committed, though the day of the return was paſt. *Barnes* 221.

From the above caſes it appears, that where a priſoner is in cuſtody charged with proceſs from another court than that to the priſon of which he would be turned over, he muſt (before ever he can be turned over) procure himſelf to be charged with ſome proceſs iſſuing out of the court into the priſon of which he would be turned over, and then bring his *habeas corpus*, that he may be returned charged with ſuch proceſs.

Where any perſon ſhall be brought into court upon an *habeas corpus*, or before a judge, in order to be committed to the cuſtody of the marſhal, the writ, with the return, ſhall be left with the *ſecondary*, or *judge's* clerk, to be filed; and a copy or note of ſuch return of the writ, under the hand of the *judge* or *ſecondary*, ſhall be delivered to the mar-

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Of Priſoners removing themſelves by *Habeas Corpus* from the Priſons of inferior Courts into the *King's Bench or Fleet Priſons.*

ſhal at the time of the commitment of ſuch perſon to his cuſtody; and ſuch copy or note ſhall be prepared by the perſon proſecuting ſuch writ of *habeas corpus*, or by his attorney. *Trin.* 3 *Anne.*

Of Outlawry.

On meſne Proceſs.

OUTLAWRY is a puniſhment inflicted on a perſon for a contempt and contumacy, in refuſing to be amenable to and abide by the juſtice of that court which hath lawful authority to call him before them; and as this is a crime of the higheſt nature, being an act of rebellion againſt that ſtate or community of which he is a member, ſo doth it ſubject the party to divers forfeitures and diſabilities; for hereby he loſeth *liberam legem*, is out of the king's protection, *&c. Co. Lit.* 128. *Rol. Ab.* 802. *Dr. and Student, dial.* 2. *c.* 3.

But as to the forfeitures for refuſing to appear, herein the law diſtinguiſhes between outlawries in capital caſes, and thoſe of an inferior nature; for as to outlawries in treaſon and felony, the law interprets the party's abſence a ſufficient evidence of his guilt, and, without requiring further proof or ſatisfaction, accounts him guilty of the fact, on which enſues corruption of blood, and forfeiture of his whole eſtate, *real and perſonal.*

But outlawry in leſſer crimes, or in *perſonal actions*, does not occaſion the party to be looked upon as guilty of the fact, nor does it occaſion an entire forfeiture of his real eſtate; but yet is very fatal and penal in its conſequences; for hereby he is reſtrained of his liberty if he can be found, forfeits his goods and chattels, and the profits of his lands, while the *outlawry* remains in force. *Plow.* 941. 9 *H.* 6. 20. *b.*

Having ſtated the difference between *outlawry* in *criminal* and *civil caſes*, I ſhall proceed to ſhew in what *civil actions* proceſs of outlawry lies, in what manner a defendant may be proſecuted to outlawry, and how ſuch outlawry may be avoided, or reverſed.

Proceſs of *outlawry* lies in no caſe, but where a *capias* lies. So that when the proceedings are *by bill*, and not by *original*, as there can be no *capias* upon a bill, ſo there can be no proceſs of *outlawry*. Leon. 329. 2 Rol. Ab. 76. Sid. 159. Keb. 577.

The proceſs of *outlawry*, in *civil actions*, is conſidered, at this day, nothing more than a *proceſs* to compel an appearance of the party againſt whom a ſuit is commenced; and therefore any plauſible cauſe, however ſlight, will, in gene-

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ral, be ſufficient to reverſe it. But in order to make the *proceſs to outlawry*, and *practice* therein intelligible, it will be neceſſary to take a view of the ſtatutes which have altered the *proceſs* of the courts.

The ſtatute 13 *Car.* 2. *ſtat.* 2. *c.* 2. being made to remedy ſome * abuſes which crept in upon authoriſing the *arreſt* of the defendant's body by the bill of *Middleſex*, *latitat*, *&c.* in *B. R.* and the general writ of *capias clauſum fregit* in *C. B.* provides, that no perſon who ſhould happen to be arreſted by force or colour of any writ or proceſs iſſuing out of the *King's Bench* or *Common Pleas*, ſhall be forced upon ſuch arreſt to give ſecurity in more than 40 *l.* *unleſs the true cauſe of action be particularly expreſſed in ſuch writ or proceſs.*

This ſtatute not having remedied all the miſchiefs that prevailed, as the ſheriff was ſtill to take bail for the defendant's appearance in 40 *l.* even upon a *general writ*, without the clauſe of "*ac etiam*;" and upon writs wherein the clauſe of "*ac etiam*" was inſerted, he was authorized to require bail upon the arreſt to the amount of double the ſum ſpecified therein, which was ſtill an engine of oppreſſion in the hands of a malicious and troubleſome plaintiff, as he could expreſs any ſum in the clauſe of "*ac etiam*," or lay his damages therein to any amount, and thereby keep the defendant in gaol for want of bail—the ſtatute 12 *Geo.* 1. *c.* 29. was made to give a further remedy for ſuch abuſes, and provides, that no one ſhall be held to bail, upon the arreſt by proceſs from the ſuperior courts, unleſs an affidavit is previouſly made, that the cauſe of action amounts to 10 *l.* or upwards, and that where no ſuch affidavit is made, that the party ſhall only be ſerved with a copy of the proceſs, in order that he may appear to the action; and, in caſe of his non-appearance at the return, the plaintiff has liberty to enter (on affidavit made of due ſervice of the proceſs) an appearance for him, and proceed as if the party had actually appeared. Then came the ſtatute 5 *Geo.* 2. *c.* 27. to remedy the inconveniences from the proceſs being in *Latin*, and requires the ſame to be in the *Engliſh tongue*; and where the party is only to be ſerved with a copy thereof when no affidavit is made of the debt's amounting to 10 *l.* or upwards, enacts, that an *Engliſh notice*, in writing, ſhall

* *Vide* the introduction.

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be ſubſcribed on the copy of the ſaid proceſs wherewith the party is to be ſerved, to the intent to warn him to appear at the return thereof, to anſwer the action againſt him.

Theſe ſtatutes have, in great meaſure, occaſioned the practice of *outlawing* defendants to fall into diſuſe, as a plaintiff may proceed with leſs expence, and more expedition, in his action, by not taking out proceſs towards *outlawry*, than by proceeding with an intention to *outlaw*, ſhould the defendant ſtand out to be *outlawed*, the proceſs thereto being dilatory and expenſive. But ſtill a plaintiff in ſome caſes, and particularly if his action is againſt a defendant who it is apprehended will be litigious, or is difficult to be arreſted, and has property wherewith to ſatisfy the plaintiff's demand, and all the charges and incidental expences of the *outlawry*, will find an advantage in this method of proceeding.

The aforementioned ſtatute of *Cha.* 2. was of equal ſervice to plaintiffs as to defendants, for a plaintiff who choſe to proceed by *original*, could inſert any cauſe of perſonal action in the clauſe of "*ac etiam*," in the *capias*, arreſt the party immmediately, and require bail to the amount of double the ſum expreſſed therein; but ſtill the defendant was ſuppoſed to be arreſted for the *treſpaſs* mentioned in the writ, though, in fact, no ſuch charge could be alledged againſt him; and not for the debt or damages inſerted in the "*ac etiam*" clauſe, the intent of that being nothing more than to ſhew the ſheriff, to what amount he was to inſiſt upon bail if he arreſted the party.

This ſtatute of *Cha.* 2. gave a plaintiff who had an action of *debt* againſt a defendant, if he ſued by original, an opportunity alſo of avoiding the *Fine* paid to the king upon ſuing out his *original writ*, in *debt*, becauſe he could inſert the amount thereof in the *ac etiam* clauſe of a *capias*, and, if the defendant was arreſted, require bail in proportion to his demand; which was a cheaper method of proceeding, evidently more expeditious, and equally anſwered the purpoſe of ſuing out an *original in debt*; and going on regularly towards *outlawing* the defendant, unleſs he was a perſon likely to abſcond or avoid being taken, and had property which the plaintiff could come at to ſatisfy his debt by proceeding to outlaw him. For which reaſon we do not often hear, at this day, of a *præcipe quod reddat*, in *debt*; or, of a perſon being *outlawed* in an action of *debt*, as that action is generally proſecuted in the *King's Bench by bill or latitat*, which

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which pre-ſuppoſes a bill, and in the *Common Pleas* by a *capias*, with an *ac etiam* in it; and a defendant cannot be *outlawed* by proceſs with *ac etiams*.

Since the ſtatute alſo of 12 *Geo.* 1. *c.* 29. before mentioned, we do not often hear of a defendant being *outlawed* by a common *capias quare clauſum fregit*; becauſe, if the plaintiff's cauſe of action does not warrant him to arreſt and hold the defendant to bail, he is generally ſerved with a copy of the proceſs, with a notice ſubſcribed, to appear; and upon no appearance within * *eight days* after the return of the proceſs, the plaintiff is at liberty, upon an affidavit made of the proceſs having been duly ſerved on the defendant, to enter an appearance for him, and proceed as if he had regularly appeared to the action. This method therefore, in caſes not warranting *bail*, if the defendant can be met with, being more eaſy and expeditious, and attended with little or no expence to the ſuitor, compared with proceedings towards *outlawry*, affords one reaſon why *outlawry* is not often heard of now upon *common capias's quare clauſum fregit*. Another reaſon alſo is, that ſhould a plaintiff proceed with an intention to *outlaw* the defendant upon *common capias's*, and the defendant even not come in till after the *exigi facias*, he may, notwithſtanding, reverſe the *outlawry* had againſt him, without being compelled to put in *bail* to the action; ſo that the plaintiff, inſtead of gaining any advantage, in proceeding to *outlawry* upon *common capias's*, and not purſuing the line chalked out by the ſtatute for his own expedition, is not only put to expence, but is himſelf the occaſion of his own delay, and frequently in a worſe ſituation towards recovering his demand than he otherwiſe might have been, if he had proceeded as the ſtatute directs him.

For the above reaſons, a plaintiff ſeldom proceeds with a view to *outlaw* the defendant, unleſs the cauſe of action is ſuch as to warrant holding him to *bail*, which muſt be for actions founded on *contract*, unleſs by ſpecial order of a judge in caſes of *torts*. And, as the action of *debt* is not often commenced at this day by a *præcipe quod reddat*, on account of the *fine* upon ſuing it out, the action of *aſſumpſit* is that in which plaintiffs uſually proceed, with a view to *outlaw* the defendant.

* *Vide* 5 Geo. 2, c. 27.

In

On meſne Proceſs.

In the *King's Bench*, as a *writ of error* brought on a judgment by *original* there, muſt be returnable in parliament, and not in the *Exchequer Chamber*, as where the ſuit is commenced by *bill*, a plaintiff having a juſt demand againſt a litigious and wealthy defendant, who is likely to put off the day of payment as long as he can, by bringing writs of error, has a proſpect therefore of getting his debt much earlier, by ſuing by *original*, than by *bill* in *B. R.* And, in either court, if the plaintiff's demand amounts to a conſiderable ſum, or the defendant cannot be eaſily caught, or has property which the plaintiff can come at, he may, in the end, reap more advantage, perhaps, by taking out proceſs towards *outlawry*, than by ſuing out a common *capias quare clauſam fregit*, or a *capias* with a clauſe of "*ac etiam*" in it.

As the action of *aſſumpſit*, where the demand is ſufficient to hold to *bail*, is the action in which plaintiffs in either court uſually proceed with an intention to *outlaw* the defendant, I ſhall ſhew the method of commencing and proſecuting ſuch action, and of outlawing a defendant therein, and of his reverſing ſuch outlawry; at the ſame time it muſt be remembered, that the practice and proceedings in another action requiring bail, towards *outlawry*, would be exactly the ſame.

The plaintiff's attorney, or ſpecial pleader, when the cauſe of action is above 10*l.* draws out a *præcipe* for a *ſpecial original*, which *præcipe* contains the whole count or declaration, and ought to be drawn up with great accuracy and preciſion, as on it all the ſubſequent proceedings are built. The defendant's name, his degree, profeſſion, or miſtery muſt be aſcertained and ſet forth according to the ſtatute of * *additions*, together with the town or hamlet, place and county, in which he is or was converſant.

The *præcipe*, in an action on the caſe on *aſſumpſit*, is to this effect.

Middleſex. If *A. B.* ſhall give you ſecurity to proſecute his ſuit, then put by ſureties and ſafe pledges *C. D.* late of *Weſtminſter*, in the county of *Middleſex*, *upholder*, that he be before our *lord the king*, *on the morrow of the Holy Trinity*, *wherefoever our ſaid*

* 1 *Hen.* 5. *c.* 5.

lord

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lord the king ſhall then be in England [or if in *C. B.* ſay, "before our juſtices at *Weſtminſter*, on the *morrow* of the *Holy Trinity*"] to ſhew wherefore Whereas, [ſo ſet forth, *verbatim*, the whole count, or declaration] to the damage of the ſaid *A. B.* of one hundred pounds, as he ſaith, *&c.*

Returnable, *&c.*

E. F. attorney,
1 *May*, 1780.

This *præcipe* muſt be carried to the *curſitor* of the proper county, who will thereupon make out the * *original writ*. But in *B. R.* the *præcipe* is uſually carried directly to the *filazer*, who procures the *original* from the *curſitor*, and immediately makes out the *capias*, *&c.*

The *curſitor* is paid at the rate of 2 *s.* 6 *d.* the firſt count, and 6 *d.* for every other count contained in the *præcipe*, upon making out the *original writ*. The *filazer*, who makes out the *capias*, &c. from the *original writ*, is alſo paid after the above rate, beſides 4 *d.* for filing the *original*.

If the *præcipe* is carried to the *curſitor*, before the eſſoign day of a term, he will make the *original* returnable on any return of the precedent term. The *original* is returned of courſe thus:

Pledges for proſecuting, { *John Doe.* / *Richard Roe.*

It has been often queſtioned, whether an *affidavit* was neceſſary to be made of the *debt*, when a plaintiff ſues by *ſpecial original*, previous to the iſſuing of the proceſs. But it has been determined in lord *Hardwicke*'s time, *M.* 10 *Geo.* 2, *Fownes and Allen*, that proceſs of *outlawry* is not within the ſtat. 12 *Geo.* 1. *c.* 29. ſo there is no need of an *affidavit*, when the plaintiff ſues by *ſpecial original*, eſpecially as the 5 *Geo.* 2. *c.* 27. *ſ.* 5. enacts, "That no ſpecial writ, nor "any proceſs ſpecially therein expreſſing the cauſe of ac-"tion, ſhall be ſued forth or iſſued from any ſuperior court, "where the cauſe of action ſhall not amount to 10 *l.* or "upwards." Since which ſtatute, as no *ſpecial* writ can iſſue where the cauſe of action is not above 10 *l.* it ſeems, that, before the iſſuing of a ſpecial writ, no affidavit is neceſſary, becauſe a ſheriff, if he apprehends the party either

* Very often no *original writ* is made out at all.

upon

On meſne Proceſs.

upon the *ſpecial capias*, *alias*, or *pluries*, before he lets him go out of his cuſtody, for his own ſafety, ſhould take bail; and he can eaſily know to what amount to take bail, as the whole cauſe of action is ſpread and ſet forth in the writ. *Vide* the caſe of *Cracraft* v. *Gledowe*, *Burr.* 4 *pt.* 1482.

In *Barnes* 322, it was held, that on proceſs to *outlawry*, no affidavit for bail is required by ſtatute, or the courſe of the court.

If the plaintiff means to proceed to *outlawry*, he has no need to wait till the *capias* is ſpent, then to take out an *alias*, and endeavour to arreſt the defendant, and after that a *pluries*; but he may, for expedition, get them all of the *filazer* at once (if there is time ſince the cauſe of action accrued to allow of the proper *teſte* and *return* to each writ,) and return them ſeverally of courſe after this manner:

"The within named *C. D.* is not found in our baili-
"wick." The anſwer of

Thomas Wright, Eſq.
And
Evan Pugh, Eſq. } Sheriff.

The *original writ* muſt have *fifteen days*, at leaſt, between the *teſte* and return. The *capias* alſo muſt have *fifteen days* between its teſte and return; and ſhould regularly bear teſte on the return day of the *original:* the *alias* alſo muſt have the ſame number of days, and ſhould bear teſte the return-day of the *capias*; and the *pluries capias* muſt have the ſame number of days, and ſhould bear teſte the return day of the *alias*; whereas, if a plaintiff ſues by *original*, and does not mean to proceed to *outlawry*, the *capias* may bear teſte before the *original*, and even before the cauſe of action accrued, ſo long as it is actually taken out afterwards; for you cannot have oyer of the *copies*, ſo as to take advantage of it. *Barnes* 173. And ſo held in *B. R. Eaſt.* 18 *Geo.* 3.

Note—The proceedings are exactly the ſame towards *outlawry* upon a *common capias quare clauſum fregit*, as on a *ſpecial capias*.

Upon the return of *non eſt inventus* to the *pluries capias*, proceſs of *outlawry* begins, which is the writ of *exigi facias*. In *B. R.* the *filazer* acts as the *exigenter*: in *C. B.* the *exigenter* is a diſtinct officer from the *filazer*.

The

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The writ of *pluries capias*, when ſealed and returned, is the warrant for the *exigenter* to make out the *exigi facias* and *writ of proclamation* thereon.

Every attorney ſhall file his warrant of attorney of the term wherein any *exigent* is awarded, upon pain of forty ſhillings for every time he offends, and is attainted by due examination of the juſtices of this court; ſuch warrant to be filed upon or before the eſſoign-day of every *Trinity* term, and within twenty-one days after the end of every other term. *Hil.* 14, 15 *Car.* 2. *C. B.*

No *exigenter* ſhall receive any *pluries capias*, in order to make an *exigent* or proclamation thereon, before the ſame be ſigned or ſtamped by the clerk of the warrants, or his deputy, to the end it may appear, that the warrant of attorney is duly filed. *Hil.* 2, 3 *Jac.* 2.

Plaintiffs, who intend to proceed to *outlawry*, generally lay their action in *London*, becauſe defendants are ſooner *outlawed* in *London* than in any other place, as the county days there are more frequent.

The writ of *exigent* therefore muſt go to the ſheriff of the county in which the action is laid; as ſuppoſe *London*. But if the defendant lives in any other county, the writ of *proclamation* muſt go there, (whether a county palatine, or other franchiſe in *England* or *Wales*) according to the 31 *Eliz. c.* 3. for avoiding ſecret outlawries againſt perſons having known places of dwelling.

The *exigent* ſhould bear *teſte* the *quarto die poſt* of the *pluries*. The *writ of proclamation*, by the ſame ſtatute, muſt bear the ſame *teſte* and *return* as the *exigent*.

If the *exigent* goes into *London*, as is uſual in *outlawries*, for expedition, carry it to one of the compters, where clerks attend for the purpoſe, who require the defendant, upon five ſeveral *huſting-days*; and, if he does not appear upon the *quinto exactus*, he is returned outlawed.

Upon receiving the *writ of proclamation*, the ſheriff muſt, according to the ſtatute of *Elizabeth*, make *three proclamations*, one in his county-court, one at the general quarter-ſeſſions, and the other at leaſt one month before the *quinto exactus* at the church door of the pariſh where the defendant lives; or, if he lives out of a pariſh, then at the church-door of the next pariſh, upon a *Sunday*, after divine ſervice; after which proclamations, if the defendant does not appear before the *quinto exactus*, he is pronounced outlawed by the

coroner.

On meſne Proceſs.

coroner. Then the ſheriffs return the writs—the return to the *exigent* ſpecifies the five county courts when he was exacted; and the judgment of *outlawry*—and the return to the *writ of proclamation* particularizes when and where he was duly proclaimed.

If it happens that there ſhould not be *five county days* between the *teſte* and *return* of the *exigent*, you may, upon application to the *exigenter*, get an *allocatur* to bring in the days.

All *outlawries* pronounced, and and no *proclamation* awarded and returned, according to the ſtatute are void. *Stat.* 31 *El. c.* 3.

The ſheriff, for making the proclamation at the church-door, ſhall have 12 *d.* Same ſtat.

No officer, in whoſe office the *exigent* ſhall be taken, ſhall take more, for making out the *writ of proclamation*, than 6 *d.* Stat. 6 Hen. 8. c. 4.

Of appearing upon the *exigent*, &c. *Vide poſt.*

When the *exigent* and *proclamation* are returned, the proclamation muſt be filed with the *exigenter*, and the *exigent* taken to the *clerk of the outlawries*, if in *C. B.* [in *B. R.* the *filazer* executes this office alſo] who thereupon makes out a *capias utlagatum*, of which there are two ſorts, either the general or ſpecial *capias utlagatum*, the one againſt the defendant's *body*, the other againſt his body, goods and lands, into as many counties as the plaintiff chuſes either in *England* or *Wales.*

No ſheriff, underſheriff, their deputies, or bailiffs, ſhall ſet at liberty any perſon arreſted upon any *capias utlagatum*, until he receive a *ſuperſedeas* according to law from the proper officer appointed. 13 *Car.* 2. *ſt.* 2. *c.* 2. *ſ.* 4.

No ſheriff, underſheriff, &c. ſhall ſet at liberty any perſon upon any writ of *capias utlagatum*, nor diſcharge the lands or goods of any perſon outlawed, without a lawful *ſuperſedeas*, under the ſeal of the court.—*Hil.* 15. 16 *Car.* 2. But *vide* the ſtatute 4 & 5 *W.* & *M. c.* 18. *poſt.* which empowers him to admit to bail, or take an attorney's engagement in writing to appear for him.

If upon the *ſpecial capias utlagatum* any goods are taken, and the defendant is not likely to put in bail to the action, or does not move to *ſuperſede* or *reverſe the outlawry*, you may get a ſatisfaction out of his goods; but if the ſame do not amount to ſomething conſiderable, ſo as to pay all the charges of petitioning, &c. and put the plaintiff ſomething in pocket

On meſne Proceſs.

pocket towards his demand, it will not be worth while to proceed.

If the plaintiff, in ſuch caſe, thinks it worth his while to proceed, he muſt get the ſheriff to extend and appraiſe the goods by an inqueſt, which the ſheriff will ſummon if requeſted, the plaintiff paying the charges thereof, amounting to about two or three guineas; and if it is neceſſary, the plaintiff may take out a *ſubpœna* for witneſſes to attend and give evidence upon the inquiſition.

The inquiſition being taken, get the *capias utlagatum* returned with the inquiſition annexed, which muſt be carried, if in *B. R. to the filazer* who acts as clerk of the outlawries, and if in *C. B. to the clerk of the outlawries*, who will tranſcribe the inquiſition and tranſmit it into the Court of *Exchequer*. Which being done, apply to a clerk in the *Remembrancer's office* for a *venditioni exponas*, by virtue of which the ſheriff will ſell the goods, and if the money raiſed thereby exceeds not 20 *l.* the court of *Exchequer*, on motion, will order it to be paid to the plaintiff; but if it exceeds that ſum, the plaintiff muſt petition the lords of the treaſury for it, who refer it to their *ſolicitor*, to examine into the merits of the plaintiff's demand.

To the Right Honourable the Lords Commiſſioners of his Majeſty's Treaſury.

The humble PETITION of *A. B.*

SHEWETH,

THAT *C. D.* late of ——— being indebted to your petitioner in the ſum of 100 *l.* your petitioner did, at his very great charge in *November* laſt, proſecute the ſaid *C. D.* to an outlawry; and by virtue of a *ſpecial capias utlagatum*, directed to the ſheriff of *Middleſex*, ſeveral goods of the ſaid *C. D.* were ſeized, and found by inquiſition to be of the value of 86 *l.* 4 *s.* which goods were afterwards ſold by the ſaid ſheriff, by virtue of a writ of *venditioni exponas*, at the ſame price and value at which they were ſo appraiſed; and the money thereupon raiſed ſtill remains in the hands of the ſheriff of *Middleſex*.

On meſne Proceſs.

That your petitioner's ſaid debt, and the charge he has already been at in proſecuting the ſaid *C. D.* to outlawry, greatly exceeded the ſum ſo remaining in the ſheriff's hands.

Wherefore your petitioner humbly prays your lordſhips, that the money ſo levied as aforeſaid may be paid over to your petitioner.

And your petitioner, as in duty bound, ſhall ever pray, *&c.*

A. B.

Reference thereon to the ſolicitor.

Whitehall Treaſury-Chambers, Feb. 1, 1780.

The right honourable the Lord's Commiſſioners of his Majeſty's Treaſury are pleaſed to refer this petition to *William Chamberlain*, eſq. who is to conſider the ſame; and report to their lordſhips a true ſtate of the petitioners caſe, together with his opinion what is fit to be done therein.

Grey Cooper.

After this reference, the plaintiff muſt make an affidavit, before one of the barons of the *Exchequer*, of his debt and proceedings againſt the defendant, and the charges he has been put unto, which affidavit, with the attorney's bill, *venditioni exponas* and return, muſt all be laid before the ſolicitor of the *Treaſury*; and if he is ſatisfied of the truth of the premiſſes, he makes his report to their lordſhips accordingly; and thereupon a warrant goes from the *Treaſury* to the *attorney general*, to conſent that ſo much of the money as remains in the ſheriff's hands, after deducting the poundage, be paid to the plaintiff towards ſatisfying the debt and coſts, on his moving the court of *Exchequer* for an order for that purpoſe. On delivering the warrant to the *attorney general*, he gives his conſent of courſe; then, on moving the court of *Exchequer*, an order is made for the ſheriff to pay the money over to the plaintiff, which, on ſight thereof, he will accordingly do.

The fees and expences in all amount to about 20*l.*

Of

Of ſuperſeding the *Exigent* before Outlawry.

IF the defendant has notice that an *exigent* is iſſued out againſt him, and would avoid the *outlawry*, he muſt find out to what ſheriff the writ is directed, and get a note of it, particularizing at whoſe ſuit, the cauſe of action, and when the exigent is returnable; from which note, the *filazer* in *B. R.* or *exigenter* in *C. B.* will make out a *ſuperſedeas* on the defendant's attorney entering an appearance; which *ſuperſedeas* muſt be carried to the ſheriff for his allowance thereof before the return of the *exigent* *.

The *ſuperſedeas* is a writ taking notice of the *exigi facias* having iſſued, at whoſe ſuit, and for what cauſe; and orders the ſheriff to forbear further proceedings, as the defendant duly appeared in court before the iſſuing thereof, and offered to anſwer the plaintiff, although the fact, perhaps, is the contrary.

If the defendant thus ſuperſedes the exigent before outlawry pronounced, no bail is required, let the debt be ever ſo large: Whereas, if a defendant ſuperſedes or reverſes an *outlawry* had againſt him, he muſt put in bail, if he was outlawed by a *ſpecial original* requiring bail.

The *ſuperſedeas* to an *exigent* muſt be delivered to the ſheriff before the return of the *exigent*. Barnes 319.

In ſuperſeding the *exigent*, the defendant muſt pay the plaintiff the coſts he has put into his proceedings.

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* The fees amount to about 10*l.*—2*s.* for entering the appearance,—3*s.* the *ſuperſedeas*—duty, 1*s.* 6*d.* ſeal, 7*d.* and allowance by the ſheriff, 2*s.* 4*d.*

Of appearing to the *Exigent*, and of reverſing the *Outlawry* by Motion, on coming in *gratis*.

FOrmerly, if the defendant appeared upon the *exigent*, though the debt originally required bail, yet the defendant was not obliged to put in bail; but the courts now hold, that if the defendant ſtands out to be *outlawed*, and will then come in, [*i. e.* voluntarily come in] and the cauſe of action requires bail, he muſt put in bail, as appears by *Campbell* v. *Daley*. *Bur.* 4 *pt.* 1920. The queſtion was, whether in a caſe originally requiring ſpecial bail, and the defendant ſtanding out to an outlawry, he can come in and appear to the outlawry without putting in ſpecial bail? *Per cur.* There ought to be a *ſpecial bail*. It would be unreaſonable, that a defendant ſhould gain an advantage, by ſtanding out until proceſs of outlawry. He certainly ought not to be in a better caſe then, than if he had appeared at firſt. And accordingly direction was given, "that the filazer ſhould not iſſue a *ſuperſedeas* till the defendant had put in ſpecial bail." And a week was given him for that purpoſe.

Inſtead of driving the party to a writ of error, to reverſe an outlawry had againſt him, the court will, at this day, in moſt caſes, relieve upon motion, where the party comes in *gratis* upon the *exigent*, if the proceedings have been irregular or unlawful.

A writ of *ſuperſedeas* to an *allocatur* to the *exigent* could not be ſealed in the morning of the day whereon the *allocatur* was returnable, it being an holy-day, but was ſealed and brought to the ſheriff's office in *London*, about an hour after the defendant was returned *outlawed*. The proceeding was by ſpecial original in an action on the caſe on promiſes, which required bail. Motion and rule was to ſhew cauſe, why defendant ſhould not have leave to appear, and ſuperſede the exigent on payment of coſts. On ſhewing cauſe, the court was not willing to ſtrip the plaintiff of an advantage which he had fairly and regularly obtained. Before a defendant is returned outlawed, he may ſuperſede the exigent, though founded on a ſpecial original, and though the debt be ever ſo large. But after he is returned outlawed, he cannot reverſe the outlawry, without bail; who are to be abſolutely bound to pay the money without power to render the principal in their diſcharge. Ordered, that proceedings on the outlawry be ſtayed on payment

Of appearing to the *Exigent*, and of reverſing the *Outlawry* by Motion on coming in *gratis*.

payment of the plaintiff's debt and coſts within a month; but in default, the rule to be diſcharged, and plaintiff at liberty to proceed on the outlawry. *Challing* v. *Fox*. *Barnes* 326.

It appeared that, pending the exigent, defendant was a priſoner in the gaol for the city of *York*, for which reaſon the court ordered the outlawry to be reverſed, without payment of coſts to the plaintiff, upon defendant's entering a common appearance. *Barnes* 321. *Heely* v. *Hewſon*.

An outlawry had againſt a bankrupt was reverſed on motion. *Anon*. *B. R*.

The outlawry was reverſed and compleated, during the defendant's reſidence in *Ireland*; and, on motion, it was ordered, at his expence, to be reverſed, without bail or appearance. Where the court ſee an unlawful proceeding, they will not put the party to the expence of a writ of error, but will avoid circuity, and relieve him in a ſummary way. *Barnes* 325. *Reilly* v. *O'Connor*.

Motion to reverſe outlawries on *common clauſum fregits*, at the plaintiff's expence, on affidavits of defendant's publick appearance and dealings, ſworn by themſelves only. *Per cur*. Let the rule be enlarged until next term, that the plaintiff's attorney may, in the mean time, make ſatisfaction to the parties. *Barnes* 320.

Rule to ſhew cauſe, why outlawry ſhould not be reverſed at plaintiff's expence. It appeared that two writs had been ſued out, and defendant could not be arreſted. He lived on the confines of *Surry* and *Kent*; and when the *Surry* bailiff come to arreſt him, he jumped over an hedge into *Kent*, and put the bailiff to defiance. *Per cur*. Though the defendant is ſworn to appear publickly, yet it is plain he kept out of the way to prevent being arreſted. Rule diſcharged. But, by conſent, the debt and coſts to be paid out of the money in the ſheriff's hands; and the overplus paid to the defendant. *Holman* v. *Braſier*. *Barnes* 320.

On motion to reverſe an outlawry, the defendant, and three others, ſwore that he was always viſible; but the court refuſed, and required poſitive affidavit, that he might have been ſerved with proceſs.

On motion to ſuperſede an outlawry, it was objected by defendant, that he was a publick viſible man; and that the

Of appearing to the *Exigent*, and of reverſing the *Outlawry* by Motion on coming in *gratis*.

return of the proclamation was bad, it importing, that proclamations were made as the ſheriff was by the writ commanded, but not where or according to the form of the ſtatute. That the defendant was a publick viſible man, was denied: and it was fully proved that he abſconded; and his living was under a ſequeſtration. The court ſeemed to think, the return of the proclamation was ſufficient; but ſaid, that as to that, the defendant might bring a *writ of error*. And the rule to ſhew cauſe, why the outlawry ſhould not be reverſed, at the plaintiff's expence, was diſcharged. *Dale* v. *Robinſon*, clerk. *Barnes* 322.

Rule to ſhew cauſe, why outlawry ſhould not be reverſed at the plaintiff's expence. Objected, on the part of the defendant, that he was a publick viſible man, and that the plaintiff had not endeavoured to arreſt him. That the *capias*, *alias*, *and pluries*, were all ſued out at the ſame time. That no affidavit of the debt was indorſed on the writs, (though bailable) purſuant to the ſtatute to prevent vexatious arreſts. That no date was on the writs, as required by the ſtatute. The affidavits, as to the defendant's viſibility, were fully anſwered, and his total abſconding proved. And the court held, that in caſe of a total abſconding, no endeavours to arreſt are neceſſary. That ſuing out the *capias*, *alias*, *and pluries* together, was regular, and warranted by conſtant practice. That on proceſs to outlawry, no affidavit for bail is required by the ſtatute, or the courſe of the court, nor is a date to ſuch proceſs uſual. Rule diſcharged without coſts. *Farnworth* v. *Smith*. *Barnes* 322.

Three ſeveral outlawries had been pronounced above a year, and tranſcribed into the exchequer, — one againſt *A.* and *B.* a ſecond againſt *A.* and the third againſt *B.* all at the plaintiff's proſecution. *Penvold and Roberts*, authorized by power of attorney executed by defendants, applied on their behalf, and obtained a rule to ſhew cauſe why theſe outlawries ſhould not be reverſed at plaintiff's expence, defendants at the time the writs of *exigent* iſſued, and ſtill being in parts beyond the ſeas. On ſhewing cauſe it appeared, that defendants had been abroad three years, and probably never intended to return; and it was urged, that as they

Of appearing to the *Exigent*, and of reverſing the *Outlawry* by Motion on coming in *gratis*.

they ſtay abroad longer than their lawful occaſion required, ſuch ſtay muſt be looked upon with a view to defeat juſtice; and conſequently, they were duly outlawed. That if not, they ought to bring their writ of error, and ſhould not be relieved by motion. The court thought it diſcretionary in them to relieve by motion, or put the parties to a writ of error, according to the circumſtances of the caſe. Courts have gone further of late years, than heretofore, on motions, as more effectually to expedite juſtice, ſave expence, and preſerve credit and characters. There is no ſufficient foundation for the court to order the plaintiff to reverſe theſe outlawries at his own expence. But as they are not ſpecial, but only common *clauſum fregits*, defendants have a right to reverſe them at their own expence, on entering common appearances and payment of coſts. Rule made accordingly. Defendants, before the outlawries were tranſcribed into the *Exchequer*, might have reverſed them, on entering common appearances, and payment of common coſts, as far as the *exigent*; but now, after they are tranſcribed, coſts muſt be paid to the time of the reverſal. *Barnes* 324.

Defendant was outlawed while reſident at *Jamaica*, for a debt contracted in *England*, and was abroad when the proceedings to outlawry were firſt commenced. On ſhewing cauſe on a rule made, why the outlawry ſhould not be reverſed at the plaintiff's expence, it appeared, that the defendant was an abſconding perſon; and that the motion, though in his name, was not made by him, but by a third perſon, and the matter appearing to be a contention between creditors, the court would not exerciſe a diſcretionary power, ſo as to relieve the defendant in a ſummary way: The plaintiff has had no remedy for his debt: The court will not take from him the legal advantage he has got.— The defendant, if he thinks fit, may bring his writ of error. Rule diſcharged. *Barnes* 325.

After the return of the *exigent*, but whilſt it remained in the hands of the ſheriff, and before the defendant was returned outlawed, the court made a rule, that a *ſuperſedeas* to the *exigent* ſhould be allowed on payment of coſts. *Withall* v. *White*. *Barnes* 323.

After outlawry pronounced, defendant moved to ſet aſide the outlawry for want of proclamation. *Per cur.* This is

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not a fit matter to be determined in a ſummary way; the defendant may bring his writ of *error*. Barnes 323.

Note, Outlawries pronounced without proclamations, are void by the 31 *El. c.* 3.

Motion that plaintiff might reverſe an outlawry at his own expence, the defendant being in parts beyond the ſeas at the time he was outlawed. *Per cur.* The defendant may take advantage of this by writ of error; but it is no matter of irregularity. *Blunt* v. *Beale*. *Barnes* 320. *Ibid.* 319.

The plaintiff having commenced a proceeding to outlawry againſt defendant, he gave notice to the plaintiff that he had appeared, and obtained a *ſuperſedeas* to the *exigent*. Plaintiff ſearched at the *Compter*, [as the outlawry was in *London*] and no *ſuperſedeas* being allowed there, defendant was returned outlawed, who moved to ſet aſide the outlawry. On ſhewing cauſe, defendant alledged, that he had entered an appearance with the *exigenter*; but that appeared to be unneceſſary, and a novel impoſition by the *exigenter*. The court held, that the *ſuperſedeas* is in itſelf an appearance, if delivered to the ſheriff before the return of the *exigent*; but that not having been done, the defendant is regularly outlawed; and the rule to ſhew cauſe, why it ſhould not be reverſed at the plaintiff's expence, was diſcharged. *Barnes* 319.

In *C. B.* it was moved, that the plaintiff might reverſe an outlawry at his own charge, upon affidavit that the defendant was actually in the *Fleet*, in execution for the plaintiff in another ſuit, and that he knew it; and it was granted, becauſe the plaintiff ſhould have brought him to the bar by *habeas corpus*, and there have charged him with a new declaration. *Adlame* v. *Colebatch*. *Salk.* 495.

A writ of *allocatur* on the *exigent* had iſſued [after judgment and *ca. ſa.*] returnable the firſt return of *Michaelmas*, whereupon defendant was returned outlawed 16th of *July* preceding. It appeared, that the plaintiff died 6th of *Aug.* and that a commiſſion of bankrupt iſſued againſt defendant on the 21ſt of *Auguſt*, preceding the return of the *exigent*. Defendant obtained a rule to ſhew cauſe why proceedings ſhould not be ſtaid, which rule was diſcharged; the court being of opinion, that the writ and return muſt be filed,

notwith-

Of appearing to the *Exigent*, and of reverſing the *Outlawry* by Motion on coming in *gratis*.

notwithſtanding the plaintiff's death after the outlawry: Before an actual aſſignment by commiſſioners of bankruptcy, the crown is not bound, though there is a great difference between an extent in *aid pro rege*, and an outlawry for a private perſon's debt. Here is no foundation to tie up the plaintiff's hands; the plaintiff [meaning the repreſentative of the original plaintiff] may proceed if ſo adviſed. *French* v. *Manby*. *Barnes* 323.

It was the practice in the *Common Pleas*, before the *ſtat.* 4 & 5 *W.* & *M.* *c.* 18. to allow a defendant, upon *appearance by attorney*, to reverſe the *outlawry*, and not to require an appearance *in perſon*. But in the *King's Bench*, no one in any caſe, *civil or criminal*, could reverſe an *outlawry*, without an appearance *in perſon*, till that ſtatute, unleſs where, *ex ſpeciali gratia* upon a reaſon aſſigned to the court, they indulged him to appear by attorney, as in ſickneſs, *&c.* *Cro. Jac.* 462. but then the entry was, that he came in perſon "*Quod venit in propria perſona*," the law being clear, that upon an outlawry he ought to appear in perſon. Vide *Carth.* 7. *Skin.* 16. *Salk.* 496. But to remedy the inconvenience and expence attending an *appearance in perſon*, that ſtatute enacts, "That no perſon who is or ſhall be "outlawed in the ſaid court, for any cauſe, matter, or "thing whatſoever, [treaſon and felony only excepted] "ſhall be compelled to come in perſon into, or appear in "perſon in the ſaid court to reverſe ſuch outlawry, but "ſhall or may appear by attorney and reverſe the ſame "without bail, in any caſes, except where ſpecial bail "ſhall be ordered by the ſaid court."

Of appearing to the *Exigent gratis*, and of reverſing the Outlawry by *Writ of Error*.

THE courts, inſtead of driving the party to his *writ of error* to reverſe an outlawry had againſt him, will moſtly, as appears from the foregoing caſes, relieve him on motion, where the proceedings have been *irregular*; but in doing this the courts always require, that the defendant pay the plaintiff his coſts up to the *exigent*, unleſs where the plaintiff has proceeded *intentionally irregular*, *and* with a view to oppreſs. But where the defendant is driven to his *writ of error* to reverſe the outlawry, either upon coming in upon the *exigent*, *&c. gratis*, or brought in upon the *capias utlagatum*, he muſt, in all caſes, pay the plaintiff his coſts to the *outlawry*; and, where *ſpecial bail* is required, he muſt put in bail, either before error can be brought to reverſe the outlawry, or elſe upon the reverſal.

By the 31 *El. c.* 3. *ſ.* 3. it is enacted, "That before "any allowance of any writ of error, or reverſing any out- "lawry be had, by plea or otherwiſe, through or by want "of any proclamation to be had or made, according to the "form of this ſtatute, the defendant and defendants in the "original action ſhall put in bail, not only to appear and "anſwer to the plaintiff in the former ſuit, in a new ac- "tion to be commenced by the plaintiff for the cauſe men- "tioned in the firſt action, but alſo to ſatisfy the condem- "nation, if the plaintiff ſhall begin his ſuit before the end "of *two terms*, next after the allowing the writ of error, or "otherwiſe avoiding of the ſaid outlawry."

This ſtatute requires *bail* to be put in before the allowance of error, only where the error is for want of *proclamations*.

But for any other cauſe than for want of *proclamations*, it is ſufficient if *bail* is put in before the reverſal of the outlawry, by the writ of error, if the original cauſe of action required *bail*.

As where error was brought to reverſe an *outlawry* in *Cheſter*; to which the defendant in error pleaded, that no bail was put in before the allowance of the writ of error, according to the 31 *El. c.* 3. *Per cur.* This is no plea, for it is well enough, if bail be put in at any time before the reverſal. The error was the want of *pro comitatu*. Wilbraham *v.* Doyley, *Ld.* Raym. 605.

So where, pending error to reverſe an outlawry on *meſne* proceſs, the defendant in error moved to quaſh the writ, becauſe

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becauſe no bail was given. *Sed per cur.* That is never done till the outlawry is reverſed; and then we take bail to appear to an original, to be brought within two terms. *Duckett* v. *Martin*, *Stra.* 951.

If a party comes in *gratis*, upon the return of the *exigent*, he may be admitted by motion to reverſe the outlawry, for any other cauſe than want of proclamations, without putting in bail. If he comes in by *cepi corpus* on the *capias utlagatum*, then he ſhall not be admitted to reverſe it without appearing in perſon, as in ſuch caſe he was obliged to do at *common law*; or putting in bail with the ſheriff for his appearance upon the return of the *cepi corpus*, and for doing what the court ſhall order. Appearing by attorney is an indulgence by 4 & 5 *W.* & *M.* and the bail is to be ſpecial or common in this as in other caſes. *Salk.* 496. But *vide* the caſe of *Campbell* v. *Daley*, *Burr.* 4 *pt.* 1920. Where it was held, that a defendant, coming in after outlawry, muſt put in *ſpecial bail*, before *ſuperſedeas* or *reverſal* of outlawry; if the original cauſe of action required ſpecial bail: which determination ſeems to have been founded on the caſe of *Serecold* v. *Hampſon*, bart, *Stra.* 1178. 1 *Wilſ.* 3. which was as follows:

The defendant was outlawed in a perſonal action, without any affidavit of the plaintiff's demand: and having brought *error*, he aſſigned his being beyond ſea at the time of the outlawry; for which the court made no difficulty to reverſe it: but the queſtion was, upon what terms they ſhould do it, the plaintiff inſiſting on ſpecial bail, and having now made a proper affidavit; and the defendant inſiſting to file common bail only.——The court, upon conſidering of the 4 & 5 *W.* & *M.* *c.* 18. *ſ.* 3. which impowers the outlaw to appear by attorney, [as he did here] and ſays, it ſhall be reverſed without bail in all caſes but "where ſpecial bail ſhall be ordered by the court," declared, they were of opinion, they had a diſcretionary power to require it or not; and that the want of an affidavit before was no objection; becauſe that is only requiſite to warrant an arreſt: and here was one in time for the new action that muſt be brought. And though the 31 *Eliz.* *c.* 3. *ſ.* 3. is the only act that requires bail, it is not to be inferred from thence, that in other caſes it ought not to be inſiſted on, for that act makes a new error, and the bail upon it is abſolutely to pay the condemnation money.

Of

Of the Arreſt upon the *Capias Utlagatum*, of Bail thereon, and of reverſing the Outlawry by *Writ of Error* afterwards.

IF a defendant was arreſted upon the *capias utlagatum*, the ſheriff could not admit him to bail, as an *outlawed* perſon is excepted out of both the ſtatutes of 23 *Hen.* 6. *c.* 9. and 13 *Car.* 2. *ſtat.* 2. *c.* 2. (unleſs by *ſuperſedeas* firſt had and received for diſcharging him.)

But by the 4 & 5 *W.* & *M. c.* 18. *ſ.* 4. it is enacted, "That if any perſon, outlawed in the * *ſaid court* (other "than for *treaſon* and *felony*) ſhall be taken and arreſted upon "any *capias utlagatum* out of the ſaid court, it ſhall and may "be lawful for the ſheriff who hath or ſhall arreſt ſuch "perſon (in all caſes where ſpecial bail is not required by "the ſaid court) to take an attorney's engagement, under "his hand, to appear for the ſaid defendant, and to reverſe "the ſaid outlawry; and thereupon to diſcharge the ſaid "defendant from ſuch arreſt: and in thoſe caſes, where "ſpecial bail is required by the ſaid court, the ſaid ſheriff "ſhall and may take ſecurity of the ſaid defendant by bond, "with one or more ſufficient ſureties, in the penalty of "double the ſum for which ſpecial bail is required, and no "more, for his appearance by attorney, in the ſaid court, "at the return of the ſaid writ; and to do and perform "ſuch things as ſhall be required by the ſaid court; and, "after ſuch bond taken, to diſcharge the ſaid defendant "from the ſaid arreſt."

And by *ſect.* 5. it is further enacted, "That if any per-"ſon outlawed as aforeſaid, and taken and arreſted upon a "*capias utlagatum*, ſhall not be able, within the return of "the ſaid writ, to give ſecurity as aforeſaid, in caſes where "ſpecial bail is required, ſo as he be committed to gaol for "default thereof, that whenſoever the ſaid priſoner ſhall "find ſufficient ſecurity to the ſheriff, in whoſe cuſtody he "ſhall be, for his appearance by attorney in the ſaid court,

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* "*The ſaid court*," means the court of *King's Bench*; the ſtatute being made to prevent malicious informations in the court of *King's Bench*, and for the more eaſy reverſal of outlawries in the ſame court. But notwithſtanding, all perſons arreſted upon the *capias utlagatum* out of the *Common Pleas*, after outlawry there have always been bailable ſince the making thereof, and before might have been diſcharged by a *ſuperſedeas* to the *capias utlagatum*. *Vide* ſect. 4. in 13 *Car.* 2. *c.* 2.

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" at ſome return in the term then next following, to reverſe " the ſaid outlawry, and to do and perform ſuch other " thing and things as ſhall be required by the ſaid court; " it ſhall and may be lawful for the ſaid ſheriff, after ſuch " ſecurity taken, to diſcharge and ſet at liberty the ſaid " priſoner for the ſame."

It is the allowed practice of the court of *Common Pleas* to ſuffer a defendant coming in by *capias utlagatum*, the ſame term on which an *exigent* is returnable, to avoid the outlawry without writ of error, by ſhewing, that he purchaſed a *ſuperſedeas* out of the ſame court, and delivered it to the ſheriff before the *quinto exactus*, &c. or by ſhewing any other matter apparent on the record, which makes it erroneous, as the want of original, or the omiſſion of proceſs, or want of form in a writ of proclamation, &c. or a return by a perſon not appearing to be ſheriff, or a variance between the original and exigent, or other proceſs, or the want of ſuch addition, &c. as is required by the 1 *Hen.* 5.—Yet, it is ſaid, in many books, to be the conſtant courſe of the court of *King's Bench*, never to reverſe an outlawry on the crown ſide, either in the ſame or a different term, for theſe or other errors of a like nature, without a writ of error. 2 *Hawk. P. C.* 458. and ſeveral authorities there cited.

But, in *civil caſes*, the *King's Bench*, as well as the *Common Pleas*, at this day, will generally reverſe *outlawry* on motion, as is ſeen in the foregoing pages, without driving the party to his *writ of error*, whether he comes in in the ſame term or another, or upon the *exigent* or *capias utlagatum*. But, in relieving by motion, the court always have regard to the plaintiff's cauſe of action, and the ſituation he is in towards the recovery of his debt.

A. who was a foreign merchant, and never in *England*, was outlawed at the ſuit of *B.* in an action on ſeveral promiſes for goods ſold and delivered; and, on a *ſpecial capias utlagatum*, a ſhip, and other effects belonging to *A.* were ſeized, as forfeited upon this outlawry; and it was moved, that this outlawry may be vacated, and reſtitution awarded, upon affidavits produced and read, that the defendant was never *infra legem*, *i. e.* that he never was in *England*, and therefore could not be outlawed; becauſe that was putting him *extra legem*. *Sed per cur.* This outlawry ſhall not be vacated

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vacated upon ſuch affidavits; but the defendant may bring a writ of error, which he was compelled to, and thereupon to put in bail to the action in which he was outlawed; and then the plaintiff conſented to the reverſal. *Matthews* v. *Erbo*, *Carth.* 459. Ld. *Raym.* 349. For, unleſs the court drives the defendant to his writ of error, in ſuch caſes, a perſon might contract debts, and then go beyond ſea, and ſo be out of the reach of the law; therefore this is ſaid to be a good way to get bail of a foreign merchant.

In debt upon a bond entered into by the wife, *dum ſola*, the huſband was abroad and *outlawed*; and the wife, though ſhe appeared publickly, *waived*. On motion to ſet aſide the outlawry againſt the wife, and to reſtore her the goods taken on a *ſpecial capias utlagatum*, on affidavit that they were her ſeparate goods, the court held, that the goods muſt be taken to be her *huſband's* goods in point of law; and that, if ſhe had any equitable right to them, ſhe muſt reſort to a court of equity: but, as ſhe appeared publickly, ſhe has been wrongfully waived; and therefore the rule was made abſolute for ſetting aſide the outlawry againſt the wife, but diſcharged as to reſtoring the goods. *Biſcoe* v. *Kennedy and his wife*, *in C. B.* 2 *Wilſ.* 127.

Defendant was taken on a *capias utlagatum* on a *Sunday*, and therefore he moved to be diſcharged, the taking being contrary to the ſtat. 29 *Car.* 2. But, notwithſtanding the court held the taking bad, they refuſed to grant an attachment, and put the defendant to take the remedy given by the ſtatute. *Oſborne* v. *Carter*, *Barnes* 319.

Defendant was waived ſpecially on meſne proceſs, as a ſingle woman by the name of *Dunſter*; and after the *exigent*, and before the outlawry, ſhe married one *Priſeley*; and, on being taken by a *capias utlagatum*, after the outlawry, on motion, a rule was obtained to ſhew cauſe, why the outlawry ſhould not be reverſed, at her huſband's expence, on his entering a common appearance for himſelf and his wife. But the rule was diſcharged, the court refuſing to interpoſe in a ſummary way, as the marriage was after the *exigent*. White *v.* Dunſter, Barnes 321.

H. was outlawed in two actions, one was 10 *l.* the other 40 *s.* and, upon reverſing the outlawry, the court took ſpecial bail for the firſt, and an appearance for the other; the recogni-

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recognizance was taken purſuant to the 31 *El. c.* 3. *Salk.* 496.

Two perſons were outlawed in a joint action againſt them, and one moved, that, on filing common bail, ſhe might have liberty to reverſe the outlawry. *Sed per cur.* The writ of error, to reverſe the outlawry, muſt be brought in the name of both the parties that are outlawed; and, if one only appears, the other may be ſummoned and ſevered, and then the outlawry may be reverſed for the benefit of the party appearing only. *Symmons* v. *Bingoe and Cooke*, *B. R. Salk.* 496.

Defendant being arreſted on a *capias utlagatum*, the ſheriff took an attorney's engagement, under his hand, to appear for the defendant and reverſe the outlawry, *without taking ſecurity, by bond, in double the ſum for which bail was required*, purſuant to the act of 4 & 5 *W. & M. c.* 18. On ſhewing cauſe, why an attachment ſhould not iſſue againſt the ſheriff for diſcharging the defendant out of his cuſtody, it was urged, that he neither did nor could know, that it was a caſe requiring bail, as the *capias utlagatum* was not marked for bail; and that 12 *Geo.* 1. *c.* 29. required an affidavit; and that the ſum, for which bail is to be taken, is to be marked on the proceſs, *&c.* For the plaintiff, it was urged, that proceſs of outlawry is not within the ſtat. 12 *Geo.* 1. that this was by *ſpecial original*; and the cauſe of action was expreſſed in the *original proceſs*, in which it appears he was entitled to bail.——The court were clear, that this was not a caſe within the 12 *Geo.* 1. and thought the ſheriff had acted improperly; but, as there was an affidavit of the underſheriff, that he had acted to the beſt of his underſtanding, without any ill intention, they enlarged the rule in order to give the ſheriff an opportunity to *put in bail.* After which the ſheriff undertook to pay the debt and coſts. *Cracraft* v. *Gledowe*, *Burr.* 4 *pt.* 1482.

Of

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AN action on the caſe lies for the eſcape of a priſoner outlawed. *Stra.* 901. *i. e.* A *qui tam* action on the caſe, if outlawed on meſne proceſs, the plaintiff having an intereſt and a damage, and the king an intereſt for the forfeiture.

But if outlawed, after judgment, it ſeems *debt* lies for the eſcape at the ſuit of the plaintiff only. *Vide Cro. El.* 706.

Upon the reverſal of outlawry, the party is reſtored to all he has loſt.

If the goods of a perſon outlawed are ſold by the ſheriff, upon a *capias utlagatum*; and, after the outlawry is reverſed, he ſhall be reſtored to the goods themſelves; becauſe, the ſheriff was not compellable to ſell thoſe goods, but only to keep them to the uſe of the king. 5 *Co.* 90. *Hoe's* caſe. *Roll. Ab.* 778. *S. C. cited. Cro. El.* 278. *S. P. adjudged. And vide* 2 *Jon.* 101. 2 *Show.* 58. *pl.* 52. 3 *Keb.* 871. There ſhall be a reſtitution of profits actually paid into the *Exchequer*.

At common law, goods and chattels only were liable in perſonal actions; and as proceſs of outlawry, in perſonal actions, was given by ſtatute, goods and chattels only ſtill remain liable, becauſe they were only chargeable in perſonal actions, *i. e.* They are forfeited to the king, and he ſhall have the pernancy of the chattels real; but this is by conſequence only—the party, being *extra legem*, is thereby become incapable to take the profits himſelf.

A *writ of error* to reverſe an outlawry in any civil caſe, is not often heard of now, as the party generally comes in and reverſes it by motion, and ſatisfies the debt and coſts, or juſtifies bail to appear to a new original; or, if ſpecial bail is not required, enters a common appearance; in which caſe the outlawry is reverſed of courſe before a judge, or in court, by confeſſion of ſome trifling error in the proceedings; as, the omiſſion of any letter, irregularity in any of the proceſs, want of proper addition, want of proclamation, want of filing the writ of proclamation, or, in ſhort, any trifling matter whatever; which, in ſuch caſes, is uſually confeſſed by the plaintiff. For, as the intent of proceeding to outlawry is anſwered, either by the payment of the debt and coſts, or by having good bail put in to

ſtand

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ſtand the event of the action, any objection to the reverſal of the outlawry would be idle and nugatory.

In order to reverſe an outlawry, without an actual *writ of error*, the defendant's attorney (having entered an appearance) gets a copy of an *exigent*, on which is uſually marked the error, which being pointed out to the *ſecondary* or *prothonotary*, and then ſhewn to one of the judges, if in court, or to a judge at chambers, a certificate is made thereof, if in court, or an order, if before a judge, to the clerk of the outlawries of the ſaid reverſal.—On ſight of which order or certificate, the clerk of the outlawries marks the outlawry book, diſcharged; and then the reverſal is drawn up in paper, and entered upon the roll, and the defendant is thereupon reſtored *in ſtatu quo prius*.

This is the uſual way where a perſon is outlawed, and neither his body, goods, or lands, ſeized upon the *capias utlagatum*. But if his body, goods, or lands be ſeized, then his attorney muſt go to the *clerk of the errors*; and on putting in *ſpecial bail*, if requiſite, he will make out a *ſuperſedeas* to diſcharge the perſon or his effects, if taken, or if not taken, then for the ſheriff to forbear. But if a man be outlawed after judgment, a reverſal in the manner before mentioned will not be allowed; for an outlawry after judgment cannot be reverſed till the plaintiff hath acknowledged ſatisfaction on record, or the defendant hath paid the money into court.

When a defendant to reverſe an outlawry is obliged to ſue out an *actual writ of error*, he muſt apply to the proper *curſitor* for the writ; who, on a *præcipe* given him, will make out the writ, which is to this effect:

> *England*, to wit, *George* the third, by the grace of *God*, &c. To our juſtices *aſſigned to hold pleas before ourſelf*, greeting. Becauſe in the record and proceeding, and alſo in the pronouncing the outlawry againſt *C. D.* late of *London*, *merchant*, in a plea of *treſpaſs on the caſe*, whereon he is outlawed in *London*, pronounced before us returned, as it is ſaid, a manifeſt error hath happened to the great damage of him the ſaid *C.* as by his complaint we have underſtood. We being willing the error, if any hath been, ſhould be

Of the Arreſt upon the *Capias Utlagatum*, of Bail thereon, and of reverſing the Outlawry by *Writ of Error*.

duly corrected, and full and ſpeedy juſtice done to the ſaid *C.* in this behalf, command you, that if the outlawry aforeſaid is returned before us, as it is ſaid, then, the record and proceedings aforeſaid being inſpected, you further cauſe to be done therein, for the error and vacating of the outlawry aforeſaid, what of right, and according to the law and cuſtom of *England*, ſhall be meet to be done.

Witneſs ourſelf at *Weſtminſter*, this ——— day of ——— in the twentieth year of our reign.

When the writ of error is duly made out and ſealed, the defendant muſt get it allowed by the court, on which allowance the *allocatur* is ſubſcribed.

If the error is in the *exigent or return, or allocatur*, or in the writ of *proclamation or return thereto*, [having firſt put in bail according to the ſtatute] or in any of the proceedings, he gets a copy thereof, and ſpreads the whole record, and aſſigns the errors in this manner:

Afterwards, to wit, On ——— next, after ——— in this ſame term, before the lord the king, at *Weſtminſter*, comes the ſaid *C. D.* by ——— his attorney, and immediately ſays, that in the pronouncing of the outlawry aforeſaid, there is manifeſt error in this, to wit, that the return of the ſaid writ of *exigi facias*, and alſo the ſaid writ of *allocatur*, are inſufficient, invalid, and void in law; therefore, in that, there is manifeſt error: There is error alſo in this, that no judgment of outlawry, upon the writ of *allocatur* aforeſaid, is returned; therefore in this there is manifeſt error [and ſo, on aſſigning the error or errors, as they happen to be]. And the ſaid *C. D.* prays the writ of our lord the king, to warn the ſaid *A. B.* to be before our lord the king, to hear the record and proceedings aforeſaid. And it is granted to him, *&c.*

If the plaintiff does not appear and confeſs the errors, the defendant muſt ſue out a *ſcire facias ad audiendum errores*, &c.

Of the Arreſt upon the *Capias Utlagatum*, of Bail thereon, and of reverſing the Outlawry by *Writ of Error*.

&c. and upon two *nihils* returned, the court will reverſe the outlawry of courſe: But if the plaintiff comes in voluntarily, or upon a *ſcire feci*, and does not confeſs the errors aſſigned, but joins in error, the defendant muſt make up *error books*, and proceed to argument and judgment, as in other caſes of error; of which vide *poſt.* title *Error.*

Of declaring after the Outlawry reverſed or ſuperſeded.

UPON the reverſal or ſuperſeding of the outlawry, if the defendant does not pay the plaintiff his debt and coſts, the plaintiff muſt proceed to declare, the defendant having, upon reverſing or ſuperſeding the outlawry, put in *ſpecial or common* bail, as the caſe required, to appear to a new *original*.

Upon appearing and ſuperſeding the *exigent*, the plaintiff muſt declare within *ſix* or *eight* days after, otherwiſe the defendant may give him a rule to declare; and if no declaration comes in within the limited time, the defendant may non-ſuit the plaintiff, and have his coſts taxed. *Compl. Soll. C. B.* 84.

So if the defendant appear by *ſuperſedeas*, and will not take a declaration, the plaintiff may have judgment againſt him, by *nil dicit*. Ibid.

But where a defendant outlawed, cauſes the ſame outlawry to be reverſed, the plaintiff has till the end of the ſecond term after reverſing the ſame, and notice thereof given, to declare in. But if he does not proceed within two terms next, after notice of reverſing the outlawry, the defendant ſhall have his coſts to be taxed. *Reg. Tr.* 33 *Car.* 2. *C. B.*

The declaration, after reverſal or ſuperſeding of the outlawry, has no need to be laid in the ſame county in which the former original was made. So held on demurrer. 3 *Lev.* 245. *Whitwick* v. *Hovenden*. Where the original and outlawry were in *London*, and on the reverſal of the outlawry, the plaintiff declared in *Suſſex*, on which it was inſiſted, that the original being laid in *London*, the plaintiff could not declare in the action in another county, though the cauſe of action was tranſitory. But the *prothonotaries* certifying, that the courſe of the court was, that although the *original* be laid in *London*, for expediting the outlawry, yet when the defendant comes in, the plaintiff may declare againſt him in any other county, be the action local or tranſitory. And the *ſtat.* 21 *Jac.* 1. *c.* 16. *ſ.* 4. giving the plaintiff generally a power to commence a new action or ſuit within a year after the outlawry reverſed, the plaintiff may do it in this caſe, to warrant his declaration delivered, within the courſe of the court. And the plaintiff had judgment.

By the 21 *Jac.* 1. *c.* 16. *ſ.* 4. it is enacted, "That if in any action brought by original, the defendant be outlawed,

Of declaring after the Outlawry reverſed or ſuperſeded.

lawed, and ſhall after reverſe the outlawry; that then the plaintiff, his heirs, executors, or adminiſtrators, as the caſe ſhall require, may commence a new action or ſuit from time to time, within a year after ſuch judgment of outlawry reverſed, and not after."

And by the 31 *Eli. c.* 3. *ſ.* 3. it is enacted, "That before the allowance of any writ of error, or reverſing of any outlawry, be had by plea or otherwiſe, through or by want of any proclamation to be had or made according to the form of the ſaid ſtatute, the defendant in the *original* ſhall put in bail, not only to appear and anſwer to the plaintiff in the former ſuit, in a new action to be commenced by the ſaid plaintiff for the cauſe mentioned in the firſt action, but alſo to ſatisfy the condemnation, if the plaintiff ſhall begin his ſuit before the end of *two terms* next after the allowing the writ of error, or otherwiſe avoiding of the ſaid outlawry."

Though this latter ſtatute relates only to the reverſing the outlawry through want of *proclamation*, and diſcharges the bail in ſuch caſe given, if the plaintiff does not proceed within *two terms* after the reverſal—yet the recognizance of bail, upon the reverſal of outlawry for other cauſes than for want of proclamations, has moſtly been taken ſince the making thereof according to this ſtatute. Therefore, if the plaintiff does not declare after the reverſal of the outlawry within *two terms*, the bail are diſcharged. But though they are diſcharged from their recognizance, the plaintiff is not barred of his action, provided he commences the ſame within a year after the reverſal of the outlawry, according to the 21 *Jac.* 1. *c.* 16. *ſupra.*

Bail upon the reverſal of outlawry, cannot render their *principal* in diſcharge of themſelves; for they are abſolutely bound to pay the condemnation money.

Defendant was outlawed on a ſpecial original, and upon reverſing the outlawry put in bail with condition as uſual, to appear to a new original, to be filed within two terms. Plaintiff proceeded to judgment, and defendant brought a writ of error; a motion was made on behalf of the bail, to diſcharge their recognizance, no original having been filed within the two terms; and a rule made to ſhew cauſe, which was diſcharged. The bail may plead as they ſhall be adviſed. *Carleton* v *Wilkinſon.* *Barnes* 86.

Of declaring after the Outlawry reverſed or ſuperſeded.

Upon ſuperſeding the exigent, if plaintiff delivers a declaration, there ſhould be a notice to plead; and a rule given to plead before judgment, for want of a plea, can be ſigned. And defendant has, in ſuch caſe, the ſame time to plead as in other caſes. *Barnes* 271—2.

Of Scire facias.

A *Scire facias* is a writ *judicial* founded on ſome matter of record, as judgments, recognizances, and letters patent, on which it lies to enforce the execution of them, or to vacate or ſet them aſide: and though it be a writ *judicial*, or of execution, yet it is ſo far in nature of an *original*, that a defendant may plead to it, and is in that reſpect as an action; and therefore it is held, that a releaſe of all actions, or of executions, is a good plea in bar to a *ſcire facias*. Vide Bac. Abr. 4 Vol. 409. and authorities there cited.

A *ſcire facias* lies for many purpoſes in law; and the writ itſelf may be formed according to the ſubject matter. But the writs of *ſcire facias*, which will be proper to notice in in this work, are only of *four kinds*—1. Of the *ſcire facias* againſt bail, after judgment had againſt the principal, on their recognizance forfeited. 2. Of the *ſcire facias* to revive a judgment by and againſt the ſame identical parties to the ſuit on which the judgment was had. 3. Of the *ſcire facias* to continue a ſuit by or againſt the repreſentatives of one of the parties dying *before* final judgment. And 4. Of the *ſcire facias* by or againſt the repreſentatives of a party to the ſuit dying *after* judgment, and *before* execution.

The writ of *ſcire facias* is adapted to the ſubject matter: For the various ſorts of which writ, ſee the ſeveral books of entries.

Of the *Scire facias* againſt Bail, and of Proceedings therein.

WHEN a defendant is admitted to *bail* by the court where the action is brought, his ſureties or bail ſtipulate, that the defendant ſhall, if he be condemned in the action, ſatisfy the plaintiff his debt and coſts; or elſe, that he ſhall ſurrender himſelf a priſoner; or in caſe he does neither, that they (his bail) will pay what the plaintiff recovers for him. Therefore after the plaintiff has recovered judgment in his action, he muſt, before ever he proceeds againſt the bail, look to ſatisfaction from the defendant; and the plaintiff has his election of three ſorts of executions, either of which he is at liberty to purſue againſt the defendant, *viz.* by *elegit* againſt his lands and goods; by *fieri facias* againſt his goods only; or by *capias ad ſatisfaciendum* againſt his body; by which writ, he may be impriſoned till ſatisfaction is made.—If the plaintiff proceeds by *elegit* or *fieri facias*, he aims at a ſatisfaction by a ſeizure of the defendant's property; and by taking out either of thoſe writs of execution, he cannot fix the bail; but if he would look to the bail to make him ſatisfaction, his execution muſt be by a *capias ad ſatisfaciendum* againſt the principal; and that is the only writ which has effect to fix the *bail*, as it amounts to a demand on him to ſurrender himſelf a priſoner; which if not done by the return thereof, or if he is not ſurrendered by the bail in diſcharge of themſelves, it is preſumed that the bail are ready to pay the debt and damages recovered.

If the plaintiff therefore would ever reſort to the *bail*, his execution muſt be by *capias ad ſatisfaciendum* againſt the principal; for then he ſhews, that he would have the body till ſatisfaction is made him; which writ of *ca. ſa.* muſt be returned by the ſheriff, with a *non eſt inventus*, for the bail are liable only on failure of their principal.

When the recognizance is forfeited by the defendant's not being ſurrendered by his bail, or ſurrendering himſelf to priſon, the plaintiff may either bring his action of debt on the *recognizance*, or proceed by *ſcire facias*, by which the ſheriff is commanded to make known to them the judgment recovered, and the force and effect of their recognizance entered into, that the defendant has not ſurrendered himſelf to the priſon of the marſhal of the *Marſhalſea* or *Fleet*, as the caſe is; and therefore, that they appear in court and ſhew cauſe,

Of the *Scire facias* againſt Bail, and of Proceedings therein.

cauſe, why the plaintiff ſhould not have execution againſt them, for his debt and damages recovered.

In order to ground the proceedings by *ſcire facias* againſt the bail, the plaintiff, before he ſues out the writ of *ſcire facias*, muſt enter the recognizance of bail on a roll, carry in the ſame, and docquet it; ſo he muſt, if he proceeds by action of debt on the *recognizance*. The entry on the roll is to this effect in *B. R.*

Michaelmas term 20th *George* the third (the term this declaration is of)

Middleſex ff. *A. B.* complains againſt *C. D.* &c. [go through the declaration] and the ſaid *C. D.* by *John Palmer* his attorney, comes and defends the wrong and injury, when, &c. and thereupon *E. F.* of *Charing Croſs*, in the county of *Middleſex*, mercer; and *G. H.* of *Fleet-ſtreet*, in the city of *London*, grocer, [deſcribing the bail as in the recognizance] came into the court of our lord the king, before the king himſelf, at *Weſtminſter*, in their proper perſons, and became pledges and manucaptors, and each of them became pledge and manucaptor for the ſaid defendant, that if it ſhould happen that the ſaid defendant ſhould be condemned in the plea aforeſaid, then the ſaid manucaptors granted, and each of them did grant, that all ſuch * damages, coſts, and charges [if the action be in debt, and judgment be recovered on a verdict, ſay, did grant, that as well the ſaid debt, as all ſuch damages, coſts, and charges—or if

* In *B. R.* where the ſuit is by *bill*, the bail are not bound in a ſum certain, 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. But in *C. B.* the bail are bound in a ſum certain, upon condition, that if the defendant be condemned in the ſaid action, he ſhall pay the condemnation money, or render himſelf a priſoner to the *Fleet* for the ſame; or upon failure thereof, that they will do it for him,

in

Of the *Scire facias* againſt Bail, and of Proceedings therein.

in debt and judgment was by default, ſay, did grant, that as well the ſaid debt, as all damages] as ſhould be adjudged to the ſaid plaintiff in that behalf, ſhould be made of their and each of their lands and chattels, and to be levied to the uſe of the ſaid plaintiff, if it ſhould happen that the defendant ſhould not pay the ſaid plaintiff, or render himſelf on that occaſion, to the priſon of the marſhal of the *Marſhalſea*, of our ſaid lord the king, before the king himſelf.

The docquet paper —— "the entry of *Joſeph Lyon*, gentleman, one, &c. of *Michaelmas* term 20th of *George* the third.

Middleſex ſſ. Recognizance of bail for *C. D.* at the ſuit of *A. B.*

Roll 273.

When the entry of the recognizance is made up, and the roll docquetted and carried in, and a *capias ad ſatisfaciendum* alſo ſued out, and got returned by the ſheriff, with a *non eſt inventus*, the recognizance thereby being forfeited, becauſe there is a default in the party, the plaintiff may ſue out a *ſcire facias* againſt the bail. But though the recognizance be abſolutely forfeited in law, yet the bail may ſurrender the principal afterwards, and the court, *ex gratiâ*, on motion, will relieve the bail, as will be ſhewn hereafter.

If the plaintiff has not ſued out a *ca. ſa.* againſt the principal, in order to ground his proceedings by *ſcire facias* againſt the bail, within a year after the judgment obtained, a *ſcire facias* ſhould firſt go againſt the principal to revive the judgment, before a *ſcire facias* goes againſt the bail on their recognizance; but the bail cannot take advantage of this: *Raym.* 1096. 6 *Mod.* 304. *Holt* 90.

A *ſcire facias* does not lie againſt bail, unleſs a *ca. ſa.* is ſued out returned and filed; but it may be filed after the *ſcire facias* iſſues. *Att. Pract.* 343. 1 *Lev.* 225. Note on *Reg. Eaſt.* 5 *Geo.* 2.

If

Of the *Scire facias* againſt Bail, and of Proceedings therein.

If the principal defendant dies after the return of the *ca. ſa.* although his death be before the ſuing forth the firſt *ſcire facias*, the bail are fixed with the debt and coſts, in point of law; and the *ſcire facias*'s are only an indulgence of the court. 2 *Wilſ.* 67.

On a recognizance taken in *B. R.* the *ſcire facias* muſt be brought in *Middleſex*. 3 Danv. Abr. 313. for the recognizances in *B. R.* are not obligatory by the caption, but by their being entered of record in the court. *Salk.* 600, 659. *Hob.* 195. *Brownl.* 69. *S. C. Moor* 883. *S. C. Styles* 9.

But if bail be taken by a *commiſſioner* in the country, the *ſcire facias* may either be ſued out into *Middleſex*, where the recognizance is entered of record, or the county where taken. *Lutw.* 1287.

But in *C. B.* if a recognizance be taken in *London* at a judge's chambers, and entered on record as taken in *London*, all the prothonotaries held, that the *ſcire facias* ought to be directed to the ſheriffs of *London*, and not to the ſheriffs of *Middleſex*. *Bro. Abr. fol.* 66. *b. pl.* 85. Although the recognizance is not a perfect record till it is entered upon the roll, yet when it is entered in *C. B.* it is held, that it is a record from the firſt acknowledgment, and binds perſons and lands from that time; for it is the acknowledgment before a judge that gives it the force of a record, though the inrolment be neceſſary for the teſtification and perpetuity of it. *Hob.* 195.

But in *Andrews* and *Harborne*, the prothonotaries certified, that upon ſuch recognizance, the *ſcire facias* might be brought in *Middleſex*, or in *London*. Roll. Abr. 891. All. 12.

And ſo, as in *B. R.* where bail is taken by commiſſioners, the *ſcire facias* is ſued out, either into the county where taken, or into *Middleſex*, where filed. *Att. Prac.* 361.

But *note*, On a recognizance of *bail in error*, if it be entered to be taken at a judge's chambers in *London*, the *ſcire facias* muſt be ſued there.

A *ſcire facias* againſt bail, is not amendable. *Grey* v. *Jefferſon*. *Stra.* 1165.

But a *ſcire facias* may be quaſhed, on motion, without coſts, before plea pleaded, though defendant has entered an appearance. *Barnes* 431.

If

Of the *Scire facias* againſt Bail, and of Proceedings therein.

If the judgment of an inferior court is removed into *B. R.* or *C. B.* by *certiorari*, and the party ſues a *ſcire facias* to have execution, he ought to ſhew in his *ſcire facias*, that it is the judgment of ſuch an inferior court, removed thither by *certiorari*; and ought to ſhew the particular limits of the inferior juriſdiction, and pray execution within the particular limits. But if the judgment be removed into *B. R.* or *C. B.* by *writ of error*, or *falſe judgment*, and affirmed, the party may have execution in any part of *England*; for by the affirmance it is become the judgment of the ſuperior court. But then in a *ſcire facias* upon ſuch a judgment affirmed, the plaintiff ought to alledge, that it was removed thither by *writ of error*, &c. —— Vide *Guilliam* v. *Hardy*. 1 Ld. *Raym.* 216.

Of the *Scire facias* againſt Bail, and herein of the *Teſte* and *Return* of the Writ, *&c.*

IN *B. R.* if the ſuit was *by bill*, the *ca. ſa.* taken out againſt the principal in order to ground proceedings by *ſcire facias* againſt the bail, muſt have *eight* days between the *teſte and return*; and muſt lie *four* days, excluſive, in the ſheriff's office. *Salk.* 599.

The *ca. ſa.* againſt the principal being left in the ſheriff's office, gives notice to the bail, that the plaintiff will proceed againſt the perſon, and therefore it is incumbent on the bail to ſearch whether any *ca. ſa.* be left in the office. *Burr. Rep.* 4 *pt.* 1360.

A *ca. ſa.* returnable, pending error, is no regular foundation for proceeding againſt the bail. *Barnes* 83.

If *by original*, it muſt have *fifteen days* between the *teſte* and *return*.

The *ſcire facias* againſt the bail muſt not bear *teſte* the ſame day as the *ca. ſa.* againſt the *principal*.

Two *ſcire facias's* were quaſhed, the *ca. ſa.* and the firſt *ſcire facias* bearing teſte on one and the ſame day. *Barnes* 95.

But the *ſcire facias* againſt the bail may bear *teſte* the very day of the *return* of the *ca. ſa.* againſt the principal. *Stra.* 866. Ld. *Raym.* 1567.

But a *ſcire facias* muſt not bear teſte on a *Sunday*, for it is not *dies juridicus*. Dy. 168. a.

If the ſuit be by *original* in *B. R.* there muſt be *fifteen days* between the *teſte* and *return* of each writ. *Att. Pract.* 346. and the *teſte* and *return* may be both incluſive, and in this, whether the days ſhall be excluſive or incluſive, there is no difference between proceedings by *bill* or *original*. Stra. 765.

But if the ſuit be *by bill in B. R.* it is ſufficient if there are *fifteen days* between the *teſte* of the firſt *ſcire facias* and return of the ſecond; as if the firſt be teſted on 24*th October*, and the ſecond returnable on the 7*th November*, this is good. *Att. Pract.* 347.

The *ſcire facias* muſt be returnable as the original proceedings are, that is at a day certain *or* a common return. Ld. *Raym.* 1417.

In *C. B.* if the ſuit was on a writ of attachment, or a bill againſt a privileged perſon, fifteen days between the *teſte* and *return* of a *ſcire facias* are not requiſite; but if by *original aliter*,

Of the *Scire facias* againſt Bail, and herein of the *Teſte* and *Return* of the Writ, &c.

aliter, and muſt be returnable on a general return. *Att. Pract.* 67.

But in *C. B.* in a *ſcire facias* againſt bail, if there be fifteen days between the *teſte* of the firſt and *return* of the *ſecond ſcire facias*, that is ſufficient. *Pract. Reg.* 377. Rules and orders, 2 *vol.* 114. *Pract. Utr. Banci.* 27.

When the ſuit in *B. R.* is *by bill*, and the two *ſcire facias's* are made returnable in *fifteen days*, as they may—each writ ſhall have ſeven days between the *teſte* and *return*, and not one ten and the other *five*. Att. Pract. 347. Pract. U. B. 27.

But in *Elliott and Smith*, *Stra.* 1139. It was held, that if there be *fifteen days* between the *teſte* of the firſt and the *return* of the ſecond *ſcire facias* againſt bail, it is ſufficient, without any regard to the number of the days between the *teſte* and *return* of each writ.

There were but *fourteen days* between the *teſte* and *return* of a *ſcire facias*; and the court held it aided by the 17 *Car.* 2. *c.* 8. Lutw. 26.

In *B. R.* when the ſuit is by *original*, the *philazer* makes out the *ſcire facias*.

In *C. B.* the *philazer* makes out the firſt *ſcire facias*, and the prothonotary the ſecond. *Barnes* 96.

An *alias ſcire facias* muſt not iſſue till the firſt be returnable; and if it do, it is void. *Att. Pract.* 348.

And the *alias* muſt bear *teſte* the day of the return of the firſt in all caſes, except in caſe of a *ſcire facias quare executionem non* on a writ of error, and then it is not neceſſary. *Att. Pract.* 348.

If the plaintiff does not wiſh the bail to be ſummoned on the firſt *ſcire facias*; but would have a *nihil* thereto returned, it ought to be delivered to the ſheriff, or left in his office, *ſometime* before the return thereof. *Reg.* 5 *Geo.* 2.

In *Miller and Yarraway*, *Burr.* 4 *pt.* 1723. It was ſaid, that a *ſcire facias* againſt bail muſt lie in the ſheriff's office *four days* at leaſt before the return.

Every *alias ſcire facias* muſt *lie four* days, excluſive, before the return thereof in the office. *Reg. E.* 5 *G.* 2. *B. R.*

So every *ſcire facias*, on which a *ſcire feci* is returned, ought to be delivered to the ſheriff, or left in his office, *four days*, excluſive, before the return. *Ibid.* and *Att. Pract.* 347.

But,

Of the *Scire facias* againſt Bail, and herein of the *Teſte* and *Return* of the Writ, *&c.*

But, if the party is ſummoned the day before, or on the day of the return, that is ſufficient.

The ſheriff muſt indorſe the time of his receiving it.

A *ſcire facias* againſt bail is not amendable; but the court, on motion, will quaſh it, if irregular. *Stra.* 401, 1165.

A *ſcire facias* ordered to be quaſhed, on plaintiff's motion, without coſts, before plea pleaded, although the defendant had entered an appearance. *Barnes* 431.

The *alias ſcire facias* differs in nothing from the firſt, except in the *teſte* and *return*, and adding, after the words, "We command you," theſe words, "as we have before commanded you."

A *ſcire facias* is an action, and requires a new warrant of attorney. Ld. *Raym.* 1048, 1253.

Of the *Scire facias* againſt Bail, and herein of relieving them [by Motion] after they are ſaid to be fixed.

WHEN a *non eſt inventus* is returned to the *ca. ſa.* taken out againſt the principal, the bail are then ſaid to be fixed with the debt and damages recovered, becauſe of the default made by the party; but notwithſtanding they are ſaid to be fixed, the court will relieve them, if they come in upon the *ſcire facias* againſt them, and ſurrender the *principal* in time.

Bail have *ex gratiâ curiæ*, till the return of the ſecond *cire facias* to ſurrender the *principal.*

Bail may be relieved by motion, where they cannot plead the matter to the *ſcire facias* againſt them. As where a *non eſt inventus* is returned to a *ca. ſa.* the condition of their recognizance being then broken, they cannot plead a render of the principal afterwards; nor would the courts formerly have accepted ſuch render; but they may now, upon render of the body, upon the return of the ſecond *ſcire facias*, move the court to ſtay the proceedings againſt them.

This indulgence of the courts aroſe from the great miſchief which happened to bail, by a plaintiff's taking out a *ca. ſa.* and making it returnable the next day,—ſo that bail had not time to bring in the body; wherefore the courts indulged the bail ſo far as to permit them to render the body upon the return of the firſt *ſci. fa.* if the *ca. ſa.* was returnable *de die in diem.* Cro. Car. 618.

But if the *ca. ſa.* was returnable at the next ſummons, the bail was held ſtrictly to render the principal upon the return of the *ca. ſa.* and not after. *Ibid.* 738.

But afterwards the favour was extended, to admit a render any time before the return of the ſecond *ſcire facias*, or upon the return *ſedente curia*; but afterwards this practice was diſallowed. *Moor* 850. 3 *Bulſt.* 182.

However, it has ſince become the practice again both in *B. R.* and *C. B.* as appears by 1 *Wilſ.* 270. in *B. R.* Where the court held, that the *bail* muſt render the principal the *quarto die* of the return of the ſecond *ſci. fa. ſedente curia*, [and it is not ſufficient before a judge at chambers] or they come too late afterwards, even though the ſame day—and ſo is the practice in *C. B.* as appears by Ld. *Raym.* 156, 7. ſo that they always admit a render upon the return of the ſecond *ſci. fa.* [*i.e.* the *quarto die poſt* of the return day] *ſedente curia*, or any time before that. But all the admittances of theſe

Of the *Scire facias* againſt Bail, and herein of relieving them [by Motion] after they are ſaid to be fixed.

theſe renders are *ex gratia curiæ*, and not *ex merito juſtitiæ*, for the condition of the recognizance is broken by the non-render upon the return of the *ca. ſa.* and therefore theſe renders cannot be pleaded, but the party muſt be relieved by motion.

If *ſcire feci* is returned to the firſt *ſcire facias*, the bail may ſurrender the principal on the appearance day of the return of that *ſcire facias*.

If there be no *ca. ſa.* ſued out, returned and filed, it is no ground for a motion to quaſh the *ſcire facias* againſt the bail; but the bail muſt plead it, and be diſcharged by that means.

A *ca. ſa.* may be void as to the principal, and yet well enough to ground a *ſcire facias* againſt the bail; as if a *ca. ſa.* be ſued out above a year after judgment, without reviving the judgment by *ſcire facias*; for the bail are ſtrangers, and cannot take advantage of that error in a collateral action. 2 Ld. *Raym.* 1096. 6 *Mod.* 304. *Holt.* 90.

A motion was made to ſtay proceedings againſt one of the bail, who had been excepted to, and had not juſtified, but had omitted to get his name ſtruck out of the bail-piece.—The court denied the motion in its preſent form, as in the caſe of *Fulk and Birk*, 4 *Geo.* 3. ſaying, that whilſt the name remained upon record, proceedings could not regularly be ſtayed; but, as in that caſe, they now gave leave to enter an *exoneretur* on the bail-piece, *nunc pro tunc*, on payment of coſts. *Humphrey* v. *Leite*, *Burr.* 4 *pt.* 2107.

The bail are not liable if the principal dies any time before the return of the *ca. ſa.* and they may plead it to the *ſci. fa.*

But the death of the principal, after the *ſcire facias* brought, does not diſcharge them, if he was alive at the *capias* returned. *Cro. Car.* 165. 1 *Rol. Abr.* 336, *&c.*

A motion was made to ſtay proceedings againſt bail, becauſe the principal died after a *capias ad ſatisfaciendum* returned; but before the return of the ſecond *ſci. fa.* againſt the bail, but denied, becauſe it was the bails omiſſion, that they did not ſurrender him, he living till after the return of the *ca. ſa.* 1 Mod. 31. 2 Ld. Raym. 1452. 2 Stra. 717.

Motion to ſtay proceedings againſt the bail, the *ca. ſa.* was returnable the laſt return of *Michaelmas*, viz. 28*th Nov.*

Of the *Scire facias* againſt Bail, and herein of relieving them [by Motion] after they are ſaid to be fixed.

and the principal died 1 *Dec.* the *ca. ſa.* being then in the ſheriff's office, and not actually returned till the 3*d Dec.* and the motion was denied. *Boyland* v. *Crooke and others, bail of Porter*, *B. R.* 1748.

But where the principal died after a *ca. ſa.* returned, and before it was filed, the court, on motion, ſtayed the filing it in favour of the bail. 1 *Lill. Abr.* 183. *Mich.* 35 *Car.* 2. *B. R.*

A *ca. ſa.* 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. *Burr. Rep.* 4 *pt.* 1187.

An action was commenced againſt the bail, and afterwards the plaintiff was obliged to deſiſt therein; and then the bail ſurrendered the principal before the new action brought, and moved to ſtay the proceedings; the court held the ſurrender to be good, it being before the return of the proceſs in this ſuit, and it was the fault of the plaintiff not to begin right at firſt. *Hoare* v. *Mingay, one, &c. Stra.* 915.

In an action of aſſault and battery, the plaintiffs procured a judge's order to hold the defendant to bail for 140 *l.* whereupon the defendant became bound in 280*l.* and the bail jointly and ſeverally in 140 *l.* The plaintiff had a verdict for 300*l.* and brought ſeparate actions on the recognizance againſt the bail. On which the bail moved the court, that on payment of one ſum of 140 *l.* and coſts, proceedings might be ſtaid, and compared this to an action on bond. But the plaintiffs inſiſted, that there was a difference; for in a bond the condition is to pay the money; and if one obligor pays it, then the other is diſcharged, as the condition is complied with; but, in a recognizance, the condition is not ſatisfied till the damages recovered be paid, or the defendant ſurrendered. And it was held, that the bail being jointly and ſeverally bound, the actions againſt them could not be diſcharged, unleſs the condition of the recognizance was performed, *viz.* That the defendant paid what was recovered, or ſurrendered himſelf to the *Fleet*. *Calverac and Ux.* v. *Pinkero, Mich.* 12 *G.* 2. *C. P. Barnes* 74. *Pract. Reg. C. P.* 88.

If

Of the *Scire facias* againſt Bail, and herein of relieving them [by Motion] after they are ſaid to be fixed.

If an action be brought on a recognizance of bail, the writ muſt be ſerved *four days* before the return, and the bail may ſurrender the principal on the *quarto die poſt* of the return *ſedente curia*; but not after the court is riſen. *Rep. & Caſ. of Pract. C. P.* 18.

Motion to ſet aſide a *fi. fa.* againſt bail, defendant having ſurrendered in their diſcharge. It appeared by affidavit, that the ſecond *ſci. fa.* was returnable *Cras. Mart. Nov.* 12. and the defendant's ſurrender not before the 15*th*, the appearance day of the return. *Per cur.* The affidavit is defective, as it does not ſhew that the defendant ſurrendered [*ſedente curiâ*] on the appearance-day of the return of the ſecond *ſci. fa.* which if he did not, the ſurrender is out of time. No rule. *Barnes* 75.

The bail, for one who was convicted afterwards for a felony, brought up the body by *habeas corpus*; and the court allowed them to ſurrender him in diſcharge of themſelves. *Stra.* 1217.

Debt was brought on the recognizance; plea, no *ca. ſa.* repl. a *ca. ſa.* and demurrer, *inde.* But the court afterwards, being informed by motion that the defendants had ſurrendered the principal before the return of the *latitat* againſt them, ordered the proceedings to be ſtayed, and an *exoneretur* to be entered on the bail-piece, notwithſtanding the plea, replication, and demurrer, before the motion. *Dodſon* v. *King*, *Carth.* 516.

Of the *Scire facias* againſt Bail, and herein of relieving them after *Error* brought on the principal Judgment.

A Writ of *error* is ſo abſolutely a *ſuperſedeas*, that the plaintiff cannot ſo much as take out a *ca. ſa.* and return *non eſt inventus*, in order to proceed againſt the bail. *Sweetapple* v. *Goodfellow*. *Stra.* 867.

The plaintiff, in order to proceed againſt the bail, took out a *ca. ſa.* on the 3d of *December*. On the 4th a writ of error was allowed, notwithſtanding which he called for a return of *non eſt inventus*, and then waiting till the writ of error was at an end, proceeded by *ſcire facias* againſt the bail: and on motion all the proceedings were ſet aſide: for the ground of them, *viz.* the return of *non eſt invent.* was obtained after notice of the writ of error, which in its nature ſtopt all proceedings, and the ſheriff could not ſo much as look after the defendant. * *Stra.* 1186. 1 *Wilſ.* 16.

But in Ld. *Raym.* 342. it is held, that *error* on the principal judgment is no bar to hinder the ſuing a *ca. ſa.* in order to charge the bail—and ſo again. *Ibid.* 1260. *Sed q.* as the other caſes above are more modern.

The plaintiff recovered judgment, took out a *ca. ſa.* and had a *non eſt invent.* returned. Of the judgment *error* was brought, and two days after the plaintiff ſued out a *ſci. fa.* againſt the bail, who moved to ſtay the proceedings therein, as is done in caſes where, pending error, the plaintiff brings debt on the judgment, inſiſting that it was more reaſonable in this caſe, becauſe otherwiſe the bail might loſe the advantage of diſcharging themſelves by ſurrendering the principal, which they can do at any time before the return of the ſecond *ſci. fa.* and the court thought it reaſonable that the proceedings ſhould be ſtayed, on the bail's conſenting, that if the judgment be affirmed, they would ſurrender the

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* But *note*, there is a difference in the two courts of *B. R.* and *C. B.*

In *B. R.* a writ of error is a *ſuperſedeas* from the time of the allowance, and that is notice of itſelf—or if the party have notice thereof before the allowance, it is even from that notice a *ſuperſedeas*. Bur. Rep. 4 pt. 340. Say 51.

But in *C. B.* a writ of error is no *ſuperſedeas* from the ſealing, but from the delivery to the clerk of the errors. *Barnes* 205. 209.

principal,

Of the *Scire facias* againſt Bail, and herein of relieving them after *Error* brought on the principal Judgment.

principal, or give judgment on the *ſci. fa.* *Myer* v. *Arthur.* Stra. 419.

But on a like motion as above, it appearing that bail was not put in upon the writ of error, ſo as to make an abſolute *ſuperſedeas*, the court refuſed to ſtay the proceedings on the *ſci. fa.* ſaying they would not go one ſtep farther than the caſe of *Myer* v. *Arthur.* *Hunter* v. *Sampſon.* *Stra.* 781.

So where the *ſecond ſci. fa.* was returned, and a four-day rule given, on the fourth day of which error being brought on the principal judgment, the bail moved to ſtay proceedings on the *ſci. fa.* and cited *Myer* v. *Arthur.* But, *Per cur.* that differed, for there the bail came in time whilſt they might ſurrender, which they cannot do here after the return of the *ſecond ſci. fa.* at which time no writ of error was brought. Rule denied. *Everett* v. *Gery.* *Stra.* 443.

And, *Per cur.* in *Richardſon* v. *Jelly.* *Stra.* 1270. Where the bail do not apply to ſtay the proceedings pending error, till their time to ſurrender is out, we will not give them any time for that purpoſe, but only four days to pay the money in, after the judgment is affirmed.

The bail in the original action, upon a writ of error brought, are not liable to the coſts upon the affirmance of the judgment.

Though an action of debt on a judgment may be brought, pending a writ of error in the original action, and the court will let the plaintiff proceed to judgment thereon, and only ſtay execution till the writ of error is determined; yet if an action of debt on the recognizance of bail in the original cauſe be brought, pending *error* on the judgment, the court will ſtay proceedings in ſuch action, without the bail giving judgment; for, by the judgment, the bail would be barred from ſurrendering the principal. *Prac. Reg. C. P.* 83.

The *ſecond ſcire facias* was returnable the firſt day of the term; and a week within term the bail moved to ſtay the proceedings, on the common terms of giving judgment in the *ſcire facias*, and taking four days to ſurrender after the affirmance of the principal judgment. But the court ſaid they came too late, after the time to ſurrender was gone, and would not revive it again; all they would do was, to ſtay

Of the *Scire facias* againſt Bail, and herein of relieving them after *Error* brought on the principal Judgment.

the ſuing out execution againſt them, till after the affirmance in error. *Cole* v. *Buckland*, *Stra.* 872.

The plaintiff got judgment on the *ſcire facias* againſt bail, pending *error* by the principal, and took them in execution; and now they moved to be diſcharged. *Sed per cur.* Though you might have applied, and had the proceedings ſtayed, yet we will not ſet them aſide. If an action of debt had been brought upon the judgment, we ſhould have granted an imparlance, if it had been aſked; but we never ſet aſide the judgment when it is once ſigned; becauſe we take it, that by your not applying in time you have ſubmitted to meet the plaintiff. *Fiſher* v. *Emerton*, *Stra.* 526.

Error was brought in *cam. ſcacc.* upon a judgment obtained againſt the defendant in *B. R.* and writs of *ſcire facias* had iſſued againſt the bail in the original action in *B. R.* where the bail obtained a rule to ſtay proceedings againſt them in *B. R.* upon the *ſcire facias's*, until the writ of error returnable in *cam. ſcacc.* ſhould be determined, they undertaking to pay the debt and damages within four days after *affirmance* of the judgment, if the ſame ſhould be *affirmed*. The judgment was *affirmed* in *cam. ſcacc.* and afterwards the original defendant brought error returnable in parliament to reverſe the judgment given in *cam. ſcacc.* on which the bail moved to ſtay proceedings againſt them till that writ of error was determined; and though it was objected, that the bail were bound by the *expreſs terms* in the former rule, the court made the rule abſolute, holding, that the word "*affirmance*," in the firſt rule, muſt neceſſarily be underſtood to mean *final affirmance*. Kirſhaw v. Cartwright and Pearce, *bail of* Green, *Burr.* 4 pt. 2819.

Of the *Scire facias* againſt Bail, and herein of appearing thereto.

IF the plaintiff proceeds by *ſcire facias*, the uſual way is to ſue out a *ſcire facias*, and get it returned *nihil*; and then ſue out an *alias ſcire facias*, and upon a *nihil* alſo returned to that, after a rule given, ſign judgment on the *ſcire facias*. But if the plaintiff would have the parties ſummoned, either upon the firſt or ſecond *ſci. fa.* the ſheriff will make him out a ſummons, which he muſt give to an officer, with inſtructions for the execution thereof; and, at the return of the writ, the ſheriff will return *ſcire feci*; for, in all caſes of *ſcire facias* againſt *bail*, there muſt be a *ſcire feci* returned, or *two nihils*; for two *nihils* amount to a warning.

Where two writs of *ſcire facias* iſſue returnable in different terms, the firſt muſt be entered of the term wherein it is returnable; and an award of the ſecond is ſufficient, without ſetting it forth at length.

The writs and returns in *B. R.* if *by bill*, muſt be filed at the *Treaſury Chamber*, or at the *King's Bench* office, with Mr. *Heberden*, the ſigner of the writs—But if by *original*, with the *filazer*.

In *C. B.* they are entered on the prothonotary's remembrance roll.

Where a *ſcire facias* againſt bail is not returned, the plaintiff cannot proceed upon an *alias ſci. fa.* without an entry of the firſt upon the roll. Ld. *Raym.* 822, 1252.

After the writs and returns thereto are filed, the plaintiff muſt take out a rule to appear, and ſerve a copy thereof on the bail.

A. B.
v.
E. F. and *G. H.* bail of *C. D.* } Rule on *ſcire facias*, *8th April*, 1780.

The above rule expires in four days excluſive, but *Sunday* is not one; and, if the parties do not enter an appearance, at the expiration thereof judgment may be ſigned on the *ſcire facias*.

But if they enter an appearance in time, the plaintiff muſt declare in *ſcire facias*, and the proceedings to iſſue or demurrer are the ſame as in other caſes.

Of the *Scire facias* againſt Bail, and herein of declaring, pleading, Judgment, and Execution, &c.

THE form of a declaration in *ſcire facias* is as follows:

Eaſter Term, 20 *Geo.* 3.

[Prothonotary's name if in *C. B.*] [Chief clerk's name if in *B. R.*]

Middleſex to wit. Our Lord the king gave in charge to the ſheriff of *Middleſex* his writ, cloſe in theſe words, to wit, *George* the *third*, &c. [here inſert the proceedings, from the ſuing out the *ſcire facias*, exactly as they have been—whether if only one *ſcire facias*, and a *ſcire feci* returned thereto; or if a *ſcire facias* and *nihil* returned, and then award of an *alias ſcire facias*, and *ſcire feci* returned thereto, inſerting the writs and returns] And the ſaid *E. F.* and *G. H.* at that day having been ſolemnly demanded, came by *Q. R.* their attorney, upon which the ſaid *A. B.* prays execution to be adjudged to him of the debt and damages (or of the damages, coſts and charges, as the action was) aforeſaid, according to the force, form, and effect of their ſaid recognizance, &c.

O. P. for the plaintiff.

Q. R. for the defendant.

A declaration on a *ſcire facias*, returnable the laſt return of the term, may be intitled of the ſame term generally. 3 *Wilſ.* 154.

A man may plead in abatement, or in bar to a *ſcire facias*, as well as other actions. *Lucas* 112.

There are but few pleas in bar which can be pleaded by bail to a *ſcire facias*.

They can plead that no *ca. ſa.* iſſued againſt the principal, or that he died before the return of the *ca. ſa.* or that the plaintiff had other execution.

But they cannot plead, that the principal died before the *ſcire facias* iſſued. *Cro. Jac.* 163. &c.

But they can plead, that the principal died before any judgment againſt him; becauſe they cannot have a writ of error to reverſe that judgment.

Cf

Of the *Scire facias* againſt Bail, and herein of declaring, pleading, Judgment, and Execution, &c.

If the principal ſurrendered himſelf, or the bail rendered him [upon or before the return of the *ca. ſa.* or otherwiſe, ſuch render cannot be pleaded, though upon ſuch render afterwards the court will diſcharge them on motion. *Vide ante.*] But ſuch ſurrender, or render, are not ſufficient, unleſs the plaintiff, or his attorney, have notice thereof; and this is requeſted, that the plaintiff may, if he pleaſes, charge him in execution, alſo that he may not be at any further trouble or charge againſt the bail. *Leon.* 58. 2 *Bulſt.* 260. *Moor* 883.

Alſo now by 4 & 5 *Ann. c.* 16. *ſ.* 12. payment of the ſum recovered may be pleaded as well to a *ſci. fa.* as to an action of debt.

For other pleas, *vide* the *books.*

Bail pleaded to a *ſcire facias*, payment by the principal before the return of the *ſecond ſcire facias*; and it was reſolved the plea was bad, for, in ſtrictneſs of law, the recognizance was forfeited by ſuing out the firſt *ſci. fa.* againſt the bail. Ld. *Raym.* 157. But *vide* the 4 & 5 *Ann. c.* 16. *ſ.* 12.

Sci. fa. againſt the defendant as bail for *A. B. C.* and *D.* the defendant pleads, that before the return of the ſecond *ſci. fa.* the plaintiff took *A.* in execution and ſtill detains him—Demurrer *inde.* It was argued for the defendant, that the plaintiff having taken one of the principals in execution, had thereby diſabled the bail to render him, and therefore diſcharged him as to all the reſt. *Sed per cur.* The bail have undertaken to bring in all four principals; and therefore though the plaintiff hath taken one, this does not diſcharge the bail as to the other three, for they ought, as they took upon them, to bring in all four. 2 *Lev.* 192. 1 *Vent.* 315.

Formerly, if the plaintiff recovered a greater ſum than was laid in the action, the bail were not chargeable *in that action.* 1 Salk. 102. But now, 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 leſs ſum which the plaintiff in ſuch action ſhall recover. *Paſch.* 5 *Geo.* 2.

The

Of the *Scire facias* againſt Bail, and herein of declaring, pleading, Judgment, and Execution, &c.

The practice of the courts, upon pleading to *ſcire facias*, is exactly the ſame as in other caſes; only in the *venire*, *diſtringas*, or *habeas corpora* and *jurata*, for a trial upon the *ſcire facias*, after the words, "in a plea of debt, treſpaſs, &c." (as the action may be) add theſe words, "Whereupon a *ſcire facias*, &c."

Scire facias againſt *Fane* and *Barker*, bail of *Barrell*, judgment thereon, and a *ca. ſa.* againſt *Fane* only taken out. *Per cur.* Though the *ſcire facias* was joint, yet the execution may be ſeveral.

And *note*, Though the recognizance be to levy of the *lands and chattels*, yet execution by the body is good, by the law and uſage of this court. 1 *Lev.* 225. 1 *Sid.* 339. 2 *Keb.* 269, 274. 3 *Danv. Ab.* 307. *pl.* 2, 4, 5, 6. 2 *Sid.* 12. 2 *Inſt.* 395. 3 *Dan. Abr.* 325. *G. p.* 3, 339. *p.* 6.

And in *Elliott* v. *Smith*. *Stra.* 1139. It was held, that a *ca. ſa.* may be taken out againſt bail, without any *fi. fa.* or return of *nulla bona* previouſly iſſued.

If *bail* bring *error* upon an award of execution in a *ſcire facias* againſt them, matter which lies properly in the mouth of the principal, or might have been pleaded to the *ſcire facias*, is not aſſignable for error, after execution awarded againſt them. *Wraight* v. *Kitchingham*. *Stra.* 197. *Salk.* 262. 4 *Mod.* 306.

A judgment on a *ſcire facias* againſt bail was reverſed for want of a *warrant* of attorney. *Salk.* 603.

A moiety of the damages was levied on one bail; and the other bail not having goods ſufficient to levy the remainder, the plaintiff took out a ſecond execution againſt the goods of the firſt *bail*. But, on motion to ſet aſide the ſecond execution, the court held it irregular, for the plaintiff might have levied the whole at firſt. *Barnes* 202.

If the plaintiff, in a *ſcire facias*, either for want of the damages being previouſly aſcertained, or upon obtaining judgment by default upon the *ſcire facias*, or judgment upon demurrer therein, is of neceſſity obliged to ſue out a *ſcire fieri inquiry*, in order to aſcertain his damages, he muſt give the like notice of executing the ſame, as muſt be given in other caſes of trial, and executing writ of inquiry. For which, vide the firſt *vol.* under thoſe titles.

Note; A *ſcire facias* againſt *bail* is not amendable.

In

Of the *Scire facias* againſt Bail, and herein of declaring, pleading, Judgment, and Execution, *&c.*

In a *ſcire facias* againſt bail, the plaintiff made a miſtake in ſetting out the recognizance, which the defendant took advantage of, by pleading *nul tiel record.* And afterwards, the plaintiff moved to amend it, but was denied: for *ſcire facias*'s againſt bail are never amended; and the courſe is, for the plaintiff to quaſh his own writ. This may be to defeat the bail of an opportunity to ſurrender, which he would have done, if he could not have been ſure of proceeding in his plea. *Grey* v. *Jefferſon.* *Stra.* 1165.

Of the *Scire facias* to revive a Suit by and againſt the ſame Parties.

THE ſecond ſort of *ſcire facias*, which is proper to be treated of in this place, is that to revive a judgment formerly had between the parties; and on which no execution was taken out after the rendering ſuch judgment.

Different opinions have been entertained, whether a *ſcire facias* in ſuch caſe lay at Common law? But the doubt, ſays Lord *Coke*, aroſe for want of diſtinguiſhing between *perſonal* and *real* actions. 2 *Inſtit.* 409.

At Common law, if after judgment given, or recognizance acknowledged, the plaintiff ſued out no execution within the year; the plaintiff, or his conuzee, was driven to an original on the judgment; and the *ſcire facias*, in *perſonal* actions, was given by *Weſt.* 2. *c.* 45. 2 Salk. 600. pl. 8. Ld. Raym. 669. Co. Lit. 290. b. Sid. 351. 3 Co. 12. 3 Mod. 189. 4 Mod. 248.

But in *real* actions, or upon a *fine*, though no execution was ſued out within a year after the judgment given, or fine levied, yet after the year, a *ſci. fa.* lay for the land, *&c.* becauſe no new original lay upon the judgment or fine. 2 *Inſtit.* 470. And the reaſon why it lay in this caſe was, for that in a real action one could have no other advantage of his judgment; but in a perſonal action he might have debt on his judgment.

A *ſcire facias* lay alſo in *mixed* actions as well as *real*, as in an aſſize, writ of anuity, and ejectment.

Therefore, after judgment had in a *perſonal* action, and no execution ſued out within a year, the plaintiff muſt revive the judgment by *ſcire facias*, and have judgment thereon, before he can ſue out execution.

But if execution were ſued out within the year, and returned, and from which the plaintiff had no benefit, there needs no *ſcire facias* in ſuch caſe afterwards, but that execution may be continued down on the roll to any diſtance of time. *Att. Prac. B. R.* 248, 341, 372.—like-practice in *C. B. Att. Pract. C. B.* 234, 330. And where execution was awarded on a *ſcire facias*, and *four years* after the defendant, being in the *Fleet* for another cauſe, was brought into court by *habeas corpus*, and there admitting himſelf to be the ſame perſon, he was committed in execution without a *ſcire facias*. Att. Pract. C. B. 359.

So

Of the *Scire facias* to revive a Suit by and againſt the ſame Parties.

So if there be a *ceſſet executio* for a year, or a *writ of error*, no *ſcire facias* is neceſſary. *Att. Prac. B. R.* 371.

But it ſeems, the *ceſſet executio* ſhould be entered on record. *Ibid.*

However, if the plaintiff does not take out execution within a year after the *ceſſet executio* is determined, he muſt firſt ſue out a *ſcire facias*.

If execution is ſtayed by *injunction* out of *Chancery* for above a year, the plaintiff muſt ſue out a *ſcire facias*. Prac. Reg. C. P. 370. Same in B. R. 1 Stra. 301. Salk. 322.

And a *ſuperſedeas quia improvide* was awarded to an execution [ſtayed by an injunction out of *Chancery* for above a year] ſued out without a previous *ſci. fa.*

But *note*, An *injunction* only ſtays the actual executing the writ; therefore, a plaintiff may ſue out his execution, notwithſtanding an injunction, and continue it down by *vicecomes non miſit breve*. Ibid.

But notwithſtanding the rule is, that *if no execution be ſued out within a year, a ſcire facias muſt be ſued out to revive the judgment*, yet the court of *B. R.* in the caſe of *Mitchell* v. *Cue* and *Ux.* Burr. 4 pt. 660. were unanimous, that this rule of reviving a judgment above a year old, by *ſcire facias*, before ſuing out execution upon it, which was intended to prevent a ſurprize upon the defendant, ought not to be taken advantage of by a defendant, who was ſo far from being ſurprized by the plaintiff's delay, that he himſelf had been trying all manner of methods whereby he might delay the plaintiff, *viz.* by *injunction*, *&c.* And ſo the court not only diſcharged the rule, [which had been obtained to ſet aſide the execution] but with coſts.

An execution had after a year and day, without a *ſcire facias*, is not void, but voidable only. 3 *Lev.* 404. *Salk.* 273. *pl.* 4.

If a defendant brings *error*, and is nonſuit therein; or if the writ be diſcontinued, although it be above a year ſince the original judgment was given, the plaintiff may take out execution; for though in ſuch caſes there is not any new judgment given, yet the bringing of the writ of error revives the firſt judgment. *Cro. Jac.* 364. *Rol. Rep.* 104, 133.

If

Of the *Scire facias* to revive a Suit by and againſt the ſame Parties.

If the plaintiff delay the executing a writ of inquiry, till a year after the interlocutory judgment, he cannot do it after, without a *ſcire facias*. Caſ. in B. R. Paſch. 13 W. 3. Haw. *v.* Cuton.

But in the caſe of the king, there need not be any *ſcire facias* after the year and day. 2 *Salk.* 603. *pl.* 13. Ld. *Raym.* 328, 553.

After a judgment, if the plaintiff within the year ſues a *ſcire facias*, he cannot after have a *capias* within the year, till he hath a judgment on the *ſci. fa.* Rol. Abr. 900.

If the plaintiff does not proceed upon the firſt *ſcire facias*, within a year and a day, he cannot afterwards proceed on that writ, but muſt ſue out a new *ſcire facias*, for the old writ is diſcontinued.

If a judgment be above ten years ſtanding, the plaintiff cannot ſue out a *ſcire facias*, without motion in court. 2 *Salk.* 598. *pl.* 3.

If under ten, but above ſeven years, not without a motion at the ſide bar.

But *note*, If after ſuch motion the judgment is revived by a *ſcire facias*, and then the defendant dies before execution, the plaintiff muſt ſue out a *new ſcire facias*; but may have it without motion, for the judgment was revived before. 2 *Salk.* 598.

If the judgment of an inferior court is removed into *B. R.* by *certiorari*, and the party ſues a *ſci. fa.* to have execution upon ſuch judgment; he ought to ſhew in his *ſci. fa.* that it is the judgment of ſuch an inferior court removed thither by *certiorari*, and ought to ſhew the particular limits of the inferior juriſdiction, and pray execution within the particular limits. But if the judgment be removed into *B. R.* by writ of error, and affirmed, the party may have execution in any part of *England*; for by the affirmance it has become the judgment of the *King's Bench*. But in a *ſci. fa.* upon ſuch judgment affirmed, the plaintiff ought to alledge, that it was removed thither by writ of error. Ld. *Raym.* 216.

After judgment recovered, *Hil.* 30, 31 *Car.* 2. and no execution actually ſued out within the year and day, the plaintiff, without a previous *ſci. fa.* in *Trin. vac.* 5 *W. & M.* took out an *elegit*, on which an inquiſition was had, and defendant's

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defendant's lands delivered in execution; and then the plaintiff entered on the *roll* an award of an *elegit*, of the ſame term with the judgment, with continuances of *vicecomes non miſit breve* to the time of ſuing out the *elegit*. And on examination it appearing to have been the practice for many years, the court, conſidering the inconveniences that might enſue by opening a gap to deſtroy many executions, and becauſe the practice had prevailed ſo long, ordered the execution to ſtand. *Carth.* 283. 2 *Show.* 235; 3 *Danv. Abr.* 33.

A *ſcire facias* lies not on a judgment pending a writ of error brought on that judgment, but the writ of error pending is a good plea to the *ſci. fa.* Ld. Raym. 1295.

If a joint judgment is obtained againſt two, and one dies, the *ſcire facias* ought to be brought againſt both the ſurvivor, and the repreſentatives of the deceaſed defendant. Vide *Carth.* 105.

After interlocutory judgment the plaintiffs became bankrupts, then took out a writ of inquiry, and proceeded to final judgment in their own names. On which judgment the plaintiffs aſſignees ſued a *ſcire facias* to ſhew cauſe why they ſhould not have execution: Defendant pleaded the whole matter of the bankruptcy in bar, and prayed judgment if the aſſignees ought to have execution againſt him, demurrer *inde* and joinder. The court held the aſſignees properly entitled to the damages; and that the bankrupt's proceeding in their own names, after the *interlocutory* judgment, till final judgment, was well enough, becauſe the *interlocutory* judgment entitled the bankrupts to ſomething, which by the inqueſt was aſcertained. *Hewit & al. aſſignees of Bibbins & al.* v. *Mantel.* 2 *Wilſ.* 372.—The aſſignees might have taken up the cauſe after the interlocutory judgment.

Plaintiff had judgment, and brought a *ſcire facias*, to which the defendant pleaded, and judgment thereon was for the plaintiff, who afterwards became a bankrupt. The commiſſioners aſſigned the original judgment to *P.* who moved the court, that it might be entered to entitle him to the benefit of the judgment on the *ſci. fa.* which was ruled accordingly, without bringing a new *ſci. fa.* Plumer *v.* Lea. 5 Mod. 88.

Of the *Scire facias* to revive a Suit by and againſt the ſame Parties.

A man had judgment in debt, then became a bankrupt, and afterwards ſued out execution; and the money being levied and brought into court, the aſſignee moved that it might not be paid to the plaintiff [the bankrupt] ſurmiſing that the judgment was aſſigned to him. But the court detained the money till the aſſignee brought a *ſcire facias* to try the bankruptcy — cited in the above caſe in 2 *Wilſ.* 372.

A *ſcire facias*, if againſt the party, is *in hac parte*; but if againſt bail, *in ea parte*. Salk. 599. Ld. Ray. 393, 532.

A *ſcire facias* to revive a judgment or award of execution, muſt be in the county where the judgment is recovered, or execution awarded. *Hob.* 4. *Cro. Car.* 228.

And the *ſcire facias* muſt be returnable at a common return, or at a day certain, as the original proceedings were. Ld. *Raym.* 1417.

If the proceedings were by *original*, there muſt be fifteen days between the *teſte* and return of each *ſcire facias*; and the writs muſt be returnable on a general return.

But in *ſcire facias*'s on writs of attachment, or bills againſt privileged perſons in *C. B.* fifteen days are not requiſite between the *teſte* and *return*.

And in *B. R.* if the proceedings were by *bill*, fifteen days incluſive between the teſte of the firſt and return of the ſecond *ſci. fa.* is ſufficient—But then each writ ſhould have ſeven days between the teſte and return, and not one ten and the other five.

Every *ſcire facias* whereon *nihil* is to be returned, ſhould be delivered to the ſheriff, or left in his office, ſometime before returned. *Reg. Eaſt.* 5 *G.* 2.

The *alias ſcire facias* muſt be delivered to the ſheriff, or left in his office, *four days* before returned. *Ibid.*

So every *ſcire facias*, on which a *ſcire feci* is to be returned, ought to be delivered to the ſheriff, or left in his office, *four days* excluſive, before the return day. *Ibid.* And *Att. Pract.* 347.

The ſheriff muſt indorſe the time of his receiving it.

And if the party is ſummoned the day before, or on the return day, it is ſufficient. *Att. Prac. B. R.* 347. The ſame in *C. B.*

In a *ſcire facias* to revive a judgment, the term of the recovery need not be inſerted. *Barnes* 431.

Of the *Scire facias* to revive a Suit by and againſt the ſame Parties.

In *B. R.* in all caſes, there muſt be two *nihils*, or one *ſcire feci* returned.

But in *C. B.* in order to revive a judgment, if both parties are alive, one *ſcire facias*, though returned *nihil*, is ſufficient. *Att. Pract.* 330.

After the writs and returns are filed, the plaintiff gives a rule to appear, which expires in four days; and if no appearance is entered, he may then ſign judgment on the *ſcire facias*, and take out his execution.

But if the party appears, the plaintiff declares in *ſcire facias*; and the practice throughout the ſubſequent proceedings is exactly the ſame as in other caſes. Of appearing, declaring, pleading, *&c.* in *ſcire facias*, Vide ante under title *ſci. fa.* againſt bail.

Of the *Scire facias* to continue a Suit by and againſt the Repreſentatives of one of the Parties dying before final Judgment.

BY the 17 *Car.* 2. *c.* 8. it is enacted, "That in all actions perſonal, real, or mixt, the death of either party, between the verdict and the judgment, ſhall not hereafter be alledged for error, ſo as ſuch judgment be entered within two terms after ſuch verdict."

And "where any judgment after a *verdict* ſhall be had, by or in the name of any executor or adminiſtrator, in ſuch caſe an adminiſtrator *de bonis non* may ſue forth a *ſcire facias*, and take execution upon ſuch judgment."

A. ſued a *ſci. fa.* againſt *C.* as executor of *B.* on a judgment obtained by the plaintiff againſt the ſaid *B.* *C.* pleaded in abatement, that *B.* died before judgment, &c. To this *C.* replied, and ſet out the *ſtat.* 17 *Car.* 2. *c.* 8. and that *B.* died after the verdict obtained againſt him, and after the day of *niſi prius*, and before the day in bank. Thereupon *C.* demurred. And the objection was, that the plaintiff ought to have ſued a *ſpecial ſcire facias*, and not a general one; for this ſuppoſes a judgment againſt the teſtator in his life-time; and the replication ſhews it was entered after his death, though well entered according to the ſtatute. *Sed per cur.* The writ is good as it is, and could not be otherwiſe; for had it been *ſpecial*, there would have been a variance, the judgment being entered generally; and a *reſpondeas ouſter* was awarded. Ld. *Raym.* 1280.

The death of either party, before the aſſizes, is not remedied by this ſtatute; but if the party die after the aſſizes begin, though the trial be after his death, that is within the remedy of the ſtatute; for the aſſizes is but one day in law. Yet the court ſaid it was in their diſcretion, whether they would arreſt the judgment. But in Lord *Raym.* 1415. it was holden not aſſignable for error, it appearing by the record, that the defendant appeared *per attornatum ſuum.*

By the 8 & 9 *W.* 3. *c.* 11. *ſ.* 6. it is enacted, "That in all actions commenced in any court of record, if any plaintiff happen to die after an interlocutory judgment, and before a final judgment obtained therein, the ſaid action ſhall not abate by reaſon thereof, if ſuch action might be originally proſecuted or maintained by the executors or adminiſtrators of ſuch plaintiff; and if the defendant die after ſuch interlocutory judgment, and before final judgment therein obtained, the

Of the *Scire facias* to continue a Suit by and againſt the Repreſentatives of one of the Parties dying before final Judgment.

the ſaid action ſhall not abate, if ſuch action might be originally proſecuted or maintained againſt the executors or adminiſtrators of ſuch defendant: and the plaintiff, or if he be dead, after ſuch interlocutory judgment, his executors or adminiſtrators ſhall and may have a *ſcire facias* againſt the defendant, if living after ſuch interlocutory judgment; or if he died after, then againſt his executors or adminiſtrators, to ſhew cauſe why damages in ſuch action ſhould not be aſſeſſed and recovered by him or them; and if ſuch defendant, his executors or adminiſtrators, ſhall appear at the return of ſuch writ, and not ſhew or alledge any matter ſufficient to arreſt the final judgment, or being returned warned, or upon two writs of *ſcire facias* it be returned, that the defendant, his executors or adminiſtrators, had nothing whereby to be ſummoned, or could not be found in the county, ſhall make default; that thereupon a writ of inquiry of damages ſhall be awarded, which being executed and returned, judgment final ſhall be given for the ſaid plaintiff, his executors or adminiſtrators, proſecuting ſuch writ or writs of *ſcire facias*, againſt ſuch defendant, his executors or adminiſtrators reſpectively."

The former ſtat. 17 *Car.* 2. makes the judgment good, as entered between the parties themſelves to the ſuit, though one died after the *verdict*, and before the judgment entered.

But by this ſtat. of 8 & 9 *W.* 3. if a defendant dies after interlocutory judgment, and the action may be continued againſt his repreſentatives, the final judgment muſt be againſt the repreſentatives, for they are expreſly taken notice of for that purpoſe; and the *ſcire facias* againſt them muſt be ſpread and appear on the ſame record. *Vide* 1 *Salk.* 42.

If a defendant dies after a *writ of inquiry* executed, and before the return thereof, it is within this act, and the *ſcire facias* againſt his executor or adminiſtrator muſt be to ſhew cauſe why the damages aſſeſſed ſhould not be recovered. *Goldſworthy* v. *Southcot*, *B. R.* 1 *Wilſ.* 243.

The plaintiff, as adminiſtrator to *J. S.* ſued a *ſcire facias* againſt the defendant, ſetting forth, that his inteſtate ſued the defendant as executor in ſuch an action, and had judgment by *nil dicit*, on which a writ of inquiry was awarded, which abated by the inteſtate's death before the return; that adminiſtration was granted the plaintiff, and com-

Of the *Scire facias* to continue a Suit by and againſt the Repreſentatives of one of the Parties, dying before final Judgment.

manded the ſheriff to ſummon the defendant to ſhew cauſe, why the plaintiff, as adminiſtrator, ſhould not have judgment: to which *ſci. fa.* the executor pleaded a bond of his teſtator's, on which judgment had been recovered, and no aſſets *ultra.* To which plea plaintiff demurred, and had judgment; for the ſtatute never intended that the executor ſhould ſtand in any other circumſtances, to make another defence than the party himſelf might have made againſt the inquiry; and he could have pleaded nothing but a releaſe, or other matter in bar ariſing *puis darrein continuance.* He is, by the words of the ſtatute, to ſhew cauſe why damages in ſuch caſe ſhall not be aſſeſſed and recovered; and if he ſhall appear at the return, and not ſhew any matter ſufficient to arreſt the final judgment, then a writ of inquiry ſhall be awarded, *&c.* And arreſting judgment is by matter apparent in the record, and not extrinſic; and heretofore they pleaded in arreſt of judgment, as now it is moved. And the executor cannot be hurt by this, for the judgment is only *de bonis teſtatoris*, as if recovered againſt the teſtator himſelf. *Salk.* 315.

The defendant died after the rule was out, but before the time given to plead by a judge's order expired; and the plaintiff ſigned an interlocutory judgment, and ſued out a *ſcire facias* againſt the defendant's executor upon this ſtatute, to ſhew cauſe why damages ſhould not be aſſeſſed and recovered; but on motion the court ſet aſide the proceedings for irregularity, as the writ abated by the death of the defendant before interlocutory judgment was ſigned, notwithſtanding the rule to plead was out. And ſo held in *Sibert* v. *The executor of general Ruſſel*, *Mich.* 9 *Geo.* 2. *Wallop* v. *Irwin*, 1 *Wilſ.* 315.

Note: The *teſte and return* of ſuch writs of *ſcire facias* are according to the action, whether that is by *bill* or *original*; and proceedings therein are the ſame as in other caſes of *ſcire facias.*

Of

Of the *Scire facias* by and againſt the Repreſentative of a Party to the Suit, dying after Judgment, and before Execution.

ONE that is no party to the record, recognizance, fine or judgment, as the heir, executor or adminiſtrator, though they be privy, and it be within the year, ſhall have no writ of execution, but a *ſcire facias* to enable themſelves to the ſuit; and ſo of the tenant or defendant, for the alteration of the perſon altereth the proceſs: otherwiſe in the caſe of a ſtatute ſtaple or merchant, becauſe the proceſs is given by other acts of parliament. 2 *Inſt.* 471. *Cart.* 112, 193. *Godb.* 83.

But if there be two plaintiffs in a perſonal action, and one of them dies, pending the ſuit, that ſhall not put the other to a *ſcire facias*; ſo if one of the defendants die, becauſe the ſame party ſtill remains on record. 7 *Mod.* 68. but the way is now, to ſuggeſt the death of the party upon the roll, on record, at whatever ſtage of the ſuit he died, according to 8 & 9 *W.* 3. *c.* 11. *ſ.* 7.

So if there is judgment againſt *A.* on which a *fi. fa.* is ſued out; but before execution thereof *A.* dies inteſtate; there needs no *ſcire facias* to renew this judgment, but execution of the goods under that writ of *fi. fa.* may be made in the hands of the adminiſtrator. *Farrer* v. *Brooks.* For, as the party himſelf could not have made any defence to the writ of execution, there is no reaſon that his repreſentative ſhould be in a better condition.

But if there be judgment in debt againſt two, and one dies, a *ſcire facias* lies againſt the other alone, reciting the death; and he cannot plead, that the heir of him deceaſed has aſſets by deſcent, and demand judgment if he ought to be charged alone; for at common law, the charge upon a judgment, being perſonal, ſurvived; and the *ſtat. Weſt.* 2. which gives an *elegit*, does not take away the common law remedy; and therefore the plaintiff may take out his execution which way he pleaſes; but if he ſhould, after allowance of this writ and revival of judgment, take out an *elegit* to charge the land, the party may have remedy by ſuggeſtion, or by an *audita querela.* Vide Bac. Abr. 4 *vol.* 419.

If an executor brings a *ſcire facias* on a judgment, or a recognizance, and gets a judgment *quod habeat executionem*, and dies inteſtate, the adminiſtrator *de bonis non* muſt bring a *ſcire facias* upon the original judgment, and cannot pro-

Of the *Scire facias* by and againſt the Repreſentative of a Party to the ſuit, dying after Judgment, and before Execution.

ceed upon the judgment in the *ſcire facias*. Vide *Ld.* Raym. 1049.

A *ſcire facias* by executors upon a judgment obtained by the teſtator—demurrer *inde*, and it was inſiſted, that the practice of this court in ſuch caſes is, that the plaintiffs in the *ſcire facias* ſhould inſert the profert of letters teſtamentary, [this clauſe being omitted] and that the writ is not good. To which it was anſwered, that it was inſerted at the end, and that is the practice of *B. R.*—*Per cur.* Both forms are good here; but in *C. B.* this clauſe is always inſerted in the end. Judgment *pro quer.* Carth. 69.

A *ſcire facias* againſt an adminiſtrator, teſted 24*th October*, and returnable the 31*ſt October*, *alias ſcire facias* teſted 31*ſt October*, returnable 7*th November*; and it was objected, that theſe writs were irregular, becauſe there were not fifteen days between the 24th of *October* and the 7*th* of *November*, but adjudged well, there being eight days excluſive between the *teſte* and *return* of each writ. *Carth.* 468.

Note: In *B. R.* in all caſes there muſt be either two *nihils* returned to the *ſcire facias's*, or a *ſcire feci*; but in *C. B.* in caſe of the death of the *plaintiff* one *nihil* is ſufficient. *Att. Pract. C. B.* 337.

But in caſe of the death of the *defendant* there muſt be a *ſcire feci*, or two *nihils* returned. *Ibid.*

If a *feme*, executrix to *J. S.* marries, and then ſuch huſband and wife bring debt againſt *A. B.* on an obligation in the right of the wife as executrix, and have judgment to recover the debt, damages and coſts, and then the wife dies before execution ſued, the huſband cannot have a *ſcire facias* upon the judgment; for that he, though he was privy to the judgment, ſhall not have the thing recovered; but it belongs to the ſucceeding executor or adminiſtrator. *Cro. Car.* 207, 227. *Beaumont* v. *Long*, adjudged, although it was objected, that the judgment was for the *coſts and damages* which belonged to the huſband, though the debt did not; and therefore the *ſcire facias* ſhould be for the damages: but a *ſcire facias* being as well for the debt as damages, it was held not maintainable; and whether he might maintain a *ſci. fa.* for the damages and coſts, they would give no opinion. *Jones* 248. *S. C.* adjudged, and ſaid this recovery does not turn it to the proper debt of the huſband; as

it

Of the *Scire facias* by and againſt the Repreſentative of a Party to the Suit, dying after Judgment, and before Execution.

it would if the baron and feme recovered the proper debt of the feme.

But if huſband and wife obtain judgment, and the wife dies, the huſband, without taking out adminiſtration to her, may have a *ſcire facias*; for by the judgment it is become a debt to him. *Sid.* 337. *Cro. El.* 844. 3 *Mod.* 188. 2 *Leon.* 14. 4 *Leon.* 186.

So if a woman obtains judgment in debt, and after marries, and the huſband and wife ſue out a *ſcire facias*, and thereupon have an award of execution, though the wife dies, yet the huſband [without taking out adminiſtration] may have execution upon the judgment, for the award upon the *ſci. fa.* attached in the huſband and ſhall ſurvive, though objected, the award on the *ſci. fa.* made no alteration, as the execution muſt be on the firſt judgment. *Woodyer* v. *Greſham*, *Salk.* 116. *pl.* 7. and *Comb.* 455. *S. C.* by which it appears, that the year expired before the *ſci. fa.* taken out; and ſaid by *Holt*, ch. juſt. That the debt was attached to him, jointly with his wife; ſo that although the award of the execution did not alter the nature of the debt, yet it altered the property. *Carth.* 415. *Skin.* 682. *pl.* 2.

If a judgment in debt is obtained againſt a *feme ſole*, who afterwards marries, and then a *ſcire facias* is thereupon brought againſt huſband and wife; and after two *nihils* returned, judgment is given, that the plaintiff ſhall have judgment againſt them, and then the wife dies, the huſband ſhall be liable to this execution. *Carth.* 30. *Salk.* 116. *pl.* 7.

So *note*; In the above caſe of *Obrian* and *Ram*, reported alſo in 1 *Mod.* 170. If judgment be againſt a *feme ſole*, and ſhe marries; and then plaintiff ſues out a *ſcire facias* againſt huſband and wife, and has judgment *quod habeat executionem*, againſt both, and afterwards the wife dies, plaintiff may ſue out a *ſcire facias* againſt the huſband, and have judgment thereon againſt him.

And ſo *vice verſa* in *Woodyer* v. *Greſham*, *Salk.* 116. If *feme ſole* recovers judgment, and then takes huſband, and they both ſue out a *ſcire facias*, and have judgment *quod habeant executionem*, and then ſhe dies, the huſband alone may have a *ſcire facias* afterwards, and have execution.

A *ſcire facias* was brought againſt defendant as adminiſtratrix of her huſband, on a judgment againſt him for 1,500 *l.* and after two *nihils* returned, a *ſcire fieri inquiry*

Of the *Scire facias* by and againſt the Repreſentative of a Party to the Suit, dying after Judgment, and before Execution.

was taken out, and the defendant attended the execution of it, in order to lay the ſtate of the aſſets before the jury; but the plaintiff inſiſting, that the award of execution on the former writs was in point of law an evidence of aſſets, a *devaſtavit* was found to 1,117 *l.* &c. In *Hil.* 8 *Geo.* 2. ſhe appeared to the *ſcire fieri inquiry*, pleaded *plene adminiſtravit*, and traverſed the *devaſtavit*; and notice of trial being given and countermanded, and nothing further done on it, ſhe, in *Mich.* 10 *Geo.* 2. moved to have the award of execution ſet aſide, and to be admitted to plead; it being to no purpoſe to expect relief upon the trial of the traverſe; and cited *Salk.* 93. 264. to ſhew, that where there has been no *ſcire feci*, and only two *nihils*, the court will relieve upon motion, and not put the party to an *audita querela*: and the ſtate of the real aſſets was proved to be 130 *l.* which ſhe offered to deliver up, and be examined upon interrogatories, if the plaintiff was diſſatisfied with the account. The court was greatly inclined to relieve her; but upon conſideration of her long acquieſcence, and the ſeveral ſteps taken ſubſequent to the award of execution, they thought ſhe came too late, and for that reaſon only refuſed to interpoſe. *Wharton* v. *Richardſon wid. Stra.* 1075.

Note: Formerly the method was upon obtaining judgment by default againſt an *executor* or *adminiſtrator* (which would reach only the goods of the teſtator or inteſtate) and *nulla bona* returned to a *fi. fa.* ſued out on ſuch judgment, to iſſue out a writ to inquire, whether the defendant had waſted any of the effects of the deceaſed; and if a *devaſtavit* was found by the inquiſition and returned thereto, then for the plaintiff to proceed by *ſcire facias* for the defendant to ſhew cauſe why the plaintiff ſhould not have judgment *de bonis propriis*, to which *ſcire facias* the executor or adminiſtrator could appear and plead *plene adminiſtravit* [as in the caſe above].—But now the *fieri facias inquiry*, and the *ſcire facias* are incorporated and made out in one writ for expedition. However this method, though much better than the old one, is ſeldom purſued at this day, as it does not anſwer to the plaintiff if the debt is but a ſmall one, becauſe no coſts are allowed againſt the executor or adminiſtrator, unleſs they appear and plead to the *ſcire facias*, and it be found againſt them. But the way is to bring an action of debt on the judgment, ſuggeſting a *devaſtavit*.

Of Attornies.

Of Proceedings by and againſt Attornies.

ATTORNIES have privilege not to be ſued in any other courts except thoſe in which they are ſworn and admitted, becauſe of the prejudice that may accrue to the buſineſs of thoſe courts in which their attendance is required; neither are they to be held to *ſpecial bail*, becauſe they are obliged to attend, and therefore are preſumed to be always amenable; alſo, as officers of the court, they are entitled to the proceſs of *attachment*, and may ſue by *attachment of privilege*.

But this *privilege* an attorney ſhall not have at the *King*'s ſuit. 2 *Rol. Abr.* 274. *Bro. Superſedeas* 1. 9 *Hen.* 6. 44.

Nor unleſs there be the ſame remedy in his own court; therefore he ſhall not have his *privilege* when money is attached in his hands by foreign attachment in the ſheriff's courts in *London*. Saund. 67. *Vide* Comb. 427.

Nor in an *action real* againſt an attorney of the *King's Bench*. Saund. 67.

Nor in *appeal* againſt an attorney of the *Common Pleas*. Saund. 67.

Nor when he ſues, or is ſued in *auter droit*, as executor or adminiſtrator. 12 *Mod.* 316. Ld. *Raym.* 533. *Hob.* 117. *Salk.* 2. *pl.* 4.

Nor where an attorney of one court ſues another of another court, the defendant ſhall not plead his *privilege*; for the attendance of the plaintiff is as neceſſary in his court, as the defendant's is in his; and therefore the cauſe is legally attached in the court where the plaintiff is an officer. *Rol. Abr.* 275. *Moor* 556. 2 *Mod.* 298. 2 *Lev.* 129.

But *quære*, as to this, for it ſeems, the defendant attorney muſt be ſued *by bill*, although the plaintiff is an attorney; and therefore he muſt be ſued in his own court. *Stra.* 1141. *Barnes* 43, 44.

Nor when he joins, or is joined, in the ſame action with others. *Vent.* 298. *Dyer* 277. *Godb.* 10.

One attorney ſued another attorney of the ſame court by attachment of privilege, and on motion the proceedings were ſtayed. *Barnes* 44.

An action on a penal ſtatute, *viz.* 13 *El.* for entering a fraudulent judgment againſt an attorney of *C. B.* was commenced by *original*; on which he moved to ſtay proceedings, inſiſting he ought to be ſued *by bill*. On ſhewing cauſe, it was urged, that this was a proſecution for the crown.

And

Of Proceedings by and againſt Attornies.

And that defendant, if entitled to privilege, may plead it. *Sed per cur.* Theſe *qui tam* actions are never conſidered as the king's cauſes. In proſecutions at the ſuit of the crown, defendants, though acquitted, can have no coſts; but in actions *qui tam* it is otherwiſe. The proceeding by original is irregular. Rule abſolute to ſtay proceedings. *Britton* qui tam *v. Teaſdale, Barnes* 48.

An attorney has *privilege* to keep the *venue* in *Middleſex* when he is *plaintiff*, but not to change it thither when he is *defendant*. Burr. 4 pt. 2027, 2032. But *contra* in 2 *Vent.* 47. and *vide* 1 *Salk.* 668. If an attorney, being *plaintiff*, lay his action in *Middleſex*, the *venue* ſhall not be changed; otherwiſe if in *London*.

An attorney has no *privilege* againſt the court of conſcience in *London*. Burr. 4 pt. 1583.

An attorney, being *executor* or *adminiſtrator*, ſhall not ſue or be ſued as a *privileged perſon*. 1 Ld. *Raym.* 533.

An attorney may have his *privilege* in ſuing a *member* of the univerſity. Ld. *Ray.* 342.

If an attorney abſent himſelf for a year together, and does not give his attendance, he loſes his *privilege*. Att. Pract. 51. *Sed vide*, ibid. And *Lutw.* 1667. where it is ſaid, that he ſhall have his *privilege*, ſo long as he continues an attorney *on record*, though he do not practice.

But by *Burr.* 4 *pt.* 2113, 2116. *Privilege* continues no longer than he remains an *acting attorney*.

Anciently rolls were kept of attornies in *B. R.* but ſince the *ſtamp acts* the rolls have been diſuſed, and a book ſtamped hath been kept, and the attornies names entered therein. *Stra.* 77. But in *C. B.* there is a regular record kept of the attornies. *ibid.*

The *privilege* of an attorney is the *privilege* of the court he belongs to, and not his own *perſonal privilege*; and he may wave it. *Burr.* 4 *pt.* 2113. that is, when he is *plaintiff*.

But an attorney cannot waive his *privilege* of being ſued by *bill*. And one having cauſe of action againſt him, however ſmall, may ſue him in the *ſuperior court*, inſtead of ſuing him in an *inferior*. Gardner *v.* Jeſſop, one, *&c.* in *C. B.* 2 *Wilſ.* 42.

An attorney muſt be ſued *by bill*, though the plaintiff be alſo an attorney; and he cannot take out an attachment and hold the defendant *to bail*, as he does in the caſe of common perſons; therefore this caſe is an exception out of the rule, that *privilege* takes away *privilege*. Stra. 1141.

Of Proceedings by and againſt Attornies.

Attornies muſt ſue each other by *bill*, as well of different different courts as of the ſame. *Barnes* 43, 44.

But an attorney of *C. B.* may, for a debt *bona fide* paid, ſue an attorney of *B. R.* *by attachment*, and he ſhall not be entitled to *privilege*. Barnes 44.

One attorney of *C. B.* ſued another attorney of *C. B.* by *capias*; and the defendant moved to ſtay the proceedings, inſiſting he ought to be ſued by *bill*. It appeared that the defendant had obtained a judge's order for time to put in *bail*; but this was held not to be a ſufficient waiver of his objection to the plaintiff's method of proceeding againſt him; and the rule was made abſolute to ſtay proceedings with *coſts*. Barnes 53.

An attorney having been arreſted, was *bailed*; and another action being brought againſt him in the ſame court, he pleaded his *privilege*; and it was adjudged, that putting in bail to the firſt action did not diſcharge his privilege. *Carth.* 377.

An attorney of *C. B.* was arreſted at the ſuit of an attorney of *B. R.* and gave *bail*; and then *B.* delivered a *declaration by the by* againſt him, as in cuſtody of the *marſhal*, to which he pleaded his *privilege*; and reſolved, that though he be in cuſtody of the *marſhal*, at the ſuit of *A.* yet when *A.* declares againſt him, he may plead his *privilege*, becauſe he comes here by coercion, and had no opportunity before to take advantage of it. 2. That although he files *bail* at the ſuit of *A.* and in the ſame term a declaration is delivered againſt him at the ſuit of *B.* yet the defendant may plead his privilege againſt *B.* as well as againſt *A.* for it were abſurd, that *B.* who tops his ſuit upon the action of *A.* ſhould have more liberty or advantage againſt the defendant than *A.* himſelf had. But if the defendant waives his privilege in the firſt action, he is then obnoxious to the ſuits of every body, notwithſtanding his privilege. 3. That if after the defendant has waived his privilege, he ſhall yet plead it, the plaintiff in his replication muſt ſhew the defendant's waiver, and reply upon the eſtoppel. Ld. *Raym.* 135. Vide *Wilſ. Rep. B. R.* 306.

Declaration *by bill of Middleſex* againſt an *attorney* of *B. R.* as acceptor of a bill of *Exchange* drawn upon him, according to the cuſtom of *merchants*; to which defendant pleaded in abatement, that he was, and ſtill is, an attorney of *B. R.* and ought to have been ſued there by *bill of privilege* as an attorney, and not by *bill of Middleſex*. Demurrer

inde

Of Proceedings by and againſt Attornies.

inde and joinder. *Per cur.* He muſt have his privilege. Judgment for defendant. *Cornforth* v. *Price. Hilary*, 20 *Geo.* 3. *B. R.*

An attorney has *privilege* in a *qui tam* action commenced againſt him. *Barnes* 48. *Att. Prac.* 54. *Skin.* 549.

If an attorney ſue by *original*, he has no privilege, and cannot ſue in *propria perſona*. Att. Pract. 311. 2 Lev. 39. 2 Stra. 837. Barnes 479.

It is ſaid, that a *bill* cannot be filed againſt an attorney in *vacation*. Att. Pract. 309. 2 Barnes 34, 36. Har. Pract. 360. But it has been done in many caſes, to ſave the ſtatute of limitations.

A motion was made, that an *attorney*, who was going to *Ireland*, might put in *ſpecial bail*, and denied. 1 *Mod.* 10.

If an attorney is arreſted, it is a motion of courſe, to diſcharge on *common bail*; 1 Wilſ. 292. that is, an attorney of the ſame court. But if an attorney of *C. B.* is arreſted by proceſs of *B. R.* he muſt *plead his privilege*, and cannot be diſcharged on *common bail*. Stra. 864. 1 Wilſ. 306.

If an attorney of *C. B.* be *actually* in the *cuſtody of the marſhal*, he ſhall only be ſued in *B. R.* 1 *Stra.* 191. and cannot plead his *privilege*; 2 Roll. Abr. 232. for there is a great difference between an *actual* and a *ſuppoſed* cuſtody. 1 *Salk.* 1.

In an action againſt *baron and feme*, if the huſband be an attorney, he cannot appear in perſon, and put in bail for his wife, but he ought to put in *bail* for himſelf and his wife; for he ſhall not have privilege in an action againſt him and his wife. 1 *Roll.* 380. *c.* 45.

By 12 *Geo.* 2. *c.* 13. *ſ.* 9. it is enacted, "That no attorney or ſolicitor, who ſhall be a priſoner in any gaol or priſon, or within the limits, rules, or liberties of any gaol or priſon, ſhall, during his confinement in any gaol or priſon, or within the limits, rules, or liberties of any gaol or priſon, in his own name, or in the name of any other attorney or ſolicitor, ſue out any writ or proceſs, or commence or proſecute any action or ſuit, in any courts of law or equity, under pain of being ſtruck off the roll and incapacitated, *&c.*"

This ſtatute only diſqualifying attornies who are priſoners, relates only to proſecuting, and not to defending ſuits. *Barnes* 263.

An

Of Proceedings by and againſt Attornies.

An attorney, priſoner, commencing an action on a bail-bond, aſſigned after his impriſonment, in an action begun before, is not within this ſtatute, it being a continuance of the former ſuit.

Attornies, in caſe of miſbehaviour or *mal* practice, are ſubject to the animadverſion and cenſure of the court in which they are admitted by a ſummary application, by way of motion thereto; and will be ſtruck off the rolls, impriſoned, or otherwiſe puniſhed, at the diſcretion of the court; and the proceſs ſued out, on ſuch occaſions, to bring them into court, is an *attachment*; and being iſſued at the ſuit of the king, for contempt of the court, muſt be made out by the clerks in the *Crown-office*.

An attorney cannot be *leſſee* in *ejectment*. *Mich.* 1654. Nor bail in any action depending in the court of which he is an attorney. *Ibid.* But an attorney houſe-keeper is often bail, though contrary to the above rule. 8 *Mod.* 338.

Attorney cannot be commiſſioner to take bail. *Stat.* 4 *W. & M. c.* 4.

Attorney or not, muſt be tried by the record. And yet, when an attorney pleads his privilege, he has no occaſion to ſay, *prout patet per recordum*, or to produce his writ of privilege. And *per Holt* ch. juſt. There are two ways of pleading his privilege ſo as it cannot be denied, *viz.*—with a *profert* of a writ of privilege, or an exemplification of the record of his admiſſion of attorney. But he may plead his privilege only. Vide Ld. *Raym.* 1173.

Of Proceeding by an Attorney *Plaintiff*.

AN attorney *plaintiff* may ſue out by *attachment of privilege*, which is in the nature of an *original* writ, and is to the following effect:

> *GEORGE* the third, *&c.* To the ſheriff of *Middleſex*, greeting. We command you, that you attach *C. D.* and *E. F.* [any number of defendants may be put in this writ] if they may be found in your bailiwick, and them ſafely keep, ſo that you may have their bodies *before us* at *Weſtminſter*, on next after [a day certain in term, and not a general return day] to anſwer *A. B.* gentleman, being one of the attornies of our court, *before us*, according to the liberties and privileges of ſuch attornies and other miniſters of the ſame court, from time whereof the memory of man is not to the contrary uſed and approved in the ſame court of a plea of treſpaſs, [or whatever the action is] and have there this writ.
>
> Witneſs, *&c.*

If the attachment requires only a *common appearance*, a copy muſt be ſerved, with notice as in other caſes.

By the 4th ſect. of 13 *Car.* 2. *ſtat.* 2. *c.* 2. [the ſtatute which occaſioned the inſertion of the *ac etiam* clauſe in proceſs to arreſt and hold to *ſpecial bail*] it is provided, "That the ſaid act, nor any clauſe or thing herein before "ſpecified or contained, ſhall not extend, nor be conſtrued "or taken to extend, unto any arreſts hereafter to be "made, upon or by virtue of any writ of *capias utlagatum*, "attachment upon reſcues, or attachment upon any con"tempt, *or of any attachment of privilege, at the ſuit of any "privileged perſon*, or of any other attachment for con"tempt whatſoever iſſuing or to be iſſuing out of either of

Of Proceeding by an Attorney *Plaintiff*.

THE the ſame in this court.

The ſame in this court.

An attachment of privilege in *C. B.* is in the nature of an original writ; and when it is replied to ſave the ſtatute of limitations, it is ſufficient to ſhew the *teſte* without continuances, till the declaration. *Finch* v. *Wilſon*, one, &c. of *C. B.* in error. 1 *Wilſ.* 167.

And the court will amend an *attachment of privilege*, tho' it is in the nature of an original writ, if there are not *fifteen days* between the teſte and return; and ſo they will a *ca. ſa.* But the court cannot amend an *original writ*, becauſe it iſſues out of *Chancery*.

Note, By the oppoſite ſection of the ſtatute 13 *Car.* 2. it ſhould ſeem, that there is no occaſion for an "*ac etiam*" clauſe in a writ of *attachment of privilege*, to hold defendant to bail, at the ſuit of an attorney, though ſuch clauſe is uſually inſerted in the attachment, if the party is to be held to *ſpecial bail*. Vide 2 *Wilſ.* 392.

If the party is to be held to *bail*, the ſum ſworn to muſt be marked on the back of the *attachment*, and alſo the day it is ſued out.

Of Proceeding by an Attorney *Plaintiff.*

" the ſaid courts, although there be no particular certainty " of the cauſe of action expreſſed or contained the ſaid writs; " but that nevertheleſs, no ſheriff or under-ſheriff, nor any " of the officers or miniſters aforeſaid, ſhall diſcharge any " perſon or perſons, taken upon any writ of *capias utlagatum*, out of cuſtody, without a lawful *ſuperſedeas* firſt had " and received for the ſame; and that, upon the ſaid writs " of *attachment*, ſuch lawful courſe be taken for ſecurity " for appearance therein as hath been heretofore uſed; " any thing herein before expreſſed to the contrary thereof " in any wiſe notwithſtanding."

The ſame in this court. *New Pract.* 310.

An attachment of *privilege*, is but as a *latitat*, and not as an original. 1 *Show.* 367.

By *Reg. H.* 20 *Geo.* 2. Every attorney of this court, who ſhall ſue out any attachment of *privilege* againſt any defendant, ſhall leave a *præcipe* with the *ſigner of the writs*, with the defendants names, *not exceeding four in each writ*, with the return and day of ſigning ſuch writ, with the agent's or attorney's name who ſued out the ſame. And all ſuch *præcipes* ſhall be entered on the roll, where the *præcipes* of *latitat*, and all other writs iſſuing out of this court, are entered; and the officer who ſigns the writs in this court ſhall not ſign ſuch attachment till a *præcipe* be left with him for that purpoſe.

In *B. R.* you pay nothing for ſigning the writ; but for ſealing it, 7 *d.* to the ſealer. *Rich. Att. Pract. B. R.* 410.

The form of the *præcipe* to be left with the *ſigner of the writs*, is as follows:

Surry. Attachment of privilege for *A. B.* gentleman, one of the attornies, *&c.* againſt *C. D. Debt.*

Returned *Wedneſday* next after the *morrow of All Souls.*

O. P. agent.
21 *Nov.* 1779.

Affidavit for 50 *l.*

If

Of Proceeding by an Attorney *Plaintiff*.

An attachment of *privilege*, is not like an *original writ*; and therefore, the plaintiff may put ſeveral defendants into one attachment, and declare againſt them ſeverally. *King's Rep.* 38—9. *Att. Pract.*

An attachment of *privilege* muſt have fifteen days between the *teſte and return*. Att. Prac. 67.

By *Reg. H.* 11 *G.* 2. You muſt make out a *præcipe*, containing the plaintiffs and defendants names, *not exceeding four in the whole*, with the return of the writ, day of ſigning, and the agent's or attorney's name, who ſues out the ſame: this *præcipe* you muſt leave with the *prothonotary*, who, without *fee* or reward, is to enter the ſame on a remembrance roll, to be kept in his office for that purpoſe; and he is not to ſign any attachment of privilege, unleſs ſuch *præcipe* be left in his office at the time of ſigning thereof.

In *C. B.* you pay nothing to the *prothonotary* for ſigning the writ, and only one penny for the ſeal. *Rich. Att. Pract. C. B.* 258.

Like *præcipe* in this court, to be left with the *prothonotary*.

Of Proceeding by an Attorney *Plaintiff*.

If the attachment requires only a common appearance, a copy thereof is ſerved with an *Engliſh* notice in writing, ſubſcribed as in other caſes; and the appearance muſt be entered with the clerk of the *common bails*.

If it requires *ſpecial bail*, a judge's clerk takes the recognizance, as in other caſes.

Of Proceeding by an Attorney *Plaintiff*.

If the attachment requires only *common bail*, after a copy thereof is ſerved, with an *Engliſh* notice in writing, ſubſcribed as in other caſes, the appearance muſt be entered with the *prothonotary*, who ſigned the writ; but if it requires *ſpecial bail*, his clerk of the dockets prepares the bail-piece or recognizance, and attends a judge, or the court where the ſame is entered into, and the bail juſtify, or freſh bail is added, in the ſame manner as the *filazer* does on meſne proceſs by original.

Of Proceeding by an Attorney *Plaintiff.*

The beginning of a *declaration*, at the ſuit of an attorney in *B. R.* is thus:

Middleſex, to wit. *A. B.* gent. one of the attornies of the court of our lord the king, before the king himſelf, complains againſt *C. D.* being in the cuſtody of the *marſhal* of the *Marſhalſea*, &c. [as in other declarations

add pledges.

In *C. B.* it is in this form:

Middleſex. C. D. late of, *&c.* was *attached* by a writ of our lord the king, of privilege iſſuing out of our court here, to anſwer *A. B.* gent. one of the attornies of the court of our lord the king of the *Bench* here, according to the liberties and privileges of the ſame court; for ſuch attornies and other miniſters of the ſame *Bench*, time out of mind, uſed and approved of in the ſame in a *plea of treſpaſs on the caſe*, &c. and thereupon the ſaid *A.* in his proper perſons, complains, *&c.*

add pledges.

The ſubſequent proceedings, at the ſuit of an attorney, are the ſame as in other caſes.

If an attorney delivers his declaration *four days* excluſive, before the end of the term, the defendant muſt plead as of that term.

If an attorney delivers his declaration four days excluſive, before the end of the term in which the *attachment* was returnable, and enters a rule to plead, and demands a plea, the defendant ſhall be obliged to plead as of that term; and if he does not deliver his declaration in that time, the defendant is entitled to an *imparlance:*

And if he does not deliver his declaration before the *eſſoin day* of the ſubſequent term, the defendant muſt have an imparlance to the term next following.

Of Proceeding againſt an Attorney *Defendant*.

AN attorney of the *King's Bench* muſt be ſued by *bill*, and cannot be arreſted; and the method of ſuing him is this, The plaintiff files a *bill* againſt him, [which is a direct copy of a *declaration* engroſſed on a ſlip of parchment ſtamped with a treble penny ſtamp] with the *clerk of the declarations* in the *King's Bench* office, and then makes a copy thereof on treble penny ſtampt paper, for the declaration, which muſt be delivered to him with notice thereon to plead; and then the plaintiff proceeds as in other caſes.

A *bill* againſt an attorney is in the following form:

Middleſex to wit. *A. B.* complains againſt *C. D.* gent. one of the attornies *of the court of our lord the king, before the king himſelf*, preſent here in court in his own proper perſon; for that *Whereas*, &c. [as in other caſes] and therefore he prays relief, &c.

O. P. for the plaintiff.
The defendant in perſon.

Pledges of proſecuting. { *John Doe*, and *Richard Roe*.

Upon delivery of this *declaration*, and a rule given to plead thereto, [either a *four* or *eight* day rule] and the ſame being expired, the plaintiff may ſign judgment; ſo that in the *King's Bench* the remedy againſt attornies is ſpeedier than in the *Common Pleas*, which *vide* the next page; and alſo ſpeedi- than againſt other indifferent perſons, as the *bill* and *declaration* are one and the ſame thing, and the firſt commencement of the *ſuit*.

In *B. R.* if the action be laid in *London* or *Middleſex*; and the defendant attorney lives within twenty miles of *London*, upon a rule given to plead, he has *four days* time to plead; and if he reſides above twenty miles from *London*, or the action be laid in any other county than *Middleſex* or *London*, he has *eight days* time to plead.

Of Proceeding againſt an Attorney *Defendant*.

AN attorney of the *Common Pleas* alſo muſt be ſued by *bill*, and cannot be arreſted; but the *bill* and *declaration* againſt an attorney are different in this court; for by *Reg. Trin.* 21 *Car.* 2. "*No bill* ſhall be filed againſt an officer, *attorney*, clerk or miniſter of the court, in order to a *forejudger*, *until the bill* be actually entered on record, and a number-roll actually put to *the bill*."

The above rule however is in a great meaſure diſuſed, and the method of proceeding at this day againſt an *attorney defendant* is as follows:

The *plaintiff* engroſſes *his bill* on a ſlip of parchment ſtamped with a double penny ſtamp, and carries it to the *prothonotary*, who marks it as entered, on being paid for the entry, and it is thereby ſuppoſed to be entered, though no number-roll is put on *the bill*; which being done, the *bill* muſt be carried to *Weſtminſter-hall*, and given to one of the criers of the court, who calls the defendant in court, for which he is paid 1 *s.* and by 2 vol. *Rules and Orders*, he muſt be called *three* times in court. After which the *plaintiff* gives a rule on the *bill*, with the *ſecondary*, for the *defendant* to appear, for which is paid 1 *s.* 4 *d. viz.* 1 *s.* duty, and 4 *d.* the rule; and then *the bill* is filed in the *prothonotary's office*, for which is paid 4 *d.* upon filing which *bill*, notice thereof muſt be given to the *defendant*, in writing, by *Reg. Hil.* 11 *Geo.* 2. whereby it is ordered, that

"Where a bill ſhall be filed againſt an attorney of the court, no *forejudger* ſhall be entered for want of appearance, if the action be laid in *London or Middleſex*, *and the attorney reſides within twenty miles of London*, until *four days* after notice in writing of filing ſuch bill be given to ſuch attorney, or his agent, or left at his uſual place of abode, and a rule given for ſuch appearance as uſual; and if ſuch attorney *reſides above twenty miles from London*, *or the action be in any other county than London or Middleſex*, no *forejudger* ſhall be entered till *eight days* after ſuch notice ſhall be given. in manner as aforeſaid; and a rule to appear the ſaid days, to be excluſive of the days of giving ſuch notice."

The

Of Proceeding againſt an Attorney *Defendant*.

The notice of a bill being filed.

Common Pleas.
A. B.
againſt
C. D. gentleman, one of the attornies, *&c.*

Take notice, that a bill was this day filed in the prothonotary's office of his majeſty's court of *Common Pleas* at *Weſtminſter*, againſt you the defendant *C. D.* at the ſuit of the plaintiff *A. B.* in an action of *treſpaſs upon the caſe upon ſeveral promiſes* [or whatever it is] and unleſs you appear to the ſaid bill on *Wedneſday* the twenty-ſixth day of *January* inſtant, you will be forejudged the court.

23*d January* 1780. *O. P.* attorney for the plaintiff.

To *C. D.* the defendant.

The above is the notice given by the *ſecondary*'s rule of the *bill* being filed, the notice to plead is as follows:

Common Pleas.
A. B. againſt *C. D.*

Take notice, that there is left in the prothonotary's office, in the *Inner Temple*, *London*, a *declaration* againſt you the defendant, at the ſuit of the plaintiff *A. B.* in an action upon the *caſe upon ſeveral promiſes* [whatever the caſe is] which the plaintiff lays to his damage of 100 *l.* and unleſs you plead to the ſaid declaration within *four days* next after the firſt day of next *Hilary* term, judgment will be entered againſt you by default.

O. P. attorney for the plaintiff.

To *C. D.* defendant.

Before the above rule for giving the defendant notice, the plaintiff did nothing more than have him called by the *cryer* in court, which was then thought ſufficient, as all attornies were ſuppoſed to be perſonally preſent during the ſitting of the court; but many of the attornies having been

Of Proceeding againſt an Attorney *Defendant*.

ſtruck off the roll on *forejudgers*, for want of other notice; and many living at a diſtance, ſo that it was impoſſible to give orders for an appearance in time before the expiration of the rules to appear, the above rule became neceſſary.

If the defendant appears in time, you deliver a *declaration*, and proceed as in other caſes; but if he does not appear, he muſt be *forejudged*, that is, ſtruck off the roll, to effect which the plaintiff enters his *bill*, and a *forejudger*, on the roll, in the following form, beginning with a *memorandum*, as in ſuits by bill in *B. R.*

Middleſex, to wit. Be it remembered, that on the day of in this ſame term, *A. B.* came here into court by *O. P.* his attorney, and exhibited to the juſtices of our lord the now king of the bench here, his bill againſt *C. D.* gentleman, one of the attornies of the court of our ſaid lord the now king, of the bench here preſent, here in court in his proper perſon, in a plea of *treſpaſs on the caſe*; the tenor of which ſaid bill followeth in theſe words, (to wit) To the juſtices of our lord the king, of the bench. *Middleſex*, to wit. *A. B.* by *O. P.* his attorney, complaineth of *C. D.* gentleman, *&c.* [the whole bill to] and thereupon he prayeth relief, *&c.*

Pledges for proſecuting, { *John Doe* and *Richard Roe.*

Whereupon the ſaid *C. D.* being ſolemnly called came not, therefore he ſtandeth forejudged from exerciſing his office of attorney of this court for his contumacy, *&c.*

You pay the prothonotary 2 *s.* for ſigning the *forejudger*, and the *clerk of the warrants* 1 *s.* 4 *d.* for ſtriking the defendant off the roll, and then you may proceed againſt him as againſt a common perſon.

When once an attorney is *forejudged*, the ſuit *by bill* is at an end, and the plaintiff, if he proceeds, muſt proceed as againſt an indifferent perſon, by *original* and *capias*, in the common way. *Barnes* 43. and ſo muſt every other perſon who ſues him.

When

Of Proceeding againſt an Attorney *Defendant*.

When an attorney *defendant* has appeared to a *bill* filed againſt him in court, the ſubſequent proceedings throughout the cauſe are the ſame, as in cauſes againſt indifferent perſons, only the writs, ſuch as the *venire*, *habeas corpora*, *diſtringas*, &c. are made returnable *on a day certain in term*, and not on a *general return day*.

But it ſeems, that proceſs of *execution* againſt an attorney has no occaſion to be made out returnable on *a day certain*, for execution begins when the cauſe is ended.

The plaintiff, *an attorney*, having ſued by his *attachment of privilege*, was non-ſuited, and afterwards taken upon a *ca. ſa.* for the coſts, upon the judgment of non-ſuit returnable on a *general return day*, and the court held it well enough. For though all proceſs, both for and againſt an attorney, is made returnable on a day certain, becauſe of his daily attendance in court; yet when an attorney is out of court, as in the caſe above, and in cuſtody in execution, he has no day in court, ſo cannot attend; and therefore in ſuch caſe he loſes his privilege to have his proceſs againſt him returnable on a day certain.

Of getting an Attorney arreſted, diſcharged.

IF an attorney is ſued otherwiſe than *by bill*, and arreſted, and in cuſtody, by virtue of proceſs, in order to get his diſcharge, he muſt ſue out his *writ of privilege* from the court wherein he is an *attorney*; and to obtain which he muſt get a *certificate from the maſter's clerk in B. R.* or *clerk of the warrants in C. B.* that the defendant is an attorney of the court, which certificate is an authority for the *ſigner of the writs* in *B. R. or prothonotary in C. B.* for ſigning the ſame, for which nothing is paid, only 7 *d.* to the *ſealer*, which writ muſt be allowed by the court or ſheriff wherever it is directed, who will thereupon make out a *ſuperſedeas* for the defendant.

A *writ of privilege* is to the following effect:

GEORGE the *third*, &c. *To the judges of our court of our palace at Weſtminſter*, and to every of them greeting: Whereas, according to the cuſtom of our court { *of the bench*, or *before us.* } at *Weſtminſter*, hitherto uſed and approved of in the ſame; the *attornies* of the ſame court, { *of the bench*, or *before us.* } whilſt they are proſecuting or defending ſuits and actions therein for their clients, ought not, nor have they, from time immemorial, been uſed to be compelled to anſwer before any of our juſtices or officers, or any other ſecular judges whatſoever, upon any pleas, plaints or demands, which do not particularly belong to us (pleas of freehold felonies and appeals excepted) ſave only before { *our ſaid juſtices of our ſaid court of the bench*; or thus, *before us by bill exhibited in our ſaid court before us, and not by writ.* } And *whereas* we have lately received information, by the complaint of *A. B.* gentleman, one of the attornies of our ſaid court, { *of the bench*, or *before us* } that ſeveral ill diſpoſed perſons intending to diſquiet the ſaid *A.* have iſſued forth and proſecuted out of *our court of our palace of Weſtminſter*, one or more writ or writs, returnable before you in the ſame court, or one or more precept or precepts returnable againſt

Of getting an Attorney arreſted, diſcharged.

ble in our ſaid court, before you or one of you, againſt the ſaid *A.* and threaten to arreſt and detain him in your cuſtody thereupon, in ſuits which do not relate to us, (or in pleas of freehold, felonies, or appeals excepted) whereby the ſaid *A. B.* is unable to attend his ſaid office as an attorney, upon ſeveral affairs and ſuits depending in our ſaid court {*of the bench*, or *before us.*} which, if it is permitted, will manifeſtly take away, and be not only in derogation and diminution of the juriſdiction of our ſaid court {*of the bench*, or *before us*,} and the liberties and privileges thereof; but alſo to the great detriment of the ſaid *A.* and his clients. And becauſe we are willing that the juriſdictions, privileges, and cuſtoms, for ſo long time uſed and approved in our ſaid court {*of the bench*, or *before us*,} ſhould be inviolably kept and obſerved: *We command you*, and every of you, that you deſiſt from taking the ſaid *A. B.* into your cuſtody, upon any writ or writs, precept or precepts: and if the ſaid *A. B.* be detained in your cuſtody by any writ or writs, precept or precepts, other than ſuch as particularly concern us, (pleas of freehold, felony, and appeals, only excepted) that then you diſcharge the ſaid *A. B.* out of your cuſtody, and ſuffer him to go at large, as you will anſwer the contrary at your peril; and, that you inform the party or parties, plaintiff or plaintiffs, in the plaint or plaints, that he, ſhe, or they, may proſecute his, her, or their action or actions, ſuit or ſuits, {*in our court of the bench*, or *before us*} *by bill* to be exhibited {*to our juſtices of the ſaid bench*, or *to us in our ſaid court before us*} at *Weſtminſter*, againſt the ſaid *A. B.* if he, ſhe, or they, ſhall think it expedient ſo to do. *Witneſs*, &c.

Of

Of Officers.

Of Proceeding againſt Officers of the Courts.

ALL the *officers* in the court of *King's Bench*, as well as the attornies, have the privilege of ſuing by *attachment*; and being ſued *by bill* in actions by and againſt them in their own right, and where they are not joined with others, except in pleas *of land*, of which the court of *Common Pleas* alone has juriſdiction.

But the officers of the *Common Pleas*, amongſt whom are the *ſerjeants*, *prothonotaries*, *ſecondaries*, *clerks of the prothonotaries*, *ſerjeants clerks*, *clerks of the judges*, *&c.* have not the privilege of being ſued there *by bill* as attornies have, but the privilege of being ſued there in every ſuit [except *appeals*] by *original writ*, becauſe they are ſuppoſed not to be always preſent in perſon in court, as attornies are. *Baker* v. *Swindon*. Ld. *Raym.* 309. 3 *Salk.* 283. 1 *Barnes* 280. *Holt* 589. *Adj. P.* 6 *W. & M. C. B.* *Winford. Rot.* 685. *Baker* v. *Duncalf*, 3 *Lev.* 398.

But it was agreed in *Serjeant Scroggs'* caſe, that the privilege of *C. B.* which *Serjeants* claimed, extended only to inferior courts, and not to the courts of *Weſtminſter-hall*; and that he may be ſued in either of theſe, becauſe he is not confined to that court alone; but may practice in any other court.—But it is otherwiſe as to *attornies* or *filazers*, who cannot practice in their own name in any other court but ſuch as they reſpectively belong to; and that therefore a *ſerjeant at law* is to be ſued by *original*, and not *by bill* of privilege. 2 *Lev.* 129. 3 *Keb.* 424. 4 *Mod.* 226. So of the ſervant of a ſerjeant at law. *Cro. Car.* 84.

Note: The *judges* have privilege of being ſued in their own court. *Vide* 3 *Leon.* 149.

Of privileged perſons.

Of the Privileges of Peers and Members of Parliament.

PEERS are created, as is ſaid in our *law books*, for two reaſons: 1. *Ad conſulendum.* 2. *Ad defendendum regem*, for which reaſons the law gives them certain great and high privileges. *Vide* 7 *Rep.* 34. 9 *Rep.* 49. 12 *Rep.* 96.

1. At the ſuit of the ſubject their bodies ſhall not be *arreſted*, neither *capias* nor *exigent* lies againſt them.

2. For the honour and reverence which the law gives to nobility, their bodies are not ſubject to torture *in cauſâ criminis læſæ majeſtatis.*

3. They are not to be ſworn in *aſſizes*, *juries*, or *other inqueſts.*

4. If any ſervant of the king, named in the *cheque-roll*, compaſs or intend to kill any lord of parliament, or other lord of the king's council, this is *felony.*

5. In the *Common Pleas*, a lord of parliament ſhall have *knights* returned on his jury. [This privilege is taken away by *ſtat.* 24 *Geo.* 2. *c.* 18. *ſ.* 4.]

6. He ſhall have day of grace.

7. A lord of parliament ſhall not be tried in caſe of *treaſon*, *felony*, or *miſpriſion* of them, but by thoſe who are noble and peers of the realm.

8. In trial of a peer, the lords of parliament ſhall not ſwear, but they may give their judgment *ſuper fidem et ligeantiam Domino Regi debitam*, ſo that their *faith and allegiance ſtands* in equipage with *an oath* in the caſe of a common perſon in trial of life. And the writs of parliament, directed to the lords of parliament, are *ſub fide et ligeantia*, *&c.* And the reaſon and cauſe that the king gives them many other privileges, is for this, becauſe all honour and nobility is derived from the king, as the true fountain, and he honours with nobility for two cauſes. 1. *Ad conſulendum*, and for that reaſon he gives them a robe. 2. *Ad defendendum regem et regnum*, and for that cauſe he gives them a ſword. 12 *Rep.* 96.

All *peers*, without any diſtinction as to degree or rank, are entitled to the privilege of peerage alike; for they are equally obliged to attend the ſervice of the publick, and are always ſuppoſed amenable to juſtice, and to have ſufficient property to anſwer in ſuits and actions brought againſt

Of the Privileges of Peers and Members of Parliament.

them; and for theſe reaſons, are not to be arreſted or moleſted in their perſons. *Bacon's Abr.* tit. *Privilege*, 4 *Vol.* 228.

This privilege from arreſts extended formerly to *abbots*, as it does to *biſhops*, * *members of the convocation, and members of the Houſe of Commons at this day.*

The *privilege* of parliament, according to the *law of parliament*, is of a very extenſive nature, as may be ſeen by various reſolutions and orders, in the *journals* of both the houſes: but various ſtatutes which parliament has condeſcended to make, have taken away many privileges which were heretofore claimed. However, there is one ſtanding reſolution and order in the journals of both the houſes, that no court whatever ſhall preſume to determine concerning the *privilege* of parliament, as ſettled by the rules and orders of each houſe, they themſelves claiming to be the ſole judges of their reſpective privileges; of which order, the king's courts accidently take notice.

The *privilege of a peer* from arreſts extends only to peers of *Great Britain*, ſo that a nobleman of any other country, or a lord of *Ireland*, hath not any other privilege in this kingdom than a common perſon. Alſo the ſon and heir apparent of a nobleman is not entitled to the privilege, which is confined to ſuch perſons as are *lords of parliament* at the time. But it ſeems that an *infant peer* is privileged from arreſts, his perſon being held ſacred. *Co. Lit.* 156. 2 *Inſt.* 48. 3 *Inſt.* 30. *pl.* 19.

The *peers of Scotland* had no privilege in this kingdom before the *union*; but by the twenty-third article of the union, the *ſixteen elected peers* ſhall have all the privileges of the *peers of the parliament of Great Britain.* Alſo, all the reſt of the *peers of Scotland* ſhall have all the privileges of the peerage of *England*, excepting only that of ſitting and voting in parliament. *Stat.* 5 *An. c.* 8. 2 *Stra.* 990. *Fort.* 163. *P. Wil.* 583. Since which ſtatute, the perſon of a *Scotch peer* has been held to be privileged from arreſts.

The twenty-third article of the union, upon which this privilege is claimed by a *peer of Scotland*, not one of the ſixteen, ſays, that the *peers of Scotland* ſhall have all the

* Eq. Caſ. Ab. 349. 3 Chan. Rep. 38.

privileges

Of the Privileges of Peers and Members of Parliament.

privileges of *peers of Great Britain*, except the right and privilege of sitting in the *House of Lords, and the privileges depending thereon.* Now, as every *privilege*, claimed by a *peer*, solely depends, and is in consequence of his sitting in parliament, that is, being an *actual lord of parliament*, it seems, that the allowing *all the Scotch peers* the privilege from arrests, is not within the words of the act of union, the only law under which the *Scotch peers* to this day, can claim any privilege here at all.

A *peeress by birth*, is entitled to *privilege*. 2 Inst. 50. Stili. 222, 234, 252. Fort. 162. Vent. 298. Eq. Cas. Abr. 349. Co. Lit. 16. a. 6 Rep. 53. b. Dy. 79. pl. 51. Order of the *House of Peers*, 21 Feb. 1692. But it was doubted, whether a *peeress by patent* only for life, is entitled to this privilege. *Styl.* 234, 252. Held that she is not entitled, *Sty.* 254. but adjourned.

A *peeress by marriage*, is entitled to *privilege*, and that as well during the coverture, as after: But as a *peeress by marriage* loses the dignity by marrying a commoner, after such marriage she is not entitled to any *privilege*. Co. Lit. 16. 6 Co. 53. Dyer 79.

In lord *Banbury*'s case, it was holden by *Holt* ch. just. that where a person is called *by writ* to the *House of Peers*, he is no peer till he sits in parliament, the writ giving him no nobility or honour; but that it was sitting in the *House of Lords*, and associating with them, that ennobled his blood; and that therefore, if the king or he dies before the parliament meets, the writ is determined, and the party remains a commoner: but he held it otherwise in a creation by *letters patent*, by which the party is immediately noble without any other act or ceremony; and though the parliament never meets, or the king dies, the nobility remains to him and his posterity, according to the limitations in the patent.

Formerly, the *privilege* from arrests extended to the servants of *peers*; and was also claimed by their tenants in old *times*. And the horses, *&c.* of *peers*, and other goods, were privileged from distresses: but these *privileges* have been taken away, as will be shewn hereafter.

Note, The *privilege* of parliament does not extend to high treason, felony, breach of the peace, or surety of the peace. 4 *Inst.* 25. 2 *Hawk. P. C.* 424.

By

Of the privileges of Peers and Members of Parliament.

By 12 & 13 *W.* 3. *c.* 3. An act for preventing any inconveniences that may happen by privilege of parliament, it is enacted, "That any perſon or perſons may commence or proſecute any action or ſuit, in any of his majeſty's courts of record, *at Weſtminſter*, &c. againſt any peer of the realm, or lord of parliament; or againſt any of the knights, citizens, and burgeſſes of the *Houſe of Commons*, for the time being; or againſt their or any of their menial, or other ſervants, or any other perſon entitled to the privilege of parliament, at any time from and immediately after the diſſolution or prorogation of any parliament, until a new parliament ſhall meet, or the ſame be re-aſſembled; and from and immediately after any adjournment of both houſes of parliament, for above the ſpace of *fourteen days*, until both houſes ſhall meet or re-aſſemble: And that the ſaid reſpective courts ſhall and may, after ſuch diſſolution, prorogation, or adjournment as aforeſaid, proceed to give judgment, and to make final orders, decrees, and ſentences, and award execution thereupon; any privilege to the contrary, *&c.*"

Provided, "That this act ſhall not extend to ſubject the perſon of any of the knights, citizens, and burgeſſes of the *Houſe of Commons*, or any other perſon entitled to the privilege of parliament, to be arreſted during the time of privilege. Nevertheleſs, if any perſon or perſons, having cauſe of action or complaint againſt any peer of this realm, or lord of parliament, ſuch perſon or perſons, after any diſſolution, prorogation, or adjournment as aforeſaid; or before any ſeſſion of parliament, or meeting of both houſes as aforeſaid, may have ſuch proceſs out of his majeſty's courts of *King's Bench*, *Common Pleas*, and *Exchequer*, againſt ſuch peer or lord of parliament, as he or they might have had againſt him, out of the time of privilege. And if any perſon or perſons, having cauſe of action againſt any of the ſaid knights, citizens, or burgeſſes, or any other perſon entitled to the privilege of parliament, after any diſſolution, prorogation, or adjournment as aforeſaid; or before any ſeſſions of parliament, or meeting of both houſes as aforeſaid, ſuch perſon or perſons, may proſecute ſuch knight, citizen, or burgeſs, or other perſon entitled to the privilege of parliament, in his majeſty's courts of *King's Bench*, *Common Pleas*, or *Exchequer*, by ſummons and diſtreſs infinite,

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finite, or by original bill, and ſummons, attachment and diſtreſs infinite thereupon, to be iſſued out of any of the ſaid courts of record, which the ſaid reſpective courts are hereby empowered to iſſue againſt them, or any of them, until he or they ſhall enter a common appearance, or file common bail to the plaintiff's action, according to the courſe of each reſpective court. And any perſon or perſons, having cauſe of ſuit, or complaint, may, in the times aforeſaid, exhibit any bill or complaint, againſt any peer of this realm, or lord of parliament; or againſt any of the ſaid knights, citizens, or burgeſſes, or other perſon entitled to the privilege of parliament, in the high *court of Chancery*, *court of Exchequer*, or *duchy court of Lancaſter*, and may proceed thereon, by letter or ſubpœna, as is uſual, *&c.* "But not to arreſt the body of any knight, *&c.*"

By ſect. 3. "That where any plaintiff ſhall, by reaſon or occaſion of any privilege of parliament, be ſtayed or prevented from proſecuting any ſuit by him commenced, ſuch plaintiff ſhall not be barred by any ſtatute of limitation, or nonſuited, diſmiſſed, or his ſuit diſcontinued, for want of proſecution of the ſuit by him begun; but ſhall, from time to time, upon the riſing of the parliament, be at liberty to proceed to judgment and execution."

By ſect. 4. "No action, ſuit, *&c.* commenced againſt the king's original and immediate debtor for the recovery of any debt, *&c.* to the crown, ſhall be ſtayed or delayed by or under the colour or pretence of any privilege of parliament;" yet ſo nevertheleſs, "that the perſon or perſons, of any ſuch debtor or accountant, or perſon anſwerable or liable to account, being a peer of this realm, or lord of parliament, ſhall not be liable to be arreſted or impriſoned, by or upon any ſuch ſuit, order, *&c.* or being a member of the *Houſe of Commons*, ſhall not, during the continuance of the privilege of parliament, be arreſted or impriſoned by or upon any ſuch order, decree, judgment, proceſs, or proceedings."

By the 2 *&* 3 of *Anne*, *c.* 18. An act for the further explanation and regulation of privilege of parliament, in relation to perſons in publick offices, it is enacted, "That any action or ſuit may be commenced or proſecuted againſt any officer or perſon entruſted or employed in the revenue, *&c.* for any forfeiture, miſdemeanour, or breach of truſt, *&c.* and ſhall not be ſtayed or delayed by or under colour

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or pretence of any privilege of parliament, although ſuch officer or perſon be a peer of the realm, or lord of parliament, or one of the knight's, &c."

Provided, "that nothing therein ſhall extend to ſubject the perſon of ſuch officer, being a peer of the realm, or lord of parliament, to be arreſted or impriſoned: but that all proceſs ſhall iſſue againſt ſuch officer or perſon, being a peer of the realm, or lord of parliament, as ſhould have iſſued againſt him out of the time of privilege: nor ſhall extend to the perſon of ſuch officer, being a knight, citizen, or burgeſs of the *Houſe of Commons*, to be arreſted or impriſoned, during the time of privilege of parliament; and that againſt ſuch officer or other perſon, being a knight, citizen, or burgeſs of the *Houſe of Commons*, entitled to privilege, ſhall be iſſued ſummons and diſtreſſes infinite; which the ſaid reſpective courts are hereby empowered to iſſue in ſuch caſe, until the party ſhall appear upon ſuch proceſs, according to the courſe of ſuch reſpective courts."

The act of 12 & 13 *W.* 3. *c.* 3. reſtraining only the privilege of parliament, in actions or ſuits commenced in the courts therein ſpecified, by the 11 *Geo.* 2. *c.* 24. in amendment of the act of king *William*, it is enacted, "That any perſon and perſons ſhall and may commence and proſecute, in *Great Britain* or *Ireland*, any action or ſuit in any court of *Record*, or court of *Equity*, or court of *Admiralty*; and in all cauſes matrimonial and teſtamentary, in any court having cognizance of cauſes matrimonial and teſtamentary, againſt any peer or lord of parliament of *Great Britain*; or againſt any of the knights, citizens, and burgeſſes of the *Houſe of Commons* of *Great Britain*, for the time being, or againſt them and any of their menial and other ſervants, or any other perſon entitled to the privilege of the parliament of *Great Britain*, at any time from, and immediately after the diſſolution or prorogation of any parliament, until a new parliament ſhall meet, or the ſame be reaſſembled; and from and immediately after any adjournment of both houſes of parliament, for above the ſpace of *fourteen days*, until both houſes ſhall meet or re-aſſemble; and the ſaid reſpective courts may proceed, &c.

Provided, "That the ſaid act ſhall not extend to ſubject the perſon of any knight, &c. to be arreſted during the time of privilege. And ſect. 2. authorizes proceed-

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ing as above in any of the courts *of great ſeſſions in Wales, courts of ſeſſion in the counties palatine of Cheſter, Lancaſter, and Durham*; *the courts of King's Bench, Common Pleas*, and *Exchequer*, in *Ireland*, after any ſuch diſſolution, *&c.* And the *court of Chancery* in *Ireland*, and *equity of Exchequer*, are authorized to proceed in like manner as the *court of Chancery*, and *equity court of Exchequer* in *England* may, againſt any *peer*, *knight*, &c. after ſuch diſſolution, *&c.*"

Sect. 3. ſaves the ſtatute of *limitations* in like manner as the act of king *William*.

And by ſect. 4. No action or ſuit commenced againſt the *king's debtor*, &c. to be ſtayed in any court in *England* or *Ireland* [as by ſect. 4. in the act of king *William*].

And laſtly, by the *ſtat.* 10 *Geo.* 3. *c.* 50. The preamble of which ſtates, that the acts already in being are inſufficient to obviate the inconveniences ariſing from delay of ſuits, by reaſon of the privilege of parliament, it is enacted, "That any perſon or perſons ſhall and may, *at any time*, commence and proſecute any action or ſuit, in any court of *Record*, or court of *Equity*, or of *Admiralty*; and in all cauſes matrimonial and teſtamentary, in any court having cognizance of cauſes matrimonial and teſtamentary, againſt any peer, or lord of parliament of *Great Britain*; or againſt any of the knights, citizens, or burgeſſes, and the commiſſioners for ſhires and burghs of the *Houſe of Commons* of *Great Britain*, for the time being; or againſt their or any of their menial or any other ſervants, or any other perſon entitled to the privilege of parliament of *Great Britain*: and no ſuch action, ſuit, or any other proceſs or proceeding thereupon, ſhall, at any time, be impeached, ſtayed, or delayed, by or under colour or pretence of any privilege of parliament."

2. Provided, that "Nothing in this act ſhall extend to ſubject the perſon of any of the knights, citizens, and burgeſſes, or the commiſſioners, *&c.* for the time being, to be arreſted or impriſoned upon any ſuch ſuit or proceedings."

3. And whereas the proceſs by *diſtringas* is dilatory and expenſive: For remedy thereof, be it enacted, "That the court out of which the writ proceeds, may order the iſſues levied, from time to time, to be ſold; and the money ariſing thereby to be applied to pay ſuch coſts to the plaintiff as the ſaid court ſhall think juſt, under all the cir-

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cumſtances, to order; and the ſurplus to be retained until the defendant ſhall have appeared, or other purpoſe of the writ be anſwered."

4. Provided always, when the purpoſe of the writ is anſwered, that then the ſaid iſſues ſhall be returned; or if ſold, what ſhall remain of the money ariſing by ſuch ſale, ſhall be repaid to the party diſtrained upon.

5. And it is further enacted, "That obedience may be enforced to any rule of his majeſty's courts of *King's Bench*, *Common Pleas*, or *Exchequer*, againſt any perſon entitled to privilege of parliament, by diſtreſs infinite, in caſe any perſon or perſons, entitled to the benefit of ſuch rule, ſhall chuſe to proceed in that way: and the laſt clauſe extends them to *Scotland*.

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BY this laſt ſtatute, the *privilege* is wholly taken away from the ſervants of *peers and members of parliament*, ſo that they may be proceeded againſt as other indifferent perſons—and *ſuits* may now alſo, ſince the above ſtatute, be commenced at any time, whether the parliament is ſitting or not ſitting, againſt any *peer or member* thereof.

Peers and members of parliament may be proceeded againſt *two ways*, viz. by *original writ*, and by *original bill*, in either court, except that they cannot be proceeded againſt by *original writ* in *B. R.* in all actions; but in thoſe actions only, ſuch as *caſe*, *treſpaſs*, *ejectment*, *replevin*, and *debt*, which the *King's Bench* can hold plea of by *original writ*.

If the plaintiff proceeds by *original*, againſt a *peer*, or *commoner*, the plaintiff makes out a *præcipe* for an *orginal writ*, which writ muſt be made out by the *curſitor* of the proper county, and filed with the *filazer in B. R. and cuſtos brevium in C. B.* upon which, a ſummons is made out to the *ſheriff*, for the defendant's appearance, which is in the following form:

> *GEORGE* the third, by the grace of *God*, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, &c. To the ſheriff of *Middleſex*, greeting. We command you, that you cauſe to be ſummoned, *A. B.* eſq. [*or if a peer, the right honourable Henry earl of* ——— or whatever his title is] he having privilege of parliament, that he be *before us* [or if in *C. B. before our juſtices*] at *Weſtminſter*, on [a general return day] to anſwer *C. D.* in a plea of, &c. reciting the whole cauſe as in the original, to the damage of the ſaid *C.* of one hundred pounds, and have there then this writ.
>
> Witneſs, &c. ———

Upon the return of which, if the defendant appears, the proceedings are the ſame as in other caſes; but if he does not appear, and ſhould caſt an *eſſoin*, which it ſeems he may do any time before the return of the *original writ*, but not afterwards, the plaintiff is delayed a whole term, as the defendant has till the firſt return of the next term to appear; and then, ſhould the defendant not enter an appearance, the *eſſoin* muſt be adjourned to a further day

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by the plaintiff; upon which day, and the like default, the plaintiff may then ſue out a *diſtringas*. However, the caſting an *eſſoign* is ſeldom done at this day, as the courts ſet themſelves againſt ſuch obſolete practice, and conſider it nothing more than a trick, calculated for the purpoſe of delay, and a great abuſe of the law; and ſhould the practice of *eſſoins* be revived, there is no doubt but that the courts would inſtantly make ſuch new rules and orders, as would effectually prevent their occaſioning that unneceſſary delay of juſtice which they formerly did. Vide the caſes of *Anſon* v. *Jefferſon*, *C. B.* 2 *Wilſ.* 164.—And *Barclay* v. *Earle*. *Stra.* 1194.

Should no *appearance* be entered upon the return of the ſummons, or *eſſoin* caſt, the plaintiff's attorney makes out a *præcipe* for a *diſtringas*, and carries it to the proper *filazer*, to draw out the ſame, which muſt be ſealed; and is in the following form:

> *GEORGE* the third, by the grace of *God*, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, *&c.* To the ſheriff of *Middleſex*, greeting. We command you, that you diſtrain *A. B.* eſq. having privilege of parliament, by all his lands and chattels in your bailiwick, ſo that neither he, nor any one for him, do intermeddle therewith, until you ſhall have other command in that behalf from us; and that you anſwer us for the iſſues of he ſame, ſo that you have his body *before us* [or if n *C. B. before our juſtices* at *Weſtminſter*, on——— *a general return day*] to anſwer *C. D.* in a plea of, *&c.* [*reciting the original as before*] to the damage of the ſaid *C.* of one hundred pounds; and have you there then this writ.
>
> Witneſs, *&c.* this ——— day of ——— in the twentieth year of our reign.

If the defendant does not appear at the return of the *diſtringas*, the plaintiff's attorney muſt call upon the ſheriff to return the *writ*, whereupon he may ſue out an *alias*; and, upon the return of that, a *pluries diſtringas*. But inſtead of proceeding as formerly, by the writ of *diſtringas ad infinitum*, the plaintiff may now move the court out of which

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the writ iſſues, by virtue of the 10 *Geo.* 3. *c.* 50. *ſ.* 3. for the ſheriff to enlarge the *iſſues*, which the court will accordingly order to be encreaſed, to the amount of the plaintiff's demand.

This motion, is a *common motion*, and requires neither notice nor affidavit.

The plaintiff, in an action againſt a member of parliament, had proceeded agreeable to the act of 10 *Geo.* 3. *c.* 50. and had obtained rules for felling the iſſues levied upon a *diſtringas*, *alias*, and *pluries*; and alſo a rule for an attachment againſt the ſheriff: but no iſſues had been actually levied, and at length defendant appeared; whereupon it was moved, that theſe rules ſhould all be diſcharged: For as no iſſues had been levied, they could not be *ſold*; [vide ſect. 3. of the ſtatute 10 *Geo.* 3. *c.* 50.] and as the defendant in the action had now appeared, the end and purpoſe of the writs were anſwered. On the other ſide, the plaintiff inſiſted on the coſts of iſſuing the writs, before the rules ſhould be diſcharged. And the court thought that reaſonable; and directed, *that on payment of coſts* the rules ſhould be diſcharged. They were of opinion, that theſe coſts were not to attend the event of the ſuit, but were to be paid to the plaintiff at all events, whether he ſhould finally ſucceed in his ſuit or not. *Martin* v. *Townſend and Sawbridge. Burr.* 4 *pt.* 2725.

If the plaintiff proceeds by *bill* againſt a *peer*, or *member of parliament*, he muſt then file his *original bill*, containing the whole cauſe of action againſt him, with the *clerk of the declarations in B. R. or prothonotary in C. B.* and take out a *ſummons* thereon, which need not have *fifteen days* between the *teſte and return*, as the proceſs has when by *original writ*; and which muſt be made returnable together with the *diſtringas*, &c. in caſe of non-appearance thereto, *on a day certain in term*, and not on a general return day.

The *ſummons*, *attachment*, *diſtringas*, &c. when *by bill* in *B. R.* do not ſtate the cauſe of action at large, as when the proceedings are by *original writ*, but generally; but in both caſes, the *ſummons*, *attachment*, &c. in *C. B.* ſtate the whole cauſe as in the *original writ*.

In declaring againſt a *peer*, or *member of parliament*, when the ſuit is by *original*, the declaration begins thus:

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Middleſex. A. B. eſq. [or whatever his title is] having privilege of parliament, was ſummoned to anſwer *C. D.* in a plea, *&c.*

And if by *bill*,

Middleſex, to wit, *C. D.* complains againſt *A. B.* eſq. having privilege of parliament, *&c.*"—and though the ſuit is in the *King's Bench by bill*, the defendant muſt not be declared againſt, "*as being in the cuſtody of the marſhal of the Marſhalſea.*" Sayer Rep. 63, 64.

If the declaration ſhould be in an *action of aſſumpſit* againſt a *peer*, the plaintiff muſt take care, in aſſigning the breach, not to uſe the following words, as is uſual againſt a common perſon; "*but contriving, and fraudulently intending, craftily and ſubtily, to deceive and defraud the ſaid* C. D. *in this behalf*;" for the *Houſe of Lords* have adjudged it a very high contempt and miſdemeanour in any perſon, to charge their noble body with any ſpecies of fraud or deceit. But in ſuch caſe, againſt a *member of the Houſe of Commons*, thoſe words may be inſerted, as there is no ſtanding order to the contrary; the reſentment of the members of that honourable houſe having never yet been irritated at the charge.

In *Trinity term*, 18 *George* 3. in the *King's Bench*, in the caſe of *Goſling and wife, againſt lord viſcount Weymouth*, it was argued, whether a *peer* could be ſued there by *bill of privilege*. And adjudged that he might. The caſe was this:

The plaintiffs commenced an action againſt the lord *Weymouth*, *by bill of privilege*, to which he pleaded in abatement, that he ought to have been ſued by *original writ*, and *not by bill of privilege*; and thereupon, there was a *demurrer and joinder*. On the argument of which, the court relied on the caſe of *Say* againſt lord *Byron* in that court, a few years before, and awarded a *reſpondeas ouſter*.

The caſe of *Say* and lord *Byron* came on before *B. R.* on a motion to ſet aſide a *diſtringas* iſſued againſt lord *Byron by bill*, and the court, having directed precedents to be ſearched, found that it had been the uniform practice and uſage to proceed againſt *peers* in that court *by bill of privilege* before the

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the ſtatute 12 & 13 *W.* 3. and as that act made no difference in that reſpect, it was held, that the juriſdiction of the *King's Bench* remained as before.

It is however very remarkable, that when the act of king *William* went to the *lords* for their concurrence to the proceedings therein, againſt the members of both houſes, *by bill and ſummons thereon*, the *lords* expunged that part of the clauſe relating to themſelves being ſued by *original bill and ſummons*, and ſent back the amended bill to the commons; which afterwards paſſed accordingly. Which clearly proves, that the *lords*, at that time, did not think themſelves included therein.

The court therefore, relying on their juriſdiction before the ſtatute of *king William*, determined that a *peer* may be ſued *by bill* in *B. R.* but as this determination is founded ſolely on the juriſdiction of the court, and the uniform practice thereof before the ſtatute, it may be ſtill a queſtion in the court of *Common Pleas*, whether a *peer* can be ſued there by *original bill and ſummons thereon.*

All the ſubſequent proceedings to the declaration againſt a *peer or privileged perſon* are the ſame as in other caſes, except that their bodies cannot be taken *in execution*, unleſs the judgment is obtained upon a *ſtatute ſtaple*, or *ſtatute merchant, or upon the ſtatute of* Acton Burnell 11 *Edw.* 1. and then a *capias ad ſatisfaciendum* lies even againſt peers of the realm.

Of Corporations.

Of Proceeding by and againſt Corporations.

CORPORATIONS aggregate muſt ſue and be ſued *by attorney*, and therefore the proper proceſs againſt them is a *diſtringas*. *Co. Lit.* 66.

A *corporation* cannot be *eſſoined*. Dalt. 121. pl. 154.

Nor *outlawed*. 10 *Co.* 32. b.

No *attachment* lies againſt a *corporation*.

A *corporation* cannot be declared againſt as in the cuſtody of the *marſhal*. 6 *Mod.* 183.

A *corporation* cannot ſue as a *common informer*. 2 *Stra.* 1241.

As *outlawry* does not lie againſt an aggregate corporation, therefore *treſpaſs* does not lie againſt them; for a *capias* and *exigent* do not go. *Bro. Corp.* 43.

Corporations aggregate cannot diſtrain in their own perſons but by their bailiff, therefore *replevin* does not lie againſt them by the name of their corporation. *Brownl.* 175.

Corporations cannot ſue without their head, or in time of vacation of their headſhip. *Wood's Inſtit.* 110.

Corporations aggregate cannot commit treaſon, or be outlawed or excommunicated. 10 *Rep.* 32. 1 *Rep.* 127. 1 *Inſt.* 134. a. or be executors or adminiſtrators. *Ibid.* Tho' 1 *Roll. Abr.* 915. *contra*, but *quære?* for they cannot take an oath.

They cannot be joint-tenants to take by ſurvivorſhips, but they may be tenants in common. *Wood's Inſtit.* 110.

They cannot be ſeized to the uſe of another. *Ibid.*

The members cannot regularly be witneſſes for the corporation, eſpecially if they teſtify for any conſiderable advantage or profit of the body. 2 *Lev.* 232. 236. 2 *Str.* 1069. For every member hath a right and freehold for his life as to his freedom, and all the members together have an inheritance in the lands, and an intereſt in the goods.

If a *corporation* ſue, they muſt ſue in the name of the corporation by an attorney appointed under the ſeal of the corporation.

And if a corporation is ſued, it muſt be ſued by its name of *incorporation* by *original writ*—and in order to ſue a corporation, the plaintiff's attorney muſt make out a *præcipe* for an *original writ*, which *original writ* muſt be made out by the *curſitor* of the proper county, and duly filed with the

filazer

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filazer in B. R. *or cuſtos brevium in* C. B.; on which a *ſummons* muſt be made out containing the whole cauſe of action for the ſheriff to ſummon them; upon which, if they appear, the proceedings are the ſame as in other caſes; but their appearance muſt be by an attorney appointed under the *common ſeal*, and not in their own perſons. *Bro. Corp.* 28.

If they do not appear upon the ſummons at the return of the *original writ*, the plaintiff muſt take out a *diſtringas*, and proceed againſt them by *diſtreſs infinite*; and it is not ſufficient if the particular perſons diſtrained upon appear at the return of the proceſs. *Bro. Corp.* 28. or if all the members of the corporation appear in perſon; but they muſt appear by an attorney appointed under ſeal.

Should the ſheriff return but ſmall *iſſues* on the *diſtringas*, the court, on motion, will order him to return greater.

In an action againſt the *Eaſt-India Company* for 5000 *l.* it was moved, that the ſheriff might return exemplary iſſues, becauſe ſeveral writs of *diſtringas* had been already ſerved to no purpoſe; and the court ſaid, he ſhould return good iſſues; and if he did not, the plaintiff might bring an action againſt him; but at laſt he was ordered to attend. *Salk.* 191. *pl.* 2.

When a corporation is once brought into court, the ſubſequent proceedings are the ſame as in other caſes.

Of Hundredors.

Of Proceeding againſt Hundredors.

IF an action be commenced againſt *hundredors*, the ſuit in *B. R.* as well as in *C. B.* muſt be *by original*, for the inhabitants of an hundred cannot be in the cuſtody of the *marſhal*. 3 Keb. 126. 2 Saund. 375. 4 Mod. 296.

To proceed againſt an hundred on the ſtatute of *hue and cry*. 13 Ed. 1. the plaintiff muſt take out his *original writ*, which muſt be teſted *forty days* after the robbery; [which forty days are allowed for the hundred to take the thieves by the ſtatute of *Winton*. R. 3 Lev. 320.] and within a year after the robbery. *R.* 1 *Brownl.* 156.

The *original writ* uſually recites the ſtatute. *Th. Br.* 141. 2 *Saund.* 374. 4 *Mod.* 296. 1 *Bro. Ent.* 99. But the recital of the ſtatute is not neceſſary; though it muſt ſtate the circumſtances of the robbery, and the plaintiff's compliance with the *ſtatutes* *, *viz. that he made hue and cry, gave notice of the robbery, deſcribed the felons, the time and place of the robbery; that within twenty days he cauſed notice thereof to be given in the* London Gazette, *deſcribed the robbers and robbery therein; that he entered into bond before the ſheriff to the high conſtable of the hundred, with condition for the ſecurity of the coſts in caſe of being nonſuited, diſcontinuing*, &c. *that twenty days before the iſſuing of the writ, he made oath before a juſtice, that he did not know the parties who robbed him, and that the inhabitants of the hundred have not taken the robbers*, &c.

The proceſs ſerved is a copy of the *original writ*, which proceſs formerly uſed to be ſerved on ſome inhabitant of the hundred. But by the 8 *Geo.* 2. *c.* 16. It is enacted, "That No proceſs for appearance in any action to be brought upon the ſtatutes of hue and cry, or either of them, againſt any hundred, ſhall be ſerved on any inhabitant thereof, ſave only upon the high conſtable, or high conſtables, of the hundred wherein the robbery ſhall happen, who is required to cauſe publick notice thereof to be given in one of the principal market towns within ſuch hundred, on the next market-day after he or they ſhall be ſerved with ſuch

* The ſtatute of *Winchcſter*, 13 Edw. 1. c. 1. is explained and enforced by ſeveral ſubſequent ſtatutes, *viz.* 27 El. c. 13. 29 Car. 2. c. 7. 8 Geo. 2. c. 16. 22 Geo. 2. c. 24.

proceſs;

Of Proceeding againſt Hundredors.

proceſs; or, if there ſhall happen to be no market-town within the hundred, then in ſome pariſh-church within the ſame hundred, immediately after divine ſervice, on the *Sunday* next after his or their being ſerved with ſuch proceſs; and he or they is and are hereby impowered and required to enter, or cauſe to be entered, an appearance in the ſaid action, and alſo defend the ſame for and on behalf of the inhabitants of the ſaid hundred, as he or they ſhall be adviſed.

The declaration muſt be againſt the inhabitants of the hundred generally; for if it is againſt any by name, and all are not named, it will be bad. *R.* 2 *Keb.* 126.

The declaration need not recite the original at large, *Reg.* 1654. *Mills* 26. nor more of the ſtatute than is pertinent to the action. 2 *Ventr.* 215. and muſt conclude *contra formam ſtatuti*, *i. e.* the ſtatute of *Winton*, for *contra formam ſtatutorum* is bad, *Yelv.* 116.

If the defendants plead, and there is an iſſue, the *venire facias* ſhall be awarded to the next hundred. *Theſ. Brev.* 144. *quær.* for ſince the 24 *Geo.* 2. *c.* 18. *ſ.* 3. it ſeems the *venire* ſhould be awarded *de corpore comitatus*, except the hundred againſt which the action is brought.

If judgment be given againſt *the hundred*, the ſheriff, *&c.* upon receipt of any writ of execution againſt any inhabitant, inſtead of ſerving the ſame, ſhall cauſe the ſame to be ſhewn *gratis* to two juſtices of the county, riding, or diviſion, [whereof one to be of the *quorum*] who are to cauſe ſuch taxation and aſſeſſment to be made, and to be levied, according to the 27 *Eliz.* [*viz.* by the conſtables, *&c.* rateably and proportionably, *&c.*] in which taxation and aſſeſſment there ſhall be provided and included, over and above what the coſts and damages recovered by the plaintiff in ſuch action ſhall amount to, all ſuch juſt and neceſſary expences which the high conſtable of the hundred hath been at in defending ſuch action, claim being made thereto by ſuch high conſtable, before the ſaid juſtices, upon due notice for that purpoſe given him; and the money, ſo to be levied, to be paid over by ſuch conſtable, *&c.* within ten days after collection, to the ſheriff of the county, to the uſe of the plaintiff in ſuch action, for ſo much as his coſts and damages recovered ſhall amount unto, and to the uſe of the ſaid high conſtable, for ſo much as his expences in defending the ſaid action ſhall amount to, of which he ſhall give an account, and make proof thereof upon oath, to the

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ſatisfaction of the ſaid juſtices, before any taxation ſhall be made for reimburſing ſuch high conſtable, and ſhall, in ſuch expences, have no further allowance, toward paying an attorney to defend the ſaid action, than what ſuch attorney's bill ſhall be taxed at by the proper officer of that court where the action ſhall be brought, which the ſaid high conſtable ſhall cauſe to be taxed for that purpoſe. *Stat.* 8 *Geo.* 2. *c.* 16. *ſ.* 4.

The 7th *ſect.* of the above act provides in what manner the conſtable ſhall be reimburſed his expences in caſe the plaintiff is nonſuited, *&c.* and becomes, or his ſureties in the bond become, *inſolvent.*

Of Ejectment.

Of the Action of Ejectment.

THE action of *ejectment* is a mixed action, in which a *leſſee* for years ſhall recover his term, and alſo his damages. 5 *Co.* 105. 9 *Co.* 77. and is almoſt the only remedy in practice for recovering land wrongfully withheld. *Bur.* 4 *pt.* 667. For it is *real* in reſpect of the *lands*, and *perſonal* in reſpect of the *damages* and *Coſts*. Per Holt, ch. j. Comb. 250.

Real actions required ſo much nicety and exactneſs, and were attended, in old times, with ſo much trouble and expence, that the remedy by *ejectment* was contrived to ſupply ſeveral defects which attended the bringing them; for in *real actions* the demandant could not recover any *damages*, only his poſſeſſion; and if he was barred in one action, he could not regularly bring another. 6 *Co.* 7. *Ferrar*'s caſe.

The concluding a man by one action being often found ſo prejudicial to his right, that the manner of forming a term for years, and the leſſee's bringing an ejectment to recover his *term*, and thereby to aſſert the title of his leſſor, was found out, and was firſt introduced in the 14 *Hen.* 7. * [before which time the plaintiff in *ejectment* only recovered *damages* for the turning him out of poſſeſſion, and did not recover his term in the premiſſes] for, till about that time, leaſes for years were but of very ſhort duration, and were generally defeated or determined before any intricate title could be decided; and were ſuch precarious poſſeſſions, with reſpect to the power that the owner of the freehold or inheritance had over them, that every ſuch leſſee was looked upon only as his bailiff or ſteward; and therefore, if ouſted by a ſtranger, could only have recovered *damages* for the loſs of this poſſeſſion; or if turned out by his leſſor, could only ſeek remedy from his *covenants*.

But as, about this time of *Henry* 7. leaſes for long terms began to creep into uſe, the leſſees whereof, when moleſted, uſed to go, in order to ſecure themſelves, into equity, againſt their leſſors, for a ſpecifick performance; and againſt ſtrangers, to have perpetual injunctions to quiet their poſſeſſions, which, as it drew conſiderable buſineſs into the

* *F. N. B.* 506.

courts

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courts of equity, was probably one reaſon which induced the courts of law to come to a reſolution to give judgment, that *the leſſee in ejectment ſhould recover poſſeſſion of the land itſelf, by the proceſs of an habere facias poſſeſſionem*; ſo that the object of the action became entirely changed; for, as the plaintiff recovered the *term* itſelf, he had nominal damages only for the *ouſter*, but not the *meſne profits*; whereas, by the old writ of ejectment, he recovered nothing but *damages* for the ouſter, the meaſure whereof were the *meſne profits* of the eſtate accruing to the ejector ſince the time of the ouſter.

The above reſolution of the courts brought on a new method of trial unknown to the *common law*. For now it became uſual for a man that had a right of entry into any lands to enter thereon and ſeal leaſes; and then the perſon that next came on the freehold, *animo poſſidendi*, was accounted an ejector of the leſſee; by which means any man might be turned out of poſſeſſion; becauſe the leſſee in ejectment would recover his term without any notice to the tenant in poſſeſſion; ſo that the courts of law, to remedy this inconvenience and injuſtice, made it a ſtanding rule, that no plaintiff ſhould proceed in ejectment to recover his lands againſt ſuch a feigned ejector, without delivering the tenant in poſſeſſion a declaration, and making him an ejector and proper defendant if he pleaſed.

This rule of court became abſolutely neceſſary upon the alteration of the object of the action of ejectment, which was now *in rem*; for otherwiſe the court would have been inſtrumental in doing an injury to a third perſon; becauſe a declaration might otherwiſe be delivered to a ſtranger, a feint defence be made, and a verdict, judgment, and execution thereon obtained, whereby the tenant would have been ouſted, without notice of any proceedings againſt him.

Upon this notice to the tenant in poſſeſſion, and *affidavit* thereof made, it was uſual for the tenant in poſſeſſion to move the court, that, as the title of the land belonged to him, he might defend the ſuit in the caſual ejector's name; which the court, upon an *affidavit* of that matter, uſed to grant; and that the ſuit ſhould be carried on in the caſual ejector's name, the tenant in poſſeſſion ſaving him harmleſs; and then the caſual ejector was not permitted to releaſe errors in prejudice of the tenant in poſſeſſion; ſince the ſuit was carried on in his name by rule of court; and the proceſs for coſts was taken out againſt the caſual ejector, who

was

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was obliged to resort to the tenant in possession to recover back the same, and put his bond of indemnification in suit upon his refusal to pay them. *Styl.* 468. 1 *Keb.* 705, 740.

Also such leases were actually to be sealed and delivered, otherwise the plaintiff could maintain no title to the term, and were also obliged to be sealed on the land itself, otherwise it amounted to *maintenance* by the old law, to convey a title to any one, when the grantor himself was not in possession.

But at this day there is regularly no necessity of sealing and delivering leases on the lands, where there is an actual tenant or occupier of the lands, a much more expeditious and easy method of proceeding in ejectment having been invented by lord chief justice *Rolle*, [who sat in the *upper* bench so called during the exile of king *Charles* the second] and followed ever since by the courts.

I have said thus much of the action of *ejectment*, and the old method of proceeding therein, that the practiser and student may the better understand the *modern practice* relating thereto, and the reasons on which it is founded.

The new method of proceeding in *ejectment* entirely depends on a string of legal fictions; no actual *lease* is made, no actual *entry* by the plaintiff, no actual *ouster* by the defendant, but all are merely ideal, for the sole purpose of trying the *title*. To this end, in the proceedings, a lease for a term of years is stated to have been made by him who claims title to the *plaintiff*, who is generally an ideal fictitious person who has no existence, though it ought to be a real person. In this proceeding, which is the *declaration*, for there is no other process in this action, it is also stated, that the *lessee*, in consequence of the demise to him made, entered into the premisses; and that the *defendant*, who is also now another ideal fictitious person, and who is called the *casual ejector*, afterwards entered thereon and ousted the *plaintiff*, for which ouster the *plaintiff* brings this action. Under this *declaration* is written a notice, supposed to be written by this *casual ejector*, directed to the *tenant in possession of the premisses*, in which notice the *casual ejector* informs the *tenant* of the action brought by the *lessee*, and assures him, that as he, the *casual ejector*, has no title at all to the premisses, he shall make no defence; and therefore he advises the *tenant* to appear in court at a certain time, and

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defend his own title, otherwiſe he, the *caſual ejector*, will ſuffer judgment to be had againſt him, by which the *actual tenant* will inevitably be turned out of poſſeſſion.

The declaration is then ſerved on the *tenant* in poſſeſſion, with this friendly caution annexed to it, who has then an opportunity of defending his title, which if he omits to do in a limited time, he is ſuppoſed to have no right at all; and, upon judgment being had againſt the *caſual ejector*, the *real tenant* will be turned out of poſſeſſion by the ſheriff.

But if the *tenant* applies to be made a defendant, it is allowed him upon this condition, that he enter into a *rule* of court to confeſs at the trial of the cauſe *three* of the four requiſites for the maintenance of the plaintiff's action, *viz.* the *leaſe* of the leſſor, the *entry* of the plaintiff, and the *ouſter* by the *tenant* himſelf, who is now made *defendant* inſtead of the *caſual ejector*; which requiſites, as they are wholly fictitious, ſhould the defendant put the plaintiff to prove, he muſt of courſe be *non-ſuited* at the trial for want of evidence; but by ſuch ſtipulated confeſſion of *leaſe, entry and ouſter*, the trial will ſtand upon the merits of the *title* only.

Upon this rule being entered into, the *declaration* is now altered by inſerting the name of the *tenant* inſtead of the fictitious name of the *caſual ejector*; and the cauſe goes to trial under the name of the *fictitious leſſee* on the demiſe of *A. B.* (the leſſor or perſon claiming title) againſt *C. D.* (the now defendant) and therein the leſſor is bound to make out his *title* to the premiſſes, otherwiſe his nominal leſſee cannot obtain judgment to have poſſeſſion of the land for the term ſuppoſed to be granted. But if he makes out his *title* in a ſatisfactory manner, the judgment is given for the *nominal plaintiff*, and a writ of poſſeſſion goes in his name to the ſheriff to deliver poſſeſſion. But if the *now defendant* fails to appear at the trial, and to confeſs *leaſe, entry and ouſter*, the *nominal plaintiff* muſt indeed be there nonſuited for want of proving theſe requiſites; but judgment will nevertheleſs, in the end, be entered for him againſt the *caſual ejector*; for the condition on which the *tenant* was admitted defendant is broken; and therefore the *plaintiff* is put again in the ſame ſituation as if he never had appeared at all; the conſequence of which we have ſeen would have been entered for the *plaintiff*; and the *tenant* would have been turned out of poſſeſſion; the ſame proceſs therefore as would have been had, provided no conditional rule had been made,

muſt

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muſt now be be purſued as ſoon as the condition is broken; but execution will be ſtayed if any landlord, after the default of his *tenant*, applies to be made a defendant, and enters into the uſual rule to confeſs *leaſe, entry and ouſter*.

Of recovering the *meſne profits* of the *tenant*, after the plaintiff has recovered poſſeſſion by the action of *ejectment*. Vide poſt.

For what an Ejectment lies.

THE action of *ejectment* lies in *B. R.* by *bill*, and by *original*; but in *C. B.* by *original* only.

As declarations in *ejectment* are generally made out by the attornies themſelves, who may buy common forms of declarations in *ejectment*, with blanks, of the law ſtationers: it will be neceſſary to ſhew for what an *ejectment* may be maintained.

It lies of a manor, meſſuage, ſo many acres of land, of meadow, of paſture, of wood, *&c.* 11 *Co.* 55.

Of a houſe. *Cro. Jac.* 654. *Noy* 37. 3 *Lev.* 97. *Palm.* 337. *Hard.* 76.

Of a chamber in the ſecond ſtory of ſuch a houſe. 3 *Leon.* 210. *Noy* 109. *Hard.* 57. Of part of an houſe. *Stra.* 695.

Of a certain place called the veſtry in *D.* 3 Lev. 96.

Of a rectory; of a chappel. *Latch.* 62. and may be demanded by the name of a meſſuage. *Salk.* 256. *Styl.* 101.

Of a cottage. 1 *Lev.* 58. *Cro. El.* 818. Of a ſtable. 1 *Lev.* 58.

Of a college, and of an orchard. *Noy* 37. *Cro. El.* 118. 854. 1 *Rol. Rep.* 55. *Cro. Jac.* 655. *Palm.* 337. *Hard.* 55, 57. *Cro. Car.* 555.

Of a garden. 1 *Lev.* 58. *Godb.* 6.

Of a boilery of ſalt. 1 *Lev.* 114.

Of a coal-mine. *Cro. Jac.* 150. *Noy* 121. and in *Durham*, of mines of coals, though not ſaid how many. Affirmed in error; the precedents for coal-mines being ſo in that county. *Carth.* 227. 4 *Mod.* 143. *Comb.* 201. 1 *Show.* 364. *Salk.* 255.

Of land, and a coal-mine in the ſame land. *Cro. Jac.* 21.

For a pool, or ſtanding water. *Yelv.* 143. 1 *Inſt.* 5. *Reg.* 227. And for a ſtream, or running water. 1 *Inſt.* 5. *ſed court. Yelv.* 143. for it ought to be of ſo many acres of land covered with water.

For a beaſt-gate. *Stra.* 1084. *Andr.* 106.

For ſo many acres of herbage. *Hard.* 303, 401.

For a firſt mowing. *Cro. Car.* 362.

For a hop-yard. *Palm.* 337.

Of a cloſe called *D.* containing three acres of land. *Cro. Jac.* 435. *Palm.* 102. 4 *Mod.* 98.

So for a parcel of a highway, and though it be built upon, it ſhall be demanded as land. *Bull. Ni. Pri.* 99.

For twenty acres of furze and heath. *Cro. Jac.* 179. 1 *Mod.* 90.

For

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For fifty acres of furze and heath, and fifty acres of moor and marſh. *Burr.* 4 *pt.* 2672.

For an alder car in *Norfolk*. *Str.* 1063.

For ten acres of wood, and ten acres of underwood. 2 *Rol. Rep.* 482.

For common of paſture. *Stra.* 71.

For the paſture of one hundred ſheep. *Hard.* 58. *Dalis* 95.

For four mills, without ſpecifying wood or water-mills, for ten acres of ———. *Cro. El.* 339.

For a piece of land called *B.* or a cloſe of land called *B.* Cro. Jac. 435. 3 Lev. 97.

For a meſſuage or burgage; for they are ſynonimous in a borough. *R. Hard.* 173.

For a meſſuage *or tenement* called the *Black Swan*. 3 *Mod.* 238. 1 *Sid.* 295. becauſe certain enough for the ſheriff to deliver poſſeſſion.

So an ejectment lies for *tythes*; for although tythes are eſteemed part of the incorporeal inheritance, and by the common law were only of eccleſiaſtical conuſance, yet, being in the hands of lay-proprietors, are now conſidered as a temporal eſtate; for, by 32 *H.* 8. *c.* 7. it is provided, that every * lay-perſon having any eſtate of inheritance, freehold, right, term, or intereſt, in tythes; and being thereof diſſeiſed, ouſted, wronged, or otherwiſe kept from the ſame, ſhall have his remedy, in the courts of law, for them, in like manner as for lands; and hence it is, that an ejectment lies for *tythes*. Vide Cro. Car. 301. Jones 331. *Ld.* Raym. 789.

An ejectment lies for *a rectory*, becauſe a rectory conſiſts of a church, glebe lands and tythes. *Latch.* 62.

It was formerly held, that ejectment did not lie for a *chapel*, becauſe it was *res ſacra*, which was not demiſeable; but now, ſince they are become lay-inheritances, they are recoverable in ejectment, as other lay-eſtates; but it muſt be demanded by the name of a meſſuage, or it is not formal. 11 *Co.* 25. *Style* 101. *Doct. Plac.* 191. *Salk.* 256. *pl.* 7.

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* This remedy by the ſtatute is given only to *lay impropriators*; therefore the act of parliament leaves *ſpiritual perſons* to purſue their old remedy in the ſpiritual court. *Co. Lit.* 159. *Dyer* 116. *pl.* 71.

For what an Ejectment lies.

But see 2 *Stra.* 914. 2 *Barnard, K. B.* 27. which seems *contra.*

Ejectment lies for a prebendal ſtall after collation to it. 1 *Wilſ.* 14.

But an ejectment does not lie for a *tenement.* 2 Stra. 834 Barnard, *K. B.* 155. being too indefinite a term.

Nor for *pannage*, becauſe this is no more than the fruit which falls from trees, which the ſwine have a right to feed on, and is not a part of the ſoil, as the herbage is. *Lev.* 212. *Sid.* 416. *S. C.* adjudged.

Nor for a rent or common appendant. *Cro. Car.* 292. *Cro. Jac.* 146. 1 *Inſt.* 9. *a. ſed vide Stra.* 71.

Nor of a fiſhery in ſuch a river. *Cro. Car.* 492. *Cro. Jac.* 146.

Nor of a croft. *Style* 30. But ſee 1 *Lev.* 58.

Nor of a *kitchen.* Noy 409. Nor of a cloſe without ſpecifying it. *Godb.* 53. 11 *R.* 55. *Bridg.* 56. 1 *Roll. Rep.* 55.

Nor of arable or paſture land, without ſhewing how much of one, or how much of the other. *Bridg.* 56. *Hard.* 133. *Palm.* 102. 3 *Lev.* 97. *Salk.* 254.

Nor for a rod of land. *Cro. El.* 339.

Nor of the fourth part of a meadow, without ſhewing how many acres the meadow contains. 1 *Lev.* 213.

An ejectment for a meſſuage or tenement, without other deſcription, bad for incertainty. *Cro. El.* 186. 3 *Leon.* 228. *Pop.* 197, 203. *Noy* 86. *Cro. Jac.* 125. *Style* 364. 1 *Sid.* 295. *Cro. El.* 116. *March* 96. 2 *Rol. Abr.* 80.

So an ejectment for 100 acres of waſte, or for an hundred acres of mountain, is bad for incertainty. *Palm.* 100. *Hard.* 57. *Salk.* 255. 1 *Show.* 338.

In ejectment for an *entirety*, a *moiety* may be recovered.

Ejectment for five cloſes of land, arable and paſture, called *long furlongs*, containing ten acres, held ill; for the plaintiff ought to have ſhewn how many acres of arable land, and how many acres of paſture, diſtinctly, ſo as the ſheriff might certainly know what to deliver upon the *habere facias poſſeſſionem.* Carth. 204. Cro. Car. 573, 471. Hard. 59. Salk. 254. 1 Show. 338. 4 Mod. 42, 97. Comb. 198.

Ejectment for a houſe, ten acres of land, and twenty acres of meadow by the name of a houſe, and ten acres of meadow.

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meadow. Verdict for plaintiff, but judgment arrested for repugnancy and incertainty. *Yelv.* 166. 4 *Noy* 143.

Ejectment for a manor should describe the quantity and species of land contained therein. *Hetl.* 146. *Latch.* 61. *Lit. Rep.* 301.

So an ejectment for all and all manner of tythes in *D.* without saying or giving any other description of the nature and quality of the tythes, held naught. 11 *Rep.* 25. *Moor* 837. *pl.* 1130. 1 *Roll. Rep.* 68. *Palm.* 101. *Andr.* 107.

Ejectment does not lie where no certainty appears, whereof the sheriff can deliver possession. *Mar.* 96.

But it seems sufficient if so much certainty appears, upon which the sheriff can deliver possession, as ejectment for a parcel of land called *B.* or a close called *B.* Cro. Jac. 435. 3 Lev. 97. or a *tenement* called the *Black Swan*, *&c.*

An ejectment does not lie for a rent, or other things that lie merely in grant, because these, being incorporeal things, are in their nature invisible, *quæ neque tangi nec videri possunt*; and therefore not in their nature capable of being delivered in execution. *Co. Lit.* 9. a.

Of the Demiſe.

THE declaration in ejectment muſt ſhew a good demiſe. *Yelv.* 166.

And if it is of *tythes*, it ought to ſay, that the leſſor demiſed by *deed*. Cro. Jac. 613.

Alſo the leſſor of the plaintiff muſt have a right of entry when this action is brought. And by the ſtatute of limitations, 21 *Jac.* 1. *c.* 16. none ſhall make an entry into lands, but within twenty years after their right or title which ſhall firſt deſcend or accrue to them; but this act hath the uſual ſavings for *infants*, *feme coverts*, *&c.*

The *demiſe* in the declaration muſt be laid after the title accrues, otherwiſe the plaintiff will be nonſuited; and the plaintiff muſt lay the commencement of his ſuppoſed leaſe to have been precedent to the ejectment by the defendant. 1 *Sid.* 8.

If there be ſeveral leſſors, and it is laid in the declaration that *they demiſed*, you muſt ſhew ſuch a title in them, that they could demiſe the whole. *Cro. Jac.* 166.

In ejectment, on the demiſe of an *heir* by deſcent, the demiſe was laid on the day his anceſtor died, and held to be well enough. 3 *Wilſ.* 274.

If leſſors of plaintiff are *tenants in common*, there ought to be a different count on the demiſe of each *tenant in common*; or they may join in a leaſe [and if there are many it is the better way] to a third perſon; and that leſſee make a leaſe to try the title. For *tenants in common* cannot make a *joint leaſe*. 2 Wilſ. 232.

So if there are ſeveral *coheirs*, each muſt make a leaſe.

But *joint-tenants* are ſeized *per my et per tout*; and therefore each may be ſaid to demiſe the whole.

So of *coparceners*, for they ſtand on the ſame foundation. *Vide Bull, Ni. Pri.* 107.

Where a *corporation aggregate* is leſſor of the plaintiff, they muſt give a letter of attorney to ſome perſon to enter and ſeal a leaſe on the land; and therefore the plaintiff ought in ſuch caſe to declare upon *a demiſe by deed*; for they cannot enter and demiſe upon the land as natural perſons can, though this will be aided after verdict. *Carth.* 390.

But a demiſe of a corporation in ejectment was held to be good, without mentioning that it was *by deed*. *Ld. Raym.* 136.

If *truſtees* of a charity want to bring *ejectment*, the *truſtees*, at the time of bringing the ejectment, ſhould be the leſſors of

Of the Demiſe.

of the plaintiff; but beſides the count on their demiſe, there ſhould be another on the demiſe of the leſſors (*truſtees*) in the leaſe; another on the demiſe of all the then truſtees, if more than were the leſſors in the leaſe; and another on the demiſe of the receiver of the charity.

If the leſſor of the plaintiff be an *infant*, the demiſe ſhould be ſtated to be *by deed*, and alſo rendering rent; though there is no occaſion in ſuch caſe for a real leaſe.

So upon the demiſe of a maſter and fellows of a college, dean and chapter of a cathedral, maſter or guardian of an hoſpital, parſon, vicar, or other eccleſiaſtical perſon, of any lands, *&c.* the declaration ſhould ſtate, that there was a rent reſerved, *&c.* purſuant to the ſtat. 13 *El. c.* 10. *R. Sav.* 129.

The form of a *declaration* in ejectment on a ſingle demiſe *by bill* in *B. R.* is as follows:

Hilary term, in the 20*th* year of king *George* the *third*.

Stormont and *Way*.

Middleſex, to wit. *John Den* complains of *Richard Fen* being in the cuſtody of the marſhal of the *Marſhalſea* of our ſovereign lord the king, before the king himſelf. For that *whereas William Smith*, eſquire, on the fifth day of *January*, in the nineteenth year of the reign of our ſovereign lord *George*, the now king of *Great Britain*, *&c.* at *Weſtminſter*, in the county of *Middleſex*, had demiſed, granted, and to farm let to the ſaid *John Den*, *four meſſuages*, *four barns*, *four ſtables*, *fifty acres of land*, *fifty acres of arable land*, *fifty acres of paſture land*, *twenty acres of wood*, *and twenty acres of underwood* [ſo deſcribe the parcels according to the caſe] with the appurtenances, ſituate, lying and being in the pariſh of Saint *Mary*, *Iſlington*, [the vill or town where the premiſſes lie] in the county aforeſaid, to have and to hold the ſaid premiſſes, with the appurtenances, from the ſaid fifth day of *January*, in the year aforeſaid, for and unto the full end and term of five years thence next enſuing, and fully to be compleat and ended; by virtue of which ſaid demiſe, he the ſaid *John Den* entered into the ſaid premiſſes, with the appurtenances,

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purtenances, and was poſſeſſed thereof, until the ſaid *Richard Fen* afterwards, to wit, on the tenth day of *January*, in the nineteenth year aforeſaid, with force and arms, &c. entered on the premiſſes aforeſaid, with the appurtenances, in the poſſeſſion of the ſaid *John Den*, and then and there ejected, drove out, and amoved the ſaid *John Den* from his ſaid farm; his ſaid term therein not being yet ended: and him the ſaid *John Den*, ſo ejected, drove out and amoved, hath kept out, and ſtill doth keep from his poſſeſſion thereof, and other injuries to him then and there did, againſt the peace of our ſaid lord the king, and to the damage of the ſaid *John Den* of ten pounds, and therefore he brings ſuit, &c.

A. B. attorney for the plaintiff.
———— for the defendant.

Pledges to proſecute, { *John Doe*, and *Richard Roe.*

Then ſubſcribe the notice, the form of which ſee hereafter.

The form of a *declaration* on a ſingle demiſe by *original* is as follows:

Hilary Term, in the 20*th* year of the reign of king *George* the *third.*

Middleſex. *Richard Fen*, late of the pariſh of St. *Mary*, *Iſlington*, yeoman, was attached to anſwer *John Den* of a plea, wherefore with force and arms he entered into four meſſuages, four barns, &c. with the appurtenances, in the pariſh of St. *Mary*, *Iſlington*, which *William Smith*, eſquire, demiſed to the ſaid *John Den* for a term which is not yet expired, and ejected him from his ſaid farm, and other wrongs to him did, to the great damage of the ſaid *John*, and againſt the peace of our ſaid ſovereign lord the king. And *whereupon* the ſaid *John Den*, by *William Lyon*, his attorney, complains, that *whereas* the ſaid *William Smith*, on the *firſt day of March*, *in the nineteenth year of the reign* of

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of our preſent ſovereign lord the king, at *Weſtminſter*, in the ſaid county of *Middleſex*, had demiſed to the ſaid *John Den* the ſaid tenements, with the appurtenances, to have and to hold to the ſaid *John Den*, and his aſſigns, the aforeſaid tenements, with the appurtenances, from the ſaid firſt day of *March*, in the year aforeſaid, unto the full end and term of five years thence next enſuing, and fully to be compleat and ended: by virtue of which ſaid demiſe, the ſaid *John Den* entered into the ſaid tenements, with the appurtenances, and was poſſeſſed thereof; and the ſaid *John Den*, being ſo poſſeſſed thereof, he the ſaid *Richard Fen* afterwards, to wit, on the ſecond day of *March*, in the year aforeſaid, with force and arms, *&c.* entered into and upon the ſaid tenements, with the appurtenances, which the ſaid *William Smith* had demiſed to the ſaid *John Den* as aforeſaid, for the term aforeſaid, which is not yet expired, and ejected the ſaid *John Den* from his ſaid farm, and other wrongs to him then and there did, to the great damage of the ſaid *John Den*, and againſt the peace of our ſaid ſovereign lord the king; whereupon the ſaid *John Den* ſaith, that he is injured, and hath damage to the value of 20 *l.* and therefore he brings ſuit, *&c.*

For other forms of *declarations*, ſee the various books of *entries*.

The notice to be written under the declaration is in the following form:

To Mr. *John Bull.*

I am informed, that you are in poſſeſſion, or claim title to the premiſſes, in this declaration of ejectment mentioned, or to ſome part thereof; and I being ſued in this action as a caſual ejector, and having no claim or title to the ſame premiſſes, do adviſe you to appear on the firſt day of next *Eaſter term*, in his majeſty's court of *King's Bench* [or *Common Pleas*, as the caſe is] at *Weſtminſter*, by ſome attorney of that court; and then and there, by rule of the ſame court, to cauſe yourſelf to be made defendant in my ſtead, otherwiſe I ſhall ſuffer judgment to be entered

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entered againſt me, and you will be turned out of poſſeſſion.

Your loving friend,

The 1ſt day of *February*, 1780. *Richard Fen.*

The notice in ejectment was to appear on the *eſſoign-day* of the term, and held ill; for it ſhould be to appear the firſt day in full term, which is the firſt day in term. *Stra.* 1049.

B. R.

If the premiſes lie in *London* or *Middleſex*, make the notice to appear on the *firſt day of the next term* to that of which the declaration is entitled; otherwiſe, if made generally, the tenant will have the whole of the next term to appear in.

But if the premiſſes lie in any other county, the notice ſhould be to appear the next term generally.

C. B.

The ſame in this court.

The notice may be either for the beginning of the next term, or the next term generally.

As many copies of the *declaration* muſt be made out on treble penny ſtamped paper, as there are tenants in poſſeſſion of the premiſſes which the plaintiff claims; and each declaration muſt be perſonally ſerved on the tenant, or his wife, before the *eſſoign-day* of the term wherein he is to appear, otherwiſe the plaintiff cannot have judgment till the term following. And the notice muſt be read over on the delivery, and fully explained.

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A Copy of the *declaration*, and notice thereon, muſt be delivered perſonally to the tenant or his wife, to whom, at the time of delivery, the notice ſhould be read over, or an account given of the contents and meaning thereof.

And a delivery to his ſon, daughter, or ſervant, he being abroad, or out of the way, is not a good delivery, unleſs it evidently appears to the court, that ſuch declaration and notice came to his hands before the eſſoign-day of the term; and that on receipt thereof he very well underſtood the contents and meaning of the notice; and in ſuch caſe it has been held a good delivery. *Salk.* 225. *pl.* 5.

The tenant in poſſeſſion acknowledged the receipt of a declaration in ejectment on a *Sunday*, which, before the *eſſoign-day*, had been delivered to his daughter, and ſhe made acquainted of the contents. 2 *Barnes* 148. But *q.* for a *declaration in ejectment* is in the nature of proceſs, and no proceſs ſhall be ſerved on a *Sunday*, by the ſtat. 29 *Car.* 2. *c.* 7. *ſ.* 6. Though the delivery of a *declaration*, in another action, on a *Sunday*, had been held good; but that is not proceſs.

Upon affidavit that they had tendered a declaration in ejectment, and that the ſervants refuſed to call their maſter, or receive it, ſaying, they had orders to take no papers; it was ordered, that leaving it at the houſe ſhould be ſufficient. *Stra.* 575.

The declaration was tendered to the tenant in poſſeſſion, who refuſed it; whereupon it was left on the floor in his preſence; and he entering into a parlour, and ſhutting the door, the perſon who ſo tendered and left the declaration, read the notice aloud, ſo that the tenant might hear it; and this was held good ſervice.

The tenant ſecreted himſelf in the houſe, ſo that he could not be perſonally ſerved; whereupon, on motion for a rule to ſhew cauſe why ſervice of it on the ſervant ſhould not be good, the court ordered the rule to be ſerved in that manner.

The wife of the tenant in poſſeſſion, on a perſon's knocking at the door of the houſe in order to ſerve the declaration, opened a wicket in the door, and looked through it, and was then acquainted with the contents of the declaration, and the *Engliſh* ſubſcription was read to her; and immediately after, and before the declaration could be tendered

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dered to her, ſhe ſhut the wicket; whereupon the declaration was fixed upon the door, as by affidavit appeared; and it was ſworn, that the tenant in poſſeſſion afterwards acknowledged the receipt of the declaration on the day it was tendered to his wife and fixed upon the door; the ſervice was held inſufficient, becauſe the tenant's acknowledgment that he received the declaration is not enough. An actual delivery, or tender, and refuſal, ought either to be proved or confeſſed. *Barnes* 171.

On motion for judgment, upon an affidavit, that tenant in poſſeſſion refuſed to accept the declaration when tendered to him; that he was acquainted with the contents; and that he brought a gun, and ſwore he would ſhoot the perſon who tendered the declaration, if he did not get off his land; whereupon the declaration was laid down on the ground in the preſence of defendant and his man, whom defendant ordered not to take it up. The court were of opinion, that theſe circumſtances amounted to good ſervice, and made a rule for judgment. *Per cur.* It is the ſame thing as a continual claim, where the party comes as near the land as he can to make his claim, for fear of his life. *Barnes* 174.

The affidavit of ſervice of declaration was, that deponent did ſerve the wives of *A.* and *B.* who, or one of them, are tenants in poſſeſſion, *&c.* the court refuſed to make a rule for judgment; the affidavit is defective. *Ibid.*

On motion for judgment againſt the caſual ejector, upon an affidavit, that the declaration was tendered to the wife of the tenant in poſſeſſion, who refuſed to open the door of the houſe, but looked out of a parlour window, and was acquainted with the contents; and the ſubſcription was read to her, after which ſhe refuſing to accept the declaration, it was put in at the window to her. The ſervice was held ſufficient. *Barnes* 178.

The declaration was tendered to the wife of the tenant in poſſeſſion, upon the premiſſes; ſhe was acquainted with the contents thereof, and of the ſubſcription, through a window, which ſhe refuſed to open or receive the declaration; and thereupon the declaration was left upon the outſide ledge of the window. The perſon who tendered the declaration ſwore, that he heard the woman's voice diſtinctly through the window, and was well aſſured ſhe heard what he ſaid, by the anſwers ſhe gave him; the ſervice was held ſufficient

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ſufficient, and the common rule for judgment was made. *Barnes* 180.

A declaration in ejectment ſerved on the church-wardens and overſeers of a pariſh, who rented a houſe for harbouring ſome of the pariſh poor, and did not otherwiſe occupy the houſe than by placing the poor in it, deemed ſufficient ſervice, and a rule made for judgment. *Barnes* 181.

The declaration was left with the father of the tenant in poſſeſſion, with the uſual ſubſcription, and he was acquainted with the contents; after which, and before the eſſoign-day, the tenant acknowledged the receipt of it. Held ſufficient. *Barnes* 176.

Affidavit of ſervice of declaration on the wife of tenant in poſſeſſion, as ſhe informed deponent, and as he verily believes; held ſufficient. *Barnes* 194.

The tenant ſecreting himſelf, ſo that he could not be ſerved, the declaration was delivered to the daughter, who kept the houſe, and ſhe made acquainted with the contents. A rule was made for the tenant to ſhew cauſe, why ſuch former ſervice ſhould not be deemed good. The rule to be ſerved on the daughter at the houſe.

On affidavit, that one of the tenants is a *lunatic*, and that one *C.* lives with her, tranſacts her buſineſs, and has the ſole conduct thereof, and of her perſon, but would not permit the deponent to have acceſs to her, in order to ſerve her with the declaration; whereupon, he delivered it to the ſaid *C.* and a rule was made for the lunatic and *C.* both to ſhew cauſe, why ſuch ſervice ſhould not be good, and ſervice of the rule on the ſaid *C.* to be good.

On affidavit, that the tenant abſconded to avoid being ſerved, and that ſhe came into the poſſeſſion ſurreptitiouſly, and of ſervice of the declaration on her ſon, who is her ſervant, manages her affairs, and lives in her family, a rule was made to ſhew cauſe, why ſuch ſervice ſhould not be good, and leaving a copy of the rule at her houſe to be good ſervice of the rule.

The tenant in poſſeſſion abſconded, and on affidavit thereof, the court ordered that ſervice of the declaration upon his niece, the only manager of the houſe, and reſident in it, and fixing up another copy on the premiſes, ſhould be good; and made a rule to ſhew cauſe, why judgment ſhould not be entered up againſt the caſual ejector. And ordered that ſervice of this rule, on *any* perſon in the houſe, and

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and if no perſon there, then fixing the ſame on the door, ſhould be good ſervice thereof. *Burr.* 4 *pt.* 1116.

The tenant was perſonated at the time of ſervice, by another who accepted the ſervice in the name of the tenant; and the court made a rule to ſhew cauſe, why it ſhould not be deemed good ſervice upon the tenant himſelf; and why judgment ſhould not be ſigned againſt the caſual ejector, in default of his appearing; and that leaving a copy of this rule at his houſe, with ſome perſon there, or if no one to be met with, affixing it on the door, ſhould be good ſervice thereof. Which rule was made abſolute on a proper affidavit. *Burr.* 4 *pt.* 1181.

When the tenant is ſerved with the declaration, a copy of the declaration muſt be made out on ſtamps, to annex to an *affidavit* of ſervice of the declaration on the tenant, in order to move for judgment on default of the tenant's appearance. Which *affidavit* muſt be to the following effect:

In the *King's Bench.*

John Den, on the demiſe of *William Smith*, plaintiff, againſt *Richard Fen*, defendant.

A. B. of, *&c.* gentleman, maketh oath, that he this deponent, did, on the day of laſt paſt, deliver to Mr. *John Bull*, the tenant, in poſſeſſion of the premiſes in the declaration hereunto annexed mentioned, or of ſome part thereof, a true copy of the ſaid declaration, and of the notice thereunder written; and did at the ſame time inform him the ſaid *John Bull*, that it was a declaration in ejectment; and that unleſs he appeared by ſome attorney in this court, on the firſt day of this preſent *Eaſter* term, and cauſe himſelf, by rule of court, to be made defendant, in the room of the caſual ejector, *Richard Fen*, judgment would be entered againſt the caſual ejector by default; and that he the ſaid *John Bull* would thereupon be turned out of poſſeſſion; or words to that effect.

Sworn, *&c.* *A. B.*

This affidavit muſt be poſitive, that the tenant is tenant in poſſeſſion.

Of moving for Judgment againſt the *caſual Ejector*.

ON the following affidavit, and default of the tenant's appearance, you move for judgment againſt the *caſual ejector*; which affidavit is delivered over to the *clerk of the rules in B. R. or ſecondary in C. B.* when the motion is made to be filed; and then you draw up the *rule, with the clerk of the rules in B. R. or ſecondary in C. B.*

If the premiſſes lie in *London* or *Middleſex*, and the notice be to appear the firſt day of the next term, move for this rule the beginning of the term, and then the tenant has *four days* incluſive next after the motion to appear in *; but if the motion is made late in term, the court will not allow him more than one or two days; and will ſometimes order the tenant to appear immediately, ſo that the plaintiff may be able to give notice of trial within the term. But if the motion is not made before the laſt four days of the term, the tenant will then have, by the rule, until two days before the eſſoin day of the ſubſequent term, to appear. But if the notice be to appear generally, then the tenant hath the whole term to appear in. And if the tenements lie in any other county than *London* or *Middleſex*, though the declaration be delivered before the eſſoin day of *Eaſter* or *Michaelmas terms*, yet the tenant has till four days before the next iſſuable term, *i. e.* either *Trinity* or *Hilary*, to appear in *C. B.* till within *four days* excluſive, after the next iſſuable term. And if the premiſes are in one of the northern counties, or where the aſſizes are held but once a year, the tenant has till *four days* next after the end of the term, preceding the aſſizes, to appear.

The rule for judgment againſt the *caſual ejector*, is drawn out in the following manner, in the reſpective courts:

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* But in *C. B.* in ſuch caſe, by *Reg.* 32 *Car.* 2. "The plaintiff ſhall take nothing by his motion for judgment, againſt the *caſual ejector*, for default of appearance, unleſs the motion be made within one week next after the firſt day of every *Michaelmas* term, and every *Eaſter* term; and within four days after the firſt day of every *Hilary* and *Trinity* term.

Of moving for Judgment againſt the *caſual Ejector*.

The rule for judgment againſt the *caſual ejector* is drawn out in the following manner in the reſpective courts,

In *B. R.*

Saturday next, after eight days of the purification of the bleſſed virgin Mary, in the twentieth year of the reign of king George the third,

Den on the demiſe of *Smith, eſq.* againſt *Fen.* } Unleſs *John Bull*, the tenant in poſſeſſion of the premiſes in queſtion, ſhall appear and plead to iſſue on *Thurſday* next, after the end of the term, let judgment be entered for the plaintiff, againſt the now defendant *Fen*, by default. And in the mean time proceedings to ſtay, upon the motion of Mr. *Bond*.

Let the rule be entered

By the court.

In *C. B.*

Hilary, the twentieth of king *George* the third.

Den againſt *Fen*, the caſual ejector. } *Twelfth* day of *February*, upon the affidavit of *John Thomas*, gent. it is ordered, That unleſs *John Bull*, tenant in poſſeſſion of the tenements in queſtion, or any other perſon concerned in the title thereof, on *Saturday* next ſhall appear by an attorney of this court, who ſhall then forthwith receive a declaration, and plead thereto the general iſſue, and conſent to the common rule for confeſſing leaſe, entry, and ouſter, upon the trial to be had. Let judgment againſt the caſual ejector be entered, and in the mean time proceedings are to ſtay upon the motion of Mr. *Serjeant Walker*.

By the court

Fothergill.

By *Reg. Hil.* 2 *Geo.* 2. in *C. B.* No declaration in ejectment ſhall be taken or received by the *ſecondary*, unleſs ſigned by ſome ſerjeant at law, and delivered by himſelf to the ſecondary in open court.

And by the ſame rule, the ſecondary ſhall, the morning next after the end of every term, and at all other times when required, ſhew to any other perſon, who ſhall demand the ſame, his alphabetical paper of ejectments, moved or delivered into court in each term.

Of

Of appearing in Ejectment.

BY the 11 *Geo.* 2. *c.* 19. *ſ.* 12. *Tenants* are obliged to give notice to their landlords, of a declaration in ejectment being delivered, under pain of forfeiting three years improved or rack rent of the premiſes ſo held and enjoyed by the tenant.

And as the tenant in poſſeſſion could not be compelled to appear and enter into the common rule, to become defendant inſtead of the caſual ejector; ſo neither could the landlord alone, without joining with the tenant, enter into ſuch rule, and be made ſole defendant. But to remedy this inconvenience, by ſect. 13. of the ſame ſtatute, it is enacted, "That it may be lawful for the court where ſuch ejectment ſhall be brought, to ſuffer the landlord to make himſelf defendant, by joining with the tenant, in caſe he ſhould appear; but in caſe ſuch tenant ſhall neglect or refuſe to appear, judgment ſhall be ſigned againſt the *caſual ejector*, for want of ſuch appearance: but if the landlord, *&c.* of any part of the lands, *&c* for which ſuch ejectment was brought, ſhall deſire to appear by himſelf, and conſent to enter into the like rule, that by the courſe of the court, the tenant in poſſeſſion, in caſe he or ſhe had appeared, ought to have done; then the court, where ſuch ejectment ſhall be brought, ſhall and may permit ſuch landlord ſo to do; and order a ſtay of execution upon ſuch judgment, againſt the caſual ejector, until they ſhall make further order therein."

Note: Under this act, no one but a *landlord*, can be made a defendant, *Bull. Ni. Pri.* 95. that is, a perſon who is in ſome degree of poſſeſſion, as in receiving rent, *&c.* *Suppl. to Barnes* 29.

Therefore, where a man deviſed his eſtate to *J. S.* and the heir brought an ejectment againſt the tenant in poſſeſſion, the court, on motion, held, that *J. S.* could not be made a defendant. *Roe ex dem. Leake* v. *Doe. Mich.* 29 *Geo.* 2. *C. B.* In like manner a mortgagee, who had never received the rents, was refuſed to be admitted a defendant with the tenant. *Jones ex dem. Woodward* v. *Williams. Tr.* 15 *Geo.* 2.

But a lord claiming by *eſcheat*, was admitted to defend. *Burr.* 4 *pt.* 1296.

When the rule to plead is out, and no plea and rule left by the tenant, for which you muſt ſearch all the judges books in *B. R.* if the ejectment is *by bill*; and if by *original*, the *filazer*'s office; or if in *C. B.* the *prothonotary's*

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plea-book; you ingroſs your *declaration* on a double half-crown ſtamp; and on the roll draw up the rule againſt the caſual ejector, for judgment, and then carry the ſame to the *clerk of the judgments* in *B. R.* who, on producing the rule, will ſign the judgment, for which you pay 3 *s.* 6 *d.* or if in *C. B.* it muſt be carried to the *prothonotary*, who will ſign the judgment; and then you enter up the judgment by *nil dicit* on the roll, and then take out an *habere facias poſſeſſionem.*

Note: If judgment is ſigned againſt the *caſual ejector*, without the tenant of the premiſes coming in to defend, execution cannot be taken out to turn the tenant out of poſſeſſion, without leave of the court on motion; on which a rule to ſhew cauſe will be granted.

An attorney cannot appear for the *tenant* in poſſeſſion in ejectment, by order of the landlord. *Barnes* 39.

But if the tenant has refuſed to appear, and the *landlord*, according to the 11 *Geo.* 2. *c.* 19. would wiſh to defend, he muſt apply to the court for that purpoſe, on an *affidavit* of the *tenant*'s refuſal; and a copy of the rule for that purpoſe, when obtained of the *clerk of the rules in B. R. or ſecondary in C. B.* muſt be annexed to the plea and conſent rule.

The *affidavit* of the tenant's refuſing to defend an *ejectment*, in order to have the landlord admitted defendant, is as follows:

In the *King's Bench.*

Between { *John Den* on the demiſe of *William Smith*, plaintiff, and *Richard Fen*, defendant.

A. B. of, &c. maketh oath, that he this deponent, did, on the day of laſt, by the direction of *Thomas Hodgſon*, eſquire, landlord of the premiſes in queſtion, in this cauſe apply to *John Bull*, tenant in poſſeſſion of the ſame premiſes, to know whether he the ſaid *John Bull* would appear and become defendant in this cauſe; or would permit the ſaid *Thomas Hodgſon* to defend his title to the ſaid premiſes, in the name of the ſaid *John Bull*; and this deponent, at the ſame time, ſhewed and offered to deliver to the ſaid *John Bull*, a note, ſigned by the ſaid *Thomas Hodgſon*, whereby the ſaid *Thomas Hodgſon* promiſed to defend and keep the ſaid

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ſaid *John Bull* of, from, and againſt all coſts and charges in this cauſe; and the ſaid *John Bull* told this deponent, that he would not appear and become defendant in this cauſe, or any way concern himſelf therein.

Sworn, &c. *A. B.*

Upon this *affidavit*, the landlord may appear and defend in like manner as the tenant might have done; and the method of appearing is as follows:

If the *tenant* or *landlord* appears, his attorney gets a blank conſent rule from a ſtationer, unſtamped, or from the *ſecondary* in *C. B.* then fills it up, making the *tenant* or *landlord* defendant, inſtead of the *caſual ejector*, entitling the cauſe in the margin, and inſerting the premiſes, as deſcribed in the declaration, or ſuch part thereof as the party would wiſh to defend; then the attorney for the defendant ſigns his name at the bottom, leaving a blank ſpace for the plaintiff's attorney to do the like, [for this is rather an agreement between the parties, than the *rule itſelf*, which is drawn out by the officer] and engroſſes the general iſſue on ſtamped paper, and afterwards annexes the ſame to the rule; [and if there is a rule to admit the *landlord* defendant, the tenant having refuſed, annex that alſo] then file *common bail, if by bill in* B. R. *with the clerk of the common bails*; and if by *original in B. R.* enter the appearance with the *filazer*, who will mark it; or if in *C. B.* enter appearance with the *proper filazer*, who will ſtamp the rule; which being done there, if the proceedings are in *B. R.* you carry and leave this rule, &c. at any of the judges chambers; or if in *C. B.* you carry and leave the ſame with the *prothonotary*.

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The form of the conſent rule in *B. R.* is as follows:

Michaelmas term, in the twentieth year of king *George* the third.

Middleſex. *Den*, on the demiſe of *Smith*, of four meſſuages, four barns, four ſtables, fifty acres of land, fifty acres of arable, fifty acres of paſture, twenty acres of wood, and twenty acres of underwood, with the appurtenances, ſituate in the pariſh of St. *Mary*, *Iſlington*, in the county of *Middleſex*.

It is ordered, by conſent of the attornies of both parties, that *John Bull* [the tenant or landlord, as the caſe is] be made defendant, in the ſtead of the now defendant *Richard Fen*, and do appear forthwith at the ſuit of the plaintiff, *and file common bail*, [if *by original*, leave out theſe words] and receive a declaration in an action of treſpaſs and ejectment, for the premiſes in queſtion in this cauſe, and forthwith plead thereto, not guilty; and upon the trial of the iſſue, confeſs leaſe, entry, and ouſter, and inſiſt upon the title only; otherwiſe, let judgment be entered for the plaintiff, againſt the now defendant *Richard Fen*, by default; and if, upon the trial of the iſſue, the ſaid *John Bull*, ſhall not confeſs leaſe, entry, and ouſter, whereby the plaintiff ſhall not be able further to proſecute *his bill* [or if *by original*, *his writ*] againſt the ſaid *John Bull*, then no coſts ſhall be allowed for not proſecuting the ſame; but the ſaid *John Bull* ſhall pay coſts to the plaintiff in that caſe, to be taxed. And it is further ordered, that if upon the trial of the ſaid iſſue, a verdict ſhould be given for the ſaid *John Bull*, or it ſhall happen, that the plaintiff ſhall not further proſecute his *ſaid bill* [or writ], for any other cauſe than for not confeſſing leaſe, entry, and ouſter, then the leſſor of the plaintiff, ſhall pay to the ſaid *John Bull* his coſts in that behalf to be adjudged

By the court.

O. P. for the leſſor of the plaintiff.
I. M. for the defendant.

If

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The form of the conſent rule in *C. B.* is as follows:

Michaelmas term, in the twentieth year of king *George* the third.

Middleſex, to wit. *Den* againſt *Fen*, for four meſſuages, four barns, four ſtables, *&c.* with the appurtenances, in the pariſh of St. *Mary, Iſlington*, in the county of *Middleſex*, on the demiſe of *William Smith*.

It is ordered, by conſent, *O. P.* attorney for the plaintiff, and *I. M.* attorney for *John Bull*, who claims title to the premiſes in queſtion, that the ſaid *John Bull* ſhall be admitted defendant; and that the ſaid *John Bull* ſhall immediately appear by his ſaid attorney, who ſhall receive a declaration, and plead thereto the general iſſue this term; and at the trial to be had thereon, ſhall appear in his proper perſon, or by his counſel or attorney, and confeſs the leaſe, entry, and ouſter, of ſo much of the tenements ſpecified in the plaintiff's declaration, as are in the poſſeſſion of the ſaid defendant, or his tenants, or any perſons claiming by or under his title; or that in default thereof, judgment ſhall be thereupon entered againſt the defendant *Richard Fen*, the caſual ejector; but proceedings ſhall be ſtayed againſt him, until default ſhall be made in any of the premiſſes: And by the like conſent, it is further ordered, that if, by reaſon of any ſuch default, the plaintiff ſhall happen no be nonſuited upon the trial, the ſaid *John Bull* ſhall take notice thereof, but ſhall thereupon pay to the plaintiff, coſts to be taxed by the prothonotary. And it is further ordered, that the leſſor of the plaintiff ſhall be liable to the payment of coſts to the ſaid *John Bull*, by the court here to be in any manner allowed or adjudged

By the court.

O. P. attorney for the plaintiff.
I. M. for the defendant.

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If the defendant enters into the common rule, to confeſs *leaſe, entry, and ouſter*, for a part of the premiſes only, his attorney ſhould give notice to the plaintiff's attorney, of what premiſes he means to defend in this manner:

In the *King's Bench.* { *Den*, on the demiſe of *Smith* againſt *Fen.*

Sir,

Take notice, that I defend for a *meſſuage or tenement, a garden and ſtable*, [ſpecifying the particular premiſes], ſituate in the pariſh of St. *Mary, Iſlington*, now in the poſſeſſion of the ſaid *John Bull*, or his under-tenant.

Dated this day of 1780.

Yours, &c.

I. M. defendant's attorney,

To Mr. *O. P.* plaintiff's attorney.

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A tenant is not obliged to appear in ejectment, though the landlord is ready to indemnify him. *Barnes* 173.

In *C. B.* it was moved, that the landlords, *viz. A. B.* and *C.* might be made defendants without the tenant in poſſeſſion, who refuſed to appear. But the motion was denied, and the common rule was made to add the landlords to the tenants in poſſeſſion. *Barnes* 172.

Motion, that Mr. *P.* who claimed title, might be made defendant, inſtead of the late tenant, who quitted poſſeſſion, denied. *Barnes* 175.

Motion, on affidavit that the tenant in poſſeſſion was a material witneſs for the landlord, that therefore the landlord might be made a defendant, in the room of the tenant in poſſeſſion. Objected, that it was never done, and it would not make him a witneſs when done. And *per cur.* He is liable for the meſne profits. The declaration is regularly delivered to the tenant in poſſeſſion. It was never done in this court. *Bourne* v. *Turner*. *Stra.* 632.

On motion for the landlord, to defend upon the ſtatute of 11 *Geo.* 2. the court objected, that this motion could not properly be made, till after judgment ſigned againſt the caſual ejector; and that an affidavit ought to be produced of the tenant's refuſal, or neglect to appear. To which it was anſwered, that after judgment ſigned againſt the caſual ejector, the plaintiff might take poſſeſſion. But the court held the affidavit to be neceſſary, and made no rule, declaring, that the intent of ſigning judgment againſt the caſual ejector was only, that the plaintiff, after having tried his cauſe againſt the landlord, [the tenant not being a party] might have the benefit of his verdict, and take poſſeſſion under the judgment, which under ſuch verdict he could not. It ſeems reaſonable [upon a proper affidavit] to grant a rule to ſhew cauſe, before judgment againſt the caſual ejector can be ſigned, to prevent the ill conſequences of taking poſſeſſion immediately after. *Barnes* 179.

It was moved on the ſtatute 11 *Geo.* 2. that the landlord might be added defendant to *C. D.* one of his tenants, who appeared to defend the premiſes in his poſſeſſion; and that as to the reſidue of the premiſes contained in the declaration, in the poſſeſſion of *T. M.* another tenant, who refuſed to appear, [as *per* affidavit] the landlord might appear and defend ſingly; and that the plaintiff might ſign judgment againſt the caſual ejector, as to the tenants in poſſeſſion of *T. M.*

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T. M. but that the writ of *hab. fac. poſſ.* be ſtayed till further orders. *Barnes* 179.

A regular judgment had been fairly obtained againſt the *caſual ejector*, the tenant having neglected to give notice to his landlord; for which reaſon, the landlord moved to ſet aſide the judgment. The landlord was an infant, and therefore could not conſent to any iſſue. The court held, that the poſſeſſion ought not to be changed, where there had been no trial, nor opportunity of trying; and ordered, that the tenant in poſſeſſion ſhould pay the coſts. That the regular judgment and writ of poſſeſſion ſhould be ſet aſide, that the landlord be made defendant, and not to ſet up any ſatisfied term or truſt eſtate; and to admit that *Z. T.* was ſeized. *Burr.* 4 *pt.* 1996.

Where the landlord is made defendant, the plaintiff muſt prove the landlord tenant in poſſeſſion of the premiſes in queſtion. 1 *Wilſ.* 220.

A landlord was made defendant, according to the 11 *Geo.* 2. *c.* 19. *ſ.* 13. on the tenant's non-appearance, and entering into the common rule; and thereupon a ſtay of execution was ordered, until the court ſhould make further order. *Burr.* 4 *pt.* 757.

If a writ of error is brought by the landlord, it is a ſufficient reaſon againſt taking out execution. *Ibid.*

But the proper opportunity for the landlord, to make his ſtand againſt the execution, is by ſhewing this as cauſe againſt the plaintiff's motion for leave to take it out. *Ibid.* And if he omits this opportunity, the execution regularly iſſued ſhall not be ſet aſide. *Ibid.*

A landlord made defendant without his tenant, may bring error, and ſtay execution. *Stra.* 1241.

When the rule for judgment againſt the *caſual ejector* is out, the *plaintiff*'s attorney muſt ſearch at the chambers of the reſpective judges in *B. R.* for the defendant's plea, [in caſe he has appeared] and conſent rule. To which, after the judge, with whom it was left, has ſigned it, and the plaintiff's attorney given a receipt for the ſame, he ſigns his name over the defendant's attorney, and then carries it to the *clerk of the rules*, who files it, and draws up the *conſent rule* from it on ſtamp, for which he is paid 6 *s.* of which rule the plaintiff's attorney makes a copy, and annexes the ſame to the iſſue, when delivered to the defendant's attorney for trial. But in *C. B.* when the defendant has appeared, and left the conſent rule in the *prothonotary's office*,

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office, the plaintiff's attorney reſorts there for it; and having ſigned his name over that of the defendant's attorney, he gets two *rules* from it, drawn up by the *ſecondary* on ſtamps, one for each party, for which he pays 7 *s.* and then the plaintiff's attorney makes up the iſſue, and delivers a copy thereof, with notice of trial on the defendant's attorney. And proceeds to trial as in other caſes.

Note: If the plaintiff proceeds in ejectment *by original*, he does not ſue out his *original writ* at firſt, but proceeds by delivering his declaration as *by bill*; but if a *writ of error* ſhould be brought, he muſt ſue out his *original writ*, which muſt be returned by the ſheriff, and filed on the treaſury; or if the *tenant* has not appeared, the *original* muſt be ſued, returned, and filed properly; and if he has appeared, then, on ſuing out the *original*, you muſt inſert his name, inſtead of the nominal defendant.

The appearance, when by *original* in *B. R.* is entered with the *filazer*, in like manner as it is in other ſuits by *original*; and the writs are made out returnable on a *general return day*, as in other caſes.

The *præcipe* for the *curſitor*, to make out the *original writ* by, is as follows;

Middleſex, to wit. If *John Den* ſhall make you ſecure, *&c.* then put, *&c. Richard Fen*, late of, *&c.* that he be before our lord the king, on whereſoever, *&c.* to ſhew wherefore, with force and arms he entered into four meſſuages, *&c.* [reciting the premiſes] with the appurtenances in the pariſh of St. *Mary, Iſlington*, in the county of *Middleſex*, which *William Smith* demiſed to him for a term, which is not yet expired, and ejected, *&c.* and other enormities, *&c.* againſt the peace, *&c.* and to the damage, *&c.*

——— *January*, 1780.

Q. P.

Of Proceeding to recover Premiſes according to the 4 *Geo.* 2. *c.* 28. by a Landlord having a Right of Re-entry.

BY the * 4 *Geo.* 2. *c.* 28. *ſ.* 2. after reciting that inconveniences often happen to landlords or leſſors in caſes of re-entry for non-payment of rent, by reaſon of the many niceties that attend the re-entries at common law, *&c.*

It is enacted, "That in all caſes between landlord and "tenant, as often as it ſhall happen that one half year's "rent ſhall be in arrear, and the landlord or leſſor, to "whom the ſame is due, hath right by law to re-enter for "the non-payment thereof; ſuch landlord or leſſor ſhall "and may, without any formal demand or re-entry, ſerve "a declaration in ejectment for the recovery of the demiſed "premiſes; or in caſe the ſame cannot be legally ſerved, "or no tenant be in actual poſſeſſion of the premiſes, then "to affix the ſame upon the door of any demiſed meſſuage; "or in caſe ſuch ejectment ſhall not be for the recovery of "any meſſuage, then upon ſome notorious place of the "lands, tenements, or hereditaments, comprized in ſuch "declaration in ejectment; and ſuch affixing ſhall be "deemed legal ſervice thereof; which ſervice, or affixing "ſuch declaration in ejectment, ſhall ſtand in the place "and ſtead of a demand and re-entry; and, in caſe of "judgment againſt the caſual ejector, or nonſuit, for not "confeſſing leaſe, entry and ouſter, it ſhall be made appear "to the court, where the ſaid ſuit is depending, by affida-"vit, or be proved upon the trial, in caſe the defendant "appears, that half a year's rent was due before the ſaid "declaration was ſerved; and that no ſufficient diſtreſs "was to be found on the demiſed premiſſes countervailing "the arrears then due; and that the leſſor, or leſſors, in "ejectment had power to re-enter: then, and in every "ſuch caſe, the leſſor, or leſſors in ejectment, ſhall reco-"ver judgment and execution, in the ſame manner as if "the rent in arrear had been legally demanded, and a re-"entry made; and in caſe the leſſee or leſſees, his, her, or "their aſſignee or aſſignees, or other perſon or perſons "claiming or deriving under the ſaid leaſes, ſhall permit "and ſuffer judgment to be had and recovered on ſuch

* This ſtatute relates only to ejectments for non-payment of rent, where the landlord has a right to re-enter.

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Of Proceeding to recover Premiſes according to the 4 *Geo.* 2. *c.* 28. by a Landlord having a Right of Re-entry.

" ejectment, and execution to be executed thereon, without " paying the rent and arrears, together with full coſts, " and without filing any bill or bills for relief in equity, " within ſix calendar months after ſuch execution exe- " cuted; then, and in ſuch caſe, ſuch leſſee, or leſſees, *&c.* " and all others claiming and deriving under the ſaid leaſe, " ſhall be barred or foreclоſed from all relief or remedy in " law or equity, other than by writ of error for reverſal " of ſuch judgment, in caſe the ſame ſhall be erroneous; " and the ſaid landlord, or leſſor, ſhall, from thenceforth, " hold the ſaid demiſed premiſes diſcharged from ſuch " leaſe: and if on ſuch ejectment verdict ſhall paſs for the " defendant, or the plaintiff ſhall be nonſuited therein, " except for the defendant's not confeſſing, *&c.* then, in " every ſuch caſe, ſuch defendant ſhall have and recover " his, her, or their full coſts: *Provided always*, That no- " thing herein contained ſhall extend to bar the right of " any mortgagee, or mortgagees, of ſuch leaſe, or any " part thereof, who ſhall not be in poſſeſſion, ſo as ſuch " mortgagee, or mortgagees, ſhall and do, within ſix ca- " lendar months after ſuch judgment obtained, and exe- " cution executed, pay all rent in arrear, and all coſts and " damages ſuſtained by ſuch leſſor, perſon or perſons, en- " titled to the remainder or reverſion as aforeſaid, and per- " form all the covenants and agreements, which, on the " part and behalf of the firſt leſſee or leſſees, are and ought " to be performed."

By *ſect.* 3. " a leſſee, filing a bill in equity, ſhall not have an injunction, unleſs, within forty days after the anſwer of the leſſor, he bring into court ſo much as the leſſor ſhall in his ſaid anſwer ſwear to be due, over and above allowances and coſts, there to remain till hearing, or to be paid to the leſſor, ſubject to the decree of the court: and in caſe ſuch bill ſhall be filed within the time, and after execution executed, the leſſor of the plaintiff ſhall be accountable only for ſo much, and no more, as he ſhall *really* make *bonâ fide* of the demiſed premiſes from the time of his entering into poſſeſſion; and if what ſhall be ſo made ſhall appear to be leſs than the rent reſerved on the leaſe, then the leſſee, *&c.* ſhall, before he be reſtored to his poſſeſſion, pay to the leſſor the deficiency."

Of Proceeding to recover Premiſes according to the 4 *Geo.* 2. *c.* 28. by a Landlord having a Right of Re-entry.

Sect. 4. Provided, "That if the tenant, *&c.* ſhall, at any time before the trial in ſuch ejectment, pay, or tender to the leſſor, *&c.* or pay into court all the rent and arrears, together with coſts, then further proceedings on the ejectment ſhall ceaſe; and if the leſſee, *&c.* ſhall, upon the bill filed as aforeſaid, be relieved in equity, ſuch leſſee, *&c.* ſhall hold the demiſed premiſſes according to the leaſe thereof, without any new leaſe to be made thereof."

Note: The courts had permitted the tenant to bring into court the arrears of rent and coſts, antecedent to this act. *Salk.* 597.

After judgment againſt the *caſual ejector*, and before any writ of poſſeſſion executed, the court made a rule to ſtay the proceedings, on payment of all rent due and coſts, it not being pretended, that the ejectment was brought on any other title than a re-entry for non-payment of rent. *Stra.* 906.

Per lord *Mansfield*, in the caſe of *Doe ex dem. Hitchings* v. *Lewis*, *Burr.* 4 *pt.* 614. The true end of this act of parliament is to take off from the landlord the inconvenience of his continuing always liable to an uncertainty of poſſeſſion, [from its remaining in the power of the tenant to offer him a compenſation at any time, in order to found an application for relief *in equity*] and to limit and confine the tenant to *ſix calendar months* after execution executed, for his doing this; or elſe, that the landlord ſhould from thenceforth hold the demiſed premiſſes diſcharged from the leaſe.

In moving for judgment upon a *declaration* in ejectment delivered, or in caſe of no tenant, affixed on the premiſſes, according to this act of 4 *Geo.* 2. *c.* 28. the courts require an *affidavit*, that there was half a year's rent in arrear before declaration ſerved, that the leſſor of the plaintiff had a right to re-enter, that no ſufficient diſtreſs was to be found on the premiſes countervailing the arrears of rent then due, that the premiſes were untenanted, or that the tenant could not be legally ſerved with the declaration, (as the caſe is) and that a copy of the declaration was affixed on the moſt notorious, and what part of the premiſes, or the court will not give a rule for judgment.

The

Of Proceeding to recover Premiſes according to the 4 *Geo.* 2. *c.* 28. by a Landlord having a Right of Re-entry.

The affidavit muſt be to the following effect:

In the ———

Between { *George Hunt* on the demiſe of *A. B.* plaintiff, againſt *Richard Roe* defendant in ejectment.

A. B. the leſſor of the plaintiff in this cauſe, and *John Dixon* of, *&c.* ſeverally make oath; and firſt, this deponent *John Dixon*, for himſelf, ſaith, that he this deponent did, on the day of inſtant, ſerve a true copy of the declaration in ejectment hereunto annexed, and the *Engliſh* notice thereunto written, by *affixing the ſame copy on the ſtreet door or outward door of the meſſuage* in queſtion, mentioned in the ſaid declaration, and late in the poſſeſſion of *Philip Howe:* and this deponent, *A. B.* ſaith, that half a year's rent then was and now is due, and in arrear to him this deponent, from the ſaid *Philip Howe*, before the ſaid declaration was ſerved: and this deponent further ſaith, that he this deponent then was, and now is, landlord of the ſaid meſſuage, and that the ſaid *Philip Howe* then was, and now is, tenant to this deponent, and holds the ſaid meſſuage by leaſe from this deponent; and this deponent alſo ſaith, that it appears by the ſaid leaſe, that he the ſaid deponent then had, and now hath power to re-enter on the ſaid meſſuage for the non-payment of the ſaid half year's rent; and this deponent further ſaith, that before the ſaid ejectment was ſerved, no ſufficient diſtreſs was to be found on the ſaid meſſuage, countervailing the arrears of rent then due to this deponent.

Sworn, *&c.*

This *affidavit* is only neceſſary upon moving for judgment againſt the *caſual ejector*, or after a nonſuit at the trial for the tenants not confeſſing *leaſe, entry and ouſter.*

But if the tenant appears, and the ejectment comes to a trial, all the matters in the above *affidavit* muſt be proved upon

Of Proceeding to recover Premiſes according to the 4 *Geo.* 2. *c.* 28. by a Landlord having a Right of Re-entry.

upon the trial. *Per Denniſon*, juſt. *in the caſe of Doe ex dem. Hitchings* v. *Lewis*, *Burr.* 4 *pt.* 614.

The late tenant, or other perſon, claiming title to the premiſſes, has the ſame time to appear in as is allowed to tenants in poſſeſſion.

In *ejectment* by a landlord, the tenant moved to ſtay proceedings upon payment of rent, arrear, and coſts, according to *ſect.* 4. of the above act. And, on a rule to ſhew cauſe, it was inſiſted for the plaintiff, that the caſe was not within the act, but that it was brought likewiſe on a clauſe of re-entry in the leaſe for not *repairing*. And the leaſe was produced in court. However, the rule was made abſolute, with liberty for the plaintiff to proceed upon any other title. *Piere ex demiſe Withers* v. *Sturdy*. *H.* 1752.

By this ſtatute 4 *Geo.* 2. where a landlord has a right of re-entry, and there is half a year's rent due and unpaid, and no ſufficient diſtreſs on the premiſes, or the ſame are untenanted, there is no occaſion for the landlord to make an *actual entry*, *and ſeal a leaſe on the premiſes in the preſence of ſome perſon*, as muſt be done in all other caſes where the premiſes are untenanted. The method of proceeding to recover which, by a perſon claiming *title*, is as follows:

Of Proceeding to recover Premiſes *untenanted*,

IN all caſes, where there is no tenant on the premiſes, and the ſame are vacant, [except in the caſe of *landlord* and *tenant*, where the landlord has a right of re-entry, on half a year's rent being due and unpaid, and he proceeds according to the 4 *Geo.* 2. *c.* 28. *ante*] the proceedings are in the old way by ſealing a leaſe on the premiſes; and then, on the motion for judgment, there muſt be an *affidavit* of the ſealing of the leaſe, and the purport of it to be ſhortly ſet forth in the affidavit; and alſo in what manner the defendant got the poſſeſſion given to and taken from the leſſee, (who is always made plaintiff) and how the declaration was delivered to the defendant, that the court may judge of the regularity of the proceedings.

The method of proceeding is thus:

A. (the perſon claiming title) ſigns the following letter of attorney, to empower *B.* to execute a leaſe in his name of the premiſes in queſtion to *C.* which is done upon the premiſes, *B.* and *C.* being only thereon; then *B.* after having executed the leaſe to *C.* leaves him in poſſeſſion of the premiſes, who is turned out by *D.* to whom, while on the premiſes, *E.* delivers a declaration in ejectment; and then, on *affidavit* of the due execution of the letter of attorney, and executing the leaſe in the above form, you move for judgment.

The letter of attorney is to the following effect:

> " *KNOW* all men by theſe preſents, that I *A. B.* &c. have made, ordained, conſtituted, and in my ſtead and place, and by theſe do make, ordain, conſtitute, and in my ſtead and place put *C. D.* of, &c. my true and lawful attorney, for me, and in my name to enter into and take poſſeſſion of all, &c. in the tenure of, &c. and, when he hath taken poſſeſſion thereof and for me, in my name, and as my deed, to ſeal and execute a leaſe of the ſaid premiſes unto *E. F.* of, &c. to hold the ſame to him, his executors, adminiſtrators, and aſſigns, from laſt paſt, before the date hereof, for the term of years, at the yearly rent of a pepper-corn, (if lawfully demanded) ſubject

Of Proceeding to recover Premiſes *untenanted.*

to a proviſo to be void on my tendering of 6*d.* to the ſaid *E. F.*"

In witneſs, *&c.*

H. H. maketh oath, that he was preſent and did ſee *A. B.* of, *&c.* duly ſign, ſeal, and deliver the letter of attorney hereunto annexed.

The leaſe referred to by the above letter of attorney.

THIS INDENTURE made, *&c.* between *A. B.* of, *&c.* of the one part, and *E. F.* of, *&c.* of the other part, witneſſeth, that the ſaid *A. B.* for and in conſideration of the ſum of five ſhillings of lawful, *&c.* to him in hand paid by the ſaid *E. F.* at and before the ſealing and delivery of theſe preſents, the receipt whereof the ſaid *A. B.* doth hereby acknowledge, hath granted, demiſed, ſet, and to farm let unto the ſaid *E. F.* his executors and adminiſtrators, all, *&c.* now or late in the tenure of, *&c.* to have and to hold the ſaid herein before mentioned and hereby demiſed premiſes, with all and every their appurtenances, unto the ſaid *E. F.* his executors, adminiſtrators, and aſſigns, from the day of laſt paſt, before the date of theſe preſents, unto the full end and term of five years from thence next enſuing, and fully to be compleat and ended, yielding and paying therefore, during the ſaid term, unto the ſaid *A. B.* or his aſſigns, the rent of one pepper-corn, at the feaſt of yearly, (if lawfully demanded) provided always, and theſe preſents are on this condition nevertheleſs, that if the ſaid *A. B.* or his aſſigns, ſhall, at any time or times hereafter, tender, or cauſe to be tendered, unto the ſaid *E. F.* the ſum of 6*d.* that then and in ſuch caſe, and from thenceforth, this indenture, and every thing herein contained ſhall ceaſe, determine, and be abſolutely void; any thing herein contained to the contrary thereof in any wiſe notwithſtanding.

The attorney is to write the name of his principal.

Sealed

Of Proceeding to recover Premiſes *untenanted*.

Sealed and delivered as the act and deed of the above named *A. B.* by *C. D.* of, &c. by virtue of a letter of attorney to him for that purpoſe made by the ſaid *A. B.* bearing date the day of this inſtant, being firſt duly ſtamped in the preſence of

The form of the *affidavit* required of the proceedings in caſe of a vacant poſſeſſion, is as follows:

H. H. of, &c. maketh oath, and ſaith, that he this deponent, on, &c. now laſt paſt, did ſee *C. D.* of, &c. for and in the name of *A. B.* the leſſor of the premiſes in this cauſe, ſeverally enter upon and take poſſeſſion of part of the premiſes in the deed hereunto annexed mentioned, by entering into the firſt of the ſaid houſes, and putting his foot on the threſhold of the outer doors of two other of the ſaid houſes, the ſame being locked and uninhabited, ſo that no other entry thereon, or poſſeſſion thereof, could be made or taken without force. And this deponent did then likewiſe ſee the ſaid *C. D.* after ſuch his entry into and upon the ſaid premiſes, and whilſt he was in ſuch poſſeſſion thereof as aforeſaid, at each of the ſaid houſes, ſeal and deliver the leaſe hereunto annexed unto the plaintiff, and further ſaith, that after the ſaid leaſe was ſo executed, this deponent did ſee the *plaintiff* take poſſeſſion of the ſaid three houſes with their appurtenances, by virtue of the ſaid leaſe, by entering upon the threſhold of the ſaid outer doors of the ſaid three houſes, the ſame being then locked and uninhabited, and no other entry to be made therein, ſave as aforeſaid, and this deponent ſaith, that immediately afterwards, the *defendant* did enter each and every of the ſaid three houſes, and turned the *plaintiff* out of poſſeſſion thereof, by thruſting him out of the ſame; whereupon this deponent did then and there deliver and leave with the ſaid *defendant*, a true copy of the declaration hereunto annexed.

H. H.

Sworn, &c.

Of Proceeding to recover Premiſes *untenanted.*

The declaration muſt be delivered, as in other caſes, before the *eſſoin day* of the term, in order to entitle the *plaintiff* to judgment as of that term; and there needs no notice at all at the end of the declaration; for inſtead of notice, the *plaintiff* only gives one rule to plead as in common actions; and on no plea being put in within the regular time, by the rule the plaintiff is entitled to judgment.

In caſes of *vacant poſſeſſion*, no perſon claiming title will be let in by the courts to defend; but he that can firſt ſeal a leaſe on the premiſes muſt obtain poſſeſſion. *Bull. Ni. Pri.* 96. 1 *Barnes* 122. And therefore, the perſon claiming title muſt reſort to his new ejectment.

Of Proceeding to recover Premiſes by a *Mortgagee.*

IF a *mortgagee* of the premiſes, having a right of entry, wants to get poſſeſſion of the premiſes, and the ſame are untenanted, the *mortgagee* ſhould ſeal a leaſe, in order to nominate the *plaintiff in ejectment*, who is to be turned out by the nominal *defendant*, and then the *ejectment* muſt be delivered to the nominal *defendant*, to which declaration there is no need of notice as in other caſes.

Such mortgagee, or leſſor of plaintiff, ſhould enter upon and take poſſeſſion of the premiſes in queſtion, by going upon the land; or, if a houſe, by putting his foot upon the threſhold of the houſe uninhabited; and then after ſuch entry, and whilſt he ſo remains on the premiſes, ſeal and deliver a leaſe to the nominal *plaintiff*, and give him poſſeſſion; and after ſuch leaſe is executed, and nominal *plaintiff* taken poſſeſſion, then the nominal defendant muſt come and put the *plaintiff* by, and take poſſeſſion of the ſaid premiſes, to whom, while he ſo remains in poſſeſſion, another perſon muſt deliver *the declaration in ejectment.*

The above leaſe differs not from a leaſe for a term, [which vide *ante*] only at the end is inſerted the following clauſe: "Provided always, and it is the true intent and meaning of theſe preſents, that if I the ſaid leſſor of the ſaid *E. F.* my executors, adminiſtrators, or aſſigns, ſhall at any time hereafter tender to the ſaid *plaintiff*, his executors, adminiſtrators, or aſſigns, the ſum of one ſhilling; then theſe preſents, and every thing herein contained, ſhall be void and of no effect. In witneſs whereof, I the ſaid *A. B.* the leſſor of the plaintiff, have ſet my hand and ſeal the day and year firſt above written. Signed, ſealed, and delivered by the ſaid *A. B.* (leſſor or mortgagee) to the ſaid *E. F.* the tenant or leſſee, cloſe to the threſhold of the door of the ſaid meſſuage, in the preſence of us,"

O. P.
Q. R.

Inſtead of the notice at the foot of the *declaration*, there muſt be a rule to plead given in this caſe, and the parties muſt be all real perſons.

When the rule to plead is out, judgment may be ſigned, and the *plaintiff* has no occaſion to move for judgmen, as in other caſes.

Of Proceeding to recover Premiſes by a *Mortgagee*.

If a *mortgagee* means only to get into the receipt of the rents and profits of the eſtate, he need not give notice to a tenant to quit, before bringing his ejectment, though the mortgage be made ſubſequent to the tenant's leaſe. But in ſuch caſe, he ſhall not be ſuffered to turn the tenant out of poſſeſſion by the execution. *White ex dem. Whatley* v. *Hawkins*. *Mich.* 14 *Geo.* 3. *Bull. Ni. Pri.* 96. And though, in this caſe, the leaſe was only from year to year, and, with reſpect to the laſt year, might be conſidered as a leaſe ſubſequent to the mortgage, yet the court held it would have been the ſame, if the leaſe were for a long term.

If a man makes a mortgage for years to *A.* who, without the mortgagor's joining, aſſigns to *B.* who aſſigns to *C*—*C.* may bring ejectment againſt the mortgagor; for, upon executing the deed of mortgage, the mortgagor, by the covenant to enjoy till default of payment, is *tenant at will*, and the aſſignment of the mortgagee could only make him *tenant at ſufferance*. 1 Salk. 245.

But it has been ſaid, that it would be otherwiſe, if the mortgagor were to die, and his heir enter, and then the *mortgagee* make an aſſignment without entry, or the heir of the mortgagor joining; for the entry of ſuch heir would be tortious, and conſequently, the *mortgagee* would be out of poſſeſſion, and his aſſignment void. *Ibid. Tamen quære.*

By the 7 *Geo.* 2. *c.* 20. An act for the more eaſy redemption and foreclоſure of mortgages, after reciting, that "mortgagees frequently bring actions of ejectment for the recovery of lands and eſtates to them mortgaged, and bring actions on bonds given by mortgagors to pay the money ſecured by ſuch mortgagees, and for performing the covenants therein contained; and likewiſe commence ſuits in equity, to foreclоſe their mortgagors from redeeming their eſtates; and the courts of law, where ſuch ejectments are brought, have not power to compel ſuch mortgagees to accept the principal monies and intereſts due on ſuch mortgages and coſts, or to ſtay ſuch mortgagees from proceeding to judgment and execution in ſuch actions; but ſuch mortgagors muſt have recourſe to equity for that purpoſe, in which caſe likewiſe, the courts of *Equity* do not give relief until the hearing of the cauſe:" For remedy, *&c. it is enacted*, "That where any action ſhall be brought on any *bond*, for payment of money ſecured by ſuch mortgage,

or

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or performance of the covenants therein contained, or where any action of *ejectment* ſhall be brought in any of the courts at *Weſtminſter*, great ſeſſions, or ſuperior courts of the counties palatine, by any mortgagee, *&c.* his heirs, executors, adminiſtrators, or aſſigns, for the recovery of the poſſeſſion of any mortgaged lands, *&c.* and no ſuit ſhall be then depending in any of his majeſty's courts of *Equity*, for or touching the foreclоſing or redeeming of ſuch mortgaged premiſes; if the perſon, having right to redeem ſuch mortgaged premiſes, and who ſhall appear and become defendant in ſuch action, ſhall at any time, pending ſuch action, *pay unto ſuch mortgagee*, &c. or, in caſe of his refuſal, ſhall *bring into court*, where ſuch action ſhall be depending, all the principal monies and intereſt due on ſuch mortgage, and alſo all ſuch coſts as have been expended in any ſuit at law or in equity upon ſuch mortgage, [ſuch money for principal, intereſt, and coſts, to be aſcertained and computed by the proper officer of the court] the monies ſo paid, or brought into court, ſhall be deemed and taken to be in full ſatisfaction and diſcharge of ſuch mortgage; and the court ſhall and may diſcharge ſuch mortgagor of and from the ſame accordingly; and ſhall and may, by rule of the ſame court, compel ſuch mortgagee, at the coſts and charges of ſuch mortgagor, to aſſign, ſurrender, or reconvey ſuch mortgaged premiſes, and ſuch an intereſt therein as the mortgagee hath, and deliver up all deeds, *&c.* in his cuſtody, relating to the title thereof, to the mortgagor, who ſhall have paid or brought ſuch monies into court, or his executors, *&c.* or other perſon as he ſhall appoint."

The ſecond ſection enacts, "That on *bills of* foreclоſure brought in equity for the payment of the money, or in default thereof for the recovery of the premiſes, ſuch court of equity, upon application of the defendant having a right to redeem, and upon admiſſion of the plaintiff's right, may, before hearing, make order therein, as if the cauſe had been brought to a hearing, *&c.*

Provided, "that this act ſhall not extend to caſes where the right of redemption is controverted or the money due not adjuſted, nor to prejudice any ſubſequent mortgage."

A judge made an order, purſuant to this act, to ſtay the *mortgagee*'s proceeding in ejectment, upon bringing principal, intereſt, and coſts, into court; and a rule was made to

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make the order a rule of court *niſi cauſâ*. But it afterwards appearing to the court, that notice had been given by the *mortgagee* to the *mortgagor*, that he inſiſted upon payment of two bonds, which were a lien upon the eſtate, the caſe was adjudged to be out of this act, and the rule *niſi* was diſcharged. *Barnes* 177.

Motion to ſtay proceedings in ejectment, on payment of mortgage-money and coſts, purſuant to this act; on ſhewing cauſe the plaintiff produced an affidavit, that the *mortgagee* had been at great expence in neceſſary repairs of part of the premiſes in his poſſeſſion, (the ejectment was brought for the reſidue) and therefore prayed, that the *prothonotary* might be directed to make allowance for ſuch repairs. *Per cur.* The rule muſt follow the words of the ſtatute. The prothonotary will make juſt allowances and deductions. *Barnes* 176.

Rule on *ſtat.* 7 *Geo.* 2. to ſhew cauſe why proceedings ſhould not be ſtaid, on payment of mortgage-money and coſts, was made abſolute; the leſſors of plaintiff, aſſignees of the mortgagee inſiſted to be paid a bond, and a ſimple contract debt due to themſelves in their own right. *Per cur.* A bond is no lien in equity, unleſs where the heir comes to redeem. *Barnes* 182.

In *Mich. term*, 20 *Geo.* 3. *B. R.* a caſe was reſerved from the *Oxford* circuit, reſpecting a *mortgagee*'s getting into the receipt of the rents and profits of the eſtate. Caſe was this, The plaintiff obtained a leaſe of the premiſes from *H.* 1 *January*, 1772, for twenty years, rendering 40 *l.* rent, payable the 12*th* of *May*. In *May* 1772, *H.* mortgaged to the defendant *G.* The leſſee entered at the commencement of his term, and had paid all the rent to *H.* except 28 *l.* Afterwards, in *Nov* 1778, *H.* became a bankrupt, the ſaid 28 *l.* being due to him for rent from the plaintiff; and more than that due from the bankrupt to the defendant *G.* for intereſt on the mortgage. 31 *December*, Notice was given to the plaintiff of the bankruptcy of *G.* and a demand of the rent due made by the aſſignees; and on 13*th January* following, notice was alſo given to the plaintiff of the mortgage, and a demand made of the ſaid rent in arrear by the defendant *G.* the mortgagee; which not being paid, *P.* the other defendant, by the direction of *G.* diſtrained for the ſaid rent, and gave notice. On which the plaintiff brought

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treſpaſs; and the court held, that the mortgagee had the legal intereſt in the premiſſes; and that, after notice being given by him, he might diſtrain for the rent due, and not paid to the mortgagor before notice, to ſatisfy the arrears of intereſt due to him on the mortgage. *Moſs* v. *Gallimore and Pyott.*

Of amending the Declaration in Ejectment, ſtaying Proceedings, conſolidating Declarations, &c.

IN the declaration delivered to the tenant in poſſeſſion, the *ſaid James*, inſtead of *John*, was ſaid to enter by virtue of the demiſe; and the court refuſed to amend it, for they conſidered it as proceſs: and Mr. juſtice *Wright* cited a caſe, *Hil.* 15 *Geo.* 2. where the premiſes were laid to lie in *Twickenham* and *Iſleworth*, *or one of them*; and the court refuſed to let the plaintiff amend by ſtriking out the disjunctive words. *Stra.* 1211.

But if the declarations delivered be right, it ſeems, that they will be a ſufficient warrant to amend the declaration *on record* by. *Vide* 2 Ld. *Raym.* 896.

The term in ejectment being near expiring it was amended, without *any conſent*, from five years to ten years. *Oates* v. *Shepherd*, *Stra.* 1272. But *vide Salk.* 257. if the term expires, pending the ſuit, it cannot be enlarged without conſent.

But where a cauſe was hung up ſo long by agreement, on ſpecial verdict, that the term expired, the court would not let it be enlarged. *Anon.*

Declaration in ejectment amended by making the verbs in the plural number, *they entered*, inſtead of *he entered*, &c. Stra. 807.

On a rule to ſhew cauſe, why a declaration in ejectment ſhould not be amended on payment of coſts, by altering the time of the demiſe, where the plaintiff had been barred by a fine from bringing a new ejectment, the rule was made *abſolute*. Burr. 4 pt. 2446.

Ten declarations on the ſame demiſe were delivered for ten houſes in *Steyning* in *Suſſex*, in the occupation of *ten perſons*; and on motion to conſolidate them, and put them all in one iſſue, upon ſuggeſtion that the title was the ſame in all, the court refuſed it; for they ſaid the leſſor might have ſued them at ten different times, and it would be obliging him to go on againſt all, when perhaps he might be ready in ſome of them only. *Stra.* 1149.

But in *C. B.* on motion to conſolidate *ſixteen ejectments* in one, after ſixteen ſeveral iſſues joined, and though it was urged for the plaintiff that the iſſues were delivered and paid for a long time ago, the court held, that it was neceſſary for the defendants to pay for the iſſues to prevent judgment, and ordered the ejectments to be conſolidated.

N. B. Each declaration contained a large number of meſſuages, and they were word for word the ſame. Had each

Of amending the Declaration in Ejectment, ſtaying Proceedings, conſolidating Declarations, &c.

each been for one meſſuage only, the plaintiff might have tried them ſeparately. *Barnes* 176.

Proceedings were ſtayed till the leſſor of the plaintiff ſhould give ſecurity for the coſts, [his reſidence being in *Ireland*;] although this ejectment was brought under the direction of the court of *Chancery*, and 40 *l.* ſecurity had been already given there. *Burr.* 4 *pt.* 1177.

If the leſſor of the plaintiff is an infant, the court on motion will oblige him to name a good plaintiff who will be anſwerable for coſts. *Stra.* 694, 932. *Barnes* 133.

If a ſecond ejectment is brought, the coſts of the firſt not being paid, the court on motion will ſtay proceedings therein till thoſe coſts are paid. Lord *Conyngſby*'s caſe. *Stra.* 548. *Ibid.* 1152. So proceedings ſtayed in error, and a ſecond ejectment, the plaintiff not being able to ſhew that the writ of error was brought with any other view than to keep off the payment of coſts. *Stra.* 554.

But where the plaintiff in ejectment having declared on one demiſe, to which not guilty was pleaded; but afterwards finding it neceſſary to add another demiſe of truſtees, he delivered a new ejectment on the double demiſe; and on motion to ſtay proceedings on the laſt, till payment of coſts, and for notice where the leſſors were to be found, [grounding the motion, as to the firſt part, on Lord *Conynſby*'s caſe; and as to the latter, on the common caſe of a *qui tam*; becauſe here the leſſor was to enter into a rule]—The court granted the laſt part; but as to the coſts, they ſaid, it was never done but where it appeared the party was vexatious, or had run the defendant to a great expence, as was Lord *Conyngſby*'s caſe, who came for a trial at bar on his new ejectment, after the former cauſe was ready for the bar, which was a matter of mere favour, in which they might make their own terms. *Short* v. *King*. *Stra.* 681.

The leſſors of plaintiff delivered three ejectments in *C. B.* and two in *B. R.* for the ſame tenements, and made the defendants attend at five aſſizes, but countermanded in time to ſave coſts; and on application to ſtay proceedings in the laſt ejectment, till coſts paid of the former, on account of the vexation,—The court would not do it, inaſmuch as coſts were not demandable by the rules of the court. *Stra.* 1099.

Of

Of making up the *niſi prius* Record in Ejectment.

IF the tenant, or landlord appears, the plaintiff having got the plea and rule, muſt draw up the iſſue, entitling it of the ſame term as the plea is of; then copy the conſent rule, and annex the ſame to the iſſue; indorſe thereon the notice for trial, and deliver the ſame to the defendant's attorney, charging 4 *d. per* ſheet; and alſo for entering the plea and conſent rule. The defendant's attorney muſt pay for the iſſue, or the plaintiff may ſign judgment.

The *niſi prius* records in ejectment are made up in the ſame manner as *niſi prius records* in other actions, for which ſee the firſt volume, obſerving the diſtinction between proceedings by *original* and *by bill.*

If the plaintiff, after iſſue, and before the trial, enter into part, the defendant may, at the aſſizes, plead this as a plea *puis darrein continuance*, in bar to the plaintiff's action; but it is at the diſcretion of the juſtices, whether they will receive it; but if they do, it ſtops the trial, and the plaintiff is not to reply to it at the aſſizes; but the judge is to return it as parcel of the record of *niſi prius.* Yelv. 180. Cro. Car. 261.

The plaintiff has a right to proceed, both for the poſſeſſion and the treſpaſs; and therefore the death of the leſſor [though only tenant for life] is no abatement; but if the plaintiff, in ſuch caſe, inſiſt to go on, the court will oblige him to give ſecurity for payment of the coſts, in caſe judgment go againſt him. *Stra.* 1056.

Of the Trial in Ejectment, and of Judgment againſt the *caſual Ejector* for not confeſſing, &c.

IF on the trial the defendant will not appear, and confeſs *leaſe, entry and ouſter*, the courſe is to call the defendant to confeſs, &c. and his attorney, if he be within the rule, and then to call the plaintiff and nonſuit him; and pray to have it indorſed on the *poſtea*, that the nonſuit was for not confeſſing *leaſe, entry and ouſter*, and then upon the return of the *poſtea*, judgment will be given againſt the *caſual ejector*, becauſe the defendant has not complied with the terms of the *rule*, upon which the court admitted him to be the defendant. Afterwards, on application to the *maſter* or *prothonotary*, coſts will be taxed upon the *rule* for confeſſing *leaſe, entry and ouſter*; and if the ſame are demanded of the defendant, and he refuſes to pay them, the court will, on motion and affidavit of ſuch refuſal, grant an attachment againſt him. *Salk.* 259.

If there be ſeveral *defendants*, and ſome of them do not appear and confeſs, according to the old method, a verdict was to be taken for them. And the *poſtea* was indorſed, that the verdict was for them becauſe they did not confeſs; and then the plaintiff, upon the return of the *poſtea*, had judgment againſt the caſual ejector for ſuch lands as were in the poſſeſſion of thoſe who did not confeſs. *Claxmore* v. *Searle & al'*, Ld. *Raym.* 729.

But it is ſaid in *Salk.* 456, that by a rule made 4 *Ann.* in *B. R.* In ſuch caſe the plaintiff ſhall go on againſt thoſe who will confeſs, and ſhall be nonſuited as to thoſe who will not confeſs; but the cauſe of the nonſuit ſhall be expreſſed on the record; and then upon the return of the *poſtea*, the court being informed what lands were in the poſſeſſion of thoſe defendants, judgment ſhall be entered againſt the *caſual ejector* as to them. Mr. *Buller* in his *niſi prius* ſays, that he could find no ſuch rule in the printed book. And that in the caſe of *Ellis* v. *Knowles*, *E.* 7 *Geo.* 2. *C. B.* 1 *Barnes* 118. upon the above precedent of *Claxmore and Searle & al'*, judgment was given, on motion, againſt the caſual ejector, as to ſuch of the defendants as were acquitted at the trial for not confeſſing, as appeared by indorſement on the *poſtea*, which ſeems to be the right way. *Vide Bull. Ni. Pri.* 98.

A rule was made to ſhew cauſe, why a *non proſs* for not confeſſing *leaſe, entry and ouſter*, ſhould not be ſet aſide, there

Of the Trial in Ejectment, and of Judgment againſt the *caſual Ejector* for not confeſſing, &c.

there being a material variance between the iſſue and the record; the defendant therefore did not confeſs. *Per cur.* Confeſſion would not have been a defence; defendant might have afterwards moved to ſet aſide the verdict for the variance; the non-proſs is regular; but let it be ſet aſide on payment of coſts. *Barnes* 175.

Of Proceeding againſt the Plaintiff nonſuited at the Trial, and of the Plaintiff's recovering his Coſts of a Nonſuit for not confeſſing, &c.

IF a *verdict* is given for the defendant, or the plaintiff is nonſuited for any other cauſe than for the defendant's not confeſſing *leaſe, entry and ouſter*, the defendant muſt proceed to tax his coſts on the *poſtea* as in other actions, and ſue out a *capias ad ſatisfaciendum* againſt the plaintiff; and if upon ſhewing the ſaid writ under ſeal to the leſſor of the plaintiff, and ſerving him with a copy of the rule by conſent to confeſs *leaſe, entry and ouſter*, the leſſor of the plaintiff does not pay them, the court will grant an attachment againſt him.

If the plaintiff is nonſuited, he may pay the coſts to which of the defendants he pleaſes. *Stra.* 516.

The *plaintiff* in ejectment is a meer nominal perſon, and truſtee for the leſſor; and therefore he cannot releaſe the action, without being guilty of a contempt; or if an action for *meſne profits* after recovery be brought in his name, and he releaſes it, he may be committed for a contempt.

So the *caſual ejector* is only a nominal perſon, and has no intereſt in the premiſſes, therefore a *caſual ejector* cannot confeſs judgment. *Stra.* 531.

Defendant at the trial did not appear to confeſs, &c. a nonſuit happened; and afterwards the plaintiff's leſſor, inſtead of taking his remedy for the coſts taxed upon the common rule as he ought to have done, entered judgment againſt the caſual ejector, ſued out a *fi. fa.* againſt the defendant's goods, and levied his coſts thereon, acting as ſpecial bailiff himſelf. An action being brought for this irregular levy in *B. R.* the defendant moved in *C. B.* to ſet aſide the *fi. fa.* and the court ordered reſtitution to be made, and the defendant's coſts to be paid by the leſſor and his attorney; and by conſent the action in *B. R.* to be diſcontinued without coſts, and no other action brought. *Barnes* 182.

Of the Verdict, and Judgment in Ejectment.

AS the verdict is the ground of the judgment, it ought not to be entered for more land or different parcels than the defendant was found guilty of by the verdict; but a variance between the verdict and judgment occasioned by the misprision or default of the clerk in entering the judgment, is not fatal, but hath been amended by the court after a writ of error brought.—As where the plaintiff had judgment, "*That he recover his term* of a messuage and ten acres of land, and the verdict acquitted the defendant *quoad* the land, [by which the judgment was larger than the verdict] and, because it appeared to be the misprision of the clerk, who had not pursued the verdict which ought to have been his guide in making up the judgment, and no mistake in point of law in giving the judgment, therefore the party ought not to suffer for his misprision, since the statute of 8 *H.* 6. *c.* 12. gives the judges, in affirmance of their judgment, power to amend and reform what in their discretion seems to be the misprision of clerks.

If the plaintiff has a verdict for all, the entry of the judgment is, that "*the plaintiff recover his term against the defendant of and in the premisses aforesaid*," and till the statute 5 & 6 *W.* & *M.* took away the *capiatur* fine, there used to be also judgment *quod capiatur*. Carth. 390.

But if the judgment in ejectment be entered, "that he recover possession of the term aforesaid," this is as well as if it had been, "that he recover his aforesaid term," because both signify the same thing, the possession itself being to be recovered on the *habere facias possessionem*. Law of Eject.

And hence it is, that if the term expires pending the suit, the plaintiff cannot recover the possession, because the court cannot give the plaintiff judgment for the land; when it appears upon the face of the record that his title to it is determined, yet he shall have his judgment for damages because the trespass still remained. *Sav.* 28. *Co. Lit.* 285.

If the defendant be acquitted of part, and judgment be entered *quod def. sit quietus quoad, &c.* that part whereof he is acquitted; this is error, because the judgment in this action is not final as in the writs of right, and the judgment in this action doth not protect the defendant from any further suit, but only quits against the title set up by the plaintiff in that action; but since it appears that the plaintiff's demand was groundless as to that part whereof the defendant was acquitted, the judgment as to that part must be set down to be *quod def. eat inde sine die.* The plaintiff

Of the Verdict and Judgment in Ejectment.

plaintiff as to that having no further cauſe to detain him longer in court. *Cro. Eliz.* 763.

If one of the defendants die after a verdict, the plaintiff ſhall have judgment againſt the ſurvivors, on his ſuggeſting the death of one on the roll, but then the judgment muſt be entered as to the perſon deceaſed, *quod quer. nil capiat.* Moor 469. Cro. Car. 513. 14. Jon. 401. Law Eject. 97. 8.

If an ejectment be brought againſt baron and feme, and the plaintiff hath a verdict againſt both, and before judgment the huſband dies, the plaintiff may, on the ſuggeſtion, have judgment againſt the wife; not only becauſe this is a treſpaſs committed by the wife, and that therefore ſhe is puniſhable for her own act, which is injurious to another; but becauſe, where the wife is found guilty of the ejectment, ſhe muſt have obtained that in lawful poſſeſſion, either jointly with her huſband, and then it ſurvives, or elſe ſhe had the whole poſſeſſion in her own right; and in either caſe the plaintiff may puniſh her, and recover the poſſeſſion, which is wholly in her on the death of her huſband. *Rol. Rep.* 14. *Cro. Jac.* 356.

It was formerly held, that if a demiſe was laid in the declaration for a longer term than the leſſor had intereſt in the premiſes, the plaintiff could not recover. *Per Hale. Tr.* 27 *Car.* 2. But upon an objection made at *ni. pri.* where the demiſe was laid for a longer term than the leſſor had title; and 2 *Leo.* 140. *Brown* 133. were cited in ſupport of it, lord *Mansfield* ſaid, "there is nothing in the objection, for if the leſſor have a title, though but for a week, he ought to recover; for the true queſtion in ejectment is, who has the poſſeſſory right. Suppoſe a perſon has an intereſt for three years only, and ſhould make a leaſe for five, it would be good for the three years. *Bull. ni. pri.* 106.

Of arresting the Judgment in Ejectment.

IF by any intendment a judgment in ejectment after a verdict can be made good, the court will do it. As where on *error* brought after judgment for plaintiff, that he recover his *terms*, when the declaration was on two separate demises, by two different lessors of the very same premises, and for the very same term; and though objected, that the judgment being to recover his *terms* in the plural number, was wrong, as both the lessors could not have title to the same premises, at one and the same time, the court affirmed the judgment. And the chief justice cited a case, *Trin.* 4 & 5 *Geo.* 2. *Fisher* and *Hughes*, where, upon three demises, by several lessors of the same premises, and judgment as to two demises, was entered for the plaintiff; and as to the other, for the defendant; the objection being, that there was judgment both for the plaintiff and defendant, yet the court held the judgment right. 1 *Wilf.* 1. *S. C. Stra.* 1180.

So, where after judgment to recover his *term*, when there were two demises of different lands, and *error* brought, and objected, that the judgment being in the singular number to recover his *term*, was wrong. *Per cur.* The judgment is to recover his term *de et in tenementis prædict*, which *reddendo singula singulis* is well enough, for there is but one term in each part of the premises. *Stra.* 835.

But where on motion in arrest of judgment, the words in the declaration being one messuage or *tenement*, which is too uncertain, as *tenement* is all a man holds, and after judgment, the sheriff cannot tell of what to deliver possession, the court made a rule to stay judgment till cause shewn, and afterwards judgment was arrested. *Barnes* 174.

The ejectment was brought for one messuage, with the appurtenances in the parishes of *A. or B. or one of them*; and though after a verdict for plaintiff, judgment was arrested for the uncertainty. *Barnes* 184.

The *English* notice at the foot of the declaration, was subscribed by the nominal plaintiff, instead of the casual ejector, which the court held bad, and discharged the rule for judgment. *Barnes* 172.

The same case in *B. R. H.* 2 *Geo.* 2. *Barker* v. *Merifield.*

After *verdict* for plaintiff in ejectment, and motion in arrest of judgment, because the demise was laid on a day not

Of arresting the Judgment in Ejectment.

not then arrived, held to be no objection. *Burr.* 4 *pt.* 1159.

The death of the *plaintiff* in ejectment, is no ground for a motion to arrest the judgment. 1 *Mod.* 252.

In ejectment against *two* defendants, the declaration was, that *he* entered instead of *they* entered; and, on motion in arrest of judgment, the court at first held it to be bad, but afterwards ordered it to be amended on the authorities of *Cro. Jac.* 306. And plaintiff had judgment. *Salk.* 48.

Trespass and ejectment by *original*; motion in arrest of judgment upon a fault in the original [for a bad original is not helped by verdict;] but the master certifying there was no original at all, the plaintiff had judgment, though in his declaration he recited an *original*. 1 Mod. 3.

The plea of the landlords and tenants, who had appeared with the filazer, and entered into the common rule, was left in the prothonotary's office, entitled with the true name of the cause; but, by mistake, in the plea was inserted the name of the plaintiff's *lessor* (as complaining) instead of that of the nominal plaintiff; upon which the attorney, conceiving the plea to be a nullity, signed judgment against the casual ejector; which judgment, upon application to the court, was set aside with costs. *Barnes* 191.

Where judgment is obtained against the casual ejector, and a trial is not lost, the courts will, on the defendant's application, his payment of costs, and entering into the common rule, to confess lease, entry, and ouster, set aside such judgment in ejectment, (as well as in other actions) and not put the tenant to the charge, inconvenience, and hazard of recovering back his possession, by another action. *Stra.* 975.

There is no distinction between a judgment in ejectment upon a *verdict*, and one *by default*; in the former, the plaintiff's right is found, in the latter, confessed. *Burr.* 4 *pt.* 667.

A regular judgment in ejectment may be set aside in *B. R.* and *C. B.* Stra. 975.

Of Execution in Ejectment.

IF the plaintiff has judgment to recover his term, he may enter without ſuing out an *habere facias poſſeſſionem*; for where the land recovered is certain, the recoveror may enter at his own peril, and the aſſiſtance of the ſheriff is only to preſerve the peace. 2 *Sid.* 156. 1 *Rol. Rep.* 213. *Noy* 71. *Palm.* 263.

But although, after judgment, the plaintiff is entitled to and may ſue out an *habere facias poſſeſſionem*, yet if he neglect to ſue out execution within a year after the judgment, he muſt bring a *ſcire facias* to revive the judgment * as in other caſes, otherwiſe the court will award a reſtitution *quia erronice emanavit.*

The defendant in ejectment died, and a *ſcire facias* went out againſt the tertenants of the land, which was demurred unto, for that the heir was not named, nor was it alledged that any ſtrangers had intruded; but the court ruled it well, for the heir may come in as tertenant. *Sid.* 317. 2 *Keb.* 143. But for this, vide *Cro. Car.* 295, 312. *Cro. Jac.* 506. 2 *Brown* 145.

In ejectment, there was judgment againſt the teſtator, and a *ſci. fa.* againſt the executor, without naming him terre-tenant; and it being objected, that in ejectment the defendant is ſuppoſed to be a diſſeiſor, and that the lands deſcend to his heir at law, the plaintiff took out a new *ſcire facias*, and amended the fault. *Carth.* 2.

Judgment was for two meſſuages, and, after the year, a *ſcire facias* upon it recited a judgment of one meſſuage only; to which *nul tiel record* being pleaded, it was moved to amend it. But denied. For there may be ſuch a judgment; and this does not appear to be erroneous upon the face of it. 6 *Mod.* 310.

But if the plaintiff hath a judgment, with ſtay of execution for a year, he may, after the year, take out his execution without the *ſcire facias*, becauſe the delay is by

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* It ſeems to have been doubted, whether a *ſci. fa.* lay to revive a judgment in ejectment after the year, becauſe by the common law it lay only in real actions; and at the time of *Weſtm.* 2. *c.* 45. which extends it to perſonal actions, the *term or poſſeſſion* was not recovered in the action of ejectment; but it ſeems now agreed, that a *ſcire facias* lies to revive the judgment in the action after the year, as well as in others. *Sid.* 351. 1 *Salk.* 258. Ld. *Ray.* 806. *Comb.* 250. 2 *Keb.* 307. *Skin.* 427.

conſent

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conſent of parties, and in favour of the defendant; and the indulgence of the plaintiff ſhall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage, and at his inſtance. *Rol. Rep.* 194. *Salk.* 258. 6 *Mod.* 288. *Barnes* 132. 2 *Barnes* 165, 166, 172. *Stra.* 300.

But it ſeems this delay of execution, being only the compromiſe or agreement of the parties, is never entered on the roll; and therefore, after the year, the plaintiff ought to move the court for a *ſcire facias*, leaſt the execution ſhould be ſuſpended *quia erronice* after the year, without the *ſcire facias*. Keb. 785. 6 *Mod.* 288. and the above authorities.

So if the defendant brings *error* after the year, after judgment given, and afterwards becomes nonſuit, the defendant in *error* may ſue out execution without a *ſcire facias*. Ld. Raym. 807. Cro. El. 416. 5 Co. 88.

But if there is an *injunction* out of *Chancery*, he cannot take out execution after the year, without a *ſcire facias*, becauſe the courts of law do not take notice of *Chancery injunctions*, as they do of *writs of error*; for the latter is a judicial proceeding, appearing to them upon record; whereas, an injunction is not a matter of record, ſo as the court can take notice of it. *Stra.* 301.

But in the caſe of an injunction, the party may take out his execution within the year, and continue it down by *vic. non miſit breve*, and it will be no breach of the injunction, which is only to prevent an actual execution. *Salk.* 322. *pl.* 9. 6 *Mod.* 388.

The plaintiff may enter, pending a *writ of error*, upon a judgment in ejectment, if he finds the poſſeſſion empty; for the writ of error binds the court, but not the party. But then he muſt take care that he do not enter with force. *Badger* v. *Lloyd. Holt* 199. Ld. *Raym.* 808.

After verdict for plaintiff, motion for leave to take out execution againſt the caſual ejector, *non obſtante* a writ of error brought by the defendant. Rule diſcharged. *Per cur.* In caſes where the landlord is admitted to defend without the tenant, the reaſon for judgment againſt the caſual ejector, *per* ſtatute, is, that under it, after an end of the ſuit, plaintiff may obtain poſſeſſion of the premiſes ſued for, which he could not do by virtue of a judgment againſt a perſon out of poſſeſſion. But where a writ of error is brought,

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there is not the leaſt reaſon to give plaintiff leave to take poſſeſſion, till after a determination in error. *Barnes* 208.

No new ejectment ſhall be brought by the defendant after judgment againſt him, till he has quitted the poſſeſſion, or the tenants have attorned to the plaintiff, ſo as he be in poſſeſſion, and the defendant out. *Salk.* 258.

A writ of poſſeſſion is to the following effect:

GEORGE the third, *&c.* To the ſheriff of—— greeting. Whereas *A. B.* lately in our court, *before us* [or before our juſtices, if in *C. B.*] at *Weſtminſter*, by *bill without our writ, and by the judgment of the ſame court*, [if by *original*, ſay by the judgment of the ſame court] recovered againſt *C. D.* his term yet to come of and in one *meſſuage*, &c. with the appurtenances, ſituate, lying, and being at ——— in your county, which *E. F.* on the ——— day of ——— demiſed to the ſaid *A.* to hold and enjoy to the ſaid *A.* from the ——— day of —— then laſt paſt, unto the full end and term of ——— years thence next enſuing, and fully to be compleat and ended; by virtue of which ſaid demiſe, the ſaid *A.* entered upon the ſaid tenements, with the appurtenances, and was poſſeſſed thereof, until the ſaid *C.* afterwards, to wit, on the ——— day of —— in the ——— year aforeſaid, with force and arms entered into the ſaid tenements, with the appurtenances, and him the ſaid *A.* from his farm aforeſaid ejected, put out, and amoved, his ſaid term therein not being expired; and him ſo ejected, put out, and amoved from his poſſeſſion of his ſaid farm, hath withheld, and ſtill doth withhold, whereof the ſaid *C.* is convicted, as appears to us upon record. Therefore, we command you, that without delay you cauſe the ſaid *A.* to have his poſſeſſion of his farm aforeſaid, yet to come of and in the tenements aforeſaid, with the appurtenances, and how you ſhall execute this our writ, make appear *to us* [or to our juſtices] at *Weſtminſter*,

Of Execution in Ejectment.

Weſtminſter, on, *&c.* [the return] and have then there this writ.

Witneſs, *&c.*

For other forms, ſee the various books of entries.

The writ of poſſeſſion has relation to its *teſte*, though it be not actually ſued out till after the death of the leſſor of the plaintiff; yet if teſted before his death it is regular. *Burr.* 4 *pt.* 1971.

The words of the writ are *quod habere facias poſſeſſionem*; ſo that there muſt be a full and actual poſſeſſion given by the ſheriff, and conſequently all power neceſſary for this end muſt be given him; and therefore if the recovery be of a houſe, the ſheriff may juſtify breaking open the door, if he be denied entrance by the tenant, becauſe the writ cannot be otherwiſe executed. 5 *Co.* 91. *b.* *Law of Ejectm.* 108.

The ſheriff is to give *poſſeſſion*, upon the *plaintiff's ſhewing*, and at the plaintiff's peril; who is, at his peril, to take poſſeſſion of no more than he is intitled to. *Vide Burr.* 4 *pt.* 2673.

An iſſue has been directed to try whether the ſheriff had delivered poſſeſſion properly according to the recovery. *Ibid.*

If plaintiff recovers ſeveral meſſuages in the poſſeſſion of different perſons, the ſheriff muſt go to each houſe, and deliver the poſſeſſion thereof; and this is done by turning the tenants out of each of the houſes; for the delivery of one meſſuage in the name of all, is not a good execution of the writ; becauſe the poſſeſſion of one tenant is not the poſſeſſion of another; but each hath his ſeveral poſſeſſion. *Law of Ejectm.* 108.

If the ſheriff turns out all perſons he can find in the houſe, and gives the plaintiff, as he thinks, quiet poſſeſſion; and, after the ſheriff is gone, there appears ſome perſons to be lurking in the houſe, this is no good execution; and therefore the plaintiff ſhall have a *new habere facias poſſeſſionem*; becauſe he never had execution. *Upton* v. *Wells*, *Leon.* 145.

If the execution goes to the ſheriff for twenty acres, the ſheriff muſt give twenty acres, according to the common eſtimation of the country where the lands are. *Roll. Rep.* 410.

Of Execution in Ejectment.

If the recovery is of land, and the plaintiff demanded more than he recovered, the ſheriff uſed formerly to give poſſeſſion of one or two acres in the name of all, which the plaintiff recovered, in order to be ſafe from an action of treſpaſs, by giving that which was not recovered; but now, at this day, in the caſe of recovering leſs than was demanded, the plaintiff uſually gives the ſheriff ſecurity to indemnify him from the defendant; and then the ſheriff gives execution of all which the plaintiff demands under his judgment. *Law of Eject.* 110.

Judgment was for *one* meſſuage, and the ſheriff delivered poſſeſſion of *two* [as it was ſaid] a lath and plaiſter being run up in the middle of the meſſuage, and occupied by two families, held a good execution.

Ejectment was for *five eights* of a cottage, and the ſheriff gave poſſeſſion of the whole to the plaintiff, who was tenant in common. *Per cur.* This is wrong, the writ ought to have purſued the verdict; let there be a rule upon the ſheriff and the leſſor of plaintiff, to reſtore the tenant to *three eights* parts of the premiſes, otherwiſe he will be forced to bring another ejectment for the ſame. 3 *Wilſ.* 49.

A *moiety* may be recovered in ejectment for an *entirety*.

A rule was made for the leſſor of plaintiff and his attorney, to pay the tenant his coſts of the application, and reſtore his goods, they having entered a general judgment, and taken out a general writ, and thereby taken poſſeſſion of the whole premiſes and removed the goods, when the defendant had obtained a rule to defend for *two thirds*. Barnes 191.

A judgment irregularly obtained was ſet aſide, and the poſſeſſion given upon the execution ordered to be reſtored. But the leſſor of plaintiff (who held the poſſeſſion) abſconding, the rule became ineffectual—whereupon it was moved, on behalf of the late tenants, for a writ of reſtitution, which the court awarded accordingly. *Barnes* 178.

In ejectment after a verdict, and writ of error allowed, if no recognizance is entered into, nor bail put in, the plaintiff may ſue out his execution. *Suppl. to* 2 *Barnes* 30. as to *bail on error* in ejectment. *Vide* the ſtat. 16, 17 *Car.* 2. *c.* 8. and 4 *Burr.* 2501. and *poſt* title *Bail in error*, where requiſite.

Of quieting the Plaintiff, and of relieving him when his Poſſeſſion is diſturbed.

THE writ of execution in ejectment is only returnable at the inſtance and election of the plaintiff, for the court will not direct the writ to be returned at the inſtance of the defendant; which ſeems to be left to the choice of the plaintiff, that he may take what is moſt for his advantage, in order to have the full benefit of his judgment; and the way to that is, to ſuffer him to renew the execution at his pleaſure, till a new execution be had; but he cannot renew execution after he has once procured the writ of poſſeſſion to be returned and filed; becauſe it then appears on record, that the plaintiff hath had the benefit of his ſuit, and then to award a new execution would be *actum agere*, and conſequently ſuperfluous; and therefore the court will never oblige the ſheriff to make a return, but at the plaintiff's deſire. *Rol. Abr.* 386. 2 *Keb.* 245. *Rol. Rep.* 353. Ld. *Raym.* 252, 346, 482, 718, 725, 1072. *Carth.* 496. *Salk.* 260. *pl.* 1. 5 *Mod.* 443.

If the writ is once returned, though not filed, it ſeems no new *habere facias* ſhall iſſue, becauſe when the return is made it becomes a record, which the court then is entitled to. 2 *Brown* 216.

When the writ is not returned, in order for a new writ, there muſt be a ſuggeſtion, that *vicecomes non miſit breve*; but this new writ cannot iſſue, till the return of the firſt writ is out; becauſe till that return is paſt *non conſtat* to the court, but that the ſheriff may do his duty, and the plaintiff thereby have the full benefit of his judgment, and ſo no new writ neceſſary. *Palm.* 289,

The writ is not executed, nor the execution compleat, till the ſheriff and his officers are gone, and the plaintiff left in quiet poſſeſſion. If the officer is diſturbed in the execution of the writ, on affidavit thereof, the court will grant an attachment againſt the party, whether the defendant or a ſtranger, becauſe the writ is the proceſs of the court, and the diſturbance is a contempt of its authority. 6 *Mod.* 27.

But after poſſeſſion once given, and a diſturbance thereof, the law makes a difference where the plaintiff is turned out by the defendant himſelf, and where by a ſtranger: If by the defendant, and the writ not returned, the plaintiff may have a new *habere facias* or an attachment, becauſe the defendant himſelf ſhall never keep that poſſeſſion, which the plaintiff is entitled to, and has recovered by due courſe of

law;

Of quieting the Plaintiff, and of relieving him when his Poſſeſſion is diſturbed.

law; but if he is turned out by a ſtranger after execution executed, the plaintiff is put to his new action upon an indictment of *forcible entry*, where the force will be puniſhed, becauſe the title was never tried between the plaintiff and a ſtranger; and the ſtranger may claim the land by title paramount the plaintiff, or he may come in under him, and then the recovery and execution in the former action ought not to hinder the ſtranger from keeping that poſſeſſion which he may have a right to; and if the law were otherwiſe, a plaintiff, by virtue of an *habere facias*, might turn out his own tenant, who came in after execution executed; whereas the poſſeſſion was given him againſt the defendant only, and not againſt others not party to the ſuit. *Ratcliff* v. *Tate*. *Keb*. 479.

In the caſe of *Fortune* and *Johnſon*, on motion for an attachment againſt *Johnſon*, for ejecting the plaintiff who had been put into poſſeſſion by an *habere facias*, the court made no rule, becauſe it appeared that *Johnſon* claimed under an elder judgment, and it was title againſt title, and therefore left them to take their courſe at law. *Style*. 318.

The plaintiff had judgment, but by agreement afterwards, the defendant was to hold for the reſidue of his term, and accordingly held for ſome time; then the plaintiff took out an *habere facias*, and executed it; upon which the defendant moved for reſtitution on the agreement, which the court refuſed, and left him to his action on the agreement, for the judgment was ruled abſolutely; but if the judgment had been with a *ceſſat executio* till ſuch a time, there if the plaintiff takes out execution within the time, the defendant ſhall have reſtitution, becauſe the judgment was entered with the limitation. *Style* 408. *Law of Eject*. 113.

But quære, how does this appear to the court, ſince it ſeems a *ceſſat executio* is never entered on the roll? The difference ſeems to be between a judgment *by confeſſion*, and *on verdict*, where the former is given with a *ceſſat executio*; and there, if the execution is taken out contrary to the agreement, the court will ſet it aſide, and puniſh the attorney: but where judgment is given on *verdict*, the verdict is the foot and ground of the judgment, and the court will not take notice of agreements between the parties, but leave them to their remedy.

Of

Of bringing a new or ſecond Ejectment.

ONE great advantage attending this action is, that a man may have a remedy *toties quoties*, in being allowed to bring as many ejectments as he pleaſes [10 *Mod.* 1.] which has ſometimes proved a great miſchief, but is ſtill without remedy; for though it has ſometimes been attempted in chancery, after three or four ejectments, by a *bill of peace* to eſtabliſh the prevailing party's title, yet it hath always been denied to alter the courſe of law, for that every *termor* may have an ejectment, and every ejectment ſuppoſes a new demiſe, and the *coſts* in ejectment are a recompence for the trouble and expence to which the poſſeſſor is put. But where the ſuit begins in *Chancery* for relief touching pretended incumbrances on the title of lands, and the court has ordered the defendant to purſue an ejectment at law, there, after one or two ejectments tried, and the right ſettled to the ſatisfaction of the court, the court hath ordered a *perpetual injunction* againſt the defendant, becauſe there the ſuit is firſt attached in that court, and never began at law, and ſuch precedent incumbrances appearing to be fraudulent, and inequitable againſt the poſſeſſion, it is within the compaſs of the court to relieve againſt it.

If one has a verdict in ejectment, and coſts taxed, and an attachment iſſues for the nonpayment of coſts, the defendant ſhall not have an ejectment in the ſame court againſt the plaintiff till thoſe coſts are paid, but he may proceed in another court; and the reaſon is, becauſe the court will have obedience paid to their rules; but another court cannot take cognizance of the rules of a diſtinct court. *Sid.* 279. 8 *Mod.* 225. *Stra.* 548. 554. 681. 2 *Stra.* 1152.

But where *H.* brought an ejectment in *C. B.* and at the aſſizes was nonſuited, and coſts were taxed on the nonſuit, and then he brought a new ejectment in *C. B.* and upon a rule being there made to ſtay proceedings till the coſts of the firſt nonſuit were paid, he brought an ejectment in *B. R.* that court ſtayed proceedings there alſo, upon producing the rule of the court of *C. B.* and made a like rule there. 2 *Barnes* 107.

No new ejectment ſhall be brought by the defendant after recovery againſt him, till he has quitted the poſſeſſion, or the tenants have attorned to the plaintiff; ſo that he be in poſſeſſion and the defendant not. *Salk.* 258. *pl.* 12.

The

Of bringing a new or ſecond Ejectment.

The court would not ſtay proceedings in one ejectment till the event of another was determined. *Barn. K. B.* 47.

But proceedings in a ſecond ejectment were ſtayed till the ſpecial verdict in the former was determined. *Ibid.* 298. 2 *Stra.* 1105.

Of recovering the meſne Profits.

BEFORE the time of *Hen.* 7. plaintiffs in ejectment did not recover the term; but until about that time the *meſne profits* accruing to the *ejector* were the meaſure of the damages given the *ejected.* So that by the old law and practice in ejectment, the plaintiff recovered nothing but damages, no term was recovered; but when it became eſtabliſhed that the term ſhould be recovered, the ejectment was put into the form of a *real action*; the proceeding was *in rem.* and the thing itſelf; the term only then was recovered, and nominal damages, but not the *meſne profits*; whereupon a mode of recovering the *meſne profits* [after the ejectment had been tried, and the plaintiff had recovered poſſeſſion] in an action of *treſpaſs* was introduced, and grafted upon the preſent fiction in ejectment; and the action of *treſpaſs* for the *meſne profits* is put in the place of the ejectment at common law, which was a true, and not a fictitious action, and nothing more than an action of treſpaſs. *Vide* 3 *Wilſ.* 120. and *Aſlin* v. *Parker*, *Burr.* 4 *pt.* 688.

Actions for meſne profits tend to create double expence; the plaintiff ſhould be ready at the trial of ejectment to prove his damages. *Barnes* 87.

It was ſettled by all the judges in *Aſlin* v. *Parker*, 32 *Geo.* 2. on a caſe reſerved, that in treſpaſs againſt the tenant in poſſeſſion for *meſne profits*, either by the leſſor or the nominal plaintiff, after a recovery in ejectment, the plaintiff need not prove a title; but it is ſufficient to produce the judgment in ejectment, and the writ of poſſeſſion executed, and to prove the value of the profits, and thereupon he ſhall recover from the time of the demiſe laid in the declaration. *Burr.* 4 *pt.* 688, *Barnes* 472.

Where the judgment was againſt the caſual ejector, and no rule entered into, the leſſor cannot maintain *treſpaſs for the meſne profits* without an actual entry—but *aliter* where the judgment is againſt the tenant in poſſeſſion; and he entered into a rule, for then he is eſtopped. *Oct. Stra.* 5.

In caſe the plaintiff can prove his title accrued before the time of the *demiſe*, and prove the defendant to have been in poſſeſſion, he ſhall recover antecedent profits; but then the defendant may controvert the title, which he cannot if the plaintiff goes for no longer time than is contained in the demiſe. *Decoſta and Atkins*, per *Eyre*, ch. juſt. *Hil.* 4 *Geo.* 2. *Bull. Ni. Pri.* 87.

But

Of recovering the meſne Profits.

But *note:* Should the plaintiff in an action of treſpaſs for *meſne profits* go back for damages till the time his title accrued, and the defendant have been in poſſeſſion, he may protect himſelf by the ſtatute of limitations, from all damages, but for the laſt *ſix years.* Bull. Ni. Pri. 88.

If the action be brought, after judgment by default, againſt the *caſual ejector*, it is uſual for the plaintiff to recover the coſts of the ejectment, as well as the meſne profits. *Bull. Ni. Pri.* 88.

And in caſe the action be brought by the *nominal plaintiff* in ejectment, the court on application will ſtay the proceedings therein till ſecurity is given for the coſts. Agreed. *Ibid.*

If one tenant *in common* recovers in ejectment againſt another, he may have treſpaſs for the *meſne profits.* 3 Wilſ. 118.

The defendant cannot pay money into court in an action for meſne profits after recovery in ejectment. 2 *Wilſ.* 115.

Of Replevin.

Of the Action of Replevin.

GOODS, *&c.* are only repleviſable when they have been taken by way of *diſtreſs*; and therefore replevin is a remedy grounded upon a *diſtreſs*, being a re-deliverance of the goods or cattle diſtrained to the firſt poſſeſſor, on ſecurity given by him to try the right, and to re-deliver the things diſtrained, if judgment be given againſt him. *Co. Lit.* 145.

The action of *replevin* is of two ſorts; 1. In the *detinet*. 2. In the *detinuit*, and may be brought in any caſe where a man has his goods or cattle taken from him by another, by way of *diſtreſs*.

Where the party has had his goods re-delivered to him by the ſheriff upon a *writ* of replevin, or upon a *plaint* levied before him, [which by the ſtatute of *Marlbridge* 52. *Hen.* 3. the ſheriff may take out of the county court, and make replevin preſently] the action is in the *detinuit*, *wherefore he detained the goods*, &c. but where the ſheriff has not made ſuch replevin, but the diſtrainer ſtill keeps poſſeſſion, the action is in the *detinet*; *wherefore he detains the goods*, *&c.* However, of late years, no action has been brought in the *detinet*, though there is much curious learning in the old books concerning it.

The advantage the plaintiff has in bringing an action of replevin in the *detinet*, inſtead of an action of treſpaſs *de bonis aſportatis*, is, that he can oblige the defendant to re-deliver the goods to him immediately, in caſe upon making his avowry they appear to be repleviſable; but as he may more ſpeedily have them delivered immediately after they are diſtrained, by application to the ſheriff, the action in the *detinet* has fell into diſuſe, and is never brought, unleſs the diſtrainor has eſloined the goods, ſo that the ſheriff cannot get at them to make replevin; and then it may be brought in the *detinet*: Whereupon, after avowry made, the plaintiff may pray that the defendant gage deliverance; or he may, upon the return of *elongavit* to the *pluries writ of replevin*, have a writ to the ſheriff, commanding him to take other beaſts, *&c.* of the defendants in *withernam*; but then, if the defendant, before the return of the *withernam*, appears to the writ of replevin, and offers to plead *non cepit*, it ſhall ſtay the *withernam*; for the defendant ſhall not be con-

Of the Action of Replevin.

cluded by the return of the *elongavit*, becauſe the ſheriff can make no other return, where he cannot find the thing to be replevied.

The word *withernam*, is a term, which ſignifies a ſecond or reciprocal diſtreſs, in lieu of the firſt, which was eſloined. The writ of *capias in withernam*, is a writ therefore to the ſheriff, commanding him to take other goods, *&c.* of the diſtrainors, in lieu of the diſtreſs formerly taken and eſloined or withheld from the owner. So that here is now diſtreſs againſt diſtreſs, one being taken to anſwer the other by way of repriſal, and as a puniſhment for the illegal behaviour of the original diſtrainor. For which reaſon, goods taken in *withernam*, cannot be replevied, till the original diſtreſs is forthcoming. Ld. *Raym.* 475.

If the perſon taking the goods claims property in them before the ſheriff, he cannot make replevin of them: But then the plaintiff may ſue out a writ *de proprietate probanda*, upon which the ſheriff muſt have an inqueſt of office; and if, upon ſuch inquiſition, the property is found in the plaintiff, the ſheriff ſhall make replevin; otherwiſe not. But though the property is not found in the plaintiff, he is not concluded, for he may ſtill have his action of replevin in the *detinet*, or of treſpaſs. But if in an action of replevin the defendant *plead property*, and it be found for him, the plaintiff is thereby concluded.

Therefore, he that brings replevin muſt have an abſolute, or at leaſt a ſpecial property in the thing diſtrained; and therefore, ſeveral men cannot join in a replevin, unleſs they be joint-tenants, or tenants in common. *Co. Lit.* 145.

Executors may have a replevin of a taking in *vita teſtatoris*.

So if the cattle or goods of a feme ſole be taken, and ſhe afterwards intermarry, the huſband alone may have replevin; but if they join, and there be a verdict for them, judgment will not be arreſted, becauſe the court will preſume them jointly intereſted (as they may, if a diſtreſs be taken of goods, of which a man and woman were joint-tenants, and afterwards intermarry:) the avowry admitting the property to be in the manner it is laid. Vide *Bull. Ni. Pri.* 53.

Of the Action of Replevin, and where it may be brought.

THE action of replevin may be brought either in *B. R.* or *C. B.* by writ made returnable therein; but the action is moſt uſually commenced in the county court, though by ſpecial cuſtom a replevin may be brought in an *hundred* court, *&c.* or other court of record, that may hold plea thereof. Vide *Salk.* 580. 2 *Inſtit.* 139. 3 *Mod.* 56. *&c.*

A replevin lies two ways in a *county court*, by *writ* and by *plaint*. However, it is ſeldom brought by *writ* there, becauſe the plaintiff may have his goods or cattle reſtored to him more ſpeedily, by levying his *plaint* there, according to the ſtatute of *Marlbridge* 52. *Hen.* 3. *c.* 21. which gives a replevin by plaint, either in or out of court; till which ſtatute, the ſheriff could not replevy by *plaint*. For, at common law, the ſheriff could replevy by writ only, and that in his county court. Vide Ld. *Raym.* 219.

If the replevin is *by writ* there, the writ iſſues out of *Chancery*, and is in the nature of a *juſticies*. 2 Inſtit. 240.

And if he does not return it, or does nothing upon it, the plaintiff may have an *alias*, in which is inſerted uſually this clauſe, that he make replevin, *vel cauſam nobis ſignifices*. F. N. B. 68. E. And after that a *pluries*.

If the ſheriff makes replevin, he need not return the writ; but if he does not, he ought to return the cauſe. 2 *H.* 7. 5. *b.*

And if he does not, an attachment lies againſt him to the coroners, commanding them to attach the ſheriff for his contempt, and in the interim make replevin. *Reg.* 81.

To any of theſe writs, the ſheriff cannot return a *mandavi ballivo*, &c. For by *Weſtm.* 1. 17. the ſheriff ought immediately to enter the franchiſe, and make deliverance. *F. N. B.* 58. *F.*

If he does not replevy, and makes any other return, the plaintiff ſhall have a *capias in withernam*; and after that, *an alias*, and a *pluries capias in withernam.*

But as replevin by *plaint* is the moſt uſual and expeditious, I ſhall ſhew how to proceed therein.

Upon *plaint* made to the ſheriff, of goods or cattle diſtrained, he, by *parol* or precept, may, by his bailiff, replevy them. 2 *Inſtit.* 139. *F. N. B.* 69. *E. Per Lit.* 9 *Edw.* 4. 48. *b.*

And it is not neceſſary for the plaintiff to ſtay till the county court is held, before he makes plaint, if the plaint

Of the Action of Replevin, and where it may be brought.

is afterwards entered there. *Ibid.* And the ſheriff may make deliverance, though the goods or cattle are above the value of 40 *s.*

By ſtat. 1 & 2 *P.* & *M. c.* 12. *ſect.* 3. "For the more ſpeedy delivery of cattle diſtrained, the ſheriff muſt appoint four deputies at leaſt in his bailiwick, dwelling not above twelve miles one from the other, to make replevins; who have authority in his name, to make replevins and deliverances, &c."

Of finding Pledges in Replevin.

UPON making replevin, the ſheriff ought to take two kinds of *pledges*—viz. *pledges of proſecution* by the common law, and pledges *pro retorno habendo*, according to the ſtatute *Weſtm.* 2. *c.* 2. by which it is provided, "That ſheriffs or bailiffs from thenceforth ſhall not only receive of the plaintiff, pledges for the purſuing of the ſuit, before they make deliverance of the diſtreſs, but alſo for the return of the beaſts, if return be awarded; and if any take pledges otherwiſe, he ſhall anſwer for the price of the beaſts; and the lord that diſtrains ſhall have his recovery by writ, that he ſhall reſtore to him ſo many beaſts or cattle; and if the bailiff be not able to reſtore, his ſuperior ſhall reſtore."

The pledges for proſecution in this, as in all other actions, are now become *nominal perſons*; but the pledges *pro retorno habendo* ought to be real and reſponſible perſons; for an action lies againſt the ſheriff if he omits to take theſe pledges, or if he takes thoſe that are inſufficient; for the party may have a *ſcire facias* againſt the pledges, where the ſuit is in any court of record; and if it is in any court not of record, as the county court, hundred court, *&c.* he may have a *precept* in the nature of a *ſcire facias* againſt theſe pledges, though not a *ſcire facias*, becauſe a *ſcire facias* ought to be grounded on a record. Ld. *Raym.* 278. *Comb.* 1, 2. 593.

But as ſheriffs grew remiſs in their duty, and often neglected taking theſe pledges *pro retorno habendo*; or if any were taken, for the moſt part they were found to be indigent and irreſponſible people; by the ſtat. of 11 *Geo.* 2. *c.* 19. *ſ.* 23. "An act for the better ſecuring the payment of "rents, and preventing frauds by tenants;" It is enacted, "That to prevent vexatious replevins of diſtreſſes taken *for* "*rent*, all ſheriffs and other officers, having authority to "grant replevins, may and ſhall, in every replevin of a "diſtreſs for rent, take in their own names, from the "plaintiff, and two reſponſible perſons as ſureties, a bond "in double the value of the goods diſtrained [ſuch value to "be aſcertained by the oath of one or more credible witneſs "or witneſſes not intereſted in the goods or diſtreſs, which "oath the perſon granting ſuch replevin is hereby autho-"rized and required to adminiſter] and conditioned for pro-"ſecuting the ſuit with effect and without delay, and for "duly returning the goods and chattels diſtrained, in caſe "a return ſhall be awarded before any deliverance be made

Of finding Pledges in Replevin.

" of the diſtreſs; and that ſuch ſheriff, or other officer as " aforeſaid, taking any ſuch bond, ſhall, at the requeſt and " coſts of the avowant or perſon making conuzance, aſſign " ſuch bond to the avowant or perſon aforeſaid, by indorſ- " ing the ſame, and atteſting it under his hand and ſeal, in " the preſence of two or more credible witneſſes; which " may be done without any ſtamp, provided the aſſignment, " ſo indorſed, be duly ſtamped before any action be brought " thereon; and if the bond ſo taken and aſſigned be for- " feited, the avowant, or the perſon making conuzance, " may bring an action and recover thereupon in his own " name; and the court, where ſuch action ſhall be brought, " may, by a rule of the ſame court, give ſuch relief to the " parties, upon ſuch bond, as may be agreeable to juſtice " and reaſon; and ſuch rule ſhall have the nature and ef- " fect of a defeazance to ſuch bond."

An action on the caſe was brought againſt a ſheriff for taking inſufficient pledges upon a replevin; to which he pleaded not guilty; and a verdict being found againſt him, and a judgment given thereon in the court of *C. B.* on a writ of error in *B. R.* it was objected, 1. That an action on the caſe was not the proper remedy; 2. Suppoſing ſuch action lay, that there ought to have been a *ſcire facias* firſt ſued out againſt the pledges. As to the firſt, the court held, that the party diſtraining has, by the ſtat. *Weſtm.* 2. an intereſt in the pledges; and if the ſheriff omits to take ſuch, or, which is the ſame thing, takes inſufficient ones, he is aggrieved, and conſequently entitled to his action.—2*dly*, That though a *ſcire facias* may be brought againſt the pledges, yet it does not follow from thence, that an action does not lie againſt the ſheriff; and ſuch *ſcire facias*, which is only to certify the ſufficiency of the pledges, is the leſs neceſſary in the preſent caſe, ſuch inſufficiency being ſet forth in the declaration, and found by the verdict. *Hil.* 13 *Geo.* 2. *Pattiſon and Prowſe.*

Note: In ſuch action againſt the ſheriff, ſome evidence muſt be given by the plaintiff of the inſufficiency of the pledges or ſureties; but very ſlight evidence is ſufficient to throw the proof on the ſheriff, for the ſureties are known to him, and he is to take care that they are ſufficient. *Saunders* v. *Darling and another*, *Sittings at Weſtm. Tr.* 10 *Geo.* 3.

Of

Of making Replevin.

UPON *plaint* being made, and pledges found; or in caſe the goods, &c. have been diſtrained for *rent*, a replevin-bond having been taken, according to the ſtat. of 11 *Geo.* 2. *c.* 19. The ſheriff, or one of his deputies, by the ſtat. 1, 2 *P.* & *M.* *c.* 12. is to make replevin of the goods or cattle diſtrained, which is done by granting a warrant, which is to the following effect:

" *Bucks*, to wit. *A. B.* Eſq. ſheriff of the county aforeſaid: To the bailiff of the hundred of *Deſborough*, in the ſaid county; and alſo to *John Thomas*, and *William Jones*, my bailiffs, and to every of them, greeting: For as much as *C. D.* hath found me ſufficient ſecurity as well to proſecute his ſuit againſt *E. F.* and *G. H.* for taking and unjuſtly detaining of his cattle, goods and chattels, to wit, *one mare and four colts* which the ſaid *E. F.* and *G. H.* have taken and unjuſtly detained, as is alledged; as alſo for return thereof, if a return thereof ſhould be alledged: therefore I command you, and every of you, jointly and ſeverally, that on the behalf of our lord the king, you replevy, and cauſe to be delivered to the aforeſaid *C. D.* his cattle, goods and chattels aforeſaid; and that the aforeſaid *E. F.* and *G. H.* give, or cauſe to be given, ſufficient pledges, ſo that they may be and appear at the next county court to be holden at *Ayleſbury*, in and for the county of *Bucks* aforeſaid, to anſwer the aforeſaid *C. D.* in a plea of taking, and unjuſtly detaining, of his cattle, goods and chattels aforeſaid; and in what manner you ſhall execute this precept certify to me at the ſaid next county court, to be held at the time and place aforeſaid, under the peril incumbent, given under the ſeal of my office this day of in the twentieth year of the reign of our ſovereign lord *George* the third, king of *Great Britain*, &c. and in the year of our Lord 1780."

By *John Dixon*,

One of the replevinors appointed by the ſaid ſheriff for the ſaid county of *Bucks*.

Of removing the Suit from the *County-court*, *&c.* into the Courts of *B. R.* or *C. B.*

THE replevin remains before the ſheriff, *&c.* though the goods and chattels, *&c.* diſtrained are above the value of 40*s.* for the replevin, *alias* and *pluries*, are all vicontiel writs, 2 *H.* 7. 5. *b.* and the ſuit may be determined in ſuch inferior court; but the ſuit may be removed by either of the parties into the courts of *B. R.* or *C. B.* to be there determined.

And it may be removed by the plaintiff without cauſe. *F. N. B.* 69. *m.*

And by the defendant with cauſe, but not without cauſe. *F. N. B.* 70. *a.* This, however, is otherwiſe now, for either party may remove it.

The method to be purſued in moving it, depends entirely on the manner in which the ſuit was commenced below.

For if replevin be in the county court by *writ*, it muſt be removed into *B. R.* or *C. B.* by *pone*. F. N. B. 69. m.

If in the county court by *plaint*, it is removed by writ of *recordari facias loquelam*, [commonly called a *reſalo*, for the ſake of abbreviation]. *F. N. B.* 71. *a.*

If replevin is in a court of record, that may hold plea in replevin, it muſt be removed by writ of *certiorari*, and can be removed in no other manner. 3 *Mod.* 56.——*Per King* ch. juſt. *Hil.* 3 *Geo.* 1. For a *reſalo* does not go to a court of record, becauſe there the ſuit is already recorded.

And if the plaint is in the court of another lord, it may be removed into *B. R.* or *C. B.* by *recordari* to the ſheriff, commanding him *quod accedas ad curiam et in plena curia ill' recordari facias*, &c. *F. N. B.* 70. *b.*

But it is ſaid, that a replevin ſhall not be removed out of a court, which is not the king's court, without cauſe, neither by the plaintiff, nor by the defendant. *Reg.* 85. *b.* 2 *Inſtit.* 339. for the prejudice that may come thereby to the lord.

All the above writs, to remove the ſuit from the inferior courts into *B. R.* or *C. B.* are in their nature *original writs*, and iſſue out of *Chancery*. But as the ſuit is moſt uſually commenced in the *county court* by *plaint*, and ſeldom or ever at this day by *writ*, I ſhall only ſhew the method of removing it when by *plaint*.

In order to remove it therefore, the party makes out a *præcipe* to the *curſitor* of the proper county, in the following form:

Of removing the Suit from the *County-court*, &c. into the Courts of *B. R.* or *C. B.*

Bucks, to wit, *Refalo* for [either the plaintiff or defendant naming him] of a plaint between *C. D.* and *E. F.* and *G. H.* for taking and unjuſtly detaining the cattle, goods, and chattels of the ſaid *C.*

Returnable from *Eaſter* in fifteen days.

Upon delivery of this writ to the *curſitor*, he makes out the writ, which muſt be carried to the under-ſheriff of the county, who returns it of courſe.

The *refalo* is to the following effect:

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*, greeting. We command you, that in your full county you cauſe the plaint to be recorded, which is in the ſame county, without our writ, between *C. D.* and *E. F.* and *G. H.* of the cattle, goods, and chattels of the ſaid *C.* taken and unjuſtly detained, as it is ſaid; and that you have the ſaid record *before us* [or if *C. B.* before our juſtices] at *Weſtminſter*, from *Eaſter* day, in fifteen days, under your ſeal, and the ſeals of four law-knights of the ſame county, of ſuch as ſhall be preſent at the ſaid record; and that you prefix the ſame day to the parties, that then they may be there ready to proceed in the ſaid plaint as ſhall be juſt, and have you there the names of the ſaid four knights, and this writ. Witneſs ourſelf at *Weſtminſter*, the —— day of ——— in the twentieth year of our reign.

Let this writ be executed if the ſaid *C.* deſires it, otherwiſe not.

The return thereof, is as follows:

By virtue of this writ to me directed, in my full county held at *Aylesbury*, the ——— day of ——

Of removing the Suit from the *County-court*, *&c.* into the Courts of *B. R.* or *C. B.*

in the twentieth year of the reign of our ſovereign lord *George* the third, king of *Great Britain*, *France*, and *Ireland*, &c. I cauſed the plaint to be recorded, which is in the ſame county, without the writ of our ſaid lord the king, between *C. D.* and *E. F.* and *G. H.* of the cattle, goods, and chattels of the ſaid *C.* taken and unjuſtly detained, as it is ſaid, which ſaid plaint appears in a certain ſchedule to this writ annexed; and I have the ſaid record before our ſaid lord the king [or the juſtices of our ſaid lord the king] at *Weſtminſter*, on the day within written, under my ſeal, and the ſeals of four lawful knights of the ſame county, who were preſent at the ſaid record; and I have prefixed the ſame day to the parties, that they may be then and there ready to proceed in the ſaid plaint, as ſhall be juſt.

The anſwer of *A. B.* eſq. ſheriff.

The ſchedule to be annexed to the writ and return.

At my full court held at *Ayleſbury*, in the county of *Bucks*, the ——— day of ——— in the twentieth year of the reign of our ſovereign lord *George* the third, *&c.* before *L. M. N. O. P. Q.* and *R. S.* four lawful knights of the ſame county, (amongſt other things) it is thus contained: *C. D.* complains againſt *E. F.* and *G. H.* of a plea of taking and unjuſtly detaining of his cattle, goods, and chattels, to wit, one mare and four colts of the ſaid *C.* and at my full court held at *Ayleſbury*, in the county aforeſaid, the —— day of —— laſt, before *S. T. J. M. N. U.* and *W. X.* four lawful knights of the ſaid county, I cauſed the ſaid plaint between the parties aforeſaid to be recorded as the writ hereunto annexed requires. In teſtimoney whereof, as well I the ſaid ſheriff, as the ſaid *S. T. J. M. N. U.* and *W. X.* who were preſent at the ſaid record, have cauſed our ſeals to be hereunto put, the day and year and place above mentioned.

A. B. eſq. ſheriff.

If

Of removing the Suit from the *County-court*, &c. into the Courts of *B. R.* or *C. B.*

If the ſheriff returns the *recordari*, *tardè*, the party ſhall have an *alias*, &c. *F. N. B.* 70. *b.*

By the *recordari* nothing is removed but the *plaint*, even though iſſue ſhould be joined below. *F. N. B.* 71. *a.*

And the plaint may be removed, though the plaintiff has diſcontinued there. *Ibid.*

When the plaint is removed into *B. R.* or *C. B.* the plaintiff muſt declare there *de novo*, otherwiſe the defendant may ſue out a writ *de retorno habendo*. F. N. B. 71. a.

And the plaint, when removed, is filed with the *filazer* of the county in *B. R.* as it is alſo when removed into *C. B.* *

If the plaintiff removes the plaint, he muſt file the *refalo*, &c. with the *filazer*, and ſee if the defendant has appeared; and if he has not appeared, he muſt give him a rule to appear; and upon non-appearance thereto, the plaintiff muſt ſue out a *pone*; and upon like non-appearance thereto, he may ſue out a *diſtringas ad infinitum*, till he does appear—And then the plaintiff declares.

But if the defendant removes it, he muſt file the *refalo* and return thereto with the *filazer*; and having entered an appearance, he muſt then give a rule for the plaintiff to declare; and for want of a declaration, when the rule is out, he may ſign a *non-pros* for not declaring, and immediately ſue out a writ *pro retorno habendo*.

The defendant's attorney, upon filing the *refalo*, which he ought to do on the return day, or at leaſt on the appearance day of the return, ought to give the plaintiff's attorney notice thereof, and call upon him for a declaration. But if the defendant does not get it returned and filed within two terms, the plaintiff may have a certificate thereof from the *filazer*, and thereupon the *curſitor* will make him out a writ of *procedendo*, which being obtained, he may proceed in his plaint in the court below.

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* But *note:* Upon removal of any other actions, except *replevin*, into *C. B.* the writ and proceedings are filed with the *prothonotary* there.

Of the Declaration in Replevin.

THE declaration in replevin may be laid in the county where the cattle or goods were taken, or in the county into which they were driven after the taking. *F. N. B.* 69. *I.*

And the declaration ought to be not only of a taking in a vill or town, but alſo in *quodam loco vocat'*. But if the defendant would take advantage of this omiſſion, he muſt *demur* to the declaration. *Hob.* 16. *Bullithorp* v. *Turner*, *C. B. Tr.* 16, 17 *Geo.* 2.

But if the defendant would take advantage of a variance in the place where the taking is laid, from that in which it really was, he muſt plead it in *abatement*. 6 Mod. 103.

For *priſal in auter lieu* muſt be pleaded in abatement, and cannot be pleaded in bar. *Salk.* 3. *pl.* 8. 2 Ld. *Raym.* 1016. *Carth.* 344. *Show.* 98.

The declaration muſt mention the cattle or goods demanded with ſuch certainty, that the ſheriff may make deliverance of them—and therefore, it ſhould mention the ſorts or ſpecies, as ſheep, cows, *&c.* Carth. 218.

If the cattle or goods are returned, the declaration ſhould ſay, *wherefore he took*, &c. *and detained them againſt gages and pledges*, *until*, &c. 1 *Saund.* 347.

But if they are not returned, the declaration muſt be, *wherefore he took*, &c. *and ſtill detains againſt goges and pledges.* Co. Ent. 610. b. Raſt. Ent. 560.

So if only part are returned, it ſhall ſay as to that, *detained until*, &c. and as to the reſidue, *ſtill detains.* Co. Ent. 611. b.

If the declaration is in the *detinuit*, and the plaintiff prevails, he ſhall have damages for the taking and coſts.

If in the *detinet*, and he prevails, he ſhall recover the value of the cattle or goods diſtrained, and his damages for the taking and coſts. *F. N. B.* 69. *L.*

How

How to proceed if the Plaintiff does not declare, &c.

IF the plaintiff declares, the defendant may *plead in abatement, or in bar*; or he may *avow* in his own right, *make conuſance in right of another, or juſtify*—for all which, ſee *Comyns's Digeſt*, *Viner's Abridgment*, *Bacon's Abridgment*, &c. and the various books of entries.

If the parties go on to *iſſue or demurrer*, the proceedings and practice therein are the ſame as in other actions.

If the plaintiff has removed the cauſe, and does not declare or proceed therein; or if the defendant has removed it, and after having ſerved the plaintiff with a rule to declare, and demanded a declaration, and the plaintiff does not declare and proceed therein, the defendant may ſign a *non-pros* and judgment *pro retorno habendo*, and then ſue out a * writ *pro retorno habendo*, which is made out by the *filazer*, and is to the following effect:

> *GEORGE* the third, by the grace of *God*, &c. To the ſheriff of *Bucks*, greeting. Whereas *E. F.* was ſummoned to appear in our court before us [or before our juſtices] at *Weſtminſter*, to anſwer *C. D.* in a plea, wherefore he took the cattle of the ſaid *C.* to wit, one mare and four colts, and unjuſtly detained the ſame againſt ſureties and pledges, as he ſays; and the ſame *C.* afterwards in our ſaid court made default, whereupon it was then and there conſidered, that the ſaid *C.* and his pledges of proſecuting ſhould be in mercy, and that the aforeſaid *E.* ſhould go thereupon without delay, and that he ſhould have a return of the cattle aforeſaid. Therefore we command you, that you cauſe to be returned the cattle aforeſaid to the ſaid *E.* without delay; and the ſame at the complaint of the aforeſaid *C.* you do not deliver without our writ, which ſhall make expreſs mention of the aforeſaid judgment, and in what manner you ſhall execute this our precept, you ſhall make manifeſt *to us* [or *to our juſtices*] at

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* *Note:* If the diſtreſs was made for *rent*, ſee a better method of proceeding, *poſt*.

Weſtminſter

How to proceed if the Plaintiff does not declare, &c.

Weſtminſter, on [a general return day, all the proceedings being *by original*] and have you there this writ.

Witneſs, &c. on, &c. in the twentieth year of our reign.

If, however, the plaintiff even after ſuch judgment of *non-pros* ſigned, and this writ of *retorno habendo* ſued out by the defendant, would wiſh to go on in his ſuit, he is at liberty ſo to do; and his application for that purpoſe muſt be made to the *filazer* for a *writ of ſecond deliverance*; which *writ of ſecond deliverance* is in the nature of a *ſuperſedeas* to the *writ pro retorno habendo*, if brought before it be executed.

At the common law, if the plaintiff in replevin had been nonſuited, either before or after verdict, the defendant who diſtrained had judgment for a return, but not *irreplevi-ſable*: So that the plaintiff might have had as many replevins as he would, which was vexatious and miſchievous. To remedy which, the ſtatute *Weſtm.* 2. *c.* 2. reſtrains the plaintiff from having any more replevins after a nonſuit, but gives him a *writ of ſecond deliverance*. 2 Inſtit. 340.

And if after ſuch *writ of ſecond deliverance* the plaintiff is nonproſſed, or becomes nonſuited, or the plea be diſcontinued, or the writ abates, or he prevails not in his ſuit, the defendant then ſhall have judgment for a return *irreplevi-ſable*. 2 Inſtit. 341.

The *writ of ſecond deliverance* is to the following effect:

"*GEORGE* the third, &c. To the ſheriff of *Bucks*, greeting. We command you, if *C. D.* ſhall make you ſecure of proſecuting his complaint, and alſo of returning the cattle which to *E. F.* lately in our court, before *our juſtices* at *Weſtminſter*, at a certain day now paſt, were adjudged by the default of him the ſaid *C. D.* if a return thereof ſhall be adjudged; then the cattle to him the ſaid *C. D.* without delay, you cauſe to be delivered, and put by ſureties and ſafe pledges the aforeſaid *E. F.* that he be before our juſtices at

How to proceed if the Plaintiff does not declare, &c.

at *Weſtminſter*, [the return] to anſwer the ſaid *C. D.* of the taking of the cattle aforeſaid, and that you have there the names of the pledges, &c. and this writ. Witneſs Sir *William de Grey*, knight, at *Weſtminſter*, the day of in the twentieth year of our reign.

If upon the return-day, or the appearance-day of the return-day of the *writ of ſecond deliverance*, the plaintiff declares, the ſubſequent proceedings are the ſame as in other caſes throughout the cauſe.

If the plaintiff does not ſue out a *writ of ſecond deliverance*, and the ſheriff ſhould return to the *writ pro retorno habendo*, that the cattle, &c. were eloined or removed to places unknown, by reaſon of which he could not return the ſame to the defendant, as by the ſaid writ he was commanded, then upon ſuch return of *elongata*, the defendant ſhall have a *capias in withernam*, which is to the following effect, and which is alſo obtained of the *filazer*.

GEORGE the third, &c. To the ſheriff of *Bucks*, greeting: Whereas *E. F.* was ſummoned to appear in our court, before *our juſtices* at *Weſtminſter*, to anſwer *C. D.* of a plea, wherefore he took the cattle of the ſaid *C.* and unjuſtly detained the ſame againſt ſureties and pledges, as he ſays; and the ſame *C.* afterwards, in our ſame court, made default in the ſame plea; whereupon it was then and there conſidered, that the ſame *C.* and his pledges of proſecution ſhould be in mercy; and that the ſaid *E.* ſhould go thereupon without day, and that he ſhould have a return of the cattle aforeſaid: whereupon, by our writ, we commanded you, that you cauſed to be returned the cattle aforeſaid to the ſaid *E.* without delay, and the ſame at the complaint of the ſaid *C.* you ſhould not deliver without our writ, which of the aforeſaid judgment ſhould make expreſs mention, and in what manner you ſhould have executed our ſaid precept

How to proceed if the Plaintiff does not declare, &c.

precept you ſhould make manifeſt to *our juſtices* at *Weſtminſter*, on [the return-day of the *retorno habendo*] laſt paſt, on which day you returned to *our ſaid juſtices* at *Weſtminſter*, that before the coming of the aforeſaid writ the cattle aforeſaid were eloined or conveyed away to places unknown to you by the ſaid *C.* ſo that the cattle aforeſaid to the ſaid *E.* you could not cauſe to be returned as by the ſaid writ you was commanded: *therefore* we command you, that of the cattle of him the ſaid *C.* to the value of the cattle before taken in *withernam*, you take and deliver to him the ſaid *E.* to be held by him until the ſaid cattle, before taken, you can cauſe to be returned, and put by ſure and ſafe pledges the aforeſaid *C.* that he be before *our juſtices* at *Weſtminſter*, on [the return-day] to anſwer as well to us of the contempt, as to the ſaid *E.* of the damages and injuries to him in that behalf done; and in what manner this our precept you ſhall execute make appear to *our juſtices* at *Weſtminſter*, at the aforeſaid return; and that you have there the names of the pledges, and this writ. Witneſs, &c. on, &c. at, &c. in the *twentieth year of our reign.*

The writ of *withernam* is but *meſne proceſs*. *Ld.* Raym. 614. *Vide* Comb. 201. 2 Salk. 582.

W. ſued a replevin. *H.* removed it by *recordari* into the *King's Bench*; the plaintiff did not declare, and upon that a return was awarded to *H.* upon which the ſheriff returns *averia elongata*, and then a *withernam* was awarded and executed; afterwards the plaintiff came and prayed that he might be admitted to declare; and alſo prayed a deliverance of the cattle taken *in withernam*: and it was teſtified by the clerks, that upon the plaintiff's ſubmiſſion to a *fine* for not declaring, and that being impoſed upon him by the judges, he ſhall have deliverance of the *withernam*; and a fine of 3 *s.* 4 *d.* being accordingly impoſed on the plaintiff, he then declared and had deliverance. *Noy* 50. *Webb and Hind*; but ſaid, that the courſe of *B. R.* is contrary to that of *C. B.*

If the ſheriff ſhould return *nulla bona vel catalla ad valorem*, &c. to the *writ of withernam*, the defendant may ſue out an *alias capias in withernam*, and after that a *pluries*.

If

How to proceed if the Defendant does not appear, &c.

IF the plaintiff has removed the cauſe; and the defendant has not appeared upon the return, or at leaſt upon the appearance-day of the return of the *refalo*; the plaintiff ſhould ſerve him with a rule to appear, and upon his non-appearance thereto ſue out a *pone*, which is to this effect:

> *GEORGE* the third, *&c.* To the ſheriff of *Bucks*, greeting: Put by ſureties and ſafe pledges, *E. F.* that he be before *our juſtices* at *Weſtminſter* from [the return-day] to anſwer to *C. D.* of a plea, wherefore he took the cattle, goods and chattels of the ſaid *C.* and them unjuſtly detained againſt gages and pledges, as he ſaith, and to ſhew wherefore he hath not appeared in our court before *our juſtices* at *Weſtminſter*, from [the return of the *refalo*] laſt paſt, as the day prefixed to him; and have you there the names of the pledges, and this writ. Witneſs Sir *William De Grey*, knight, at *Weſtminſter*, the day of in the twentieth year of our reign.

If upon the return of the *pone*, the defendant does not appear, the plaintiff may ſue out a *diſtringas ad infinitum* till he does appear; which *diſtringas* is to the ſame effect as other writs of *diſtringas*, to compel an appearance of the party in court.

How the Plaintiff is to proceed if the Defendant has removed the Suit, and does not file the *Refalo*.

IF the defendant has taken out the *recordari facias loquelam*, and does not get it returned and filed within two terms, the plaintiff ſhould apply to the *filazer* for a certificate that the ſame is not returned and filed, which certificate, when obtained, is a ſufficient warrant for the *curſitor* to make out a *writ of procedendo*, which remands the cauſe to the county-court to be there determined. Which *writ of procedendo* is to this effect:

> *GEORGE* the third, &c. To the ſheriff of *Bucks*, greeting: Although we lately commanded you, that in your full court you cauſed the plaint to be recorded, which is in the ſame county, without our writ, between *C. D.* and *E. F.* of the cattle, goods and chattels of the ſaid *C.* taken and unjuſtly detained, as it was ſaid; and that you ſhould have the ſaid record *before our juſtices* at *Weſtminſter*, from [the return of the *refalo*] under your ſeal, and the ſeals of four lawful knights of the ſame county of ſuch as ſhould be preſent at the ſaid record, and that you prefixed the ſame day to the parties, that then they might be there ready to proceed in the ſaid plaint, as ſhould be juſt; and that you ſhould have there the names of the ſaid four knights, and that writ. Yet we being now moved with certain cauſes in our court, before our ſaid juſtices, command you, that in the ſame plaint, againſt the ſaid *E. F.* at the ſuit of the ſaid *C. D.* before you levied or affirmed, and now depending undetermined, you proceed at your next county-court to be holden in and for the ſame county, with what ſpeed you can, in ſuch manner, according to the law and cuſtom of *England*, as you ſhall ſee proper. Our ſaid writ in that behalf heretofore directed to the contrary in any wiſe notwithſtanding. Witneſs, &c. on, &c. at, &c. in the twentieth year of our reign.

How

How the Defendant may proceed in caſe the Diſtreſs was for *Rent* after the Cauſe removed, and the Plaintiff *nonpros'd* or *nonſuited* at the Trial.

IF the cauſe has been removed into the ſuperior court by the *plaintiff*, and after the defendant has appeared he does not declare or proceed therein; or if the cauſe has been removed by the *defendant*, and a rule being ſerved on the plaintiff, he does not declare or proceed therein; the defendant may ſign a *non-pros*, enter up judgment *pro retorno habendo*; and if the *original diſtreſs* was made *for rent*, he may proceed to execute a writ of inquiry of damages, which is the better way than taking out a writ *pro retorno habendo*; becauſe that writ may be ſuperſeded by the plaintiff's ſuing out a *writ of ſecond deliverance*, as was ſeen before. For by the *ſtat.* 17 *Car.* 2. *c.* 7. An act for the more ſpeedy and effectual proceeding upon diſtreſſes and avowries for *rents*, reciting that "Foraſmuch as the ordinary remedy for arrearages of "rents, is by diſtreſſes upon the lands chargeable there-"with; and yet nevertheleſs, by reaſon of the intricate "and dilatory proceedings upon replevins, that remedy is "become ineffectual:" *It is enacted*, "That whenſoever "any plaintiff in replevin ſhall be nonſuit before iſſue "joined, in any ſuit of replevin by plaint or writ lawful-"ly returned, removed or depending in any of the king's "courts at *Weſtminſter*, that the defendant making a *ſug-"geſtion*, in nature of an avowry or cognizance for ſuch "rent, to aſcertain the court of the cauſe of diſtreſs, the "court upon his prayer ſhall award a writ to the ſheriff of "the county where the diſtreſs was taken, to enquire by "the oaths of twelve good and lawful men of his bailiwick, "touching the ſum in arrear at the time of ſuch diſtreſs "taken, and the value of the goods or cattle diſtrained: "and thereupon notice of fifteen days ſhall be given to the "plaintiff, or his attorney, in court, of the ſitting of ſuch "inquiry: and thereupon the ſheriff ſhall inquire of the "truth of the matters contained in ſuch writ, by the oaths "of twelve good and lawful men of his county: and upon "the return of ſuch inquiſition, the defendant ſhall have "judgment to recover againſt the plaintiff the arrearages of "ſuch rent, in caſe the goods or cattle diſtrained ſhall "amount unto that value: and in caſe they ſhall not "amount to that value, then ſo much as the value of the "ſaid goods and cattle ſo diſtrained ſhall amount unto,

How the Defendant may proceed in caſe the Diſtreſs was for *Rent* after the Cauſe removed, and the Plaintiff *nonpros'd* or *nonſuited* at the Trial.

" together with his full coſts of ſuit: and ſhall have exe-
" cution thereupon by *fieri facias* or *elegit*, or otherwiſe, as
" the law ſhall require. *And* in caſe ſuch plaintiff ſhall be
" nonſuit after cognizance or avowry made, and iſſue
" joined, or if the verdict ſhall be given againſt ſuch
" plaintiff, then the jurors that are impannelled, or re-
" turned to inquire of ſuch iſſue, ſhall, at the prayer of
" the defendant inquire concerning the ſum of the arrears,
" and the value of the goods or cattle diſtrained: and there-
" upon the avowant, or he that makes cognizance, ſhall
" have judgment for ſuch arrearages, or ſo much thereof as
" the goods or cattle diſtrained amount unto, together with
" his full coſts, and ſhall have execution for the ſame by
" *fieri facias* or *elegit*, or otherwiſe as the law ſhall re-
" quire."

Sect. 3. gives the like remedy to the *avowant*, *&c.* upon a judgment given for him upon *demurrer*.

And *ſect.* 4. enacts, " That in all caſes aforeſaid, where
" the value of the cattle, diſtrained as aforeſaid, ſhall not
" be found to be the full value of the arrears diſtrained
" for, that the party to whom ſuch arrears were due, his
" executors or adminiſtrators, may, from time to time,
" diſtrain * again for the reſidue of the ſaid arrears."

It has been the cuſtom ever ſince this ſtatute, as it was before, in all caſes when the plaintiff is *non-proſſed*, to enter judgment *pro retorno habendo*; but notwithſtanding, the defendant may enter a *ſuggeſtion* according to this ſtatute, and take out a writ of *inquiry*; and if the plaintiff ſhould take out a *writ of ſecond deliverance* afterwards, it will be no *ſuperſedeas* to ſuch *writ of inquiry*. Cooper *v.* Sherbrook, Eaſt. 32 Geo. 2. C. B. 2 Wilſ. 116. although ſuch *writ of ſecond deliverance* would be a *ſuperſedeas* to the *writ de retorno habendo*. Ibid. and Palm. 403.

The *entry of a ſuggeſtion* upon a *non-pros* before iſſue joined in the nature of an *avowry* or *cognizance* for *rent*, is in the following manner:

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* A ſecond diſtreſs might have been taken by *common law* in ſuch caſe.

The

How the Defendant may proceed in caſe the Diſtreſs was for *Rent* after the Cauſe removed, and the Plaintff *nonpras'd* or *nonſuited* at the Trial.

The entry of a ſuggeſtion in the nature of a *cognizance* in *C. B.*

Bucks, to wit. *E. F.* was ſummoned to anſwer *C. D.* in a plea, wherefore he took the cattle, goods and chattels of the ſaid *C.* and unjuſtly detained the ſame againſt gages and pledges, *&c.* and whereupon the ſaid *E.* offered himſelf in court here, in his own proper perſon, on the day of againſt the ſaid *C.* in the plea aforeſaid, and the ſaid *C.* came not, but made default, Therefore it is conſidered, that the ſaid *C.* and his pledges for proſecuting be in mercy, and that the ſaid *E.* go thereof without day, and have a return of the ſaid cattle, goods, and chattles, &c. and thereupon the ſaid *E.* ſays, that he the ſaid *E.* took the ſaid cattle, goods, and chattles, of the ſaid *C.* for the taking whereof he was ſummoned to appear in the ſaid court of our ſaid lord the king *of the bench* at *Weſtminſter*, to anſwer to the ſaid *C.* as aforeſaid, at the pariſh of *O.* in the ſaid county, in a certain place there called the ſtable, and that he took the ſame as bailiff of *I. A.* for that the ſaid *C.* at the time of the taking the ſaid cattle, goods and chattels, and for the ſpace of two years and three quarters of a year ended at and upon the day of and from thence until the time of the taking of the ſaid cattle, goods and chattels, held and enjoyed the ſaid ſtable, with the appurtenances, amongſt other things, as tenant thereof, to the ſaid *I. A.* at and under the yearly rent of twelve pounds, payable quarterly; and becauſe the ſum of thirty-three pounds, of the yearly rent aforeſaid, for two years and three quarters of another year, ending at and upon the ſaid day of in the ſaid year of our Lord 1779, on that day, in that year, and at the time of taking the ſaid cattle, goods and chattels, were in arrear and unpaid, he the ſaid *E.* as bailiff of the ſaid *I.* took the ſaid cattle, goods

How the Defendant may proceed in caſe the Diſtreſs was for *Rent* after the Cauſe removed, and the Plaintiff *nonpros'd* or *nonſuited* at the Trial.

and chattels, for and in the name of a diſtreſs for the ſaid rent ſo due in arrear and owing from the ſaid *C.* to the ſaid *I.* as aforeſaid. And the ſaid *E.* according to the form of the ſtatute in ſuch caſe made and provided, prays a writ of our lord the king to be directed to the ſheriff of *Bucks*, to enquire of the ſum in arrear of the rent aforeſaid, and of the value of the cattle, goods and chattels aforeſaid; and it is granted to him: wherefore the ſheriff is commanded, that, by the oath of twelve good and lawful men of his bailiwick, he diligently enquire how much rent was in arrear and due to the ſaid *I.* at the time of the taking of the cattle, goods and chattels aforeſaid; and how much the ſaid cattle, goods and chattels, ſo taken in the name of a diſtreſs as aforeſaid, were worth according to the true value thereof, and the inquiſition which he ſhall thereupon take let him make appear here on [the return day] under his ſeal and the ſeals of thoſe by whoſe oath he ſhall take the ſaid inquiſition, *&c.*

Upon entering the above *ſuggeſtion* on a *roll*, the defendant may then ſue out his writ *of enquiry*, which is to the following effect:

GEORGE the third, by the grace of *God*, &c. To the ſheriff of *Bucks*, greeting. Whereas *E. F.* was lately ſummoned to appear in our court *of the Bench*, *before our juſtices* at *Weſtminſter*, to anſwer unto *C. D.* of a plea, wherefore he took the cattle, goods, and chattels of the ſaid *C.* and unjuſtly detained the ſame againſt gages and pledges, until, *&c.* and the ſaid *E. F.* offered himſelf in court, before *our juſtices* at *Weſtminſter*, in his own proper perſon, on the day of againſt the ſaid *C.* in the plea aforeſaid: and the ſaid *C.* came not, but made default. Therefore it was conſidered, that the ſaid *E.* and his pledges ſhould be in mercy; and that the ſaid *E.* ſhould go

How the Defendant may proceed in caſe the Diſtreſs was for *Rent* after the Cauſe removed, and the Plaintiff *nonpros'd* or *nonſuited* at the Trial.

go thereof without day, and have a return of the ſaid cattle, goods, and chattels. And thereupon it hath been ſuggeſted to us in our ſaid court, before *our ſaid juſtices* at *Weſtminſter* aforeſaid, by the ſaid *E.* that he the ſaid *E.* took the ſaid cattle, goods, and chattels of the ſaid *C.* for the taking whereof, he was ſummoned to appear in our ſaid court *of the Bench, before our ſaid juſtices* at *Weſtminſter*, to anſwer the ſaid *C. D.* as aforeſaid, at the pariſh of *O.* in the ſaid county, in a certain place there called the ſtable; and that he took the ſame as bailiff of *J. A.* for that the ſaid *C.* for the ſpace of two years, and three quarters of another year, ending at and upon the ſaid day of . . . . in the year of our Lord 1779; and from thence, until and at the time of taking of the ſaid cattle, goods, and chattels, held and enjoyed the ſaid ſtable, with the appurtenances, amongſt other things, as tenant thereof to the ſaid *J.* at and under the yearly rent of twelve pounds, payable quarterly: and becauſe the ſum of thirty-three pounds of the yearly rent aforeſaid, for two years, and three quarters of an another year, ending at and upon the ſaid day of in the year of our Lord 1779, on that day in that year, and at the time of taking the ſaid cattle, goods, and chattels, were in arrear, and unpaid to the ſaid *J.* he the ſaid *E.* as bailiff of the ſaid *J.* took the ſaid cattle, goods, and chattels, for and in the name of a diſtreſs, for the ſaid rent ſo due in arrear and owing from the ſaid *C.* to the ſaid *J.* as aforeſaid. And the ſaid *E.* according to the form of the ſtatute in ſuch caſe made and provided, prayed our writ to be directed to you, to enquire of the ſum in arrear of the rent aforeſaid, and of the value of the cattle, goods, and chattels aforeſaid. Therefore we command you, that according to the form of that ſtatute, in that caſe made and provided, you diligently enquire, by the oath of twelve good and

How the Defendant may proceed in caſe the Diſtreſs was for *Rent* after the Cauſe removed, and the Plaintiff *nonpros'd* or *nonſuited* at the Trial.

lawful men of your county, how much of the yearly rent aforeſaid, at the time of taking the ſaid cattle, goods, and chattels, were in arrear and unpaid; and how much the ſaid cattle, goods, and chattels, taken as aforeſaid, were worth, according to the true value of the ſame. And the inquiſition which you ſhall thereupon make you ſhall certify to *our juſtices* at *Weſtminſter* on [the return] under your ſeal, and the ſeals of thoſe by whoſe oath you ſhall take that inquiſition; and have you there the names of thoſe by whoſe oath you ſhall take that inquiſition, and this writ. Witneſs Sir *William De Grey*, knight, at *Weſtminſter*, the day of in the twentieth year of our reign.

Upon this writ of enquiry the whole fact is to be proved and may be litigated. *Cooper* v. *Sherbrook*. *E.* 32 *Geo.* 2. *C. B.*

If *A.* diſtrains *B.* for *rent*, and *B.* replevies and gives the uſual bond to proſecute, then levies his plaint, and afterwards removes the ſame by *recalo*, and then does not declare; or if he declares and *A.* avows, and *B.* not putting in a plea in bar, the avowant have judgment by default, that *B.* ſhall be amerced, and avowant have a *retorno habendo*. —*A.* in ſuch caſe may either ſue out a *writ of enquiry* of damages, according to this ſtatute 17 *Car.* 2. *c.* 7. or he may commence actions on the replevin bond [taken according to the 11 *Geo.* 2. *c.* 19. *ſ.* 23.] againſt the plaintiff and his bondſmen, to recover his damages and coſts.

As the ſtatute 17 *Car.* 2. *c.* 7. relates only to diſtreſſes for *rent*, and gives a writ of enquiry *by default*, &c. if the diſtreſs was for *damage feaſant*, after judgment *pro retorno habend.* the defendant's remedy is by writ *de retorno habend.* and if an *elongata* is returned, he may have a *withernam*, &c. or if the ſheriff has taken inſufficient pledges, he may have an action againſt the ſheriff for ſuch inſufficiency of the pledges; or if in caſe the ſheriff took a replevin bond, and

How the Defendant may proceed in caſe the Diſtreſs was for *Rent* after the Cauſe removed, and the Plaintiff *nonpros'd* or *nonſuited* at the Trial.

and aſſigned the ſame to the defendant, he may have an action on ſuch bond againſt the bondſman.

But *note*: In caſes of *damage feaſant*, &c. the ſheriff is not obliged to take a *replevin bond*, nor can he compel the plaintiff to find bondſmen and enter into a bond; [the ſtat. 11 *G.* 2. *c.* 19. *ſ.* 23. only relating to diſtreſſes for *rent*] but then the ſheriff before he makes *replevin* may inſiſt upon ſufficient pledges *pro retorno habendo* in purſuance of *Weſtm.* 2. *c.* 2. and then the defendant after *elongata* returned to the *writ de retorno habendo*, may have a *ſcire facias* againſt ſuch pledges—or if the plaint was never removed after a *non-pros* below, he may have a *precept* in the nature of a *ſcire facias*. Vide 2 Will. 41.

By the ſame ſtatute 17 *Car.* 2. *c.* 7. if the plaintiff is *nonſuited* after iſſue joined, or if verdict is given againſt him, the jury returned or impanelled, at the prayer of the defendant, ſhall enquire of the rent in arrear, and the value of the goods, *&c.* diſtrained, *&c.*

But if in ſuch caſe the jury impanelled omit to enquire of the value of the rent arrear, or of the cattle, the defendant cannot then have a writ of enquiry to ſupply that omiſſion, becauſe the ſtatute confines it to *the jury impanelled in the cauſe*. 1 Lev. 255. Therefore, in ſuch caſe, the defendant muſt take judgment *de retorno habenda* at common law. *Tucket* v. *Stephens*. *P.* 6 *Geo.* 1. *C. B. Carth.* 362.

Note: In writs of enquiry under this ſtatute, the jury ſet their hands and ſeals to the verdict; and upon the trial of ſuch writs, the judge of *niſi prius* is only aſſiſtant to the ſheriff, and has no judicial power. And if the parties come to any agreement at the trial, the way is to bring it to the judge to ſign, and afterwards move to have it made a rule of court. *Caſ. K. B.* 519, 610.

By the 21 *Hen.* 8. *c.* 19. *ſ.* 3. it is enacted, "That every avowant, and every other perſon or perſons that make any avowry, juſtification, or conuzance, as baily or ſervant to any perſon or perſons in any *replegiare* or ſecond deliverance, for *rents*, *cuſtoms*, *ſervices*, *or for damages feaſant*, *or rent or rents* upon any diſtreſs taken in any lands or tenements, if the ſame avowry, cognizance, or juſtification be found for them, or the plaintiffs in the ſame be nonſuit,

How the Defendant may proceed in caſe the Diſtreſs was for *Rent* after the Cauſe removed, and the Plaintiff *nonpros'd* or *nonſuited* at the Trial.

or otherwiſe barred, that then they ſhall recover their damages and coſts againſt the ſaid plaintiffs, as the ſame plaintiffs ſhould have done or had, if they had recovered in the *replegiare*, or ſecond deliverance found againſt the defendants."

Neither this ſtatute, nor the 43 *Eliz.* [if the defendant avows as overſeer for a diſtreſs for a poor rate,] tie the inquiſition up to the ſame jury as are returned or impanelled, as the 17 *Car.* 2. *c.* 7. does. *Salk.* 95.

In replevin the defendant avowed, and the plaintiff, being nonſuited, brought a writ of ſecond deliverance, whereupon it was moved to ſtay the writ of enquiry of damages. *Et per cur.* This is a *ſuperſedeas* to the *retorno habendo*, but not to the writ of enquiry of damages; for theſe damages are not for the thing avowed for, but are given by the ſtat. 21 *H.* 8. *c.* 19. as a compenſation for the expence and trouble the avowant has been at. *Salk.* 95. *pl.* 6. *Palm.* 403. *Latch.* 72.

If the plaintiff is nonſuited for want of delivering a declaration, if it was through any cauſe that would have entitled him to a writ of *ſecond deliverance*, as ſickneſs of the perſon employed, *&c.* the court will order the defendant to accept of a declaration on payment of coſts; otherwiſe, the plaintiff would be remedileſs, *the writ of ſecond deliverance* being taken away by the 17 *Car.* 2. in caſes of *rent.* Vent. 64.

No *ſecond deliverance* lies after a judgment in demurrer, or after a verdict, or confeſſion of the avowry; but in all theſe caſes, the judgment muſt be entered with a return irreplevisable. But upon a nonſuit either before or after evidence, where the diſtreſs was not for *rent*, a *writ of ſecond deliverance* will lie, becauſe there is no determination of the matter; and there a *writ of ſecond deliverance* lies to bring the matter in queſtion: but in the caſe of a demurrer and verdict, the matter is diſtrained by law; and in the caſe of a confeſſion, it is determined by the confeſſion of the party. 2 *Lill. Reg.* 457.

Of

Of *nonproſſing*, *nonſuiting*, *diſcontinuing*, &c.

THE plaintiff pleaded two matters in bar to an *avowry*, and on one of the pleas the fact was found for him, but the judge did not certify [according to 4 *Anne*, *c.* 16. *ſ.* 5.] that the plaintiff had probable cauſe to plead the other plea. The defendant moved for coſts purſuant to that ſtatute; and the queſtion was, whether the proceedings were within that ſtatute or not? the avowant in replevin being omitted in the words of the ſtatute. Rule to ſhew cauſe why the plaintiff ſhould not pay coſts was enlarged. *Barnes* 144.

The defendant made two *avowries*, and plaintiff obtained an order for time to plead, pleading iſſuably and taking notice of trial for the ſitting after laſt term in *Middleſex*, and within time *demurred* to the *firſt*, and pleaded in bar to the *latter*; and upon that the defendant ſigned a *non-pros* for want of pleading iſſuably to both avowries, which the court held to be regular. But upon payment of coſts, pleading iſſuably and taking notice of trial within the ſame term, the *non-pros* was ſet aſide. *Barnes* 314.

After joinder in *demurrer*, plaintiff obtained a rule for the avowant to ſhew cauſe why he ſhould not diſcontinue on payment of coſts; it was objected for the avowant, that a diſcontinuance in replevin is very different from a *non-pros*; and that after a diſcontinuance, a *writ de retorno habendo* could not be awarded. The court, however, did not enter into that matter, as the parties entered into a rule by conſent, to ſtay proceedings on payment of the rent arrear with coſts. *Barnes* 171.

In replevin, both plaintiff and defendant may carry down the record to trial.

The defendant brought down the record, but the plaintiff did not appear at the aſſizes; upon which, the defendant's counſel inſiſted ſtrongly on a verdict, which was complied with. But afterwards, upon application by the plaintiff to ſet the verdict aſide, the court after hearing the judge's report, ordered the *poſtea* to be amended, and a *nonſuit* to be returned, inſtead of a verdict for the defendant; and that he ſhould pay the coſts of the motion. *Barnes* 458.

On motion for judgment as in *caſe of a nonſuit*, a diſtinction was endeavoured to be made from common caſes, becauſe in replevin defendant might, in the firſt inſtance, have carried down the record to trial. *Per cur.* The act of parliament has made no diſtinction. *Barnes* 317.—But the

King's

Of *nonproſſing*, *nonſuiting*, *diſcontinuing*, &c.

King's Bench hold, that the defendant in replevin ought never to have judgment as in caſe of a *nonſuit*, as he himſelf is an actor, and may carry the cauſe down. *Sayer on Coſts.* 142.

The plaintiff's goods diſtrained were not replevied, but, by conſent of the attornies on both ſides, remained in the diſtrainors hands; and without any writ of *refalo* or appearance in the court above, the plaintiff declared, the defendants avowed, and after long ſpecial pleadings, and after trial of the iſſues of the aſſizes, and a verdict for the 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. *Barnes* 451.

Of the Judgment and Execution in Replevin.

IF there is judgment for the *plaintiff* upon a *relicta verificatione*, *cognovit actionem*, *nil dicit*, &c. or for want of a replication to his plea in bar to the avowry, or upon a demurrer, *a writ of enquiry* of damages ſhall be awarded. *Com. Dig.* 5 *Vol.* 303.

Or at the requeſt of the plaintiff by the aſſent of the defendant, the juſtices may aſſeſs the damages without a writ of enquiry.

But if there is judgment for the plaintiff in replevin, *quod adhuc detinet* by default after appearance, there ſhall be a *ſpecial writ of enquiry* for the value of the goods or cattle and damages. *F. N. B.* 69. *l.* *Co. Ent.* 611. *a.*

But where the taking was lawful, the damage ſhall be only for the detainer, as where goods are taken *damage feaſant*, and detained after amends tendered. *F. N. B.* 69. *T. G.*

If there is a verdict for the *plaintiff*, the jury uſually aſſeſs the damages. 2 *Saund.* 315.

Or the jury after verdict may be diſmiſſed, and damages aſſeſſed by the juſtices with the defendant's conſent.

Or if the jury do not aſſeſs the damages, and the goods, *&c.* ſhould be detained, the plaintiff may make a ſuggeſtion thereof upon the roll, whereupon a writ ſhall go to enquire of the value of the cattle, *&c.* and damages; upon which the plaintiff ſhall have judgment for both.

If there is judgment for the defendant upon a demurrer or verdict, or the plaintiff is nonſuited, the defendant ſhall have return *irreplevi*ſable; but if the nonſuit is before verdict, the judgment for a return is not *irreplevi*ſable. 14 H. 7. 6. b. 34 H. 6. 5. a.

If the diſtreſs was for *rent*, and plaintiff is *nonproſſed*, or judgment is given againſt him upon *demurrer*, the defendant may have a *writ of enquiry* according to 17 *Car.* 2. *c.* 7. which vide *ante*. Or if *verdict* is given for the defendant, or the plaintiff is nonſuited after iſſue joined, *&c.* the jury impanelled or returned ſhall enquire what arrear, and of what value the diſtreſs is, *&c.* and after ſuch inquiſition he ſhall have a *fi. fa. elegit*, &c.

If the defendant, upon the judgment *de retorno habendo*, ſue out a writ *pro retorno habendo*, and the ſheriff cannot find the cattle, he may have a *capias in withernam*, upon the return of *elongata*. 2 Leon. 174.

But

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But if the defendant has judgment for a *return irreplevisable*, if the owner of the cattle or goods tenders all that is due on the judgment, and it is accepted, he ſhall have a *writ of delivery* for the goods. 2 *Inſtit.* 107.

So if he tenders the whole upon the judgment, which is aſcertained upon the avowry, and is refuſed, he ſhall have *detinue*. 2 Inſtit. 107.

Of Prohibition.

AS all external jurisdiction, whether *ecclesiastical* or *civil*, is derived from the crown, and the administration of justice is committed to a great variety of courts, hence it hath been the care of the crown, that these courts keep within the limits and bounds of the jurisdiction prescribed them by the laws and statutes of the realm; and for this purpose a *writ of prohibition* was framed so early as the 3 *Ed.* 1. which *writ* issues out of the superior *common law courts*, to restrain all inferior courts, whether *ecclesiastical* or *temporal*, *maritime*, *military*, &c. upon a *suggestion* made in the superior court, that such inferior court hath assumed a greater or other power than was entrusted to it by law, or that it hath refused to allow of acts of parliament, or hath expounded them contrary to their true and proper exposition and intent, &c. &c.

If inferior courts exceed their jurisdiction, the officer who executes the sentence, and in some cases the judges that give it, are in such superior courts punishable, sometimes at the suit of the king, sometimes at the suit of the party, sometimes at the suit of both, according to the variety of the case. *Dav.* 52.

The writ of prohibition is to preserve the right of the king's crown and courts, and is intended for the ease and quiet of the subject; so that it is the wisdom and policy of the law to suppose both best preserved when every thing runs in its right channel, according to the original jurisdiction of every court. *Show. Par. Cas.* 63.

So that *prohibitions* do not import that the *ecclesiastical* or other inferior temporal court are *alia* than the king's courts; but signify that the cause is drawn *ad aliud examen* than it ought to be: and therefore it is always said in all *prohibitions* (be the court ecclesiastical or temporal to which it is awarded) that the cause is drawn *ad aliud examen contra coronam et dignitatem regiam.* 2 Instit. 602. Rol. Rep. 252. 3 Bulst. 120. Palm. 297.

From

From whence it iſſues.

THE ſuperior courts at *Weſtminſter*, having a ſuperintendency over all inferior courts, may, in all caſes of innovation, *&c.* award a prohibition: in this the power of the *King's Bench* has never been doubted. *F. N. B.* 53. 4 *Inſt.* 71.

Alſo the court of *Chancery* may award a prohibition, which may iſſue as well in vacation as in term time; but ſuch writ is returnable into *B. R.* or *C. B.* Bro. Proh. pl. 6. 4 Inſt. 81. Will. Rep. 43.

As the common law courts are not always open, if one is ſued in an inferior court for a matter out of the juriſdiction, the defendant, if it happen in *vacation time*, when only the *Chancery* is open, may move that court for a prohibition: but then it muſt appear by *oath* made, that the fact did ariſe out of the juriſdiction, and that the defendant tendered a foreign plea, which was refuſed; and if a prohibition has been granted out of *Chancery improvidè*, or without theſe circumſtances attending it, the court will grant a *ſuperſedeas* thereto. *Will. Rep.* 476. *pl.* 135.

As the juriſdiction of the court of *Common Pleas* is founded on *original writs* out of *Chancery*, it was formerly doubted, whether it could, without count or plea depending therein, award a prohibition: but it has been determined by the unanimous ſenſe of all the *judges*, that this court may, upon a ſuggeſtion, grant prohibitions, to keep as well *temporal* as *eccleſiaſtical* courts within their bounds and juriſdictions; and that without any *original writ or plea* depending: the common law being in theſe caſes a prohibition of itſelf, and ſtanding inſtead of an *original*. Bro. Proh. pl. 6. Noy 153. 12 Co. 58, 108. Bro. Con. pl. 3. 4 Inſtit. 99. 2 Brownl. 17. Vaughan 157.

The grand ſeſſions *in Wales* may alſo ſend a prohibition, and write to the ſpiritual courts there, as well as the courts here may. *Sid.* 92. *Sed vide Cro. Car.* 341. *Jones* 330. *Vau.* 411.

In *B. R.* and *C. B.* this difference hath been made, that in *B. R.* a prohibition may be awarded upon a bare ſurmiſe without any ſuggeſtion on record; but that for a prohibition out of *C. B.* there muſt be a ſuggeſtion on record, and therefore the latter is conſidered as the ſuit of the party, and in which he may be nonſuited, and is not diſcontinued by the demiſe of the king; but the former is only in nature of a commiſſion prohibitory, which is diſcontinued by the demiſe of the king. *Noy* 77. *Palm.* 422. *Latch.* 114.

But

From whence it iſſues.

But if an attachment iſſues upon ſuch prohibition, or the party puts in *bail*, then it becomes a private ſuit, not diſcontinued by the demiſe of the king; and after ſuch proceeding the party may be nonſuit, but not before. *Palm.* 423. *Latch.* 114.

But *per Holt*, ch. juſt. *B. R.* a prohibition cannot be moved for, if it be inſiſted, till the ſuggeſtion be entered on record. *Salk.* 136.

So for want of a ſuggeſtion on record the court of *B. R.* diſcharged the rule to ſhew cauſe why a *prohibition* ſhould not be awarded. *Hawkins, aſſignee of Wooldridge, a bankrupt*, againſt *Blaquire and others, aſſignees of Sampſon, Hil.* 20 *Geo.* 3.

It hath been ſaid, that the granting a prohibition is *ex debito juſtitiæ*; but the better opinion ſeems to be, that the awarding a prohibition is a matter *diſcretionary*, *i. e.* that from the circumſtances of the caſe, the ſuperior courts are at liberty to exerciſe a legal diſcretion herein, but not an arbitrary one in refuſing prohibitions, where in ſuch like caſes they have been granted; or, where by the laws and ſtatutes of the realm they ought to be granted. *Salk.* 33. *pl.* 6. Ld. *Raym.* 220, 578, 586.

It hath been determined in the houſe of lords, that no *writ of error* will lie upon the refuſal of a prohibition; but when a *conſultation* is awarded it is with an *ideo conſideratum eſt*, and then a writ of error will lie, becauſe there is a judgment. Ld. *Raym.* 545. *Salk.* 136.

No prohibition can be had, unleſs the party is in danger by ſome ſuit actually depending; and therefore a prohibition cannot be granted before a libel, or appearance to a ſuit below. *Salk.* 35. *pl.* 8. *March*, 24, 25. For a prohibition *quia timet* does not lie. *Allen* 56.

It is clearly agreed, that in all caſes where it appears upon the face of the libel, that the admiralty or ſpiritual court, *&c.* have not a juriſdiction, a prohibition may be awarded, and is grantable as well after as before ſentence; for the ſuperior courts are to take care that the inferior courts keep within their due bounds. 2 *Inſt.* 602. 2 *Roll. Abr.* 318. *Noy* 137. *Sid.* 65. *Cro. El.* 571. *Moor* 462, 907. *Carth.* 463. *Skin.* 299. *pl.* 2. But *after ſentence* a prohibition ſhall not go, unleſs the want of juriſdiction in the court below appears upon the face of the proceedings. *Burr. Rep.* 4 *pt.* 2036. to 2040.

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WHERE the court has a natural juriſdiction of the thing, but is reſtrained by ſome ſtatute, as by 23 *H.* 8 for not citing out of the dioceſe, there the party muſt come before ſentence; for after pleading and admitting the juriſdiction of the court below, it would be hard and inconvenient to grant a prohibition. *Vide* the authorities *antea* and *Cro. Car.* 97. 2 *Show.* 145. *pl.* 153, 155, &c. 2 *Salk.* 543. *pl.* 1. Ld. *Raym.* 27. *Salk.* 30. *Carth.* 33.

When a prohibition is moved for, the method is for the party to file a *ſuggeſtion* in court, ſtating the proceedings that have been had in the court below, and then ſuggeſting the reaſon why he prays the prohibition; and upon this the court grants a rule to ſhew cauſe why a prohibition ſhould not iſſue; and if upon ſhewing cauſe it appears to the court that the ſurmiſe is not true, or not clearly ſufficient to ground the prohibition upon, they will deny it; otherwiſe they will make the rule abſolute for a prohibition; or if the matter be doubtful they will order the party to declare. *Hob.* 67.

The court will not grant a prohibition the laſt day of term, but on motion a rule may be obtained to ſtay proceedings till the enſuing term. *Latch.* 7. 2 *Rol. Rep.* 456.

The ſuggeſtion for a prohibition is to the following effect:

The form of a ſuggeſtion for a prohibition to the *bailiff* of a borough to prohibit him from holding plea in a matter ariſing *extra juriſdictionem.*

" *Great Britain.* Be it remembered, that on ——— next after fifteen days of Saint *Martin*, in this ſame term, before the lord the king at *Weſtminſter*, comes *A. B.* in his proper perſon, and giveth the court of our lord the king here to underſtand, that *whereas* by a certain act of parliament, made at a parliament holden at *Weſtminſter* the twenty-fifth day of *April* in the third year of the reign of the late king *Edward* the firſt, it was (amongſt other things) ordained and eſtabliſhed by the authority of the ſame parliament " Of great men and their bailiffs, and other (the king's officers only excepted unto whom eſpecial authority is given) which at the complaint of ſome, or by their own authority attack other paſſing through their iuriſdiction with their goods, compelling them to

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anſwer afore them upon contracts, covenants and treſpaſſes, done out of their power and their juriſdictions, where indeed they hold nothing of them, nor within the franchiſe, where their power is, in prejudice of the king and his crown, and to the damage of the people: it is provided, that none from thenceforth ſo do; and if any do, he ſhall pay to him, that by this occaſion ſhall be attached, his damage double, and ſhall be grievouſly amerced to the king" as by the ſaid ſtatute (amongſt other things it more fully appears) nevertheleſs one *C. D.* not ignorant of the premiſes, but contriving and intending the ſaid *A.* againſt the form of the ſtatute, unjuſtly to vex, oppreſs and weary, and to draw him into plea in the court of our lord the king, of record, of the borough of *Bridgnorth*, in the county of *Salop*, held in the ſaid borough, before the bailiff of the ſaid borough, in a certain action which had ariſen and accrued out of the juriſdiction of that court; and alſo the common law of the realm (to every ſubject of right due) to derogate from and abridge, and the due courſe of law to ſubvert, and the iſſues and profits which to the ſaid lord the preſent king thereof might happen, and which to his royal crown eſpecially belongeth to diminiſh, in the ſaid court of our ſaid lord the preſent king, of record there, held on ——— in the nineteenth year of the reign of the lord the preſent king, before the bailiffs of the ſaid borough, according to the cuſtom of the ſaid borough, from time whereof the memory of man is not to the contrary uſed and approved, levied his certain plaint againſt the ſaid *A.* in a certain plea of treſpaſs upon the caſe, to the damage of the ſaid *C. D.* of fifty pounds: and the ſaid *C. D.* by pretence of the plaint aforeſaid, in form aforeſaid, levied and affirmed, then and there cauſed and procured him the ſaid *A.* paſſing within the juriſdiction of that court, to be attached and arreſted, and compelled the ſaid *A.* to appear in the ſaid court, and the ſaid *A.* of and upon the premiſes unjuſtly conſtrained to anſwer. And thereupon in the ſame court, held on the day of

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in the nineteenth year of the reign aforeſaid, before the ſaid bailiffs of the ſaid borough, the ſaid *C. D.* upon his aforeſaid plaint did declare againſt the ſaid *A.* in manner and form following; that is to ſay, *C. D.* complains againſt *A. B.* (here inſert the declaration) *&c.* which ſaid plaint now remains in the ſaid court depending and undetermined, and there in the ſaid court is proſecuted by the ſaid *C.* "*Whereas*, in truth and in fact, the aforeſaid cauſe of action in the ſaid plaint and declaration mentioned, aroſe and accrued to the ſaid *C. D.* out of the ſaid borough of *Bridgnorth*, and out of the juriſdiction of that court, that is to ſay, at the pariſh of ——— in the ſaid county of *Salop*, and not within the ſaid borough of *Bridgnorth*, or within the juriſdiction of that court. And whereas the ſaid *A.* holds nothing of them the ſaid bailiffs, or within the franchiſe or juriſdiction of that court. And, whereas in fact, the bailiffs of the ſaid borough, or any of them, never had or hath power to hold the plea aforeſaid, nor to hear and determine the ſaid plea as aforeſaid, ariſing and accruing out of the juriſdiction of the ſaid court, by the laws of this realm, nor by virtue of any letters-patent of the ſaid lord the preſent king, nor of any of his progenitors or predeceſſors, kings or queens of this realm; nor by any title of preſcription, from time whereof the memory of man is not to the contrary uſed and approved, or any otherwiſe howſoever; "*And although the ſaid* A. *all and ſingular the matters and things by him above ſuggeſted hath pleaded in his diſcharge in the aforeſaid court* * before the aforeſaid bailiff of the ſaid borough, and there offered to verify and prove the ſame by undeniable teſtimony

* *Note*: Where there is no *defectus juriſdictionis*, but only *triationis*, the defendant muſt plead it below, and have his plea diſallowed, before he can be entitled to a prohibition. But where there is a *defectus juriſdictionis*, the party has no occaſion to plead it below, before motion for prohibition.—Therefore in the above precedent given of a ſuggeſtion there was no occaſion for that part of it.

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and proof; *neverthelefs*, the bailiffs of the borough aforeſaid, the aforeſaid plea and allegation of the ſaid *A.* there to receive or admit altogether refuſed, and threatened to give judgment in the ſaid court, in the ſaid action, againſt the ſaid *A.* in contempt of our lord the preſent king, and to the great damage of the ſaid *A.* and contrary to the law of this realm, and alſo againſt the form of the ſtatute aforeſaid; and this the ſaid *A.* is ready to verify: *whereupon* the ſaid *A.* humbly imploring the aid and munificence of the court of our lord the preſent king, prays ſpeedy remedy, and a writ of our lord the preſent king of prohibition to be directed to the ſaid bailiffs of the ſaid borough, and other competent judges in that behalf; and alſo to the ſaid *C.* his counſellors, attorneys, and ſollicitors in this behalf whomſoever, to prohibit them and every of them, that they, or any of them, in the ſaid plea of treſpaſs, in any manner touching the ſame in the ſaid court, before the ſaid bailiffs of the ſaid borough, or any of them, to proceed, ſhould not preſume, nor any further in that behalf ſhould attempt, which to the further derogation of the crown of his preſent majeſty, or to the contempt of the law, or the loſs or prejudice of the ſaid *A.* might in any wiſe turn, on pain of incurring the puniſhment due to violators of the law of this realm; but from all further proſecution againſt the ſaid *A.*, in the ſaid court, before the bailiffs of the ſaid borough, or any of them, ſhould utterly deſiſt, and each and every of them ſhould deſiſt; and it is granted to him, *&c.*

The form of a ſuggeſtion for a prohibition to an *eccleſiaſtical* court on a libel there by a vicar againſt a pariſhioner for ſubtraction of tithes, ſetting forth that there is a *modus* in the ſaid pariſh, *&c.*

"*England.* Be it remembered, that on next, after days from the day of *Eaſter*, in this ſame term, before our lord the king, at *Weſtminſter*, comes *A. B.* by his attorney, and gives the court here to underſtand and be informed, that *whereas* all and all manner of pleas,

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of and concerning any preſcriptions and cuſtoms whatſoever, within this realm, and the cognizance of ſuch pleas belong and appertain to the ſaid lord the king, and his royal crown, and to the common law, and in the courts of our ſaid lord the king, of record, ought and have always been accuſtomed to be tried and diſcuſſed, and not in any eccleſiaſtical court. And *whereas* on the *1ſt* day of *January*, 1779, the ſaid *A. B.* was, and from thence hitherto hath been, and ſtill is, ſeized in his demeſne as of fee, of and in divers, to wit thirty, acres of meadow, ſituate, lying and being, within the pariſh of ——— in the county of ——— and within the bounds, limits, and titheable places thereof; and, during the time aforeſaid, was poſſeſſed of divers cows and calves, within the ſaid pariſh, and the bounds, limits, and titheable places thereof. *And whereas* within the ſaid pariſh there are, and from time whereof the memory of man is not to the contrary have been, certain cuſtoms and modes of tithing, that is to ſay, one certain cuſtom, *&c.* [*inſerting the cuſtoms and moduſſes, &c.*] *nevertheleſs*, one *C. D.* clerk, vicar of the pariſh of ——— aforeſaid, not ignorant of the premiſſes, but contriving unduly to aggrieve and oppreſs the ſaid *A. B.* againſt the due courſe of the law of this realm, and to draw the cognizance of a plea which belongs to our lord the king's temporal courts, and ought there to be tried, diſcuſſed, and determined to another trial, on the day of 1779, drew the ſaid *A. B.* into a plea and cauſed him to appear in the court chriſtian, before the right worſhipful *J. C.* maſter of arts, vicar general, and principal of the epiſcopal or conſiſtorial court of ——— lawfully conſtituted his ſurrogate, or ſome other competent judge in that behalf, by craftily and ſubtilly libelling againſt the ſaid *A.* in the ſaid court chriſtian—Firſt, that in the year, *&c.* [*ſtate the libel*] and although the ſaid *A.* hath alledged and pleaded all and ſingular the matters above ſuggeſted and alledged in the ſaid court chriſtian, in his diſcharge of and from the tithes, *&c.* and offered to prove

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the ſame by indiſputable evidence; yet the aforeſaid ſpiritual judges have altogether refuſed, and ſtill do refuſe, to admit or receive the ſame plea, allegation, or proof, and endeavour with all their might to compel the ſaid *A.* to pay the ſaid monies in the aforeſaid libel ſpecified, and daily threaten to condemn the ſaid *A.* of and upon the premiſes, in contempt of our ſaid lord the king and his laws, to the great damage and injury of the ſaid *A.* and againſt the courſe of the law of this realm, and the cuſtoms and preſcriptions aforeſaid, all which ſaid premiſes the ſaid *A.* is ready to verify and prove, as the court of our lord the king here ſhall direct: *wherefore* the ſaid *A.* imploring the aid and aſſiſtance of this court here, prays relief, and his majeſty's writ of prohibition to be directed to the ſaid official principal of the epiſcopal conſiſtorial court of ——— aforeſaid, his ſurrogate, or other competent judge in this behalf, to prohibit them and every of them, that neither they nor any of them do any further hold pleas in the ſaid ſpiritual court, before them or any of them, touching the premiſes aforeſaid, or any part thereof, *&c.*

For other forms, reſpecting other matters, ſee the various books of entries.

Of proving the Suggeſtion, and in what Caſes neceſſary, and at what Time.

IF the ſuggeſtion for a prohibition is to ſtop a ſuit commenced in the eccleſiaſtical court for ſubtraction of *tythes* or *other eccleſiaſtical dues*, *the* 14 *ſect. of the* 2 & 3 *Edw.* 6. *c.* 13. requires, "That if any party do ſue for any prohibition "in any of the king's courts, that then the ſame party, "before any prohibition ſhall be granted to him or them, "ſhall bring and deliver to the hands of ſome of the juſti- "ces or judges of the ſame court where ſuch party demand- "eth the prohibition, the very true copy of the libel de- "pending in the eccleſiaſtical court, concerning the matter "whereupon the party demandeth the prohibition, ſub- "ſcribed or marked with the hand of the ſame party; and "under the copy of the ſaid libel ſhall be written the ſug- "geſtion, wherefore the party ſo demandeth the ſaid pro- "hibition: And in caſe the ſaid ſuggeſtion, *by two honeſt* "*and ſufficient witneſſes at the leaſt*, be not proved true in "the court where the prohibition ſhall be ſo granted, *with-* "*in ſix months* next following after the ſaid prohibition "ſhall be ſo granted and awarded, that then the party that is "letted or hindered of his or their ſuit in the eccleſiaſti- "cal court by ſuch prohibition, ſhall, upon his or their "requeſt and ſuit without delay, have a conſultation grant- "ed in the ſame caſe in the court where the ſaid prohi- "bition was granted; and ſhall alſo recover double coſts and "damages againſt the party that ſo purſued the ſaid prohi- "bition, *&c.*"

As this ſtatute refers to the ſtatutes 27 & 32 *H.* 8. which extend to tythes and offerings generally, all ſuch tythes and church duties as are mentioned in thoſe ſtatutes are as much within this act as if enumerated. 2 *Inſtit.* 662. *Comp. Incumb.* 600. *Dyer* 170. *b.*

And therefore it extends to prohibitions to ſuits for ſmall tythes as well as great. *Yelv.* 102. Ld. *Ray.* 1172.

So a ſuggeſtion of a *modus decimandi* ought to be proved within *ſix months*, being within this act. *Noy* 148. *Yelv.* 104.

So where the party ſuggeſted, that he was to pay ſo much upon an *arbitrament*, being the ſame as a *modus decimandi*. Roll. Rep. 55.

But there needs no proof of the ſuggeſtion where the ſuit is for tythes contrary to common right, or where the contract of the party is ſuggeſted. *Yelv.* 104, 119. 2 *Leon.* 29. *Hetl.* 145. 2 *Keb.* 134. *Lit. Rep.* 297.

The

Of proving the Suggeſtion, and in what Caſes neceſſary, and at what Time.

The ſuggeſtion need not be proved ſtrictly,—proof by hear-ſay is ſufficient. *Palm.* 397.—or that it is ſo by common fame. *Noy* 28. Nor with preciſe certainty as to all its circumſtances; but that if it be proved in ſubſtance, or in ſuch a manner as to ſhew that the eccleſiaſtical court hath not juriſdiction, it is ſufficient.

And the ſuggeſtion may be proved by perſons, although ſuch perſons at the trial may not be able and competent witneſſes. *Mich.* 27 *Car.* 2. *C. B. Sharp* v. *Hobarts.*

If a ſuggeſtion conſiſts of two parts, one witneſs to one part, and another to the other part, is ſufficient. *Vent.* 107.

And *note:* The *ſix months* is according to the *calendar*, and not *lunar* months, for this is a computation which concerns the church. *Hob.* 179. 2 *Mod.* 58. *Lit. Rep.* 19. And the *ſix months* commence from the *teſte* of the writ, and not from the time of the rule for awarding it. 2 Ld. *Ray.* 1172. 2 *Salk.* 554. *pl.* 20, 656. *pl.* 2.

And if the ſurmiſe be proved before one of the judges within the ſix months, it is ſufficient, although it is not recorded till after the ſix months by the court. *Noy* 30. But it muſt be entered in the office. 2 *Show.* 308.

And proof which is not ſufficient may be ſupplied with better within the ſix months. *Lit. Rep.* 155.

The plaintiff had obtained a rule to ſhew cauſe why a *conſultation* ſhould not go, for want of the plaintiff's proving his ſuggeſtion within the *ſix months*, and why the plaintiff ſhould not pay double coſts. Upon cauſe ſhewn it appeared, that the declaration had been, by rule, ordered to be made agreeable to the proceedings in the ſpiritual court, and thereupon a prohibition to iſſue. And the court being of opinion, that the time for proving the ſuggeſtion ought to be computed from the time of the amendment, and not farther back; the ſix months were not expired. So the rule was diſcharged. *Barnes* 428.

Of entering the Proof of the Suggeſtion.

WHEN the party has proved his ſuggeſtion before a judge, according to the 14th *ſect. of the* 2 & 3 *of Edw.* 6. *c.* 13. an entry of ſuch proof muſt be drawn out in order to be entered of record in court, which is to be done in the following manner, after the ſuggeſtion and the award of the writ of prohibition.

" And the writ of the prohibition of the lord the king is granted to him, *&c.*"

AFTERWARDS, that is to ſay, on the day of in the twentieth year of the reign of our ſovereign lord *George* the third, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, *&c.* at in the county of before [the judge] comes, the ſaid *A. B.* in his proper perſon, and to verify, teſtify, and prove his ſuggeſtion aforeſaid, and all and every matter and thing contained in the ſame ſuggeſtion on the part of the ſaid *A. B.* to be proved, produceth three good lawful and ſufficient witneſſes, to wit, *O. P.* of in the county aforeſaid, huſbandman, and aged about twenty-four years, or thereabouts; *Q. R.* of the ſame place, labourer, aged ſixty years or thereabouts; and *S. T.* of the pariſh of in the ſaid county, farmer, aged forty years and upwards, before the ſaid juſtice at aforeſaid, according to the form of the ſtatute in ſuch caſe made and provided: which ſaid witneſſes ſo as aforeſaid produced by the ſaid *A. B.* being then and there ſworn upon the holy *Evangeliſts*, to depoſe the truth of and upon the premiſes ſpecified in the aforeſaid ſuggeſtion, ſay and depoſe, and each of them ſeverally upon his oath ſaith and depoſeth in manner and form following, that is to ſay, the ſaid *O. P.* for himſelf, upon his oath ſaith and depoſeth, that, *&c.* [Here enter the proof of what he ſwears.] And the ſaid *Q. R.* for himſelf upon his ſaid oath ſaith and depoſeth, that, *&c.* [Enter what he ſwears to.] And the ſaid *O. P.* and *Q. R.* for themſelves ſeverally upon their ſaid oath ſay, and depoſe, that, *&c.* [Enter what they both ſwear to.] And the ſaid

S. T.

Of entering the Proof of the Suggeſtion.

S. T. for himſelf, upon his ſaid oath, ſaith and depoſeth that, *&c.* [The part he ſwears to.] Which ſaid depoſitions taken before the ſaid [the name of the judge] in form aforeſaid, the ſaid juſtice afterwards, to wit, in *Michaelmas term*, in the nineteenth year of the reign of our ſaid lord the now king, delivered by his own proper hands, into the court of our ſaid lord the king *of the Bench*, here to be enrolled of record.

Sworn the day of
in the year of our Lord 1780.

By me ———

Where

Where the Suggeſtion muſt be verified by an Affidavit.

IN ſome caſes the courts require an *affidavit* to be made on application for a *prohibition*, to ſupport the *ſuggeſtion*.

Per Holt ch. juſt. *B. R.* in *Godfrey* v. *Llewellin*. 11 *W.* 3. the biſhop of St. *David*'s caſe. Where the matter ſuggeſted for a prohibition appears upon the face of the libel, we never inſiſt upon an *affidavit*; but unleſs it appear upon the face of the libel, or if you move for a prohibition as to more than appears upon the face of the libel, to be out of their juriſdiction, you ought to have *affidavit* of the truth of your ſuggeſtion. *Salk.* 549. *pl.* 3.

Upon motion for a prohibition, there muſt be an *affidavit* that the matter ſuggeſted to have been pleaded was pleaded below in the ſpiritual court, and diſallowed, vide Ld. *Raym.* 1211. for otherwiſe, any one might come and ſuggeſt a falſe fact, and ſo ouſt the ſpiritual court of their *juriſdiction*.

In *Hynes* v. *Thompſon*, [mentioned by *Aſton Jce*, in *Buggin* v. *Bennet*. *Burr.* 4 *pt.* 2039—40.] Lord ch. juſt. *Lee* laid down the rule to be, "That if you move for a prohibition upon any thing not appearing upon the face of the proceedings, you ought to have an affidavit of the truth of the ſuggeſtion." And he cited *Godfrey* and *Llewellin*. 2 *Salk.* 549. in point; and 2 *Salk.* 551. *pl.* 13. where *Holt* ch. juſt. laid down the law to be, "That wherever the matter which you ſuggeſt for a prohibition is *foreign* to the libel, you muſt plead it below, before you can have a prohibition; otherwiſe, where the cauſe of prohibition appears *upon* the libel." And lord ch. juſt. *Lee* ſaid in that caſe of *Hynes* v. *Thompſon*, that he thought it muſt either be pleaded "that there was ſuch a cuſtom," or an *affidavit* of it. And Mr. *J. Chapple* hinted, that prohibitions had been too eaſily granted: And was of opinion, that there ought to have been an affidavit to verify the ſuggeſtion.

In *Driver* v. *Colgate*, [mentioned alſo by *Aſton Jce*, in the ſame caſe of *Buggin* v. *Bennett*. *Burr.* 4 *pt.* 2039—40.] The court held, that there was no neceſſity to *plead* it below, in caſes of prohibition for *words* ſpoken where they are by the cuſtom actionable, as there is in caſe of a prohibition or ſuggeſtion of a *modus*. For in the former caſe, they cannot go on if the ſuggeſtion be true; but in the latter of a *modus*—if the modus be admitted in the ſpiritual court, they may go on; becauſe the juriſdiction continues.

In

Where the Suggeſtion muſt be verified by an Affidavit.

In all other caſes the court laid down a general rule, "that the matter muſt either be *pleaded* below, or verified by *affidavit*." Vide Burr. 4 pt. 2040.

As in caſe for a prohibition to the conſiſtory court of *London*, in a cauſe for calling a woman "*whore*" in *London*, there muſt be an affidavit of the *cuſtom*, and alſo that the words were ſpoken there. *Theyer* v. *Eaſtwick*. *Burr.* 4 *pt.* 2032.

In *C. B.* on ſhewing cauſe why a prohibition ſhould not be granted, it was objected that no affidavit was filed whereby the libel whereupon the plaintiff had moved appeared to be a true copy. *Per cur.* The objection is good. Rule diſcharged. *Eaglesfield* v. *Anderſon*. *Barnes* 427.

Of granting a Prohibition abſolutely, or *hoc uſque* only.

PROHIBITIONS are granted either abſolutely, or *hoc uſque* only till ſuch an act be done; the firſt of theſe is peremptory, and ties up the inferior juriſdiction till a *conſultation* is awarded; the ſecond is *ipſo facto* diſcharged upon complying with the act, and that without any *writ of conſultation.* 6 Mod. 308.

When a prohibition is moved for becauſe a copy of the libel is denied, the court requires that oath ſhould be made of the denial, and the prohibition is only *quouſque* the copy be delivered. *Vent.* 252. 2 *Salk.* 553. *pl.* 19.

The ſtat. 2 *Hen.* 5. *ſtat.* 1. *c.* 3. requires a copy of the *libel* in the eccleſiaſtical court to be given to the party ſued there. But as this ſtatute extends only to the *eccleſiaſtical courts*, a prohibition was denied to be granted to the *admiralty* court, upon a ſuggeſtion that they refuſed to give the party ſued there a copy of the libel. Ld. *Raym.* 442.

A prohibition *quouſque* they give a copy of the libel, if it be granted before any libel exhibited, does not bind them from exhibiting any libel; but after, they ſhall not proceed till they give a copy of it. 6 *Mod.* 308.

It was formerly held by all the judges, that when there was a proceeding *ex officio* in the eccleſiaſtical court, they were not bound to give the party a copy of the articles: but the law is otherwiſe; for in ſuch caſes, if they refuſe to give a copy of the articles, a prohibition ſhall go *quouſque* they deliver it. Ld. *Raym.* 991.

In *C. B.* rule was made for civilians to be heard on both ſides in relation to a prohibition. Dr. *Lee* attended to argue againſt the prohibition; but none would attend to argue for it, as by affidavit appeared. *Per Cur.* We ought to hear civilians on both ſides, or not at all. Enlarge the rule: perhaps, when our opinion is known, a doctor may attend on the other ſide. Afterwards no civilian attending to argue for the prohibition, the court would not hear doctor *Lee* againſt it. *Barnes* 428.

Of declaring in Prohibition, &c.

THE court ſeldom awards a prohibition upon the motion, but generally grants a rule *niſi*, or that the adverſe party ſhould ſhew cauſe why it ſhould not be granted. *Cro. El.* 16. 94. 5 *Mod.* 247. Ld. *Raym.* 86. 236. *Wil. Rep.* 7. *pl.* 2.

Alſo in nice and difficult caſes it is uſual to direct the plaintiff to declare in prohibition. *Cro. El.* 736. 4 *Mod.* 151. *Lev.* 125. Ld. *Raym.* 88.—and ſo proceed to iſſue, that the merits of the cauſe may be brought before them with the greater exactneſs, and the court thereby be the better enabled to judge of the reaſonableneſs of granting or refuſing the writ. *Stil. Pract. Reg.* 43. *F. N. B.* 44.

When the court inclines to grant the motion for a prohibition, the defendant has a ſort of right to inſiſt that the plaintiff ſhall declare; but where the court inclines againſt the motion, the plaintiff has no ſuch right, for there might be judgment by default, and the court be obliged to prohibit againſt their own opinion; and it is no injury to the plaintiff, as he may apply to another court. The *King* v. the *Biſhop of Ely*. *Mich.* 30 *Geo.* 2.

The court is not obliged to give direction for ſuch declaration, but are abſolute judges of the ſufficiency or inſufficiency of the ſuggeſtion. *Leon.* 181.

On ſhewing cauſe againſt a *prohibition*, the court made the rule abſolute, with a direction that the plaintiff ſhould declare in prohibition. He tendered a declaration, but the defendant refuſed it, and applied to ſtay the proceedings, as being willing to ſubmit. The other inſiſted he had a right to go on, and ſo get at the *coſts* of the motion, which he could not otherwiſe have; but the court ſtayed the proceedings without coſts; ſaying, the direction to declare was in favour of the defendant, who might waive it. *Gegge* v. *Jones*. *Stra.* 1149. [*Vide* the ſtatute 8 & 9 *W.* 3. *c.* 11. *ſ.* 3. which gives coſts in prohibition upon plaintiff's obtaining judgment, or any award of execution after *plea pleaded or demurrer joined*] but the plaintiff can recover no coſts in prohibition, unleſs he has execution after *plea or demurrer* and judgment for him: but then after ſuch judgment and execution, after plea or demurrer, the coſts ſhall be taxed from the ſuggeſtion, ſo as to take in the motion. *Wills* v. *Turner*. *Hil.* 2 *Geo.* 1. *C. B.*

Where the party is ordered to declare in prohibition, he ought not to take out the writ, but ſerving the other ſide with a rule is ſufficient; and if in that ſuit he obtain judgment,

Of declaring in Prohibition, &c.

ment, the judgment is *ſtet prohibitio*, otherwiſe it is *quod eat conſultatio*; therefore if the party be excommunicated, the mandatory part of the writ to aſſoil the party is not to be obeyed till after trial had. *The Dean and Biſhop of Wells. Mich.* 25 *Geo.* 2.

It was at the defendant's inſtance made part of the rule whereby a writ of prohibition was granted, that the plaintiff ſhould declare in prohibition. Defendant afterwards demanded a declaration, and threatened *a non pros* for want thereof. Whereupon a declaration was prepared: and when it was ready he was told by defendant's agent that he need not deliver it; but as he had been at the trouble and expence in preparing it, he delivered the ſame, and called for a plea. Defendant pleaded nothing to the merits, but only that he did not proceed in the ſpiritual court after the prohibition, gave a rule to reply, and demanded a replication. Whereupon plaintiff applied to the court, and obtained a rule for defendant to ſhew cauſe, why he ſhould not pay the plaintiff's coſts of the proceedings in prohibition. Which rule was made abſolute. The court looked on the plea to be a ſham nugatory plea, and not to the merits of the cauſe: the allegation, that defendant has proceeded, contrary to the prohibition, is and muſt be put into every declaration of this kind: but whether he has ſo proceeded, or not, is totally immaterial. The ſtat. 8 & 9 *W.* 3. *c.* 10. *ſ.* 3. gives coſts after plea or demurrer: but this is not a plea within the ſtatute. *Seed* v. *Wolfenden. Barnes* 148.

In caſes of tythes and ſuch ſort of matters where many things are in controverſy, it is very frequent to order the prohibition to ſtand as to part, and a *conſultation* to go as to the other part.

If the declaration in prohibition varies from the ſuggeſtion, this is naught, and a *conſultation* ſhall be awarded. 7 *Mod.* 113. *Leon.* 128. For the ſurmiſe is as the writ.

The declaration in prohibition is founded upon an *attachment* for a contempt, and therefore the declaration in prohibition is a *qui tam* declaration, for it ſuppoſes a contempt to the king in proceeding after the writ delivered. 12 *Co.* 61.

Where an iſſue is joined on a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they ſhall give no more than *one ſhilling* damages, for it is in nature of an iſſue to inform the conſcience of the court. *Carter* v. *Leeds. Mich.* 2 *Geo.* 2. But after the plaintiff has had judgment

Of declaring in Prohibition, &c.

judgment *quod ſtet prohibitio*, he may bring his action upon the caſe, and recover the damages he has ſuſtained.

If the jury, upon an iſſue joined in a prohibition *de modo decimandi*, find a different *modus*, than that alledged by the plaintiff, yet the defendant ſhall not have a conſultation; becauſe it appears that he ought not to ſue for tythes *in ſpecie*, there being a modus found. *Vent.* 32.

The declaration ought to ſhew a place where the defendant proceeded, after the prohibition ſerved; otherwiſe, the plaintiff ſhall not have judgment, though the writ of enquiry finds damages. 1 *Vent.* 348, 350. *Ray.* 387. 2 *Jones* 128. 2 *Show.* 145.

Two perſons cannot join in the declaration, where the cauſe of complaint is ſeveral. *Cro. Car.* 162.

If the libel be againſt ſeveral pariſhioners, who all inſiſt upon the ſame *modus*, they cannot join, but muſt have ſeveral prohibitions. *Yel.* 128. *R. Raym.* 425.

If there appears cauſe for a prohibition, there ſhall not be a conſultation, though the declaration be defective for want of form; as becauſe there is not the *profert* of a deed, or letters patent. *Per Coke.* 1 *Rol.* 332.

After a rule given to declare in prohibition, the defendant may ſubmit and ſtay proceedings. *Stra.* 1149.

Of granting a *Conſultation*, &c.

IF a prohibition be granted without notice to the other party, and upon motion it appears that there was no cauſe for it, the court will grant a *conſultation*, without putting him to declare upon the prohibition. *Cro. Car.* 97.

So, after a prohibition granted, if upon trial the matter be found for the defendant, generally, a *conſultation* ſhall go.

So if the matter found for the defendant varies in words, but not in ſubſtance, from the ſuggeſtion; as if the ſuggeſtion be, that *two thirds of the tythes* belong to the plaintiff, and the verdict is *two entire parts of all tythes*.

So if there be a material variance between the ſuggeſtion for a prohibition, and the libel in the ſpiritual court, there ought to be a *conſultation*; for the prohibition ought to be founded upon the libel; as if the libel be for tythes of corn, and a *modus* be ſuggeſted for tythes of hay, upon demurrer to the declaration in prohibition, a *conſultation* ſhall go. *Yel.* 79.

So if there be a variance in quantity, as if the libel be for two hundred faggots of wood, and the ſuggeſtion be for twenty only. *Yel.* 79.

So after a prohibition granted, if it appears that the ſpiritual court has conuſance for part, a *conſultation* ſhall go *quoad*, &c. 12 *Co.* 44.

So if, after a prohibition granted, it be not ſerved till ſentence and appeal, it cannot be afterwards uſed. *Cro. Jac.* 429.

But a *conſultation* ſhall not be granted except in term. 12 *Co.* 41.

Nor by a judge, but only in court. *Ibid.*

Nor after a declaration upon a prohibition, it ſhall not be granted upon motion before *plea* or *demurrer*. Cro. Car. 238.

Nor ſhall a *conſultation* go, where a verdict is found for the defendant, if it appears upon the whole matter that the ſpiritual court has no conuſance; as if a prohibition be upon a ſuggeſtion, that all lands in *A.* are diſcharged by a *modus*, and there is a verdict for the defendant, becauſe it is found that all, except *ten acres*, are within the *modus*; yet a *conſultation* does not go for ſuch miſtake in the iſſue, if the libel was not for tythes of the ten acres. 2 *Rol.* 320, *L.* 5, 15. *Hob.* 192.

So if the ſuggeſtion was of unity, *ratione cujus* he ſhall be diſcharged, and a verdict finds that he ſhall not be diſ-

Of granting a *Conſultation*, &c.

charged *ratione inde*; though it be againſt the plaintiff, yet being impertinent, for the fact to be tried was, whether there was an unity, &c. a *conſultation* does not go? 2 *Rol.* 320. *l.* 35. 11 *Co.* 15.

So, though there be an immaterial variance between the ſuggeſtion and the libel, a *conſultation* does not go: as if the ſuggeſtion be for a total diſcharge upon the ſtat. 31 *H.* 8. and recites the libel to be for twenty faggots, where it was for two hundred; for it was not material for what quantity the libel was, when the plaintiff claims a diſcharge for the whole. *Yel.* 79.

So if the ſuggeſtion varies in quantity from the libel, if it be conformable to the copy of the libel delivered by the ſpiritual court, this variance ſhall not be a ground for a *conſultation*. 2 *Rol.* 329. *l.* 45.

A *writ of conſultation* is to the following effect:

GEORGE the third, by the grace of *God*, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and ſo forth. To the right *worſhipful J. C. maſter of arts, vicar general, and principal official of the epiſcopal or conſiſtorial court of* ——— &c. Whereas *C. D.* lately in the court chriſtian before you impleaded *A. B.* by the the name and deſcription of *A. B.* of the pariſh of ——— in the county of *Devon*, for this, that by the laws, &c. [Here ſet forth the ſubſtance of the libel.] as by the libel of the ſaid *C. D.* amongſt other things more fully appears. And whereas the ſaid *A. B.* has lately proſecuted and cauſed to be directed to you our certain prohibition, out of our court, before our juſtices at *Weſtminſter*, that you ſhould no farther hold the plea aforeſaid, in the court chriſtian aforeſaid, before you or any thing farther in that behalf attempted, by pretence of which our ſaid prohibition you have from thence hitherto delayed, and yet do delay further to proceed in the cauſe aforeſaid, as we have underſtood, to the great damage of the ſaid *C. D.* and to the manifeſt prejudice of the eccleſiaſtical liberty.—Wherefore the ſaid *C. D.* hath in our court, *before our ſaid juſtices at Weſtminſter*, humbly beſought

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us to grant him our aid and aſſiſtance in this behalf; and we favourably conſenting to the petition of him the ſaid *C. D.* and being unwilling that the cogniſance, which to the eccleſiaſtical court in this behalf belongs, ſhould be further delayed by ſuch falſe and ſubtle aſſertions; becauſe in our ſaid court, before our ſaid juſtices at *Weſtminſter*, it is in ſuch manner proceeded, that it is conſidered by the ſame court, that the ſaid *C. D.* may have our writ of conſultation to the court chriſtian aforeſaid, our ſaid writ of prohibition to the contrary thereof notwithſtanding, whereof the ſaid *A. B.* is convicted, as it appears to us on record. We therefore being unwilling that the ſaid *C. D.* ſhould be in any wiſe injured in this behalf, ſignify to you, and command, that you may in that cauſe lawfully proceed and further do what you ſhall know to belong to the eccleſiaſtical court, our ſaid prohibition to the contrary thereof before to you directed in any wiſe notwithſtanding.

Witneſs Sir *William de Grey*, knight, at *Weſtminſter*, the day of, *&c.*

Where a Prohibition may be granted after a *Conſultation* awarded, and where not, and of Diſobedience to the Writ of Prohibition.

BY the 50 *Edw.* 3. *c.* 4. "It is ordained and ſtabliſhed, That where a conſultation is once duly granted upon a prohibition made to the *judge of the holy-church*, that the ſame judge may proceed in the cauſe by virtue of the ſame conſultation, notwithſtanding any other prohibition to him thereupon delivered: Provided always, that the matter in the libel of the ſaid cauſe be not engroſſed, enlarged, or otherwiſe changed."

Judge of holy-church, means ſpiritual judge; and therefore, this ſtatute extends not to the court of *admiralty*. 2 Brownl. 35.

Same judge, means eccleſiaſtical judge in general, or perſon competent, and not to the ſame individual perſon. *Pop.* 159. *Palm.* 418. *Latch.* 6, 75.

This ſtatute hath been conſtrued to extend to thoſe caſes only where a *conſultation* hath been lawfully granted; that is, upon the right and merits of the thing in queſtion, and not to ſuch caſes where for defect of form, miſpriſion of a clerk, miſpleading an act of parliament, &c. conſultations have been awarded. 2 *Brownl.* 26, 247. *Leon.* 130. 3 *Bulſt.* 182. *Moor* 917.

And therefore regularly, where a conſultation was awarded upon the merits, the party ſhall not have another prohition upon the ſame ſuggeſtion.

Though he appeals, and then prays another prohibition. *R. Pop.* 159. *Lat.* 6. 1 *Rol.* 378. *Moor* 919.

Though the conſultation be granted by another court. *Cro. El.* 277.

And though he varies in the *modus* upon which the former prohibition was had. 1 *Rol.* 378.

But if a conſultation was awarded for want of form in the ſuggeſtion, or proceeding thereon, another prohibition may be allowed. *Cro. Car.* 208.

So if the conſultation was awarded for want of proof of the ſuggeſtion within the *ſix months*, purſuant to the ſtatute 2 & 3 *Edw.* 6. the plaintiff is not precluded, but may bring another prohibition, [but then he muſt pay *double coſts* according to the ſtatute, *Carth.* 463.] for this ſtatute of *Edward* 3. goes to the ſuggeſtion made upon the ſame libel, and to a conſultation duly granted, and not to the caſe of not having witneſſes ready to prove the ſuggeſtion through

Where a Prohibition may be granted after a *Conſultation* awarded, and where not, and of Diſobedience to the Writ of Prohibition.

negligence. But it was ſaid by *Holloway* juſt. that after a conſultation awarded for not proving his ſuggeſtion, &c. the party ſhall be for ever barred from having another prohibition on the ſame libel. *Comb.* 63.

But if, after a conſultation for want of proving his ſuggeſtion, the party appeals, there may be another prohibition to the court, to which the *appeal* was, upon the ſame ſuggeſtion. 2 *Rol.* 500.

So if after a conſultation the libel is enlarged or changed. 2 *Rol.* 207.

So if a conſultation goes for a *collateral* matter, as if the plaintiff was nonſuited. *Com. Dig.* 4 *Vol.* 484. *But. Keb.* 286. —If upon the trial of a ſuggeſtion the plaintiff be nonſuit, no new prohibition ſhall be granted, although the nonſuit was occaſioned for want of ſome of the plaintiff's witneſſes, who were to prove the truth of the ſuggeſtion, and who were neceſſarily obliged to be abſent.

But where the ſuggeſtion was for a *modus* of tythe of lambs in the pariſh, and a conſultation went; another prohibition ſhall go upon a ſuggeſtion of the ſame *modus* in a *particular farm.* 2 Vent. 47. This caſe is reverſed there.

So if a conſultation goes, and there be afterwards a new libel for the ſame ſpecies of tythes in another year, a prohibition ſhall go upon the ſame ſuggeſtion as was tried before. *Yel.* 102.

And if a conſultation goes, and the party againſt whom, appeals; the appellee may have a prohibition, though the *appellant* cannot have it. *Pop.* 159.

So if, after a conſultation, the plaintiff pleads the ſame matter (which was ſuggeſted and found againſt him at common law) in the ſpiritual court, which is accepted, and proceeds there for a trial; the former defendant may have a new prohibition: for they cannot try in the ſpiritual court, a matter determined at a trial at law, which was proper to be there tried, as if a diſcharge within 31 *H.* 8 was ſuggeſted. 2 *Rol.* 319. *l.* 45. *Hob.* 286.

If the eccleſiaſtical court refuſe to grant a copy of the libel for which a prohibition is granted, and thereupon they grant the copy, and afterwards proceed in the cauſe, the matter not being *within* their juriſdiction, another prohibition lies. *Moor* 917.

If

Where a Prohibition may be granted after a *Conſultation* awarded, and where not, and of Diſobedience to the Writ of Prohibition.

If the defendant in prohibition dies, his executors may proceed in the eccleſiaſtical court, and the judges of the court out of which the prohibition was granted will alſo in ſuch caſe make a rule to the ſpiritual court to proceed: But then the plaintiff may, if he pleaſes, have a new prohibition againſt the executors. *Lil. Rep.* 155.

The diſobeying a prohibition is a contempt to the ſuperior court that awards it, and puniſhable by *attachment*, which iſſues againſt the judge and party for proceeding after ſuch prohibition, and for which they are ſubject to fine and impriſonment according to the direction of the ſuperior court. *F.N.B.* 40. *Bro. Att. Pro. pl.* 5. 9. 11. and 279. Tho' the writ was not directed to the party. 19 *H.* 6. 54. And ſuch attachment may be awarded againſt a peer of the realm. 21 *Ed.* 3. 3 *pl.* 7.

An *attachment* was granted upon an affidavit that the party proceeded after a prohibition delivered to him, in a ſuit for a ſeat in the church, which the plaintiff claimed by *preſcription*; and, upon his appearance and examination upon interrogatories, he confeſſed the matter, and was fined five marks. Dr. *Wainright*'s caſe. 2 *Jon.* 47.

And not only an *attachment* lies for proceeding in the ſame cauſe pending a prohibition, but alſo for inſtituting a new ſuit for the ſame thing; as if a perſon libels for tythes, and a prohibition is brought, and he libels for tythes of another year, the firſt not being determined, an *attachment* ſhall be awarded. *Leon.* 111. *Moor* 599.

And in an *attachment* upon a prohibition, the plaintiff ſhall recover damages and coſts againſt the party, for proceeding after the writ of prohibition awarded. *Cro. Car.* 559. 2 *Jon.* 128. *Vent.* 348. 3 *Lev.* 369.

Of Quare Impedit.

Of the Writ of *Quare Impedit*, and Appearance thereto, &c.

A *Quare impedit* is a poſſeſſory action brought in the *Common Pleas* by all except the king who may bring it in *B. R.* or *C. B. F. N. B.* 32. *E.* and is now the only action uſed in caſe of the diſturbance of patronage to a church or eccleſiaſtical benefice; the aſſize of *darrein preſentment*, which lies only for diſturbance where a man has an advowſon by deſcent from his anceſtors, having fallen into diſuſe, as the *writ of quare impedit* is equally remedial, whether a man claims title by *deſcent* or *purchaſe*. 3 Blackſt. Com. 246.

In order to bring a *quare impedit*, the party applies to the *curſitor* for an *original writ* out of *Chancery*, which is to to this effect:

> *GEORGE* the third, by the grace of *God*, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, &c. To the ſheriff of ——— greeting. Command *Thomas*, *biſhop of* ——— *and* C. D. *eſquire*, that juſtly and without delay they permit *A. B.* to preſent a fit perſon to the church of ——— in the ſaid county which is void, and in the gift of the ſaid *A.* as he ſaith, and whereof he complaineth, that the ſaid biſhop and *C. D.* unjuſtly hinder him; and unleſs they ſhall ſo do, and the ſaid *A.* ſhall give you ſecurity that his ſuit ſhall be proſecuted, then ſummon by good ſummoners the ſaid biſhop and *C. D.* that they be before our juſtices at *Weſtminſter*, from * ——— to ſhew wherefore they will not do it, and have you there the ſummoners and this writ.
>
> Witneſs Ourſelf at *Weſtminſter*, the ——— day of ——— in the twentieth year of our reign."

* Muſt have at leaſt fifteen days between the teſte and return,

The

Of the Writ of *Quare Impedit*, and Appearance thereto, *&c.*

The ſheriff's warrant thereon.

——— to wit. *John Williams*, eſquire, ſheriff of the county aforeſaid, to *O. P. Q. R.* &c. jointly and ſeverally, by virtue of his majeſty's writ to me directed, I command you, that you or ſome or or one of you command *Thomas, biſhop of* ——— *and* C. D. *eſquire*, that juſtly and without delay, they permit *A. B.* to preſent a fit perſon to the church of ——— ——— which is void, and in the gift of the ſaid *A.* as he ſaith, and whereof he complaineth that the ſaid biſhop and *C. D.* unjuſtly hinder him; and unleſs they ſhall ſo do, and the ſaid *A.* ſhall give you ſecurity, that his ſuit ſhall be proſecuted, then ſummon by good ſummoners the ſaid biſhop and *C. D.* that they be before his majeſty's juſtices at *Weſtminſter*, from ——— ——— to ſhew wherefore they will not do it. And that you return the ſame to me, ſo that I may have there the ſummoners and this precept given, *&c.* at, *&c.* in, *&c.*

By the ſame ſheriff.

By the *ſtat. of Marlbridge*, 52 *H.* 3. The ſheriffs ought to make ſummons by good ſummoners, and return their names upon the original. 1 *Brownl.* 158.

And the ſummons ought to be ſerved on the defendant, or at the church door. *Ibid.* 2 *Mod.* 265.

The defendants may have the common *eſſoin*, or *de malo lecti*. 2 Inſt. 124. but no other *eſſoign*. 2 Inſt. 125. 1 Brownl. 160.

And if the defendants *eſſoin*, the plaintiff ought to adjourn it for 15 days, otherwiſe he ſhall be nonſuited. 1 *Brownl.* 159. *Dal.* 81.

Upon default of appearance, and no eſſoin, the plaintiff ſhall have an *attachment*, and afterwards a *diſtringas*. 2 Inſt. 124. 1 Brownl. 128.

And, by the *common law*, the proceſs to compel an appearance was by diſtreſs infinite. *Ibid.*

But now by the *ſtat. of Marlbridge*, if the defendant does not appear, nor caſt an *eſſoin* on the firſt diſtreſs, or before,

Of the Writ of *Quare Impedit*, and Appearance thereto, &c.

there ſhall be judgment for the plaintiff, and a * writ to the biſhop. 2 *H.* 4. 1 *b.* 2 *Inſt.* 124. 1 *Brownl.* 158. *Dy.* 353. *b.*

But if the party be not actually ſummoned, there ſhall not be judgment upon default at the diſtreſs. 1 *Mod.* 248. 2 *Mod.* 264.

By the common law, and now by the *ſtat. art. ſup. chart.* 15. In ſummonſes and attachments, there ought to be 15 days excluſive between the *teſte* and return at leaſt. 2 *Inſt.* 567.

And by the *ſtat. of Marlbridge*, in *quare impedit*, or *darrein preſentment*, there ought to be only 15 or 21 days before the return.

And the ſummons ought to be *teſted* the ſame day it iſſues, that there may be no prejudice in reſpect of *lapſe*. Reg. 30. *a.* Bro. Qu. Imp. 151.

If the injury done to the plaintiff, or the delay, ariſes from the *biſhop* alone, as upon pretence of incapacity, or the like, then he only is named in the writ.

But if there be another preſentation ſet up, then the pretended patron and his clerk are alſo joined in the action.

Or it may be brought againſt the pretended patron and his clerk, leaving out the biſhop.

Or againſt the patron only.

But it is generally brought againſt all three—for if the *biſhop* be left out, and the ſuit is not determined till *ſix months* are paſt, the *biſhop* is intitled to preſent by *lapſe*; but if he is named, and is made a party to the ſuit, no *lapſe* can poſſibly accrue till the right is determined; and therefore it is always moſt adviſeable to make him a party. *Cro. Jac.* 93.

If the *patron* is left out, and the writ is only brought againſt the *biſhop* and the *clerk*, the ſuit is of no effect, and the writ ſhall abate. *Hob.* 316. For the right of the *patron* is the principal queſtion in the cauſe. 7 *Rep.* 25.

And if the *clerk* is left out, and has received inſtitution before the action brought (as is ſometimes the caſe) the *patron* plaintiff, by his ſuit, may recover the right of patron-

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* *i. e.* A writ *ad admittendum clericum*; but then, before ſuch writ, there muſt be a *writ of inquiry* to inquire of *four points*, which *vide poſt.*

age,

Of the Writ of *Quare Impedit*, and appearance thereto, &c.

age, but not the preſent turn, for he cannot have judgment to remove the *clerk*, unleſs he be made a defendant and party to the ſuit to hear what he can alledge againſt it: for which reaſons it is the ſafer way to inſert them all three in the writ.

If the clerk of the *pſeudo* patron has not been inſtituted, or if the plaintiff ſuſpects that the biſhop will admit the defendant's, or any other clerk, pending the ſuit, he may, immediately upon ſuing out the writ of *quare impedit*, ſue out alſo a prohibitory writ, called a *ne admittas*; which recites the contention begun in the king's courts, and forbids the biſhop to admit any clerk whatſoever, till ſuch contention be determined. The *writ of ne admittas* is to this effect:

> *GEORGE* the third, by the grace of God, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith and ſo forth: To the reverend father in God, *Thomas*, by divine providence, biſhop of ——— greeting. We prohibit you, that you admit a perſon to the church of ——— which is, void, as it is ſaid, and concerning the advowſon whereof, an action is commenced in our court of the *Bench*, between *A. B.* eſq. and you and *C. D.* eſquire, until it ſhall be diſcuſſed in the ſaid court, *Whether* the ſaid advowſon belongeth to the ſaid *A.* or to you and the ſaid *C.* Witneſs Ourſelf at *Weſtminſter*, the day of in the twentieth year of our reign, &c.

If the biſhop doth, after the receipt of this writ, admit any perſon, even though the patron's right may have been found in a * *jure patronatus*, then the plaintiff, after he has

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* A *jure patronatus* is a commiſſion from the biſhop, which he is bound to iſſue if requeſted by either of the conteſting patrons, or their clerks, directed uſually to his chancellor, and others of competent learning, who are to ſummon a jury of ſix clergymen, and ſix laymen, to inquire into and examine who is the rightful patron. 1 *Burn.* 16, 17.

obtained

Of the Writ of *Quare Impedit*, and Appearance thereto, *&c.*

obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a ſtranger, by *writ of ſcire facias*. 2 Sid. 94. and ſhall have a ſpecial action againſt the biſhop, called a *quare incumbravit*, to recover the preſentation, and alſo ſatisfaction in damages for the injury done him by incumbering the church by inſtituting the clerk, pending the ſuit, and after the *ne admittas* received *.

If one defendant ſhould appear before the others, the plaintiff may declare againſt him *ſimul cum*, *&c.* 1 Brownl. 159.

And *note:* Summons and ſeverance lies if one plaintiff will not ſue. 1 *Brownl.* 158.

And if the writ abates it may be brought by *journies accompts*. Ibid.

The writ may be general, and the count thereon *ſpecial*. *F. N. B.* 33. *a.* 5 *Co.* 102. *b.* 10 *Co.* 135.

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* But if the biſhop has incumbered the church by inſtituting a clerk before the *ne admittas* iſſued, no *quare incumbravit* lies: for the biſhop hath no legal notice, till the writ of *ne admittas* is ſerved upon him.

Of Declaring in *Quare Impedit.*

THE plaintiff in his declaration muſt ſhew a *title* to preſent. *Vide Com. Dig.* tit. *Pleader*, 5 *vol.* 278.

And if he claims a right to preſent againſt common right, he muſt ſhew the commencement of it; as if he alledges preſentations by turns he muſt ſhew how this commenced, by preſcription, compoſition or otherwiſe. *Dy.* 299. 3 *Leon.* 163.

And the plaintiff muſt ſhew a title in him before the avoidance. *Dyer* 129. *b. Bend. pl.* 79.

And if there are ſeveral plaintiffs, and they vary in title, the writ abates. *R. Mod.* 184.

The plaintiff ought alſo to alledge a preſentment by himſelf or his anceſtor, or ſome other under whom he claims. *Vaug.* 7. 17. 57. But though it is generally neceſſary to alledge a preſentment, the want thereof will be cured by a verdict. *Stra.* 1006.

In a *quare impedit* for a united church, the patron ought to ſhew a preſentation either to the united church, or to one of the old churches. *Vide* Ld. *Raym.* 201, 202.

A purchaſor may alledge a preſentment by the vendor. 2 *Inſt.* 356.

And if the plaintiff alledges a preſentment without a precedent title, he muſt ſay it was *tempore pacis.* 1 *Mod.* 230.

But he need not, if a precedent title is alledged. *R.* 1 *Mod.* 230.

And if a preſentment be alledged by a common perſon he muſt ſay, that the clerk was thereon inſtituted and inducted. *Bend. pl.* 297.

The laſt preſentment regularly ſhall be mentioned; and therefore if the biſhop preſents by *lapſe*, upon the next avoidance the patron in *quare impedit* ſhall make mention of that. 3 *Leon.* 18. *Dal.* 75.

And the plaintiff ought alſo to alledge a diſturbance.

And if the ſuit be by an executor or adminiſtrator, upon an avoidance in the life of the teſtator, an allegation of the diſturbance in the life of the teſtator is ſufficient. *R. Sav.* 95. *Lut.* 2.

Of Pleading in *Quare Impedit*,

TO a declaration in *quare impedit* the defendants may imparl—and afterwards may either join or plead severally. *Bro. Q. Imp.* 157, 165.

And they may plead in abatement, or to the action.

But the ordinary cannot plead in *abatement*, or caſt an eſſoin without making himſelf a diſturber. *Hob.* 200.

Every defendant may plead the *general iſſue*, which is *ne diſturba pas*; becauſe the plea doth not defend the wrong wherewith he ſtands charged, and leaves the plaintiff's title not only uncontroverted, but in effect confeſſed; and the plaintiff may upon that plea preſently pay a writ to the *biſhop*; or at his choice maintain the diſturbance for damages. *Hob.* 162. *Vaugh.* 58.

But the *biſhop* generally, when made a party to the ſuit, to ſhew that he is not a diſturber, pleads in bar of the action, that he claims nothing but as *ordinary*. Hob. 198. Keil. 43. a. Co. Ent. 498. d. 38 Ed. 3. 2.

He muſt diſclaim, or admit himſelf a diſturber. *Hob.* 320.

And if he refuſes a clerk, without cauſe, he is a diſturber. 1 *Leon.* 230.

Upon ſuch plea by the *biſhop*, the plaintiff may have judgment againſt him with a *writ*, but a *ceſſat executio* till the other pleas are determined. *Hob.* 320. *Vau.* 6. *Keil.* 43. *a.*

If a *ceſſat executio* is not entered, it is only form. *R.* 1 *Roll.* 363.

But if there be not a *ceſſat executio*, it is error, if execution be before the other pleas are determined. *Ibid.*

If the *clerk* of the *pſeudo-patron* has been inſtituted, he generally pleads, that he claims nothing but as *perſona imperſonata ex preſentatione* of ſuch a one.

Or he may plead *plenarty* of the plaintiff, or a ſtranger; and by the common law, *plenarty*, before the writ for any time, was a good plea. 2 *Inſt.* 360.

But now by the *ſtat. Weſt.* 2. *c.* 5. It muſt be *plenarty for ſix months* before the action brought to be a ſufficient bar of the plaintiff's action, to recover the preſentation, if the plaintiff prevails.

In pleading *plenarty* for *ſix months*, by the preſentment, either of the plaintiff himſelf, or by collation, or by lapſe by the ordinary, the incumbent need not make title. *Noy* 30. But where he pleads the preſentment of a ſtranger, he ought to ſhew *title*. But *plenarty*, even for *ſix months*, is no

plea.

Of Pleading in *Quare Impedit*, &c.

plea againſt the king, according to the rule, *nullum tempus occurrit regi.* 2 Inſt. 361.

The *defendant patron*, if he does not rely on the *general iſſue*, or plead a releaſe, muſt ſet up a *title* and traverſe the *plaintiff*'s; but if he ſhews a title, ſubſequent to the plaintiff's, he need not traverſe the plaintiff's title, for then he confeſſes and avoids it.

In replying to the defendant's plea and title, it is not ſufficient for the plaintiff to deſtroy that title, without maintaining his own title. *Vaugh.* 60.

The conteſting parties go on to *iſſue* or *demurrer*, and the proceedings therein are the ſame as in other caſes; but in this action the plaintiff muſt recover upon the ſtrength of his own right, and not by the weakneſs of the defendant's. *Vaugh.* 7, 8.

Upon the trial the plaintiff is put to make out his own title; and upon failure thereof, the defendant is put upon the proof of his, in order to obtain judgment for himſelf, if needful.

If upon the trial the right be found for the plaintiff, the jury are to inquire of *four things*—1. Whether the church is full. 2. Of whoſe preſentation; for if it be of the defendant's preſentation, his clerk is removeable, if made a party to the ſuit, and the plaintiff commenced his action in due time, *i. e. infra tempus ſemeſtre*, by writ. 3. In caſe of plenarty upon an uſurpation, whether *ſix calendar months* have paſſed between the avoidance and the time of bringing the action; for if * *ſix months* have paſſed it will not be be within the ſtatute *Weſtm.* 2. which permits an uſurpation to be diveſted by a *quare impedit* brought *infra tempus ſemeſtre.* 2 Inſt. 361. 4. Of what value yearly the living is, and this in order to aſſeſs damages according to the ſtat. *Weſt.* 2. before which ſtatute no damages were allowed; but by that ſtatute, if *ſix months* paſs by the diſturbance of any, ſo that the biſhop do confer to the church, and the patron loſeth his turn, damages ſhall be awarded to two years value of the church; and if ſix months be not paſſed, but the preſentment be deraigned within the ſaid time, then damages ſhall be awarded to the *half year's* value of the church.

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* *Note:* In all *eccleſiaſtical* proceedings, a month means a *calendar month*; in *temporal*, a *lunar month.*

Of

Of the Verdict, Enquiry, Judgment, &c.

IF all the defendants make default upon the *diſtreſs*, the plaintiff has judgment againſt all; for all are ſuppoſed diſturbers. *R. Mod.* 81. and that without title made. *F. N. B.* 38. 11. *Semb. cont.* 1 *Brown.* 158.

But if the plaintiff recovers upon *demurrer*, there muſt be a *writ of inquiry* iſſued to inquire of the preceding *four points* before the plaintiff has final judgment, and a writ to the biſhop. *R. Mod.* 81.

Or after a verdict for the plaintiff, if the jury have omitted to inquire of theſe points, there ſhall be a *writ of inquiry*, and till this is executed, the writ to the biſhop ſhall ſtay. 1 *Bro. Ent.* 327.

If the patron and incumbent confeſs the action, or *nil dicunt*, &c. there ſhall be judgment for the plaintiff, and a writ to the biſhop.

If the church remains void, the plaintiff ſhall recover no damages; and if the jury aſſeſs them, a *remittitur de damnis* muſt be entered. 3 *Lev.* 59. 2 *Inſt.* 362.

The damages are to be recovered againſt the diſturber; and therefore if the incumbent counterplead the title of the plaintiff as well as the patron, the plaintiff ſhall recover the value as well againſt him as againſt the patron. But no damages ſhall be recovered againſt the biſhop, where he claims only as ordinary—and *note:* The king is not within the ſtatute, becauſe, by his prerogative, he cannot loſe his preſentation. 6 *Co.* 52.

Of the Judgment in *Quare Impedit, &c.*

IF it be found that the plaintiff hath the right, and hath commenced his action in due time, then he ſhall have judgment to recover his preſentation; and if the church be found to be full, by the inſtitution of any clerk, to remove him, unleſs it were filled *pendente lite*, by lapſe to the ordinary, he not being a party to the ſuit, in which caſe the plaintiff loſes his preſentation *pro hac vice*, but ſhall recover *two years* full value of the church from the defendant, the pretended patron, as a ſatisfaction for the turn loſt by his diſturbance; or in caſe of his inſolvency, he ſhall be impriſoned for two years. *Stat. Weſt.* 2. *f.* 5. *f.* 3.

If the action was commenced within the ſix months, and the plaintiff have judgment to recover his preſentation, and the church be full, whereby the former preſentment will be deraigned, then damages ſhall be awarded to the plaintiff, for half a year's value of the church.

Upon the plaintiff's recovering his preſentation the writ iſſued in conſequence thereof is a writ directed to the biſhop, called a writ *ad admittendum clericum*, which recites the judgment of the court, and orders him to admit and inſtitute the clerk preſented; and if upon this order he does not admit him (the clerk being duly qualified) the patron may ſue the biſhop in a *quare non admiſit*, and recover ample ſatisfaction in damages.

The writ *ad admittendum clericum*, is to this effect:

"*GEORGE* the third, by the grace of God, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and ſo forth. To the reverend father in God, *Thomas*, by divine permiſſion, biſhop of ——— greeting: Whereas *A. B.* has lately in our court, before our juſtices of the *Bench*, at *Weſtminſter*, by the conſideration of the ſame court, recovered againſt *you and* E. F. *clerk*, and *C. D.* his preſentation to the *rectory* and pariſh church of ——— in our county of ——— and your dioceſe, which became vacant, and belongs to his preſentation: And whereupon it was conſidered by our ſaid court of the *Bench*, that the ſaid *A.* ſhould have our writ to you the ſaid biſhop, the ordinary of that place, to be directed; and notwithſtanding your diſclaimer, and the claims of the ſaid *E. F.* and *C. D.* or either of them, you ſhould

Of the Judgment in *Quare Impedit, &c.*

ſhould admit a fit perſon to the rectory and pariſh aforeſaid, at the preſentation of the ſaid *A.* We therefore command you, that notwithſtanding your diſclaimer, or the claims of the ſaid *E. F.* and *C. D.* you admit a fit perſon to the rectory and pariſh church aforeſaid, at the preſentation of the ſaid *A.* and how you ſhall have executed this our writ, certify to us on ——— whereſoever we ſhall then be in *England.* Witneſs Sir *William De Grey*, knight, at *Weſtminſter*, the ——— day of ——— in the twentieth year of our reign, *&c.*

By the *ſtat. of Weſtm.* 2. *c.* 30. The judge of *niſi prius* has power to give judgment immediately; yet if he do not, upon return of the *poſtea*, judgment may be given by the court to which the return is made.

If the plaintiff is nonſuited, the judgment is peremptory, and the defendant ſhall have a writ *ad admittendum clericum* to the biſhop. 1 *Brown.* 161. but not before *title* made. *F. N. B.* 38. *K.*

But if he has judgment upon *demurrer*, he ſhall have a writ to the biſhop preſently.

But the defendant cannot have a writ to the biſhop, if the *quare impedit* abates for form, miſnomer, or inſufficiency. *R.* 7 *Co.* 27. *b.* *F. N. B.* 38. *M.*

Note: If the ordinary does nothing upon the *writ ad admittendum clericum*, the party may have an *alias* and *pluries*, which may be returnable, and after that an attachment. *Reg.* 42. *a.* 80. *F. N. B.* 38. *c.* *Dy.* 254. *b.* 350. *a.*

There was a fine of 10 *l.* for a bad return upon the firſt writ, and an *alias* under the penalty of 100 *l.* 3 *Leon.* 139.

If the incumbent, of which the church is full, was not a party to the writ, he ſhall never be removed. *Co. Lit.* 344. *b.*

By the 3 *Hen.* 7. *c.* 10. [which gives *coſts* upon writs of error brought if judgment be affirmed] If the defendant bring a writ of error, and the judgment be affirmed, the plaintiff ſhall recover his coſts and damages for his wrongful delay.

By virtue of this ſtatute, the court of *King's Bench* have, upon a writ of error, awarded damages according to the

Of the Judgment in *Quare Impedit, &c.*

value of the church found by the verdict. *Cro. Jac.* 145, 175.

But as the real damages which the plaintiff ſuſtains is only the being kept out of the half year's value, the legal intereſt on that ſeems to be all he is entitled to. *Stra.* 931.

Of Partition.

BY the *ſtatute* 8 & 9 *W.* 3. *c.* 31. An act for the eaſier obtaining partition of lands in coparcenary, joint-tenancy, and tenancy in common; after reciting, that "Whereas the proceedings upon writs of partition between "coparceners by the common law or cuſtom, joint-tenants, "and tenants in common, are found by experience to be "tedious, chargeable, and oftentimes ineffectual, by rea-"ſon of the difficulty of diſcovering the perſons and eſtates "of the tenants of the manors, meſſuages, lands, tene-"ments and hereditaments, to be divided, and the defec-"tive or dilatory executing and returning of the proceſs of "ſummons, attachment, and diſtreſs, and other impedi-"ments in making and eſtabliſhing of partitions, by reaſon "of which divers perſons having undivided parts, or pur-"parts, are greatly oppreſſed and prejudiced, and the pre-"miſſes are frequently waſted and deſtroyed, or lie uncul-"tivated and unmanured, ſo that the profits of the ſame "are totally or in a great meaſure loſt; for remedy where-"of, *it is enacted*, That after proceſs of *pone*, or attachment "returned upon a writ of partition, affidavit being made "by any credible perſon of due notice given of the ſaid "writ of partition to the tenant or tenants to the action, "and a copy thereof left with the occupier, or tenant or "tenants, or, if they cannot be found, to the wife, ſon or "daughter (being of the age of one and twenty years or "upwards) of the tenant or tenants, or to the tenant in "actual poſſeſſion, by virtue of any eſtate of freehold, or "for term of years, or uncertain intereſt, or at will, of "the manors, lands, tenements or hereditaments, whereof "the partition is demanded (unleſs the ſaid tenant in actual "poſſeſſion be demanded in the action) at leaſt forty days "before the day of the return of the ſaid *pone* or attach-"ment, if the tenant or tenants to ſuch writ, or any of "them, or the true tenant of the meſſuages, lands, tenements "and hereditaments as aforeſaid, ſhall not, in ſuch caſe, "within fifteen days after return of ſuch writ of *pone*, or "attachment, cauſe an appearance to be entered in ſuch "court where ſuch writ of *pone* or attachment ſhall be re-"turnable; then, in default of ſuch appearance, the de-"mandant having entered his declaration, the court may "proceed to examine the demandant's title, and quantity of "his part and purpart; and accordingly as they ſhall find "his right, part and purpart to be, they ſhall for ſo much

" give judgment by default, and award a writ to make " partition, whereby ſuch proportion, part and purpart, " may be ſet out ſeverally: which writ being executed after " eight days notice to the occupier, or tenant or tenants of " the premiſſes, and returned, and thereupon final judg- " ment entered, the ſame ſhall be good, and conclude all " perſons whatſoever after notice as aforeſaid, whatever " right or title they have, or may at any time claim to have, " in any of the manors, *&c.* mentioned in the ſaid judg- " ment and writ of partition, although all perſons con- " cerned are not named in any of the proceedings, nor the " title of the tenants truly ſet forth."

By *ſect.* 2. Provided, that if ſuch tenant or other ſhall in one year after judgment entered, or in caſe of infancy, coverture, non-ſanity, or abſence, within a year after ſuch inability determined, ſhew a good matter in bar of ſuch partition, *&c.* the court may ſet aſide ſuch judgment; but if the ſame is confirmed the party appealing pays coſts.

By *ſect.* 3. No plea in *abatement* ſhall be admitted or received in any ſuit of partition, nor ſhall the ſame be abated by reaſon of the death of any tenant.

By *ſect.* 4. If the *high ſheriff* cannot be preſent at the execution of the judgment in partition, the under-ſheriff, in the preſence of two juſtices, may proceed therein—And in caſe ſuch partition be made, returned and filed, the tenants, before diviſion, are to remain tenants, under the ſame conditions, and the landlords, *&c.* are to make good to their tenants the ſaid parts as before partition made.

By *ſect.* 5. The ſheriffs, under-ſheriffs, *&c.* are to give due attendance to the execution of the writ of partition, and in caſe the demandant does not pay the fees to the ſheriff, *&c.* then the court ſhall award them, *&c.*

The above act is made perpetual by the 3 & 4 *Ann. c.* 18. *ſect.* 2.

Of the Writ of Partition, &c.

SINCE the above ſtatute, *partition* has been uſually made by *writ*; before which ſtatute it was done either by *writ*, *commiſſion*, *or conſent*, and was in many caſes liable to be defeated.

By the ſtatute 31 *Hen.* 8. *c.* 1. *joint-tenants*, and *tenants in common*, or in right of their wives, are compellable *by writ* to make partition.

To proceed to make *partition*, according to this ſtatute, the demandant or demandants apply to the court of *Chancery*, and ſue out an *original writ*, which is to this effect:

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 ——— greeting: If *A. B.* and *C. D.* ſhall give you ſecurity, that their ſuit ſhall be proſecuted; then ſummon, by good ſummoners, *E. F.* that he be before our juſtices at *Weſtminſter*, on the morrow of *All Souls*, to ſhew wherefore, whereas the ſaid *A. B. C. D.* and *E. F.* hold together, and undivided, *the manor of ——— with the appurtenances, and fourteen meſſuages, twelve cottages, ſixteen barns, three dove-houſes, four ſtables, thirteen gardens, two hundred acres of land, two hundred acres of meadow, two hundred acres of paſture, two hundred acres of wood, one hundred acres of furze and heath, two hundred acres of moor, one hundred acres of buſhy ground, one hundred acres of marſh, one hundred acres of broom, twenty acres of land covered with water, twenty pounds rent; common of paſture for all manner of cattle, court-leet, courts-baron, view of frankpledge, profits and perquiſites of court, free warren, free chace, free fiſhery, goods and chattels of felons, fugitives, outlaws, and thoſe which are put in exigent, Deodands, chattels waifed and eſtrayed, with the appurtenances*, in the pariſhes of ——— ——— and ——— of which the ſaid *E. F.* denieth partition to be made between them according to the * *form of the ſtatute in ſuch caſe made and provided*, and unjuſtly permitteth not the ſame to be done,

* Or "according to the cuſtom of *England*" if parceners by cuſtom.

and

Of the Writ of Partition, &c.

and contrary to the form of the ſaid ſtatute, as they ſay; and have you there the ſummoners, and this writ. Witneſs Ourſelf at *Weſtminſter*, the ——— day of ——— in the nineteenth year of our reign.

Upon this writ the ſheriff ſhould ſummon the tenants, and upon the return thereof, *affidavit* of the ſervice of ſuch writ ſhould be made according to the ſtatute, to this effect:

Between { *A. B.* and *C. D.* demandants, and *E. F.* tenant.

I. M. and *O. P.* of ——— officers to the ſheriff of ——— ſeverally make oath, and ſay, that they the ſaid deponents did on the ——— day of ——— in the year of our Lord 1779, ſerve the above named *E. F.* tenant, with the writ of partition in this cauſe, by delivering to and leaving with the ſaid *E. F.* a copy of the ſaid writ, and acquainting him with the contents thereof; and theſe deponents did, on the ſaid ——— day of ——— in the ſaid year of our Lord 1779, deliver to and leave with *P. Q. R. S. T. V.* &c. the occupiers of the meſſuages, lands, and tenements, in the ſaid writ mentioned, a true copy of the ſame writ.

Sworn, &c.

Upon default of appearance in court, the *demandants* ſhould ſue out a *pone* or attachment, which is to this effect:

GEORGE the *third*, &c. To the ſheriff of ——— greeting: Put by ſureties and ſafe pledges, *E. F.* of ——— that he be before our juſtices at *Weſtminſter* in eight days of St. *Hilary*, to anſwer *A. B.* and *C. D.* wherefore the ſaid *A. B. C. D.* and *E. F.* hold together and undivided *the manor of* ——— *with the appurtenances*, &c. [as in the writ] of which the ſaid *E. F.* denieth partition to be made between them according *to the form of the ſtatute in ſuch caſe made and provided*, and unjuſtly

Of the Writ of Partition, &c.

permitteth not the ſame to be done; and to ſhew wherefore he was not in our court before our juſtices at *Weſtminſter*, on the *morrow of All Souls* laſt paſt, as he was ſummoned, and have there the names of the pledges and this writ.

Witneſs, &c.

This writ ſhould be ſerved in the ſame manner as the *writ of partition* was, and the parties ſhould be informed of the contents.

This *pone* ſhould bear teſte on the *quarto die poſt* of the return day of the *writ of partition*, and there muſt be fifteen days between the teſte and return of it at leaſt; and by the ſtatute of 8 & 9 *W.* 3. *ante*, there muſt be at leaſt *forty days* between the ſervice of the *writ of partition* and the return of the *pone* or attachment.

Of the Declaration in Partition.

IF the tenant or tenants do not within *fifteen days* after the return of the *pone* or attachment cauſe an appearance to be entered, the *demandant or demandants* may enter their declaration, and the court will proceed to examine his or their title; and if they find the right with the demandant there ſhall be judgment by default for ſo much, and a *writ awarded to the ſheriff* to make *partition*.

Or if the defendant appears, the plaintiff muſt declare. The declaration is in the following form:

——— to wit, *E. F.* of ——— in the county aforeſaid, was ſummoned to anſwer *A. B.* and *C. D.* of a plea, wherefore, whereas, the ſaid *A. B. C. D.* and the ſaid *E. F.* hold together and undivided, the manor of ——— with the appurtenances, *&c.* [ſpecify the premiſes according to the writ] of which the ſaid *E. F.* denieth partition to be made between them according to the form of the ſtatute *in ſuch caſe made and provided*, and unjuſtly permitteth not the ſame to be done, and contrary to the form of the ſtatute: And whereupon the ſaid *A. B.* and *C. D.* by ——— their attorney, ſay, that whereas they and the ſaid *E. F.* hold together and undivided the tenements aforeſaid, with the appurtenances, whereof it belongs to the ſaid *A. B.* and *C. D.* and their heirs, to have *one moiety* of the tenements aforeſaid, with the appurtenances, to hold them in ſeveralty, ſo that the ſaid *A. B.* and *C. D.* of their *moiety* belonging to them of the tenements aforeſaid, with the appurtenances; and the ſaid *E. F.* of his *moiety* belonging to him of the tenements aforeſaid, with the appurtenances; may ſeverally apportion themſelves: He the ſaid *E. F.* denieth partition thereof to be made between them according to the form of the ſtatute in ſuch caſe made and provided, and unjuſtly permitteth not the ſame to be done, and contrary to the form of the ſaid ſtatute; whereupon they ſay, that they are injured, and have damage to the value of one hundred pounds. And therefore they bring ſuit, *&c.*

The declaration by one *parcener* or *joint-tenant* againſt the others, muſt ſhew how they are joint-tenants. *Cro. El.* 64.

Of the Declaration in Partition.

But not where they are *tenants in common*, for they claim by ſeveral titles, and one is not conuſant of the others title. *R. Cro. El.* 64.

So, if they are parceners, *&c.* a declaration which ſhews that it was the inheritance of the common anceſtor in *tail*, is ſufficient without ſhewing how the eſtate tail is commenced. *Dy.* 79. *b.*

But if the declaration ſays that the plaintiff and defendant were ſeized in fee, where it is found that the defendant has only in tail, the writ abates. *R. Cro. El.* 760.

Of Pleading in Partition.

TO the declaration there can be no plea in *abatement*, ſince the ſtat. 8 & 9 *W.* 3. *c.* 31. *ſ.* 3. Nor ſhall the writ abate by the death of defendant. *Ibid.*

And if he pleads in *bar*, he can plead no other plea than *non tenent inſimul*, for every other plea in bar is *tantamount* to *non tenent inſimul.*

Upon which plea iſſue may be taken, and the parties proceed to trial as in other caſes.

But the party may confeſs the action, and conſent that partition may be made.

In a writ of partition no *damages* ſhall be recovered, nor an enquiry of them. *Noy* 68, 143. for it is a real action.

Of the Judgment in Partition.

AFTER confeſſion of the action or iſſue tried for the plaintiff, there ſhall be judgment *quod partitio fiat.* Co. Lit. 167. b.

And thereon a writ ſhall iſſue to the ſheriff to make *partition.*——

The judgment in *partition.*

Therefore it is conſidered, that partition be made thereof between them, *&c.* And it is commanded to the ſheriff, that in his proper perſon he go to the manor and tenements aforeſaid, and in the preſence of the parties aforeſaid, being forewarned, if they ſhall be willing, the manor and tenements aforeſaid, with the appurtenances, by the oath of good and lawful men of his county, reſpect being had to the true value of the manor and tenements aforeſaid, with the appurtenances, he cauſe to be divided into *two equal parts* (or as the caſe is) and one part of thoſe parts he cauſe to be delivered and aſſigned to the ſaid *A. B.* and *C. D.* and the other part thereof to the ſaid *E. F.* to be holden to them and their heirs in ſeveralty, ſo that neither the ſaid *A. B.* and *C. D.* nor the ſaid *E. F.* may have more of the manor and tenements aforeſaid, with the appurtenances, than it belongeth to them to have; and that the ſaid *A. B.* and *C. D.* of their part to them thereof belonging, and the ſaid *E. F.* of his part to him thereof belonging, may ſeverally apportion themſelves; and that that portion, by the ſaid ſheriff ſo diſtinctly and openly made, he have here from the *day of Eaſter in fifteen days,* under his ſeal and the ſeals of thoſe, *&c.*

Of the Writ *de partitione facienda*, &c.

UPON the foregoing judgment, the *demandant* ſhall have a *writ de partitione facienda*, which is to the following effect:

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 ——— greeting. Whereas *E. F.* late of ——— in your county, eſquire, was ſummoned to be in our court, before our juſtices at *Weſtminſter*, to anſwer *A. B.* and *C. D.* of a plea wherefore the ſaid *A. B.* and *C. D.* and the ſaid *E. F.* hold together and undivided the manor of ——— with the appurtenances, [ſpecify the premiſes according to the declaration] and the ſaid *E. F.* denied partition thereof to be made between them according to *the form of the ſtatute in ſuch caſe made and provided*, and unjuſtly permitted not the ſame to be done, and contrary to the form of the ſtatute, as they ſaid; and the ſaid *E. F.* * *appearing in our ſaid court, freely conſented that partition thereof might be made*: Whereupon it was conſidered in our ſame court, before our juſtices at *Weſtminſter*, that partition ſhould be made between them of the manor and tenements aforeſaid, with the appurtenances. Therefore we command you, that taking with you twelve free and lawful men of the neighbourhood of ——— aforeſaid, by whom the truth of the matters may be better known, in your proper perſon you go to the manor and tenements aforeſaid, with the appurtenances; and there, in the preſence of the parties aforeſaid, by you to be forewarned, if they ſhall be willing to be preſent, the ſame manor and tenements, with the appurtenances, by the oath of the ſaid twelve free and lawful men, reſpect being had to the true value of the manor and tenements aforeſaid, with the appurtenances, you cauſe to be

* If there was judgment by default, and the plaintiff declared and proceeded according to the ſtatute, it ſhould ſo be ſtated in this writ——So if he pleaded *non tenent inſimul*, and there was a verdict againſt him.

divided

Of the Writ *de partitione facienda*, &c.

divided into *two equal parts*, and one part of thoſe parts to be delivered and aſſigned to the ſaid *A. B.* and *C. D.* and the other part thereof to the ſaid *E. F.* to be holden to them and their heirs in ſeveralty, ſo that neither the ſaid *A. B.* and *C. D.* and the ſaid *E. F.* may have more of the manor and tenements aforeſaid, with the appurtenances, than it belongs to them to have: And that the ſaid *A. B.* and *C. D.* of their part to them thereof belonging, and the ſaid *E. F.* of his part thereof to him belonging, may ſeverally apportion themſelves. And that that partition by you ſo diſtinctly and openly made, you have here from the day of *Eaſter* in fifteen days, under your ſeal and the ſeals of thoſe by whoſe oath you ſhall have made that partition: And have you there the names of thoſe by whoſe oath you ſhall have made the ſame partition, and this writ. Witneſs Sir *William de Grey*, knight, at *Weſtminſter*, the ——— day of ——— in the twentieth year of our reign, *&c.*

Upon this writ, the ſheriff ought to give notice to the parties of executing the ſame —— And he ought to attend in perſon. But by the *ſtat. of William* 3. *ante*, the under-ſheriff, or one who officiates as under-ſheriff, may execute the ſame in the preſence of two juſtices.

If the manor to be divided lies intermixt with other lands, ſo that the jury do not know the limits, quantity, *&c.* of the tenements to be divided; and the owner of the intermixt lands, *&c.* will not ſhew the certainty of his lands, yet the jury ought to make partition as well as they can. *Dy.* 266. *a.*

After the partition made, it muſt be returned to the court under the ſeals of the ſheriffs and twelve jurors. *Lit. ſect.* 249.

The return of the above writ.

AT which day here come as well the ſaid *A. B.* and *C. D.* as the ſaid *E. F.* by their attornies aforeſaid. And the ſheriff, namely, *John Thomas, eſquire*, now here returns a certain partition between the

Of the Writ *de partitione facienda*, &c.

the parties aforeſaid, of the tenements aforeſaid, by the ſaid ſheriff, by virtue of the aforeſaid writ, and according to the form thereof, by the oath of twelve free and lawful men of the neighbourhood of ——— aforeſaid made: Which follows in theſe words, to wit, ——— to wit, I *John Thomas, eſquire*, ſheriff of the county aforeſaid, humbly certify and return to his majeſty's juſtices, at the day and place in the writ hereunto annexed mentioned, that by virtue of the ſaid writ to me directed, on the ——— day of ——— in the twentieth year of the reign of king *George* the third, of *Great Britain*, *France*, and *Ireland*, king, defender of the faith, and ſo forth, and in the year of our Lord 1780, having taken with me *O. P. Q. R. S. T.* &c. twelve free and lawful men of my bailiwick, and of the neighbourhood in the ſaid writ mentioned, by whom the truth of the matter may the better be known, in my proper perſon did go to the manor and tenements in the ſaid writ ſpecified; and there, by the oath of the ſaid jurors, in the preſence of the parties in the ſaid writ named, by me forewarned according to the command of the ſaid writ, and by their aſſent, the ſaid manor and tenements, with their appurtenances, (reſpect being had to the true value of the ſame) I did cauſe to be divided into two equal parts, and one part thereof, that is to ſay, all thoſe *two meſſuages, two barns, and the land thereto belonging, called the* ——— *containing two hundred and twenty acres, two roods, and ſeven perches, more or leſs, late in the occupation of* William Jones, *and now of* Michael Dixon *and his aſſigns, and all that meſſuage*, &c. [ſpecifying in like manner the whole apportionment allotted to the demandants]; and all commons, common of paſture, woods, under-woods, and trees, ways, waters, eaſements, and appurtenances, to the ſaid ſeveral meſſuages, cottages, farms, lands, wood, ground, and premiſes belonging or appertaining, or therewith uſed and enjoyed; all which ſaid premiſes are ſituate, lying, and being in ——— in my ſaid county; and did cauſe to be delivered and aſſigned to the ſaid *A. B.* and *C. D.* in the

ſaid

Of the Writ *de partitione facienda, &c.*

ſaid writ named, and the other part thereof, that is to ſay, all the manor of ——— in the ſaid county of ——— with the court baron of the ſame; and all rights, royalties, members, and appurtenances thereof; and all that barn, farm, and lands, *&c. &c.* [ſpecifying the whole apportionment allotted to the defendant]. All which ſaid meſſuages, cottages, farms, barns, lands, woods, grounds, and premiſes, are ſituate, lying, and being in the pariſh of ——— in my county, I did cauſe to be delivered and aſſigned to the ſaid *E. F.* eſq. in the ſaid writ named, to be holden to them and their heirs in ſeveralty, as by the ſaid writ I am commanded; ſo that neither the ſaid *A. B.* and *C. D.* nor the ſaid *E. F.* might have more of the manor and tenements aforeſaid, with the appurtenances, than it belonged to them to have; and that the ſaid *A. B.* and *C. D.* of their part to them thereof belonging, and the ſaid *E. F.* of his part to him thereof belonging, may ſeverally apportion themſelves.

In witneſs whereof as well I the ſaid ſheriff, as the jurors aforeſaid, to this indented partition have ſet our ſeals the day and year and place above mentioned.

John Thomas, eſquire, ſheriff.

Of the final Judgment in Partition.

UPON the foregoing return to the writ *de partitione facienda*, the judgment of the court is, "Therefore it is conſidered, that the aforeſaid partition be holden firm and effectual for ever, *&c.*" And therefore this judgment, when made by writ after the appearance of the party, ſhall not be defeated. *Co. Lit.* 168. *b.* 171. *a.* — even though made againſt a *feme* covert — *Ibid.* — or though not equal — *Ibid.* — or though not equal, and any one of the parties be an infant. *Ibid.*

And ſo by the *ſtat.* 8 & 9 *W.* 3. *c.* 31. If made without the appearance of the tenant, if he does not appear within fifteen days after the return of the attachment, where an affidavit was made of notice to the tenant *forty days* before the return of the writ, and a copy of it left with the occupier of the land.

But by the ſame ſtatute, if judgment be in a writ of partition, without the appearance of the defendant, upon motion ſhewing a probable bar, or that the demandant hath not title to ſo much, within a year after judgment, or (if the party was an infant, covert, nonſane, or out of the realm after the inability is removed,) the court may order the defendant to plead, *&c.*

Or if the demandant's title be admitted, but the partition appears unequal, the court may award a new partition.

Of Error.

A *Writ of error* lies for ſome miſtake or ſuppoſed miſtakes in the proceedings of a *court of record*; for to amend errors or miſtakes in a baſe court, not of record, a *writ of falſe judgment* lies; of which hereafter.

A *writ of error* is a writ of right in all caſes but *felony and treaſon*, Salk. 504. and may be had againſt the king.

Error lies either in the ſame court where the judgment was, or in a ſuperior court——It lies in the ſame court where the judgment was given, when the error was not for any fault in the court, but for ſome defect in the proceſs of the cauſe, other than in the judgment, or for default of a continuance, *Dy.* 196. *a.* or for default *in adjudging execution*, 1 Rol. 176. 7 H. 6. 30. Yelv. 157. F. N. B. 21. I. as for miſpriſion of the clerk, or for error in *fact*; and there the writ may be in the ſame court, 1 *Sid.* 208. except where it was in the *Exchequer*. 3 Lev. 38.—But if there is error in *law*, or in the judgment of the court, then the writ lies to a ſuperior court—And ſuch writ of error only lies upon matter of *law* ariſing upon the face of the proceedings; ſo that no evidence is required to ſubſtantiate or ſupport it: For if there has been an error in the determination of the *facts* in the cauſe, which it was the province of the jury to determine, the method of obtaining redreſs in ſuch caſe, is not by *writ of error*, but by an *attaint* of the jury, or appealing to the juſtice of the court to grant a *new trial*, in order to correct the miſtakes of the former verdict.

A *writ of error* lies from almoſt all inferior courts of record in *England* into the *King's Bench*. But *error* does not lie from any inferior court of record in *England* into the *Common Pleas*, except in two or three caſes; for which, vide *Com. Dig. Bac. Abr.* &c. But the better opinion ſeems to be, that *error* lies not into *C. B.* in any caſe.

Of Proceeding in Error from *inferior* Courts.

IF there is *error* in the proceedings of an *inferior court of record*, application muſt be made by the * *plaintiff in error* to the curſitor for a *writ of error*, which writ may bear *teſte* before the judgment given; and this is the uſual courſe for preventing and ſuperſeding the execution; but then judgment below muſt be given before the return of it. 3 *Keb.* 308. *Vent.* 96. *Latch.* 133. For if it ſhould be made returnable before judgment given, it is ſuch a fault as is not amendable. *Stra.* 807.

Upon a ſhort abſtract or *præcipe* delivered, the curſitor will make out the *writ of error* returnable in *B. R.* as that court has, by its conſtitution, a ſuperintendency over all inferior juriſdictions.

As ſoon as the writ is made out, the party who ſued it muſt carry it to the *prothonotary* of the inferior court, and get it allowed; and if execution ſhould have been ſued out, that officer will alſo grant a *ſuperſedeas* to the ſame; but if no execution ſhould have iſſued, the allowance of the writ of error is of itſelf a ſufficient *ſuperſedeas*, and no execution can then be taken out.

Upon a *writ of error* to remove the record from an *inferior court*, the party removing it need not formerly have put in *bail* below; for the ſtatutes requiring *bail* upon proſecuting *error*, did not extend to the inferior courts of record. But now, by the ſtat. 19 *Geo.* 3. *c.* 70. *ſ.* 5. "No "execution ſhall be ſtayed or delayed, upon or by any *writ* "*of error*, *or ſuperſedeas* thereon to be ſued, for the reverſ- "ing of any judgment in any inferior court of record "where the damages are under 10 *l.* unleſs ſuch perſon or "perſons, in whoſe names ſuch writ of error is brought, "with two ſureties, ſuch as the inferior court ſhall ap- "prove, before ſuch ſtay made, or *ſuperſedeas* awarded, be "bound unto the party for whom ſuch judgment was given "in a recognizance to be acknowledged in the ſame court "in double the ſum adjudged to proſecute ſuch writ of er- "ror with effect; and pay (if the judgment is affirmed "or writ of error nonproſſed) all the debt, damages, and

* ☞ It is a certain rule, that all the parties to the ſuit below, muſt, in all caſes of *error*, be made parties alſo in the writ of error; and in caſe of the death of a party, he muſt be named, and his death alledged in the *writ*. And if one refuſes, he ſhould be ſummoned and ſevered. *Curth.* 7. Stra. 606.

Of Proceeding in Error from *inferior* Courts.

" coſts adjudged; and all coſts and damages awarded for " the delaying of execution."

On the return of the *writ of error*, the *defendant* in error ſhould ſerve the *plaintiff* in error with a rule out of the inferior court to tranſcribe the record, who, upon ſervice thereof, ſhould beſpeak the tranſcript of the record of the proper officer below, and carry the ſame into the office, and file the ſame, if in *B. R.* with the *ſigner of the writs.* The officer who is to receive and deliver out *writs of error* and *certiorari*, &c. now Mr. *Heberden.*

The tranſcript ſhould be filed before the ſecond ſeal or the *defendant in error* may apply and get a *certificate* from the office, that the *writ of error* is not returned, and the tranſcript brought in; and may thereupon apply to the *curſitor* for a writ of *executio judicii* directed to the court below, and commanding them, that, notwithſtanding the *writ of error*, they proceed to execution on the ſaid judgment.

The defendant in error cannot tranſcribe the record. 1 *Wilſ.* 35. but if the plaintiff does not tranſcribe it, he muſt be ſerved with a rule to tranſcribe. But if the tranſcript of the record is carried in and filed in due time, each party ought to beſpeak a copy thereof, which is made out at the rate of 4*d. per* ſheet; and the *defendant* in error ſhould then, in order to accelerate the *plaintiff* in error, ſue out a *ſcire facias quare executionem non* directed to the ſheriff of the county where the original action was brought, and which is to this effect:

> *GEORGE* the third, by the grace of God, *&c.* To the ſheriff of ——— greeting. Whereas *A. B.* lately in our court of ——— [*the inferior court*] before the judges of the ſame court *without our writ*, and by the judgment of the ſame court, recovered againſt *C. D.* 10*l.* for his damages which he ſuſtained as well by occaſion *of the not performing certain promiſes and undertakings made by the ſaid* C. to the ſaid *A.* at ——— in your county, and within the juriſdiction of the ſame court, as for his coſts and charges expended by him about his ſuit in that behalf whereof the ſaid *C.* is convicted, as by inſpecting the record and proceſs thereof in our court, before us at *Weſtminſter*, now remaining, and which for certain cauſes

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cauſes we lately cauſed to be brought in our ſame court before us, appears to us. And now, on behalf of the ſaid *A.* in our court before us, we have been informed, that although judgment be thereof given, yet execution of the ſaid damages ſtill remains to be made to the ſaid *A.* Whereupon the ſaid *A.* hath beſought us, that a proper remedy may be provided for him in this behalf: And we, being willing that what is juſt ſhould be done in this behalf, do command you, that, by good and lawful men of your bailiwick, you make known to the ſaid *C.* that he be before us on* ——— *whereſoever we ſhall then be in England*, to ſhew if any thing he has or knows to ſay for himſelf, why the ſaid *A.* ought not to have his execution againſt him of the damages aforeſaid, according to the force, form, and effect of the ſaid recovery, if it ſhall ſeem expedient to him; and further to do and receive what in our ſame court before us ſhall be conſidered of him in this behalf, and have there the names of thoſe by whom you ſhall make known to him, and this writ. Witneſs, *&c.*

If *nihil* is returned to this writ, the *defendant in error* may ſue out an *alias ſcire facias* which differs only from the above in this, that it is ſaid, "do command you as before we have commanded you, that by good and lawful men, *&c.*"

If a *ſcire feci* is returned to the former writ, or there be a *nihil* alſo returned to the latter, the *defendant* in error muſt enter a rule with the *clerk of the rules*, which is given in the ſame manner as a rule to plead, and which expires in *four days*. After the expiration of which, if the *plaintiff* in error has neglected to aſſign errors, the *defendant* may enter an award of execution on the roll for the amount of the judgment below; but then the defendant in error is not entitled to coſts, nor is the *plaintiff* thereby precluded

* A *ſci. fa. quare executionem non* on error from *C. B.* and all other writs and proceſs muſt be returnable on a *general return ubicunque*, and have fifteen days between the *teſte* and *return*.

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from proceeding in his *writ of error*, but may afterwards proceed therein and aſſign his errors, even though execution be actually executed; and in ſuch caſe, after aſſignment of errors, joinder in error, and argument thereon, if the judgment given below be reverſed above, the *plaintiff* in error ſhall have reſtitution of all he hath loſt by reaſon of the execution.

On motion to ſet aſide an execution taken out upon a judgment in a *ſcire facias quare ex. non*, becauſe they had aſſigned errors before. On reference to the maſter, he reported an old rule, that if the party pleads to the *ſcire facias*, and it goes againſt him, execution may be ſued out; but that the writ of error ſhall go on notwithſtanding. Whereupon the court, in conſideration of the delay, eſtabliſhed it as a ſtanding rule, for the future, that if upon the return of the *ſcire facias* the plaintiff aſſigns his errors, then all farther proceedings ſhall be ſtayed upon it; but where he chuſes to ſtand out upon pleadings to the *ſcire facias*, execution ſhall go if it be adjudged againſt him. *Gardner* v. *Claxton*, *Stra.* 391. vide alſo *Stra.* 679. *Parker* v. *Stanton*, Ld. *Raym.* 1414.

Of Proceeding in Error from *inferior* Courts, and herein of *non-proſſing* the Writ of Error.

BUT to prevent the *plaintiff* in error from reaſſuming the proceedings after the rule is out, upon default made upon the *ſcire feci*, or upon two *nihils* returned, the better way for the *defendant* in error to proceed is, to *non-pros* the writ of error, which is done by getting another rule from the maſter [after the former rule is out] upon the back of the tranſcript of the record for the *plaintiff* in error to aſſign errors *de recordo*. Enter this rule with the *clerk of the rules*, and ſerve a copy thereof on the *plaintiff* in error's attorney; upon which, if the *plaintiff* in error does not aſſign his errors within four days, the defendant may ſign a *non-pros*, and then may have his *coſts* taxed and allowed.

The entry of a *non-pros in error* from an inferior court, after two *ſcire facias's* and *nihils* returned, is in this manner:

Hilary term, twentieth of *George* the third.

" *England*, to wit. *C. D.* puts in his place *William Lyon*, his attorney, to proſecute his writ of error againſt *A. B.* in a plea of *treſpaſs on the caſe*.

" *England*, to wit. The ſaid *A. B.* puts in his place *George Hodgſon*, his attorney, againſt the ſaid *C. D.* on the ſaid writ of error in the plea aforeſaid.

" *England*, to wit. Our lord the king hath ſent to the judges of his court of ——— [name the inferior court] his writ cloſe in theſe words, " to wit," *George* the third, *&c.* [here copy the writ of error, and the tranſcript of the record, according to the office copy thereof] afterwards, to wit, on ——— next, after the *octave* of *Saint Hilary*, in this ſame term, before our lord the king at *Weſtminſter*, comes the ſaid *A.* by his attorney aforeſaid, and ſays, that execution of the ſaid judgment ſtill remains to be made to him; therefore he prays the writ of our lord the king, to be directed to the ſheriff of the ſaid county of ——— to warn the ſaid *C.* to be before our lord the king, whereſoever, *&c.* to ſhew if any thing he has or knows to ſay for himſelf, why the ſaid *A.* ought not to have his execution thereof againſt him of

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his damages, coſts and charges aforeſaid, according to the force, form and effect of the ſaid recovery; and it is granted to him, &c. by which it is commanded to the ſheriff of the county *Scire facias awarded.* of ——, that by good and lawful men of his bailiwick he make known to the ſaid *C.* that he be before our lord the king on —— whereſoever, &c. to ſhew in form aforeſaid, if, &c. And further, &c. the ſame day is given to the ſaid *A.* &c. at which day, before our lord the king at *Weſtminſter*, the ſaid *A.* comes by his attorney aforeſaid, and the ſheriff of the ſaid *Nihil returned.* county of ——, to wit, *O. P.* eſquire returns, that the ſaid *C.* hath nothing in his bailiwick, by which he can make known to him; nor is he found in the ſame: *Therefore*, as before, it is commanded to the ſheriff of —— aforeſaid, that by good and lawful men, &c. he *Alias ſcire facias awarded.* make known to the ſaid *C.* that he be before our lord the king, on —— whereſoever, &c. to ſhew in form aforeſaid, if, &c. And further, &c. the ſame day is given to the ſaid *A.* &c. at which day, before our ſaid lord the king at *Weſtminſter*, the ſaid *A.* comes by his attorney aforeſaid; and the ſheriff of the ſaid county of —— to wit, the ſaid *O. P.* *Nihil returned.* eſquire, likewiſe returns, that the ſaid *C.* hath nothing in his bailiwick, by which he can make known to him, nor is he found in the ſame: and the ſaid *C.* although on *the fourth day* ſolemnly required, came not, but made default: and upon this the ſaid *A.* ſaith, that the ſaid *C.* hath not yet aſſigned error or er- Day given to aſſign errors. rors in the ſaid record and proceedings. Therefore a day is given to the ſaid parties, before our lord the king at *Weſtminſter*, until, &c. —— [the day in the rule given by the maſter] to wit, to the ſaid *C.* to aſſign error or errors in the ſaid record and proceedings, &c. At which day, before our lord the king at *Weſtminſter*, the ſaid *A.* comes by his attorney aforeſaid; and the ſaid *C.* at that day, although ſolemnly demanded, comes not, but makes default;

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nor doth he further proſecute his ſaid writ of error againſt the ſaid *A.* It is therefore conſidered, Judgment. { that the ſaid *C.* be in mercy, and that the ſaid *A.* have therefore his execution againſt the ſaid *C.* of his damages, coſts and charges, according to the force, form and effect of the ſaid recovery, *&c.* And it is further conſidered, that the ſaid *A.* recover againſt the ſaid *C.* ——— pounds, adjudged to the ſaid *A.* by the court of our ſaid lord the king now here, according to the form of the ſtatute, for his damages, coſts and charges, which he hath ſuſtained by occaſion of the delaying the execution of the ſaid judgment, by pretence of proſecuting the ſaid writ of error, and that the ſaid *A.* likewiſe have execution thereupon, *&c.*"

Of Proceeding in Error from *inferior* Courts, and herein of assigning Errors, and making up the Error-book, &c.

IF the *plaintiff* in error appears and proceeds, the next step is to *assign* errors. An *assignment* of errors may be either general or special, and in either case must be signed by counsel.

The plaintiff may assign for error, error *in fact*, or *error in law*. *F. N. B.* 20. *E.* But he cannot assign both, for this will be double. 1 *Rol.* 761. *l.* 35. 1 *Lev.* 105. 76. 1 *Sid.* 147.

Nor can he assign several errors *in fact*, but he may several errors *in law*. F. N. B. 20 E.

In error from an *inferior* court, the plaintiff in error cannot alledge diminution of the record. *Sid.* 40. 147. Nor can the defendant; but the court, if they see occasion, may award a *certiorari ad informandum conscientiam*.

Nor can he assign for error matter contrary to the record. *Cro. Jac.* 21. 1 *Lev.* 76. 1 *Salk.* 262. 1 *Lev.* 313. *Cro. Jac.* 244.

Nor matter which he might have pleaded. 1 *Rol.* 762. *l.* 40. Though judgment were by default. Though *Dub. Cro. Jac.* 547.—But *Carth.* 124. says—Not matter which might have been pleaded in *abatement*.

An *assignment* of errors is in the place of a declaration in error, and must be engrossed and delivered over to the defendants on treble-penny stamped paper; the entry whereof is in this form:

Hilary term, twentieth *George* the *Third*.

Stormont and Way.

" *And* the said *C.* by *William Lyon* his attorney, comes and says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, That the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said *A.* to maintain his said action against the said *C.* there is also error in this, that by the record aforesaid here sent, it appears, that the judgment aforesaid, in the plea aforesaid, in form aforesaid given, was given for the said *A.* when by the law of the land of this kingdom of *England*, judgment in the plea aforesaid

Of Proceeding in Error from *inferior* Courts, and herein of aſſigning Errors, and making up the Error-book, &c.

aforeſaid ought to have been given for the ſaid *C.* againſt the ſaid *A.* and ſo the judgment aforeſaid is erroneous; and hereupon the ſaid *C.* alſo prays, that the judgment for the ſaid errors, and other the errors in the record and proceedings aforeſaid, may be reverſed, annulled, and ſet aſide, and that he may be reſtored to all things which he hath loſt by occaſion of the ſaid judgment, &c."

George Bond.

If plaintiff in error moves to amend his aſſignment of errors, it is always on payment of coſts, for he comes for a favour of the court. *Fitzgib.* 268.

The tranſcript on record ought to be entered by the *plaintiff* in error the ſame term it is brought into the office; but if he neglects ſo to do, the *defendant* in error may enter it.

As ſoon as the *tranſcript* is entered, and the *plaintiff* hath alſo aſſigned his errors, and entered the ſame on record; and if the defendant does not immediately plead or join in error, the *plaintiff* may ſue out a *ſcire facias ad audiendum errores*, which is to this effect:

GEORGE the third, &c. To the ſheriff of ——— greeting: Foraſmuch as in the record and proceedings, and alſo in the giving of the judgment in a certain plaint lately levied in our court of ——— before the judges of the ſame court between *A. B.* and *C. D.* of a plea of *treſpaſs on the caſe*, manifeſt error, as it is ſaid, hath intervened to the great damage of the ſaid *C.* as by his complaint we are informed, which ſaid record, and proceedings therein, we have, for certain reaſons, cauſed to come in our court before us; and we, being willing, if any error there be, to correct the ſame, and to do unto the parties aforeſaid full and ſpeedy juſtice in this behalf, do command you, that, by good and lawful men of your bailiwick, you make known to the ſaid *A.* that he before us in ——— whereſoever we ſhall then be in *England*, to hear the proceedings aforeſaid,

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aforeſaid, if it ſhall ſeem expedient unto him; and further, to do and receive what in our ſaid court before us ſhall be conſidered of him in this behalf, and have there the names of them by whom you ſhall make known unto the ſaid *A.* as aforeſaid; and this writ. Witneſs, &c.

If the *defendant* in error does not come in and plead, or join to the aſſignment of errors upon the return of the *ſcire facias ad audiendum errores*, the plaintiff may have an *alias ſcire facias*, &c. and upon default thereto, the *plaintiff* in error muſt proceed to argument, and will be heard *ex parte*.

After judgment for the defendant the plaintiff brought error, and aſſigned infancy in defendant, and appearance by attorney, then took out a *ſci fa. ad aud. errores*; and after a *ſcire feci* returned, entered the default; and on producing the record, the judgment was reverſed on motion, without making it a *concilium*, or putting it in the paper. *Walmſley* v. *Roſon*, *Stra.* 1210.

If the errors aſſigned are *ſpecial*, the joinder in error muſt be ſigned by counſel, and ingroſſed on ſtamped paper, and then delivered over to the plaintiff's attorney: but if the errors aſſigned are *general*, the defendant's attorney may join in error directly, and deliver the common joinder *in nullo eſt erratum*, on a treble penny ſtamped paper, to the plaintiff's attorney, paying him 2 *s.* 4 *d.* for entering the ſame on record.

Stormont and Way.

Hilary term, twentieth *George* the *Third*.

A. B. }
ats. } There is not any error.
C. D. }

George Hodgſon, attorney for the defendant in error.

The joinder of "*in nullo eſt erratum*" to an aſſignment of error in *fact*, is a confeſſion thereof, if the error in fact be well aſſigned; for if error in fact be aſſigned, and the defendant in error would deny it, he ſhould not join *in nullo eſt*

Of Proceeding in Error from *inferior* Courts, and herein of aſſigning Errors, and making up the Error-book, &c.

eſt erratum; but ought to take iſſue upon it, ſo as to have it tried by the country. *Sid.* 93. *Raym.* 59.

But if the aſſignment is of an error in *fact*, and that be ill aſſigned, "*in nullo eſt erratum*" is no confeſſion of it; as if it be aſſigned, that ſuch a one, at the time of the return of the *venire*, was not ſheriff, and the record be removed; there, *in nullo eſt erratum* is no confeſſion of that *fact*; becauſe the record thereof is not in court, that being no part of the record, for the plea is *in nullo eſt erratum in recordo*. Cro. Jac. 12. 29. 521. Raym. 231. Cro. Car. 421. Rol. Abr. 758.

Alſo if an error in *fact*, that is not aſſignable, be aſſigned, and *in nullo eſt erratum* be pleaded, it is no confeſſion; as if it be aſſigned, that on ſuch a day there was no court ſitting; becauſe that is againſt the record, and then *in nullo eſt erratum* is only a demurrer. So if a man ſays, he did not appear, and the record ſays he did, *in nullo eſt erratum* is no confeſſion, but a demurrer, becauſe it is againſt the record. *Vide Bac. Abr.* title *Error*, 2 *vol.* 218. and authorities there cited.

If the plaintiff in error therefore aſſigns error in *fact*, which is aſſignable, and the defendant would not confeſs it, he muſt not join *in nullo eſt erratum*, but plead thereto, and then the parties go to iſſue upon the error in fact, the record is made up, as in other caſes, and the matter goes to a jury.

But where the defendant joins *in nullo eſt erratum*, the parties thereupon are at iſſue in law for the determination of the court; and in ſuch caſe either of them may enter the ſame on record, and move for a *concilium*, or day, for arguing the errors. Then the cauſe for argument muſt be entered with the clerk of the papers, and error-books made up and delivered to the reſpective judges of the court, in like manner as upon argument of a *demurrer* *.

The defendant in error cannot give a rule to aſſign errors, before he has given a rule on the *ſcire facias quare executionem non*.

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* For the inſtructions to do which, *vide* title *Demurrer*, &c. in the firſt vol.

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A rule to aſſign errors was ſet aſide, becauſe given before any rule on the *ſcire facias quare executionem non.* Marſhal *v.* Cope, Stra. 917.

If the *plaintiff* in error, on being ſerved with a rule for that purpoſe, aſſigns his errors, and the defendant joins *in nullo eſt erratum*, in making up the record, purſue the foregoing precedent of *non-proſs* as far as the day given upon the rule, and then go on with the *joinder in error*, &c. in the following manner:

" *Whereupon* the ſaid *A. B.* by *George Hodgſon* his attorney, comes and ſaith, that neither in the record and proceedings aforeſaid, nor in the giving of the judgment aforeſaid in any thing is there error; and he prayeth, that the court of our lord the king now here may proceed to the examination, as well of the ſaid record and proceedings aforeſaid, as of the matters aforeſaid above aſſigned for error; and that the judgment aforeſaid may be in all things affirmed. But becauſe the court of our ſaid lord the king now here are not yet adviſed of giving their judgment of and upon the premiſes, therefore a day is given to the ſaid parties to be before our lord, until, &c. ——— whereſoever, &c. to hear judgment thereof; for that the court of our ſaid lord the king is not yet adviſed thereof: at which day came here into court, as well the ſaid *C.* as the ſaid *A.* by their attornies aforeſaid; upon which the premiſes being conſidered, as well the record and proceedings aforeſaid, as the judgment aforeſaid on the ſame given, and the cauſes before for error aſſigned, being by the court of our lord the king here diligently examined and fully underſtood; it ſeemeth unto the court of our ſaid lord the king here, that the judgment aforeſaid is not in any wiſe vicious or defective; and that in the ſaid record there is not any thing erroneous. Therefore it is conſidered by the ſaid court of our lord the king, before the king himſelf now here, that the judgment aforeſaid in all things be affirmed, and do ſtand in its full force and

Of Proceeding in Error from *inferior* Courts, and herein of aſſigning Errors, and making up the Error-book, &c.

and effect (the ſaid cauſes above for error alledged in any thing notwithſtanding); and it is further conſidered, that the ſaid *A. B.* do recover againſt the ſaid *C. D.* ſixteen pounds ten ſhillings, by the court of our ſaid lord the king now here adjudged to the ſaid *A.* at his requeſt, for his coſts and charges which he hath expended by reaſon of the delay of the execution of the ſaid judgment, and by the proſecution of the ſaid writ of error.

Upon affirmance of the judgment, the *defendant* in error may take out his execution, either a *fi. fa. ca. fa.* or *elegit*—which writ of execution recites the former judgment below, the removal of the record into the court above, and the affirmance thereof, together with the coſts given upon the affirmance.

If judgment were given below for the *defendant*, and the *plaintiff* brings *error*, and thereupon the court reverſes the former judgment, the court above gives ſuch judgment as the court below ought to have given—and then there is no *coſts* upon the *writ of error*, but only the coſts of the original action given. *Wyvill* v. *Stapleton*, *Stra.* 617.

On *writs of error* from inferior courts, the ſuperior court takes notice of the laws and cuſtoms of inferior courts; but otherwiſe upon removal of a cauſe by *habeas corpus*. Salk. 269.

Of Proceeding in Error from the Court of *Common Pleas* into the *King's Bench.*

IF an erroneous judgment is given in the *Common Pleas*, the *writ of error*, in all caſes, is made returnable into the court of *King's Bench.*

In order to bring error, the attorney for the party ſuing it finds the number of the judgment roll from the doggett of the prothonotary's office, and thereby finds the roll in the treaſury, of which he makes a copy, and thereupon the curſitor makes out the *writ of error.* Comp. Att. 63. Which may be ſued out before judgment, but judgment muſt be given before the return of it. 3 *Keb.* 308. *Vent.* 96. *Latch.* 133.

When the *writ of error* is obtained from the *curſitor*, you muſt get it ſealed, and then carry it to the *clerk of the errors*, and pay him his fee for the allowance of it, who will give you a notice in writing of ſuch allowance; after which you ſhould ſerve the other party's attorney with a copy of the writ, and allowance thereof, which ſhould be ſerved immediately; for till it is ſerved it is no *ſuperſedeas* to the execution; nor is it a *ſuperſedeas* in many caſes, unleſs *bail* be put in by the party ſuing the *writ of error.*

Of *Bail in Error*, where requiſite.

THERE are ſeveral ſtatutes requiring *bail* to be given by the party proſecuting error to reverſe a judgment; in order to underſtand which I ſhall ſtate the ſtatutes in their order, and give ſeveral of the determinations of the courts upon thoſe ſtatutes.

The firſt ſtatute requiring bail on *error*, is the 31 *El. c.* 3. *ſ.* 3. which enacts, "That before any allowance of any writ of error, or reverſing of any outlawry be had by plea or otherwiſe, through or by want of any *proclamation* to be had or made according to the form of this ſtatute, the defendant in the original action ſhall put in bail, not only to appear and anſwer to the plaintiff in the former ſuit in a new action to be commenced by the ſaid plaintiff, for the cauſe mentioned in the firſt action, but alſo to ſatisfy the condemnation, if the plaintiff ſhall begin his ſuit before the end of two terms next after the allowing the writ of error, or otherwiſe avoiding of the ſaid outlawry."

The next ſtatute requiring *bail on error* is the 3 *Jac.* 1. *c.* 8. entitled "An act to avoid unneceſſary delays of execution"—whereby it is enacted, "That no execution ſhall "be ſtayed or delayed upon or by any writ of error, or "*ſuperſedeas* thereupon to be ſued for the reverſing of any "judgment given in any action or bill of debt upon any "ſingle bond for debt, or upon any obligation with condi- "tion for the payment of money only; or upon any action "or bill of debt for rent, or upon any contract ſued in any "of his highneſs's courts of record at *Weſtminſter*, or in "the counties palatine of *Cheſter*, *Lancaſter*, and *Durham*; "or in the courts of great ſeſſions in any of the twelve ſhires "of *Wales*, unleſs ſuch perſon or perſons, in whoſe name "or names ſuch writ of error ſhall be brought, with two "ſufficient ſureties, ſuch as the court (wherein ſuch judg- "ment is or ſhall be given) ſhall allow of, ſhall firſt, be- "fore ſuch ſtay made or *ſuperſedeas* to be awarded, be "bound unto the party for whom any ſuch judgment is "given, by recognizance to be acknowledged in the ſame "court, in double the ſum adjudged to be recovered by the "ſaid former judgment, to proſecute the ſaid writ of error "with effect; and alſo to ſatisfy and pay (if the ſaid judg- "ment be affirmed) all and ſingular the debts, damages, and "coſts adjudged upon the former judgment: and all coſts "and damages to be alſo awarded upon the delaying of ex- "ecution."

This

Of *Bail in Error*, where requiſite.

This ſtatute requires only bail to be given upon error to reverſe any judgment of *debt upon any ſingle bond for debt, or obligation with condition for payment of money only, or action of debt for rent, or upon contract.*

Therefore *bail in error* on a judgment in debt on bond, are each bound in the ſum recovered, that being double the ſum due. 1 *Wil.* 213.

But *bail* is not requiſite upon bringing a writ of error upon a judgment in an action of debt founded upon a prior judgment, *Burr. Rep.* 4 *pt.* 1548. becauſe this is *caſus omiſſus* out of this act, which is to be taken literally and not extended by conſtruction. *Ibid.*

A bond given by a third perſon, to a third perſon, as collateral ſecurity for a debtor's paying his creditors 15 *s.* in the pound upon a liquidated total of his debts, is a bond with condition for the payment of money only within this act —— Therefore, bail requiſite. *Burr. Rep.* 4 *pt.* 746. —And it's being payable by inſtalments, makes no difference.

No bail is requiſite in bringing a writ of error upon a judgment in debt on bond conditioned for *performance of covenants*, or *upon a bail-bond*—becauſe theſe bonds are not conditioned *for the payment of money only.*

But if the defendant brings error after judgment againſt him in an action upon a *bottomree bond*, he muſt put in bail; becauſe, the contingency having happened, this is now, in every reſpect, a bond for the payment of money. *Stra.* 476.

Motion for leave to take out execution, no bail being put in on a writ of error brought by defendant, the action being in debt on bond, conditioned only for payment of money according to the true intent and meaning of an indenture, and not performanee of covenants. On ſhewing cauſe, the court held that bail was requiied by 3 *Ja.* 1. If the bond had been generally for performance of covenants in an indenture, and the only covenant in that indenture had been for payment of money, bail muſt have been given on error. But the court gave time to put in bail. *Barnes* 98.

The condition of a bond was for the payment of 500 *l.* at ſuch a day, being the ſame mentioned in certain indentures of ſuch a date. And error being brought, the plaintiff in error would have been excuſed from giving bail, becauſe the words of 3 *Jac.* 1. are "*bonds for payment of money only*;" whereas, this was rather a bond for perform-

ance

Of *Bail in Error* where requiſite.

ance of covenants. But the court held, that bail ought to be given; for the material part of the condition was the payment of 500 *l.* and the other words were only added to ſhew they were not diſtinct debts, but only different ſecurities for the ſame. *Deſboſder* v. *Horſey*. *Stra.* 959.

Action upon an *inſimul computaſſet in C. B.* error brought in *B. R.* after judgment for the plaintiff—and upon the queſtion of bail being requiſite—*Per cur.* This caſe is out of the ſtatute, for the debt recovered did not accrue by any contract or other duty certain at firſt, but merely upon an account between the parties, which account has reduced divers uncertain ſums to one certainty—Therefore, as the action was founded upon the account, which is uncertain, this caſe is out of the ſtatute ——————— The ſame law in debt upon an award, when the arbitrators have reduced divers controverſies to be recompenſed by one ſum: Tho' this is a debt, yet it is not ſuch a one as is intended by the ſtatute, which muſt be a debt certain at firſt. *Yelv.* 227. 2 *Bulſt.* 53.

The original action was in debt on *bond* conditioned to pay ſo much money as *J. S.* ſhould declare to be due on an account; and, after pleadings below, error was brought on the judgment. And by all the judges, except *Keeling*, the *plaintiff* in error muſt put in bail, or execution may go; for this obligation is made for the *payment of money only*, which, though not certain when the obligation was made, is yet certain before the action brought. 1 *Lev.* 117. 1 *Keb.* 613, 690.

The condition of a bond was to perform *covenants* in an indenture; and amongſt the reſt was one *for payment of money*, and the other were collateral; and the breach aſſigned, was *for the non-payment of the money*: Yet, on error brought upon the judgment, no bail was taken; for *per Holt*—this is not a condition *for the payment of money only*, but to do collateral acts. It is true, the breach aſſigned is *for not paying the money*; and therefore, the caſe upon the pleadings is the ſame as if the condition had been for the payment of money only, yet the *condition* is not for payment of money *only*. Carth. 28.

The condition of a bond was to pay for ſo much beer as ſhould be delivered to *S.* not exceeding 100 *l.* After judgment upon demurrer below, error was brought. *Et per cur.* No bail requiſite. This ſum was not *certain* even at the

Of *Bail in Error*, where requiſite.

time of the action brought. *Thrale* v. *Vaughan*. *Stra.* 1190.

But if an action of debt be brought on a bond, conditioned for the performance of *covenants*, and the defendant lets judgment go by default, without craving oyer of the condition, and after brings error, he muſt put in bail; becauſe it does not appear to the court upon the record, that the condition was for performance of covenants.

Motion for bail upon error in an action of debt on bond, conditioned for payment of 300 *l.* mentioned in a ſurrender of a copyhold by way of mortgage, and not for performance of covenants, wherein judgment had paſſed by default. *Per cur.* There muſt be bail. This caſe is out of the ſtat. 16 & 17 *Car.* 2. but within the ſtat 3 *Jac.* 1. Barnes 78.

By the 13 *Car.* 2. *c.* 2. [reciting the ſtatute of 3 *Jac.* 1. in the 8 *ſect.*] 9 *ſect.* enacts, "That no execution ſhall be "ſtaid in any of the courts * aforeſaid, by any writ or "writs of error or *ſuperſedeas* thereupon, after any *verdict* "and judgment thereupon obtained in any action of debt "grounded upon the ſtatute made in the ſecond year of "the reign of the late king *Edward* the ſixth, for not "ſetting forth of tythes; nor in any action upon the caſe "upon any promiſe for payment of money, actions *ſur* "*trover*, actions of *covenant*, detinue and treſpaſs, unleſs "ſuch recognizance, and in ſuch manner, as by the ſaid "recited former act is directed, ſhall be firſt acknowledged "in the ſaid court where ſuch judgment is given."

Sect. 10. "Gives double coſts to a defendant by delay "of execution by reaſon of error brought, if the judgment "be affirmed."

Sect. 11. Provides that the ſaid ſtatute ſhall not extend to "actions popular; or upon penal ſtatutes, indictments, *&c.* "other than the ſtatute of *Edward* ſixth mentioned."

By the 16 & 17 *Car.* 2. *c.* 8. *ſ.* 3. it is enacted, "That "no execution ſhall be ſtayed in any of the aforeſaid ‡ "courts, by writ of error or *ſuperſedeas* thereon, after *ver-* "*dict* and judgment thereupon, in any action perſonal "whatſoever, unleſs a recognizance, with condition ac- "cording to the ſtatute made in the third year of king

* *i. e.* The courts mentioned in the ſtatute of *Jac.* 1.

‡ The ſame courts as are mentioned in the ſtatute of *James* 1. viz. *the courts at Weſtminſter, courts of the counties palatine, and great ſeſſions.*

"*James*

Of *Bail in Error*, where requiſite.

" *James* the firſt, ſhall be firſt acknowledged in the court " where ſuch judgment ſhall be given:" And further, " That in writs of error to be brought upon any judg- " ment after *verdict* in any writ of *dower*, or in any action of " *ejectione firmæ*, no execution ſhall be thereupon or thereby " ſtayed, unleſs the plaintiff or plaintiffs in ſuch writ of " error, ſhall be bound unto the plaintiff in ſuch writ of " *dower*, or action of *ejectione firmæ*, in ſuch reaſonable ſum " as the court to which ſuch writ of error ſhall be directed " ſhall think fit; with condition, that if the judgment " ſhall be affirmed in the ſaid writ of error, or that the " ſaid writ of error be diſcontinued in the default of the " plaintiff or plaintiffs therein, or that the ſaid plaintiff or " plaintiffs be nonſuit in ſuch writ of error, that then the " ſaid plaintiff or plaintiffs ſhall pay ſuch coſts, da- " mages, and ſum and ſums of money as ſhall be awarded " upon or after ſuch judgment affirmed, diſcontinuance, or " nonſuit had."

And by *ſect.* 4. " To the end that the ſame ſum and " ſums and damages may be aſcertained," it is enacted, " That the court wherein ſuch execution ought to be " granted, upon ſuch affirmation, diſcontinuance, or non- " ſuit, ſhall iſſue a writ to enquire as well of the meſne " profits, as of the damages by any waſte committed after " the firſt judgment in *dower*, or in *ejectione firmæ*; and upon " the return thereof, judgment ſhall be given, and execu- " tion awarded for ſuch meſne profits and damages, and " alſo for coſts of ſuit."

Provided, " That this ſtatute ſhall not extend to any " writ of error to be brought by any executor or admini- " ſtrator, nor any action popular or upon a penal ſtatute, " (except the ſtatute of *Edward* the ſixth) nor upon in- " dictments, *&c.*"

The rule upon *error* brought after verdict in *ejectment for rent*, is to juſtify *bail* in double the *rent due*. Burr. 4 pt. 2501.

On error in *ejectment*, the plaintiff in error being in a remote part of the kingdom, found two ſufficient men to be his bail, who were bound in a recognizance, *&c.* The court, holding that the intent of this ſtatute of *Charles* the ſecond being to ſecure the defendant in error, it was here fully obſerved, becauſe this bail was better than the plaintiff's own recognizance, *Barnes* v. *Bulver*. *Carth.* 121. *Barnes* 103. 78. 75.

Of *Bail in Error*, where requiſite.

A recognizance on error in *ejectment*, ought to be in the value of two years *meſne profits*; and double coſts is uſually taken in both courts. *Barnes* 103.

Error on verdict in *ejectment* allowed, but plaintiff in error entered into no recognizance, nor put in bail, as plaintiff below had not got the coſts taxed, without which, the meaſure or *quantum* of the recognizance could not be fixed.—Plaintiff below, for want of the recognizance and bail, *in four days*, took out an *habere facias poſſ.* and had poſſeſſion given him, which the court held to be regular. *Et per cur.* Defendant ſhould have applied to ſtay execution, and then the court would have obliged plaintiff to have got his coſts taxed. The writ of error is no *ſuperſedeas* without bail. A judge would have taken bail, if applied to. Rule diſcharged. *Barnes* 212.

If judgment be againſt an *executor or adminiſtrator de bonis propriis*, and he brings a writ of error, he muſt put in bail in ſuch caſes as are required by the ſtatutes before mentioned, and pay coſts if judgment be affirmed; but if judgment be *de bonis teſtatoris* only, he ſhall neither put in bail nor pay coſts—vide the proviſo in 16 & 17 *Car.* 2.

Though an executor is not obliged to give bail on error, yet the court may take it; and if he does give bail, it is binding. *Stra.* 745.

A *ſcire facias* againſt the defendant as *adminiſtrator* on a *devaſtavit* alledged, and judgment was *de bonis propriis*; on which he brought error; and by the whole court he ſhall find bail, for here he is charged in his proper goods, and it is not as where an *adminiſtrator* is charged in the teſtator's goods. 1 *Lev.* 245. 1 *Sid.* 368. 2 *Keb.* 295. 371.

After an award of execution againſt *bail* on a recognizance in error, they brought a writ of error as to ſuch award of execution. Plaintiff moved for leave to take out execution for want of bail on the writ of error brought by the bail, and obtained a rule to ſhew cauſe, which was diſcharged: no bail in this caſe being requiſite. *Barnes* 194.

Bail is not requiſite, as it ſhould ſeem [*ſed q.*] upon bringing a writ of error returnable in parliament upon a judgment in *B. R.* in an action of debt brought upon a *recognizance in error*. Burr. Rep. 4 pt. 1567—8.

But upon error in parliament of a judgment affirmed in *B. R.* new bail is required. *Salk.* 97.

New bail muſt be put in upon every *new writ of error*. Ld. Raym. 840.

Of *Bail in Error*, where requiſite.

As if on a judgment in *C. B.* error is brought in *B. R.* where the judgment is affirmed, and afterwards error is brought in parliament, the party muſt give a new recognizance, for the firſt does not include coſts to be aſſeſſed in the *Houſe of Lords*. Salk. 97.

Formerly, upon error brought of a judgment in an *inferior* court of record, no bail was neceſſary, as not within either of the foregoing ſtatutes: But now, by 19 *Geo.* 3. *c.* 70. it is enacted, "That no execution ſhall be ſtayed "upon or by any *writ of error* or *ſuperſedeas* thereon to be "ſued for the reverſing of any judgment given in any in- "ferior court of record, where the damages are under ten "pounds, unleſs ſuch perſon, in whoſe name the writ of "error ſhall be brought, with two ſufficient ſureties, ſuch "as the court [wherein ſuch judgment is given] ſhall allow "of, ſhall firſt, before ſuch ſtay made or *ſuperſedeas* award- "ed, be bound unto the party for whom any ſuch judg- "ment is given, by recognizance to be acknowledged in "the ſame court, in double the ſum adjudged by the for- "mer judgment, to proſecute the ſaid writ of error with "effect; and alſo to ſatisfy and pay [if the ſaid judgment "be affirmed, or writ of error be nonproſſed] all and ſin- "gular the debts, damages, and coſts adjudged; and all "the coſts and damages awarded for the delaying of exe- "cution."

Bail in Error when to be put in, &c.

THE *plaintiff* in error has four days after the allowance to put in *bail*; and the plaintiff in the action, during that time, ought not to take out execution.

When *bail in error* is put in, notice thereof ought to be given to the defendant or his attorney; and if the defendant does not except to thoſe bail *within twenty days* after ſuch notice, they ſhall be allowed. *Reg. Mich.* 5 *W. & M.*

If the *defendant* in error thinks the bail inſufficient, he may at any time, *within the twenty days*, have a rule from the clerk of the errors for better bail; and after ſervice of ſuch rule, if thoſe bail do not juſtify in *four days*, or better bail is not put in within that time, the *defendant* in error may ſue out execution of his judgment below: But the *writ of error* ſtill remains and may be proceeded in, the *ſuperſedeas* to the execution only being taken away. Vide Ld. *Raym.* 840.

If a rule for better bail is ſerved in vacation, the *plaintiff* in error has not time, of courſe, to perfect his bail till the next term, but ought to juſtify before a judge: and execution ſued out for want of it, was held regular. *Barnes* 211.

Bail in error, who refuſes to juſtify, may have his name ſtruck out of the bail-piece at any time. *Jones* v. *Tubb.* in error in *B. R.*. 1 *Wilſ.* 337.

After error allowed and notice, plaintiff in the judgment executed a *fi. fa.* for want of *bail in four days.* Motion to ſet aſide the *fi. fa.* ſuggeſting that plaintiff could not regularly take out execution till after certificate from the clerk of the errors, that no bail was put in. Rule diſcharged. Such certificates have been frequently taken out of caution, but are not eſſentially neceſſary. The ſtat. 16, 17 *Car.* 2, is poſitive as to bail within four days. No bail is yet put in. Bail ought to have been put in before the motion. A queſtion aroſe, whether, after bail perfected, the goods can be reſtored? In *Meriton* v. *Stevens.* *Mich.* 16 *Geo.* 2. and *Sykes* v. *Dawſon.* *Hil.* 18 *Geo.* 2. held, that if defendant's perſon be taken by a *ca. ſa.* and bail in error afterwards perfected, the perſon ſhall be diſcharged: But in caſe of a *fi. fa.* the proceedings, ſo far as the ſheriff has gone, muſt ſtand. *Incledon* v. *Clark.* *Barnes* 212.

Bail in a writ of error cannot ſurrender their principal in diſcharge of themſelves, for the condition of the recognizance is, that the *plaintiff* in error ſhall proſecute his writ with

Bail in Error when to be put in, &c.

with effect; and, if judgment be affirmed, ſhall ſatisfy and pay the debt, damages, and coſts recovered, together with ſuch coſts as ſhall be awarded by occaſion of the delay of execution; or elſe that they, the bail, ſhall do it for him.

Of Proceeding in Error from the Court of *Common Pleas* into the *King's Bench*, and herein of tranſmitting the Record.

WHEN the *writ is allowed by the clerk of the errors*, and *bail* put in, according to the foregoing ſtatutes, if the record is not brought in, the *defendant* in error may take out and ſerve the *plaintiff* with a rule to tranſcribe, who muſt, upon ſervice thereof, give inſtructions to the *clerk of the errors* to make up the tranſcript, who does it by the following times.

If the *writ of error* upon a judgment in *C. B.* is made returnable the *firſt* return of term, the clerk of the errors does not bring in the roll till the laſt day of that term.

If it be returnable on any other return of term, he does not bring it in till the firſt day of the ſubſequent term.

If, upon a rule given, the plaintiff in error in *B. R.* does not aſſign errors, and certify the record within eight days, he will be nonſuited.—But the writ cannot be nonproſſed without a rule to aſſign errors. *Burr.* 4 *pt.* 1772.

In *error* of a judgment in *C. B.* into *B. R.* a *mittitur* is written on the roll, and the record itſelf in all caſes [except in error on a *fine* levied there] is tranſmitted into *B. R.* 1 Rol. Ab. 752. l. 45. *F. N. B.* 20. *F. Stra.* 837.

And the reaſon why the tranſcript only of the record upon error on a *fine* is tranſmitted, is, that in caſe judgment is affirmed, *B. R.* has no *chirographer*, nor can it hold plea in a *quid juris clamat.* 1 Rol. 752. *l.* 50. *Dy.* 89. *b.*

When the *record* is brought in and filed in the office of the chief clerk with Mr. *Heberden*, the parties take copies thereof, and the *defendant* in error may ſue out a * *ſcire facias quare executionem non*; and if *nihil* is returned thereto, he may have an "*alias.*" Which writs muſt have *fifteen days* between the *teſte and return*, if the proceedings were by *original*, and be made returnable on a general return—If by *bill* as againſt *attornies* in *C. B.* on a day certain in term *ubicumque*.

* Vide the nature aud form of *theſe writs ante*, under title, "*Of proceeding in error from inferior courts.*"

Of

Of Proceeding in Error from the Court of *Common Pleas* into the *King's Bench*, and herein of *non-proſſing* the Writ.

IF the record be brought into *B. R.* by the eſſoign-day of the term, the writ of *ſcire facias quare, &c.* may bear *teſte* the laſt day of the preceding term; and if brought in within the term, it may be *teſted* the firſt day of the term.

Note: That a *ſci. fa. quare, &c.* may be prayed and ſued by one executor, upon a writ of error brought upon a judgment for him and another, without ſhewing that the other executor is dead. *Burr. Rep.* 4 *pt.* 1791.

If two *nihils* are returned to the *ſcire facias quare*, and *alias*; or *ſcire feci* is returned, and the plaintiff in error does not aſſign errors, the defendant in *error* may get a rule from the *maſter* [by whom all rules in error in *B. R.* after the record tranſmitted and before argument thereon are given] for the *plaintiff* to aſſign *errors*. Upon entering of which rule with *the clerk of the rules*, and ſerving a copy thereof on the plaintiff in error's attorney, if *errors* are not aſſigned *within four days*, the *defendant in error* may * *non-proſs* the *writ of error*, and ſhall have his coſts, according to the ſtatute 8 & 9 *W.* 3. *c.* 11. But without ſuch rule to *aſſign errors*, a writ of error cannot be *non-proſſed*. Leith *v.* M'Farlan, Burr. 4 pt. 1772.

A rule to aſſign errors was ſet aſide, becauſe given before any rule on the *ſci. fa. quare executio. non.* Stra. 917.

The court will not grant *oyer* of this *ſcire facias*, or allow any plea to it, ſave an aſſignment of errors. *Mich.* 5 *Geo.* 2. *B. R. Miles* v. *Wolſham.*

A *ſcire facias* in error needs not lie in the ſheriff's office *four days* before the return of it, as a *ſcire facias* againſt bail muſt. *Groſs* v. *Naſh*, *Bur.* 4 *pt.* 2439. *Millar* v. *Yarraway*, *ibm.* 1723.

Error brought, and defendant in error took out a *ſci. fa. quare, &c.* to which the plaintiff in error pleaded, that the damages recovered were levied by a *fi. fa.* And on motion the plea was ſet aſide, as it evidently tended to delay; and this writ is only uſed as a method to bring the party to aſſign errors. *Stra.* 679.

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* The form of a *non-proſs*, *vide ante* under title, "*Of Proceeding in Error from inferior courts.*"

Of Proceeding in Error from the Court of *Common Pleas* into the *King's Bench*, and herein of *non-proſſing* the Writ.

A *ſci. fa. ad aud. errores* is not well brought before the record of the judgment be certified into the court, to reverſe which the writ of error was brought, and errors aſſigned thereupon: for there is no record in court to warrant the granting of the *ſci. fa.* before the record of the judgment is certified, and errors thereupon aſſigned.

Of Proceeding in Error from the Court of *Common Pleas* into the *King's Bench*, and herein of alledging Diminution, Want of Original, Warrant of Attorney, &c.

IF the court of *C. P.* upon a writ of error do not certify all the record, and the *plaintiff* in error alledges diminution, or aſſigns for error, that there is no *original*, or warrant of attorney, and prays a *certiorari*; the *defendant* in error may immediately get a *rule from the maſter* to return the *certiorari*, and ſerve the plaintiff's attorney with a copy thereof; and if it be not thereupon returned and filed in the office within *four days*, the defendant may join in *nullo eſt erratum*, and enter on record a *non miſit breve*, and proceed to argument, as in caſes of *demurrer*.

Where the want of an *original* is aſſigned for error, the plaintiff in error muſt ſue a *certiorari*, unleſs the defendant in error confeſs it. *Salk.* 267.

The caſe was error of a judgment in *C. P.* after a verdict. Want of *original* aſſigned for error, but no *certiorari* taken out to get the want of the *original* certified. *In nullo eſt erratum* pleaded. And when the cauſe came on in the paper, it was objected, that there ought to have been a *certiorari*, and a certificate made of the error; for it might be, that there was an ill original, and if that were returned, the plaintiff in error might take advantage of that, and that would not be helped by verdict, though the want of an original were. *Per Holt*, ch. juſt. If the want of an *original* be aſſigned for error, and the plaintiff in error does not take out a *certiorari*, and get a return to it, and the want of an *original* certified; the courſe is for the defendant to go to the maſter of the office, and get a rule for the plaintiff in error to return his *certiorari*; and if he does not get it done, as ordered by the rule, the aſſignment of error ſtands for nothing. But if the defendant in error will come in *gratis*, and confeſs the error, there need be no *certiorari* returned. And as to the matter, that there might be a bad *original*, &c. that is another ſort of error, and when the want of an *original* is aſſigned for error the court will never intend, that there is a bad original, and judgment was affirmed. *Smith and others* v. *Stoneard*, Ld. *Raym.* 1156.

But an original returned by one not ſheriff is not aſſignable for error. *Salk.* 265.—And irregularity in the return thereof muſt be complained of the ſame term. *Ibid.*

Want

Of Proceeding in Error from the Court of *Common Pleas* into the *King's Bench*, and herein of alledging Diminution, Want of Original, Warrant of Attorney, &c.

Want of original was aſſigned for error, the defendant, before the return of the *certiorari*, came in *gratis* and pleaded a releaſe in bar, to which plaintiff demurred and defendant joined. *Per cur.* The releaſe is miſpleaded for want of a *venue*, and it was agreed, that the court could award, *ex officio*, a *certiorari ad informandum conſcientiam*, whether there was an original or not.—*Sed Holt, cont.* Vide Salk. 268.

So the court can *ex officio* award a *certiorari* to ſupply a defect in the body of the record, even after *in nullo eſt erratum* pleaded. *Salk.* 270.

If a variant original is returned on the firſt *certiorari*, the *defendant* in error may ſue a ſecond *certiorari*. Salk. 266.

Continuances cannot be returned upon the ſame *certiorari* with the *original*. Salk. 269.

If upon error, diminution, want of original, warrant of attorney, &c. is alledged, and a *certiorari* is ſued out, upon which a record is returned contrary to what is before returned, it cannot be received. *Vide* the caſe of *Tyſoun* v. *Hylyard*, 2 Ld. *Raym.* 1122.

If error be aſſigned in the *original*, and upon a *certiorari* granted an erroneous original is returned; and upon this, *in nullo eſt erratum* is pleaded; and after the court, *ad informandum conſcientiam*, grant another *certiorari* for another original; and upon this a good original is certified; the court ought to intend that this is the original upon which the judgment was given, in favour of judgments, which ought to be intended to be good. *Cro. Car.* 91. *Style* 176. 2 *Rol. Rep.* 362. *Godb.* 407. *Rol. Ab.* 765.

An original writ of the term wherein final judgment is given, will not warrant that judgment, if it appear upon the ſame record, that there have been proceedings of a preceding term.—But the plaintiff below ought to have an original writ of the term the *placita* is of. *Dyke* v. *Sweeting*, 1 *Wilſ.* 181.

If a *certiorari* be prayed to certify an *original*, or a *warrant* of attorney of a wrong term, and the *chief juſtice* or the *cuſtos brevium* return, that there is no *original* or *warrant* of that term, the defendant in error may make a ſuggeſtion of the right term, and pray a *certiorari*, which when returned

and

Of Proceeding in Error from the Court of *Common Pleas* into the *King's Bench*, and herein of alledging Diminution, Want of Original, Warrant of Attorney, &c.

and filed, he may join *in nullo eſt erratum*, and enter it on the roll, paying the plaintiff's attorney 2 *s.* 4 *d.* for it.

Want of *original* was aſſigned, *certiorari* prayed, and return no *original*; afterwards the defendant applied to *chancery*; and upon affidavit, that inſtructions were given to the *curſitor* for an original, but they were loſt, the court of *chancery* allowed, that the original ſhould be ſupplied. Upon which the defendant in error prayed another *certiorari*, and an *original* was certified of the ſame term in which the default of an *original* was certified before; on which it was moved, that this was irregular; for, before the ſecond *certiorari* was returned, the defendant ought to have given a copy of the original to the plaintiff's attorney; but the *maſter* informing the court, that the courſe was ſo when the ſecond original certified was of another term, but not when it was of the ſame term, the motion was diſallowed. *Com.* 118.

The plaintiff aſſigned for error want of an *original*, and the defendant thereupon did not give a rule; but, at his own proper charges, took out a *certiorari*, and procured a certificate of an original. *Sed per cur.* This is ill, for the error is not compleatly aſſigned until the certificate is returned, by which it appears, that there was no original in the cauſe. *Com.* 115.

Diminution cannot be alledged upon a *writ of error* brought upon a judgment in any *inferior court*—But it may, upon *error*, in *Wales* and counties palatine. *Sid.* 147, 364.

So it may upon *error* of a judgment before juſtices of of *oyer* and *terminer*. Sid. 40.

But if on a *certiorari* upon a *writ of error* it be certified, that the judgment was *quod defend. ſit in miſericordia*, the defendant, in the writ of error, cannot alledge diminution: *ſſ.* that the record is *quod capiatur*, becauſe that is contrary to the record certified. *Rol. Abr.* 764.

In a writ of error in *B. R.* on a judgment in *C. B* the want of warrant of attorney being aſſigned for error, the plaintiff prayed one *certiorari* to the chief juſtice, and another to the *cuſtos brevium*; both of whom returned *non inveni aliquod warrant'*; and the defendant dying, the plaintiff, by journies accounts, brought a new writ of error againſt

Of Proceeding in Error from the Court of *Common Pleas* into the *King's Bench*, and herein of alledging Diminution, Want of Original, Warrant of Attorney, *&c.*

againſt the ſon and heir of defendant, who appearing, alledged diminution, in that the warrant of attorney was not certified, and prayed another *certiorari* to the *cuſtos brevium*; and it was urged, that the return was not *quod non habetur*, *&c.* but *quod non inveni*, *&c.* ſo that if upon the ſecond a warrant ſhould be returned it would not be repugnant: But it ſeemed to *Wray*, ch. juſt. That it would be hard to grant a new *certiorari* in this caſe; for though if any variance could be alledged, it would be otherwiſe, as was adjudged in the caſe of one *Laſſells*, where it was certified there was no warrant, and becauſe the original was *inter Laſſells execut' teſtamenti*, *&c.* where he was not named executor in the firſt *certiorari*; and upon the matter a new *certiorari* was granted. *Leon.* 22. Vide *Cro. Jac.* 277. and *Bulſtr.* 21.——Where to the firſt it was returned, there was no warrant of attorney in that term wherein the action was commenced, and a ſecond *certiorari* was awarded *.

After *in nullo eſt erratum* pleaded, no diminution can be alledged, either by the plaintiff or defendant in error, without leave of the court.

Error, upon a *fine* in *C. B.* and error aſſigned in the proclamations, upon which a *certiorari* went to the *cuſtos brevium*, who certified, that two of the proclamations were

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* ☞ When all the proceedings are in one and the ſame term, an original of that term will warrant the ſame, but not otherwiſe. 1 *Keb.* 327, *Booth* v. *Beard.* But an original of the term final judgment is given will not warrant that judgment, if it appear upon the ſame record, that there have been proceedings of a precedent term. *Duke* v. *Sweeting*, 1 *Wilſ.* 181.

The caſe of *originals* differs from *warrants of attorney*; for it is ſufficient if a *warrant of attorney* be filed at any time pending the ſuit, let it be which term it will. The ſtat. of *Hen.* 8. only requires a warrant of attorney to be filed in the cauſe: and the 4 *Ann.* requires it to be filed according to the courſe of the court; and that is, to have it filed any time pending the ſuit; but it is otherwiſe as to an *original writ*, for if there be proceedings in the action in a term *preceding the return thereof*, the original of a term after will not ſupport them.

Of Proceeding in Error from the Court of *Common Pleas* into the *King's Bench*, and herein of alledging Diminution, Want of Original, Warrant of Attorney, &c.

made in one day: but it appearing in the *chirographer*'s office, that the proclamations were duly made, and he being the principal officer as to them, and the *cuſtos brevium* having only an abſtract thereof; upon the prayer of the defendant a *new certiorari* was directed to the *chirographer*, who having certified the proclamations duly made, after examination of the clerks of *C. B.* by the juſtices of *B. R.* they awarded, that the proclamations with the *cuſtos brevium* ſhould be amended according to thoſe in the cuſtody of the *chirographer*. 3 *Leon.* 106.

Of Proceeding in Error from the Court of *Common Pleas* into the *King's Bench*, and herein of aſſigning Errors, Joinder, *&c.*

THE *aſſignment of errors* by the plaintiff ought to be in the ſame term the record is removed. *Lutw.* 354. *F. N. B.* 20 *G.*

Otherwiſe the defendant may *non-proſs* the writ after a *ſci. facias quare, &c.* and *alias* returned *nihil*, and a rule thereon given to aſſign errors, which *vide ante.*

The errors aſſigned muſt be ſigned by counſel, and muſt be aſſigned in term, and not in vacation. *Prac. Reg.* 203.

And muſt be aſſigned upon the record.

Of aſſigning errors, and of joinder in error, *vide ante* under title, "*Of Proceeding in Error from inferior courts, &c.*"

Upon the joinder in error, either party may move for a *concilium*, and ſet the cauſe down with the clerk of the papers for argument.

After the *plaintiff* has aſſigned errors, he may have a *ſcire facias ad audiendum errores*—but ſuch writ is now ſeldom ſued out, as the *defendant* appears uſually *gratis*; or the *plaintiff* in error, after his aſſignment of errors, takes a rule out for the defendant to appear thereto, and ſerves a copy thereof on the defendant.

Two days at leaſt before the cauſe comes to be argued, paper-books muſt be delivered to the judges. 2 *Jac.* 2. though that rule of court ſays *four days* before, yet the practice has been for a long time paſt to deliver the paper-books only *two days* before.

The *plaintiff* in error delivers paper-books to the *chief juſtice* and the *ſenior judge*—the *defendant* to the two *junior judges.*

The court will not hear arguments unleſs books be delivered to all the judges; therefore it behoves the attorney who expects the judgment of the court to be for his client, to deliver all the books, eſpecially as he will be allowed in his coſts for the copies he makes for the other ſide. *Mich.* 17 *Car.* 1.

Of Proceeding in Error from the Court of *Common Pleas* into the *King's Bench*, Argument thereon, Judgment, *&c.*

THE court has refuſed to hear any argument on the ſide of the party who hath neglected to deliver books, though he has been willing to pay the other ſide for them.

If a judgment be below for the plaintiff, and error is brought, and that judgment reverſed; yet, if the record will warrant it, the court ought to give a new judgment for the *plaintiff*. Vide Cro. Car. 443. Salk. 401. Rol. Ab. 774. pl. 1. Hob. 194.

But if the judgment be erroneous, and againſt the plaintiff, that ought to be reverſed, and no new judgment given for the plaintiff. *Ibid.*

If an erroneous judgment be given for the defendant, and that is reverſed, and the merits appear for the plaintiff, he ſhall have judgment—But if the merits be againſt the plaintiff, the defendant ſhall have a new judgment. So it is in the *exchequer chamber*, for they are to reform, as well as to affirm or reverſe it. *Ibid.*

But in *Salk.* 262. it is laid down, that where the *plaintiff* brings the writ of error, and the court reverſes the judgment below, they give a new judgment for the plaintiff; but otherwiſe if the defendant below brings the writ of error, for then they only reverſe it.

So in *Burr. Rep.* 4 *pt.* 2156. If error is brought by the *plaintiff* below, the court upon the reverſal of the judgment may give ſuch judgment as the court below ſhould have given: but if error is brought by the *defendant* below, the court can only reverſe it.

And *per lord Mansfield*, in *Cuming* v. *Sibley*, *Mich.* 10 *Geo.* 3. *B. R. Burr.* 4 *pt.* 2490. Where the *plaintiff* below brings a *writ of error*, we may not only reverſe what is wrong, but give judgment for what is right. Where the *defendant* below brings a writ of error, we only reverſe ſuch wrong part of the judgment as he complains of.

A judgment cannot be reverſed in part, and affirmed in part, unleſs part is by *common law*, and part by *ſtatute*. Salk. 24.

Of Proceeding in Error by a Plaintiff to reverſe his own Judgment.

IF a plaintiff having obtained judgment below brings a *writ of error* to reverſe his own judgment [which is nothing ſtrange or unreaſonable where it is given for a leſs ſum than he has a right to demand] the common method of bringing a *ſcire facias quare executionem non* would be improper, ſo would his ſuing out a *ſcire facias ad audiendum errores.*—Therefore if ſuch plaintiff in error will not proceed after his writ of error brought, the court of *B. R.* may and ought to make a rule to oblige him to aſſign errors within a limited time; which rule the court will make upon the *plaintiff* in error, to aſſign errors within *four days*, or elſe that his *writ of error* ſhall be *non-proſſed.* Johnſon v. Jebb, Burr. 4 pt. 1772.

Of Proceeding in Error from the *King's Bench* into the *Exchequer-chamber*.

AS no *writ of error* lay of a judgment in the *King's Bench* but in *parliament*, and as the ſubjects were often diſappointed of their writ of error by the not ſitting of parliament, or by their being employed in publick buſineſs when they did ſit:

By the 27 *Eliz. c.* 8. it is enacted, "That where any "judgment ſhall, at any time hereafter, be given in the ſaid "court of the *King's Bench*, in any ſuit or action of *debt*, "*detinue*, *covenant*, *account*, *action upon the caſe*, *ejectione* "*firmæ or treſpaſs*, firſt commenced there [other than ſuch "only where the queen's majeſty ſhall be party] the party "plaintiff or defendant, againſt whom any ſuch judgment "ſhall be given, may at his election ſue forth out of the "court of *chancery*, a ſpecial writ of error to be deviſed in "the ſaid court of *Chancery*, directed to the chief juſtice of "the ſaid court of the *King's Bench* for the time being, "commanding him to cauſe the ſaid record, and all things "concerning the ſaid judgment, to be brought before the "juſtices of the *Common Bench*, and the barons of the *Ex-*"*chequer* into the *Exchequer* chamber, there to be examined "by the ſaid juſtices of the *Common Bench*, and barons afore-"ſaid; which ſaid juſtices of the *Common Bench*, and ſuch "barons of the *Exchequer* as are of the degree of the coif, or "ſix of them at the leaſt, by virtue of this preſent act, "ſhall thereupon have full power and authority to examine "ſuch errors as ſhall be aſſigned or found in or upon any "ſuch judgment; and thereupon to reverſe or affirm the "ſaid judgment as the law ſhall require, other than for "errors to be aſſigned or found for or concerning the ju-"riſdiction of the ſaid court of *King's Bench*, or for any "want of form in any writ, return, plaint, bill, declaration, "or other pleadings, proceſs, verdict, or proceeding what-"ſoever, and that after the ſaid judgment ſhall be affirmed "or reverſed, the ſaid record, and all things concerning "the ſame, ſhall be removed and brought back into the "ſaid court of the *King's Bench*, that ſuch further proceed-"ing may be thereupon had, as well for execution as other-"wiſe, as ſhall appertain."

The exchequer chamber, under this ſtatute, hath nothing to do with errors in *fact*. 2 Lev. 38. 1 Vent. 207. 2 Mod. 194.

The *writ of error* can only be returnable in the *exchequer chamber* in the *ſeven* caſes mentioned in this act, where the

Of Proceeding in Error from the *King's Bench* into the *Exchequer-chamber*.

ſuit was *firſt commenced* in *B. R.* Therefore if a ſuit is by *original* in *B. R.* a writ of error on a judgment thereon muſt be returnable in parliament, and cannot be in the *Exchequer-chamber*, becauſe ſuch ſuit is not commenced there, but in *chancery* where the *original writ* is purchaſed.

A *writ of error* therefore can only be returnable on judgments in *B. R.* in actions of *debt*, *detinue*, *covenant*, *account*, *action on the caſe*, *ejectment*, *and treſpaſs*, firſt commenced in *B. R.* which muſt be by *bill*.

But if a plaintiff in *B. R.* be nonſuited, and there is a judgment againſt him for coſts, error lies in *Cam Scacc.* Stra. 235.

This *writ of error* is obtained of the *curſitor* in like manner as all other writs of error are;—and by *Reg. Eaſt.* 36, *Car.* 2. Every attorney who ſhall ſue out any writ of error on any judgment of this court returnable in the *Exchequer-chamber*, ſhall forthwith allow ſuch writ of error with the *clerk of the errors* of this court for the time being, and no execution ſhall be ſtayed until ſuch allowance.

And where ſpecial bail * is required, if the plaintiff upon ſuch writ of error does not *within four days* after the allowance thereof put in *ſpecial bail*, the plaintiff in the action may proceed to take out execution, notwithſtanding ſuch writ of error. Same rule.

If ſpecial bail is put in, the *plaintiff* in error, or his attorney, muſt forthwith give notice thereof to the *defendant* in error, or his attorney; and if the *defendant* in error does not except againſt ſuch bail *within twenty days* after ſuch notice, ſuch bail ſhall be allowed. *Mich.* 5 *W. & M.*

The record itſelf is not tranſmitted from the *King's Bench* into the *Exchequer-chamber*, as it is from the *Common Pleas* into the *King's Bench* in caſes of error, but only a tranſcript thereof; and all the rules, until the making up and delivering over the tranſcript, are given by the *clerk of the errors* [Mr. *Wey*]: But after delivery of the tranſcript, all rules, &c. are given by the *clerk of the errors* of the *Exchequer Chamber*.

When the *plaintiff* has aſſigned his errors in the *Exchequer-chamber*, that court does not award a *ſcire facias ad audien-*

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* In what caſes requiſite, *vide* ante, title—"*Bail in error where requiſite.*"

dum

Of Proceeding in Error from the *King's Bench* into the *Exchequer-chamber*.

dum errores, but notice is given to the parties concerned. 1 *Vent.* 34. Vide *Palm.* 186.

If the *plaintiff* in error, after errors aſſigned in the *Exchequer-chamber*, intends to argue the ſame, he muſt give ten days notice to the *clerk of the errors* there, before they ſhall be argued; and copies of the paper book in error muſt be made and delivered by the parties—The *plaintiff in error* delivers books to the judges of the *Common Pleas*, and the *defendant* to the barons of the *Exchequer*. Eaſt. 33 Car. 2.

On judgment in error in the *Exchequer-chamber*, a *remittitur* of the tranſcript to the *King's Bench* is entered, and the execution thereon iſſues out of *B. R.*

Upon a ſpecial verdict, the judgment was in *B. R.* for the defendant, which judgment was reverſed in the *Exchequer-chamber*. Beſides the reverſal that court gives a compleat judgment for the plaintiff, *viz. that he do recover.* Carth. 319. Ld. Raym. 10.

Judgment for defendant on demurrer was reverſed in the *Exchequer-chamber*; and judgment *that the plaintiff do recover, was given*, &c. But becauſe, that court had not power to award a writ of enquiry, it was ſent into *B. R.* for the execution of that writ, and thereupon to give final judgment. Vide *Carth.* 319. Ld. *Raym.* 10. And authorities there cited.

If error is brought by many in the *Exchequer-chamber*, and ſome die, a *remittitur* ſhould be entered to warrant execution in *B. R.* againſt the ſurvivors. *Carth.* 236.

If a writ of error abates in *Cam. Scacc.* or is diſcontinued, there muſt be a *remittitur* entered in *B. R.* for without ſuch *remittitur* it cannot appear to the court of *King's Bench*, but that the writ of error is ſtill depending in the *Exchequer-chamber*.

On a writ of error into the *Exchequer-chamber*, a *ſcire facias ad audiend. errores* was awarded, returnable on the 11th of *May*; and there being no ſuch day of adjournment in *Cam. Scacc.* it was held to be a diſcontinuance; and that a writ of error *quod coram vobis* lies not in *Cam. Scacc.* which has its power by ſtatute, and can only reverſe or affirm the judgments of *B. R.* and remand to the *King's Bench* for execution; and when the plaintiff in error there is nonſuited, or the writ is diſcontinued, they have no more to do with it, for they have no record before them, but it remains in the *King's Bench*. And though ſeveral precedents

Of Proceeding in Error from the *King's Bench* into the *Exchequer-chamber*.

were produced where *writs of error coram vobis*, &c. were allowed, yet, as thoſe paſſed without debate, no regard was paid to them. *Cro. Jac.* 620.

Error of a judgment in *B. R.* into *Cam. Scacc.* infancy aſſigned, and appearance *by attorney below*, defendant in error pleaded in *nullo eſt erratum*, and prayed the judgment to be affirmed. On argument, all the juſtices and barons agreed, that error in *fact* could not be aſſigned, nor was it examinable in the *Exchequer-chamber*; and that *in nullo eſt erratum* was in the nature of a demurrer to it, and that judgment ought to be affirmed; upon which it was moved, that the plaintiff in error might diſcontinue his writ, upon payment of coſts, which was granted *niſi*, and afterwards made abſolute: But afterwards, upon affidavit that the coſts were taxed, and had been demanded, and that the plaintiff in error refuſed to pay them, the rule for diſcontinuing the writ of error was diſcharged. The cauſe was again put into the paper, and the judgment affirmed. *Roe* v. Sir *John Moore*, bart. *Com. Rep.* 597.

In treſpaſs 300 *l.* damages were recovered, and error was brought on the judgment in *Cam. Scacc.* pending which, plaintiff brought an action of debt on the judgment; and by all the judges, except *Keelynge*, it well lies, for the record itſelf is yet in the court, and the writ of error is a *ſuperſedeas* only. 1 *Lev.* 153.

Of Proceeding in Error from the Court of *King's Bench in Ireland* into the *King's Bench* here.

ERROR of a judgment given in the *King's Bench* in *Ireland*, lies into the *King's Bench* here; for it lies not in the parliament there. *Rol. Rep.* 17. *per Coke.*

The *writ of error* is obtained of the curſitor in the ſame manner as other writs of error, directed to the chief juſtice of the *King's Bench* in *Ireland*, made returnable in *B. R.*

The *chief juſtice* ſends only a *tranſcript* of the record, and not the record itſelf, becauſe of the danger of the ſeas. *Cro. Jac.* 535, *&c.*

And when the tranſcript is brought over, it muſt be filed in the *chief clerk*'s office, *with* Mr. *Heberden, the ſigner of the writs.*

If the *plaintiff in error* does not bring in the *tranſcript* in due time, the defendant, upon a certificate that the *tranſcript* is not brought in, may apply to the *curſitor* for a *writ de executione judicii* directed to the *chief juſtice in Ireland*, whereupon execution may be had of the judgment there.

When the tranſcript is brought over and filed, copies thereof are made out for both parties.

It is ſaid, that neither party can alledge *diminution* of the record, and pray a *certiorari*. But ſee *Show.* 214. *contra.* And in *Palm.* 285. *Baniſter* v. *Kennedy*, where it is ſaid—If error be brought upon a judgment in *B. R.* in *Ireland* in a writ of falſe judgment, upon a judgment in the *Thoulſel*, (which is the court of the mayor and aldermen of *Dublin*) and it is aſſigned for error, that there was no plaint entered in the *Thoulſel*, and that the words *per quod actio accrevit* were omitted in the declaration, if the defendant alledges diminution, yet he ſhall not have a *certiorari* to the chief juſtice in *Ireland*, to certify the reſidue of the record, *&c.*; and that if any part of the record be not before him, that he ſhould write to the mayor and aldermen to certify it, and that he ſhould certify it to this court; for, by the plea of *in nullo eſt erratum* in *B. R.* in *Ireland*, he hath admitted the record well certified by the *mayor and aldermen*: And this court hath no authority to require the court of *Ireland* to write to the mayor, *&c.* And the whole, of *B. R.* in *Ireland*, is only here in queſtion, writ being iſſued, a *ſuperſedeas* was granted as to the inferior though it was prayed that the *ſuperſedeas*

Of Proceeding in Error from the Court of *King's Bench in Ireland* into the *King's Bench* here.

inferior court only; but at another day it being moved, that there might be a *certiorari* as to the words *per quod*, &c. it was granted.

In error from *Ireland*, if the *plaintiff* does not affign his errors, the way is not to take out a *ſcire facias ad audiendum errores*, as is uſual on writs of error from *C. B.* * but to move for a common rule that the plaintiff ſhould affign his errors, and if you cannot find any one concerned for him, fix it up in the office; and if the *plaintiff* in error, or ſome one for him, does not appear and affign errors within the time ſpecified in the rule, an affidavit muſt be made thereof; and upon ſuch affidavit, the court on motion will grant a new rule, that, unleſs errors be aſſigned in *four days* after fixing a new note up in the office, you may be at liberty to ſign a *nonpros.* Stra. 417.

In error from *Ireland* no bail is requiſite, for *Ireland* is not mentioned in any of the ſtatutes requiring *bail* upon proſecuting writs of error. Which vide *ante*.

If the plaintiff affigns errors, he muſt move for a rule for the defendant to join in error, after ſervice of a copy of which rule, the *defendant* has *four* days allowed to join in error.

On the aſſignment of errors, there muſt be an *affidavit* annexed, verifying the ſame.

Paper-books are made up and delivered by the plaintiff and defendant in error to the judges, and the cauſe is entered for argument in like manner, as in error from the *Common Pleas* to the *King's Bench* here.

If the judgment is affirmed, the record is tranſmitted to *Ireland*, and the court there awards execution.—Coſts are given at the diſcretion of the court. Vide *Carth.* 460.

Ejectment in *B. R.* in *Ireland*, judgment for defendant, error brought in *B. R.* here, and the judgment was reverſed; and judgment given, *that the plaintiff do recover his term*, &c. and reſolved, that there ſhould be a writ directed to the *chief juſtice in Ireland* to reverſe the judgment there,

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* errors in writs of error from *C. B.* a *ſcire facias*, &c. is not out, but the plaintiff is ſerved with a rule to affign

and

Of Proceeding in Error from the Court of *King's Bench* in *Ireland* into the *King's Bench* here.

and commanding the court there to award execution. *Cro. Car.* 368.

A judgment in *Ireland* can be amended here upon a writ of error in *B. R.* Vide *Burr. Rep.* 4 *pt.* 2157.

A *capias* does not lie for costs given here upon affirmance of a judgment given in *Ireland*. Ld. Raym. 427.

The *declaratory act*, 6 *Geo.* 1. *c.* 5, which declares the subordinacy and dependency of the kingdom of *Ireland* on the king and parliament here, and that the *House of Lords* there have not of right jurisdiction to judge of, affirm, or reverse any judgment, sentence, or decree, given in any court there, is, at present, a disagreeable subject of contention between the two kingdoms. The *associations* formed in that country seem determined to exact from the legislature here a formal repeal of this odious, unjust, and impolitic act, as they term it. In all probability, therefore, it will be long before our parliament, to quiet the minds of the people, will relinquish their claim to the examination of errors from the courts in *Ireland* to their own *House of Lords*.

Of Proceeding in Error returnable in Parliament.

THE court of parliament is the ſupreme court where anciently cauſes of great conſequence, as between the *magnates regni*, were heard and determined. Hence the lords is the *dernier* reſort to which a writ of error lies; and therefore, if a writ of error be brought of a judgment in the *King's Bench* into the *Exchequer-chamber*, and there the judgment is reverſed, yet a writ of error lies of ſuch judgment into parliament, and the lords may reverſe ſuch ſecond judgment.

So, a writ of error lies into parliament upon a judgment given in *B. R.* upon a ſuit originally commenced there, even in thoſe actions mentioned in the ſtat. 27 *Eliz. c.* 8. for that ſtatute only gives the party an election in thoſe actions to have the writ of error returnable in the *Exchequer-chamber*.

If the ſuit is by *original* in *B. R.* in all caſes, a writ of error is returnable in parliament; for the ſtatute of *Eliz.* only gives the party an action to proſecute error in the *Exchequer-chamber* in the *ſeven actions* therein ſpecified, if ſuch actions were originally commenced in *B. R.*

The writ of error is obtained of the *curſitor* as in other caſes, and is made returnable, if the parliament is ſitting, *immediately*; or, if the parliament is prorogued, then *ad proximum parliamentum*.

If error is brought on a judgment in *B. R.* the *chief juſtice* conveys the *roll*, with the *tranſcript*, to the *Houſe of Lords*, and leaving the *tranſcript* there, takes back the *roll*. 4 Inſ. 21. Dy. 375. a. 1 Rol. 753. l. 20. Cro. Jac. 341. Godb. 247.

Note: Error does not lie from the court of *Exchequer* into the *Houſe of Lords* immediately, for the *Exchequer-chamber* interpoſes. *Salk.* 511. 4 *Inſt.* 21. 31 *Ed.* 3.

When the *tranſcript* is brought in, a peer moves the houſe for a day to be given the plaintiff to aſſign his errors, which is accordingly ordered, and of which the plaintiff muſt take notice; otherwiſe, the tranſcript will be remitted. Upon the aſſignment of errors, the *defendant* joins iſſue *in nullo eſt erratum*, and thereupon another motion is made by a peer for their lordſhips to appoint a day for hearing the errors. On the day appointed, both parties attend with their counſel; but no more than two counſel will be heard on each ſide.

To

Of Proceeding in Error returnable in Parliament.

To regulate the proceedings in *error* returnable in parliament, the lords have made ſeveral orders; and firſt, by *Ordo Dom. Proc. die Ven.* 13 *Dec.* 1661.

Foraſmuch as upon writs of error returnable in this high court of parliament, the parties therein often deſire to delay juſtice, rather than to come to the determination of the right of the cauſe; "It is therefore ordered, by the lords ſpiritual and temporal in parliament aſſembled, that the plaintiffs, in all ſuch writs, after the ſame and the records be brought in, ſhall ſpeedily repair to the clerk of the parliament, and proſecute the writs of error, and ſatisfy the officers of this houſe their fees juſtly due unto them, by reaſon of the proſecution of the ſaid writs of error, and the proceedings thereupon; and further, ſhall aſſign their errors *within eight days after the bringing in of ſuch writs with the records*; and if the plaintiff makes default ſo to do, then the ſaid clerk, if the defendant in ſuch writs require it, ſhall record, that the plaintiff hath not proſecuted his writ of error; and that the houſe do therefore award that ſuch plaintiff ſhall loſe his writ, and that the defendant ſhall go without day, and that the record be remitted: and if any plaintiff, in any writ of error, ſhall alledge diminution, and pray a *certiorari*, the clerk ſhall enter an award thereof accordingly, and the plaintiff may, before *in nullo eſt erratum* pleaded, ſue forth the writ of *certiorari* in ordinary courſe, without ſpecial petition or motion to this houſe for the ſame; and if he ſhall not proſecute ſuch writ, and procure it to be returned *within ten days after his plea of diminution put into this houſe*, then, unleſs he ſhall ſhew ſome good cauſe to this houſe for the enlarging of the time for the return of ſuch writ, he ſhall loſe the benefit of the ſame, and the defendant in the writ of error may proceed as if no ſuch writ of *certiorari* were awarded."

And by *Ordo Dom. Procer. die Martis*, 19 *Aprilis* 1698.

The houſe taking notice, that upon appeals and writs of error, there have been of late ſeveral ſcandalous and frivolous printed caſes delivered to the lords of this houſe; for preventing whereof for the future, It is this day ordered, by the lords ſpiritual and temporal, in parliament aſſembled, that no perſon whatſoever do preſume to deliver any printed caſe or caſes to any lord of this houſe, unleſs ſuch caſe or caſes

Of Proceeding in Error returnable in Parliament.

caſes ſhall be ſigned by one or more of the counſel, who attend at the hearing of the cauſe in the courts below, or ſhall be of counſel at the hearing in this houſe: and this order to be added to the roll of ſtanding orders, and affixed on the doors of this houſe, and the courts in *Weſtminſter*.

And by *Ordo Dom. Procer. die Mercur.* 22 *Dec.* 1703.

Upon conſideration of the great inconveniencies ariſing by motions and petitions for putting off cauſes after days have been appointed for hearing thereof; It is ordered, by the lords ſpiritual and temporal in parliament aſſembled, that when a day ſhall be appointed for the hearing any cauſe, appeal, or writ of error, argued in this houſe, the ſame ſhall not be altered, but upon petition; and that no petition ſhall in ſuch caſe be received, unleſs *two days notice thereof be given to the adverſe party*, of which notice oath ſhall be made at the bar of this houſe; and it is further ordered, that this order be added to the roll of ſtanding orders.

And by *Ordo Dom. Procer. die Veneris*, 21 *Feb.* 1717.

Ordered, that in all caſes upon writs of error depending in this houſe, when diminution ſhall be at any time alledged, and a *certiorari* prayed and awarded before *in nullo eſt erratum* pleaded, the clerk of the parliaments ſhall, upon requeſt to him made, give a certificate that diminution is ſo alledged, and a *certiorari* prayed and awarded thereupon. And it is further ordered, that this order be entered on the roll of the ſtanding orders of this houſe.

And by *Ordo Dom. Procer. die Sabbatis*, 2 *Mart.* 1727.

Upon report from the committee of the whole houſe, appointed to take into conſideration matters relating to the proceedings on appeals, and writs of error; It is ordered, by the lords ſpiritual and temporal, in parliament aſſembled, that at the hearing of cauſes for the future, one of the counſel for the appellant ſhall open the cauſe, then the evidence on their ſide ſhall be read, which done, the other counſel for the appellants may make obſervations on the evidence; then one of the counſel for the reſpondents ſhall be heard, and the evidence on their ſide to be read, after which

Of Proceeding in Error returnable in Parliament.

which the other counſel for the reſpondents ſhall be heard and one counſel only for the appellants to reply.

If the parliament is diſſolved, the writ of error is abated.

A writ of error returnable in parliament, was diſcontinued by the prorogation; another writ was brought *teſted* the laſt day of the ſeſſion, *viz.* 1 *March*, *returnable* 19 *Nov.* the day to which it was prorogued. The court reſolved, that though the firſt writ was not diſcontinued by any act of the party, yet the ſecond writ ſhould be no *ſuperſedeas*. Vide 1 *Vent.* 31.

A writ of error teſted 30 *Nov.* returnable in parliament the 30*th of April* next, the day to which parliament was prorogued. *Per Hale*, The lords have lately declared, that prorogation does not determine a cauſe depending in parliament by writ of error; but that comes not to this caſe, the writ not being returned. A writ of error returnable *at the next parliament* is not good; but otherwiſe if they are ſummoned or prorogued to a day certain. A writ of error bore teſte 10 *Nov.* and returnable 1 *Nov. next following*, and the record was ſent into the *Exchequer-chamber*, and a *mittimus* indorſed upon the roll here; and it was reſolved, that execution might be taken out, becauſe of the long return. 2*dly*, That though there were a *mittimus* upon the roll, yet the record remained here until the return of the writ to all purpoſes.—In the opinion of the court, the writ of error was no *ſuperſedeas*; but they would make no rule, becauſe not judicially before them; but that the party might take out execution if he thought fit; and then if the other ſide moved for a *ſuperſedeas*, they would reſolve the point. 1 *Vent.* 266. 2 *Lev.* 120.

If a *writ of error* be brought in the *Exchequer-chamber*, and that being diſcontinued, another is brought in parliament, this ſecond writ is a *ſuperſedeas*. But if a writ of error be brought in parliament, and that abates, and the plaintiff brings a ſecond, this is no *ſuperſedeas*, becauſe it is in the ſame court. 1 *Vent.* 100.

A writ of error does not determine by the prorogation of the parliament. 2 *Lev.* 93.

Error of a judgment in *B. R.* for defendant into *dom. Proc.* and the judgment was reverſed, and the record was remitted into *B. R.* whereupon the plaintiff moved *B. R.* for a new judgment. *Per cur.* A new judgment cannot be given here contrary

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contrary to that which is already given; the ſame court which reverſed muſt give a new judgment. *Philips and Bury, Carth.* 319. Ld. *Raym.* 9, 10.

If judgment below was given for the defendant, upon *demurrer*, and the judgment be reverſed, whereupon a *writ of enquiry* becomes neceſſary, in ſuch caſe, as the lords cannot award a *writ of enquiry*, the record is remitted to *B. R.* for them to award the writ of enquiry, and upon return thereof, then to give final judgment. *Vide ibid.*

Of Proceeding in Error *coram nobis*, and Error *coram vobis*.

IF a judgment in *B. R.* be erroneous in matter of *fact* only, and not in point of *law*, a *writ of error coram nobis reſidend'* may be brought in *B. R.* where the judgment was given, to reverſe that judgment; for error in *fact* is not the error of the judges, and reverſing it is not reverſing their own judgment.

This writ of error is allowed in court by the *ſecondary*, or it may be allowed in vacation by the *ſecondary*.

It is ſaid to be no *ſuperſedeas* of execution without leave of the court. *Vide Carth.* 368, 9.

The ſtatutes requiring *bail* in error do not extend to this writ of error.

When the *writ* is allowed, and notice thereof given, the defendant in error ſhould move for a rule to compel the plaintiff to aſſign errors; upon ſervice of which he muſt immediately aſſign errors. Upon the aſſignment of error *in fact*, if the error *in fact* is aſſignable and well aſſigned, the defendant may confeſs it. *Salk.* 268.

But a defendant can never confeſs error in *law*.

But if the *error* in fact is not well aſſigned, the defendant may plead thereto, upon which the parties are at iſſue in *fact*; and that muſt be tried by a jury. The record for trial is then made up the ſame as in other caſes, and either party may carry it down; and in ſuch caſe, if the iſſue is found for the *plaintiff in error*, he muſt move to put the cauſe in the paper for argument, and then upon producing the *poſtea* the court will give judgment of reverſal.

But if the error in *fact* aſſigned, is not aſſignable for error, then the defendant may join *in nullo eſt erratum*, which is in nature of a *demurrer*, and the ſame is argued in court as in other caſes.

Error *coram vobis*, and infancy aſſigned, a *ſcire facias ad audiendum errores*, and *ſcire feci* returned; but defendant did not appear and join in error; on which plaintiff applied to know what to do. The court directed him to put it in the paper, without taking out any rule to join in error; and when it came on, the judgment was reverſed. *Thatcher* v. *Stephenſon*, *Stra.* 144.

Error in *C. B.* infancy aſſigned. *Doubt del court*, and feigned iſſue, which was found for plaintiff in error, and the judgment was reverſed on return of the *poſtea*, upon motion, without argument in the paper, but within a day or two after. *Oſborn* v. *Barrington*, *Stra.* 127.

In

Of Proceeding in Error *coram nobis*, and Error *coram vobis*.

In *F. N. B.* 21. It is ſaid, that a judgment cannot the ſame term it is given be reverſed in *B. R.* without a *writ of error*, though a judgment in the *Common Pleas* may: but there ſeems no foundation for this diſtinction. *Moor* 186. *pl.* 332. *Yelv.* 157. *Pop.* 181. For during the whole term in which any judicial act is done, the record remains in the breaſt of the judges of the court; and therefore the roll is alterable during the term, as they ſhall direct. But when the term is paſt, the roll is the record, and admits of no alteration. *Co. Lit.* 260. *a.*

When a record is removed upon error brought from *C. B.* or other inferior court into *B. R.* and the ſame writ of error is quaſhed for any other fault than *variance*, error *coram vobis* lies in the ſame court to which the record is removed. *Co. Ent.* 289. 1 *Stra.* 607. and in ſuch caſe ſuch writ of error is the only writ that can be had. *Ibid.* Ld. *Raym.* 1403.

When errors are aſſigned, and afterwards that writ of error is diſcontinued, the *plaintiff* in error may have another writ *quod coram vobis reſiden'*, and upon this new writ may aſſign other errors than thoſe he aſſigned before, either within or without the record, and is not bound to the ſame errors.

This writ of error *coram vobis* recites the former writ of error, and muſt recite it accurately, for where ſuch writ recited the former writ to be returnable *coram nobis*, where it was before the king and the late queen, it was * quaſhed. Ld. *Raym.* 151. *Carth.* 370. *Sed q.* and *vide* title *Amending Writs of Error*, poſt.

This writ of error muſt be entered upon the ſame roll with the firſt, that the court may ſee all together. *Cro. El.* 155, 281.

If a *writ of error*, *quod coram vobis*, is brought after *abatement or diſcontinuance* of a writ of error *quod coram nobis*, no bail is requiſite, becauſe none was required in the writ of *error coram nobis*.

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* But that writ was quaſhed for that reaſon, becauſe the writ of error was brought to *defeat* a judgment; and therefore it ſhould not have a favourable conſtruction; although in the ſame caſe it was inſiſted, that according to a grammatical conſtruction, the relatives and verb being in the plural number, the clauſe would extend to the queen as well as the king.

Of Proceeding in Error *coram nobis*, and Error *coram vobis*.

But if *error coram vobis* is brought upon *diſcontinuance*, &c. of a writ of error upon a judgment of *C. B.* or other inferior court, it ſeems new bail is requiſite. *Vide Carth.* 369. and Ld. *Raym.* 151.

Such writ of error *coram vobis* is allowed by the *ſecondary* in court. *Carth.* 369.

Such writ of error *coram vobis*, is not a *ſuperſedeas* of itſelf, therefore the plaintiff in error muſt move the court for a *ſuperſedeas*. Ibid.

If a writ of error once good, abates by plea or death, the inferior court cannot proceed; but the ſuperior court and party may have a new writ *quod coram vobis reſidet*; but where the writ is ill, no new writ *coram vobis* can be had; as where the writ was to remove a judgment *quod fuit in curia noſtra*, where it was in the time of a *predeceſſor*. Latch. 198.

Error *coram vobis* lies not after an affirmance of a judgment, except in caſe of error upon a *fine* in *C. B.* after affirmance thereof in *B. R.* Salk. 337. although in this caſe of a * *fine*, the tranſcript is only tranſmitted into *B. R.* upon error brought.

Error *coram vobis* does not lie in *B. R.* after error brought in *Cam. Scacc.* and judgment affirmed. Becauſe, before the ſtat. of *Eliz. B. R.* could not examine its own errors in *fact*, after an affirmance in parliament; and the *Exchequer-chamber* is now in the ſame degree with regard to *B. R.* in thoſe caſes within the ſtatute, as the parliament was before, and is now. *Vide Stra.* 690.

Error *coram vobis* lies not in the *Exchequer-chamber*.

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* If on error brought into *B. R.* of a *fine* in *C. B.* and the ſame is reverſed, a *certiorari* goes for the foot of the *fine*, and it is cancelled in *B. R.* If it is affirmed the tranſcript is remitted into *C. B.* becauſe *B. R.* has no *chirographer*.

Of Proceeding in Error *tam quam.*

A Writ of error *tam in redditione judicii quam in adjudicatione executionis*, is a writ of error brought by *bail* (after *ſcire facias* againſt them, and award of execution thereon) of the judgment againſt them, and the execution awarded thereupon; for they cannot have error of the *principal judgment.* Vide *Cro. Car.* 481. 2 *Leon.* 101. *Cro. Car.* 561.

Nor can the bail join with the principal in error. *Palm.* 567.

This writ of error recites the judgment againſt the principal, but alledges the error in the ſecond judgment, and in the execution thereof to the damage of the bail.

For error in *fact* the bail are relievable by *audita querela.* Yelv. 155.

No bail is requiſite upon ſuch writ of error.

Of quaſhing and amending Writs of Error, of Abatement, Diſcontinuance, Summons, and Severance in Error, &c.

A *Writ of error* was not amendable at *common law*, nor by any of the ſtatutes of amendments and jeofails, till the 5 *Geo.* 1. *c.* 13. for all amendments are granted for the ſupport of judgments; but the principal deſign of writs of error is to reverſe them. Ld. *Raym.* 71.

But by the ſtat. 5 *Geo.* 1. *c.* 13. it is enacted, "That all "writs of error, wherein there ſhall be any variance from "the original record or other defect, may and ſhall be "amended and made agreeable to ſuch record, by the re-"ſpective courts where ſuch writ or writs of error ſhall be "made returnable, &c."

No coſts are to be paid on any amendment of writs of error, purſuant to this ſtatute; but if the writ of error be quaſhed, the defendant in error ſhall have *coſts*. Fitzgib. 201.

Error of a judgment in *C. B.* in an action there by a *feme* ſole. To the *ſcire facias quare executio. non*, the plaintiff in error pleaded in abatement, that the defendant in error was married ſince the judgment, and before the iſſuing of the *ſcire facias*; on which defendants in *error* moved to quaſh their own *ſci. fa.* and the other ſide inſiſted upon coſts. *Per cur.* It is the ſame in a *ſcire facias* as in an action, where you plead in abatement, and plaintiff's writ is abated, he pays no coſts. Had there been no plea in abatement, and the party had moved to quaſh his own writ, we ſhould have made him pay coſts. The writ was quaſhed without coſts. *Pocklington* v. *Peck*, *Stra.* 638.

A writ of error was returnable before any judgment given, and on conſideration it was held to be ſuch a fault as is not amendable by the 5 *Geo.* 1. Stra. 807.

There was a variance between the writ of error and the record; and as it ſtood in the paper the court obſerved it; but neither party would move to amend it, for fear of paying coſts. Upon which the court ſaid the ſtat. 5 *Geo.* 1. *c.* 13. would warrant their amending it, which they did without coſts. *Gardner* v. *Merratt*, *Stra.* 902. Ld. *Raym.* 1587.

A writ of error cannot be quaſhed till the tranſcript is returned and filed. Ld. *Raym.* 329.

A writ of error was quaſhed becauſe all the proper parties were not plaintiffs. Ld. *Raym.* 71.

Of quaſhing and amending Writs of Error, of Abatement, Diſcontinuance, Summons, and Severance in Error, &c.

A writ of error *tam quam* may be quaſhed as to one judgment, and ſtand good as to another, if it ſhould be brought for error in the principal judgment, as well as for error *in adjudicatione executionis*, which is wrong. Ld. *Raym.* 328.

Judgment was againſt *A.* and *B.* executors; a *ſcire fieri* inquiry was awarded, to which a *devaſtavit* againſt *A.* was returned; and upon that *devaſtavit* judgment was given againſt *A.* upon which judgment *A.* ſued a writ of error without naming his co-executor to reverſe the *principal* judgment, and alſo the judgment upon the *devaſtavit* againſt himſelf; and becauſe he alone could not ſue error upon the principal judgment; the writ of error was quaſhed as to that, and ſtood good as to the other part. *Ibid.*

A writ of error of a judgment on a recognizance was quaſhed, becauſe it was in *adjudicatione executionis judicii.* Ld. *Raym.* 553. for it ought to have been *in adjudicatione executionis ſuper recognitionem.*

So quaſhed for variance in the ſtile of the court. Ld. *Raym.* 704.

If one brings error without the other, who ought to join with him, though the writ ſhall be quaſhed, yet the record ſhall be removed by it. Ld. *Raym.* 1403.

Coſts upon quaſhing writs of error are to be given in all caſes. *Stra.* 606.

The court will not quaſh a writ of error on motion, though it appears to be brought *twenty-nine years* after the judgment, and the ſtatute reſtrains the party to *twenty years*, becauſe if they did, it would deprive the plaintiff in error of the benefit of replying to the exceptions in the ſtatute. *Higgs* v. *Evans*, *Stra.* 837.

Several judgments were againſt three executors, two of whom only joined in bringing error, and bad. 1 *Wilſ.* 88.

No perſon can bring error to reverſe a judgment, who was not a party or privy to the record, or who was not injured by the judgment, and therefore to receive advantage by the reverſal. *Rol. Abr.* 747. *Dy.* 90. Vide *Bac. Abr.* 2 *vol.* 195.

So error does not lie againſt any but him who was party or privy to the firſt judgment, his heirs, executors or adminiſtrators. *Rol. Abr.* 747. 9 *H.* 6. 46, &c.

If a writ of error abates by the act of the party, execution ſhall go. *Stra.* 1015. as where a writ of error brought by

Of quaſhing and amending Writs of Error, of Abatement, Diſcontinuance, Summons, and Severance in Error, &c.

by a *feme ſole* abated by her marriage, and then ſhe and her huſband brought a ſecond writ; the court gave leave to take out execution, it being a delay by the act of the plaintiff in error.

If there are ſeveral plaintiffs in one writ of error, the death of one abates the writ of error, becauſe there cannot be any judgment according to the writ; but if there are ſeveral defendants in error, and one dies, it is otherwiſe, for they are not named in the writ. Ld. *Raym.* 244.

A writ of error does not abate by the death of the defendant in error. Ld. *Raym.* 439. *Salk.* 264. but otherwiſe if the plaintiff die. Sir *H. Thynne* v. *Corie*, 1 *Vent.* 34. A *ſcire facias ad aud. errores* went againſt the executor, when the defendant in error died.

If the plaintiff in error dies before errors aſſigned, the writ abates, and the defendant in error may ſue out a *ſcire facias* to revive the judgment againſt his executor, &c. But if he die after errors aſſigned, and a joinder in error, it does not abate the writ, and the defendant in error may proceed to get the judgment affirmed, but muſt then revive it againſt the executor, &c. of the plaintiff in error.

So a writ of error does not abate by the death of the defendant in error after *in nullo eſt erratum* pleaded. Ld. *Raym.* 1295.

After the record removed into *B. R.* by writ of error, defendant died, and plaintiff moved *C. B.* for leave to ſue out a *ſci. fa.* againſt defendant's executors. *Per cur.* The record being removed out of this court, the motion is improper. *Barnes* 206.

Entry of *diſſeiſee*, pending a writ of error, abates it. Ld. *Raym.* 476.

An abateable writ is abated as to a ſtranger. *Ibid.*

Where a writ of error abates by motion, the court muſt be moved to take out execution; but otherwiſe if for *variance*. Salk. 264, 5. But now if the writ varies from the record, &c. it is amendable by 5 *Geo.* 1. *c.* 13.

If a writ of error abates or diſcontinues by the act and default of the party, a ſecond writ ſhall be no *ſuperſedeas*. *Keb.* 658. As if a plaintiff in error be nonſuit, he ſhall not have a writ of error again. *Salk.* 263. *pl.* 4. Ld. *Raym.*

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91. 5 *Mod.* 228. *Com.* 393. 12 *Mod.* 105. *Comb.* 19. *S. P.*

But if a writ of error abates by the act of God, or the law, a ſecond writ of error will be a *ſuperſedeas*. As where a writ of error abated by the death of the lord chief juſtice *Foſter*, and a ſecond writ of error was ſued out and allowed, and it was held a *ſuperſedeas*. Keb. 658, 686.——

So a ſecond writ is a *ſuperſedeas* upon abatement of the firſt writ of error by death.

Three join in bringing a writ of error, the defendant pleads outlawry in abatement as to one of them; but the court held this no good plea, becauſe they are all compellable to join. *Palm.* 151.

Where two join in a writ of error, and one will not aſſign errors, the court will give the other time to ſummon and ſever. *Stra.* 783.

For if judgment is given againſt two, both ought to join in error—but if one dies after judgment, error may be brought by the ſurvivor without the executor of the other. *Stra.* 234.

If one plaintiff aſſigns errors, he muſt do it in the name of all, except where the others are ſevered. *Mod. Caſ.* 40.

If after a writ of error brought by *two*, and to a *ſcire facias quare executionem non* one only appears, ſummons and ſeverance lies. *Yelv.* 4.

A. ſued *B.* in the *Common Pleas* in *Ireland*, and recovered —*A.* died, and his executors took out a *ſcire facias quare ex. non*, to which *B.* pleaded payment, and found againſt him, with 6*d.* damages; and the judgment was, that *they* ſhould have execution of the debt and damages aforeſaid, and alſo their *coſts and expences*, &c. and for *coſts de incremento.*——*B.* brought error in *B. R.* in *Ireland*, and only one of the executors appeared to the writ, who *alone* ſued out the *ſcire facias quare ex. non* in *B. R.* there; and yet, that court affirmed the judgment of *C. B.* for both, and adjudged, that both ſhould recover.——On which *B.* brought error into *B. R.* here, and though — 1. Objection was taken that the court below had given damages for the non-payment, whereas damages cannot be given in a *ſci. fa.*——And 2. That the *ſci. fa.* in *B. R.* in *Ireland* was prayed by one executor *only*, though the writ of error was brought againſt

two,

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two, and no ſuggeſtion that either is dead; yet *B. R.* in *England* affirmed the judgment. And as to the firſt objection they ſaid, "that the being damnified and put to coſts to the amount of 6 *d.* was only meant as a foundation for the coſts *de incremento*; and the judgment is, that the plaintiffs ſhall recover 17 *l.* 14 *s.* 8 *d.* for their coſts and expences, &c.——To the ſecond objection, The *ſci. fa. quare*, &c. is only a proceſs to bring the plaintiff in error in to aſſign errors, and as he came in and aſſigned errors, he waved any objection, and admitted the one executor to be ſufficient to call upon him to aſſign errors; and from this we are to preſume, that the other executor is dead: And though a writ of error *by* one alone, upon a judgment againſt *two*, is not good, it is upon account of the inconvenience that would ariſe from a perpetual delay of execution, if every defendant might bring a writ of error by himſelf; but that reaſon does not not hold in this caſe, where the executors are *defendants* in error, and not *plaintiffs*. Knox *v.* Coſtello. Burr. 4 pt. 1789.

In an action for ſlander, verdict was for the plaintiff as to one ſet of words, and for defendant as to the other. And on error from *C. B.* into *B. R.* the errors aſſigned were, that there ought to have been a judgment for defendant as to the words of which he was acquitted, that he might be able hereafter to plead acquittal in bar of another action; and that the plaintiff ſhould have been amerced *pro falſo clamore* as to ſo much. The court of *B. R.* thought the iudgment inſupportable, but allowed the defendant in error to move the court of *C. B.* for leave to amend the record by the verdict, which was granted on a rule to ſhew cauſe; and then *B. R.* amended the record which had been ſent there, and affirmed the judgment. *Smith* v. *Fuller*. *Stra.* 786.

After error in *Cam. Scacc.* from *B. R.* the tranſcript was brought back and amended in *B. R.* by the original record there; and it was held neceſſary to make the amendment in *B. R.* becauſe this differs from the caſe of a writ of error from *C. B.* into *B. R.* for *C. B.* ſends up the very record, whereas *B. R.* only ſends the tranſcript. *Rutter* v. *Redſtone*. *Stra.* 837.

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Plaintiff's attorney, after a writ of error brought artfully, delayed ſigning the final judgment till the writ of error was ſpent, and then brought an action of debt upon the judgment. The court ordered proceedings in the action upon the judgment to be ſtayed, and a new writ of error to be brought at plaintiff's attorney's expence. *Arden* v. *Lamley*. *Barnes* 250.

After error brought on a judgment againſt an executor *de bonis propriis*, and *in nullo eſt erratum* pleaded, and on argument thereon in *Cam Scacc.* it was moved in *B. R.* to amend the judgment by making it *de bonis teſtatoris ſi, &c. et de bonis propriis ſi non, &c.* And the amendment was granted contrary to 1 Ld. *Raym.* 182. *Short* v. *Coffin Exor.* *Burr.* 4 *pt.* 2730.

Of False Judgment.

A Writ of *false judgment* lies where an erroneous judgment is given in any court not of record, in which the suitors are judges. *F. N. B.* 18. *a.*——

If there are no *suitors* by whom the plaint may be certified, there shall not be *false judgment*, as in a copyhold court, in which, upon an erroneous proceeding, the copyholder must sue to the lord by petition. *F. N. B.* 18. *H.*

A writ of false judgment upon a judgment in the sheriff's court, is in the nature of a *recordari*. F. N. B. 18. A. B.

And upon a judgment in another court, not of record, it is in the nature of an *accedas ad curiam*. Ibid.

A writ of false judgment may be sued by any one against whom judgment is given; his heir, executor, or administrator.

Or by any one who has damages, though the other defendants do not join as they ought to do in *error*. R. Mod. 854.

A writ of *false judgment* issues as a *writ of error* out of *Chancery*, upon application to the proper *cursitor*.

Upon the return of the writ and the whole record certified, and not before, the plaintiff shall assign his errors. *F. N. B.* 18. *I.*

And he may have a *scire facias ad audiendum errores*, as in error. *F. N. B.* 18. *F. G.* Or now he may serve a rule as in cases of error.

Or, if the defendant has day by the roll, the plaintiff may assign errors without a *scire facias* against him.

The writ of *false judgment* ought to be served in court. 6 *Hen.* 7. 16. *a.*

And being served, shall be a *supersedeas* to all proceedings below. 6 *Hen.* 7. 15. *b.*

Upon *two sci. fa. ad aud. errores* awarded, and *nihils* returned, or *scire feci* and default made, the judgment shall be reversed.

If a writ of false judgment abates, or the plaintiff therein is nonsuited, the defendant shall have a *scire facias quare executionem non*. F. N. B. 18. G.

If upon false judgment brought, which ought to be served in court, and the lord refuses to hold his court, a *distringas tenere curiam* goes against him. 6 *Hen.* 7. 16. *a.*

When the parties are once in court, the subsequent proceedings in *false judgment* are the same as in error.

A writ

A writ of false judgment was delivered to the under-sheriff, but no money was tendered or paid for the return; for want whereof, the sheriff took no notice of it and executed a writ *de executione judicii.* Upon hearing council on both sides, the sheriff's proceeding was now held to be regular. *Per cur.* The defendant if he think fit, may proceed on his writ of false judgment. *Gale* v. *Hooker. Barnes* 199.

Of Habeas Corpus.

AN *Habeas corpus* is a writ for bringing the body of him who is impriſoned, before the court, *cum cauſâ detentionis*, and is the proper remedy wherever a perſon is reſtrained of his liberty by being confined in a common gaol; or by a private perſon, whether it be for a criminal or a civil cauſe, to have his body and cauſe removed to ſome ſuperior juriſdiction, which hath authority to examine the legality of ſuch commitment; and on the return thereof, either bail, diſcharge, or remand the priſoner. *Vaugh.* 136.

Of this writ of *Habeas corpus* there are various ſorts, *viz.* The *habeas corpus ſubjiciendum*, which iſſues in *criminal* caſes.

Alſo, the *habeas corpus ad deliberandum et recipiendum*, another writ iſſuing in *criminal* caſes to remove a perſon to the proper place, where he committed an offence, to be tried.

Alſo, the *habeas corpus ad reſpondendum* which iſſues where one has a cauſe of action againſt a perſon (already confined for a cauſe of action accruing within an inferior juriſdiction) to charge him with this new action in a ſuperior court.

Alſo, the *habeas corpus ad ſatisfaciendum*, which iſſues after a judgment.

But the writ of *habeas corpus*, of which it will be neceſſary to treat here, is that of *habeas corpus ad faciendum et recipiendum*, which iſſues only in *civil* caſes, and lies where a perſon is ſued and in gaol, in ſome inferior juriſdiction, and is willing to have the cauſe determined in ſome ſuperior court, which hath juriſdiction of the matter. This writ is uſually called an *habeas corpus cum cauſâ*, and is grantable at all times of common right, whether in term or vacation, without any motion in court; and upon the delivery thereof to the officer or court below, it inſtantly ſuperſedes all the proceedings therein.

But an *habeas corpus*, where a party is committed for a crime, ought to be on motion. 1 *Lev.* 1.

Of the *Habeas Corpus ad faciendum et recipiendum.*

THE court of *Common Pleas*, as well as the *King's Bench*, has a general juriſdiction to grant writs of *habeas corpus* in all caſes whatſoever; but if, upon the return of ſuch writ to the court of *Common Pleas*, it appears that the body was in cuſtody for any *criminal matter*, that court cannot take cognizance of it. See *Wood*'s caſe. 3 *Wilſ.*

The writ of *habeas corpus* is engroſſed on a five ſhilling ſtamped piece of parchment, which is made out upon a note given to the office, and in *B. R.* is ſigned by the ſigner of the writs; in *C. B.* by the prothonotary, who takes fees to the amount of ſix or ſeven ſhillings.

In ſuing out the writ, care muſt be taken to ſtate the ſtile of the court, or perſon to whom it is to be delivered, with accuracy.

The liberty which every defendant had, againſt whom an action was commenced in an inferior court, of removing it into a ſuperior court at *Weſtminſter* to be determined, was formerly very much abuſed, as it was uſual for a defendant to ſue out a writ of *habeas corpus cum cauſâ*, and keep the ſame in his pocket, till iſſue was joined, the jury ſworn, and the plaintiff below had actually given his evidence, and then to produce the writ, and ſuſpend all further proceedings; by which piece of knavery, the defendant, from a knowledge of the evidence produced by the plaintiff, had an opportunity of making a better defence hereafter, when the cauſe came to be tried. But to prevent this abuſe for the future, by the 43 of *Eliz. c.* 5. it is enacted, "That no writ of *habeas corpus*, or other writ ſued "forth by any perſon whatſoever, out of any of her ma- "jeſty's courts of record at *Weſtminſter*, to remove any ac- "tion, ſuit, plaint, or cauſe depending in any inferior "court, having juriſdiction thereof, ſhall be received or "allowed by the judges or officers of ſuch court wherein "or to whom ſuch writs ſhall be delivered, (but they may "proceed therein, as if no ſuch writ were ſued forth or de- "livered) except, that the ſaid writ or writs be delivered "to ſuch judges or officers of the ſaid court, before that "the jury which is to try the cauſe in queſtion, and the "party that ſued forth the ſaid writ, or for whoſe benefit "it was ſued forth, have appeared, and one of the ſaid "jury ſworn to try the ſaid cauſe."

And

Of the *Habeas Corpus ad faciendum et recipiendum.*

And by the 21 *Jac.* 1. *c.* 23. *ſ.* 2. it is enacted, "That "no writs of *habeas corpus*, *certiorari*, or other writ ſued "forth to remove any action or ſuit commenced in any "inferior court, having juriſdiction thereof, ſhall be al- "lowed by the ſteward, judges or officers thereof, un- "leſs delivered before *iſſue* or *demurrer* joined in the ſaid "cauſe ſo depending, ſo as the ſaid iſſue or demurrer be "not joined within ſix weeks next after the arreſt or appear- "ance of the defendant to ſuch action or ſuit."

And by *ſect.* 3. "If any ſuch action or ſuit ſo as afore- "ſaid commenced in ſuch inferior court be removed by "any writ or proceſs, and afterwards remanded back by "writ of *procedendo* or other writ, that then the ſaid action "or ſuit ſhall never afterwards be removed or ſtayed before "judgment, by any writ out of any court whatſoever."

And by *ſect.* 4. it is enacted, "That if in any action or "ſuit, not concerning any freehold or inheritance, or title "of lands, leaſe or rent, be commenced or depending in "ſuch inferior court of record, it ſhall appear or be laid "in the declaration, that the debt, damages, or things "demanded, do not exceed 5 *l.* then ſuch action or ſuit "ſhall not be ſtayed by any writ whatſoever, other than "writ of error or attaint."

And by the *ſect.* 6. it is provided, that this act ſhall ex- "tend only to ſuch inferior courts of record, and for ſo "long time only, as there is or ſhall be *an utter barriſter of* "*three years ſtanding at the bar of the four inns of court*, "ſteward or under-ſteward, town-clerk, judge, or recorder "of ſuch inferior court, or aſſiſtant to the judge or judges "of the ſame, as ſhall not be an utter barriſter of that "ſtanding, and there preſent, and not of counſel in any "action or ſuit there depending.".

After this ſtatute was made, an expedient was hit upon by ſome knaviſh defendants to render the *fourth clauſe* there- of ineffectual; which was, by ſetting up a fictitious action againſt themſelves, (when the ſuit below was under 5 *l.*) for a pretended demand of 5 *l.* or upwards, and then bring an *habeas corpus* thereon, which writ removed all cauſes againſt them in that court; and thereby, notwithſtanding this clauſe, the ſmaller action under 5 *l.* was removed into the ſuperior court, to the prejudice of many poor plaintiffs, who, for want of ability and means to carry on a ſuit in

Of the *Habeas Corpus ad faciendum et recipiendum.*

the ſuperior court, was obliged often to deſiſt from proſecuting their ſuits, and thereby ſubmit to the loſs of their demands.

But by 12 *Geo.* 1. *c.* 29. *ſ.* 3. to prevent ſuch practice in future it is enacted, "That the judges of ſuch inferi- "or courts of record, as are deſcribed in the ſtatute of "*Ja.* 1. may proceed in ſuch actions commenced as are "therein ſpecified, which appear or are laid not to exceed "the ſum of *five pounds*, although there may be other ac- "tions againſt ſuch defendant, wherein the plaintiff's de- "mands may exceed the ſum of 5 *l.*

The ſtatute of 12 *Geo.* 1. *c.* 29. empowers the plaintiff, upon an affidavit made and filed that his cauſe of action amounts to *ten pounds* or upwards, to arreſt the defendant by proceſs out of the ſuperior courts—And where the cauſe of action amounts to *forty ſhillings* or upwards, within the juriſdiction of inferior courts, to arreſt the defendant by proceſs out of ſuch inferior courts. Which laſt part being found very inconvenient, and prejudicial to the lower claſs of people, by putting it in the power of any one to whom they were indebted in forty ſhillings, within the juriſdiction of the *Marſhalſea* or other inferior court, to arreſt their bodies, and impriſon and withhold them from their families and work, the *ſtat.* 19 *Geo.* 3. *c.* 70. extends the former part of the 12 *Geo.* 1. *c.* 29. to inferior courts; ſo that neither in the ſuperior nor inferior courts, can any one now be *arreſted or held to ſpecial bail*, unleſs by proceſs founded on an affidavit duly made and filed in the court, that the cauſe of action amounts to *ten pounds* or upwards—But to prevent inconveniencies and delay to plaintiffs proſecuting for ſmall debts in ſuch inferior courts, by the ſame ſtatute, 19 *Geo.* 3. *c.* 70. it is further enacted, "That no cauſe, "where the cauſe of action ſhall not amount to the ſum of "10 *l.* or upwards, ſhall be removed or removeable into any "ſuperior court by any writ of *habeas corpus*, or otherwiſe, "unleſs the defendant who ſhall be deſirous of removing "ſuch cauſe, ſhall enter into a recognizance with two "ſureties in double the ſum laid in the court from which "it is to be removed for payment of the debt and coſts, in "caſe judgment ſhall paſs againſt him."

Of the *Habeas Corpus ad faciendum et recipiendum*, when grantable, and to what Places.

BY *Reg. Mich.* 1654. *ſect.* 7. A writ of *habeas corpus* to remove the body of a priſoner directed to the ſheriffs of *London* or *Middleſex*, the judges of the *Marſhalſea court*, or inferior courts within five miles of *London*, may be granted in vacation or term time, returnable immediately; but if the *habeas corpus* be directed to any other ſheriff or court farther diſtant, it muſt be returnable at a day certain in court, unleſs it be to deliver over a priſoner in diſcharge of his bail. *Prax. U. B.* 1.

But notwithſtanding the above rule in both courts, it was held in *B. R.* in the caſe of *Doctor Betteſworth* v. *Bell. Burr.* 4 *pt.* 1875. That ſuch writ of *habeas corpus ad faciendum et recipiendum*, directed to a gaoler, *&c.* of an out county, may be returnable before a *judge*, and *immediatè*, as well as on a day certain in term. And it was there ſaid, that the above rule, *Mich.* 1654. was fallen long ſince into diſuſe.

The writ of *habeas corpus* being a prerogative writ, lies by the common law to any part or the king's dominions, for he ought to have an account why any of his ſubjects are impriſoned. 1 *Rol. Abr.* 69. *Cro. Jac.* 543. It lies to *Jerſey* and *Guernſey*. Vent. 347. Sid. 386. — To *Berwick* and *to counties palatine*. Latch. 160. 3 Keb. 279. And to the *marſhes of Wales*, as it does to all other courts which derive their authority from the king, as all the courts exerciſing juriſdiction within his dominions do; and that it being a prerogative writ, does not come within the rule *brevia domini regis non currunt*, &c. for that muſt be underſtood of writs between party and party. 2 *Rol. Abr.* 69. *Wetherley* v. *Wetherley*.

But an *habeas corpus ad faciendum et recipendum* does not lie to the cinque ports, at the ſuit of a ſubject. Vide *Bac. Abr.* and authorities there cited. 3 *Vol.* 4.

The

The Form of the Writ of *Habeas Corpus ad faciendum et recipiendum.*

THE form of the writ of *habeas corpus cum cauſâ*, &c.

GEORGE the third, *&c.* To the [deſcribe the ſheriff, judge, or ſteward of the court to which it is directed properly] greeting. We command you, that you have the body of *C. D.* detained in our priſon under your cuſtody, as it is ſaid, by whatſoever name he may be called, in the ſame, together with the day and the cauſe of the taking and detaining the ſaid *C. D. before our right truſty and well beloved William earl of Mansfield, our chief juſtice, aſſigned to hold pleas in our court before us*, [or if in *C. B. before Sir William De Grey, knight, our chief juſtice of the Bench*] at his chambers, ſituate in *Serjeant's Inn*, in *Chancery-Lane*, [or if to be returnable in term, make it returnable at a day certain in term] immediately after the receipt of this our writ, to do and receive all and ſingular thoſe things which our ſaid chief juſtice ſhall then and there conſider or him in this behalf, and have there this writ. Witneſs, *&c.* ———

If the writ be returnable before the chief juſtice, any other judge of the court may commit the defendant to the priſon of the court.

Beſides the fees paid upon ſuing out the writ and ſealing the ſame, fees are paid in the inferior court to the ſheriff, or judge thereof, for the allowance of the writ, for the return thereof, for the number of cauſes there happen to be againſt the defendant in ſuch inferior court, *&c.* Alſo fees paid upon the warrant to the bailiff to bring him up, and to the gaoler to deliver him, beſides the fees paid at the judge's chambers; or if it is returnable in court, to the ſecondary, crier, tipſtaff, *&c.* to the amount ſometimes of three or four pounds.

Of the *Habeas Corpus ad faciendum et recipiendum*, and herein of returning the Writ, &c.

THE writ of *habeas corpus*, immediately upon being ſerved, ſuſpends the power of the inferior court; and if they proceed afterwards, the proceedings are void, and *coram non judice*. 1 Salk. 352. Cro. Car. 261. 2 Jones 209. 2 Mod. 195.

A *habeas corpus* to the town court of *Nottingham*, was delivered to the proper officer in open court, to remove a plaint from that court before trial, yet the court below went on to the trial; and defendant moved for an *attachment* againſt the ſheriff for proceeding to trial after *habeas corpus* delivered, and rule made to ſhew cauſe. On ſhewing cauſe it appeared, that the iſſue was joined 27th of *April*, and the *habeas corpus* was not delivered till *May*, ſo the court below was warranted to proceed [vide 21 *Jac.* 1. *ante*]. And the rule was diſcharged. *Barnes* 221.

The record itſelf is not removed by *habeas corpus* as it is by *certiorari*, but remains below; and the return is only a hiſtory of the proceedings.

The writ muſt be returned by the ſame perſon to whom it is directed; and where the writ was awarded to a ſheriff, who before the return left his office, and a new ſheriff was made who returned *languidus*, the court held the return not good; but it ought to be returned by the two ſheriffs; by the old ſheriff that he had the body, and had delivered it to the new ſheriff; and then the new ſheriff might have returned *languidus*. Peck *v.* Creſſett. Paſ. 26 Car. 2.

The writ muſt be returned, otherwiſe an *alias* and *pluries* goes; and after that, an *attachment*.

A defendant being in cuſtody of the ſheriff of *Briſtol*, brought his *habeas corpus* to be removed to the *Fleet*, and tendered it to the ſheriffs, with ſeven guineas, (exceeding 1 *s. per* mile) which the ſheriffs refuſed to accept, inſiſting on 10*l.* On which the defendant moved for an attachment againſt the ſheriffs; which, on ſhewing cauſe was made abſolute. *Barnes* 377.

It was held, that a ſheriff upon an *habeas corpus* is not bound to bring up the priſoner, unleſs reaſonable charges be tendered him. *Cox* v. *Dowl. Hil.* 20 & 21 *Car.* 2.

But in *Hopman* v. *Barber*, *Stra.* 814. It was held ſince, that an officer muſt obey the writ of *habeas corpus*, though the party refuſes to pay him his fees, for he has a remedy for them.

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But then the court will not, upon his being brought up, order him to be turned over to the priſon of the court, till the officer is ſatisfied his charges for bringing him up. *Vide Stra.* 308.

An *habeas corpus cum cauſâ* went to the portreeve of *Yeovil* in *Somerſetſhire*, who returned, *that before the coming of the writ the party was bailed*; and the plaintiff's counſel moved for a better return; and it was ruled that he ſhould make a better return; for though the body be bailed, he ought to return the cauſe—and the body cannot be bailed after the writ received. *Salmon* v. *Slade*, *Hil.* 25, 26 *Car.* 2.

An *habeas corpus* went to the ſtannary court, to which an inſufficient return was made, and therefore diſallowed. *Et per cur.* The warden of the ſtannaries muſt be amerced, and you may go to the coroners and get it affeered, and eſtreat it; and an *alias habeas corpus* muſt go for the inſufficiency of the return to the firſt, and upon that the body and cauſe muſt be removed up; if another excuſe be returned, we will grant an attachment. *Salk.* 350. *pl.* 8.

Where an *habeas corpus* is directed to an inferior court, and the ſteward has liberty to proceed by the 21 *Jac.* 1. *c.* 23. yet the writ muſt be returned with the ſpecial matter, or the perſon to whom it is directed will be in contempt. *Carth.* 69.

An *habeas corpus* was ſued to remove a cauſe out of *London*; the plaintiff prayed a *procedendo*, becauſe the action was for calling the plaintiff *whore*, which is not actionable elſewhere.—The defendant's counſel alledged, that neither of the parties lived in *London*, nor were the words ſpoken there. And *per Hale*, ch. juſt. If the words were not ſpoken there, the plaintiff ſhall not have a *procedendo*, for the words may be made actionable every where, by laying them in *London*. 2 Roll. Abr. 69.

In a like action in *London*, before declaration, an *habeas corpus* was brought to remove it into *B. R.* to which the ſheriffs returned generally, *that at ſuch a court came the plaintiff and levied his certain plaint againſt the defendant in a plea of treſpaſs on the caſe, to the damage of* 500 l. *whereupon iſſue was joined, which remains ſtill undetermined*, &c. And upon the return a *procedendo* was prayed, upon a ſuggeſtion, that the action was commenced for calling plaintiff *whore*, which is actionable in *London*, and not elſewhere; therefore if a *procedendo*

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cedendo ſhould be denied, plaintiff would loſe her action, and by this means all ſuch actions would be loſt; and an affidavit was produced, in which plaintiff depoſed, that the only cauſe of action was *ut ſupra*. *Per Holt.* It does not appear by this return, what was the cauſe of action. The declaration itſelf ought to be returned upon the *habeas corpus*, and then the court would ſee what the cauſe of action was. And if the writ was delivered before the plaintiff had declared, yet he ought immediately to have entered his declaration, that it might be returned upon the writ. For all the proceedings in this caſe of a *cuſtom* ought to be returned, as well as in an action upon a *bye-law*. Afterwards the return was amended, and then the court granted a *procedendo*. Watſon *v.* Clerke, Carth. 75.

On an *habeas corpus* to the ſheriffs of *London*, they returned an action on a *bye-law*, with a penalty; and then it was moved to have the return filed. *Per Holt.* If a record is once filed here, it can never after be remanded, either in the term it is filed, or any other. — 2*d*. The record itſelf is never removed by *hab. corp.* the return is only an account of the proceedings; and when it is removed the plaintiff muſt declare *de novo* againſt the defendant *in cuſtodia mareſchalli*, &c. 3*d*. The *hab. corp.* immediately ſuſpends the power of the court below. 4*th*. The return in this caſe may be filed, becauſe the very record is not returned, and therefore will not be filed; of conſequence then a *procedendo* may be granted, becauſe it will not ſend out any record filed, but only remove the ſuſpenſion. Accordingly, the writ being filed, a *procedendo* was awarded. *Salk.* 352.

If a writ of *habeas corpus* is made returnable *immediatè*, it ought to be returned the ſame day it is delivered, and the body brought up immediately.

By the old rule, *Mich.* 1654, all writs of *habeas corpus* directed to any ſheriff or officer of an inferior court, at above the diſtance of *five* miles from *London*, if made returnable in *Hilary* or *Trinity* terms, muſt be made returnable at a day certain preceding the ſecond return of thoſe terms, in order, if bail be required thereon, the plaintiff may be enabled to declare of the ſame term, and the defendant ſhall be obliged to plead to iſſue as of theſe terms, ſo that the plaintiff may try his cauſe the next aſſizes, if he

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thinks fit; or in default of pleading, that judgment may be entered againſt defendant of the ſame term, if rules to plead are given in due time.

And if the *habeas corpus* is ſued out in *Hilary* or *Trinity* terms, or the beginning of the vacations of thoſe terms, the writ muſt be made returnable the firſt or ſecond return of the ſubſequent terms, *viz. Eaſter* or *Michaelmas*, or the plaintiff, on ſummons before a judge, may have a *procedendo*.

After interlocutory, and before final judgment in an inferior court, an *habeas corpus cum cauſa* was brought; before the return of the writ the defendant died, and a *procedendo* was awarded; becauſe, by the 8 & 9 *W.* 3. *c.* 11. the plaintiff may have a *ſcire facias* againſt the executors, and proceed to judgment, which he cannot have in another court; and by this means he would be deprived of the effect of his judgment, which would be unreaſonable. *Salk.* 352.

A cauſe was removed, after *interlocutory* and before *final* judgment, by *habeas corpus*, and a *procedendo* was refuſed, becauſe this is not within the words of the act 21 *Jac.* 1. *c.* 23. which are, that the *habeas corpus*, *certiorari*, &c. ſhall not be received or allowed; but that the inferior judge may proceed; except the writ be delivered to ſuch inferior judge, &c. before *iſſue* or *demurrer* joined in the cauſe (ſo as it be not joined within ſix weeks after the arreſt or appearance of the defendant). And the practice having been to allow the *habeas corpus*, if delivered before the jury are ſworn, the court refuſed a *procedendo*. Burr. 4 pt. 758. but ſee *Pract. Reg. C. P.* 217. *cont.*

Motion for a *procedendo* to a borough court, the *habeas corpus* to remove the cauſe having been brought after interlocutory judgment, and the court of *C. P.* held the *habeas corpus* too late, and made the rule for a *procedendo* abſolute. *Barnes* 221.

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IN all caſes where ſpecial bail was required in the court below, if the cauſe is removed by *habeas corpus*, either into *B. R.* or *C. B. ſpecial bail* muſt be put in above on the removal, though the debt is under 10 *l.* except the defendant is an *heir*, *executor*, or *adminiſtrator*. Reg. Hil. 2 Jac. 2.

The above is the old rule—but now by the 19 *Geo.* 3. *c.* 70. as no one can be arreſted or held to *ſpecial bail* in any inferior court, without an affidavit made and filed that the cauſe of action amounts to 10 *l.* or upwards; it follows, that where the debt is under 10 *l.* and the defendant is not arreſted below, there he would not be obliged upon removal to find *ſpecial bail* above. But to defeat the advantage that might be taken of this, by removing the cauſe in order to delay the plaintiff, the ſame ſtatute provides, that no action in an inferior court, not amounting to 10 *l.* or upwards, ſhall be removed by *habeas corpus*, *&c.* unleſs the defendant ſhall enter into a recognizance, with two ſureties, in the court below, in double the ſum for which the action is brought, for payment of the debt and coſts in caſe judgment ſhall paſs againſt him.

An *heir*, *executor*, or *adminiſtrator*, although he has put in *bail below*, ſhall not, upon removal, put in *bail above* to pay the condemnation money; yet he ſhall put in bail above to appear to a new bill or original, within two terms, but not after. But if debt is brought againſt an executor, on a judgment ſuggeſting a *devaſtavit*, he ſhall give bail, for there the action is in the *debet et detinet*. Vide Salk. 98. *and* 1 Lev. 268. 2 *Lev.* 204.

No bail to be tendered, or put in upon an *habeas corpus*, until the *habeas corpus*, and cauſe for which bail is to be put in, be returned, to the end that it may appear for what cauſe the defendant is detained, and bail may be taken, and the *habeas corpus* and *bail* duly filed. *Mich.* 1654. *Paſ.* 29 *Car.* 2. *Hil.* 16 *W.* 3.

A defendant who had removed a cauſe from an inferior court into *B. R.* or *C. B.* is not of courſe obliged to put in *ſpecial bail* there; but it lies with the plaintiff to compel him ſo to do. In order therefore to get bail to the action, the plaintiff, immediately as he diſcovers that the cauſe is removed, ſhould take out a rule, or order, from the chambers of one of the judges of the court, for a *procedendo* to remand the cauſe, unleſs good bail be put in within *four days* next

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after notice of the rule (if in term) or within *ſix days* next after notice of the rule, [if in vacation] and then ſerve a copy of ſuch rule or order on the defendant, or his attorney; and unleſs bail be put in accordingly, a *procedendo* may be had.

An action was brought in the ſheriff of *London*'s court againſt *two* partners, one brought an *habeas corpus*, and put in bail for himſelf only. And a *procedendo* being moved for, it was granted: for otherwiſe the plaintiff would be diſabled to go on in either court. *Fry* v. *Carey*, *Stra.* 527.

Habeas corpus to remove a cauſe out of an inferior court; and on ſearch plaintiff's attorney finds bail; but the *habeas corpus* not being returned and filed, the bail ſignified nothing, and therefore he carried the cauſe back by *procedendo*, of which defendant complained to the court; but it was ruled, that the defendant cannot put in bail till the *habeas corpus* be returned. *Maſters* v. *Bruges*, *Mich.* 20 *Car.* 2.

If *common bail* only is neceſſary, the attorney for the defendant fills up a common bail-piece to the *habeas corpus* and return, and files the ſame at the judge's chambers on the return of the rule, and gives notice of having filed the ſame to the plaintiff's attorney.

If *ſpecial bail* is required, the defendant upon ſervice of the rule for bail engroſſes a bail-piece, and annexes the ſame to the *habeas corpus* and return; and then takes the bail to the judge's clerk, who will take their acknowledgment, to whom is paid in term 6 *s.* 6 *d.* in vacation 7 *s.* 6 *d.* and then notice thereof muſt be given to the plaintiff's attorney.

In *B. R.* if bail be taken in the abſence of the plaintiff, or his attorney, the ſame is taken *de bene eſſe*; and if on due notice in writing of the names and places of abode of ſuch bail, the time when put in, and before whom, no exception thereto be taken by the plaintiff in *twenty-eight days* after the putting them in, the bail-piece ſhall then be filed within *four days* next after the end of the *twenty-eight days*. Mich. 16 Car. 2.

In *C. B.* if bail be taken *de bene eſſe*, and on notice being given of the names and places of abode of the bail, the time when put in, and before whom, no exception thereto be taken in *twenty days*, the bail-piece ſhall be filed within *four days* next after the expiration of the *twenty days*. Hil. 13 & 14 Car. 2.

And

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And unleſs the bail, in caſe of no exception within time, be not filed within the *four days*, a *procedendo* may be granted upon a certificate that the bail is not filed. *Same rules.*

If the plaintiff diſlikes the bail put in, he ſerves the defendant's attorney with another rule or order for a *procedendo*, unleſs better bail be put in within *four days* after ſervice thereof, whether it be in term or vacation. In term this rule coſts 1 *s.* in vacation 2 *s.*

If this rule is ſerved in *vacation time*, in *B. R.* the practice is, for the defendant's attorney to give notice only within the rule, that the bail will juſtify on the firſt day of the enſuing term. *Att. Prac. B. R.*

But on ſervice of ſuch rule in *vacation time* in *C. B.* it is uſual to juſtify within the four days before a judge at his chambers, for which 2 *s.* is paid; and on the firſt day of the term juſtify in court. *Att. Pract. C. B.* 283.

The practice is exactly the ſame as to notices of bail, exception thereto, and juſtifying bail on *habeas corpus*, as in other caſes, for which refer to the firſt vol.

When bail is taken of a priſoner in cuſtody, the judge's clerk in *C. B.* is to deliver the bail to the *prothonotary* to be filed, if aſſented to, and for that purpoſe the *prothonotary*'s fees are to be depoſited; but the priſoner is not to be diſcharged until the bail be aſſented to, or the plaintiff overruled in open court to accept the ſame upon examination. *Mich.* 1654. *Hil.* 13 & 14 *Car.* 2.

If the defendant is an actual priſoner in an inferior court, and brings an *habeas corpus* to remove the action into a ſuperior court, the *habeas corpus* will not diſcharge him out of cuſtody till *bail* is put in above and perfected; therefore it is the better way, to gain the defendant his liberty, to put in bail below, and then remove the cauſe into the ſuperior court if he would have it there determined.

If a cauſe is removed by *habeas corpus* out of the *Marſhalſea*, or other inferior court [*London* excepted] and the bail below offer to be bail above, the plaintiff cannot except to them, but is compellable to take them, becauſe he might but did not except to them below. But it is otherwiſe in a cauſe from *London*, for the ſufficiency of the bail there is at the peril of the clerk, and he is reſponſible to the plaintiff, ſo that the plaintiff has not the liberty of excepting againſt them, and the clerk is not reſponſible if they be de-

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ficient in the court above, though he was in *London*. Salk. 97.

A cauſe was removed by *habeas corpus*, in vacation time, and the bail put in on the removal ought to have juſtified on the firſt day of the enſuing term: [a rule having been ſerved on the defendant for a *procedendo*, unleſs better bail] and the bail not having offered themſelves the firſt day of the term, a *procedendo* was ſued out to remand the cauſe. On the ſecond day of the term the bail came and offered to juſtify, but were then too late; however, a rule was obtained to ſhew cauſe, why the *procedendo* ſhould not be ſet aſide: But on ſhewing cauſe the rule was diſcharged, for it was ſaid, that ſhould this rule be made abſolute, it would operate as a ſecond *habeas corpus*, which can never be granted after a cauſe is once remanded by a *procedendo*. Anon. *B. R.* 1778. The counſel offered to pay coſts of the *procedendo*, but nevertheleſs the court diſcharged the rule.

May 20*th* 1742, an *habeas corpus*, returnable *immediatè*, was lodged at the *palace-court* to remove a plaint into *C. B.* and nothing further was done in it till 20*th of Nov.* when the plaintiff ſerved the defendant with a rule to put in bail. Defendant inſiſted, that the plaintiff ſhould have ſerved ſuch rule within *two terms* after the *hab. corp.* brought, and was now too late. But the court held, that if the defendant had put in bail upon the *hab. corp.* without ſtaying to be forwarded by a rule for bail; and the plaintiff had not declared within two terms after bail put in, the cauſe would then have been out of court; but the rule for bail is not limited to any particular time: accordingly the rule to ſhew cauſe why proceedings ſhould not be ſtayed, was diſcharged. *Barnes* 90.

If one be removed into *B. R.* by *habeas corpus*, and puts in bail, the bail are liable to all other actions, as well as that for which they become bail, at the ſuit of the ſame plaintiff mentioned in the return of the *habeas corpus*, wherein he ſhall declare againſt the ſaid defendant within *two terms* next after: but ſee the next caſe.

The defendant was arreſted by proceſs out of an inferior court, *in a plea of treſpaſs on the caſe*; bail was given, the plaintiff declared, and the cauſe was removed by *habeas corpus*; and then the plaintiff delivered two declarations, one for words, the other upon an *aſſumpſit*. *Per Hale.* If a plaintiff

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tiff has declared before the *habeas corpus* delivered, the bail ſhall be ſpecial only as to that action; and ſhall be common to the other: but if no declaration before *habeas corpus*, then the bail put in upon the *habeas corpus* ſhall be ſpecial bail to all actions of the plaintiff againſt the defendant of that term; and the plaintiff cannot declare before the *habeas corpus* allowed. *Serle* v. *Newton*, *Hil.* 25, 26 *Car.* 2.

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THE record itſelf is never removed by *habeas corpus*, but remains below, therefore the plaintiff muſt declare *de novo*; and the declaration is exactly the ſame as in other caſes: and if in *B. R.* he is ſtated to be in *cuſtodia mareſchalli*. Salk. 352.

The plaintiff muſt declare before the end of the ſecond term after the return of the *habeas corpus*, otherwiſe the defendant is not bound to accept a declaration. And *note:* If the *habeas corpus* is returnable in term, that term is one; and the plaintiff muſt declare before the end of the ſucceeding term. *Vide Hutton* v. *Stroubridge*, *Stra.* 631.

There is no limited time for the plaintiff's getting an order for a *procedendo*, unleſs bail be put in. *Barnes* 90.—But if the defendant puts in bail in time, and the plaintiff does not declare in two terms, the cauſe is out of court.

If a cauſe is removed by *habeas corpus* out of the courts of *Canterbury*, *Southampton*, *Hull*, *Litchfield*, *Pool*, or other counties where the judges of *niſi prius* ſeldom go, if the action be tranſitory, it muſt be laid in the county of *Kent*, *Hampſhire*, *Yorkſhire*, *Staffordſhire* or *Dorſetſhire*, or other county in which ſuch city or town lies, and the recognizance is to be taken accordingly. *Mich.* 1654.

When a defendant has removed his cauſe into the ſuperior court, and perfected his bail, he cannot ſign a *non-proſs*, for want of a declaration, as the plaintiff is not in court till he has declared, and the cauſe is ſuppoſed to be removed againſt his inclination.

Of the *Habeas Corpus ad faciendum et recipiendum*, and herein of Pleading.

IF a cauſe be removed out of *London* or *Middleſex*, the *Marſhalſea*, or any other court within five miles of *London*, in *Hilary* or *Trinity* term, and bail is put in, and the plaintiff declares in *London* or *Middleſex*, and delivers his declaration *ſix days* before the end of the term, the defendant ſhall plead *three days* before the eſſoign day of the ſubſequent term, that the plaintiff may enter the iſſue if he will; but if the plaintiff does not deliver his declaration *ſix days* before the end of the term, the defendant ſhall have an imparlance till the next term. Vide 1 *Mod.* 1.

And if a cauſe is removed out of any court, except in *London* or *Middleſex*, the *Marſhalſea*, or other court within five miles of *London*, and the plaintiff does not declare in *London* or *Middleſex*, but in ſome other county, and delivers his delaration at any time before the end of the terms of *Hilary* or *Trinity*, the defendant is bound to plead by the time the rule is out, that the plaintiff may try his cauſe at the aſſizes, if he thinks proper; and for want of a plea in due time, judgment may be entered againſt him.

And if a cauſe is removed by *habeas corpus* returnable in *Michaelmas term*, and the plaintiff declares in *London* or *Middleſex*, and delivers his declaration before *craſtinum animarum*, the defendant muſt plead to trial the ſame term.

So, upon an *habeas corpus* returnable in *Eaſter term*, if the plaintiff declares in *London* or *Middleſex*, and delivers his declaration before *menſem Paſchæ*, the defendant muſt plead to trial the ſame term. *Salk.* 515.

But if the declaration is delivered after theſe reſpective times, and yet *ſix days* before the end of either of theſe terms, the defendant, wherever the action is laid, ſhall plead three days before the eſſoign day of the ſubſequent term; and if not delivered *ſix days* before the end of either of theſe terms, the defendant has an imparlance until the next term.

The above was the practice before the 5 & 6 *Geo.* 2. but by rule made in *B. R. Tr.* 5 & 6 *Geo.* 2. and *Mich.* 3 *Geo.* 2. in *C. B.*

On all proceſs returnable the *firſt* or *ſecond* return [*i. e.* before the * *third* return] of term, if the plaintiff declares

* And by *Reg. Tr.* 7 *Geo.* 3. On all proceſs returnable the third return of term,

in

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in *London* or *Middlesex*, and the defendant lives within twenty miles of *London*, the declaration may be delivered with notice to plead within *four days* after delivery, and the defendant shall plead within that time; and if the plaintiff declares in any other county, or the defendant lives above twenty miles from *London*, the declaration is to be delivered, with notice to plead in *eight days after*; and if the defendant does not plead in that 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.

But a declaration must be delivered *four days* before the end of term, exclusive of the day of delivery, to have a plea of that term.

Since the making of the above rules, some have proceeded upon an *habeas corpus* according thereto, as if upon a *cepi corpus*, whilst others have adhered to the old practice, as to pleading upon an *habeas corpus* before mentioned.

A plea in *abatement* must be pleaded within the *four days*, as in other cases of pleas in abatement. Vide *Pleas in Abatement in the* 1st *vol.*

Debt against a *feme sole* in the palace court, and after appearance and plea pleaded she married, and then removed the cause by *habeas corpus*; and after the plaintiff had declared against her above, she pleaded her coverture in abatement, *viz.* that she was married at the time the *habeas corpus* sued out. And it was ruled a good plea, for the proceedings are *de novo*, and the court takes no notice of the proceedings below. But the court said, that if this matter had been moved on the return of the *habeas corpus*, they would have granted a *procedendo*: for though an *habeas corpus* be a writ of right, yet where it is to abate a rightful suit, the court may refuse it. 1 *Salk.* 8.

But *note*: That coverture, *after* an action brought, cannot abate a plaintiff's writ. Ld. *Raym.* 1525. *Stra.* 811.

Though coverture *before* does, if the action is brought against her as a feme sole, and an *habeas corpus* to remove a cause, is considered as the first commencement of the action in the court above.

An action was brought in the sheriff's court of *London*, and was removed by *hab. corp.* into *B. R.* the 6th of *Nov.* the first day of *Michaelmas* term. On the twelfth, plaintiff delivered

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delivered his declaration, and gave a rule to plead: On which, the defendant moved for an *imparlance*, and inſiſted the practice was the ſame as if the action was originally commenced in this court, and cited *Salk.* 515. where it was held, that on *hab. corp.* returnable in *Michaelmas term*, if the declaration be delivered before *craſ. animarum*, the defendant muſt plead *to try*; but on a *cepi corpus*, he is only to plead *to enter*.

So in *Eaſter term*, if the declaration be delivered before *menſem Paſchæ*, the defendant, on an *habeas corpus*, muſt plead *to try*, upon a *cepi corpus* only *to enter*. But the court in the principal caſe ſaid, We will not put the plaintiff in a worſe condition than he was in the court below, and therefore refuſed an imparlance. 1 *Wilſ.* 154.

All ſubſequent proceedings to the declaration, are the ſame upon an *habeas corpus* as in other caſes.

Of the *Habeas Corpus ad faciendum et recipiendum*, and herein of granting a *Procedendo*.

THROUGHOUT the foregoing pages under this title, we have ſeen in what caſes the plaintiff is at liberty to remand the cauſe to the original juriſdiction, upon the defendant's not complying, upon removing a ſuit commenced againſt him by *habeas corpus*, with the ſtatutes and rules of court made to regulate the proceedings therein upon ſuch removal—as for want of putting in bail, where ſpecial bail is required; not juſtifying bail in due time, when ſerved with a rule; not pleading in time to the declaration delivered, *&c.*

A *procedendo* is a writ grantable by any judge of the court into which the cauſe was removed, upon application to one of their clerks at chambers.

The writ muſt be engroſſed on a two ſhilling ſtamped piece of parchment, and muſt be ſigned and ſealed; for which the uſual fees are paid.

The writ is to this effect:

GEORGE the third, by the grace of God, *&c.* To the ſheriff of ——————— or judges of, *&c.* [ſtiling the court and judges thereof properly] greeting. Although we lately by our writ commanded you, that you ſhould have the body of *C. D.* detained in our priſon under your cuſtody, as it was ſaid, under ſafe and ſecure conduct, together with the day and cauſe of his being taken and detained, by whatſoever name the ſaid *C.* might be called, in the ſame, before *our right truſty and well beloved William earl of Mansfield, our chief juſtice, aſſigned to hold pleas in our court before us*, at his chambers, ſituate in *Serjeant's Inn, Chancery-Lane*, immediately after the receipt of that writ, to do and receive all and ſingular thoſe things which our ſaid chief juſtice ſhould then and there conſider of him in that behalf. Yet we, being now moved with certain cauſes in our court *before us*, command you and every of you, that in all plaints or ſuits againſt the ſaid *C.* at the ſuit of *A. B.* in our court before you, or any of you levied or affirmed, or before you or any of you now depending undetermined, you proceed with what ſpeed

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you can in ſuch manner, according to the law and cuſtom of *England*, as you ſhall ſee proper. Our ſaid writ to you thereupon firſt directed to to the contrary in any thing notwithſtanding.

Witneſs *William earl of Mansfield*, &c.

Stormont and *Way*.

Upon carrying the writ of *procedendo* to the ſecondary of the court to which it is directed, and filing it, the court inſtantly reaſſumes the juriſdiction of the cauſe, which can never afterwards be taken from them again before judgment.

As the writ of *habeas corpus* removes all the cauſes that were in the court againſt the defendant, the writ of *procedendo* remands all back again.

Of Audita Querela.

AN *audita querela* is a writ to give relief againſt a judgment or execution awarded, or likely to be awarded againſt the party, by ſetting the ſame aſide upon ſome ground of injuſtice pointed out to the court.

If there is any other remedy at law, either by plea or otherwiſe, an *audita querela* does not lay, except in one or two inſtances in which the party has his election of this or another remedy.

An *audita querela* is an action, and is in the nature of a bill in equity to be relieved againſt the oppreſſion of the plaintiff. The writ ſtates that the complaint of the defendant hath been heard *audita querela defendentis*, and then ſetting out the matter of the complaint, it at length enjoins the court to call the parties before them; and having heard the allegations and proofs, to cauſe juſtice to be done between them.

It alſo lies to relieve bail in ſome caſes, and is a writ of a moſt remedial nature, and ſeems to have been invented, leſt in any caſe there ſhould be an oppreſſive defect of juſtice, where a party has a good defence, but by the ordinary forms of law had no opportunity to make it. But the indulgence now ſhewn by the courts in granting a ſummary relief upon * motion, in caſes of evident oppreſſion, has almoſt rendered the writ of *audita querela* uſeleſs, and driven it quite out of practice. However, as there are a few caſes in which this muſt ſtill be the remedy, ſome ſhort account of the proceedings therein cannot be altogether unneceſſary.

* For it has been held, that relief may be granted on motion in caſes proper for *audita querela*, where it is not grounded on foreign matter, as a releaſe, &c. Ld. *Raym.* 439. *Barnes* 277.

Out of what Court the Writ iſſues.

AN *audita querela* ſhall be granted out of the court, where the record upon which it is founded remains, or returnable in the ſame court. *F. N. B.* 105. *b.*

And therefore, if a man recovers in *B. R.* or *C. B.* the defendant having a releaſe after judgment and before execution, ſhall ſue the *audita querela* out of *B. R.* or *C. B.* where the record is. *Ibid.*

And if a recognizance is acknowledged, and there is a releaſe of it, and then execution be ſued on it, the party to be relieved ſhall ſue his *audita querela* out of the ſame court. *Ibid.*

And ſuch *audita querela* out of the rolls of the ſame court is *judicial.* Ibid.

But it may be *original*, and the party may ſue it out of *Chancery* returnable in the court where the record remains. *Ibid.*

But it cannot be granted out of any court, returnable in the ſame court, where the record upon which it is founded is not there. *Ibid.*

The writ of *audita querela* ſhall be allowed only in open court. 1 *Bulſ.* 140. 2 *Bulſ.* 97. 2 *Show.* 240. And on motion by *Trin.* 9 *Jac.* 1. And therefore, when the curſitor has written the writ, an *allocatur* ſhall be indorſed by the *ſecondary* in court.

So if it be irregularly granted, a *vacat* ſhall be entered upon the record. *Mo.* 354.

Of Profecuting an *Audita Querela* by the Defendant in the Suit.

IT was ſaid, before that an *audita querela* lies to relieve the defendant after judgment and execution againſt him—and alſo that it lies to relieve *bail* when judgment is had againſt them upon a *ſcire facias* to anſwer the debt of their principal; but as the proceedings in the two caſes ſomewhat differ, I ſhall firſt treat of the *audita querela* by the *defendant* himſelf.

In all caſes it is uſual, that the plaintiff in an *audita querela* be bailed, if he ſhews matter in writing for his diſcharge, and the defendant be demanded whether he can gainſay it. 1 *Rol.* 133, 384. 2 *Rol.* 113. *l.* 5.

If the plaintiff in *audita querela* has a releaſe or other writing upon which his *audita querela* is founded, the ſame muſt be proved in court by the witneſſes thereto, before the writ of *audita querela* can be allowed, or a *ſuperſedeas* granted. 1 *Sid.* 351.

And then, after proof of ſuch releaſe, *&c.* and allowance of the writ, if he be not in *execution* he may be bailed by the court, and on motion may have a *ſuperſedeas.* Com. Dig. 1 vol. 489. Salk. 92.

But if the plaintiff in *audita querela* be in *execution*, he cannot be bailed till the defendant plead to the *audita querela.* Comp. Att. 214.

But where an *infant* was taken in execution and brought an *audita querela*, he was diſcharged on clearly proving his infancy. *Carth.* 278.

If an *audita querela* be founded on record, or the party be in cuſtody, the proceſs upon the *audita querela*, when allowed, is a *ſcire facias*—But if the *audita querela* is grounded on a matter *of fact*, or the party be not in cuſtody, but only brought *quia timet*, the proceſs on the *audita querela* when allowed, *&c.* is a *venire facias*; and on default thereto, a *diſtringas ad infinitum.* Salk. 92.

If brought by one in *execution*, the *ſcire facias* is the proceſs. *Carth.* 303.

An *audita querela* is no *ſuperſedeas* of itſelf, and therefore execution may be taken out, unleſs a *ſuperſedeas* be actually ſued upon the allowance of the writ of *audita querela.* Salk. 92.

If the firſt writ of *audita querela* abate, upon a ſecond purchaſed, he may have another *ſuperſedeas.* F. N. B. 104. R.

If

Of Proſecuting an *Audita Querela* by the Defendant in the Suit.

If one in execution is admitted to bail upon bringing an *audita querela*, he muſt procure four perſons to be bail for him. The bail-piece is in this form:

Eaſter term, in the twentieth year of king *George* the third.

To wit, *C. D.* of &c. is delivered on bail to proſecute, with effect, a writ of *audita querela* brought by him to be diſcharged of and from a judgment given againſt him in the court of our lord the king, *before the king himſelf*, at the ſuit of one *A. B.* for five hundred pounds of debt, and for damages, coſts, and charges, to

E. F. of, &c. ———
G. H. of, &c. ———
N. O. attorney. *I. K.* of, &c. ———
and
L. M. of, &c. ———

The condition of the recognizance.

YOU ſeverally acknowledge yourſelves to owe *A. B.* the ſum of one thouſand pounds—

Upon condition that the ſaid *C. D.* ſhall proſecute his ſuit with effect, and if he ſhall be convicted or make default in the premiſes, that he ſhall pay the condemnation money, or you ſhall do it for him.

Are you content?

Of Profecuting an *Audita Querela* by the Defendant in the Suit.

An *audita querela* lies not after judgment upon a matter which might have been pleaded before, but where the party was condemned, and had no day in court to plead it, an *audita querela* lies. *Cro. El.* 25.

As if a releaſe be given after the day of *niſi prius*, and before the day in bank, the defendant cannot plead it, becauſe there is a verdict already in the cauſe, and upon another plea; and therefore the cauſe is already determined, ſo that he is put to his *audita querela* to hinder the execution of the judgment. 2 *Lutw.* 1143, 1174.

If on a judgment and a writ of error brought, the plaintiff in the original action brings debt on the judgment, and recovers a judgment thereon, and afterwards the firſt judgment is reverſed on the writ of error, an *audita querela* may be brought for relief againſt the ſecond judgment.

So, if an action be brought againſt *A.* for a treſpaſs committed *ſimul cum B.* and judgment be obtained thereupon, and afterwards the plaintiff releaſe *B.*—*A.* may have an *audita querela* on the releaſe.

But if a *ſcire facias* was brought on a judgment, and the defendant has a releaſe and omits to plead it to the *ſcire facias*, he ſhall not have an *audita querela*.

Where a defendant had matter which might have been pleaded to a *ſci. fa.* and has loſt the benefit of that by an award of execution upon a *ſcire feci* returned, he is eſtopped for ever, and can never have an opportunity to take advantage thereof again: but if it was an award of execution upon two *nihils* returned, he may be relieved by bringing an *audita querela*: And the court will not even drive him to that, but relieve him on motion, unleſs the ground of his *audita querela* be a releaſe, or ſome ſuch foreign matter, which ought to be pleaded.

If one be taken in execution, and afterwards ſet at liberty by the plaintiff, and then taken again upon the ſame execution, he may bring his *audita querela* to be enlarged, for the execution was diſcharged; and being once diſcharged, is diſcharged for ever, and ſuppoſes a ſatisfaction.

Judgment for 500 *l.* againſt the anceſtor who pays it, and dies, not having taken a releaſe or deed upon the payment. Reſolved, that the heir may maintain an *audita querela*

Of Profecuting an *Audita Querela* by the Defendant in the Suit.

querela upon this payment, though no deed or ſpecialty. 2 *Keb.* 455.

An adminiſtrator recovered in trover, counting of his own poſſeſſion after adminiſtration committed, but before execution the adminiſtration was revoked, and the defendant brought *audita querela*, and adjudged it lay. For though of goods in his own poſſeſſion he had no need to name himſelf adminiſtrator; yet the goods here are aſſets, and he is chargeable as executor *de ſon tort* after adminiſtration repealed for the goods ſo taken in execution.—So, where baron and *feme* executrix recover, and the *feme* dies before execution, the baron ſhall not have *ſcire facias*. *Vide* 2 Keb. 668. Cro. Car. 208, 227, 464.

The plaintiff had a verdict in treſpaſs againſt two, and after the day at *niſi prius*, and before the day in bank, in conſideration of 10 *l.* releaſed to one of the defendants.—On which the other defendant after the day in bank, but before judgment entered, to take advantage of the releaſe, ſued out an *audita querela*, put in bail, and declared as of the judgment entered.—The plaintiff in the original action to the declaration in *audita querela* pleaded *nul tiel* record, on which plea the plaintiff in *audita querela* moved, that the plaintiff in the original action might bring in the *poſtea* and enter the judgment, or that he ſhould do it for him. *Per cur.* Let the plaintiff in the original action enter his judgment within ſuch a time as of the day in bank, or let it never be entered, and let the ſuit on the *audita querela* ſtay. *Ranſere* v. *Meredith* and *Baker*. *Poſ.* 26 *Car.* 2. 1 *Mod.* 111.

The plaintiff, a *feme ſole*, married after the interlocutory judgment, and before executing the writ of enquiry; and it was now moved to ſet aſide the writ of enquiry, and the inquiſition thereon taken. But refuſed by the court. And the defendant was left to his *audita querela*. Bunb. 283.

The plaintiff, a *feme ſole*, between interlocutory and before final judgment, married; and after the final judgment, the *huſband and wife* brought a *ſcire facias* thereupon, for the defendant to ſhew cauſe *quare ex. non*, &c. And then the defendant moved to have the judgment ſet aſide; but the court refuſed to do it on motion, and put him to his *audita querela*. Bunb. 282.

One lent money, and for ſecurity accepted a judgment; the money was paid within a day or two after it became

Of Proſecuting an *Audita Querela* by the Defendant in the Suit.

due, and the party gave an acquittance, and promiſed to acknowledge ſatisfaction, and this was proved before the ſecondary; yet the plaintiff took the defendant in execution, and he remains in priſon. *Per cur.* The proper remedy is by *audita querela*; but let the plaintiff appear here next term, to ſhew cauſe why he ſhould not acknowledge ſatisfaction on record. *Anon. Mich.* 29 *Car.* 2.

If two executors ſue execution for damages recovered by the teſtator, where one hath releaſed, an *audita querela* lies againſt both. *Rol. Ab.* 312.

If *A.* hath judgment againſt *B.* for coſts and damages, and releaſes to *B.* all executions, and after *B.* brings a writ of error, and thereupon the judgment is affirmed, and further coſts given for the delay of execution, and *A.* takes *B.* in execution for the whole, upon an *audita querela B.* ſhall be diſcharged *quoad* the damages and firſt coſts, but not *quoad* the ſecond coſts. *Cro. Jac.* 337. *Rol. Rep.* 11.

☞ Of declaring, *&c.* in *audita querela.* Vide *poſt.*

Of

Of procuring an *Audita Querela* by the Bail to the original Suit.

WHEN bail bring *audita querela* to be relieved from a judgment or execution had againſt them to anſwer the debt of their principal; and the writ of *audita querela* is allowed, they have no occaſion to put in bail, unleſs the bail are in execution.

Where judgment is had againſt bail upon a *ſcire facias* upon default of their principal, and afterwards the original judgment is reverſed, bail may be relieved by *audita querela*, for they have no other remedy, having no opportunity to plead it. 1 *Rol. Abr.* 308.

Judgment in debt againſt *H.* who died, not having ſatisfied the debt or rendered his body; a *ſcire facias* iſſued againſt the bail; and after two *nihils*, execution was awarded, whereupon they brought an *audita querela*; and becauſe no *ca. ſa.* had been awarded againſt *H.* they had judgment. *Cro. El.* 597.

The *exoneretur* which had been ordered to be entered by the court was not actually entered on the bail-piece [by the omiſſion of the proper officer.] But the plaintiff himſelf was apprized of the ſurrender; though the attorney ſwore, that he, the attorney, had no notice of it.—The plaintiff's attorney not being apprized of the ſurrender of the principal ſued out *ſcire facias's* againſt the bail, who paid the money; but they were ſued into *London*, where the original cauſe of action was, and not into *Middleſex*, where the ſurrender was made, and where the bail-piece remained. Upon both theſe irregularities, *viz.* the plaintiff's being apprized of the *ſurrender* and order of the court; and *2dly*, The *ſcire facias's* being ſued out into *Middleſex*, that the *ſcire facias's* might be ſet aſide for irregularity, with coſts, and the money reſtored.—The court were clear as to both points, and made the rule abſolute for ſetting the *ſcire facias's* aſide, and reſtoring the money, but without *coſts*, as awarding coſts would have been to no purpoſe;—the plaintiff, who was apprized of the ſurrender, being gone abroad; and the attorney who was not apprized not having acted with any deſign to oppreſs. *Bond* v. *Iſaac. Burr.* 4 *pt.* 409.

Of the Proceſs in *Audita Querela*.

IT was ſaid before, that the *proceſs* upon an *audita querela* is of two ſorts, *viz.* a *ſcire facias* and a *venire facias*.

The proceſs of *ſcire facias* is proper when the party ſuing the *audita querela* is in actual cuſtody, or when the writ itſelf is founded on record.

The proceſs of *venire facias* is proper when the party is not in cuſtody, but only brings his *audita querela quia timet*, or when the writ itſelf is grounded on a matter of fact. *Salk.* 92. *Carth.* 303.

If the original ſuit were by *original writ*, there ſhould be *fifteen days* at leaſt between the *teſte* and *return* of the proceſs iſſued upon the allowance of the *audita querela*, and muſt be returnable on a *general return*.

But if the original ſuit were by *bill* (it ſeems) that *fifteen days* between the *teſte* of the firſt *ſcire facias*, and *return* of the ſecond *ſcire facias*, are ſufficient.—*i. e.* Seven days between the *teſte* and *return* of each writ, and not one ten and the other five.

And the writ ſhould be returnable on a day certain in term.

But even if the original ſuit were by *bill*, and the proceſs on the *audita querela* be a *venire facias*, I ſhould apprehend that there ought to be *fifteen days* between the *teſte* and *return* of that writ; becauſe the ſecond proceſs iſſuing upon default thereto, is a *diſtringas*.

The defendant in the *audita querela* ſhould be warned to appear.

A. being taken in execution, brought an *audita querela*, teſted 21*ſt Nov.* a *ſcire facias* iſſued and bore *teſte* the 6*th Nov.* The defendant appeared and demurred, and ſhewed for cauſe, that the *teſte* of the *ſcire facias* was before the *audita querela*. *Sed non allocatur*, for here the *ſcire facias* being but to compel the party to appear, and anſwer the *audita querela*, the appearance has helped the defect of the proceſs; but upon a *ſcire facias* upon a judgment it may be otherwiſe, becauſe another judgment is to be grounded upon it. *Vaughan* v. *Lloyd*, *Hil.* 20, 21 *Car.* 2,

Of Declaring, &c. in *Audita Querela.*

IF the defendant in *audita querela* appears upon the *ſcire facias*, *venire facias*, or *diſtringas*, the plaintiff in *audita querela* declares, in which declaration the whole writ of *audita querela* is recited in the ſame manner as in a declaration in *ſcire facias*, with a beginning to this effect:

> "OUR lord the king ſent to his juſtices, * *aſſigned to hold pleas before the king himſelf*; his writ cloſe in theſe words, to wit, *George* the third, *&c.*" (and ſo recite the whole writ of *audita querela.*)

In the declaration in an *audita querela*, the better form is to recite the whole record of the recovery, or it may be recited generally, as "*Quod cum quidam* A. *nuper ſcilicet, &c. implacitaſſet quendam* B. *&c. ſuper quo* he found bail, *taliterque in eâdem curiâ noſtrâ proceſſum fuit, quod prædictus* A. *recuperet, &c.*" Co. Ent. 87. b. c.

But if there is a variance between the *audita querela* and the record, the writ abates. *F. N. B.* 104. *R.*

The declaration ought to comprehend only one *gravamen*, or at leaſt, if it mentions ſeveral, it ought to rely upon one only, otherwiſe it will be double. *F. N. B.* 104. *R. Cro. El.* 809. *Dy.* 297. *b.* And the plaintiff ought to ſhew himſelf aggrieved. *Ibid.*

In the entry of the declaration, after the writ of *audita querela* is ſet forth, the plaintiff ſuggeſts the *gravamen*, and prays to be diſcharged, *&c.* Afterwards is ſet out the award of the *ſcire facias* or *venire*, *&c.* and the recognizance of bail (if the plaintiff was in execution and delivered on bail) then the return to the *ſcire facias*, or *venire*, and the defendant's appearance.

If the defendant confeſſes the matter alledged, the plaintiff has judgment and diſcharge by confeſſion; but if the defendant denies it, the parties proceed to iſſue in fact, or in law, as in other caſes.

No damages or coſts can be given to a plaintiff in an *audita querela.* See Dyer 194.

If the plaintiff in *audita querela* be nonſuited, though he may have a new writ of *audita querela*, he ſhall have no *ſuperſedeas* to ſtay execution.

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* This is the form of beginning in *B. R.* In *C. B.* the form is thus, "OUR lord the king ſent to his juſtices of the *Bench*," *&c.*

If

Of Declaring, &c. in *Audita Querela.*

If the *audita querela* be brought while the money recovered on the firſt judgment remains in the hands of the ſheriff, and not paid over to the party, the court will make an order for it to remain there till the *audita querela* is determined. But it ſeems, that if the money on the firſt judgment is paid over to the party recovering it, there is no remedy for it.

But by *Windham*, juſt. Where judgment is had in an *audita querela* brought before the former execution done, the plaintiff in *audita querela* ſhall be reſtored to whatever he loſt by the execution, which the court agreed, being founded on a releaſe. *Vide* 1 *Keb.* 260, 245. 1 *Sid.* 74.

Of the Judgment in *Audita Querela*.

BY the proceſs of *venire facias*, the plaintiff in *audita querela* may have diſtreſs infinite till the defendant appears—But if the defendant does not appear and plead after a *ſcire facias* and two *nihils* returned, there ſhall be judgment againſt him.

But if there is judgment after one *nihil*, it is error. *R. Yelv.* 88.

If the defendant pleads, and afterwards makes default upon the *ſcire facias ad audiendum judicium*, there ſhall be judgment againſt him.

If there be judgment for the defendant in an *audita querela*, before he have execution upon his firſt judgment, he may afterwards purſue his execution upon that. 1 *Vent.* 264.

If the defendant in the firſt judgment was in execution before the *audita querela*, and in that there is judgment for the defendant, he ſhall purſue judgment in the *audita querela*. 1 Vent. 264.

Of saving the Statute of Limitations.

Of entering Proceſs on the Roll to ſave the Statute of Limitations.

THE ſtatute 21 *Jac.* 1. *c.* 16. *ſ.* 3. for limiting perſonal actions, enacts, "That all actions of treſpaſs *quare clauſam fregit*, all actions of treſpaſs, detinue, action *ſur* trover, and replevin for taking away of goods and cattle, all actions of account and upon the caſe, other than ſuch accounts as concern the trade of merchandize between *merchant* and *merchant*, their factors or ſervants, all actions of debt grounded upon any lending or contract without ſpecialty: all actions of debt for arrearages of rent, and all actions of aſſault, menace, battery, wounding and impriſonment, or any of them which ſhall be ſued or brought, ſhall be commenced and ſued within the time and limitation hereafter expreſſed, and not after, (that is to ſay);

"Actions upon the caſe, (other than for ſlander) actions for account, actions for treſpaſs, debt, detinue, and replevin for goods or cattle, and actions of treſpaſs *quare clauſam fregit*, WITHIN SIX YEARS next after the cauſe of ſuch actions or ſuit, and not after:

"And actions of treſpaſs, of aſſault, battery, wounding, impriſonment, or any of them, WITHIN FOUR YEARS next after the cauſe of ſuch actions or ſuit, and not after:

"And actions upon the caſe for words WITHIN TWO YEARS next after the words ſpoken, and not after."

And by *ſect.* 7. It is provided, "That if any perſon or perſons that is or ſhall be entitled to any ſuch action of treſpaſs, detinue, action *ſur* trover, replevin, actions of accounts, actions of debt, actions of treſpaſs for aſſault, menace, battery, wounding or impriſonment, actions upon the caſe for words, be or ſhall be at the time of any ſuch cauſe of action given or accrued, fallen or come, within the age of twenty-one years, feme covert, *non compos mentis*, impriſoned or beyond the ſeas; that then ſuch perſon or perſons ſhall be at liberty to bring the ſame actions, ſo as they take the ſame within ſuch times as are before limited after their coming to or being of full age, diſcovert, of ſane memory, at large, and returned from beyond the ſeas,

as

Of entering Proceſs on the Roll to ſave the Statute of Limitations.

as other perſons having no ſuch impediments ſhould have done."

This ſtatute bars the plaintiff's action if he do not commence it within the time therein expreſſed, or if diſabled at the time the action accrued, if he do not commence it within the limited times after the diſability removed from himſelf—but the 4 & 5 *Ann. c.* 16. *ſ.* 19. entitles the plaintiff, in caſe the *defendant is beyond ſea* at the time the action accrues, to bring his action within the limited time, according to the ſtat. 21 *Jac.* 1. after the defendant ſhall be returned.

A *latitat* is good to avoid the ſtatute of limitations, without a *bill of Middleſex* previouſly ſued,—So is a *capias* without an *original*. Metcalf *v.* Burrowes, 14 Geo. 2. Bull. Ni. Pri. 151. *Vide* Stra. 736.

And a *latitat* ſued in vacation, will by fiction of law ſave the limitation of time, unleſs the defendant in his *rejoinder* ſet out the day on which the *latitat* iſſued. *Lambert* v. *Witeley*, *E.* 1760. *K. B.* Vide Ld. *Raym.* 432, &c. 386, 880, 553.

The proceſs ſued out with a view to avoid the *ſtatute of limitations*, muſt be carried to the ſheriff's office, in order to be returned with a *non eſt inventus*, after which it muſt be entered on a roll in this manner:

As yet of the term of the *Holy Trinity*. Witneſs, *William Earl of Mansfield*.

"*Middleſex*, to wit. The ſheriff is commanded to take *C. D.* and *E. F.* if they may be found in his bailiwick, and keep them ſafely, ſo that he may have their bodies before *our lord the king at Weſtminſter*, on *Wedneſday* next, after three weeks from the day of the *Holy Trinity*, to anſwer *A. B.* in a plea of treſpaſs, and to have then there this *precept*. *By bill*. *Stormont and Way*. At which day, before our lord the king, at *Weſtminſter*, came as well the aforeſaid *A. B.* in his proper perſon, and offered himſelf againſt the ſaid *C. D.* and *E. F.* in the plea aforeſaid; and the ſheriffs, namely, *Thomas Wright* and *Evan Pugh*, eſquires, ſheriff of the county of *Middleſex* aforeſaid, returned, that the

Of entering Process on the Roll to save the Statute of Limitations.

the aforesaid *C. D.* and *E. F.* are not, nor is either of them found in his bailiwick.

Roll.

This entry of a *bill of Middlesex* will serve to illustrate the practice upon other process, for if the process sued forth be a *latitat* or *attachment of privilege* in *B. R.* it must be set forth upon the roll, with the return, in the same form—and such process when returned must be taken to the signer of the writs in *B. R.* to file the same, and the roll carried to the clerk of the judgments to be entered and docquetted; the plaintiff's attorney making out a docquet paper in this manner:

Entry of *William Lyon*, gentleman, one, *&c.*

Middlesex, to wit. Entry of a *bill* to save the statute between *A. B.* plaintiff, and *C. D.* and *E. F.* defendants.

Returnable, *&c.*

Roll.

If in *B. R.* the process sued forth is an *original* or *capias*, the entry thereof, with the return, must be made out accordingly and docquetted, such *process* when returned being filed with the *filazer*.

So, in *C. B.* if it be an *original* or *capias*, the same must be filed with the *filazer*; and the roll carried in and docquetted with the clerk of the judgments.

If a plaintiff would take advantage of process sued out in this manner; upon the defendant's coming into court afterwards and pleading the statute in bar of the action, the plaintiff must shew that he has continued the writ to the time of the action brought, and must set forth that the first writ was returned. For if the defendant plead *non assumpsit infra sex annos ante exhibitionem billæ* and the plaintiff tenders an issue thereon and issue be taken, the plaintiff cannot give the *latitat* in evidence; for a *latitat* may either be the commencement of the action, or only process to bring the defendant into court; and as process it may be sued out before the cause of action accrues. *Bull. Ni. Pri.* 151.

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So that the plaintiff to ſuch plea, inſtead of tendering iſſue, ſhould reply a *latitat*, ſued out at ſuch a time, and ſhew the ſame returned; then continue the ſame in his replication to the proceſs on which the party comes in; averring, that the firſt proceſs ſued out and returned, was ſued out with a view to exhibit his bill, or declare for the ſame identical cauſe of action; and that the ſame was ſued out within the time limited by the ſtatute.

The continuances in ſuch caſe where the plaintiff is driven to ſhew the writ continued may be entered upon the roll at any time.

Neither the king, nor eccleſiaſtical perſon, are within the ſtatute of limitations. 11 *Rep.* 74.

If one ſues out an *original*, or takes out a *latitat* in a perſonal action within the time limited by the ſtatute, and upon his *latitat* hath a *non eſt inventus* returned by the ſheriff, and enters his writ upon the roll and files it, though he doth not declare againſt the party within the time limited by the ſtatute, the action ſhall be ſaid to be brought in due time. 2 *Vent.* 192. 193. 259.

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