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PRACTICE

OF THE COURT OF

King's Bench

IN

PERSONAL ACTIONS, AND EJECTMENT.

BY JOHN FREDERICK ARCHBOLD, ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. II.

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Errata and Addenda.

- Page 56, l. 15 from top, for "*answer*," read "*answer*."
65, l. 25 from top, for "*fu*," read "*five*."
73, l. 4 from bottom, after "*7 T. R. 500*," add "*1 Barn. & Ald. 670*."
78, l. 9 from bottom, after "*remedied*," add, "*3 B. & P. 549*."
79, l. 23 from top, after "*1 M. & S. 242*," add, "*229*."
113, l. 13 from top, after "*4 East, 350*," add "*1 Barn. & Ald. 676*."
121, l. 12 from bottom, dele "*reasonable*" at the beginning of the line.
132, l. 11 from top, for "*f*," read "*If*."
142, l. 6 from top, after "*2 Taunt. 181*," add, "*6 Taunt. 549*."
151, l. 6 from top, after "*2 M. & S. 259*," add, "*1 Barn. & Ald. 227*."
172, l. 16 from top, for "*hobear*," read "*habeas*."
183, l. 6 from bottom, after "*7 Taunt. 450*," add, "*2 Barn. & Ald. 116*."
185, l. 17 from bottom, for "*1 Str. 1220*," read "*2 Str. 1220*."
192, l. 10 from top, for "*htat*," read "*that*."
229, l. 7 from top, after "*8 T. R. 619*," add, "*See 1 Barn. & Ald. 566*."
253, l. 22 from bottom, after "*11 East, 263*," add, "*See 1 Barn. & Ald. 254*."
287, l. 7 from bottom, after "*16 East, 51*," add, "*but see 2 Barn. & Ald. 218, scmb. contra*."

BOOK II.

PART I.

PROCEEDINGS UPON COLLATERAL ISSUES.

Plea.] WHEN the plaintiff has delivered or filed his declaration, as mentioned *Vol. 1. p. 109*, the defendant, having appeared, may plead either to the jurisdiction, or in abatement, or in bar. The proceedings upon pleas in bar, have already been fully considered in the last book; we shall now treat of those upon pleas to the jurisdiction and pleas in abatement.

It may be necessary to premise that in ejectment, the defendant, according to the terms of the consent rule, can plead the general issue only; he cannot under any circumstances plead in abatement; and if he wish to plead to the jurisdiction, it is necessary that he should previously obtain the leave of the court to do so. *Barnes*, 187. 194. 1 *W. Bl.* 197. and see 2 *Bur.* 1046. 3 *Wils.* 51. 2 *Str.* 1120. *Andr.* 368.

If the declaration be delivered, or filed and notice given, before the three last days of the term, the defendant, if he intend to plead in abatement or to the jurisdiction, must file his plea with the clerk of the papers on or before the 4th day inclusive after the delivery or notice; 1 *T. R.* 277. 5 *T. R.* 210. 1 *Wils.* 23, 2 *Str.* 1191. 7 *T. R.* 298. and see 15 *East*, 159; as if the declaration be delivered on the Monday, the defendant must plead on or before the Thursday following. But if Sunday happen to be the last of the four days, the defendant is at liberty to plead upon the Monday. 3 *T. R.* 642. *R. E. 5 A. (a)*. If the defendant plead in abatement or to the jurisdiction, after the time here mentioned, the plaintiff may treat the plea as a nullity, and sign judgment, although the rule to plead have not expired, or even although no rule to plead have been regularly given. 1 *T. R.* 689. *R. E. 5 A. (a)*. The defendant must of course file common bail, or enter a common appearance in nonbailable actions, or in bailable cases must put in bail, before he can be allowed to plead; but it is not necessary that he should justify his bail before he pleads in abatement or to the jurisdiction, for if that were the case the plaintiff would have it in his power to prevent him from pleading such a plea, by not excepting to the bail until the four days had expired. 2 *East*, 406. 13 *East*, 170. and see 11 *East*, 411.

If the declaration be delivered, or filed and notice given, in vacation, or upon any of the three last days of term, the defendant in that case may plead in abatement or to the jurisdiction within the first four days of the following term. *R. E. 5 A. (a)*. If the defendant intend to plead thus in abatement of a term subsequent to the declaration, he must first obtain a side bar rule for a special imparlance, which must be entered on the plea, in making up the issue; and, in practice, it is usual to state it in the plea itself. *Vol. 1. p. 114*. So, if the defendant purpose pleading to the jurisdiction, or his privilege, of a term subsequent to the declaration, he must move the court for a general special imparlance, within the first four days of the term, and enter it on his plea in making up the issue, as above directed. *Vol. 1. p. 114*. If he plead in abatement or to the jurisdiction without an imparlance, or if he plead in abatement after a general imparlance, or to the jurisdiction after a special imparlance, the plaintiff may either sign judgment as for want of a plea, or apply to the court to set aside the plea, or may demur generally, or he may allege the wrong imparlance in his replication by way of estoppel; but if, instead of doing so, the plaintiff reply to the plea, the fault is cured. *Vol. 1. p. 114*. See as to the entry of the imparlance, *Vol. 1. p. 128*.

The plea to the jurisdiction must be pleaded in person, and not by attorney. *Gibb. C. B. 187. 1 Bac. Abr. 2. 2 W. Bl. 1094*. So, misnomer must be pleaded in person, and not by attorney, unless under a special warrant of attorney. *F. N. B. 63 a. Bro. Misnomer, 55. 3 H. 6, 55. 2 Saund. 209 a. 1 Lutw. 11*. So, if a feme covert plead her coverture in abatement, she must plead it in person. *2 Saund. 209 a*. But in all other cases, pleas in abatement may be pleaded either by attorney or in person, in the same manner as pleas in bar.

The plea in abatement and plea to the jurisdiction, like all other dilatory pleas, must be verified by affidavit; *4 A. c. 16. § 11. See Say. 293*; such as a plea of privilege, *2 Str. 738. Say. 19*, of infancy, *Pr. Reg. 5*, nonjoinder, *Pr. Reg. 4*, or the like. But if the matter of the plea appear upon the face of the record, an affidavit to verify it is unnecessary. *2 L. Raym. 1409. Pr. Reg. 5. 3 B. & P. 397*. This affidavit may be made either by the defendant or a third person. *Pr. Reg. 5, 6. Barnes, 344. 2 Saund. 211 f. See the form, Tidd, Forms, 173. § 2*. If the plea be filed without an affidavit to verify it, the plaintiff may treat it as a nullity and sign judgment, *Carth. 402. 1 Str. 225. 639. 2 L. Raym. 1409. 1 T. R. 277. 689. 5 T. R. 210. 7 T. R. 298. and see 4 East, 348*, or he may move to set it aside. *1 Str. 638. Say. 19. 293. 3 Bur. 1617*. Where the affidavit was sworn before the defendant's attorney, the court held that the plaintiff could not treat the plea as a nullity on that account and sign judgment, although probably it might be a sufficient ground for setting it aside. *3 M. & S. 154*. But where the affidavit was sworn in Liverpool, the very day the declaration was filed in London, the court held the plea to be a nullity, and that the plaintiff was warranted in sign-

ing judgment. 4 East, 348. When ancient demesne is pleaded, the affidavit must state that the lands in question are holden of a manor which is ancient demesne, that the party has a freehold interest in it, and that there is a court of ancient demesne regularly holden. 2 Bur. 1048.

Engross the plea on 4d. stamped paper, and get it signed by counsel; write your affidavit on a 2s. 6d. stamp; see the form, Tidd, Forms, 173. § 2; annex it to the plea, and file them with the clerk of the papers, as directed Vol. 1. p. 122. See 1 T. R. 278. If not filed within the time above mentioned, the clerk of the papers should not receive it. It is necessary to observe that if the declaration have been filed, the defendant must take it out of the office before he pleads, otherwise the plaintiff may sign judgment. See Vol. 1. p. 122.

Replication, &c.] When the plea is filed, the plaintiff replies or demurs to it, in the same manner as to a plea in bar. See as to the replication, &c. Vol. 1. p. 125; and as to the demurrer, and proceedings thereon, see Part 3. of this Book.

If you cannot confess and avoid the plea, or deny it, or cannot safely demur to it, you must then enter on the roll a *cassetur billa vel breve*; see Bk. 4, Pl. 1, Ch. 19. and see the form, Tidd, Forms, 316. § 69. Afterwards, if you have time within the term in which the process was returnable, you may deliver a declaration against the defendant by the bye; Vol. 1. p. 108; but if the term be passed, you must sue out fresh process, if you wish to recommence your action against him.

Judgment, &c.] If issue in fact be joined between the parties, the paper book is made up and they proceed to trial, as in ordinary cases. So, if there be a demurrer and joinder, the subsequent proceedings to judgment, are the same as in ordinary cases, and as mentioned post, Part 3.

Judgment for the plaintiff upon verdict is peremptory, *quod recuperet*; 2 Wils. 367. Yelv. 112. 1 Vent. 22. 2 Show. 42. Gilb. C. B. 53. 1 East, 542. 2 B. & P. 389; and therefore care must be taken at the trial, in cases where damages are the principal object of the action, that the jury (if they find for the plaintiff) assess the damages; otherwise, as an omission in this respect cannot be supplied by a writ of inquiry, a *venire de novo* must be awarded. 2 Wils. 367. 2 Saund. 211 a. Judgment for the plaintiff upon demurrer or on replication of *nul tiel record*, is not final, but merely a *respondeas ouster*. Yelv. 112. 1 Vent. 137. 1 Str. 532. 1 East, 542. and see 1 Wils. 302. See the form, Tidd, Forms, 294. § 35.

Judgment for the defendant, in all cases, whether upon verdict, demurrer, or *nul tiel record*, is, that the writ or bill be quashed; Gilb. C. B. 52. see the form, 1 Went. 6; unless where the matter pleaded in abatement is some temporary disability, such as excommunication, infancy, &c. in which case the judgment is that the plaint remain without day until, &c. Tidd, 581.

Subsequent proceedings.] After judgment of *respondeas ouster*, the defendant has four days to plead. 1 *Sellon*, 275. This, however, it seems, is in the discretion of the court; *Comb.* 19; and it is said that the court will sometimes order the defendant to plead *instantly*, or on the morrow. *Tidd*, 580.

The order invariably to be observed in pleading, is thus:

1. To the Jurisdiction.
2. In abatement.
 1. To the Person
 1. Of the Plaintiff.
 2. Of the Defendant.
 2. To the Court.
 3. To the Writ.
 1. To the Form of the Writ.
 2. To the Action of the Writ.
3. In bar of the action. *Co. Lit.* 303.

Pleading a plea in any one of these classes, is deemed an acknowledgment that you have no ground for pleading a plea in any of the preceding classes, and a waiver of your right to do so. Therefore, after a judgment of *respondeas ouster*, you cannot plead a plea in the same or in any preceding degree or class with that which you have already pleaded; but you may plead one in any of the subsequent classes you please. See *Com. Dig. Abatement*.

In making up the second issue or paper book, you must enter the plea in abatement and the subsequent proceedings to the judgment of *respondeas ouster*, and then enter the second plea, &c.; all which must appear in the *nisi prius* record, as well as in the issue roll. 1 *L. Raym.* 329, 5 *Mod.* 399, *Carth.* 447. 7 *Mod.* 51. But where the plea in abatement and the proceedings thereon had been omitted, the court held that it was no ground for arresting the judgment or for a new trial; and that, at all events, the defendant had waived the irregularity, by accepting the issue. 3 *Bur.* 1682.

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BOOK II.

PART II.

PROCEEDINGS UPON JUDGMENT BY CONFESSION OR DEFAULT.

CHAPTER I.

Judgment by Confession.

Cognovit.] WHERE the defendant has no available defence to make to the action, it is usual for him, instead of proceeding to trial, or of allowing judgment to pass against him by default, to give the plaintiff a *cognovit* or written confession of the action, usually upon condition that he shall be allowed a certain time for the payment of the debt or damages, the amount of such debt or damages being first ascertained and agreed upon. The *cognovit* also generally contains an agreement upon the part of the defendant that no writ of error shall be brought, nor bill in equity filed. See 2 *W. Bl.* 780. If made unconditionally, the plaintiff may of course sign judgment and sue out execution, as soon as he pleases; but if made upon terms, judgment cannot be signed or execution sued out contrary to such terms, otherwise the court upon application will set it aside. 2 *W. Bl.* 943, and see 1 *Salk.* 400.

The *cognovit* may be written upon plain paper, if it contain no terms of agreement between the parties; but if it contain such terms, as if it be conditioned for the payment of the debt by instalments, 2 *B. & P.* 150. 4 *East*, 188, or the like, it must be written on a 20s. stamp. If given before plea, it merely states the confession, the amount of the debt or damages, the terms upon which the *cognovit* is given, and the agreement by defendant not to file a bill in equity or bring a writ of error; see the form, *Tidd, Forms*, 156. § 1, 2. 1 *Sellon*, 372; but if given after plea pleaded, it also contains an agreement to withdraw the plea; in which case it is termed a *cognovit actionem relicta verificatione*, from the form of the entry of it upon the roll. See the form, *Tidd, Forms*, 156. § 3. 1 *Sellon*, 372. The *cognovit* may be of part of the cause of action, or of the entire; if of part, the plaintiff may sign judgment for the part confessed, and proceed as to the residue. 1 *Sellon*, 373. *Tidd*, 495.

If the *cognovit* be signed by the defendant, whilst in custody of the sheriff, or of the marshal, 9 T. R. 616, for the same cause of action for which the *cognovit* is given, an attorney for the defendant must be present and witness it, in the same manner as when a warrant of attorney is executed by a prisoner. See *post*, p. 13. 2 Taunt. 360. 3 T. R. 616. This, however, is not necessary, where the defendant is in custody in execution for the same debt. 2 Str. 1245.

Judgment, how signed.] Where the *cognovit* is given before plea pleaded, and the defendant has not appeared by putting in bail, or by filing common bail, or entering a common appearance, you must file common bail (see Vol. 1. p. 314), or enter a common appearance (see Vol. 1. p. 303), for him, in pursuance of the statute, before you can sign judgment. Then make an incipitur of the declaration on 10s stamped paper, if the judgment be final, or on 4d. stamped paper, if interlocutory only; make an incipitur also on the roll, as directed Vol. 1. p. 162. See R. M. 5 A. v. 1. Take the judgment paper, roll and *cognovit*, (see 25 G. 3. c. 80. § 19) to the clerk of the judgments, and he will sign the judgment; then take them to the master, who will tax the costs, and mark them on the judgment paper. After which, if the judgment be final, you may proceed to sue out execution, according to the terms of the *cognovit*; or if the judgment be interlocutory only, you may proceed to execute a writ of enquiry. See the form of the entry of the judgment, &c. in *assumpsit*, Tidd, Forms, 273. § 17. 10 Went. 428. 450.—against an executor or administrator, Tidd, Forms, 273. § 18. 282. § 25.—against an insolvent debtor, Id. 279. § 21.—in debt, Id. 231. § 23. 10 Went. 453.—in debt on bond, 10 Went. 454.—judgment as to a part confessed, non *assumpsit* being pleaded to the residue, 3 Wcnt. 109.—the like, with a remittitur for the residue, Tidd, Forms, 281. § 24. Where judgment had been irregularly signed without filing common bail for the defendant before the *quarto die post* of the term next after that in which the writ was returnable (see Vol. 1. p. 314) the court held that the defendant was estopped by his *cognovit* from objecting to the irregularity, although the common bail was not filed until after the judgment was signed. 7 T. R. 206.

If the *cognovit* have been given after plea pleaded, enter the pleadings, as far as they have gone, upon the roll, as directed Vol. 1. p. 134. Let the defendant's attorney attend with you before the master, for the purpose of withdrawing the plea; 1 L. Raym. 345; and the master will accordingly enter the *relicta verificatio* in the margin of the roll, and will tax your costs at the same time. Then take the roll, judgment paper and *cognovit*, to the clerk of the judgments, as above directed, and he will sign judgment. See the form of the entry of the judgment, &c. in *assumpsit*, Tidd, Forms, 280. § 22. 10 Went. 439.—in debt, Tidd, Forms, 286. § 29. 10 Went. 440.—against an executor in *assumpsit*, the plea of *plene administravit* being withdrawn. 10 Went. 440.

Implied confession of action.] Besides the case of judgment by default, where the defendant's default is deemed tantamount to a confession (and which shall be fully considered in the next chapter), there is also a confession of action in some cases implied in the defendant's pleading; as where an executor or administrator pleads *plene administravit*, or *plene administravit præter*, without pleading in bar, this is impliedly a confession of the action; and upon the plea of *plene administravit*, the plaintiff may take judgment of assets *in futuro*; or upon *plene administravit præter*, take judgment presently of the assets acknowledged to be in the hands of the defendant, and of assets *in futuro* for the residue. See further upon this subject, *post*, Bk. 3, Pt. 2, Ch. 5, § 2; and see the forms there referred to.

In all these cases of implied confessions, and also of express confessions which do not ascertain the amount of the damages, the plaintiff must enter up interlocutory judgment only, and then execute a writ of inquiry; except in the actions of debt and ejectment, in which cases, as the damages recoverable are not of consequence sufficient to warrant the expense of a writ of inquiry, the plaintiff may sign final judgment in the first instance; and except also in a few other cases hereinafter mentioned in Chapter 4. After the entry of the interlocutory judgment on the roll, follow the award of the writ of inquiry, the sheriff's return to it, and final judgment. See *post*, Ch. 4.

CHAPTER II.

Judgment by Default.

What, and in what cases.] WHEN a defendant hath a day certain given him in court, and is then demandable, and being demanded doth not appear, the court thereupon give judgment against him by default. 3 *Salk.* 213.

The defendant allows judgment to go by default, either intentionally, or through mistake or neglect: intentionally, where he has no merits (and he usually afterwards brings a writ of error, in order to obtain time), or when he does so according to a previous agreement with the plaintiff; through mistake, when he puts in a plea, or rejoinder, &c., so informal or defective, that it is treated as a nullity; and through neglect, when perhaps he has merits, but he neglects to plead, rejoin, &c., or return the paper book, within the time limited by the rules of court for that purpose. This is also an implied confession of the action.

Judgment by default is either by *nil dicit*, that is, where the defendant is stated to have appeared, but to have said nothing in bar or preclusion of the action;—or by *non sum informatus*, where he is said to appear by attorney, but the attorney says that he is not informed by the defendant of any answer to be given. The latter is used only in cases where judgment is entered in pursuance of a previous agreement between the parties; the former, where the defendant has not pleaded within the time limited by the rules of the court, or in a proper manner, or where he has pleaded some plea not adapted to the nature of the action or circumstances of the case, or the like. *As to judgment for want of a plea, and where the plea, from some irregularity in the form of it, or in the manner or time of pleading it, may be treated as a nullity, see Vol. 1. p. 120, 121; as to judgment for want of a rejoinder, rebutter, &c. see Vol. 1. p. 126; and as to judgment for not returning the paper book, see Vol. 1. p. 130.* If a plea be pleaded, but it do not answer the whole of the declaration, you may in general sign judgment by *nil dicit* for the part not answered, and proceed in the action for the residue. The rule upon this subject is thus: If a plea begin as an answer to part only, and is in truth an answer only to that part, 1 *Saund.* 28. (n. 1, 2, 3), or if it begin as an answer to part, but afterwards answer more, 1 *Saund.* 28. (n. 3.) 1 *Str.* 303. *but see 2 B. & P.* 427, the plaintiff should sign judgment for that part of the cause of action, which the plea in its commencement does not profess to answer; otherwise, if instead of doing so, he demur or plead over,

the whole action will be discontinued. If on the contrary, the plea begin as an answer to the whole, but in truth be only an answer to part, the plaintiff cannot sign judgment for the part not answered, but should demur, because the whole plea is bad. 1 *Saund.* 28. (n. 1, 2, 3). 296. (n. 1.) If the defendant make default at the trial, this is not such a default as will entitle the plaintiff to sign judgment; but he must proceed regularly to verdict and judgment, in the same manner as if the action were defended. See the form of the *postea* in such a case, *Tidd, Forms*, 232. § 1.

Where judgment by default is signed as to part, and issue is joined as to the residue, a special *venire* is always awarded, *tam ad triandum quam ad inquirendum*, as well to try the issue as to inquire of the damages; and the jury who try the issue, in that case assess the damages for the whole. 11 *Co.* 5. See the form of the award of the *venire*, *Tidd, Forms*, 182. § 7. a. So, where there are several defendants, if some let judgment go by default, and others plead to issue, a similar special *venire* shall be awarded, and the jury who try the issue, shall assess the damages against all the defendants. 11 *Co.* 5. 2 *B. & P.* 163. see the form of the award of the *venire*, *Tidd, Forms*, 182. § 8. 183. § 8. a. But in actions, where the plea of one defendant enures to the benefit of all, as in actions upon contracts, 1 *Lev.* 63. 1 *Sid.* 76. *Ca. Pr. C. B.* 107. *Pr. Reg.* 102. 3 *T. R.* 652, if the defendant fail of obtaining a verdict against those who have pleaded, he cannot have damages assessed against the others who let judgment go by default; for the contract being entire, the plaintiff must succeed against all the defendants or none. In actions *ex delicto*, on the contrary, if the plaintiff do not succeed against the defendants who plead, he may still have his damages assessed against those who allowed judgment to go by default, 2 *Str.* 1108. 1222, unless the plea of those who pleaded, prove that the plaintiff could have no cause of action against any of them; 2 *L. Raym.* 1372. 1 *Str.* 610. 8 *Mod.* 217; for the tort is several, as well as joint.

Judgment by default is interlocutory, in assumpsit, covenant, trespass, case, and replevin, where the sole object of the action is damages; but in debt and ejectment, damages not being the principal object of the action, and those usually recoverable not being of sufficient consequence to warrant the expense of executing a writ of inquiry, the plaintiff usually signs final judgment in the first instance.

How signed.] Judgment for want of a plea, cannot of course be signed, until the defendant be fully before the court. In bailable actions, therefore, if the defendant have not perfected bail, the plaintiff can only proceed against the sheriff or upon the bail bond, to compel an appearance; but in nonbailable actions, if the defendant have not entered an appearance or filed common bail, within the time limited for that purpose by the rules of the court, the plaintiff may do it for him in pursuance of the statute, and afterwards sign judgment by *nil dicit* if the defendant have not pleaded within the

time allowed him for that purpose. *Vol. 1. p. 106. 120, 121. 112—119.* If judgment is to be signed for want of a rejoinder, or rebutter, &c. this being deemed an abandonment of the plea, the plaintiff strikes out all the previous pleadings, and signs judgment as for want of a plea. *Vol. 1. p. 126.*

After entering an appearance or filing common bail for the defendant, when necessary, then, if your judgment is to be interlocutory merely (*vide supra*), *Make an incipitur of your declaration on 4d. stamped paper, and an incipitur on the roll, as directed ante, p. 6; take them to the clerk of the judgments, and he will sign the judgment. See the form of the entry of judgment by nil dicit in assumpsit by bill, of the same term as the declaration, Tidd, Forms, 251. § 1. 10 Went. 362. 426.—the like by original, Tidd, Forms, 254. § 3.—the like, of a different term, Tidd, Forms, 253. § 2. 10 Went. 418.—the like after an imparlance, and continuance of the inquiry by vicecomes non misit breve, Tidd, Forms, 258. § 9. a.—the like, with award of inquiry into a county palatine, Id. 255. § 5. 10 Went. 452.—the like against an executor or administrator, Tidd, Forms, 258. § 8. 5 Went. 414.—of judgment by nil dicit in detinue, and award of inquiry, Tidd, Forms, 271.—the like in other actions, 10 Went. 454.—of judgment by nil dicit in assumpsit, with a remittitur of part of the damages after the return of the inquiry, Tidd, Forms, 256. § 6.—the like, where one of the defendants died after declaration and before interlocutory judgment, Id. 254. § 4.—the like, with a suggestion of the death of one of the plaintiffs, at the return of the inquiry, Id. 257. § 7. 10 Went. 456.—of entry where one defendant pleaded, and another suffered judgment to go by default, Tidd, Forms, 192. § 8. 1 Sellon, 392. 10 Went. 358.—the like, where one defendant pleaded nul tiel record, and the other let judgment go by default, 10 Went. 390.—the like, where the defendant let judgment go by default as to one count, and pleaded to the other, 8 Went. 509.—the like, where the defendant pleaded to part of a count only, and judgment was entered for the residue, 3 Went. 181. See also the form of the entry of the judgment by non sum informatus in assumpsit, by bill, of the same term with the declaration, Tidd, Forms, 272. § 15. 10 Went. 441.* Having signed interlocutory judgment, you may proceed to sue out and execute your writ of inquiry, as directed in the fourth chapter.

If your judgment is to be final (*see ante, p. 9*), *Make an incipitur of your declaration on 10s. stamped paper, and an incipitur on the roll; take the judgment paper and roll to the clerk of the judgments, and he will sign judgment; then take them to the master, who will tax the costs, and mark them on the judgment paper. No rule for judgment is necessary. See the form of the entry of judgment in debt on mutuuus, by bill, of the same term with the declaration, Tidd, Forms, 264. § 10. 5 Went. 165. 7 Went. 402. 10 Id. 436.—the like, of another term, 10 Went. 427. 435. 436.—the like in debt on bond, Tidd, Forms, 265. § 11.—the like in debt on a*

penal statute, 7 *Went.* 129.—the like as to one count, and *nolle prosequi* as to others, *Tidd, Forms*, 270.—of judgment by *nol prosequi* in ejectment by original with a *remitter* *damna*, *Tidd, Forms*, 684. § 31. 10 *Went.* 441.—the like by bill, *Tidd, Forms*, 685. § 32. 10 *Went.* 429. 437. 449.—See also the form of judgment by *non sum informatus in debt*, *Tidd, Forms*, 272. § 16. 10 *Went.* 427. 441. 453. In actions of debt, however, within the statute 8 and 9 *W. 3. c. 11.* § 8, such as on bond for the performance of covenants, on bond for the payment of money by instalments, or of an annuity, or the like (*see post*, *Ch. 4.* § 2.), if the defendant suffer judgment to go by default, although in strictness this is a final judgment, and entered up for the entire penalty of the bond, yet the plaintiff cannot sue out execution for the sum recovered by the judgment, but he must suggest breaches upon the roll, from time to time, as they occur, and execute a writ of inquiry in order to assess damages on them. *See post*, *Ch. 4.* § 2.

In what cases set aside.] If the judgment itself be irregularly signed, or if any of the previous proceedings upon the part of the plaintiff be irregular, and the irregularity be not waived by any act of the defendant, or if judgment be signed when in fact the defendant has not been guilty of any default, the court upon motion will set aside the judgment. It is said that this motion must be made two days before inquiry executed; 1 *Sellon*, 345; or if the writ of inquiry be executed in vacation, notice of the motion should be given two days previously, to the plaintiff's attorney or agent. *Tidd*, 499.

The plaintiff, also, if he find that he has signed judgment irregularly, may waive the judgment, by getting the clerk of the judgments to strike it out; and he may give notice thereof to the defendant's attorney, in order to prevent the expense of an application to the court. *Imp. B. R.* 494. n.

The court also in some cases, on the defendant's application, will set aside a regular judgment, upon an affidavit of merits, if the plaintiff have not lost a trial. 2 *Salk.* 518. 1 *Salk.* 402. As it is wholly discretionary, however, in the court to do this or not, they will not set aside a regular judgment in order to give the defendant an advantage of any nicety of pleading; 2 *Str.* 1242; or to let him in to plead the statute of limitations, 1 *W. Bl.* 35, or his bankruptcy, *Tidd*, 500. *but see* 1 *B. & P.* 52. *contra*, or a special plea of questionable matter, designed to draw the plaintiff to demur; 2 *Salk.* 518; and the court of Common Pleas have refused to set aside a regular judgment, where it appeared that the defendant had refused to accede to equitable terms of compromise. 4 *Taunt.* 835. When the court set aside a regular judgment, it is usually upon the terms of the defendant's paying costs, 1 *Salk.* 402. *see Barnes*, 256, pleading *issuably instantier*, 1 *Bur.* 586, taking short notice of trial, *Barnes*, 242, and giving judgment of the term, 2 *Str.* 823, when necessary; and in some cases also they will order the defendant to bring the money into court. *Barnes*, 243.

CHAPTER III.

Judgment upon a Warrant of Attorney.

Warrant of attorney.] A WARRANT of attorney is a written authority to the attorney or attorneys to whom it is directed, to appear for the party executing it, and receive a declaration for him in an action at the suit of a person therein mentioned, and thereupon to confess the same, or to suffer judgment to pass by default; it also authorizes the attorney to execute a release of errors. *See the form, Tidd, Forms, 151. § 3. 10 Went. 390. Imp. B. R. 511.—the like in ejectment, Tidd, Forms, 664. § 6 a.* It must be on a proper stamp. *See 7 Taunt. 174.*

By rule *M. 42 G. 3*, every attorney of this court who shall prepare any warrant of attorney to confess a judgment, which is to be subject to any defeazance, shall cause such defeazance to be written on the same paper or parchment on which the warrant of attorney shall be written; or cause a memorandum in writing to be made on such warrant of attorney, containing the substance and effect of such defeazance. *See 3 Taunt. 465. 235.* If the attorney, however, omit to write the defeazance upon the warrant of attorney, as directed by this rule, the omission does not avoid the instrument, but merely renders the attorney answerable on motion, for the neglect of a duty thus imposed on him by the court. *15 East, 576. 7 Taunt. 307.*

If the warrant of attorney be given for the purpose of securing the payment of an annuity, or of money by instalments, it is usual to insert a clause in it, dispensing with the necessity of a *scire facias*. It may admit of doubt, perhaps, whether this clause can have the effect intended by it; besides, from several cases recently decided in the court of Common Pleas, it seems to be unnecessary: that court having determined that a warrant of attorney is not within the *stat. 8 & 9 W. 3. c. 11. § 8*, which requires suggestions of breaches and the *scire facias*, (*see the next chapter, § 2*), *3 Taunt. 74. 5 Taunt. 264, and MS. E. 1814. S. P. dict. in B. R. and see 16 East, 163*, even although the warrant of attorney be given as a collateral security with a bond. *2 Taunt. 195.*

How executed.] The warrant of attorney is signed, sealed, and delivered; the defeazance only signed. It is not necessary that it should be read over to the party previously to its being executed, as was formerly required by the court of Common Pleas. *See 2 H. Bl. 383.*

If the warrant be executed by a person in custody "of any sheriff or other officer," it shall not be valid or of any force, unless there be present some attorney on the behalf of such person in custody, to be expressly named by him and attending at his request (*see 4 Taunt. 797*), to inform him of the effect of such warrant of attorney, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof. *R. E. 4 G. 2. R. E. 15 C. 2.* Therefore if no attorney be present at the execution, the court will set aside the judgment or other proceedings upon it, *see 1 Salk. 402. 2 W. Bl. 1097*, although other persons not in custody, have also joined in the warrant, as collateral securities; *2 Taunt. 49*; unless it have been done by the contrivance of the defendant, and purposely with a view to cheat the plaintiff. *Cowp. 141.* The person thus required to attest the execution, must be an attorney; for it has been holden that the attendance of an attorney's clerk is not sufficient; *Barnes, 42. 2 Taunt. 360. See Cowp. 142*; but it is not essentially necessary that he should be an attorney of this court. *1 Str. 530. Barnes, 44.* And where it appeared that, upon the defendant's being informed that an attorney must be present on his part, he produced a person as such, in whose presence he executed the warrant of attorney; the court refused afterwards to set aside the proceedings on the ground of the person so produced not being an attorney. *1 B. & P. 97.* It is clear, however, that the presence of the plaintiff's attorney will not be sufficient, even although the defendant consent at the time to his acting as his attorney also. *7 T. R. 7.* But if the defendant himself be an attorney, the attendance of any other on his part may be dispensed with, as not being within the meaning of the rule. *Barnes, 37.*

This rule is not confined to the case of prisoners in the custody of the sheriff or other officer who arrested them, but also extends to prisoners in the custody of the marshal. *3 T. R. 616. and see 2 W. Bl. 1297.* It does not, however, extend to persons in custody in execution; *1 T. R. 715. 7 T. R. 19. Cowp. 281. 2 Str. 1245*; nor to warrants of attorney given for any other cause of action than that for which the defendant is in custody; *3 Bur. 1792. 2 L. Raym. 797. 1 East, 241*; and consequently it does not extend to the case of a person in custody on criminal process. *4 T. R. 433.* But although the rule does not extend to a defendant in custody in execution, yet if it could be shewn that he was prevailed upon to acknowledge a judgment for more money than was really due, the court, upon application, would relieve him. *Cowp. 281.*

Where a defendant, whilst in custody in Ireland, gave a warrant of attorney to confess a judgment in this court, the court held that the necessity of an attorney being present on the part of the defendant, at the time of its execution, was as essential as if the defendant were in this country. *2 Str. 1247.*

How far revocable.] A warrant of attorney to confess a judgment cannot be expressly revoked; or if the defendant do that

which purports to be a revocation of it, the plaintiff may enter up judgment notwithstanding. 2 *L. Raym.* 850. There are some cases of implied revocation, however, which it may be necessary to mention. www.libtool.com.cn

The death of either party is a revocation of the warrant. This, however, may in general be remedied, if the plaintiff be entitled to enter up judgment at the time, by entering up the judgment as of the term in or after which the party died, before the essoign day of the following term. 1 *Salk.* 87, 2 *L. Raym.* 766. 2 *Str.* 1081. 882. *Barnes*, 270. 1 *Saund.* 219 *e.* 7 *Mod.* 203. *Hardw.* 158. But if it become necessary to obtain the leave of the court to enter up the judgment, they will seldom grant it after the death of the plaintiff, particularly where the application is not made until after the essoign day of the term following the death, 8 *T. R.* 257. 2 *Str.* 718. *Barnes*, 44, and in no case will they allow it to be entered up after the death of the defendant. 2 *Str.* 1081. *Vide post.* So if a warrant of attorney be given by two, and one of them die, the plaintiff cannot have leave to enter up the judgment afterwards; not against both, on account of the rule above mentioned; nor against the survivor, for the judgment would not in that case pursue the authority. 15 *East*, 592. 7 *Taunt.* 453. But if a warrant of attorney be given to two or more, and one of them die, the court will allow the judgment to be entered up by the survivor. 2 *M. & S.* 76. 2 *W. Bl.* 1301, 1 *Wils.* 312, *Barnes*, 48.

If a feme sole give a warrant of attorney, it has been holden that her subsequent marriage, before judgment is entered up, is a revocation of the warrant. 1 *Salk.* 117. *but see* 1 *Show.* 89 *contra.* But if a warrant of attorney be given to a feme sole, her subsequent marriage will not be a revocation of it; 1 *Salk.* 117; and upon application to the court, founded upon a proper affidavit of the marriage, 3 *Bur.* 1469, they will allow the judgment to be entered up in the name of the husband and wife. 7 *Mod.* 53.

When ordered to be given up.] If the warrant of attorney have been obtained by fraud, 1 *Doug.* 196, or for an usurious consideration, *Cowp.* 727. *Barnes*, 52. *see* 1 *Taunt.* 413, or for a gambling debt, *see* 4 *Taunt.* 683, or if given to the plaintiff to induce her to live in a state of prostitution with the defendant, *Tidd*, 483, or for securing an annuity, void by the annuity act, 4 *T. R.* 694. 6 *Id.* 737, or the like, the court will order the warrant to be delivered up to be cancelled; or, if judgment have been entered up, they will set it aside, and any proceedings that may have been had upon it. But where an application was made to set aside a judgment entered up on a warrant of attorney, and execution thereon, on the ground of usury, the court of Common Pleas refused to grant the motion unless upon the terms of the defendant's agreeing to pay the principal money borrowed, and the sum legally due for interest; although they intimated that if the application had been made before judgment was entered up, they would have ordered the warrant to be delivered up unconditionally. 1 *Taunt.* 413. If

the fact of the consideration, however, be contested, the court will direct an issue to try it, and enlarge the rule for setting aside the judgment, in the mean time. *Cowp.* 727. So, if it be alleged that the warrant of attorney is forged, or the like, the court will direct an issue to try whether it has been duly executed or not. *Barnes*, 239. Also, if a warrant of attorney be given by an infant, the court will order it to be delivered up to be cancelled, even although there may be circumstances of fraud on the part of the infant; 1 *H. Bl.* 75. *MS. M.* 1814; and if an infant and another join in a warrant of attorney, and judgment be entered up against both, the judgment if vacated as to the infant, must be vacated as to both; for the judgment being entire, cannot be set aside as to one defendant, and remain good as to the other. *MS. M.* 1814. *see 2 W. Bl.* 1133. So if a feme covert give a warrant of attorney, the court will order it to be delivered up to be cancelled, or will set aside the judgment, &c.; the warrant in such a case being absolutely void; *See 3 Taunt.* 261; yet the court have refused to relieve her, where at the time she executed the warrant she lived by herself and acted as a feme sole. 1 *Salk.* 400. Also, where one of several executors gave a warrant of attorney to confess a judgment against all, the court ordered it to be delivered up to be cancelled. 1 *Str.* 20.

Judgment, when to be signed.] Judgment may be entered up on a warrant of attorney, at the time therein specified for that purpose; and if the warrant were given to secure the payment of money, it is not necessary that the plaintiff should delay the signing of the judgment until default be made in the payment, *MS. M.* 1814. and *see Hardw.* 270, unless that be expressly stipulated in the defeazance. If the warrant specify any particular term of which the judgment is to be signed, it cannot be entered up of any other, even of a subsequent term; 1 *Mod.* 1. 7 *Mod.* 53; which exactness, however, is seldom requisite at present; for modern warrants of attorney, after specifying the term of which judgment is to be signed, always add the words "or of any subsequent term." It cannot, however, be entered up of a previous term; and even if the first day of the term of which the judgment is signed, and to which the judgment has relation, be previous to the time stipulated in the defeazance, &c. for the entry of the judgment, although judgment were not actually signed until afterwards, the court would probably set aside the judgment. *See 2 Str.* 1128.

Within a year and day from the date of the warrant of attorney, judgment may be entered up as of course, without the leave of the court.

After a year and day from the date of the warrant, judgment cannot be entered up until leave of the court in term time, or of a judge in vacation, be previously obtained for that purpose. 6 *Mod.* 212. 1 *H. Bl.* 94. This application is founded upon an affidavit stating the consideration for the warrant of attorney, its execution, the amount remaining due to the plaintiff, and alleging that the

defendant was alive at a certain time therein mentioned. See the form of the affidavit, *Tidd, Forms*, 153. § 4. 10 *Went*. 230. *Imp. B. R.* 520. If the application be by motion to the court, it must appear from the affidavit that the defendant was alive, and that the deponent saw him, upon some day within the term, in order that the court may be satisfied that he was alive on the day to which the judgment will have relation; and where the motion was made on the first day of term, and the affidavit stated the defendant to have been alive four days before, *MS. H.* 1815, and even where it stated him to have been alive on the essoign day of the term, 4 *M. & S.* 174, the court held it to be insufficient, saying that it must appear from the affidavit that the defendant was alive on some day in full term. If the application be made to a judge in vacation, the affidavit must state the defendant to have been alive within two or three days, if he reside in or near London; or if he reside at a distance in the country, then within six or eight days, according to the distance. Judgment, however, has been allowed to be entered up against a defendant residing in Jamaica, upon an affidavit that he was alive five months before. *Willes*, 66. It must appear, also, that the deponent saw him at the time he is stated to have been alive; and therefore where the affidavit stated, that the deponent was told by the defendant's wife that her husband was living, the court held it to be insufficient. *MS. M.* 1814. The affidavit must also state the execution of the warrant of attorney; but where it stated that the defendant had recently acknowledged the execution of it, expressly for the purpose of enabling the plaintiff to enter up judgment, without being at the trouble of sending for the subscribing witness, the court held it to be sufficient. 2 *B. & P.* 85. If the attesting witness be dead, that fact must be substantiated by affidavit, or if he cannot be found, the affidavit must state the endeavours which have been made to find him, before the court will receive secondary evidence of the execution. 4 *Taunt.* 132. The consideration, and the sum remaining due, are usually sworn to by the plaintiff himself; but where the plaintiff was a lunatic, an affidavit of the debt being unpaid, made by a person who had received the interest due upon it for the last three years, was deemed sufficient. *Barnes*, 42. Where it appeared by the plaintiff's affidavit that she was then resident in an enemy's country, the court of Common Pleas refused to give leave to enter up the judgment. 2 *New Rep.* 97.

If the application be not made within ten years, a judge will not make an order, but you must apply to the court. If twenty years or upwards have elapsed since the execution of the warrant, the court only grant a rule *nisi*; 1 *Selmon*, 382; but if the application be made within 20 years, the rule will be absolute in the first instance. Yet where the warrant had been given with a *post obit* bond, and the application was not made until after the death of the person, upon whose death the bond was payable, the court granted a rule *nisi* only. 1 *H. Bl.* 94.

Judgment, how signed.] Where leave of the court is necessary, before you can enter up judgment,—if in term time, give the affidavit above mentioned and a motion paper to counsel, who will move it accordingly; draw up the rule with the clerk of the rules; pay him 7s. 6d. If in vacation, take the affidavit to the judge's chambers, who will make an order thereon: pay 6s. 6d.; and file the affidavit with the clerk of the rules. Make an incipitur of the declaration on a 10s. stamp, and (if judgment be entered up with leave of the court) annex the rule or order to it; make an incipitur also on the roll, intitling the roll of the term of which the judgment is to be entered up. Make out a memorandum of the warrant; 25 G. 3. c. 80. § 19. See Vol. 1. p. 24; see the form, Tidd, Forms, 14. § 3. Imp. B. R. 521. Then file common bail for the defendant, as directed Vol. 1. p. 314. R. H. 1 W. & M. Lastly, take the judgment paper, roll and warrant of attorney, to the clerk of the judgments, who will sign the judgment, and file the warrant. See the form of the entry, Imp. B. R. 524. 10 Went. 445—447. No judgment can be signed upon any warrant authorising an attorney to confess judgment, without such warrant being delivered to and filed by the clerk of the doquets, who is to file the same in the order in which they are received. R. M. 42 G. 3. It is prudent, and indeed usual, to docket the judgment immediately, for the reasons mentioned ante, Vol. 1. p. 205, 206, particularly if the warrant of attorney be given to secure the payment of an annuity, or of money by instalments, or the like.

If a bond have been given with a warrant of attorney, the declaration is made out in debt on bond; if not, it is usually made out on a *mutuatus*; but in all cases the warrant of attorney must be strictly pursued, in entering up the judgment. Therefore, if, on a warrant to enter up judgment in debt on bond, judgment be entered up in debt on a *mutuatus*, the court will set it aside as irregular. 8 T. R. 153. So a general warrant given by a person, who afterwards became insolvent, will not authorise the plaintiff to enter up a special judgment against his future effects. 1 T. R. 80. Or if a warrant be given to confess a judgment of a particular term, judgment cannot be entered up of any other term. Ante, p. 15. So, upon a joint warrant of attorney given by two, judgment cannot be entered up against one, even after the death of the other. 15 East, 592. So, a warrant given by one of two executors, will not authorise the plaintiff in entering up judgment against both. 1 Str. 20. Also, where, on a warrant of attorney given to an executor, judgment was entered up in vacation as of the previous term when the testator himself was alive, the court set it aside for irregularity. 2 Str. 1121. Or if the declaration be upon a bond purporting to bear date after the first day of the term of which the judgment is signed, the judgment will be erroneous. 7 Mod. 38. Yet, where a judgment creditor applied to set aside a judgment and execution against the debtor, upon the ground that the judgment was entered up against the defendant

by a different Christian-name from that signed to the warrant of attorney, the court refused even a rule nisi. *MS, M.* 1815.

Execution.] As soon as judgment is signed, the plaintiff may immediately sue out execution, if he be at liberty to do so by the terms of the defeazance. A writ of execution, however, may be sued out before, but it cannot be executed until on or after, the day specified for that purpose in the defeazance. *MS. M.* 1814. *See Hardw.* 270. Where a warrant of attorney was given for securing the payment of an annuity, and, upon default made in the payment of the annuity, the plaintiff sued out execution and arrested the defendant for the amount of the penalty, the court set aside the execution and ordered the defendant to be discharged, as the defeazance authorised the plaintiff to take out execution merely for the arrears. *16 East*, 163. The plaintiff in this case should have sued out execution for the amount of the penalty, (because the writ of execution must strictly pursue the judgment, *see Vol. 1. p. 257*), but should have indorsed it to levy the amount of the arrears only. But where a warrant of attorney was given for the payment of money by instalments, and by the terms of the defeazance the plaintiff was to be at liberty to enter up judgment immediately, "but no execution to be issued until default made in payment of the said sum of 140*l.* 18*s.* 8*d.* with interest as aforesaid by the instalments and in the manner hereibefore mentioned;" the court held that the plaintiff, upon a fair construction of the above terms of the defeazance, was at liberty to sue out and execute a writ of execution for the entire sum, upon default in payment of any one of the instalments. *1 M. & S.* 706.

Although a warrant of attorney be given to secure the payment of an annuity, or of a sum of money by instalments, or the like, it seems a *scire facias* is not necessary, previous to suing out execution for every periodical payment or instalment, as would be the case if a bond only had been given; for it has been decided in several cases in the court of Common Pleas (*2 Taunt.* 195. *3 Taunt.* 74. *5 Taunt.* 264. and *see 2 W. Bl.* 845.) and it seems also to be the opinion of this court, (*MS. E.* 1814, and *see 16 East*, 163) that the *stat. 8 & 9 W. 3. c. 11. § 8.* which requires suggestions of breaches and the *scire facias* in such cases (*see the next Chapter, § 2.*) does not extend to warrants of attorney, even when given merely as a collateral security with a bond. *2 Taunt.* 195.

CHAPTER IV.

Writ of Enquiry.

- SECT. 1. *Writ of Enquiry in ordinary Cases.*
2. *Writ of Enquiry in Debt on Bond.*
3. *Reference to the Master.*

SECTION 1. *Writ of Enquiry in ordinary Cases.*

Whet.] A WRIT of enquiry is a judicial writ, directed to the sheriff of the county in which the venue was laid, stating the former proceedings in the cause, and, "because it is unknown what damages the plaintiff hath sustained," commanding the sheriff that by the oath of twelve honest and lawful men of his county he diligently enquire the same, and return the inquisition into court. See the form of a writ of enquiry by bill, *Tidd, Forms*, 157. § 4. 10 *Went.* 267. 335.—the like by original, *Tidd, Forms*, 159. § 6. 10 *Went.* 267.—the like, by attachment of privilege, 10 *Went.* 288.—the like into a county palatine, *Tidd, Forms*, 158. § 5. 10 *Went.* 255. 268. 337. The writ must be returnable on a general return day, if the action were by original; or on a day certain, if the action were by bill. No advantage, however, can be taken of a mistake in this respect; not upon motion, for it is not an irregularity, but error; *Barnes*, 230; nor by writ of error, for the error is now cured by the statute of jeofail. *Say.* 245. 2 *Str.* 947.

The writ must be executed against all of the defendants, jointly, who have allowed judgment to go by default. If two defendants, even in trespass, suffer judgment by default, and the plaintiff execute writs of enquiry against them separately, and take several damages against them, it will be irregular; and if final judgment be entered up for those several damages, it will be error. 6 *T. R.* 199. The only way the plaintiff has of remedying the mistake is, by applying to the court, before final judgment, to set aside his own proceedings; which they will allow him to do, upon payment of costs. *Id.*

As to the amendment of writs of enquiry, see post, *Bk. 4, Pt. 1, Ch. 27.*

In what cases necessary.] When the judgment is interlocutory, (which is always the case in assumpsit, covenant, trespass, case,

and replevin, the sole object of these actions being damages, *see ante*, p. 9), merely the plaintiff's title to damages is thereby established; and the amount of the damages yet remains to be ascertained. This is usually done by a writ of enquiry. As the inquest, however, is merely for the purpose of informing the conscience of the court, the court themselves may, in all cases, if they please, assess the damages, and thereupon give final judgment; 3 *Wils.* 61, 62. 2 *Id.* 372, 374. 1 *Doug.* 316 n. 4 *Taunt.* 148; and it is accordingly the practice, in actions upon bills of exchange and promissory notes, to refer it to the master to compute the amount of principal and interest due on the bill or note, without a writ of enquiry; 4 *T. R.* 275. 1 *Doug.* 316 n. 2 *Saund.* 107 a. and *see* 12 *East*, 420. 4 *Taunt.* 148; and the same in an action of covenant for non-payment of a liquidated sum, 1 *Doug.* 316, as for non-payment of money lent upon mortgage, 8 *T. R.* 326, or for non-payment of rent, 8 *T. R.* 410. 6 *Taunt.* 356, or the like. But when the computation of damages is not a mere matter of calculation, the court will not refer it to the master, but will put the plaintiff to sue out his writ of enquiry; thus in an action on a bill of exchange for foreign money, 5 *T. R.* 87, in an action on a foreign judgment, 4 *T. R.* 493, in an action on a bond to save harmless, 2 *Wils.* 5, or on a covenant to indemnify, 14 *East*, 622, in an action on a bottomree bond, *Tidd*, 504, and even in an action upon a judgment recovered on a bill of exchange, 8 *T. R.* 395. *but see* 7 *T. R.* 446. 14 *East*, 442. 1 *East*, 436, or in assumpsit for a sum certain due upon an agreement, *Tidd*, 504, the court have refused to refer it to the master. In cases where the court will refer it, as when the action is on a bill of exchange or other matter where the damages are merely the subject of calculation, it is necessary that this appear upon the face of the declaration, and not be mere matter of evidence; 8 *T. R.* 648; and if one of several counts contain matter of this kind, you can, after a judgment by default, have it referred to the master to compute the damages upon that count, upon your entering a *remittitur damna* as to the others. 7 *T. R.* 473. 2 *Smith*, 46. 47 n. As to this reference to the master, *vide post*, p. 30.

But if there be judgment by default as to part, and issue joined as to the residue, or if some of several defendants suffer judgment by default and others plead to issue, a writ of enquiry is never executed; but a special *venire*, as well to try the issues as to enquire of the damages, is awarded, and the jury who try the issue shall assess the damages for the whole. *Ante*, p. 9. So, if there be a demurrer to one count, and issue in fact joined on the other, a special *venire* may issue as is above mentioned; or the plaintiff, after he has obtained judgment on the demurrer, may execute an enquiry as to that count, upon entering a *nolle prosequi* as to the other. 1 *Str.* 532. Or if there be a demurrer as to part, and judgment by default as to the residue, the plaintiff may sue out a writ of enquiry on the judgment by default, and to assess contingent damages as to the demurrer; or he may proceed to

obtain judgment on the demurrer in the first instance, and then execute a writ of enquiry upon both judgments. *Barnes*, 229. See post, p. 36. www.libtool.com.cn

In debt, the judgment is always final *quoad* the debt; and the damages usually sought for, being very trifling, it is not in general worth while to execute a writ of enquiry for them, but the plaintiff may at once enter up final judgment, and sue out execution; and this, even in an action on a bail bond. 2 B. & P. 446. So, in debt on a replevin bond, where the not making a return of goods distrained for rent was assigned for breach, it was holden that the plaintiff, after signing judgment by default, might sue out execution for the amount of the goods as indorsed on the replevin bond, and of the taxed costs, without executing a writ of enquiry. 3 M. & S. 155. But if the damages be of sufficient consequence to warrant the expense of proceeding for them, the plaintiff may either execute a writ of enquiry for them, or, where they are mere matter of calculation, may apply to have it referred to the master. Thus, in an action of debt on a judgment of many years standing, where the defendant allowed judgment to go by default, the court held that the plaintiff was justified in executing a writ of enquiry, to obtain interest on his judgment by way of damages. 7 T. R. 446. See ante, p. 20. On the other hand, in an action of debt (seemingly for goods sold, money lent, or the like, for it is not specified in the report of the case) the court upon application set aside execution upon a judgment by default, upon payment of costs, and referred it to the master to ascertain what was due to the plaintiff; 14 East, 442; in which case Le Blanc, J. intimated an opinion that a writ of enquiry should in no case be executed in an action of debt.

But in debt on bond, conditioned for the payment of an annuity, or of money by instalments, or for the performance of covenants, or of an award, or of any other specific act, although judgment by default be entered up for the amount of the penalty, yet a writ of enquiry must afterwards be executed, in order to ascertain what damages the plaintiff may have actually sustained by the breach of covenant, &c. complained of. 8 & 9 W. 3. c. 11. § 8. This, however, does not extend to bail bonds, replevin bonds, bonds of petitioning creditors, or bonds for the payment of a sum of money in gross. See the next Section; and see there the mode of executing this writ of enquiry.

And lastly, where the jury, in a trial at *nisi prius* or at bar, act as an inquest,—as where they are to assess contingent damages on a demurrer, or where they are to assess damages on a judgment by default as to some of the counts of the declaration; see ante, p. 9, 20. and *Barnes*, 228; or where a demurrer to evidence is put in at the trial; *Cro. Car.* 143; and the jury omit to assess the contingent damages on the demurrer, or the damages on the judgment by default; or where in trespass or replevin against an overseer of the poor, the plaintiff is nonsuit, or the defendant has a verdict, and the jury omit to enquire of the treble damages

given to the defendant in such a case by *stat.* 43 *El. c.* 2. § 19; *Hardw.* 138, 2 *Str.* 1021, 1 *Salk.* 205, 1 *L. Raym.* 59, 2 *W. Bl.* 921, 3 *Wils.* 442; or where in *quare impedit*, the jury, after finding for the plaintiff, omit to enquire of the value of the living, &c. 10 *Co.* 118:—in all these cases the omission of the jury to assess the damages may afterwards, upon application to the court, be supplied by a writ of enquiry; and the same in all other cases where an attain does not lie. See 2 *Wils.* 367, *Hardw.* 295, *Sey.* 214. But wherever an attain would lie, if the jury had assessed the damages,—as in an ordinary personal action, and the jury find a verdict for the plaintiff, but omit to assess the damages; see *Vol.* 1. p. 176; or, where issue is joined upon a plea in abatement, and the jury, upon finding for the plaintiff, omit to assess the damages; *ante*, p. 3;—the omission cannot be supplied by a writ of enquiry. See 2 *Wils.* 367. Also, in replevin for a distress for rent, if the jury find for the defendant, but omit to enquire of the arrears of rent, in pursuance of *stat.* 17 *C.* 2. c. 7, this omission cannot be remedied by a writ of enquiry: because the statute requires that the enquiry be made by the same jury who tries the issue. 1 *Salk.* 205. See 2 *W. Bl.* 763. It has been holden, however, that where a verdict for the plaintiff is void, but the defendant's plea amounts to a confession, the court will give judgment upon this confession, and award a writ of enquiry to ascertain the plaintiff's damages. *Cro. El.* 214. *Carth.* 370.

Where a writ of enquiry is allowable and necessary, an award of it follows immediately after the entry of the interlocutory judgment, thus: “*But because it is unknown to the court of our said lord the king now here, what damages the said J. N. hath sustained by means of the premises*” [or, where the enquiry is to extend only to some of several counts, they must be particularized, as thus: “*by means of the not performing the said first promise.*” See 1 *Str.* 684.] “*the sheriff is commanded that by the oath of twelve good and lawful men of his bailiwick, he diligently enquire,*” &c. See the form, *Tidd, Forms*, 253, &c. 10 *Went.* 362, 449. Where a writ of error is brought in the House of Lords upon a judgment for the defendant, and the judgment is reversed, we have seen (*Vol.* 1. p. 235.) that upon the record being remitted to this court, a writ of enquiry is awarded here, to ascertain the plaintiff's damages, the House of Lords having no power to award a writ of enquiry. *Coup.* 843.

How sued out.] Engross the writ on a 5s. stamped parchment; see the forms referred to, *ante*, p. 19; get it sealed; pay 7d.; it need not be signed. Indorse on it a memorandum of the day on which it is to be executed; and leave it at the sheriff's office the day before, at latest. *R. H.* 23 *G.* 3. Pay 1l. 9s. 4d. in London, 1l. 10s. 4d. in *Middlesex*, and 1l. 11s. 6d. in other counties. Pay also 4d. additionally for each witness.

Before whom to be executed.] The writ is usually executed before

the sheriff or his deputy. See *Barnes*, 231. 232. 413. 2 *Wils.* 378. It may, however, under special circumstances, be executed before the Chief Justice, if the venue have been laid in Middlesex or London; or before a judge of assize, if the venue were laid in any other county. See 12 *Mod.* 610. It is only, however, where some difficult point of law is likely to arise in the course of the enquiry, or where the facts are important, that the court will grant this indulgence; and the mere importance of the facts will not, it seems, induce the court to grant it, when the venue is laid in Middlesex or London; 1 *Sellon*, 344; for the under sheriff of Middlesex, and the secondary in London, are generally men of experience, and fully competent to conduct a business of this kind.

An application to have a writ of enquiry executed before the chief justice, must be made to the court in term time. For this purpose, make an affidavit of the circumstances, and give it to counsel with a motion paper, to move for a rule nisi; draw up the rule with the clerk of the rules, and serve a copy of it on the opposite attorney; and afterwards move to make it absolute upon an affidavit of service. Draw up the rule with the clerk of the rules; prepare the writ of enquiry as in ordinary cases, annex the rule to it, and leave it at the sheriff's office. Then enter the cause with the marshal in the same manner as if it were a record, and pay him the same fees. See *Vol. 1.* p. 163. and see post, p. 28. The sheriff afterwards returns the inquisition as in other cases.

If the enquiry is to be before a judge of assize, the application may be made either to the court in term time, or to a judge in vacation: if to the court, it is made in the manner above directed; if to a judge in vacation, get a motion paper signed by counsel, and take it, together with the affidavit above mentioned, to the judge's chambers, and the judge will make an order to the clerk of the rules to draw up the rule. Take the motion paper and order to the clerk of the rules, and draw up the rule, and proceed as is above directed.

Notice of executing it.] The plaintiff must give a written notice of executing the writ of enquiry, to the defendant's attorney or agent in town, *Vol. 1.* p. 18. See the form of a notice of enquiry in *London*, *Tidd, Forms*, 163. § 12.—in *Middlesex*, *Id.* 164. § 13.—in the country, *Id.* 164. § 14. But if the attorney or agent be not known, it may be given to the defendant himself, *Barnes*, 311. *Pr. Reg.* 276. *Say.* 133, and to all the defendants, if there be more than one, *Pr. Reg.* 443, or left at their last or most usual places of abode. See *R. T. 1 G. 2.* See *Vol. 1.* p. 136.

If the writ is to be executed in London or Middlesex, eight days notice must be given, if the defendant live within 40 miles of London, or 14 days notice if the defendant reside at a greater distance, the same as notice of trial; see *Vol. 1.* p. 135; and Sunday is reckoned, unless it be the day on which the notice is given. *R. M. 4. A. (c).* If the writ is to be executed in any other county,

eight days notice is sufficient. *R. M. 4. A. (c)*. A defendant, residing at a hotel in London, from the time of his arrest till he was served with notice of enquiry, was holden not entitled to more than eight days notice in a town cause, though his general residence was above 40 miles from London. *7 East, 624*. Also, where the defendant was residing in London before and at the commencement of the action, it was holden that eight days notice of executing the writ of enquiry was sufficient, though the defendant had in the intermediate time removed permanently to a distance of above 40 miles from London, namely, to Tortola, particularly as he had not given the plaintiff notice of his removal. *12 East, 427. but see 1 East, 685, 2 W. Bl. 1205. and Vol. 1. p. 135*. If the defendant be under terms to take short notice of enquiry, this is the same as short notice of trial, namely, four days in country causes, and two days in town causes. *See Vol. 1. p. 135*. A term's notice of enquiry is also necessary, in cases where a term's notice of trial would be required if the cause had proceeded to trial. *2 Str. 1100. See 3 Smith, 101. and see Vol. 1. p. 138*.

When the paper book has been delivered to the defendant, with notice of trial indorsed on it, and the defendant strikes out the *similiter* and demurs, (*see Vol. 1. p. 132.*), he shall be obliged to accept of notice of executing a writ of enquiry from the time of notice of trial given on the paper book. *R. H. 8 G. 1*.

When the writ is to be executed before the sheriff, the notice states that it will be executed on a day therein stated (which must be on or before the return day of the writ, *2 Salk. 627. 2 L. Raym. 1449, not being Sunday, 1 Str. 387*), usually between two certain hours, *Say. 181*, as between the hours of 10 and 12 o'clock in the forenoon, or between the hours of 4 and 6 o'clock in the afternoon, *Tidd, 513*, "at the secondary's office, No. 57, Coleman-Street, London," if in London, or "at the sheriff's office in Bedford-Street, Bedford-Row, near Holborn, in the county of Middlesex," if in Middlesex, or, if in other counties, then at some place within the county, appointed for that purpose, and particularly described in the notice. *See Comyns, 551. Barnes, 297. 300. Say. 181. Pr. Reg. 447*. A notice of executing the writ "by ten o'clock," *2 Str. 1142*, or, "at ten o'clock, or as soon after as the sheriff can attend," *Barnes, 295*, will be bad for uncertainty; so, "between the hours of 10 and 2 o'clock," has been holden insufficient, as not being sufficiently definite. *Barnes, 295, 296. Comyns, 551. and see 1 Barnard. 139. Barnes, 293. 302*. If the defendant do not attend punctually at the time mentioned in the notice, and the writ be executed in his absence, the court will not relieve him; *1 Barnard. 233*; and on the other hand, if the defendant attend at the hour, he will not be warranted in leaving the court at the expiration of the time mentioned in the notice; for the sheriff may have prior business, which may detain him beyond that time. *1 Doug. 198. 2 Barnard. 214*.

But if the writ is to be executed before the chief justice or

judge of assize, the notice is given for the sittings or assizes generally, *Tidd*, 512. 1 *Sellon*, 353, in the same manner as in the notice of trial. www.libtool.com.cn

Notice of enquiry may be continued or countermanded, in the same manner as a notice of trial. See *Vol. 1. p. 137, 138. See the form of a notice by continuance, Tidd, Forms, 164. § 15. and see 1 B. & P. 363.—of countermand, Tidd, Forms, 164. § 16.* If the plaintiff do not proceed to execute his writ according to the notice, or countermand it in time, the defendant will be entitled to his costs of the day, *R. H. 8 G. 1 (a)*, in the same manner as for not proceeding to trial. See *post, Bk. 4, Pt. 1, Ch. 23.*

An irregularity in the notice is waived in general by the defendant's attending at the enquiry.

How executed.] After giving notice of enquiry, the next step to be taken is to subpoena the witnesses necessary to prove the amount of the damages. See *Vol. 1. p. 150, 151. See the form of a præcipe for a subpoena, Tidd, Forms, 166. § 18.—of subpoena, Id. § 19.—of subpoena ticket, Id. 167. § 20.* The defendant may subpoena his witnesses in like manner. Also, if either party purpose to attend by counsel, he must give previous notice of his intention to the opposite attorney; otherwise he will not be allowed for it in costs. 1 *Sellon*, 354. *Tidd*, 514.

Immediately upon the receipt of the writ, the sheriff will summon a jury. Attend, at the time appointed, with your counsel and witnesses; and the inquest will be taken in nearly the same manner as at a trial at *nisi prius*, see *Vol. 1. p. 167.* excepting that the jurors cannot be challenged. 3 *Salk.* 81. Also, the execution of the writ may be adjourned if necessary, after it is entered upon. 2 *Str.* 853. 1259.

All the plaintiff has to prove, or the defendant is permitted to controvert, is the amount of the damages; 1 *B. & P.* 569; for the cause of action itself, as stated in the declaration, is impliedly admitted by the defendant, by his suffering judgment to pass against him by default. 1 *Str.* 612. and see 2 *Saund.* 107 n. 2. 1 *Doug.* 315. Therefore it was holden that a lease, mentioned in the condition of a bond set out by the defendant upon oyer, need not be proved. 1 *Esp.* 157. So, a bill of exchange or promissory note, if declared upon, need not be proved, although it must be produced in order to satisfy the inquest that no money has been paid on account of it. 3 *T. R.* 301. 1 *Doug.* 316 n. 3 *Wils.* 155. and see 2 *Str.* 1149. So, the defendant in an action on a contract, will not be allowed to give evidence of fraud, 1 *Str.* 612, or of any other matter which would render the contract void; for by allowing judgment to go by default, he has admitted the validity of the contract. So, the defendant will not be allowed to give in evidence, in mitigation of damages, any matter which might have been made the subject of a set off. See 14 *East*, 578.

If there be two or more defendants who suffer judgment to go by default, the inquest cannot, even in trespass, sever the da-

gages; 1 Str. 429; but where there is judgment by default against one defendant, and judgment upon demurrer against the other, the inquest may sever the damages, because the defendants have severed in their pleading. 2 Str. 1140. See Vol. 1. p. 195.

How returned.] On or after the return day of the writ of enquiry, enter a rule for judgment with the clerk of the rules, as directed Vol. 1. p. 199, 200, which will expire in four days, exclusive of the day on which it was entered. The form is the same as Vol. 1. p. 200, only instead of the word "Postea," say "Enquiry." Call at the sheriff's office, and the writ and inquisition will be given to you. See the form of the inquisition, Tidd, Forms, 164. § 17 a. The defendant is allowed these four days to move to set aside the inquisition, or in arrest of judgment. As to the causes for which the court will set aside the inquisition, see post, Bk. 4, Pt. 1, Ch. 26. "New Trial."

Final judgment.] After the rule for judgment has expired, if the defendant have not moved to set aside the inquisition or in arrest of judgment, or if he have moved and the inquisition be not set aside nor the judgment arrested, get the inquisition stamped with a 10s. stamp; get the costs taxed by the master, and final judgment signed, as upon a postea; see Vol. 1. p. 200, 201; and you may then proceed to sue out execution.

The entry of the judgment is thus: After the award of the writ of enquiry on the roll, as ante, p. 22, follows an entry of the return of it and the finding of the inquest, and lastly the entry of the final judgment as in ordinary cases. See the form, Tidd, Forms, 252, &c. 10 Went. 430. 448. 442. 435. 456. If the roll have already been carried in, this entry will be made by the clerk of the treasury, upon your leaving the inquisition with him for that purpose; pay him 1s. 6d. But if the roll have not as yet been carried in, you must get a roll, as directed Vol. 1. p. 134, and enter the proceedings on it, to the interlocutory judgment inclusive; after which enter the award of the enquiry, the return, and final judgment, as above mentioned. Then docket your entry and carry in the roll, as directed Vol. 1. p. 134.

If the defendant die, after interlocutory and before final judgment, and the interlocutory judgment be revived against the executor, &c., and a writ of enquiry executed; the final judgment in that case must be against the executor or administrator, and not against the testator or intestate. 2 Sessid. 72 n.

SECT. 2.

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Writ of Enquiry in Debt on Bond.

In what cases necessary.] "In all actions in any court of record upon any bond, or on any penal sum, for nonperformance of any covenants or agreements contained in any indenture, deed, or writing," (whether the covenant, &c. be contained in the same, or in any other deed or writing; 2 *Bur.* 824, 826; and the statute extends to bonds, &c. for the payment of money by instalments, 6 *East*, 550. see 2 *W. Bl.* 706. 958, for the payment of an annuity, 8 *T. R.* 126, for the performance of an award, 6 *East*, 613. 14 *East*, 401, or for the performance of any other specific act, excepting for the payment of a sum of money in gross, and excepting the case of a bail bond, 2 *B. & P.* 446, replevin bond, 2 *Saund.* 187; and the bond of a petitioning creditor, 7 *T. R.* 300. 3 *East*, 22)—"the plaintiff may assign as many breaches as he shall think fit, and the jury shall assess not only such damages and costs as have heretofore been usually done, but also damages for such of the breaches of covenants, &c. as the plaintiff upon the trial of the issues shall prove to have been broken; and the like judgment shall be entered on such verdict, as heretofore has been usually done. And if judgment shall be given for the plaintiff on demurrer, or by confession or *nil dicit*, he may suggest upon the roll as many breaches as he shall think fit; upon which a writ shall issue to the sheriff of the county where the action is brought, to summon a jury before the justices of assize of that county, to enquire of the truth of those breaches and to assess the damages; in which writ the said justices of assize shall be commanded to make return thereof to the court from whence the same shall issue, at the time mentioned in such writ. And in case the defendant, after such judgment and before execution, shall pay into court to the use of the plaintiff the damages assessed and costs, a stay of execution shall be entered on the record; or if by reason of an execution the plaintiff shall be fully paid all the damages and costs and the charges of the execution, the defendant's body, land, or goods shall be thereupon forthwith discharged from the execution, which shall likewise be entered upon the record; but in each case the judgment shall notwithstanding remain as a further security to answer to the plaintiff such damages as he may sustain by any further breach of a covenant contained in the same indenture, deed, or writing; upon which the plaintiff may have a *scire facias* upon the said judgment against the defendant, his heirs, tenants, or executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to shew cause why execution should not be awarded upon the same judgment, in which there shall be the same proceeding as there was in the action of debt upon the said bond, for

assessing of damages upon the trial of issues joined upon such breaches, or enquiring thereof upon a writ to be awarded in manner aforesaid; and upon payment or satisfaction as aforesaid of such future damages, costs, and charges as aforesaid, all further proceedings on the judgment aforesaid are again to be stayed, and so *toties quoties*, and the defendant's body, land, or goods shall be discharged out of execution as aforesaid. 8 & 9 *W.* 3. c. 11. § 8. The defendant, however, is accountable only to the extent of the penalty; and as soon as that is recovered, or if the defendant choose to pay it into court, the plaintiff can proceed no further, but on the contrary may be compelled to enter satisfaction on the record. 1 *Saund.* 58 a. 2 *W. Bl.* 1190. 6 *T. R.* 303. It has also been ruled that the statute is obligatory; and although it enacts that the plaintiff "may" assign, "may" suggest, &c., yet the word "may" is compulsory, and the plaintiff must assign or suggest the breaches, otherwise the proceedings will be erroneous. 5 *T. R.* 636. 538. 2 *Wils.* 377. *Cowp.* 359.

*Proceedings after judgment by default.] Enter the proceedings on the roll, as in the case of a judgment by default in debt, omitting these words in the judgment, "By the court of our said lord the king now here adjudged and with his assent; and the said J. S. in mercy, &c." Then, in a new paragraph, suggest the breaches for which you seek damages; see the form, 1 *Saund.* 58 b. *Tidd, Forms,* 266. § 12. 267. § 12 a; and in the same paragraph enter a prayer for a writ of enquiry and an award thereof; see the form, *Tidd, Forms,* 266. § 12. 2 *Saund.* 187 b. or it may be in the form given in 1 *Saund.* 58 d. Make a copy of the breaches, and serve it on the defendant's attorney or agent, together with the notice of enquiry as ante, p. 23. Then sue out a writ of enquiry, to be executed before the chief justice at the sittings, or the judges of assize at the assizes, according to the county in which the venue was laid; see the form, *Tidd, Forms,* 160. § 9. 162. § 10, 10 a. 10 *Went.* clxxxv. and see ante, p. 23; deliver it to the sheriff, who will thereupon summon a jury, will annex the panel to the writ, and deliver the writ and panel to the associate. And lastly, you must make out a copy of the record on treble 6d. stamped paper or parchment, for the chief justice or judge of assize, and leave it with the marshal when you enter the cause for trial. When the cause is called on, the inquest is taken precisely in the same manner as a cause is tried at *nisi prius*.*

The plaintiff must prove the breaches assigned, and the defendant is at liberty to controvert them. Also where, in debt on bond conditioned for the performance of covenants in an indenture, &c. or of an award, judgment is suffered to pass by default, and breaches are suggested, the plaintiff must prove the condition of the bond, the award, indenture, &c. as well as the breaches assigned. 1 *Saund.* 58 d.

The associate will prepare the inquisition, (see the form of the inquisition and return, *Tidd, Forms,* 165. § 17 c), and have it sealed with the seal of the chief justice or justices of assize, and

annex it to the writ of enquiry. You may then proceed to tax your costs and sign judgment as directed *ante*, p. 26.

The remaining proceedings are entered upon the roll, thus: after the award of the writ of enquiry, make an entry of the return of it and of the inquisition; see the form, 2 Saund. 187 b. Tidd, Forms, 267. § 12; then follows the judgment for the debt, damages, and costs, as in the usual form in debt; see the form, 1 Saund. 58 e; then an award of a writ of execution against the defendant's goods, lands, or person; see the form, 1 Saund. 58 c; and lastly, if the writ be executed, follows the entry of the sheriff's return to the writ of execution, and of an acknowledgment of satisfaction by the plaintiff as to the amount levied; see the form, 1 Saund. 58 c. The judgment above mentioned includes the costs of the enquiry, but not the damages given by the inquest. See 3 B. & P. 607. The writ of execution must of course pursue the judgment, and be for the penalty, nominal damages and costs, but must be indorsed to levy only the damages given by the inquest and costs of increase, together with the reasonable charges and expences of executing the writ. 1 Saund. 58 b.

The above proceedings are stated, upon the supposition that the plaintiff has declared as upon a common money bond; but if he have set forth the condition of the bond in the declaration, and assigned the breaches (which is not very usual, although perhaps in some cases advisable), then of course there is no necessity for a suggestion of breaches on the roll, &c. as above directed.

Proceedings after judgment upon a demurrer.] The proceedings are the same as when judgment is allowed to pass by default. The judgment for plaintiff upon demurrer in debt is entered, omitting the latter words of it, in the same manner as in the judgment by default above mentioned; then follows the suggestion of breaches, if the breaches have not already been assigned in some of the previous pleadings. The remainder of the proceedings are the same as above stated.

Proceedings upon issue joined.] The best way of declaring on a bond, &c. of the description above mentioned, particularly if expedition be desirable, is, to set forth in the declaration the condition of the bond, and assign the breaches; and the defendant is then at once obliged to plead to them. But the usual mode of declaring is, to declare as upon a common money bond; the defendant then sets forth the condition upon oyer, and pleads performance; the plaintiff in his replication states the breaches; and the defendant in his rejoinder takes issue on them. As soon as issue is joined, the paper book with an award of a venire is made up, delivered and returned, in the usual way; and the issue is tried as in ordinary cases. If the defendant, however, instead of pleading performance, plead any other plea which cannot lead to an issue upon the breaches, but upon which the plaintiff if he recovers must have judgment *quod recuperet*, as if he plead a judg-

ment recovered or the like; if in such a case the plaintiff have judgment, he must sue out and execute a writ of enquiry, in the same manner as upon a judgment by default. And the court, upon application, have allowed the plaintiff to execute such a writ of enquiry, pending error upon the first judgment. 14 *East*, 401.

But if the defendant, to a declaration as upon a common money bond, plead *non est factum*, the plaintiff, in making up the issue, immediately after entering the plea, suggests the breaches, and then enters the award of the *venire*. 8 *T. R.* 255. 1 *Esp.* 277. Or if the issue have been already delivered without the suggestions, then take out a summons before a judge, for the defendant to shew cause why a suggestion of breaches should not be entered on the record; and if no cause shewn, deliver a fresh issue, including the suggestions. 8 *T. R.* 255. and see *Vol. 1. p. 132*. This also is of course tried in the ordinary way.

The verdict for plaintiff is the same as in ordinary cases; but the jury must also assess damages for the breaches.

The judgment for plaintiff is, that he recover the debt, and 1*s.* damages for the detention thereof; together with 40*s.* costs and the costs of increase, the latter of course including the costs of the trial. 1 *Saund.* 58 *b.* The writ of execution must pursue the judgment; but must be indorsed to levy only the damages found upon the breaches, the costs of increase, and the expenses of the execution, as above mentioned.

Scire facias.] If after the first inquisition or trial, the defendant be guilty of any further breaches, as the statute says that in such a case the judgment already signed shall remain as a security to the plaintiff, the plaintiff in order to obtain damages must sue out a *scire facias* on the judgment, and thereupon suggest the farther breaches; and upon the defendant's pleading thereto or making default, the plaintiff must proceed in the manner above directed. The judgment will be the common judgment in *scire facias*, namely, an award of execution. The execution will be for the amount of the debt and costs, as above mentioned; but indorsed to levy the damages, and the costs of the *scire facias*, only. See post, *Bk. 3, Pt. 1, Ch. 3.* "*Scire facias.*"

SECT. 3.

Reference to the Master.

As to the cases in which a reference to the master may be substituted for a writ of enquiry, see ante, p. 20. The mode of proceeding is thus:

Make an affidavit of the cause of action, and that interlocutory judgment has been signed; see the form, Tidd, Forms, 157. § 3 a.

Annex this affidavit to a motion paper, and give it to counsel to move to have the matter referred to the master; and the court will thereupon grant a rule nisi. In the case of bills of exchange and promissory notes, this is a motion of course; it may be made on the same day the interlocutory judgment is signed, 3 M. & S. 109. see 3 Smith, 179, or at any time afterwards. *Draw up the rule with the clerk of the rules, and serve a copy of it on the defendant's attorney; and it may be necessary to observe that no irregularity previous to the judgment, can be shewn as cause against it.* 1 B. & P. 369. *If no cause be shewn, get counsel to move to make the rule absolute upon an affidavit of service.* *Draw up the rule with the clerk of the rules; get it stamped with a 10s. stamp; and take it to the master, who will thereupon compute the sum due to the plaintiff for principal and interest, tax the costs and sign judgment, as mentioned Vol. 1. p. 201.* You may then sue out execution. In the court of Common Pleas, it is necessary for the plaintiff to give notice to the defendant of the time appointed by the prothonotary for computing the principal and interest, &c., in analogy to the practice upon writs of enquiry; 4 Taunt. 487; but no such notice is requisite in this court. Imp. B. R. 496. Where it appeared upon affidavit that the bill had been stolen out of the attorney's pocket, the court ordered the usual reference to the master, upon production of a copy. 3 M. & S. 281.

In vacation, this may be done by application to a judge at chambers. For this purpose, *take out a summons to the defendant to shew cause why it should not be referred to the master to compute principal and interest, &c.* *Serve a copy on the defendant's attorney; and if no cause be shewn, the judge, upon your producing the affidavit above mentioned, will grant an order that the clerk of the rules do make out the rule.* *Get a motion paper signed by counsel, and take it, together with the order, to the clerk of the rules; draw up the rule, and proceed as is above directed.*

If your roll have been already carried in, the clerk of the treasury will enter the judgment, upon your leaving the rule, above mentioned, with him for that purpose. Otherwise you must get a roll, as directed Vol. 1. p. 134, and enter the proceedings upon it; see the form of the entry, Tidd, Forms, 257. § 9. and see Vol. 1. p. 134; then docket and carry in your roll, as directed Vol. 1. p. 134. see also Vol. 1. p. 205, 206. Where the roll contained an award of a writ of enquiry, and afterwards an assessment of damages (as in this entry) by the court; upon a writ of error being brought for this cause, it was urged, on the authority of 7 T. R. 446, that by the award of the writ of enquiry the plaintiff had made his election to have his damages ascertained by a jury, and could not afterwards retract, and have his damages assessed by the court. The court however affirmed the judgment. 4 Taunt. 148.

BOOK II.

PART III.

PROCEEDINGS UPON DEMURRER.

Demurrer and joinder.] LET the draft of the demurrer, whether general or special, be signed by counsel. R. E. 18 C. 2. Engross it on 4d. stamped paper; and if it be a special demurrer, or a general demurrer after a special plea, file it in the office of the clerk of the papers, who will make out a copy of it for the opposite attorney, if required; but a general demurrer, in all other cases, is to be delivered to the attorney of the opposite party, and not filed.

If the plaintiff demur, he may at once add the joinder in demurrer, and proceed to make up the demurrer book; so if the defendant demur, the plaintiff never files or delivers a joinder, but merely adds it in making up the demurrer book. Vol. 1. p. 131. If the defendant however demur, and the plaintiff will not join in demurrer, the defendant's attorney may get a rule to join in demurrer from the master on the back of the demurrer; take it to the clerk of the rules, who will enter it, and will mark on the back of the demurrer "entered;" pay him 3s. Then serve a copy of it on the plaintiff's attorney or agent, thus: "N. v S. Tuesday next after [&c.] to join in demurrer. Entered." This rule expires in four days exclusive after service; and if a joinder be not delivered or filed within that time, the defendant may sign judgment of nonpros. See Vol. 1. p. 125. Or, if the defendant wish the demurrer to be argued, he may make up the demurrer book, adding the joinder, and deliver it to the plaintiff's attorney, with a rule to enter the issue. See Vol. 1. p. 131.

Demurrer book.] The demurrer book is made up on 4d. stamped paper, written on one side only, in the same manner as is directed Vol. 1. p. 127, with respect to the issue. Where all the pleadings have been delivered to the attornies and not filed, and in the case of a demurrer upon a writ of error, *scire facias*, or *audita querela*, R. T. 12 W. 3 (a), the demurrer book is made up by the attorney. But in all cases where any of the pleadings have been filed with the clerk of the papers, he makes up the demurrer book, upon

being furnished with a copy of the declaration, and of any of the pleadings which have not been filed with him; pay him 8d. per folio for the whole book, and 4d. per folio in addition, for all the pleadings subsequent to the declaration, besides stamps. See Vol. 1. p. 131. Deliver this demurrer book to the opposite attorney, having first taken a copy thereof.

The demurrer book is the same precisely as the issue or paper book on an issue in fact, as far as the entry of the pleadings, inclusive; see Vol. 1. p. 126—128; the conclusion being the only part in which they differ. The conclusion of the demurrer book is thus: "But because the court of our lord the king now here, are not yet advised what judgment to give of and upon the premises, a day is given to the parties aforesaid, before our said lord the king at Westminster, on _____ next after _____" [or, by original, "on _____ wheresoever, &c."] "to have judgment thereon; for that the said court of our said lord the king now here are not yet advised thereof, &c." See *Tidd, Forms*, 194. § 26. If there be also issues in fact, as well as the issue in law, and it is intended to try the issues in fact before the demurrer shall be determined, then immediately after the entry of the *curia advisari vult* above mentioned, enter an award of a *venire* as well to try the issues in fact, as to assess contingent damages upon the issue in law if it be found for the plaintiff. See the form of this award of the *venire*, *Tidd, Forms*, 184. § 8 c. But if it be intended to argue the demurrer, before the issue in fact is tried, (which is much the preferable mode) then after the entry of the *curia advisari vult* above mentioned, enter an award of the *venire* as to the issue in fact, as in ordinary cases. It may be necessary to observe, that in these cases all the proceedings not only as to the issue in fact, but as to issue in law also, must be entered on the nisi prius record when you are preparing for trial of the issue in fact, in the same order they appear in the paper book. *Imp. D. R.* 402.

When there are thus several issues in law and in fact, it is optional with the plaintiff which he will have determined first; 2 *T. R.* 394. 2 *Saund.* 300 n. 3; and he may make up his issue or demurrer book accordingly. But it is much preferable, for many reasons, to have the demurrer argued first, as above mentioned; and where three actions were brought against three several defendants, for different parts they had taken in the same transaction, in one of which issue was joined on a demurrer, and issues in fact in the other two, the court, upon application of the defendant, ordered the demurrer to be argued first, as the point of law involved in it was the foundation of the plaintiff's right to damages in the other two actions. 13 *East*, 27. Where there are several issues in law and fact, and the issues in fact are tried first, if the plaintiff be nonsuit, contingent damages cannot be assessed for him on the demurrer. 1 *Str.* 507.

When the clerk of the papers makes up the demurrer book, he gives a rule in the margin to return it, as mentioned Vol. 1. p. 130; and if the defendant do not return it within the time

limited by the rule, the plaintiff may sign judgment. Where the defendant has pleaded a special plea or special demurrer, we have seen (*Vol. 1. p. 124*) that when the paper book is delivered to him, he may strike out the special plea or demurrer, and return it with the general issue or a general demurrer; in which case the plaintiff's attorney must make up the issue or demurrer book again, and deliver it to the attorney of the defendant. *Vol. 1. p. 132*. If you suspect that this will be the case, however, as where you think that the defendant has demurred merely for the purpose of gaining time, you may rule him to abide by his demurrer, as directed *Vol. 1. p. 124*. What has now been said, is confined to cases where the defendant has pleaded or demurred specially; for he cannot waive a general issue or general demurrer in this manner; *R. T. 5 & 6 G. 2 (b). 1 Wils. 29*; at least without the leave of the court. See *Vol. 1. p. 123*. Also, when the plaintiff, in an issue in fact, adds the *similiter* to the replication, and makes up and delivers the paper book, the defendant, we have seen (*Vol. 1. p. 132*) may strike out the *similiter* and demur; and, having indorsed on the paper book a notice of his having filed a demurrer in the office of the clerk of the papers, (see the form, *Tidd, Forms, 195. § 28. 1 Sellon, 397*) he must return it to the plaintiff's attorney within the time limited for that purpose. The plaintiff must then get the demurrer book made up by the clerk of the papers, and deliver it to the defendant's attorney, who must return it within 24 hours; but still, it seems, if the demurrer have been special, and the defendant have not been ruled to abide by it, he may strike out all the special pleadings, and plead the general issue or a general demurrer, as above mentioned; *Tidd, 667*; in which case the plaintiff will have to make up the issue or demurrer book a third time, and deliver it to the defendant's attorney.

As soon as the defendant has returned the demurrer book, get a roll, as directed *Vol. 1. p. 134*, and make an incipitur of the issue on it; make out your docket paper; and take it, the roll, and the demurrer book, to the clerk of the judgments, who will mark the roll and enter the docket. See *Vol. 1. p. 134*. But if the plaintiff will not enter the demurrer thus on record, you may get a rule from the master on the back of the demurrer book, or (if that have been returned) on a separate piece of paper, to compel him; see the form, *Tidd, Forms, 195. § 29*; enter it with the clerk of the rules; pay 3s.; and serve a copy of it on the plaintiff's attorney or agent. If the plaintiff do not enter the issue within the time limited by this rule, the defendant may sign judgment of *nonpros*. *Vol. 1. p. 133*. Or, where the plaintiff has demurred, and the defendant joined in demurrer, if the defendant wish the demurrer to be argued, he may rule the plaintiff to enter the issue, as above directed; *R. E. 11 W. 3. see the form of the rule in this case, Tidd, Forms, 195. § 30. 1 Sellon, 337*; and if the plaintiff do not enter it within the time limited by the rule, the defendant's attorney may enter it, and proceed to argument. *R. E. 11 W. 3.*

Argument.] When the issue has been entered on the roll, either party may move for a *concilium*. See *Barnes*, 163. This is a motion of course, and requires only counsel's signature. Get the motion paper signed by counsel, and take it together with the roll to the clerk of the papers, who will mark the record "Read," and sign his initials on the motion paper; pay him 1s. 6d. Then take the motion paper to the clerk of the rules, and draw up the rule for the *concilium*; pay 6s. 6d.; see the form, *Tidd, Forms*, 555. § 75. And lastly, take the rule to the clerk of the papers, who will thereupon enter the cause for argument; pay him 1s. Serve a copy of the rule on the opposite attorney. See 2 *Str.* 1242. and see *R. M.* 30 *G. 2. r. 2.*

Copies of the demurrer book on unstamped paper, must next be delivered to the judges: by the plaintiff's attorney, to the chief justice and senior judge; and by the defendant's attorney, to the other two judges; as directed *Vol. 1. p. 191, 192.* If either party neglect to deliver the books, and the other deliver all, the latter it seems may move for judgment upon the demurrer without argument, for the former cannot be heard. 1 *Sellon*, 336. and see *R. M.* 17 *C. 1.* See 1 *B. & P.* 292 *contra.* The party demurring must enter the exceptions intended to be insisted on in argument in the margin of the demurrer books he delivers to the judges, *R. M.* 38 *G. 3.* and should leave copies of such exceptions with the other two judges. *Per Lawrence J.* 1 *Smith*, 361. A copy of the demurrer book should also be made out for counsel, to which you may add such observations as you think necessary. Mark on the back of it whether the demurrer will be argued, and when.

Afterwards, upon some Tuesday or Friday in the term, (see *Vol. 1. p. 36*) the demurrer will be called on for argument, in the order in which it stands in the paper. If there be no argument, the counsel moves for judgment, as of course. But if argued, the counsel for the party demurring is first heard in support of the demurrer; next, the counsel for the other party is heard in answer; and lastly, the former counsel is heard in reply. One counsel only on each side (usually the junior, where there are more than one,) is allowed to argue the demurrer. The court then deliver their opinion; according to which, the judgment is afterwards entered for the plaintiff or the defendant. *Pay the crier of the court 4s.*

As to the cases, in which the parties will be allowed to amend after a demurrer, see *Bk. 4, Pt. 1, Ch. 27.* Under particular circumstances also, the court have allowed a party to withdraw his demurrer, and to plead *de novo*, even after argument. 4 *T. R.* 690. *Say.* 316, 317. *Barnes*, 155. but see *Say.* 117. But if there be issues in law and in fact, and the latter be tried first and contingent damages assessed as to the demurrer, the court, it seems, will not in that case allow either of an amendment, or of the demurrer being withdrawn. 1 *Bur.* 322.

Judgment.] Judgment upon demurrer is interlocutory or final, in the same manner and in the same cases as judgment by default. See *ante*, p. 9. 19. 21. If interlocutory, draw up the rule for judgment with the clerk of the rules; pay 6s.; and proceed to execute your writ of enquiry, or to have principal and interest computed by the master, and to sign final judgment and tax your costs, as directed *ante*, p. 22—26. 30. But if the judgment be final, sign it with the clerk of the judgments, as directed *ante*, p. 10. 17, for which the rule above mentioned will be his authority. As to the necessity of suggesting breaches upon the roll, after judgment upon demurrer in debt on bond, and the mode of making the suggestion and of proceeding to enquiry thereon, see *ante*, p. 28, 29.

In entering the judgment on the roll, if there be but a single issue, then immediately after the *curia advisari vult* which concludes the issue, enter the appearance of the parties, and the judgment. See 1 *Salk.* 402, 2 *L. Raym.* 821. See the form of the judgment for plaintiff on a demurrer to a declaration, *Tidd, Forms*, 286. § 32.—the like on a demurrer to a replication, *Id.* 291. § 33. 10 *Went.* 455.—the like, on a demurrer to a replication in debt on bond, suggesting breaches, *Tidd, Forms*, 292. § 33 a. As to the judgment for plaintiff upon demurrer to a plea in abatement, see *ante*, p. 3; and see the form of it, *Tidd, Forms*, 294. § 35. 1 *Went.* 67. 7 *Id.* 347. *Lill. Ent.* 5. If the judgment for plaintiff upon the demurrer be merely interlocutory, and a writ of enquiry executed, then follows on the roll the award of the writ of enquiry, an entry of the return of it and the finding of the inquest, and lastly an entry of the final judgment, as mentioned *ante*, p. 26.

But if the judgment on a single issue be for the defendant, then immediately after the entry of the *curia advisari vult*, as above, enter the appearance of the parties, and a judgment of *nil capiat per breve*. See the form on demurrer to a declaration, *Tidd, Forms*, 317. § 69 a.—the like, on demurrer to a plea, *Id.* 317. § 70. This is of course a final judgment, and gives the defendant his costs.

Where there are several issues in law and in fact, if the issues in fact were tried before the determination of the demurrer, then immediately after the award of the *venire*, as mentioned *ante*, p. 33, enter the *processu continuato* and *postea*, as directed *Vol. 1.* p. 206. Then enter a continuance of the issue in law by a *curia advisari vult*, then the appearance of the parties, and judgment upon the demurrer; and lastly the final judgment. If continuances become necessary, owing to the different times at which the issues are tried, respectively, continue them alternately, the issue in law by a *curia advisari vult*, and the issue in fact by *vicecomes non misit breve*. See the form of these continuances, 2 *Saund.* 299, 300, *Tidd, Forms*, 287. § 32 a.

But when, of several issues in law and in fact, the issues in law have been tried first, and found for the plaintiff, then immediately

after the award of the *venire*, as mentioned *ante*, p. 33, you enter continuances alternately, of the issue in law by *curia advisari vult*, and of the issue in fact by *vicecomes non misit breve*, down to the day on which the demurrer is determined; then enter the judgment on the demurrer; then an award of a *venire* as well to try the issues in fact as to enquire of the damages upon the issue in law; then the *processu continuato* and *postea*, as in *Vcl.* 1. p. 206; and lastly, final judgment. See the form of this entry, 2 *Saund.* 299—301. *Tidd, Forms*, 287. § 32 a. But if the plaintiff be content to take damages upon the judgment on demurrer only, he may execute a writ of enquiry as to that judgment, or, in the case of a bill of exchange or the like, may have it referred to the master, and he may enter a *nolle prosequi* as to the issues in fact. 1 *Saund.* 109 n. 1. and see 1 *Str.* 532. 1 *Salk.* 219. see a form of a judgment on demurrer to the 1st, 2d, and 3d counts of the declaration, on which damages were assessed by the court, with a *nolle prosequi* as to the remaining counts, *Tidd, Forms*, 290. § 32 c.—the like, on demurrer to the first count of a declaration, with a *relictâ verificatione* and *remititur damna* as to the other counts, *Id.* 289. § 32 b.—the like, on demurrer to a replication to one of several pleas in trespass, with a *relictâ verificatione* as to another. *Id.* 293. § 34.

* If a defendant plead several pleas to the same or several counts of a declaration, and the plaintiff demur to some of the pleas, and take issue upon others; if the defendant succeed upon any of the pleas demurred to, and that plea be an answer to the whole action, the plaintiff shall not have judgment upon the issues in fact should they be found for him; but the only judgment that shall be entered is, *nil capiat per breve*. 1 *Saund.* 80 n. 1. 2 *Bur.* 753.

BOOK II.

PART IV.

PROCEEDINGS UPON NUL TIEL RECORD.

CHAPTER I.

When a Record of the same Court is pleaded.

Issue, &c.] WHEN the plaintiff replies *nul tiel record*, or replies to a plea of *nul tiel record*, he concludes his replication that the record may be inspected; and a day is accordingly given to the parties for that purpose. See 7 Taunt. 30. As this completes the pleadings, you may get the clerk of the papers to make up the paper book, which must be delivered and returned as in ordinary cases. The paper book is the same in form, as in an issue triable by the country, (see Vol. 1. p. 126) excepting the conclusion. See the form of the conclusion of the issue, when it is not to be determined in the same term, Tidd, Forms, 194. § 6.—the like, on replication to a plea of *nul tiel record*, Id. 193. § 22.—the like on a replication of *nul tiel record*, Id. 194. § 24.—the like, where there are several issues, one triable on *nul tiel record*, the others triable by the country. Id. 184. § 86. 10 Went. 390. The paper book is made up by the clerk of the papers in all cases, excepting where *nul tiel record* is pleaded to a declaration in debt on a judgment or recognizance; in which case the plea is to be delivered to, and the issue made up by, the attorney. Vol. 1. p. 122.

The plaintiff, however, instead of replying *nul tiel record*, may demand of the defendant a note in writing of the term and number roll whereon such judgment or matter of record is entered or filed, or in default thereof the plea is not to be received, and the plaintiff may sign judgment. R. T. 5 & 6 G. 2 (b). Keilw. 95, 96. Carth. 454. 517. 1 L. Raym. 347. 550. 2 Id. 1179. 2 Str. 823. 1 Saund. 92 (n). But this cannot be done, when the defendant

pleads a record of another court; which is the reason that, in pleading the sham plea of judgment recovered, it is always a judgment of another court that is pleaded.

Where the plaintiff replies *nul tiel record*, he may obtain from the master, on the back of the paper book, a rule to produce the record; enter it with the clerk of the rules; pay 3s.; and serve a copy of it on the defendant's attorney. Or when the plaintiff replies to a plea of *nul tiel record*, he must give notice in writing to the defendant's attorney that he will produce the record on a day therein mentioned, being a day certain if the action be by bill, or a general return day if the action be by original. *Tidd*, 680.

Get a roll, and enter all the proceedings upon it; docket your entry, and carry in the roll; as directed Vol. 1. p. 134.

Trial.] Let the party who has to produce the record, bespeak it at the treasury, and desire that it may be brought into court; pay 4s. 6d. Then upon the day appointed by the notice or rule above mentioned, let the plaintiff give the paper book to one of the criers in court, who will thereupon make proclamation to produce the record; pay 4s. 6d.; and the party who has to produce the record, must get one of the criers to bring the roll into court. If the record be not produced, or if produced and found not to maintain the plea, judgment of failure of record is given for the opposite party; otherwise judgment that the party hath perfected the record will be given for the party who pleaded it.

Judgment is interlocutory or final, in the same manner and in the same cases as judgment upon demurrer or default. See *ante*, p. 9. 36. If interlocutory, make an incipitur on a 4d. stamp, and take it to the clerk of the judgments, as directed *ante*, p. 10, and he will sign judgment. Then proceed to sue out and execute your writ of enquiry, and sign final judgment, as directed *ante*, p. 22—26. But if your judgment be final, enter a rule for judgment, as upon a *postea*; see Vol. 1. p. 199; make an incipitur on a 10s. stamp, and take it to the clerk of the judgments, who will sign the judgment; then take it to the master, who will tax the costs, and mark them on the judgment paper. You may then sue out execution. See the form of judgment for plaintiff, on plea of *nul tiel record* in debt, *Tidd*, Forms, 294. § 36. 10 *Went*. 456.—the like on replication of *nul tiel record* in *assumpsit*, *Tidd*, Forms, 295. § 37. and see *Id.* 260. § 9. b. Judgment upon replication of *nul tiel record* to a plea in abatement, is, we have seen, not final, but merely a *respondeas ouster*. *Ante*, p. 3.

Judgment for the defendant is of course final, and signed on a 10s. stamp as above directed, a rule for judgment having been previously given. See the form of entering it, *Tidd*, Forms, 318. § 71.

In entering the proceedings upon the roll; if the issue be single, then immediately after the conclusion of the issue, enter in a new paragraph the appearance of the parties and the judgment, as in the precedents above referred to; and if the judgment be inter-

locutory, and a writ of enquiry have been executed, enter the award of the writ of enquiry, the return to it, and the finding of the inquest, and lastly the final judgment. But where there are several issues, some to be tried by the record, others by the country, the entries may be made in the manner directed *ante*, p. 36, 37, as to proceedings upon a demurrer; and see *Tidd, Forms*, 184. § 8. b.

CHAPTER II.

When a Record of another Court is pleaded.

Issue.] LET the issue or paper book be made up and delivered, as directed in the last section. See *Barnes*, 335. 2 *Wils.* 13. See the form of the conclusion of the issue, on replication to a plea of *nul tiel record of a judgment, &c. in a different court*, *Tidd, Forms*, 194. § 23.—the like, on a replication of *nul tiel record*, *Id.* 194. § 25.—the like, where the issue is not determined the same term, *Id.* 194. § 26. You cannot in this case demand a note in writing of the term and number of the roll, &c. as mentioned in the last chapter; but you must plead *nul tiel record*, and so proceed to trial.

Certiorari.] The only way of bringing in the record, is by writ of *certiorari*. 2 *Bur.* 1034. This writ must be sued out by the party who has to produce the record, directed to the chief justice, judge, or officer of the court below, in whose custody the record is supposed to be. It may be sued out either in this court, or with the cursitor; if the latter, it is an original writ, tested in or out of term, returnable on a general return day, and made out by the cursitor, upon your furnishing him with a *præcipe*; if sued out in this court, it is a judicial writ, tested in the name of the chief justice on some day in term, and returnable on a general return day in actions by original, or on a day certain in actions by bill, and signed and sealed as in ordinary cases. It is sufficient to return the tenor of the record, upon this writ, without certifying the record itself. 3 *Salk.* 296. *Gilb. Execution*, 143.

Trial, &c.] Give notice of your bringing in the record, or rule the other party to bring it in, and proceed to trial, judgment, &c. as directed in the last chapter.

BOOK III.

PART I.

PROCEEDINGS IN PARTICULAR ACTIONS.

CHAPTER I.

Ejectment.

- SECT. 1.** *Proceedings in Ejectment, in ordinary Cases.*
2. *Proceedings in Ejectment, on a vacant Possession.*
3. *Proceedings in Ejectment, for nonpayment of Rent.*
4. *Action for mesne Profits.*
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SECT. 1.

Proceedings in Ejectment, in ordinary Cases.

AN actual entry upon the premises sought to be recovered, (or a claim, when an actual entry is impracticable), or a notice given to the tenant to quit at the end of his year's tenancy, is in some cases necessary, before an action of ejectment is commenced.

An actual entry into lands is only necessary to avoid a fine with proclamations, 2 *Str.* 1086. 4 *Bro. P. C.* 353. *Doug.* 485. *Willes*, 182. 7 *T. R.* 433. 1 *Saund.* 319 b, &c. 9 *East*, 17, and in the cases of vacant possession mentioned in the next section; in all other cases, the entry's being confessed, according to the terms of the consent rule, is deemed sufficient. This entry must be made within five years after the fine has been levied and the proclamations completed; provided the party be not an infant, or a married woman, or insane, or beyond sea, at the time, and then within five years after the disability ceases. 4 *H. 7. c.* 24. In all other cases, an entry must be made within 20 years after the right of entry ac-

crued, unless the party labour under some of the above disabilities. 21 J. 1. c. 16. But an ejectment lies only where the party bringing it has a right of entry; and this statute having taken away his right of entry after twenty years, consequently 20 years is the time limited for bringing an ejectment. *See upon this subject,* 1 L. Raym. 716. 2 Salk. 422. 3 T. R. 172, 173. 2 B. & P. 542. 2 W. Bl. 690, 5 Bur. 2604. 1 Taunt. 578. 3 Taunt. 441. 6 East, 80. 2 Str. 1142. 1 L. Raym. 740. 1 Saund. 319 c. And by 4 & 5 A. c. 16. § 16, no entry or claim shall be of force to avoid a fine with proclamations, or be sufficient within the above statute 21 J. 1. c. 16, unless the action be commenced within one year afterwards. These statutes are never specially pleaded in ejectment, but may be given in evidence under the general issue.

A notice to quit is necessary, in order to determine a tenancy from year to year. The notice must be to quit at the end of the year of the tenancy, and must be given at least 6 months previously: as, if the tenancy commenced on the 25th March, the notice must be to quit on the 25th March, and must be given on or before the 29th September preceding. *See* 1 T. R. 160. 3 Wils. 25. 1 H. Bl. 97. 2 New Rep. 330. 1 Taunt. 555. 3 B. & P. 399. 3 T. R. 13. 4 Id. 361. Cowp. 243. Doug. 21. 1 T. R. 379. 7 Id. 68. 2 Sid. 20. 6 T. R. 83, 219. 2 East, 237. 7 Id. 552. 10 Id. 13. 11 Id. 312, 408. 12 Id. 57. 13 Id. 405. 14 Id. 234.

Declaration.] Make out a draft of the declaration, and add a notice to appear at the bottom of it. See forms of the declaration and notice, Tidd, Forms, 669. § 15.—677. § 20. 10 Went. 41—52. If there be any difficulty as to the demises, it may be prudent to get the declaration drawn by your pleader, or drawn or settled by counsel. If the venue be laid in London or Middlesex (and it must of course be laid in the county in which the premises lie, unless otherwise ordered by the court), the notice should require the tenant's appearance on the first day of the next term, that is, the first day in full term, and not the essoign day. 2 Str. 1049. But if the venue be laid in any other county, the notice should be for the next term generally; and where it was for the next issuable term, (which was not the next term, another term intervening), the court of Common Pleas held it to be sufficient. 4 Taunt. 738. If the title of the declaration appear to be precedent in point of time to the demise, &c. it is not material. After the draft of the declaration has been prepared, engross it on 4d. stamped paper, and make as many copies of it also on 4d. stamped paper, as there are tenants in possession of the premises in dispute; and let a copy be served on each tenant. See 1 B. & P. 369. Lofft, 301.

The declaration should, regularly, be served either on the tenant himself, or on his wife: 2 W. Bl. 800. Barnes, 178, 194. 2 Wils. 263. 2 B. & P. 55. 1 New Rep. 306: on the tenant himself, it may be served any where; Tidd, 435. 2 Sellon, 96; on the wife, it may be served either on the premises, or at the husband's house;

6 T. R. 765. 2 B. & P. 55; but in all other cases, it must be served upon the premises. It is not necessary to the validity of the service, however, that the tenant or his wife receive the copy of the declaration; it is sufficient if it be tendered to him or her; after which it may be left for them at the place where the tender was made. *Barnes*, 185. 174. 180. and see 2 Wils. 263. 1 Str. 575. 2 Bur. 1116. Service on the churchwardens and overseers, in ejectment for a house rented by the parish for the purpose of harbouring some of the parish poor, has been deemed sufficient. *Barnes*, 181.

If the tenant or his wife be not at home, the declaration may be served on their child or servant; and if it afterwards appear from the acknowledgment of the tenant himself that he received the declaration before the essoign day of the term, the service will be deemed sufficient. 14 East, 441. See *Barnes*, 188. 1 H. Bl. 644. But the wife's acknowledgment in such a case will not be sufficient. 1 B. & P. 384. In such cases, where the declaration is not served personally on the tenant or his wife, the manner in which it was served should be stated to the court, when you move for judgment against the casual ejector.

In many cases it happens that service of the declaration and notice, as above directed, is impracticable, either from the tenant's absconding, or from other causes. In such cases, the service should be made in the best manner possible under the peculiar circumstances of each case; as by serving the declaration on some one of the tenant's family upon the premises, or by affixing it upon some conspicuous part of the premises if there be no person in possession. Then move the court for a rule to shew cause why the service in question should not be deemed good service, and that leaving a copy of the rule with some person on the premises, or affixing it upon the outer door if no person can be met with, shall be deemed good service of the rule; see the form of the rule, *Tidd, Forms*, 682. § 29. 683. § 30. Draw it up with the clerk of the rules, and serve a copy of it in the manner directed by the rule: and if no sufficient cause be afterwards shewn, the court will make the rule absolute upon an affidavit of service. See 1 Str. 575. *Hardw.* 164. 2 Bur. 1181. 1 W. Bl. 290. 317. 1 New Rep. 293. Where the tenant in possession was a lunatic, and the declaration was served on a person who resided with her and transacted her business, (no committee being appointed), the court granted a rule to shew cause why this should not be deemed good service. *Barnes*, 190. See *Lofft*, 401.

Care must be taken to serve the declaration before the essoign day of the term. *Barnes*, 172. 14 East, 441. In serving it, the notice at the foot of it should be read over and explained, or at least the purport of it should be signified, and the nature and meaning of the service explained, to the person upon whom it is served, so as to be fully understood by him. Where a declaration was tendered to the tenant's wife, in her shop upon the premises, and the person serving it attempted to read to her the notice, but she re-

fused to hear it, and left the shop; and the declaration and notice were thereupon left in the shop: the court were of opinion that the notice should have been read aloud in the shop, but granted a rule to shew cause why this should not be deemed good service. 2 *Wils.* 263. And in another case, when the attorney, after explaining the contents of the declaration to the tenant's wife, was proceeding to read the notice, but she said she could read it herself, and ran her eye over it as if she read it; this was holden to be sufficient. 2 *W. Bl.* 800.

After serving the declaration and notice, *engross an affidavit of the service on a 2s. 6d. stamp, and let it be sworn before a judge in town or a commissioner in the country; see the form, Tidd, Forms, 677. § 21.—the like where there are several tenants, Id. 678. § 22.—the like where the declaration was served on one tenant, and on the wife of another, Id. 678. § 23.* It may be made either by the person who actually served the declaration, or by one who was present at the time of the service. 2 *B. & P.* 120. When the declaration has been served on the tenant in possession, it must appear from the affidavit that he was "tenant" in possession; merely stating a service on the "person" in possession, would be insufficient. *Tidd, 435.* The affidavit must also be certain and positive. Therefore an affidavit of service on *J. S. tenant or C. his wife*, was holden bad; *Barnes, 173*; so, of service on the wives of *A. & B.*, "who or one of them are tenants," is bad. *Id. 174.* But an affidavit of service on the wife, "as she informed deponent, and as he verily believes," has been deemed sufficient. *Barnes, 194.* Where the service is good, but the affidavit defective, the defect may in general be remedied by a supplemental affidavit. 2 *Sellon, 99. Tidd, 436.*

If the declaration be defective, the plaintiff may have leave to amend it, even after plea pleaded. Thus leave has been given to amend the declaration, in the venue; *Imp. C. B. 636*; in the demise; 4 *Bur. 2447. 2 Id. 1162. 1 Id. 665*; in the term stated in the demise; 2 *W. Bl. 940. and see Coup. 841*; in the parcels; *Pr. Reg. 16*; and the notice at the foot of it, in the time of appearance, 7 *T. R. 469*, and in the name subscribed to it. 3 *T. R. 351.*

Judgment against the casual ejector.] If the tenant, upon whom the declaration and notice were served, do not take steps to have himself made a party to the action, the plaintiff becomes entitled to judgment by default against the casual ejector. The motion for this judgment must be made some time in the term in which the tenant was required by the notice to appear; 1 *Salk. 257. R. T. 18 C. 2 (a)*; in town causes, it is usually made at the beginning of the term; in country causes, usually at the latter end of the term.

In order to move for judgment against the casual ejector, *annex the affidavit of service to the declaration, and indorse on them "To move for judgment against the casual ejector;" get it signed by counsel.* The motion paper requires only counsel's signature,

If the declaration have been regularly served on the tenant or his wife; but if the service were in any other manner, the motion must be made in court, and the particular manner of the service mentioned. See *ante*, p. 44.

Take the motion paper to the clerk of the rules, and draw up the rule; pay him 7s., and 6d. for every tenant after the first. This is a rule nisi, for judgment unless the tenant shall appear and plead within the time therein mentioned; see the form, as to the whole of the premises, *Tidd, Forms*, 681. § 26.—the like, as to part, *Id.* 682. § 27.—the like, where part of the premises are tenanted and part untenanted, *Id.* 683. § 28. One rule is sufficient, where there are several tenants, although the name of each tenant were separately prefixed to the notice served on him, instead of the names of all. 7 T. R. 477. This rule must be drawn up and taken from the office of the clerk of the rules, within two days after the end of the term in which it was moved for; otherwise it shall not be drawn up or entered, nor shall any further proceedings be had in such ejectment. R. M. 31 G. 3. r. 1.

At the expiration of the time limited for the tenant's appearance, (*vide infra*). Search the books at the judge's chambers for a plea and consent rule upon the part of the tenant; and if none be filed, then make an incipitur on a 10s. stamped paper, and an incipitur on the roll (as in other cases of judgment by default, when final, see *ante*, p. 10;) and upon producing your rule for judgment, the clerk of the judgments will sign judgment. Pay him 4s. 2d. Common bail must previously be filed for the casual ejector. R. M. 33 C. 2. 2 *Sellon*, 100. See the form of judgment by original, with a remittitur damna, *Tidd, Forms*, 684. § 31.—the like by bill, *Id.* 685. § 32. There is no distinction, in point of effect, between this judgment and a judgment obtained upon a verdict against the tenant or other person claiming title.

When judgment against the casual ejector has been signed, make out a precept for a writ of possession; engross the writ on 5s. stamped parchment; see the form, *Tidd, Forms*, 703. § 61—63; and get it signed; pay 1s. 8d.; and sealed, pay 7d. Take the writ to the sheriff's office, and get a warrant on it; and give the warrant to an officer to execute. As to the execution of this writ, *vide post*. At any time, however, before the writ of possession is executed, the court, or a judge in vacation, upon an affidavit of merits, may stay the proceedings, and let in the tenant or other person claiming title to defend the action, by obliging the plaintiff to accept a plea; 1 *Salk.* 117. 2 *Id.* 516. 2 *Str.* 975; but in no case will the court grant this indulgence to parties, after execution executed. 3 *Taunt.* 506.

[*Appearance and plea by tenant.*] The appearance is entered and plea delivered, either by the tenant upon whom the declaration and notice were served, or by his landlord, or by both jointly, or by some other person claiming title to the premises. In *town causes*, where the notice requires the tenant to appear on the first

day of the term, he is allowed four days after the rule for judgment, already mentioned, has been drawn up and entered, to appear and plead, provided the rule be drawn up and entered before the last four days of the term; or if drawn up and entered within the last four days of term, he has until two days before the escoign day of the following term allowed him. But if the notice were to appear generally of the term, he shall have the entire of the term to appear and plead. In *country causes*, the tenant, &c. has until four days exclusive after the issuable term previous to the assizes, allowed him for the same purpose. See *Say*. 303. *Barnes*, 186. 250.

It must be remarked, however, that a tenant is not bound to appear, even although his landlord offer to indemnify him; *Barnes*, 173; nor can the landlord appear and defend the ejectment in the tenant's name, without his consent. *Id.* 178. The landlord however may have leave to appear and defend the action in his own name, as shall be stated presently; and for this purpose the tenant, when served with a declaration in ejectment, is bound to give immediate notice thereof to his landlord, under pain of forfeiting three years improved rent of the premises. 11 G. 2. c. 19. § 12. See 1 *T. R.* 647. On the other hand, if the ejectment be brought by the landlord or any other person claiming under him, the court will not let the tenant in to defend the action on any supposed defect of title. 2 *W. Bl.* 1259.

The mode of appearing for the tenant is thus: *Get a blank consent rule, unstamped, at the stationer's, and fill it up; see the form, Tidd, Forms, 686. § 33. 2 Sellon, 103. If the ejectment be upon a supposed original, strike out the words, "and file common bail," in the printed form, and instead of the word "bill," insert "writ." In the margin insert the parcels stated in the declaration, or such part of them as the tenant defends for. Let the defendant's attorney sign the rule, leaving room above his signature for that of the attorney for the plaintiff. Take this rule, together with the memorandum of your warrant to defend (see Vol. 1, p. 24.) to the filacer, if the action be by original, and enter an appearance for the tenant, as directed, Vol. 1, p. 300; see the form of the præcipe for the appearance, Tidd, Forms, 690. § 40; or if the action be by bill, take the rule and memorandum to the clerk of the common bails, and file common bail for the tenant, as directed Vol. 1, p. 314; the filacer or clerk of the common bails, will at the same time mark the consent rule. Next engross the general issue upon 4d. stamped paper; see the form, Tidd, Forms, 691. § 41; annex the rule to it, and leave both at the judge's chambers. Pay the judge's clerk 2s. According to the usual terms of the consent rule, the defendant can plead the general issue only; but the court, upon application, may give him leave to plead to the jurisdiction, (*ante*, p. 1.), such as a plea of ancient demesne, or the like. See as to the affidavit necessary to support an application for leave to plead this plea of ancient demesne, 2 *Bur.* 1046. It is necessary to remark that the plea of ancient demesne in ejectment, must be pleaded within four days, or within the first four days of the term, 8 *T. R.* 474, in the same*

manner as pleas to the jurisdiction in other cases, (*see ante*, p. 1, 2), although that happen to be before the expiration of the time limited for the tenant's appearance. The court have allowed it to be filed *ad bene esse*, within the first four days of the term, pending a rule nisi for permission to allow the plea to be pleaded. 10 *East*, 523.

When the time limited for the tenant's appearance has expired, let the plaintiff's attorney call at the judge's chambers and get the consent rule; and, after separating the plea from the rule, let him sign the latter, and take it to the clerk of the rules, who will thereupon draw up the rule upon a stamp; see the form, *Tidd, Forms*, 687. § 34. 688. § 37. Where the ejectment has been brought by one tenant in common against another, 3 *Bur.* 1695, or by one coparcener or joint-tenant against another, 2 *Taunt.* 397. and see 1 *Camp.* 179, the court, upon application, will let in the tenant, &c. to defend, upon his confessing lease and entry only, so as to put the lessor of plaintiff to prove at the trial an actual ouster; provided the tenant do not dispute the plaintiff's title as joint-tenant, &c. 7 *Mod.* 39. See the form of the rule granted in such a case, *Tidd, Forms*, 688. § 36. and of the consent rule, *Id.* 688. § 37. If the plaintiff delay taking the plea, &c. from the judge's chambers, or delay proceeding afterwards, the defendant may rule him to reply; and if he do not reply within the time limited by the rule, the defendant may sign judgment of *nonpro.* 2 *W. Bl.* 763. The defendant, however, in such a case, will not be entitled to costs. *Id.* See the form of the judgment of *nonpro.*, *Tidd, Forms*, 702. § 59. a.

When you have got the stamped rule from the clerk of the rules, make up the issue as in ordinary cases, (*see Vol. 1, p. 127.*) annex a copy of the rule to it, and deliver it to the defendant's attorney. If the tenant defend only for part, the plaintiff may of course sign judgment against the casual ejector for the residue.

The defendant, after entering into the consent rule, may if he wish withdraw his plea and confess the action. *See ante*, p. 5—6. See the form of the cognovit, *Tidd, Forms*, 690. § 40. a. The plaintiff, in such a case, after a *relictâ verificatione* entered, may sign judgment in pursuance of the cognovit, as directed, *ante*, p. 6. See the form of the judgment, with a *remittitur damna*, where the confession was after issue joined, *Tidd, Forms*, 696, § 55.—the like for plaintiff as to part of the premises, and for the defendant on a *nolle prosequi* as to the residue, *Id.* 697. § 56.—the like, as to an undivided part of the premises in one count with a *remittitur damna*, and a *nolle prosequi* as to the residue, *Id.* 698. § 56. a. This is a final judgment, and has the same effect as a judgment upon verdict. Where the landlord defended the action at his own expense, but in the name of his tenant, the court, upon application, set aside a judgment entered up upon a cognovit given by the tenant, and let in the landlord to defend the action in his own name. 7 *Taunt.* 9. *see 1 Doug.* 407.

The plaintiff, at any time before trial, may take out a summons

before a judge, calling upon the defendant for a bill of particulars of the premises for which he intends to defend the action, if they have not already been specified in the consent rule; 7 T. R. 332; see the form of the bill of particulars, *Tidd, Forms*, 691. § 44. So, the defendant, if he have any doubt as to the lands, &c. for which the ejectment is brought, may, in the same manner, oblige the plaintiff to give him a bill of particulars; 7 T. R. 332; see the form of the judge's order in such a case, *Tidd, Forms*, 691. § 42.—and of the bill of particulars, *Id.* § 43. Also, where the ejectment is brought for a forfeiture, the court upon application will rule the lessor of the plaintiff to give the defendant a particular of the covenants, and breaches, &c. on which he means to insist that the defendant has forfeited his term, and that he shall not be allowed to give evidence at the trial of any thing not contained in those particulars. 6 T. R. 597.

The defendant also may move to stay proceedings, until a guardian shall be appointed for an infant lessor, to answer costs; *post*, Bk. 4, Pt. 1, Ch. 11; or where the lessor of plaintiff is abroad, or dead, or is unknown, until security be given for costs. *Id.* So, the court will stay proceedings in a second action, until the costs in the first shall be paid, if the second action be in the slightest degree vexatious. *Id.* Ch. 10. So, if ejectment be brought for nonpayment of rent, or of principal and interest due on a mortgage, the proceedings may be stayed upon payment of money to the landlord or mortgagee, or, in case of their refusal, upon payment of it into court. *Id.* But where the defendant moved to stay the proceedings in an ejectment, upon the ground that the title of the lessor of the plaintiff had determined since the commencement of the action, the court refused the rule, saying that the plaintiff had a right to proceed for the recovery of his damages and costs. 2 Str. 1056.

Appearance and plea by landlord.] We have already seen (*ante*, p. 47.) that although the tenant in possession is not bound to appear and defend the action, yet he is obliged under a penalty to give his landlord notice when a declaration in ejectment has been served on him. By 11 G. 2. c. 19. § 13, the court may allow the landlord to make himself defendant, by joining with the tenant, if the tenant appear; but if the tenant neglect or refuse to appear, judgment shall be signed against the casual ejector for want of such appearance; yet if the landlord shall desire to appear by himself, and consent to enter into the like rule the tenant must have entered into had he appeared, the court shall permit him to do so, and shall order a stay of execution upon the judgment against the casual ejector until they shall make farther order therein. A liberal construction has been given to this statute; and the court have let in the heir of the landlord, although he had never been in possession, 4 T. R. 122. and see 3 T. R. 783, a remainder-man, under the same title with the original landlord, 3 T. R. 783, a devisee in trust, 4 T. R. 122. see *Barnes*, 193.

and a mortgagee, 8 T. R. 645, severally, to defend the action. And where a lord, claiming by escheat, applied to be admitted a defendant in an action brought by one claiming as heir, the court directed the lord to bring an ejectment, and the heir to be admitted to defend; and said that if the lord refused, they would discharge his rule to be admitted; or if the heir refused, they would allow the lord to defend. 3 Bur. 1290. Where the tenant came into possession under an agreement with the lessor of plaintiff for a term of years, but afterwards disclaimed the tenancy, the court held that a stranger claiming title should not be admitted to defend; or that if he happened to be admitted, he should not be allowed to impeach the title of the lessor of plaintiff, or to set up any other defence than that of which the tenant might have availed himself had he appeared. 4 M. & S. 347. But in the case of a landlord, the court have, even after judgment against the casual ejector, let him in to defend the action, when it appeared that the tenant had not given him notice of the service of the declaration; 4 Bur. 1996; the court of Common Pleas however, in some recent cases, have refused to grant such an indulgence, unless collusion appeared between the lessor of plaintiff and the tenant. 3 Taunt. 506. 4 Id. 820. 5 Id. 205.

The motion for the landlord to be admitted to defend, either with the tenant, or by himself, is a motion of course, and requires only counsel's signature. *Get the motion paper signed by counsel, take it to the clerk of the rules, and draw up the rule; pay 10s. 6d.; see the form, Tidd, Forms, 689. § 38; and annex a copy of it to the consent rule and plea, before you leave them at the judge's chambers. You then proceed as in ordinary cases where the tenant appears alone.* If the landlord appear by himself, the rule gives liberty to the plaintiff to sign judgment against the casual ejector, until further order. The plaintiff therefore immediately signs judgment against the casual ejector; and if the landlord afterwards fall at the trial, the plaintiff upon producing the *postea* and office copies of the rules may move for leave to sue out execution, and the court will accordingly grant a rule nisi. *See the form of the rule, Tidd, Forms, 703. § 60.*

Issue.] When you have got the stamped consent rule from the clerk of the rules, *make a copy of it; make up the issue upon 4d. stamped paper, as in ordinary cases, only substituting the name of the tenant, &c. for that of Richard Roe in the declaration; indorse the notice of trial on the issue, and annex to it the copy of the rule; and deliver them to the defendant's attorney. Then sue out jury process, make up your nisi prius record, enter the cause for trial, and deliver your briefs to counsel, as in other cases. See the form of the issue by original, Tidd, Forms, 693. § 48.*

Trial, &c.] The defendant may of course give any special matter of defence in evidence under the general issue; and he will be entitled to begin to give evidence, and to the reply, as he

would in ordinary cases if his special matter of defence were pleaded. See *Vol. 1, p. 169, 170*. Also, if the lessor of plaintiff have entered into any part of the premises, after issue joined and before trial, the defendant may plead this matter *puis darrein continuance*. *Vol. 1, p. 177*. If the plaintiff do not proceed to trial in pursuance of his notice, without having countermanded it in time, the defendant shall have his costs of the day, or judgment as in case of a nonsuit, as in other cases. See *post, Bk. 4, Pt. 1, Ch. 22, 23*. See the form of the rule for costs for not proceeding to trial, *Tidd, Forms, 694, § 49*.

If the defendant do not appear and confess lease, entry and ouster, then after calling the defendant (and his attorney, if he be within the rule), the plaintiff must be called and nonsuit; and at the prayer of the plaintiff this fact is entered on the *postea*, namely, that the plaintiff was nonsuit because the defendant did not appear and confess lease, entry and ouster, which will entitle him to sign judgment against the casual ejector. *Bul. N. P. 98*. See the form of the *postea* in this case, *Tidd, Forms, 695, § 53*. So, if there be several defendants, and some of them do not appear and confess lease, entry and ouster, a verdict must be taken for them, but with an indorsement on the *postea* that it was because they did not appear and confess; *Bul. N. P. 98. 2 L. Raym. 799. See 2 Salk. 456*; and the trial proceeds as to the defendants who have appeared. After being nonsuit for this cause, you may, on or after the day in bank (*2 T. R. 779*), sign judgment against the casual ejector, as directed *ante, p. 46*, in the same manner as if the defendant had never appeared and pleaded; and sue out execution. You may also proceed upon the consent rule for your costs, *Barnes, 182. 3 Taunt. 485. See 2 Wils. 7*, thus: *Take the judgment paper, consent rule and postea, to the master, and he will tax the costs upon the rule. Then make a copy of the rule and allocatur; serve it personally on the defendant, at the same time shewing him the original rule; make a demand of the costs, and if he do not pay them, move the court for an attachment against him*. It is not necessary in this case that the *postea* or rule be stamped with a 10s. stamp. *2 Sellon, 115*.

The plaintiff is not restricted in his proof to the number of acres, &c. or quantity of estate set forth in his declaration. Therefore if he declare for 40 acres, he may recover 20; if he demand a moiety, he may recover a third. *1 Bur. 326*. If the verdict be special, it should appear upon the face of it that the lessor of plaintiff had a right of entry, at the time he commenced his ejectment. See the form of a special verdict in ejectment, *Tidd, Forms, 695, § 54. 1 Bur. 60—74. 3 Bur. 1626. 2 H. Bl. 46. 3 L. Raym. 211. 154. 1 Str. 318. 2 Id. 1253. Comyns, 205*.

The damages given in ejectment, are merely nominal; the damages actually sustained by the detention of the property, &c. being usually recovered in an action of trespass for mesne profits. *Vol. 1, p. 194*.

The prevailing party is entitled to costs in nearly the same

cases as in personal actions. If there be several defendants, and the plaintiff have a verdict each of them is liable for the entire costs, even although they defended severally. *Bul. N. P.* 335, 336. If several defend jointly, and succeed, they shall be entitled to costs; but the plaintiff may pay the costs to which of them he pleases; 1 *Str.* 516. 2 *Id.* 1203; if they defend severally, they are entitled to costs if they succeed, in the same manner as in other cases. 8 and 9 *W.* 3. c. 11. § 1. So, if plaintiff be nonsuit on the merits, the defendant is entitled to costs; 4 *J.* 1. c. 3; but where he is nonsuit, because the defendant has not confessed lease, entry and ouster, we have seen (*ante*, p. 51) that so far from being liable to costs, he is entitled to them from the defendant, according to the terms of the consent rule.

If the plaintiff have a verdict, he recovers his costs against the defendant by a writ of execution, or by action, as in ordinary cases; but if entitled to costs under the consent rule, upon his being nonsuit, as is above-mentioned, the only way of recovering them is by attachment, as directed *ante*, p. 51. So, if the defendant be entitled to costs, either upon verdict or where the plaintiff is nonsuit, his only remedy is by attachment; for the lessor of the plaintiff not being a party to the record, he cannot have a writ of execution against him, but must proceed upon the consent rule only. The usual mode is, to tax costs upon the *postea*, as in other cases, and sue out a *ca. sa.* against the nominal plaintiff for the amount of them; make copies of the rule, *allocatur* and *ca. sa.*, and serve them on the lessor of plaintiff, at the same time shewing him the originals, and demanding the costs; and if he do not pay them, move the court for an attachment against him. Suing out a *ca. sa.* against the nominal plaintiff, however, seems an absurd and unnecessary proceeding, and may, I think, be omitted; and the defendant may at once proceed on the consent rule, in the manner directed *ante*, p. 51, as to the plaintiff's proceeding for costs upon a nonsuit. See 3 *Taunt.* 485. See the form of a demand and refusal, &c. as ground for a motion for an attachment, *Tidd, Forms*, 707. § 66.

Judgment.] If a verdict have been given, let the prevailing party get the record of *nisi prius* from the associate, and, in town-couses, indorse the *postea* on it, as directed *Vol. 1*, p. 199. See the form of the *postea* for plaintiff, *Tidd, Forms*, 694. § 50.—the like for defendant, *Id.* 694. § 51.—the like, where part is found for the plaintiff, part for the defendant, *Id.* 695. § 52. 10 *Went.* 48.

Enter a rule for judgment, as directed *Vol. 1*, p. 199, 200; and if the verdict be not set aside, or the judgment arrested before it expires, then, if the verdict be for plaintiff, proceed to tax costs and sign *final judgment*, as directed *Vol. 1*, p. 200. If the verdict be for the defendant, costs are taxed upon the consent rule, as above-mentioned. See the form of the judgment on verdict for plaintiff, *Tidd, Forms*, 700. § 57.—the like for plaintiff as to part of the premises, and for the defendant as to the residue, *Id.* 700. § 58. 10 *Went.* 48, 49.—the like for plaintiff as to part of the premises, and *nolle prosequi* us to

the residue for which there was no finding by the jury, with award of *habere facias possessionem* and return. *Tidd, Forms*, 701. § 59. See also upon this subject, 2 Str. 835; 908. 1180. 1 Bur. 362. Cro. Car. 178. Cro. El. 768. Co. Lit. 285. 4 T. R. 683. Carth. 390, 5 Mod. 285.

Error.] The proceedings upon a writ of error on a judgment in ejectment, are the same (with one or two exceptions) as in other cases. Bail is required, where the defendant brings a writ of error after verdict for the plaintiff; 16 and 17 C. 2. c. 8. § 3; and the recognizance is taken for the amount of double the improved rent, and the single costs of the ejectment. 8 East, 298. 4 Bur. 2501. and see *Barnes*, 212. 78. 75. Carth. 121. 4 Taunt. 289. It is not necessary that the plaintiff in error should join in the recognizance; or if he do, he cannot be examined as to his sufficiency. 8 East, 298. The death of the nominal plaintiff cannot be assigned for error; 2 Str. 899; nor can a defendant in ejectment assign for error, that being an infant he appeared by attorney. 1 Str. 25. Vol. 1, p. 212. See the form of an assignment of error in ejectment and joinder, 10 Went. 1. 3.

When the plaintiff obtains judgment, and the defendant brings a writ of error, the plaintiff cannot sue out execution until the writ of error be determined; 2 Str. 1241. See 2 Bur. 757; provided bail in error be put in and perfected, when necessary, within the time limited for that purpose. But where the defendant below, pending a writ of error brought by him, brought a new ejectment to recover the same premises, the court would not allow him to proceed in the new action, until he quitted possession, or the tenants had attorned to the plaintiff in the former action. 1 Salk. 258. Also, where a defendant brought a writ of error, the court obliged him to enter into a rule not to commit waste, pending the writ. 3 Bur. 1823 Vol 1, p. 237. And by 16 and 17 C. 2. c. 8. § 4, if upon error brought, the judgment be affirmed, or the plaintiff discontinue or be nonsuit, the court, from which execution should issue, shall award a writ to inquire as well of the mesne profits, as of the damages by any waste committed, after the first judgment in the ejectment; and upon the return thereof, judgment shall be given and execution awarded for such mesne profits and damages, and also for costs of suit. The bail in error also are made liable for these mesne profits, damages, and costs; *Id.* § 3; but no action can be brought for them against the bail, until their amount have been first ascertained upon a writ of inquiry, as above directed. 1 M. & S. 247.

Execution.] Upon judgment for the plaintiff, he is entitled to a writ of possession; see the form, *Tidd, Forms*, 703. § 61—705. § 63. 10 Went. 243. 248. 261—263. 333—335; and he may have a separate writ of *fi. fa.* or *ca. sa.* for the costs; see the form of the *ca. sa.* 10 Went. 237. 282; or he may have the *fi. fa.* or *ca. sa.* added to the *habere facias possessionem* in the same writ; see

the form of the writ of possession and *fi. fa.* for costs, in the same writ, *Tidd, Forms*, 706. § 64.—the like, with *ca. sa.* for costs, *Id.* 706. § 65. 10 *Went.* 49.—the like, with *ca. sa.* for the costs of the actions, and also for costs in error on affirmance in the house of lords, *Tidd, Forms*, 705. § 65. a. If this writ be not executed, then upon the return of it you may sue out an *alias*, &c. *Palm.* 289. But if possession be once given under it, the plaintiff cannot sue out another writ of possession, although he be disturbed in his possession by the same defendant, and although the sheriff have not yet returned the writ. 1 *Taunt.* 55. See 6 *Mod.* 27. 1 *Salk.* 321. In such a case, however, it is probable that the court upon application would punish the defendant by attachment. The defendant, we may recollect, cannot have a writ of execution for his costs, if he have a verdict or the plaintiff be nonsuit; but must proceed upon the consent rule by attachment. *Ante*, p. 52.

In order to sue out the writ, make out a *præcipe* for it, and engross the writ on a 5s. stamped parchment; get it signed; pay 1s. 8d.; and sealed; pay 7d. Leave it at the sheriff's office, and get a warrant on it; pay 2s. 6d.; give the warrant to the officer, and he will execute the writ, by putting the lessor of the plaintiff, or some person on his behalf, into possession, upon the premises being shewn to him. The officer, if necessary, may break open doors, in order to execute an *habere facias possessionem*, if the possession be not quietly given up; or he may take the *posse comitatus* with him, if he fear violence. 5 *Co.* 91 b. *Vol.* 1, p. 261. And after he has got admission, he may remove all persons, goods, &c. from off the premises, before he gives possession. 1 *Lev.* 145. If there be several tenements in the possession of several tenants, the officer must give possession of each, separately; 2 *Ro. Abr.* 180; but if the several tenements be in the possession of one tenant, and included in the same action, possession of one, in the name of the whole, will be sufficient. If he give possession of more than he ought, the court afterwards upon application will order it to be restored. 5 *Bur.* 2673. Thus, where an ejectment was brought by a tenant in common, to recover five eighths of a cottage, and the sheriff, in execution of the writ of possession, turned the tenant in possession out of the cottage altogether; the court upon application granted a rule upon the sheriff and the lessor of the plaintiff, requiring them to restore the tenant to the possession of three eighths of the premises. 3 *Wils.* 49.

If the yearly value of the premises do not exceed 100*l.*, the sheriff is intitled to a poundage of 12*d.* in every 20*s.*; but if it exceed 100*l.*, then to 6*d.* for every 20*s.* above that sum. 3 *G. l. c.* 15. § 16.

The tenant or tenants in possession, however, in order to save the expense of executing a writ of possession, may attorn to the lessor of the plaintiff. See the form of the attornment, *Tidd, Forms*, 663. § 6. Let this be written upon unstamped paper, and signed by the tenants in the presence of a witness.

SECT. 2.

Proceedings in Ejectment, upon a vacant Possession.

Entry, lease, ouster, &c.] In order to maintain ejectment on a vacant possession (that is, where the premises are wholly deserted by the tenant, and he cannot be found, in order to be served with a declaration in ejectment, see 2 Str. 1064), an actual entry must first be made upon some part of the premises in question. This must be done either by the lessor of the plaintiff himself, or by some person authorized by him for that purpose, by a letter of attorney. See the form of the letter of attorney, *Tidd, Forms, 664.* § 7. 2 Sellon, 131.—and of the affidavit of the execution of the same, *Tidd, Forms, 665.* § 8. 2 Sellon, 132.

When the lessor or his attorney goes for the purpose of making the entry, he should be accompanied by two friends; and having made the entry upon the premises, let him there execute a lease of them (previously prepared) to one of his friends, and put him immediately in possession; the other friend is then to enter upon the premises, and thrust the lessee out; whereupon this second friend, the ejector, is immediately served with a declaration in ejectment (also previously prepared), in which he is made defendant, and the other friend plaintiff. All this should be done before the essoign day of the term; otherwise you cannot have judgment of the term. See the form of the lease, *Tidd, Forms, 665.* § 9. 2 Sellon, 132.—of the declaration and notice to appear, *Tidd, Forms, 666.* § 10, 11. 2 Sellon, 131. It may be necessary to mention that an attorney cannot be the lessee in this case. *R. M. 1654.* § 1. *Doug. 466. Vol. 1, p. 21.*

If the premises in question be a house, merely, and the door be locked; in such a case, getting upon the threshold of the door, and putting his finger into the key-hole, will it seems be a sufficient entry upon the part of the lessor or his attorney, if none better can be made without force. See *Tidd, Forms, 667.* § 12.

Judgment.] In this action of ejectment upon a vacant possession, no person claiming title can be let in to defend, but he that can first seal a lease upon the premises must obtain possession; *Bul. N. P. 95*; and persons having any claim or title to them, must have recourse to their action. Consequently the lessor of the plaintiff may immediately proceed to judgment against the casual ejector. For this purpose, engross on a 2s. 6d. stamp an affidavit of the entry, lease and ouster, and of the service of the declaration and notice; see the form, *Tidd, Forms, 667.* § 12. 2 Sellon, 132; annex to it the letter of attorney, the lease, and a copy of the declaration and notice; and let the affidavit be sworn before a judge or a commissioner. Indorse it "to move for judgment against the casual ejector," and get it signed by counsel; draw up the rule, and proceed to sign judgment as directed ante, p. 46; then sue out execution.

See stat. 11 G. 2. c. 19. § 16, which gives a power to two justices of peace, when premises are deserted by a tenant, and no sufficient distress is to be found upon them to answer the arrears of rent, to give possession of them to the landlord. *And see 1 Barn. and Ald. 369.*

SECT. 3.

Proceedings in Ejectment for Nonpayment of Rent.

1. *Where there is sufficient Distress upon the Premises.*
2. *Where there is not sufficient Distress upon the Premises.*

1. *Where there is sufficient Distress upon the Premises.*

If the tenant forfeit his term by the nonpayment of rent, the landlord may proceed to recover possession of the premises by ejectment. The mode of proceeding, however, varies, according as there is or is not a sufficient distress upon the premises to answer the amount of the rent due: if there be not a sufficient distress upon the premises, the proceeding may be under stat. 4 G. 2. c. 28. § 2; if there be a sufficient distress, the proceeding must be at common law. 7 T. R. 117. The proceedings at common law shall be first considered.

Before you commence the action, and indeed before the forfeiture can be incurred, a demand must have been made of the rent. *Bro. Abr. Demande, pl. 1^o.* There is a great strictness required in this respect; for the common law does not favour forfeitures. The demand must be made in fact, although no person be present on the part of the tenant to answer it. *Plowd. 70. ab.* If the lease do not specify where the rent is to be paid, the demand must be made upon the land, and at the most notorious place of it; and therefore if there be a dwelling-house upon the land, the demand must be made at the front door of it; but it is not necessary to enter the house. Yet if the tenant were to meet the lessor on or off the land, at any time on the last day given him to pay the rent, and then tender him the rent, it would be sufficient to save the forfeiture. *Co. Lit. 201. b. 202. a. 7 Co. 28. Plowd. 78. ab. Cro. El. 73. 4 Leon. 180. 7 T. R. 117.* If the lease however specify a place for the payment of the rent, the demand must be made at that place and no other. *Co. Lit. 202. a.* Also, the demand must be made precisely on the last day on which it can be paid to save the forfeiture; as where the proviso in the lease is, that if the rent be behind and unpaid for the space of twenty days, the lessor may re-enter, the demand must be made on the twentieth day, at some convenient time before sup-

set. *Co. Lit.* 202. *a.* and note 3. *Plowd.* 172. *b.* 173. *a.* 10 *Co.* 129. *a.* *Plowd.* 70. *ab.* *Cro. El.* 48. 4 *Leon.* 180. 1 *Leon.* 142. 2 *Lutw.* 1139. 1 *Saund.* 287. And lastly, the demand must be made of the precise sum due, and not a penny more or less. 1 *Leon.* 305, *Cro. El.* 209. If the rent be not paid when thus demanded, the tenant forfeits his term, and the landlord may re-enter for the forfeiture: that is, he may bring an ejectment to recover the possession of the premises; for an actual entry is not necessary in this case. 1 *Vent.* 248. 2 *L. Raym.* 750, 1 *Salk.* 258. 1 *Saund.* 319. 287. 3 *Bur.* 1896, 1897.

The proceedings in the ejectment are the same as in ordinary cases, as described in the last two sections, according as the tenant is in possession, or the possession is vacant.

This mode of proceeding upon a forfeiture for nonpayment of rent, when there is a sufficient distress upon the premises, is seldom however adopted in practice: first, on account of the great nicety to be observed in the previous demand of the rent; and secondly, because the tenant, by filing a bill in equity, may obtain an injunction and stay the proceedings, upon payment of the rent in arrear.

2. When there is not sufficient Distress upon the Premises.

If a term be forfeited by the nonpayment of rent, and there be not sufficient distress upon the premises, (*see* 7 *T. R.* 117), the proceedings in an ejectment by the landlord for the recovery of the possession in such a case, are regulated by stat. 4 *G. 2. c.* 28; by which 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 nonpayment 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." § 2. This however does not do away the necessity of a previous demand of the rent, if the provisions of the lease require it; only that the demand need not be made with the exactness required by the common law, and as detailed in the last section. *Doug.* 486.

Declaration.] The declaration is the same as in ordinary cases; but if the possession be vacant, the notice is signed by the plaintiff's attorney, and directed to the tenant late in possession; *see the form, Tidd, Forms,* 667. *s.* 11. If the tenant be in the occupation of the premises, the declaration and notice are served in the same manner as directed *ante*, *p.* 43, 44. But if "the same cannot be legally served, or no tenant be in actual possession of the premises, then the same may be affixed 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, comprised in such declaration

in ejectment, and such affixing shall be deemed legal service thereof; which service or affixing such declaration, shall stand in the place and stead of a demand and reentry." 4 G. 2. c. 28. § 2.

Judgment against casual ejector.] If the tenant take no steps to have himself made a party to the suit, the plaintiff may then proceed to obtain judgment against the casual ejector, as in ordinary cases. In order to this, *Let an affidavit be made of the service or affixing of the declaration and notice, and also stating that "half a year's rent was due before the declaration was served, and that no sufficient distress was to be found on the demised premises, counter-veiling the arrears then due, and that the lessor or lessors had power to reenter,"* 4 G. 2. c. 28. § 2; see the form, *Tidd, Forms*, 679. § 24, 25. *Annex this affidavit to the declaration, move upon it for judgment against the casual ejector, draw up the rule, and sign judgment, as directed, ante, p. 46.* Which judgment shall have the same effect, and the plaintiff may thereon sue out execution in the same manner, "as if the rent had been legally demanded, and a reentry made." 4 G. 2. c. 28. § 2.

Appearance, &c.] The appearance, plea, and other proceedings to trial, &c. are the same as already mentioned in the 1st section. At the trial, however, the plaintiff, in addition to what in other cases he would have to give in evidence, must prove "that half a year's rent was due before the declaration was served, and that no sufficient distress was to be found on the demised premises, counter-veiling the arrears then due, and that the lessor had power to reenter." 4 G. 2. c. 28. § 2. 1 Bur. 614.

Tender of rent; Bill in equity, &c.] If the tenant or his assigns (see 3 Taunt. 402) shall at any time before the trial (see 7 East, 363. 2 Str. 900), pay or tender to the landlord, his executors, &c. or pay into court, all the rent in arrear, together with costs, all further proceedings shall cease. 4 G. 2. c. 28. § 4. See 4 Taunt. 883, 2 W. Bl. 746. See the form of the rule for this purpose, *Tidd, Forms*, 692. § 47. The application may be to the court in term time, or to a judge in vacation. *Ca. Pr. C. B.* 6. 2 Sellon, 127.

Or the defendant may apply to a court of equity for relief, either before or after trial.

But "in case the lessee, his assignee, or other person claiming or deriving under the said lease, shall suffer judgment to be recovered on such ejectment, and execution to be executed thereon, without paying the rent in arrear together with full costs, and without filing any bill for relief in equity within six calendar months after such execution executed; then and in such case the said lessee, &c. shall be barred or foreclosed from all relief in law and equity, (other than by writ of error, if the judgment be erroneous), and the landlord or lessor shall thenceforth hold the said demised premises discharged from such lease." 4 G. 2. c. 28. § 2. see 1 Bur. 614.

SECT. 4.

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Action for mesne Profits.

THE action of trespass for mesne profits, may be brought for the amount of the profits derived by the defendant from the premises just recovered in ejectment; that is, for the amount of the yearly value of the premises, whilst he held them against the lessor's title. But where an actual entry has been made, to avoid a fine, this action can be brought only for the mesne profits accruing after the entry was made. 7 *T. R.* 727. and see 2 *Str.* 1086, 4 *Brown*, *P. C.* 353. So, where the plaintiff has had judgment against the casual ejector, he may recover his costs in this action against the tenant or person last in possession; 3 *T. R.* 261. 1 *Esp.* 358. 6 *T. R.* 593. 3 *Wils.* 121. *Bul. N. P.* 88, 89. and see 3 *Comp.* 455; but if the ejectment were defended, and the taxed costs paid, the extra costs would not be recoverable in this form of action. 2 *T. R.* 261. 1 *Esp.* 358.

The action may be brought in the name, either of the nominal plaintiff in the ejectment, or of his lessor.

The defendant cannot be holden to bail, as of course; but an application must be made for a judge's order for that purpose, which however is seldom denied. See *Vol. 1, p. 51*. The defendant may plead the statute of limitations as to all the profits, excepting those which may have accrued within the last six years. *Bul. N. P.* 88. But he will not be allowed to pay money into court, 2 *Wils.* 115.

If the action be brought in the name of the nominal plaintiff, the court upon application will stay the proceedings, until security be given for costs. *Bul. N. P.* 89. *Say.* 78.

The jury shall give damages only for the time the defendant is proved to have been in actual possession, *Barnes*, 456. and since the plaintiff's title accrued; but the plaintiff is not restricted to the time stated in his demise in the declaration in ejectment, but may also recover the profits which accrued previously, if he had title to the premises at the time. *Bul. N. P.* 87. Where an actual entry, however, has been made, to avoid a fine, as above mentioned, the jury can give damages only as to the profits accruing since the time of the entry.

If the action be brought, pending a writ of error on the judgment in ejectment, the plaintiff may proceed to judgment; but the court will stay execution, until the writ of error be determined. *Ca. Pr. C. B.* 46.

If the plaintiff recover less than 40s. he shall have no more costs than damages, unless the judge certify. 1 *Esp.* 358, 6 *T. R.* 593.

In all other respects, the proceedings in this action are the same as in ordinary cases.

CHAPTER II.

Replevin.

SECT. 1. *The Distress.*

2. *Replevin.*

SECTION 1. *The Distress.*

How made.] A DISTRESS is made by entering upon the premises (see 52 H. 3. c. 21. 2 Inst. 131. Mir. c. 2. § 26) and seizing any piece of furniture or other chattel distrainable, saying at the same time that you seize that in the name of all the chattels upon the premises, 6 Mod. 215, and stating the cause of the distress particularly; and if the distress be made by virtue of any particular authority, let it be mentioned. A landlord however may distrain, not only upon the premises demised, but also the cattle or stock of his tenant depasturing on any common appurtenant or appurtenant or any ways belonging to the same. 11 G. 2. c. 19. § 8. A distress for rent (to which these few observations shall be confined) is made either by the landlord in person, or by some person deputed by him by warrant. See the form of the warrant, Tidd, Forms, 601. § 1. 10 Went. 225. 2 Sellon, 170. 1 Burn's J. 704. After seizure, an inventory should be taken of the distrainable goods upon the premises; see the form, Tidd, Forms, 601. § 2. 2 Sellon, 171. 1 Burn's J. 705; copy it, and write at the foot of the copy a notice stating the cause of the distress, and that unless the rent be paid within 5 days, the goods shall be appraised and sold; see the form, Tidd, Forms, 601. § 3. 602. § 4. 1 Burn's J. 705. 2 Sellon, 171; and leave this copy "at the chief mansion house, or other most notorious place on the premises." 2 W. & M. s. 1. c. 5. § 2. If you remove the goods, state in your notice the place to which you have removed them.

This distress must be made in the day-time. It may be made at any time during the term for which the premises are demised, or within 6 months after the determination thereof; provided the landlord's title and the tenant's possession continue at the time of the distress. 8 A. c. 14. § 6, 7. See 4 Taunt. 720. The landlord cannot break open the outer door of a house, to make a distress; Co. Lit. 161. Comb. 17. 9 Vin. Abr. 128. See 4 Taunt. 562; nor can he break open or throw down gates or inclosures, for that purpose. Co. Lit. 161. But if he have entered the house, he may

break open an inner door, &c. *Co. Lit.* 161. *Comb.* 17. *Hardw.* 168. *Bul. N. P.* 81.

Removal of the goods.] The landlord may either remove the goods immediately, or he may allow them to remain on the premises for five days exclusive of the day of the seizure, leaving a person there in the care and possession of them, to prevent them from being clandestinely removed. He cannot however leave them on the premises longer than the time above-mentioned, otherwise he will render himself liable to an action of trespass; 11 *East*, 395. 2 *Str.* 717. see 1 *H. Bl.* 13. 11 *G. 2. c.* 19. § 19. 2 *L. Raym.* 1424; unless he have the tenant's consent to do so; and tenants usually request this as an indulgence, in order that they may be enabled in the mean time to raise money for the payment of the rent, or have an opportunity to replevy the distress. Get the tenant to give you a written memorandum of his consent to your continuing in possession; see the form, *Tidd, Forms*, 602. § 5. 1 *Burn's J.* 706. 2 *Sellon*, 172. By 2 *W. & M.* 4. 1. c. 5. § 3, however, sheaves of corn, &c. when distrained, may be impounded on the premises, until appraised and sold. And by 11 *G. 2. c.* 19. § 8, when corn, grass, &c. growing, is distrained, it may be laid up in barns or other proper places on the premises, and shall not be appraised or sold until it shall have been cut, gathered, cured and made. And lastly, by 11 *G. 2. c.* 19. § 10, any goods, when distrained, may be impounded on the premises, and may then be appraised and sold, in like manner as the distrainer might have done before off the premises.

If you remove the goods distrained, if they be household goods or other dead chattel, you must place them in a pound covert; that is, in some covered place of safety, where they may not be exposed to injury from the weather. *Co. Lit.* 47. But where cattle are distrained, they may be placed either in a pound overt or pound covert, at the option of the distrainer: if he place them in a pound covert, as in a stable or the like, he must feed and sustain them; but if in a pound overt, common or special, the owner must attend to them at his peril; and for that purpose, if the distress be impounded in a special pound overt, notice thereof must be given to the owner. *Co. Lit.* 47. By 52 *H. 3. c.* 4. a distress shall not be driven out of the county where it is taken; see 2 *Inst.* 106; and by 1 & 2 *Ph. & M. c.* 12. § 1, a distress of cattle shall not be driven out of the hundred, rape, wapentake or lathe, where it is taken, unless to a pound overt within the same shire, and not above 3 miles distant from the place where such distress was taken.

Appraisement and sale.] By 2 *W. & M. s.* 1. c. 5. § 2, if the owner of the goods distrained shall not within 5 days next after such distress taken, and notice thereof left at the chief mansion house or other most notorious place on the premises, replevy the same; in such case the person distraining shall, with the sheriff

or undersheriff of the county, or with the constable of the hundred, parish or place (see 1 *L. Raym.* 53, 1 *Salk.* 247. 1 *H. Bl.* 14) where such distress shall be taken, cause the goods, &c. so distrained to be appraised by two sworn appraisers (whom such sheriff, undersheriff or constable, shall swear to appraise the same truly according to the best of their understanding;) and after such appraisement, shall sell the same for the best price that can be gotten for them, for satisfaction of the rent and charges of distress, appraisement and sale; leaving the overplus (if any) with the sheriff, undersheriff or constable, for the owner's use. Previous to this statute, a distress, even for rent, could not be sold.

Upon the sixth day (inclusive of that on which the distress was made, 1 *H. Bl.* 13) search at the sheriff's office if the goods have been replevied; and if not, send for the constable of the hundred, parish or place, where the distress was made, and also two sworn appraisers; (see 1 *Stark.* 172); the constable will then administer the usual oath to the appraisers, (see the form, *Tidd, Forms*, 603. § 6. 1 *Barn's J.* 706. 2 *Sellon*, 172) and indorse a memorandum of it upon the inventory; see the form, *Tidd, Forms*, 606. § 7. 2 *Sellon*, 172. The appraisers, being sworn, proceed to appraise the goods; and having done so, write their appraisement also upon the inventory; see the form, *Tidd, Forms*, 603. § 8. 2 *Sellon*, 173. The goods are usually sold to the appraiser for the sum at which they were appraised; and a receipt for the sum paid for them entered on the inventory, and witnessed by the constable. See upon this subject generally, *Gilbert, Distress and Replevin*. If there be a surplus, after payment of the rent and charges, let it be given to the constable, to keep for the owner; 2 *W. & M. s.* 1. c. 5. § 2; but if goods to the amount of the rent and charges have not been distrained, or if the distress die in the pound, or be otherwise destroyed by the act of God, 1 *Salk.* 248, the landlord may distrain again.

Where a distress shall be made for rent justly due, and any irregularity shall afterwards be committed by the party distraining or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*, but the party aggrieved may recover satisfaction for the special damage in an action of trespass or on the case; and if he recover he shall have full costs. 11 *G. 2. c.* 19. § 19. But he shall not recover in such an action, if tender of amends have been made before action brought. *Id.* § 20. See 11 *East*, 395. 2 *Str.* 717. 1 *H. Bl.* 13. 1 *East*, 139.

I have treated, thus concisely, of the manner of making a distress, under this head of Replevin, because the action of replevin usually originates in a distress. But it is a mistake to think that Replevin lies only in the case of a wrongful distress; although in practice it is usually confined to that injury, the action in fact lies in all cases where mere personal chattels have been wrongfully taken and detained from a person, without a lawful authority.

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SECT. 2.

Replevin.

How obtained.] FORMERLY when the party distrained upon intended to dispute the right of the distress, he must have sued out a writ of *replegiari facias*. This writ, being an original, issued out of Chancery, and was obtained of the cursor; it commanded the sheriff to deliver the things distrained to the owner, and afterwards to do justice in respect of the matter in dispute, in his own county court. See the form of the writ, *Tidd, Forms*, 604. § 16. Upon receipt of the writ, the sheriff issued his precept to his bailiff to replevy the goods, and a summons requiring the defendant to appear at the next county court to answer the plaintiff for having taken them. The plaintiff then levied his plaint in the county court, and so proceeded in the action. If the sheriff made the replevin, it was not necessary for him to return the writ; but if the goods were not replevied, the sheriff must have returned the writ, 2 H. 7. 5. b, otherwise the party might proceed to attachment against him. Reg. 81. After the return of the writ, if the sheriff had not executed it, the party might sue out an *alias*, and after that a *pluries*; see the form of the *alias*, *Tidd, Forms*, 604. § 11.—of the *pluries*, *Id.* 605. § 12; or if the sheriff returned that the goods were eloiigned, that is, removed so that he could not find them, the party might sue out a *capias in withernam*, requiring the sheriff to take other cattle and goods of the distrainor to the value of the goods distrained, and deliver them to the party whose goods have been eloiigned, to keep until his own goods should be restored. This writ also required the sheriff to put by gages and safe pledges the defendant, that he be before the king on the return of the writ, to answer to the plaintiff of the taking and detaining of his cattle. See the form of the writ, *Tidd, Forms*, 607. § 18. If the distrainor or other person claimed a property in the goods distrained, and the sheriff returned this as his reason for not executing the writ of replevin, a writ *de proprietate probandâ* thereupon issued, requiring the sheriff to inquire by inquest whether the goods were the property of the plaintiff or of the person claiming them; if of the plaintiff, then to replevy them, and to attach the party claiming them that he be before the king at the return of the writ, to answer the contempt and also damages to the plaintiff, and to put by gages and safe pledges the defendant, that he be also before the king at the same time to answer to the plaintiff as to the taking of the goods. See the form of the writ, *Tidd, Forms*, 609. § 20. According to the tenor of these two latter writs, we may perceive that the suit was no longer to be prosecuted in the county court, but before the king in his court at Westminster.

This mode of proceeding by original writ, however, being extremely tedious, and the cattle or other goods being in the mean time detained from the owner, to his great loss and damage, it was directed and enacted by the statute of Marlbridge (52 H. 3. c. 21.) that the sheriff, without any writ being sued out of Chancery, shall proceed to replevy the goods, immediately upon complaint being made to him; and by 1 & 2 Th. & M. c. 12, the sheriff of every county shall appoint four deputies at least, dwelling not above 12 miles distant from each other, for the purpose of making replevins. See a form of the deputation, *Tidd, Forms*, 604. § 9.

Before the sheriff or his deputy, however, can replevy, either upon writ or application, he must take pledges from the plaintiff, not only to prosecute his suit, but also to return the cattle or goods if a return should be adjudged; and if he take pledges in any other manner, he shall be answerable to the defendant for the price or value of the cattle or goods replevied. The security taken by the sheriff in pursuance of this act, is usually a bond conditioned as is above-mentioned. 1 *L. Raym.* 278. Also, by 11 G. 2. c. 19. § 23, in every replevin of a distress for rent, the sheriff or his deputy shall take from the plaintiff and two responsible persons as sureties, a bond in double the value of the goods distrained (to be ascertained on the oath of one witness) conditioned for prosecuting the suit with effect and without delay, and for a return of the goods if a return should be awarded. See the form of this bond, *Tidd, Forms*, 605. § 14. Although the statute directs the bond to be taken with two sureties, yet a bond by one surety only has been holden good. 7 *Taunt.* 28. and see *Id.* 327. The sheriff is directed also by the above statute to assign the bond to the avowant or person making consuance, (see 5 *T. R.* 195. 4 *Camp.* 36. 1 *B. & P.* 378), in the same manner as a bail bond is assigned, and the party afterwards may bring an action on the bond, if forfeited, in his own name, and the court may by rule give such relief to the parties as may be agreeable to justice and reason. See the form of the assignment, *Tidd, Forms*, 606. § 15. and see *Vol. 1, p. 99—104.* If the sheriff neglect to take a bond, he is not liable to an attachment; but the defendant, if damaged, may have his remedy against him by action on the case. 2 *T. R.* 617. So, he may have an action on the case against the sheriff for taking insufficient pledges, and may therein recover damages to the extent of the value of the goods replevied. 4 *T. R.* 433. see 2 *H. Bl.* 36. 547. 2 *W. Bl.* 1220. 5 *Taunt.* 225. But if the avowant or person making consuance take an assignment of the bond, and sue the pledges, he may recover to the extent of the penalty. Where separate actions were brought against each of the pledges, it was holden that the plaintiff could recover from both damages only to the amount of the penalty, and from each the costs in the separate action against him individually. 1 *Taunt.* 218. Also, where the action was brought against the pledges before the bond was forfeited, the court refused to set

side the proceedings, saying that the matter might be pleaded as a defence to the action. 5 *Taunt.* 776. Taking an assignment of the replevin bond, is not a waiver of your remedy against the sheriff; and therefore if after proceeding against the pledges you find them insolvent, you may bring your action against the sheriff for taking insufficient pledges. 1 *Saund.* 195 *s.*

The mode of proceeding is thus: let the party intending to replevy, take two sufficient housekeepers of the city or county where the distress was made, to the sheriff's office of that city or county, or to the office of his deputy; and upon the bond being filled up, let it be executed by the plaintiff and his two sureties. A precept or warrant is then made out, commanding one of the sheriff's officers to replevy the goods, and deliver them to the plaintiff; and also to summon the defendant to appear at the next county court, to answer the plaintiff for the taking, &c. See the form of this precept, *Tidd, Forms*, 606. § 16. 2 *Sellon*, 158.—and of the summons thereon, *Tidd, Forms*, 607. § 17. Upon this precept the officer will replevy the goods, if found within the county, &c., the plaintiff or some person on his behalf accompanying him in order to identify them; and in doing this, the officer may use force if the distrainer make resistance, and may break open even the outer door of his dwelling-house, if the goods be there, having first signified the cause of his coming, and desired admittance. 2 *Inst.* 193. 140. See 2 *Ro. Abr.* 552. 20 *H.* 6, 28. Care should be taken, in cases of distress for rent, to replevy, before the expiration of five days exclusive after the service of notice of the distress; otherwise the distrainer may sell the goods. See *ante*, p. 62. But in all other cases of distress at common law, no time is limited for replevying, because the distrainer cannot sell the distress.

If the goods have been cloigned, so that the sheriff cannot replevy them, then upon plaint being levied in the county court by the plaintiff, the sheriff may issue a precept in the nature of a *capias in withernam*, commanding his officer to take goods or cattle of the defendant, to the value of those taken by him, and deliver them to the plaintiff; the plaintiff having first given him a bond with sureties, similar to that above-mentioned, conditioned to prosecute his suit, and to return the goods so to be delivered to him, if a return of them should be afterwards adjudged. See the form of the precept, *Tidd, Forms*, 616. § 16.

Plaint.] After the goods have been replevied and delivered to the plaintiff, he must, according to the terms of his bond, levy his plaint at the next county court, and prosecute his suit with effect and without delay. If he do not levy his plaint at the next county court, or if he make default in any subsequent part of the proceedings, either in the county court, or in this court after the removal of the cause, 1 *B. & P.* 410, the defendant may take an assignment of the replevin bond, and, having got it stamped, may proceed thereon against the plaintiff and his pledges, in the same manner as a plaintiff proceeds upon a bail bond. See *ante*, p. 64. and

Vol. 1. p. 99—104. See the form of the plaint; *Tidd, Forms*, 605. § 13.

The suit may be prosecuted in the county court, however considerable the value of the goods may be. 2 H. 7, 5b. 2 *Inst.* 139. But if any right of freehold come in question in the course of the proceedings in the county court, or ancient demesne be pleaded, 2 *Finch*, L. 317. 4 H. 6, 30. 2 H. 7. 6. *Co. Lit.* 145, or if the king be a party, or the taking be in right of the crown, *Bro. Abr. Replevin*, 3, the sheriff cannot proceed in the cause; so that it is usual in practice to remove the plaint into one of the courts at Westminster in the first instance.

Plaint, how removed.] The plaint may be removed by writ of *pone*, *recordari facias loquelam*, or *accedas ad curiam*, according to circumstances. It may be removed either by the plaintiff or the defendant: by the plaintiff, at pleasure; by the defendant, upon reasonable cause. *F. N. B.* 69 M. 70 B. This assignment of cause by the defendant, however, is at present but matter of form; it is assigned in the writ of *recordari*, &c. and cannot be denied by the sheriff or plaintiff. See a form of it, *Tidd, Forms*, 613. § 24 a. But where the action of replevin is commenced in a court baron, cause must be assigned for removing it, whether removed by the plaintiff or defendant. *Reg.* 85 b. *F. N. B.* 70 A. 2 *Inst.* 359.

If the goods have been replevied by virtue of a *replegiari facias*, the plaint in the county court is removed by writ of *pone*. *F. N. B.* 69 M. This is an original writ, obtained from the cursor, bearing teste after the entry of the plaint in the county court, and returnable on a general return day in term, wheresoever, &c.; but if it happen to bear teste before the entry of the plaint, it is not material. *F. N. B.* 71 D. See the form of the writ, *Tidd, Forms*, 611. § 21, 22.

If the goods have been replevied upon mere application to the sheriff, without writ, the plaint is removed by writ of *recordari facias loquelam*. This is also an original writ, to be obtained from the cursor, tested and returnable like the *pone*. See the form; *Tidd, Forms*, 612. § 24. 613. § 24 a. 2 *Sellon*, 166.

If the plaint be levied in a court baron, it is removed by writ of *accedas ad curiam*. This is also an original writ, in every respect the same as the *recordari*, excepting that it directs the sheriff to go to the lord's court, and there cause the plaint to be recorded, and so to return it to the court above. This writ must bear teste after the entry of the plaint, otherwise it will be bad. *F. N. B.* 71 D. See the form of it, *Tidd, Forms*, 616. § 30.

In order to sue out any of these writs, make out a *præcipe*; see the form of a *præcipe* for a *recordari*, *Tidd, Forms*, 612. § 23. 2 *Sellon*, 160. Make out also a memorandum of your warrant to sue or defend, as directed Vol. 1. p. 24. Take them to the cursor; and upon telling him when the next county court will be holden, he will make out the writ. Pay him 7s. 6d. Then take

it to the office of the under sheriff of the county, &c. who will allow and return it. Pay him 16s. 6d. See the form of the return, *Tidd, Forms*, 613. § 25. 2 *Sellon*, 167. If the sheriff return the writ *tardè*, the party may sue out an *alias*, &c. *F. N. B.* 70 B. If to a writ of *accedas ad curiam*, the sheriff return that the lord refused to hold his court, a *distringas* then issues, commanding the sheriff to distrain the lord to hold his court; and after that a *sicut alias*, &c. *F. N. B.* 18 E. If the sheriff do not return the *recordari*, &c. you may rule him to return it, in the manner directed *Vol. 1. p. 93. See 2 Bur.* 1151.

When you have got the writ returned, file it with the filacer of the county; pay him 2s. 10d. This should be done within two terms at least after the writ is returnable; otherwise the opposite party may obtain a certificate from the filacer that no such writ and return are filed, and the cursitor will thereupon issue a writ of *procedendo*. 2 *Sellon*, 162. *Tidd*, 346. See the form of the *procedendo*, *Tidd, Forms*, 615. § 31. 616. § 33. 2 *Sellon*, 168. If the return, however, be filed, a writ of *procedendo* cannot afterwards be had, unless perhaps where the cause was removed from a court of ancient demesne. *F. N. B.* 69 M (a). *Gilb. Replevin*, 10. 111.

The delivery of the writ to the sheriff, stays all further proceedings in the suit in the county court, even although delivered after interlocutory, provided it be before final judgment; 2 *Bur.* 1151; if the sheriff proceed further, such subsequent proceedings are void, and the sheriff is liable to an attachment. *F. N. B.* 4 R. The writ however removes the plaint only, and not any of the subsequent proceedings; and the plaint is removed by it, although the plea in the court below may have been discontinued. *F. N. B.* 71 A.

Appearance and declaration.] The defendant must enter his appearance with the filacer, before the plaintiff can declare in this court, or the defendant rule him to do so. This regularly should be done, on or before the *quarto die post* of the return of the *recordari*, &c. As to the mode of entering it, see *Vol. 1. p. 300.*

If the plaintiff wish to expedite the cause, and for that purpose to procure the defendant's appearance, he should obtain a rule to appear from the filacer; pay him 4s. 3d.; enter it with the clerk of the rules, and serve a copy of it upon the defendant. This rule expires in 4 days; and if the defendant have not entered his appearance within that time, then, if the plaint have been removed by the plaintiff by *pone* or *recordari*, sue out a *pone per vadios* with the filacer; see the form, *Tidd, Forms*, 614. § 26. 10 *Went.* 255. 288. 2 *Sellon*, 167; pay signing 5s. 6d. sealing 7d.; upon which the sheriff will summon the defendant. On the *quarto die post* of the return day of the *pone*, search with the filacer if the defendant have entered an appearance; and if not, the filacer will make out a *distringas*; see the form, *Tidd, Forms*, 614. § 27; pay 2s. 10d. signing, 7d. sealing; and have it executed as directed *post, Bk. 3, Pt. 2, Ch. 1, §. 1. If issues be*

turned upon it, and the defendant have not as yet entered his appearance, sue out an alias, and after that a pluries, &c. until the defendant appears. But if *nulla bona* be returned to the *distringas*, then sue out a *capias*, and so proceed to outlawry. *F. N. B.* 70 A (a). See the form of the *capias*, *Tidd, Forms*, 615. § 28. If the plaint, however, have been removed by the defendant, *F. N. B.* 70 A (a), or by the plaintiff by writ of *accedas ad curiam*, 2 B. & P. 137, the first process after the rule to appear, is the *distringas*, omitting the *pone per vadios*. If the defendant come in upon any of these writs, and enter his appearance with the filacer, the plaintiff may then deliver or file his declaration, as in ordinary cases. See the form of the declaration, *Tidd, Forms*, 618. § 33. See 5 *Taunt.* 771.

But if the defendant wish to expedite the cause, then, on or after the *quarto die post* of the return of the recordari, having first entered an appearance with the filacer, as directed *Vol. 1. p. 300.* get a rule to declare from the master; see the form, *Tidd, Forms*, 618. § 32; and serve a copy of it upon the plaintiff, or upon his attorney or agent if the cause were removed by him. It may be served any day before the time mentioned in the rule has expired; and the plaintiff has then four days to declare from the day of service. 11 *East*, 183. Also, if the *recordari* have not been filed on or before the *quarto die post* of the return, a demand of declaration must be made, in the same manner as directed *Vol. 1. p. 116, 117*, as to the demand of a plea; *Ca. Pr. C. B.* 55; but if filed on or before the *quarto die post*, a demand of a declaration is not necessary. 1 *H. Bl.* 281. If the plaintiff do not declare before four days after the service of the rule, and 24 hours after a declaration has been demanded (when a demand is necessary) have severally expired, the defendant may sign judgment of *nonpros.* *F. N. B.* 70 A. Sign this judgment, as directed *post, Bk. 4, Pt. 1, Ch. 17:*

The judgment of *nonpros* at common law, is, that the defendant shall have a return of the goods replevied, and his costs. See the form, *Tidd, Forms*, 627. § 45. and see the form of the writ *de retorno habendo* thereon, 2 *Sellon*, 168. The plaintiff, however, is not prevented by this judgment from proceeding; for he may sue out a writ of second deliverance; 2 *Inst.* 340. *Stat. Westm. 2. c. 2*; in execution of which, the sheriff must again take the goods from the defendant, and deliver them to the plaintiff; or the writ will operate in the sheriff's hands as a *superseedeas* of the writ *de retorno habendo*, if the latter writ have not as yet been executed. *Latch.* 72. *Palm.* 403. 1 *Salk.* 95. If the plaintiff intend to proceed thus, let an award of the writ of second deliverance be entered upon the roll, after the judgment of *nonpros*; see the form of the entry, *Tidd, Forms*, 655. § 75. Then sue out the writ with the *curator*; see the form, *Tidd, Forms*, 655. § 76. 656. § 77. *Thes. Brev.* 303. 2 *Sellon*, 169.—and of the return thereto, *Tidd, Forms*, 656. § 78. The proceedings upon this writ are the same as in the ordinary cases of replevin where the action is com-

menced by writ, as mentioned *ante*, p. 63; and if the defendant have judgment, either upon verdict, demurrer, or of *nonpros*, it is for a return irreplevisable, and he shall have a writ *de retorno habendo*; 2 *Inst.* 341; which being executed, the plaintiff cannot have any further writ of deliverance. See the form of the declaration on a writ of second deliverance, *Tidd, Forms*, 656. § 79. But if the plaintiff do not sue out a writ of second deliverance, and to the writ *de retorno habendo* the sheriff should return that the goods, &c. are elaigned, the defendant shall then have a *capias in withernam*, and after that an *alias* and *pluries*, until it is executed. See the form, 2 *Sellon*, 169. The *capias in withernam*, however, in this case, is but mesne process, to compel the plaintiff to declare; 1 *L. Raym.* 614; and as soon as he has declared, he may, it seems, obtain a restitution of the goods taken under it, upon motion. *Noy*, 50. and see *Comb.* 201. 2 *Salk.* 582.

But in cases where the replevin is of goods distrained for rent, if the plaintiff be nonprossed, the defendant, after entering the judgment for a return (and which must still be entered, although it is never executed, see 2 *Wils.* 117. *Carth.* 253), may, by 17 *C. 2. c. 7. § 2*, make a suggestion on the roll, in the nature of an avowry or consuance, and pray a writ of enquiry to be directed to the sheriff of the county where the distress was taken, to enquire of the rent in arrear at the time of the distress, and also of the value of the distress. Then follows on the roll, the award of the writ of enquiry, (of the execution of which 15 days notice must be given to the plaintiff or his attorney, 17 *C. 2. c. 7. § 2*); then the sheriff's return of the finding of the inquest; and lastly follows an entry of the final judgment. If the inquest find the value of the distress to be as much or more than the amount of the arrears of rent, then the final judgment shall be that the defendant recover the amount of such arrears, and full costs of suit; but if the distress be less than the arrears, then the judgment shall be for the sum at which the distress is valued by the inquest, together with full costs of suit. 17 *C. 2. c. 7. § 2*. See the form of the suggestion, &c. and judgment, *Tidd, Forms*, 632. § 50. 634. § 51. 2 *Sellon*, 182.—of the writ of enquiry, *Tidd, Forms*, 638. § 57. 2 *Sellon*, 183.—of the notice of enquiry, *Tidd, Forms*, 641. § 60.—and of the inquisition and return, *Id.* 642. § 61. The defendant may have execution of this judgment, by *feri facias, ca. sa. or elegit*; 17 *C. 2. c. 7. § 2*; but cannot of course have a writ *de retorno habendo*. This mode of proceeding by writ of enquiry is advisable, as a writ of second deliverance after it, would be inoperative, the goods still remaining with the plaintiff. 1 *Vent.* 64. *Bul. N. P.* 58. *Barnes*, 427. 2 *Wils.* 116. The court, however, in some cases, under particular circumstances, will set aside this judgment of *nonpros*, &c. and let in the plaintiff to declare, upon payment of costs. 1 *Vent.* 64.

Or instead of executing a writ of enquiry, as here directed, the defendant, having signed judgment of *nonpros*, in cases where the replevin is of a distress for rent, may take an assignment of the

replevin bond, and proceed upon it against the plaintiff and his pledges.

Avowry.] When the plaintiff has delivered or filed his declaration, let him enter a rule to avow with the clerk of the rules, in the manner directed Vol. 1. p. 115, as to the rule to plead. Then demand an avowry, in the same manner you demand a plea; see Vol. 1. p. 117; and if the defendant do not file his avowry or conusance, &c. with the clerk of the papers, within the time limited for that purpose, sign judgment by default, and execute a writ of enquiry, as directed ante, p. 10. 22. See the form of the judgment, Tidd, Forms, 624. § 44. 8 Went. 92.—and of the writ of enquiry, Tidd, Forms, 636. § 55.

If the defendant plead, avow, or make conusance, let the plea or avowry, &c. be signed by counsel, and filed with the clerk of the papers. If he plead or avow double, leave of the court must first be obtained for that purpose, as directed Vol. 1. p. 123. The plea of *cepit in alio loco* is not a plea in abatement, but a plea in bar; and therefore an affidavit to verify it is not required. Wills, 475.

Plea in bar.] As soon as the defendant has avowed, he may rule the plaintiff to plead, in the same manner as directed Vol. 1. p. 125, as to the rule to reply; and if the plaintiff do not plead within the time limited by the rule, the defendant may sign judgment of *nonpros*.

The judgment of *nonpros* in this case, at common law, is that the defendant shall have a return of the goods. But if the distress were for rent, customs, services, or damage feasant, the defendant shall have judgment for his damages; 21 H. 8. c. 19; and consequently, after the entry of the judgment of *nonpros* on the roll, follows the award of a writ of enquiry to ascertain the damages (in the same manner as in ordinary cases, upon a judgment by default), the sheriff's return of the inquest, and final judgment. See the form, Tidd, Forms, 627. § 46.—the like with a *remittitur damna*, Id. 629. § 47. In this case also the plaintiff may sue out a writ of second deliverance; but it will be a supersedeas of the writ *de retorno habendo* only, and not of the writ of enquiry. Latch. 72. Palm. 403. 1 Salk. 95.

Or, if the replevin were of a distress for rent, the defendant may enter his judgment, and execute a writ of enquiry, under *stat. 17 C. 2. c. 7. § 2*, in the manner above directed for want of a declaration, excepting that the entry of a suggestion in nature of an avowry must of course be omitted, and you therefore enter the prayer for the writ of enquiry, &c., immediately after the judgment for a return. See the form of the entry, Tidd, Forms, 634. § 52.—and of the writ of enquiry, Id. 639. § 58.

Or the defendant, instead of executing a writ of enquiry, may, after signing judgment of *nonpros*, take an assignment of the replevin bond, and proceed thereon. 2 Wils. 41.

If the plaintiff plead to the avowry or consuance, let the plea be signed by counsel; engross it on 4d. stamped paper, and file it with the clerk of the papers. If the plaintiff plead double, (which he may do, 4 *A. c.* 16. § 4), the leave of the court must first be obtained for that purpose, as directed *Vol. 1. p.* 123.

Issue.] Let the paper book be made up, delivered and returned, as directed *Vol. 1. p.* 126—132. See the form, *Tidd, Forms, §22. § 40.* Either plaintiff or defendant may make it up, and enter it when necessary, both parties in replevin being deemed actors. *Vol. 1. p.* 131.

Demurrer.] The proceedings upon demurrer are the same as in ordinary cases; the only thing necessary to be mentioned here, is the judgment. At common law, the judgment for the defendant is, that he have a return of the goods irreplevisable 14 *H. 7. 6. b. 2 Inst.* 340. *Rast. Ent.* 562 *b. Co. Ent.* 591 *a. Lib. Plac.* 453. *pl.* 25. But if the distress were for rent, customs, services, or damage feasant (21 *H. 8. c.* 19), an enquiry of damages and costs is awarded; see the form of the entry, *Tidd, Forms, §29. § 48.* The defendant thereupon sues out a *retorno habendo* and an enquiry of damages, either in the same writ, (see the form, *Thes. Brev.* 220. *Tidd, Forms, § 68.*) or in separate writs; (see the forms, *Lit. Ent.* 600, 601, 602. 604. *Tidd, Forms, § 56.*); and upon the return of the writ of enquiry, final judgment is entered to recover, as well the damages and costs assessed by the jury, as the costs assessed by the court. 1 *Saund.* 195 (n). No writ of second deliverance lies after judgment upon demurrer.

Or, if the distress were for rent, then, after judgment given for the avowant or person making consuance, the court may award a writ of enquiry, to enquire of the value of the distress, and the amount of the rent in arrear, (of the execution of which writ of enquiry, 15 days notice must be given to the plaintiff's attorney or agent, 6 *Taunt.* 57); and upon the return thereof, if the value of the distress be greater than the amount of the rent in arrear, the defendant shall have judgment to recover the arrears and full costs; but if the value of the distress be less than the arrears, then he shall have judgment to recover the value of the distress, and full costs. 17 *C. 2. c.* 7. § 3. see the form of the entry, *Tidd, Forms, §35. § 53.*—and of the writ of enquiry, *Id.* 640. § 59. 8 *Went.* 101. and see 1 *Saund.* 195. 2 *Id.* 286. *Carth.* 253. In this case no writ de *retorno habendo* issues.

The judgment for plaintiff on demurrer, is the same as in the action of trespass. See *ante, p.* 36. and *Vol. 1. p.* 204.

Trial.] After giving notice of trial, the plaintiff (or if he neglect to do it, the defendant) may make up the nisi prius record, sue out jury process, enter the cause for trial, and proceed to verdict or nonsuit, as in ordinary cases. As both parties in replevin are deemed actors, consequently when the record is carried down for

trial by the defendant, it is not necessary to have the proviso in the *distingas*, as in cases of trial by proviso, 2 *Salk.* 652, although in practice it is usually inserted. 3 *T. R.* 661. 1 *W. Bl.* 375. For the same reason the defendant in replevin cannot have judgment as in case of a nonsuit; 3 *T. R.* 661. 5 *T. R.* 400. 1 *W. Bl.* 375; but if either plaintiff or defendant give notice of trial, and afterwards do not proceed to try the cause or countermand their notice in time, the opposite party will be entitled to costs as in ordinary cases. See *Bk. 4, Pt. 1, Ch. 22, 23.*

If a verdict be found for the plaintiff, the jury assess the damages, as in a verdict for plaintiff in trespass, &c.; but if found for the defendant, then the jury assess the damages for the defendant, by *stat. 7 H. 8. c. 4. § 3. 21 H. 8. c. 19. § 3*; or, if the distress were for rent, and the defendant wish that the finding should be according to 17 *C. 2. c. 7. § 2*, the jury find the amount of the rent in arrear, and the value of the things distrained. If the jury, in finding a verdict generally for defendant, omit to assess damages according to these statutes of Henry 8, the omission may be supplied by a writ of enquiry. *Cart. 362, 1 Salk. 205. 95. 5 Mod. 77. 2 W. Bl. 921, 3 Wils. 442.* But if the jury find according to *stat. 17 C. 2. c. 7. § 2*, an omission in their verdict cannot be supplied by inquest; 1 *Lev. 255, 1 Sid. 380. 1 Salk. 205. Hardw. 297, 298. T. Raym. 170. 1 Vent. 40. 2 Str. 1052. 3 T. R. 349. See 2 W. Bl. 763*; although in such a case the court would probably allow the defendant to enter his judgment for a return at common law, or allow him to amend it if already entered; 3 *T. R. 349. Cart. 362. 1 Lev. 255*; or if the jury have assessed damages, but not the amount of the rent, the defendant may have leave to enter his judgment as a judgment under *stat. 21 H. 8. c. 19. 4 T. R. 509.*

Nonsuit.] If the plaintiff be nonsuit, the jury are then to enquire of the damages the defendant has sustained; *Comb. 11. 5 Mod. 76*; or if the distress were taken for rent, then, at the prayer of the defendant, the jury shall enquire of the amount of the arrears and the value of the distress (17 *C. 2. c. 7. § 2*); in the same manner as where a verdict is given for the defendant. Upon this finding, the defendant, at common law, shall have judgment that he have a return of the goods distrained, and recover his damages and cost; see the form, *Tidd, Forms, 630. § 49*; or, in case of a distress for rent, if the defendant choose that the jury shall find the value of the distress and the amount of the arrears of rent, he shall have judgment to recover the arrears and his costs, if the value of the distress be found to equal or exceed such arrears; but if the value of such distress do not equal the arrears, then he shall have judgment to recover the value of the distress and his costs. 17 *C. 2. c. 7. § 2. See the form of the judgment, where the finding is under this statute, Tidd, Forms, 636. § 54. and see 1 Lev. 255. 1 Sid. 380. 1 Salk. 205. Hardw. 297, 298. 3 T. R. 349. T. Raym. 170. 1 Vent. 40. 2 Str. 1052. 1 Tawnt. 218.*

As the judgment at common law, in this case, is not for a return of the goods irreplevisable, the plaintiff may sue out a writ of second deliverance, and proceed upon it, as mentioned *ante*, p. 68. This writ will be a supersedeas of the writ *de retorno habendo*; but the defendant is not precluded by it from levying the damages and costs awarded to him by the judgment.

Judgment.] The judgment of *non pros* and upon a nonsuit, have been already noticed; we shall here confine our consideration to the judgment after verdict. *When you have got the nisi prius record from the associate, indorse the postea upon it, if that be not already done; see Vol. 1. p. 199. See the form of the postea for plaintiff upon non cepit, Tidd, Forms, 623. § 41.—for the defendant on several issues, Id. 623. § 42. 624. § 42. a. 8 Went. 115.—for the defendant on stat. 17 C. 2. c. 7, Tidd, Forms, 625. § 43. Then sign judgment and tax your costs, as in ordinary cases.*

The entry of the judgment for plaintiff, is the same as in trespass or assumpsit, that he recover his damages and costs. *See Vol. 1. p. 202. 204.* The judgment for the defendant is, that he have a return of the goods irreplevisable, and recover the damages assessed by the jury and his costs of increase. *See the form, Tidd, Forms, 630. § 49. 631. § 49. a.* But if the distress were for rent, and the finding of the jury be according to stat. 17 C. 2. c. 7. § 2, the judgment is, that the defendant recover the amount of the rent in arrear, if the value of the distress be equal to or greater than it, together with full costs; but if the value of the distress be less, then the judgment is, that he recover the value of the distress, and costs. *See the form of the judgment, Tidd, Forms, 636. § 54.*

Costs.] If the plaintiff have a verdict, he is entitled to costs of increase, by the stat. of Gloucester (6 Ed. 1.) c. 1. § 2, in the same manner as in all other actions in which a plaintiff obtains damages.

So, if the defendant in replevin or second deliverance, making avowry, conuance or justification for rents, customs or services, or for damage feasant, have a verdict, or the plaintiff be nonsuit or otherwise barred, he is entitled to costs, by 7 H. 8. c. 4. § 3. and 21 H. 8. c. 19. § 3. *See Hardw. 153. 2 L. Raym. 788, Comyns, 122 2 Ro. Rep. 457. Cro. El. 330. Cro. Jac. 520. Cro. El. 300. 1 T. R. 371.* And by 17 C. 2. c. 7. § 2, in replevin of a distress for rent, if the defendant have judgment upon this act, he shall have full costs of suit. And lastly, where the distress is for rent, relief, heriot or other service, the defendant avowing or making conuance in replevin, shall have double costs of suit, if the plaintiff be nonsuit, discontinue his action, or have judgment against him. 11 G. 2. c. 19. § 22. *See Barnes, 148. 2 Wils. 28. 1 B. & P. 214. Willes, 429. 7 T. R. 500, and as to costs upon double pleading, see 2 T. R. 235. 2 Doug. 709. and see Bk. 4, Pt. 1, Ch. 29.*

Execution.] The execution for the plaintiff, is the same as in ordinary cases, where a plaintiff has judgment for damages and

costs, namely, by *feri facias, ca. sa. or elegit*. See the form of the *feri facias*, Tidd, Forms, 642. § 62. and see generally, Vol. 1. p. 256.

So, if the defendant have judgment under stat. 17 C. 2. c. 7, to recover the arrears of rent or value of the distress, he shall have execution by *feri facias, ca. ca. or elegit*. See the form of a *fi. fa. for arrears of rent*, Tidd, Forms, 643. § 63.—the like for the value of the distress, Id. 643. § 64.

But when the defendant has judgment at common law, he shall have execution by a writ *de retorno habendo* to have a return of the things distrained, and a *feri facias* or *ca. sa.* for the recovery of his damages and costs. These he may have in one writ, or separate. See the form of a *retorno habendo* and *feri facias*, after verdict, Tidd, Forms, 647. § 69.—of a *retorno habendo* or *nonpros* for want of a declaration, Id. 643. § 65.—and of the entry thereof, Id. 644. § 66.—of the *retorno habendo* for want of a plea in bar, Id. 644. § 67.—of a *retorno habendo* on a demurrer to a plea in bar, and enquiry of damages, in one writ, Id. 646. § 68.—of *retorno habendo* after judgment of *nonpros* in proceedings upon a writ of second deliverance, and *ca. sa.* for damages and costs, in one writ, Id. 657. § 80. Engross these writs, respectively, on a 5s. stamped parchment, taking care to make them returnable on a general return day in term; and leave them with the sheriff to be executed. The sheriff, however, is not bound to execute a writ *de retorno habendo*, unless some person attend on behalf of the defendant to shew him the goods; and it will be a good return to the writ to say that no person did so attend. 2 Saund. 74. *hc.*

If to the *retorno habendo*, the sheriff return that the goods, &c. are elaigned, (that is, conveyed to places unknown to him, so that he cannot execute the writ), the defendant may then sue out a *capias in withernam* (2 Leon, 174), requiring the sheriff to take other cattle, &c. of the plaintiff, to the value of the cattle, &c. elaigned, and deliver them to the defendant, to be kept by him until the plaintiff should deliver to him the cattle, &c. originally replevied. See the form of the return of *elongata*, Tidd, Forms, 648. § 70.—and of the *capias in withernam*. Id. 648. § 71. 649. § 72. 657. § 81. If this writ be returned *nihil*, the defendant may sue out an *alias*, and after that a *pluries*; and if the *pluries* be returned *nihil*, the defendant may then sue out a *scire facias* against the plaintiff's pledges, to shew cause why the price of the cattle, &c. elaigned should not be made of their lands and goods, and rendered to the defendant. See the forms, Tidd, Forms, 651. § 73. 652. § 74. If no cause be shewn to this *scire facias*, a writ issues to take the cattle, &c. of the pledges. But if they have none, and the sheriff return *nihil* to the writ, the defendant may then have a *scire facias* against the sheriff himself, requiring him to shew cause why he shall not render to the defendant cattle, &c. to the value of those elaigned. Hut. 77. 1 Saund. 195. (n. 3). Or the defendant may, it should seem, proceed against the pledges, by default, upon the *scire facias* above mentioned. Or, which is much the best and least circuitous method, if the sheriff have not

taken pledges, or the pledges be insufficient, the defendant upon the return of the *elongata*, may bring an action on the case against the sheriff and recover damages, whether a *scire facias* have issued against the pledges or not. 16 *Vis. Abr.* 399, 400. 2 *W. Bl.* 1220. 1 *New Rep.* 292. 1 *B. & P.* 378.

The proceeding in this case is had against the pledges, because the plaintiff has not complied with the condition of the bond, by returning the distress when judgment was given against him. But when judgment is given in pursuance of stat. 17 *C. 2. c. 7*, as a return is not required in that case, the defendant can proceed upon the bond only in cases where plaintiff has made default in prosecuting his suit, and consequently not after demurrer or verdict.

Proceedings, when stayed.] If the defendant avow or make conuance for rent, the court, upon application by the plaintiff, will stay the proceedings, upon the rent and all the costs up to that time being paid into court. 1 *H. Bl.* 24. 2 *Salk.* 697. 1 *B. & P.* 382. and see *Barnes*, 429. But they will not do so, where the defendant avows, &c. for damage feasant; 8 *Mod.* 379; nor will they stay proceedings, at the instance of the defendant, upon payment of costs. 3 *B. & P.* 603.

Scire Facias.

SECT. 1. *Scire Facias, and in what Cases it is requisite.*

A *scire facias* is a judicial writ, founded upon some record, and requiring the person against whom it is brought, to shew cause why the party bringing it should not have advantage of such record, or (in the case of a *scire facias* to repeal letters patent) why the record should not be annulled and vacated. It is considered in law, however, as an action, and in the nature of a new original; *Skt. 682, Comb. 455*; and, when brought to repeal letters patent, may in fact be an original writ, returnable in chancery, (*see the form, Tidd, Forms, 502. § 82. f.*), or a judicial writ returnable in this court. *3 H. 4, 6, 49*. The *scire facias* against bail, against pledges in replevin, to repeal letters patent, or the like, is in fact an original proceeding; but when brought to revive a judgment after a year and day, or upon the death, marriage or bankruptcy, &c. of parties, or when brought on a judgment in debt on bond, or on a judgment *quando*, &c. against an executor, it is but a continuation of the original action. In some cases it is merely an interlocutory proceeding, and in the nature of process, as in the case of a *scire facias quare executionem non*, and *scire facias ad audiendum errores*; sometimes a proceeding after the action has terminated, as in the case of a *scire facias quare restitutionem non*, and *scire facias ad rehabendam terram*.

As to the cases in which a *scire facias* is necessary, they shall be considered under the following heads.

1. *Scire Facias to revive a Judgment after a Year and Day.*
2. *Scire Facias, upon the Death of Parties.*
3. *Scire Facias, upon the Marriage of Feme Plaintiff or Defendants.*
4. *Scire Facias, upon the Bankruptcy, &c. of Parties.*
5. *Scire Facias on a Judgment in Debt on Bond.*
6. *Scire Facias on a Judgment quando, &c. against an Executor.*
7. *Scire Facias in other Cases.*

1. *Scire Facias to revive a Judgment after a Year and Day.*

When a year and day have elapsed after judgment is signed, without execution being sued out upon it, the law presumes that

the judgment has been executed, or that the plaintiff has released the execution; and therefore it is that a *scire facias* is required in such a case, in order to give an opportunity to the defendant to shew that the judgment has been already executed, or other cause, if he can, why execution should not issue against him. 2 Inst. 470. 2 Bac. Abr. Execution H. And so strict is the rule in this respect, that a plaintiff cannot sue out a *ca. sa.* after the year, even for the purpose of proceeding against the bail, without having first revived the judgment against the principal by *scire facias*. 2 L. Raym. 1096. 6 Mod. 304. Holt, 90. At common law a judgment in a personal action could not be revived, after a year and day, by *scire facias*, but the only remedy the plaintiff had was to bring an action of debt on the judgment; 2 Inst. 469. Co. Lit. 290. b. 1 Sid. 351; in real actions, 2 Inst. 470. Cro. El. 416. 6 Mod. 288. 7 Mod. 64. 66, and also in mixed actions, 1 Salk. 258. 2 Id. 600, 2 L. Raym. 669. 806, it was otherwise. By stat. Westm. 2. (13 Ed. 1.) c. 45, however, all matters enrolled, to which the king's court can give effect, shall have such force, that it shall no longer be necessary to implead upon them; but if the plaintiff come into court within a year, he shall have execution forthwith; or if he come after the year, a *scire facias* shall issue to warn the defendant to appear and shew cause why the said matters enrolled should not be executed; and if he shew no cause, or if he do not appear, then the sheriff shall be commanded to cause the said matter enrolled to be executed. This statute has been holden to extend to judgments in ejectment, 1 Salk. 258, 3 Id. 319, 2 L. Raym. 806. Comb. 250. 7 Mod. 64. 2 Saund. 72. c, as well as in personal actions; and indeed from the general manner in which it is worded, it should seem to include judgments in every species of action, real, personal and mixed. The year mentioned in the statute, must be computed not by terms, but by calendar months, 1 Str. 301, and from the time of the signing of the judgment. Barnes, 197. See forms of the writ, Tidd, Forms, 449. § 31—39. 456. § 43—45.—the like, to revive a judgment in ejectment. Id. 708. § 67.

A *scire facias*, however, is not necessary to revive a judgment for the king. 2 Salk. 603. 1 L. Raym. 328. Also, if the plaintiff have been prevented from suing out execution, by a writ of error, 2 Inst. 471. 5 Co. 88. Moor, 566. Cro. El. 416. 706. Godb. 379. Palm. 448. Ro. Abr. 899. 4 Leon, 197. 13 H. 7, 16. b. Yelv. 7. Cro. Juc. 364. 1 Str. 301. Carth. 237. 6 Mod. 288, 1 Salk. 322. 3 Id. 321. Lane, 20, or injunction, 2 Bur. 660. (but see, 1 Str. 301. 1 Salk. 322. 3 P. Wms. 36. 6 Bac. Abr. sci. fa. C. contra), or by having a judgment with a *cesset executio* for a certain time, 6 Mod. 14. 288, 7 Mod. 64. 2 Salk. 600. 2 L. Raym. 806. 1 Ro. Rep. 104, the year and day do not begin to run, until the writ of error is determined, the injunction dissolved, or the time for which the execution was stayed, have elapsed, respectively. And it has even been determined that if a writ of error be brought after the year, and the judgment be affirmed, Ro. Abr. 899, and see Palm.

449. *Litch*. 193, or the plaintiff be nonsuit, or the writ of error be discontinued, *Cro. Jac.* 364. and see 1 *Ro. Rep.* 104. *Lane*, 20. 1 *Show.* 402, 403, the party may sue out execution, without a *scire facias*, at any time within a year and day from such determination of the writ of error; because the other party, by bringing error, has revived the judgment.

Also, if a writ of execution have been sued out within the year, and be regularly returned and filed, you may at any distance of time afterwards sue out another writ of execution (if the judgment have not been satisfied by the former one) without a *scire facias*, by entering continuances from the first to the second writ. 1 *Sid.* 59. 1 *Str.* 100. *Barnes*, 210. 2 *Wils.* 82, *Barnes*, 213. 2 *Inst.* 471. *Co. Lit.* 290. b. 6 *Bac. Abr. sci. fa. C. R. E.* 5 G. 2. r. 3. (a) *Vol.* 1. p. 256. *Carth.* 283. 2 *Show.* 235. It has even been holden that if the plaintiff, after the year and day, enter an award of an *elegit* on the roll, as of the same term with the judgment, he may continue it down by *vicecomes non misit breve*, and sue out an *elegit*, without reviving the judgment by *scire facias*; *Carth.* 283. 2 *Show.* 235. *Comb.* 232; and this appears to be warranted by the precedents, *Clist.* 874. 883. In practice, however, it is the constant course in these cases to shew that a writ has actually been sued out before the year, and returned and filed. See *Vol.* 1. p. 272. It may be necessary here to remark a difference between entering meane process on the roll, and writs of execution: in the former case, the writs must be all of the same species, in the latter not; thus if a *fi. fa.* be sued out within the year, it will warrant a *ca. sa.* or *elegit* sued out afterwards. 1 *Str.* 100. 2 *Saund.* 68. d. *Vol.* 1. p. 256.

In cases where a *scire facias* is requisite, if execution be sued out without it, such execution is not void, but voidable only upon writ of error. 3 *Lev.* 404. 1 *Salk.* 273.

2. *Scire Facias*, upon the Death of Parties.

Death, between verdict and judgment.] In all actions, personal, real or mixed, the death of either party between verdict and judgment, shall not be alleged for error, so as such judgment be entered within two terms after such verdict. 17 *C.* 2. c. 8. § 1. See 1 *Wils.* 124.

Upon this statute it has been holden, that the death of either party before the assizes or sittings, is not remedied; but if the party die after the assizes begin, 1 *Salk.* 8. 2 *L. Raym.* 1415. 7 *T. R.* 32. n. or after the first day of the sittings, 7 *T. R.* 31, though before the trial, it is within the remedy of the statute; for the assizes or sittings are but one day in law.

It is not necessary that the judgment should be actually entered upon the roll within two terms after the verdict; if it be signed within that time, it will be sufficient. 1 *Sid.* 385. *Barnes*, 261. 2 *Saund.* 72. m. and see 1 *Salk.* 401. The judgment is entered by

or against the deceased party, as if he were living. 1 Salk. 42. 2 L. Raym. 1280.

But although the judgment in this case is entered as if the party were alive, yet it must be revived by *scire facias* before execution can be sued out upon it. 1 Wils. 302. And, as the *scire facias* must pursue the judgment, it must recite it as if it had been entered in the party's life-time; 2 L. Raym. 1280. and see 1 Lev. 277. 2 Saund. 72. n; that is, the *sci. fa.* must be in the form in which the writ is usually conceived, when brought by or against the personal representatives of a person who died after judgment. *Vide infra.*

[*Death between interlocutory and final judgment.*] If either plaintiff or defendant, in actions in courts of record, happen to die after interlocutory and before final judgment, the action shall not abate, if it be such as might originally be prosecuted by or against the executor, &c. of the party dying; but the plaintiff or his executors or administrators, shall have a *scire facias* against the defendant or his executors, &c. to shew cause why damages should not be assessed and recovered by him or them; and upon *scire feci* or two *nilis* returned, and default made, or no cause shewn, a writ of enquiry shall be awarded, executed and returned, and final judgment thereupon given. 8 and 9 W. 3. c. 11. § 6. and see 1 Wils. 315. 1 M. & S. 242.

If the death happen after the execution of a writ of enquiry, the *scire facias* must be to shew cause why the damages assessed by the jury should not be recovered; otherwise it will be quashed. 1 Wils. 243. 1 T. R. 388. See the form, Tidd, Forms, 477. § 55. But if the death happen before the writ of enquiry is executed, it must be to shew cause why the damages should not be assessed against the defendant, or his executors, &c. as the case may be. 1 Salk. 315. Lil. Ent. 647. and see the form, where the death happened before the issuing of the writ of enquiry, Tidd, Forms, 474. § 53.—and when it happened after the issuing and before the execution of the writ, Tidd, Forms, 475. § 54. Clift. 680. —Lil. Ent. 647.

The final judgment in this case is, of course, for or against the executor, &c. and not for or against the testator himself as upon the statute 17 C. 2. above-mentioned. 1 Salk. 42.

Also, in case of the death of a defendant, besides the *scire facias* here mentioned, sued out before final judgment, another *scire facias* must be sued out after final judgment, in order to give the executors an opportunity of pleading the want of assets, &c.; for it would be unreasonable that the executors should be in a worse situation when the defendant dies before final judgment, than when he dies after it. 2 Saund. 72. n. Say. 266.

[*Death after final judgment, and before execution.*] If the plaintiff die after final judgment, his executors, &c. must sue out a *scire*

facias against the defendant, before they can have execution; or if the defendant die after final judgment, a *scire facias* must be sued out against his executors, or against his heir and terretenant. *Fits. Execution*, 243. 15 *H. 7*, 16. *b.* 1 *Ro. Abr.* 900. *pl.* 1, 2. *Cro. El.* 459. 1 *Saund.* 219. *cf.* 2 *Saund.* 6. 72. *o.* But if the defendant have died within a year after the judgment, we have seen (*Vol.* 1. *p.* 256) that a writ of execution may be sued out against his goods in the hands of his executor, without a *scire facias*, provided such writ of execution bear teste before his death: and see 2 *Bac. Abr. Execution*, G. 2. So, if he die after a *fi. fa.* sued out, but before it has been executed, there is no necessity for a *scire facias*, but the writ may be executed upon the goods in the hands of the executor, &c. 6 *Bac. Abr. Sci. fa.* C. 4. If a judgment be revived by *scire facias*, and the defendant die before execution, the plaintiff must sue out another *sci. fa.* against his executors, &c. before he can execute the judgment. 2 *Salk.* 598. In all these cases, if any of the executors be a feme covert, her husband must be made a party to the *scire facias*. 2 *Saund.* 72. *o.* But if any of the executors be a bankrupt, he may notwithstanding proceed or be proceeded against by *scire facias*; for his bankruptcy does not affect his representative character. *Id.*

The *scire facias* must be brought by or against the person or persons who represent the deceased. If the plaintiff in a personal action die, the *sci. fa.* must be brought by his executor or administrator; in a real action, by his heirs; 6 *Bac. Abr. Sci. fa.* C. 5; in a mixed action, it is said, if the lands to be recovered be fee simple, the heir and executor shall join in the *scire facias*, and the heir have execution as to the lands, and the executor execution as to the damages. 19 *E. 4*, 5. *b.* 43 *E. 3*, 2. *Ro. Abr.* 889. If the defendant die, the *scire facias* must be brought against his executor, or his heir and terretenant, as shall be mentioned presently.

A *sci. fa.* may be sued out by or against the executor of an executor, who has proved the will; but not by or against the administrator of an executor, or the executor or administrator of an administrator, because they do not represent the deceased. 5 *Co.* 9. *b.* In these latter cases, administration *de bonis non* must be sued out, and then the administrator *de bonis non* may, by 17 *C. 2.* *c.* 8, § 2, sue out a *scire facias*, and have execution of the judgment; or he may perfect an execution already begun. 1 *Salk.* 323. This statute, however, does not extend to allow an administrator *de bonis non* to proceed upon a judgment in *scire facias* (*quod habet executionem*) already obtained by the executor in his life-time, but he must sue out a *scire facias* to revive the original judgment; 4 *L. Raym.* 1049; nor does it extend to judgments by default, but to judgments after verdict only. 1 *Salk.* 322. 2 *L. Raym.* 1072. 6 *Mod.* 290. 11 *Id.* 34. Also, if a judgment be recovered against an executor who dies intestate, it may be revived as against the administrator *de bonis non*, at common law, and execution had upon the judgment. 2 *Saund.* 72. *o.* *Cro. Car.* 167. 1 *Ro. Abr.* 890. *T. pl.* 3. *W. Jon.* 214. If an administrator *durante minori*

state bring an action, and recover, and the executor then come of age, the latter may have a *scire facias* upon the judgment. *Ro. Abr.* 883. *Cro. Car.* 227. 2 *Brownl.* 83. *Godb.* 104. 1 *Leo.* 181. See forms of *scire facias* for or against an executor or administrator to revive a judgment obtained by or against the testator or intestate, *Tidd, Forms*, 472. 478. § 56—61. *Co. Ent.* 617. a. 618 b. *Lil. Ent.* 638, 639, 640. 645. 659. *Theat. Brev.* 228. 240, 241. 250. 252. and see 1 *Str.* 631. 2 *L. Raym.* 1395.

If *nihil* be returned to a *scire facias* against the executor, the plaintiff may have another *sci. fa.* against the heir and terretenants, in order to have execution of any lands of which the defendant was seised at the time of the judgment or after it; 2 *Saund.* 7. (n. 4). 72. *op*; but it is said that the *scire facias* will not lie against the heir and terretenants, unless *nihil* have first been returned to a *sci. fa.* against the personal representatives of the deceased. *Carth.* 107. It is usual to join the heir and terretenants. *F. N. B.* 597. (a). *Cro. El.* 896. *Cro. Car.* 295. 2 *Salk.* 598. *Lil. Ent.* 384, 385. You may, however, sue out the writ against the heir alone, without naming the terretenants; but it seems the better opinion that it cannot be sued out against the terretenants alone, without the heir, unless the heir have been already summoned, or it be returned that there is no heir, or that the heir has no lands; for the heir may have a release or some other matter to plead, in bar of execution. 6 *Bac. Abr. Sci. fa. C.* 5. 27 *H.* 6, 135. 1 *E.* 2, 242. 3 *Co.* 13. a. *Cro. Car.* 295. 313. If brought against both, it is said that if it be returned that the heir has no lands, the writ may proceed against the terretenants without him. *F. N. B.* 597. (a). The writ may be against the tenants either generally or by name. 1 *Salk.* 600. 1 *L. Raym.* 669. The former, however, is preferable; for if the plaintiff undertake to name them, and do not name all, those named may plead that matter in abatement. *Comb.* 282. 1 *Salk.* 40. 2 *Id.* 679. 601. 6 *Mod.* 134. 199. 226. 1 *Ro. Rep.* 57. *T. Jon.* 122. 2 *Vent.* 104. *Cro. Jac.* 506. and see *Moor*, 524. After a *scire facias* against the heir and terretenants, the plaintiff can have execution only of a moiety of the lands, by *elegit*, in the same manner as if the defendant were living; 2 *Saund.* 7. (n); even although the heir may have pleaded a false plea, *W. Jon.* 87, 88. *Carth.* 93. *Comb.* 162, which, in actions against an heir on the bond of his ancestor, would have the effect of charging the defendant in the same manner as if the action were for his own debt. See the form of a *scire facias* against terretenants, *Tidd, Forms*, 482. § 62.—the like, by an executor or administrator against the heirs and terretenants of several defendants. *Id.* 484. § 64.

Death of one of several plaintiffs or defendants.] Where there are two or more plaintiffs or defendants, and one dies after judgment, execution by *feri facias* or *ca. sa.* may be sued out, without any *scire facias*; 6 *Bac. Abr. Sci. fa. C.* 4. 7 *Mod.* 68. 5 *Id.* 339. *Moor*, 367. *Noy.* 150. *Carter*, 112. 122. 180. 193. 1 *L. Raym.* 244. 3 *Silk.* 319. *Carth.* 404. *Comb.* 441. 1 *Show.* 402; but the

execution must be in the joint names of all the plaintiffs or defendants, and must in other respects pursue the judgment. 1 *L. Raym.* 244, 1 *Salk.* 319. See 2 *L. Raym.* 808. If the plaintiff, however, wish to sue out an *elegit* against the lands of a deceased defendant, as well as against the survivor, he may have a *scire facias* against such survivor and the heir and terretenants of the deceased, to have execution against the lands and goods of the former, and the lands of the latter. *Carth.* 107. 2 *Saund.* 72. *p.* and see 6 *Bac. Abr. Sci. fa. C.* 5. 2 *Id. Execution, G.* 1. See the form of the *sci. fa.* in such a case, *Tidd, Forms*, 483. § 63. and see *Id.* 478. § 56. 472. § 51. *a.* See *Vol.* 1. *p.* 273, 274.

3. *Scire Facias, upon the Marriage of a Feme Plaintiff or Defendant.*

Marriage of feme plaintiff.] If a feme sole obtain judgment, and marry before execution, a *scire facias* must be brought by husband and wife, in order to have execution of the judgment; 2 *Saund.* 72. *k.* See the form, *Tidd, Forms*, 471. § 50. *Thes. Brev.* 256. 265. *Clift.* 681; and if, after execution awarded on this *scire facias*, but before execution, the wife die, the husband alone may have execution upon the judgment, without even taking out administration. 6 *Bac. Abr. Sci. fa. C.* 6, 1 *Salk.* 116, *Comb.* 455, *Carth.* 415, *Skin.* 682. So, if the husband and wife obtain judgment for a debt due to the wife *dum sola*, the husband may have a *scire facias* to execute the judgment; 1 *Sid.* 337. *Cro. El.* 844. 3 *Mod.* 188. 2 *Leon.* 14. 4 *Leon.* 186. *Cro. Car.* 208. 1 *Mod.* 179. 6 *Bac. Abr. Sci. fa. C.* 6; or he may, it seems, sue out execution in the names of himself and wife, without a *scire facias*.

But if husband and wife have judgment for a debt due to the wife as executrix, and the wife die before execution, the succeeding executor or administrator *de bonis non*, and not the husband, shall have the *scire facias*. *Cro. Car.* 207, 227, *W. Jon.* 248. 6 *Bac. Abr. Sci. fa. C.* 6.

Marriage of feme defendant.] If judgment be recovered against a feme sole, and she marry before execution, a *scire facias* must be brought against the husband and wife, before the judgment can be executed; 2 *Saund.* 72. *k.* See the form, *Tidd, Forms*, 471. § 51. *Thes. Brev.* 247. 251; and if after execution awarded upon this *scire facias*, but before execution, the wife die, the husband shall be liable to the execution. 6 *Bac. Abr. Sci. fa. C.* 6. *Carth.* 30, 1 *Salk.* 116, 3 *Mod.* 186, *Comb.* 103, *Skin.* 682. However, in a modern case, where a feme sole defendant married after interlocutory judgment, the court held that the plaintiff might proceed to final judgment and execution against her, without suing out a *scire facias* to make the husband a party. 4 *East*, 521. And in a yet more recent case, where a feme sole defendant in ejectionment married before trial, and the plaintiff proceeded to judgment, and sued out a *hubere facias* and a *fi. fa.* against her by her maiden name, without a *scire facias*; the court held that there was no

pretence for setting aside these writs on that account; for the writ of possession could not affect the husband or his property, the verdict proving that the wife had no interest in the term; and as to the *fi. fa.* it was merely inoperative, as the wife could have no separate property in goods upon which such a writ might be executed. 3 M. & S. 557.

Where a feme covert, sued as a feme sole, had judgment on a plea of coverture, and execution was sued out in the names of her and her husband, the court held it to be clearly irregular; execution should not have been sued out in the name of the husband, until he had first been made a party to the judgment by *scire facias*; but in this case, the wife might have sued out execution in her own name, because the plaintiff, by declaring against her as a feme sole, was concluded from denying it. 2 Doug. 637.

4. *Scire Facias, in Case of Bankruptcy or Insolvency*

Bankruptcy, &c. of plaintiff.] If a man obtain interlocutory judgment, and before final judgment become bankrupt, his assignees may proceed to final judgment in his name, and then sue out a *scire facias* to make themselves parties, in order to have execution; 2 Wils. 372; and even where execution was taken out in the name of the bankrupt, without a *scire facias* being sued out by the assignees, the court refused to set aside the proceedings. 3 T. R. 437. and see 5 Mod. 88. See the form of the *scire facias*, Tidd, Forms, 473. § 52. and see 2 T. R. 45. So, if a man have final judgment, upon which the defendant brings a writ of error, and pending the writ of error the plaintiff become bankrupt, his assignees ought to proceed to an affirmation of the judgment in the bankrupt's name, and then sue out a *scire facias* in order to have execution. 1 T. R. 463. 631. 2 Id. 45. 1 Mod. 93. 1 Vent. 193. 2 Wils. 372. 378.

The practice, it should seem, is the same, where the plaintiff takes the benefit of an insolvent act.

Bankruptcy, &c. of defendant.] If a man have been a bankrupt, or have taken the benefit of an insolvent act, or have compounded with his creditors, and afterwards become a bankrupt; his future estate and effects shall remain liable to his creditors (with the exception of his "tools of trade, necessary household goods and furniture, and the necessary wearing apparel of such bankrupt and his wife and children"), unless his estate pay 15s. in the pound under the said commission. 5 G. 2. c. 30. § 9. See 1 Doug. 46.

If judgment in such a case be signed after the defendant has obtained his certificate under the second commission, it may be special against his future estate and effects, with the exception of his tools of trade, &c.; but where the judgment is had before the defendant has obtained his certificate, it must be a general judgment, 2 Saund. 72. g. h, and the plaintiff cannot thereupon sue out a special execution against the defendant's future effects,

1 *T. R.* 80, but must proceed by *scire facias*. See the form, *Tidd, Forms*, 466. § 49. and see 2 *Saund.* 72. h. 1 *Id.* 358 (a.) 7 *T. R.* 87. 3 *B. & P.* 185.

By the Lords' act, 32 *G. 2. c.* 32. § 20, the future effects of insolvents, discharged under that act, are rendered liable to their debts, with the exception of the necessary wearing apparel and bedding of the insolvent and his family, and the necessary tools for the use of his trade or occupation, not exceeding 10*l.* in value in the whole. If a general judgment be had against a person before his discharge under this act, a special execution cannot afterwards be sued out upon it, without first suing out a *scire facias*. 1 *T. R.* 80. see also 6 *T. R.* 366. and see the form of the *scire facias*, *Tidd, Forms*, 469. § 49. a. see also the form of a *f. fa.* against an insolvent, and a *ca. sa.* for the costs of the *scire facias*, *Id.* 335. § 23.

5. *Scire Facias* on a Judgment in Debt on Bond.

In debt on bond or other instrument in a penal sum, conditioned for the performance of covenants, or for the doing of any other specific act; although the judgment is entered up for the entire penalty, yet execution is sued out for the amount of such damages only as the jury assess upon the breaches assigned or suggested, as has been already mentioned, *ante*, p. 27—30. The judgment, however, still remains as a security to the plaintiff for such damages as he may sustain by any further breaches; and in case of any such further breaches, the plaintiff shall have a *scire facias* upon the judgment, against the defendant, his heirs, terretenants, or executors or administrators, suggesting such breaches, and summoning him or them to shew cause why execution should not be awarded upon the judgment. 8 & 9 *W. 3. c.* 11. § 8. *ante*, p. 27. 30. and see 1 *Saund.* 58. 2 *Id.* 72. g. 187. b.

The *scire facias* in this case should recite the whole proceedings in the former action, or at least so much of them as to make it appear that the judgment is warranted by the statute; and it must then suggest the further breaches. 1 *Saund.* 58. e. See the form, *Tidd, Forms*, 439. § 45. a. 46. a. Or, if the plaintiff in the original action have set forth only some of the covenants, and he now wish to recover damages for breaches of others, it should seem that he may now state these latter covenants in the *scire facias*, and assign breaches on them. 2 *Saund.* 187. b.

The proceedings upon this *scire facias*, are the same as in the original action; see *ante*, p. 28—30; but it is not necessary that there should be any other judgment than the usual one in *scire facias*, namely, an award of execution. 1 *Saund.* 58. e.

The plaintiff is entitled to costs in this *scire facias*, whether the defendant plead to it or not, notwithstanding sect. 3 of the same statute gives costs in suits upon writs of *scire facias* generally, only in cases where the plaintiff obtains an award of execution after plea pleaded or demurrer joined. 1 *Saund.* 58. e. 11 *East*, 387.

6. Scire Facias on a Judgment quando, &c. against an Executor.

If on the plea of *plene administravit* in an action against an executor or administrator, or on the plea of *riens per discent* in an action against an heir, the plaintiff, instead of taking issue on the plea, take judgment of assets *quando acciderint*; in this case, if assets afterwards come to the hands of the executor or heir, the plaintiff must first sue out a *scire facias* against such executor or heir, before he can have execution.

As the judgment *quando acciderint* is that the plaintiff do recover his debt, to be levied of the goods, &c. of the testator which shall *thereafter* come to the hands of the executor, &c. it is necessary that the *scire facias* should state that the assets came to the executor's hands after the judgment; otherwise it would be bad. 2 *Saund.* 219. a. 6 *T. R.* 1. See the form, *Tidd, Forms*, 465. § 48.

If upon this *scire facias* assets be found for part, the plaintiff may have judgment to recover so much immediately, and the residue of assets in *futuro*. See 1 *Sid.* 448. 1 *Saund.* 336. b.

As to the *scire fieri* enquiry, see *post*, Pt. 2, Ch. 5, § 2.

7. Scire Facias in other Cases.

When special bail become fixed, by the recognizance being forfeited, one of the modes of proceeding against them, we have seen, is by *scire facias* on the recognizance. See upon this subject, *Vol. 1.* p. 291. 295. 2 *Saund.* 72. *abd.* and see the form of the writ, *Tidd, Forms*, 418. § 2—8. 8 *Went.* 154. 10 *Id.* 238. The *scire facias* in this case is an original proceeding.

If to the *pluries copias in withernam* in replevin, the sheriff return *nihil*, a *scire facias* issues against the pledges; *ante*, p. 74. *Comb.* 1. and see the form of the writ, *Tidd, Forms*, 651. § 73, 74; and if no cause be shewn, another *copias in withernam* issues against the cattle of the pledges; and if *nihil* be returned to that writ, a *scire facias* issues against the sheriff himself. *Ante*, p. 74. and see *Hut.* 77.

After judgment in error, reversing the judgment of the court below, if the amount of the damages awarded by the former judgment had been previously levied, but not paid over, the plaintiff in error must now sue out a *scire facias quare restitutionem non*, suggesting the matter of fact, namely, the sum levied, &c. before he can have a writ of restitution. *Vol. 1.* p. 237. and see the form of it, *Tidd, Forms*, 581. § 100, 101.

Where a plaintiff in an action has execution by *elegit*, and is put into possession of a moiety of the rents and profits of the defendant's lands, if the defendant tender the debt, &c. to the plaintiff, and it be refused, or if the plaintiff have been satisfied his debt from any casual profit of the land, the defendant may have a *scire facias ad rehabendam terram*; or if the plaintiff have been satisfied his debt

from the extended value of the lands, the defendant may either have this *scire facias*, or he may enter upon the land, and recover actual possession by ejectment. 6 *Bac. Abr. Sci. fa. C. 2.* 2 *Saund. 72. u.*

A *scire facias* is the only means of repealing letters patent. The *scire facias* in this case may be brought either on behalf of the king, or, where the patent has been granted to the prejudice of another, by the injured party at the king's suit. It may be sued either in the Petty Bag in Chancery, 4 *Inst. 88. 3 Lev. 223. 2 Saund. 72. q.* or in this court. 5 *H. 4, 6. 29.* See as to this *scire facias*, 2 *Saund. 72. pq. 4 Inst. 88. 74. 6 Bac. Abr. Sci. fa. C. 3;* and see the form of it, *Tidd, Forms, 502. § 82. f.*

In error from the court of Common Pleas to this court, if the plaintiff do not assign errors, the defendant may sue out a *scire facias quare executionem non*, in order to compel him. See as to this writ, *Vol. 1. p. 251.*—and the form of it, *Tidd, Forms, 455. § 41.* So, if, after the plaintiff has assigned errors, the defendant do not join in error, the plaintiff may sue out a *scire facias ad audiendum errores*, in order to compel him. See as to this writ, *Vol. 1. p. 253.*—and the form of it, *Tidd, Forms, 536. § 48—52.* Upon neither of these writs does the party suing it out declare, or is the other party allowed to plead; but they are considered merely as process to compel an assignment of errors or joinder. As to the proceedings upon them, see *Vol. 1. p. 251—253.*

Where an outlawry is pardoned by the king, the defendant must sue out a *scire facias*, requiring the plaintiff to appear and prosecute his suit against him, and he must have the plaintiff summoned thereon. *Trye, 134. 154. See Style, 348. 1 Sid. 231. and post, Bk. 4, Pt. 1, Ch. 2.*—and see the form of the writ, *Tidd, Forms, 70. § 37, 38.*—and of the entry of the return thereto, *Id. 72. § 39.* There are no further proceedings upon this writ.

If a bill of exceptions be sealed by a judge, and he die, a *scire facias* lies against his executors or administrators to certify it, 2 *Inst. 438.*

If a sheriff, after returning to a *fi. fa.* that he has levied the debt, retain the money in his hands, a *scire facias* may be sued out to compel him to pay it over to the party. *Hut. 32. Cro. Jac. 514. And. 247. Godb. 276.* Or, if the sheriff, to a *fi. fa.* return that he seized goods and sold part of them, but that the remainder were rescued, a *sci. fa.* lies against him, to have execution for the entire sum returned. *Cro. Jac. 514. 2 Saund. 243.* But if the sheriff return merely that the goods remain on his hands for want of buyers, in such case a *scire facias* does not lie, but a *venditioni exponas*, or a *distringas nuper vicecomitem*, as mentioned, *Vol. 1. p. 270. Id. and 2 Saund. 71. b. c.*

As to the *scire fieri* enquiry, see post, *Pt. 2, Ch. 5, § 2.*—and see the form of it, *Tidd, Forms, 463. § 47.*

SECT. 2.

Proceedings upon a Scire Facias.

The writ, summons, &c.] A *scire facias* upon a recognizance of bail, in this court, must be directed to the sheriff of Middlesex, 2 Salk. 600. 1 Bur. 409. 5 East, 461. 2 Saund. 72. c, although the venue in the original action have been laid in a different county. See 2 Lutw. 1287. But a *scire facias* founded upon a judgment, must be directed to the sheriff of the county in which the venue was laid. Cro. Jac. 331. Yelv. 218. Hob. 4. and see Cro. Car. 313.

A *sci. fa.* upon a judgment or recognizance of bail, must be made returnable on a day certain or general return day, according as the original action were by bill or by original; R. E. 5 G. 2. r. 3 (a). 2 L. Raym. 1417, 2 Stra. 694. and see 3 Salk. 320. 1 Str. 146; in all other cases it may be returnable on a general return day. R. E. 5 G. 2. r. 3 (a). If returnable on a day certain, and only one writ is to be sued out, it is sufficient if there be 4 days exclusive between the teste and return; 4 T. R. 663; but if it be intended to sue out two writs, there must be 15 days inclusive (2 Str. 765. 2 Salk. 599) between the return of the second and the teste of the first writ; Carth. 468. 2 Salk. 599. T. Jon. 228. Cro. El. 738. See 1 Lutw. 26; the number of days, however, between the teste and return of each writ, is immaterial. 2 Str. 1139. But if the *scire facias* be returnable on a general return day, there must be 15 days between the teste and return; R. E. 5 G. 2. r. 3 (a). T. 8. W. 3 (a); and if there be two writs, there must be 15 days between the teste and return of each.

A *scire facias* against bail, must be tested on the return day of the *ca. sa.* against the principal, and the *alias sci. fa.* upon the return day of the *sci. fa.* if the original action were by bill; R. E. 5 G. 2. r. 3 (a). See Barnes, 95. 2 Str. 1220; or if the action against the principal were by original, the *sci. fa.* should be tested on the *quarto die post* of the *ca. sa.* and the *alias sci. fa.* on the *quarto die post* of the *sci. fa.* 2 L. Raym. 1567. 6 Mod. 86. 3 Mod. 227. 2 Str. 866. But a *scire facias* upon a judgment may be tested on any day of the term of which the judgment is signed, 2 Salk. 599, or in any subsequent term; and the *alias*, on the return day or the *quarto die post*, according as the original action was by bill or by original.

Care must be taken that the *scire facias* strictly pursue the terms of the judgment, recognizance or other record, upon which it is founded. Upon a judgment against two, you cannot sue out a *scire factas* against one; 2 Salk. 598; although upon a recognizance it is otherwise, because it is joint and several. 2 Inst. 395. and see 2 Ro. Ab. 468. A *scire facias* for the nonperformance of a certain promise and undertaking (in the singular number), where the judgment was upon several promises, was holden bad. 2 Str. 893. So, where upon a judgment of assets *quando acciderint*, a *scire*

facias was sued out praying execution of assets generally, instead of such assets only as had come to the hands of the executor since the former judgment, the court held that it could not be supported. 6 T. R. 1. www.libtool.com.cn

The writ must in all cases be sued out of the court, in which the record is supposed to remain. See 3 Salk. 320, 1 L. Raym. 216. In the case of a *scire facias* to revive a judgment, it is sometimes necessary to obtain the leave of the court to sue it out. At any time before seven years from the signing of the judgment, it may be sued out as a matter of course; after seven years, and under ten, there must be a side bar rule; and after ten years, there must be a motion in court, supported by an affidavit that the judgment is unsatisfied. 2 Salk. 598. After 15 years, it seems the court will grant only a rule nisi; Imp. B. R. 540; and where the judgment was of 20 years standing, the court of Common Pleas have required that the defendant should be actually summoned. 2 W. Bl. 995, 1140.

In order to sue out the writ, if the proceedings were by original, make out a *præcipe* for the writ; see the form, Tidd, Forms, 418. § 1. 449. § 30; and take it, together with a memorandum of your warrant, to the filacer, who will make out the writ; pay him 8s. 4d.; get it sealed; pay 7d. Or if expedition be required, you may engross the writ on a 5s. stamped parchment, (see the forms referred to in the last section) and get it signed by the filacer; pay him 3s. 4d. An *alias sci. fa.* however is not signed by the filacer, but by the signer of the writs; pay him 1s. 8d. signing; sealing 7d. If the proceedings were by bill, prepare your *præcipe*, writ and memorandum, as above directed; and take them to the signer of the writs, who will sign the writ; pay him 1s. 8d.; sealing 7d. The *alias* is sued out in the same manner. As to an amendment of a *scire facias*, see 2 Saund. 72, r. 9 East, 316. and post, Bk. 4, Pt. 1, Ch. 27.

If you intend that the defendant should be summoned, take the writ to the sheriff's office, at least four days before the return of it, exclusive of the day on which it is returnable; R. E. 5 G. 2. r. 3. 4 T. R. 583. 3 Bur. 1723. and see 2 Salk. 599. 1 East, 89. n. 3 East, 570. Get a warrant on it; pay 2s. 6d.; and give the warrant to your officer, who will thereupon summon the defendants; pay him 5s. for each defendant. This summons is merely a copy of the warrant. It may be served upon the defendants at any time before the return of the *scire facias*; or even upon the return day, provided it be before the rising of the court. 1 East, 86. 2 T. R. 757, 1 East, 88, 9. 1 Str. 644. See 2 W. Bl. 837. 2 Str. 813. Call at the sheriff's office at the return of the writ, and if the sberiff have returned *scire feci*, then, on or after the return day if by bill, or the *quarto die post* if by original, 13 East, 591, make out a rule to appear upon unstamped paper, thus, "J. N. v. B. C. and D. E. [bail of L. S.] rule on *scire facias*;" and enter it with the clerk of the rules; pay him 3s. This is a four day rule; see 11 East, 272; and if at the expiration of it no appearance be entered, then enter the proceedings upon a roll; see the form, Tidd, Forms,

428. § 9—12. 490. § 74—76. 2 Sellon, 50. and see Vol. 1. p. 134; take it to the clerk of the judgments, who will sign judgment; pay him 2s.; then file the *scire facias* and return with the *custos brevium*, and sue out execution.

If *nihil* be returned both to the *scire facias* and *alias*, it is the same in effect as a return of *scire feci*, two *nihil*s being considered equivalent to a garnishment. *Yelv.* 88. 112. If then you do not intend that the defendants should be summoned, leave the *scire facias* at the sheriff's office one or two days before it is returnable, (see *R. E.* 5 G. 2. r. 3), and desire that it may be returned *nihil*. Call for it on the return-day; and having got it returned, then, and not before, you may sue out the *alias*. *R. T.* 8 W. 3. See 2 *Salk.* 599. Sue out the *alias sci. fa.* as directed *ante*, p. 88, tested and returnable as there mentioned; leave it at the sheriff's office, at least 4 days exclusive before the return, (*R. E.* 5 G. 2. r. 3. *Vide supra*), with directions to return it *nihil*. On the return day, get the writ and return from the sheriff's office; give a rule to appear, enter the proceedings on the roll, sign judgment, file the writ and return with the *custos brevium*, and sue out execution, as above directed. See the form of the entry on the roll, *Tidd, Forms*, 490. § 75. 2 *Sellon*, 50. This mode of proceeding by two *nihil*s, seems much more unfavourable in appearance, than it is in reality; for the defendant may, notwithstanding judgment against him, still have advantage of any matter he might have pleaded to the *scire facias*, either on an *audita querela*, 1 *Salk.* 262, or by motion to the court, 2 *L. Raym.* 1295. 1 *Salk.* 93. See 1 *L. Raym.* 445. 2 *Str.* 1075, or even by application to a judge at chambers in vacation.

Upon a *scire facias* to have execution of a judgment against two, if one be returned summoned, and *nihil* be returned as to the other, or that he is dead, and the one summoned make default, the plaintiff may have judgment against the party summoned, for the entire. 1 *Ro. Abr.* 890. S. pl. 1, 2.

The sheriff shall indorse on every *scire facias*, the day of the month on which it is left with him. *R. E.* 5 G. 2. r. 3. See forms of the sheriff's returns, *Tidd, Forms*, 486. § 65—71. If a *sci. fa.* be brought against the personal representatives, to revive a judgment in case of death, and *nihil* be returned, the plaintiff may sue out a *testatum sci. fa.* against the heir and terretenants. *Cro. Car.* 313. *Carth.* 105.

Appearance.] If the proceedings in the original action were by bill, let the defendant's attorney give a written notice to the attorney of the plaintiff, that he appears for the defendant. This will be sufficient; for common bail is never filed in such a case. See the form of the notice, *Tidd, Forms*, 433. § 13. 494. § 77. But if the proceedings in the action were by original, the appearance should be entered regularly with the filacer, as directed *Vol.* 1. p. 300.

Declaration.] As soon as the defendant has appeared, you may
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declare against him. *Engross your declaration on 4d. stamped paper, charge for it, and indorse upon it the notice to plead, as in ordinary cases; and deliver it to the defendant's attorney. See the form of the declaration, Tidd, Forms, 433. § 14—15. a. 494. § 78—82. 710. § 67. a. 2 Sellon, 51. and see 2 Saund. 72. t. 3 Wils. 154.*

Plea.] As soon as you have declared, rule the defendant to plead and demand a plea, in the same manner as in ordinary cases, excepting that in *scire facias* against bail, Sunday or a *dies non* is not reckoned as one of the 4 days given by the rule to plead, even when it is not the last day of the four. 11 *East*, 271. *Engross your plea on 4d. stamped paper, and deliver it to the plaintiff's attorney or agent. See as to pleas in scire facias, 6 Bac. Abr. Sci. fa. E. 2 Saund. 72 t u. 12 (n. 19). 6. 7 a. 9 a b. 10. 11. See Tidd, Forms, 497. § 82. a. 9 Went. 548, &c. If the defendant have been summoned, and he neglect to appear and plead, he is for ever after barred from availing himself of any matter which he might have pleaded; 1 Wils. 98; although if two *nihilis* had been returned, we have seen that he would be relievable either by *audit & quereld*, or upon motion. *Ante*, p. 89.*

Issue.] The issue is in all cases made up by the attorney. *R. T. 12. W. 3. (a.) See the form, Tidd, Forms, 435. § 16. 498. § 82. b. If it be an issue of fact, indorse on it the notice of trial, as in ordinary cases.*

Trial, &c.] Proceed to trial as in ordinary cases. The jury find the affirmative or negative of the issue; but they cannot give damages for the delay of execution. 2 *L. Raym.* 1532, 2 *Str.* 807. 3 *Bur.* 1791. and see *Vol. 1. p. 236.* The plaintiff may be nonsuit, as in other cases. 1 *Camp.* 484.

Get the nisi prius record from the associate, and indorse the postea upon it, if it be not already indorsed by the associate; see the form, 9 Went. 552. Then enter a rule for judgment; and at the expiration of the time limited by the rule, if the judgment be not arrested or a new trial granted, sign judgment and proceed to execution, as in ordinary cases. See the form of the entry of the judgment on the roll, Tidd, Forms, 435. § 17. 9 Went. 552. § 3.

Error in *scire facias* upon a recognizance in this court, must be brought in Parliament in all cases, whether the original action were by original or by bill; *Vol. 1. p. 213, and 6 Bac. Abr. Sci. fa. A.; and the same in all other cases where the scire facias is an original proceeding.*

If plaintiff have judgment, or award of execution, after plea pleaded or demurrer joined, he shall also be entitled to costs; or if the plaintiff be nonsuit, discontinued, or if a verdict pass against him, the defendant shall be entitled to costs. 8 & 9 *W. 3. c. 11. § 3.* But the plaintiff is not entitled to costs until after plea

pleaded; not even after a plea in abatement. 1 Str. 638. 2 Saund. 72. u. The statute also does not extend to charge executors or administrators with costs; 1 Str. 188. 1 Lil. P. R. 475; nor does it extend to a scire facias to repeal a patent; 7 T. R. 367; but costs are payable under the 8th section of the statute, in a scire facias suggesting breaches, after judgment by default in debt on bond conditioned to perform covenants. 11 East, 387. See ante, p. 84. 29. 30. If costs be given where they should not, the judgment may be reversed as to that, and affirmed as to the residue. 1 Str. 188.

Execution.] The execution is the same as in ordinary cases. See 8 & 9 W. S. c. 11. § 3. See the form of the *fi. fa.* Tidd, Forms, 334. § 21—23. 331. § 10. a. 436. § 18—24. 327. § 3. 338. § 5. 10 Went. 272. 324. 342. 344.—of the *ca. sa.* Tidd, Forms, 444. § 25—29. 10 Went. 301. 303. 319.—of the *elegit*, Tidd, Forms, 371. § 74. a. As to execution against bail on a scire facias, see Vol. 1. p. 293; and as to the manner in which the execution must pursue the judgment, see Vol. 1. p. 257. Upon a scire facias against bail, you may have one writ of execution against both, or separate writs against each; for the recognizance is joint and several. 1 Ro. Abr. 888.

Second scire facias.] After reviving a judgment by scire facias, if a year and day pass before execution, the judgment must be again revived by scire facias, before the execution can be sued out. 2 Sellon, 189. And the same, in the cases of death, marriage, &c. after scire facias sued out, the judgment must be again revived before execution. 2 Salk. 598. 2 Sellon, 196. Tidd, 990. See the form of a second scire facias, after a former revival, Tidd, Forms, 454. § 40.

PART II.

PROCEEDINGS IN ACTIONS BY AND AGAINST PARTICULAR PERSONS.

CHAPTER I.

Proceedings against Peers and Members of Parliament.

- SECT. 1. *Proceedings by Original, Summons and Distringas.*
2. *Proceedings by Bill and Summons.*
3: *Proceedings against Members subject to the Bankrupt Laws.*

SECT. 1.

Proceedings by Original, Summons, and Distringas.

PEERS, peeresses, and members of the House of Commons, we have seen, cannot be holden to bail; *Vol. 1. p. 39*; nor can they be taken in execution, upon a *capias ad satisfaciendum*. *Vol. 1. p. 276*. Consequently if they be sued, it must be in a nonbailable action; and judgment against them must be executed by *feri facias* or *elegit*.

Peers and peeresses can be proceeded against only by original, summons and *distringas*, see *2 H. Bl. 267, 299. 3 B. & P. 7. 3 East, 127*, even when sued jointly with others; where a peer was sued jointly with others, by bill of Middlesex, the court set aside the proceedings as against the peer. *3 M. & S. 88*. Members of the House of Commons may be sued, either in this manner by original, summons and *distringas*, or by original bill and summons. If either a peer or member of the House of Commons, however, be in the actual custody of the marshal, he may be proceeded against by bill, in the same manner as other prisoners; but he cannot be charged with a bailable action, nor afterwards charged in execution. *5 T. R. 361*. There is also a particular mode of proceeding, which may be adopted against members of Parliament who are traders, and subject to the bankrupt laws. These several modes of proceeding shall form the subject of this and the two following sections.

. *The original writ.*] In order to save expense and prevent delay, it is best to have the original writ directed to the sheriff of the county in which the defendant resides. The writ is the same as in ordinary cases, (see Vol. 1. p. 62—66), excepting that it is always in form a *præcipe* and not a *posse*, and commands the sheriff to summon the defendant, describing him by his proper titles, and adding these words, “having privilege of parliament.” See the form of the *præcipe* for the writ, 1 *Went.* 206. *Imp. B. R.* 601. 608. and see Vol. 1. p. 58—62. Take the *præcipe* to the curitor, as directed Vol. 1. p. 298, and he will make out the writ; for the writ must be actually sued out, and not merely instructions left for it with the filacer, as when the proceeding is by original and *capias*.

Process.] The process upon the original is by summons and *distringas*. Make out a copy of the original writ, and leave it, together with the writ, at the sheriff's office, and the officer will serve the copy upon the defendant as a summons, either personally, or by leaving it for him at his residence. But if he have no place of residence within the county, or cannot otherwise be served there, you will be obliged to sue out a writ of *testatum* summons, as directed in the next section. See the form, *Tidd, Forms*, 42. a.

After the *quarto die post* of the return of the original, search at the office of the filacer if the defendant have entered an appearance; and if not, get the original returned, and file it with the filacer; and the filacer will then make out the *distringas* for you, upon your furnishing him with a *præcipe*. This is a judicial writ, commanding the sheriff to distrain the defendant by all his goods and chattels, so that he be before the king on a general return day, wheresoever, &c. to answer the plaintiff of a plea of, &c. See the form, *Tidd, Forms*, 34. § 10. 42. § 5, 6. It must bear teste in term time, be returnable on a general return day, in the same or in the next term, and have 15 days between the teste and return, in the same manner as a *capias ad respondendum*. See Vol. 1. p. 66, 67. Care must be taken that the defendant be correctly named in the writ, otherwise the sheriff will not be justified in executing it. 6 *T. R.* 234. Take this writ to the sheriff's office, and obtain a warrant thereon; pay 2s. 6d.; give the same to your officer, who will thereupon levy the sum of 40s. See 4 *East*, 162.

If the defendant have not entered an appearance on the *quarto die post* of the return of the *distringas*, get the writ returned, and sue out an *alias*, and after that a *pluries*; or if the sheriff return *nulla bona*, you may sue out a *testatum distringas* into a different county. See 4 *East*, 162. See the form of the *alias* and *pluries*, *Tidd, Forms*, 34. § 11. 43. § 7.—and of the *testatum*, *Id.* 34. § 12, 43. § 8. Upon suing out the *alias*, move the court to increase the issues, who will thereupon grant a rule absolute in the first instance; draw up the rule with the clerk of the rules, annex a copy of it to the *alias distringas*, and leave it with the sheriff to be executed, as above directed. If upon the *quarto die post* of the return of this writ, the defendant have not entered an appearance, sue out a *pluries distringas*, and

again move the court to increase the issues, which they will now order to the amount of the debt and costs; draw up the rule, and get the writ executed, as above directed. If on the *quarto die post* of this writ, the defendant have not appeared, then, in pursuance of stat. 10 G. 3. c. 50, move for a rule to shew cause "why the issues returned upon the several writs of *distringas* should not be sold, and the monies arising from the sale thereof should not be forthwith brought into court; and why it should not be referred to the master to tax the plaintiff his costs occasioned by his issuing out the said several writs; and why the costs, when taxed, should not be paid out of the monies so brought into court; and why the surplus of the said money, after payment of the said costs, should not be retained in court, until the purpose of the said writs be answered." See the form of the rule, *Tidd, Forms*, 35. § 13. Move this upon an affidavit, stating the issuing and returns of the writs of *distringas*, and that the defendant has not appeared. Draw up the rule, and serve a copy of it upon the sheriff. Afterwards move to make the rule absolute; draw up the rule, and serve a copy on the sheriff, at the same time shewing the original; and if he do not pay the money into court, move for an attachment. If the money be paid in, make out a bill of costs and get it taxed; then take the rule and allocatur to the signer of the writs, and he will pay you the amount of the costs. See 5 Bur. 2725. You may afterwards proceed by *distringas* thus *ad infinitum*, applying from time to time to sell the issues for payment of costs, until the defendant appear.

Or, if the defendant have been personally served with the summons, then, instead of suing out writs of *distringas* as above directed, in order to compel an appearance, you may enter an appearance for the defendant, and proceed thereon as if he had appeared. 45 G. 3. c. 124. § 3.

[*Appearance.*] If the defendant appear, let his attorney enter the appearance with the filacer, as directed *Vol. 1. p. 300*. If the appearance be entered before any application is made for the sale of issues, the sheriff will thereupon deliver to the defendant the issues levied, upon his producing a certificate from the filacer of the appearance being entered; or if he refuse to do so, a judge on summons will compel him. But if the appearance be not entered until after the rule obtained, the court will not discharge the rule but upon payment of the costs of the several writs of *distringas*, &c. 5 Bur. 2725. See 1 B. & P. 81.

Or, if the defendant, within 8 days after the return of the original, do not enter an appearance, the plaintiff may, if he wish, upon affidavit being made and filed of the personal service of such summons, enter an appearance for the defendant, and proceed thereon as if the defendant had appeared. 45 G. 3. c. 124. § 3. As to the mode of entering an appearance by the plaintiff for the defendant, see *Vol. 1. p. 299*.

[*Declaration, &c.*] The plaintiff cannot declare until after the defendant have appeared, or an appearance have been entered for

him according to the statute; *Vol. 1. p. 105*; and the declaration must be in chief, and not by the by. As to the delivery of the declaration, see *Vol. 1. p. 109, 110*.

The remaining proceedings in the cause, from the declaration to the end of the suit, are the same as are already stated, *Vol. 1. p. 111—296*; excepting that the execution must be by *feri facias* or *elegit*, and not by *ca. sa.* as already mentioned *ante*, p. 92.

SECT. 2.

Proceedings by Bill and Summons.

FORMERLY the proceeding by original writ, summons and *distringas*, was the only one which could be adopted against a member of the House of Commons. But now, he may be proceeded against, either by original writ (as in the last Section), or by original bill, summons, and *distringas*; 12 & 13 *W. 3. c. 9*; or if he be already in the custody of the marshal, he may be sued in the ordinary way by bill, as mentioned *ante*, p. 92.

Bill.] The bill is in the usual form of a declaration, omitting of course the charge of fraud, &c. usually inserted in the breach, and concluding with the following prayer in a new paragraph: "*And the said J. N. prays the process of our lord the king to be made to him thereupon against the said J. S. according to the form of the statute in such case made and provided; and it is granted to him, &c.*" Then add the usual pledges to prosecute. See a form of the declaration, *Tidd, Forms, 41. § 1.* Engross it on 4d. stamped parchment, and file it, together with a memorandum of your warrant, with the clerk of the declarations.

Summons.] After the bill is filed, as above directed, a writ of summons must be sued out. This is a judicial writ, commanding the sheriff to summon the defendant, so that he be before the king at Westminster on the return day of the writ, to answer the plaintiff of a plea, &c.; see the form, *Tidd, Forms, 42. § 4.* It is tested of course upon some day in term, and must be returnable on a day certain and not on a general return day; and it is not necessary that there should be 15 days between the teste and return.

Engross the writ on a 5s. stamped parchment; and make out a *præcipe*; see the form, *Tidd, Forms, 41. § 3.* Take them to the signer of the writs, and get the writ signed; pay 1s. 8d.; get it sealed; pay 7d. Get a warrant on it at the sheriff's office, and give it to your officer, who will thereupon serve it either personally, or by leaving it at the defendant's residence. If the writ cannot be served in the county in which the venue is laid, you may sue out a *testatum* summons into another county. See the form, *Tidd, Forms, 42. § 4. a*

Distringas, &c.] If within four days after the return of the writ of summons, the defendant have not filed common bail,—get the writ of summons returned; engross a writ of *distringas* on a 5s. stamped parchment; see the form, *Tidd, Forms*, 43. § 6; and take it, together with a *præcipe* (see the form, *Tidd, Forms*, 42. § 5.) to the signer of the writs, and get the writ signed, pay 1s. 8d.; and sealed, pay 7d. Get it executed; sue out *alias* and *pluries*, and move to increase the issues; and afterwards move to sell the issues;—as directed in the last section. Each of the writs of *alias*, *pluries*, and *distringas* may be sued out and tested on the return day of the preceding writ, respectively.

But if the summons have been served personally, then, instead of proceeding by *distringas*, the plaintiff, if common bail be not filed by the defendant within eight days after the return of the writ of summons, may file common bail for him, and proceed in the action as if the defendant had himself filed common bail. 45 G. 3. c. 124. § 3.

Common bail is filed by the defendant, or by the plaintiff for him, in pursuance of the statute, in the manner directed *Vol.* 1. p. 314. The remainder of the proceedings are the same as mentioned in the last section.

SECT. 3.

Proceedings against Members of Parliament subject to the Bankrupt Laws.

By *stat.* 4 G. 3. c. 33, if any trader, &c. within the description of the statutes relating to bankrupts, having privilege of parliament, be served with a copy of a summons upon an original writ, or original bill, at the suit of any single creditor or partners whose debt amounts to 100*l.*, or at the suit of two creditors whose debts together amount to 150*l.*, or at the suit of any three or more creditors whose debts together amount to 200*l.*, (and affidavit being previously made and filed in any of the courts at Westminster by such creditor or creditors that such debts are justly due to him or them respectively, and that he believes the debtor to be a trader within the description of the statutes relating to bankrupts); if such debtor do not pay, secure, or compound for such debts to the satisfaction of such creditor or creditors, or enter into a bond in such sums and with such sufficient sureties as a judge of the court, out of which the writ issues, shall approve of, conditioned to pay such damages and costs as the plaintiff may recover in the action, such debtor shall be accounted a bankrupt from the time of the service of the summons, and any creditor may thereupon sue out a commission of bankrupt against him.

And if he enter into the bond with sureties, above-mentioned, he must, within two months after personal service of the summons,

cause an appearance to be entered to the action, in the court where such action is brought, otherwise he shall be accounted and adjudged a bankrupt from the time of service of such summons, and any creditor may sue out a commission of bankrupt against him. 45 G. S. c. 124.

It is optional, of course, with the plaintiff in this case, to adopt the remedy here given, or to proceed regularly in the action, as directed in the last two sections.

CHAPTER II

Proceedings against Corporations and Hundredors.

SECT. 1.

Proceedings by and against Corporations.

CORPORATIONS aggregate (to which alone this section has reference) cannot sue or defend otherwise than by attorney, which attorney must be appointed under their common seal. *Co. Lit.* 66 b. *Vol.* 1. p. 22. In actions by corporations, they may hold to bail, and proceed by original or bill, in the same manner as individuals. Even in ejectment they may now proceed in the ordinary way, without executing a power of attorney authorising a third person to enter and make a lease on the land, as used to be the practice. *Run. Eject.* 150. They cannot, however, sue as a common informer. *2 Str.* 1241.

Proceedings against corporations aggregate must be by original, summons and *distringas*, in the same manner as in actions against peers, excepting that the plaintiff is not authorised by any statute to enter an appearance for the defendant, but he must proceed to compel an appearance by levying issues on successive writs of *distringas*, moving to increase them, and from time to time to sell them, as directed *ante*, p. 93, 94. The remaining proceedings are the same as mentioned *ante*, p. 94, 95.

SECT. 2.

Proceedings against Hundredors.

On the statutes of hue and cry.] THE statutes relating to hue and cry in the case of robbery, and which give the action against the hundred as a remedy to the party robbed, or regulate the proceedings therein, are—The *stat. Winton.* (13 Ed. 1. st. 2.) c. 1, confirmed and re-enacted by 28 Ed. 3. c. 11; *stat. 27 El.* c. 13. 8 Geo. 2. c. 16. 22 G. 2. c. 24. As to the cases in which this action lies, see 2 *Saund.* 376 e., and the authorities there cited.

Previously to the commencement of the action, there are certain acts required of the party robbed, such as that he shall give notice

of the robbery, shall make oath of it before a magistrate and enter into a recognizance to prosecute, and that he shall enter into a bond with sureties to pay costs in case he should fail in his suit. It may be necessary to state the law upon these subjects more particularly.

The party robbed shall not have or maintain any action against the hundred, unless he have "with as much convenient speed as may be" given notice of the robbery to some of the inhabitants of some "town, village, or hamlet" near the place where the robbery was committed. 27 *El. c.* 13. § 11. See 8 *East*, 173. Besides this notice, he must "with as convenient speed as may be" after the robbery, leave a written notice thereof at the house of one of the constables of the hundred, or of some constable or headborough, &c. of some town, parish, village, &c. near the place of the robbery, describing the felon, and the time and place of the robbery. 8 *G. 2. c.* 16. § 1. and see 2 *Str.* 1170. Also, within 20 days after the robbery, he must cause public notice of it to be given in the London Gazette, describing the felons, the time and place of the robbery, and the goods of which he was robbed; 8 *G. 2. c.* 16. § 1; and if the party omit any material part of this description within his knowledge, the omission will be fatal. See 2 *Wils.* 109. 113. *Barnes*, 458. *Bul. N. P.* 186.

Also, before he can maintain his action, he must, within 20 days before the action brought, be examined upon oath before a justice of peace of the county, and residing in or near the hundred, in which the robbery was committed, as to his knowledge of the persons who committed the robbery; and if it appear that he know any of them, he shall be bound in a recognizance effectually to prosecute them. 27 *El. c.* 13. § 11. His knowing the offenders, however, does not prevent him from maintaining the action; it merely imposes upon him the duty of prosecuting them, and of binding himself to do so. *Noy*, 150. The oath must be made by the party robbed: therefore if a master bring an action for the robbery of his servant, the servant must take the oath; *Cro. El.* 142. 1 *Leon.* 323. *Cro. Car.* 38. 336. 2 *Salk.* 613; or if two servants were robbed, both must swear; 3 *Mod.* 288. 1 *Show.* 94. 241; and the same, where a servant gave part of the money to a person travelling with him, and both were robbed; 3 *Mod.* 288; but if one only of them swear, the master shall recover for so much as that servant was robbed of. *Carth.* 145. 3 *Mod.* 288. 2 *Salk.* 613. If, however, the servant deliver part of his master's money to a person travelling with him, and both be robbed, if the servant bring the action (which may be done), the servant's oath alone is sufficient; so, if the master and servant be robbed of the master's property, and the master bring the action, the master's oath alone is sufficient. *Id.* If the examination be taken out of the county, before a justice of peace of the county, &c. it is sufficient; for this is but a ministerial act. *W. Jon.* 239. *Cro. Car.* 211. See the form of the oath, *Thes. Brev.* 141.

And lastly, before action brought, he must go before the chief

clerk or secondary, or the filacer of the county where the robbery happened, or the clerk of the pleas of the court in which the action is brought, or their deputies respectively, or before the sheriff of the county where the robbery happened, and enter into a bond, with two sufficient sureties, to the high constable of the hundred, in the penal sum of 100*l.* conditioned to pay the defendant's taxed costs, if the plaintiff should be nonsuit, discontinue his action, or if judgment be given against him on demurrer or verdict. 8 G. 2. c. 16. § 1.

This action must be commenced within a year after the robbery; 27 *El.* c. 13. § 9; and the day of the robbery is reckoned inclusive. Therefore if a man be robbed on the 9th of October, he must commence his action on or before the 8th of the same month in the following year; *Hob.* 139. 2 *Ro. Abr.* 520. A. pl. 8. *Moer*, 878. 1 *Brownl.* 156; for which reason the plaintiff at the trial must produce a copy of the original writ, to shew that the action was commenced within the time limited. It must not, however, be brought within 40 days after the robbery, that being the time allowed by the statute of Winton for the hundred to take the robber; 3 *Lev.* 320; otherwise it would be error: nor is it prudent to commence it until the expiration of 40 days from the publication of the notice, above mentioned, in the Gazette; for if the hundred have taken any of the robbers within that time, they may plead it in bar of the action. 8 G. 2. c. 16. § 3. 2 *Saund.* 375 a.

If a servant be robbed of his master's property, in the latter's presence, the action must be brought by the master; 4 *Mod.* 308; but if the master be absent when the servant is robbed, the action may be brought either by the master or the servant. *Id.* If several persons be robbed at the same time, they cannot join in the action, unless they are joint owners of the property taken. *Dy.* 370 a.

The mode of proceeding in this action is by original, summons, and *distringas*, in the same manner as against corporations. See the last Section. The original must bear *teste* 40 days at least after the robbery, 2 *Leon.* 12, otherwise it will be error; it must be directed to the sheriff of the county in which the robbery happened; and must be against the inhabitants of the hundred, generally. 2 *Saund.* 376 f. and see *Id.* 375 b. See the form of the writ, *Thest. Brov.* 141. 2 *Saund.* 375 a. *Tidd, Forms*, 32. § 4 a. and as to the summons, &c. see *ante*, p. 93.

The summons must be served upon the high constable or high constables of the hundred in which the robbery happened; who shall thereupon cause public notice thereof to be given on the next market day, in one of the principal market towns within the hundred; or if there be no market town, then on the next Sunday in some parish church within the hundred, immediately after divine service. 8 G. 2. c. 16, § 4.

The high constable, upon being served with the summons, must enter an appearance, and defend the action, for and on behalf of the inhabitants of the hundred. 8 G. 2. c. 16. § 4. If he do not, how-

ever, the plaintiff cannot enter it for them. This appearance must be entered with the filicer, on or before the *quarto die post* of the original, as directed *Vol. 1. p. 300.*

As to the form of the declaration, see 2 *Saund. 376. 376 b e f. 377 f. 379.* The plaintiff cannot declare until the defendants have appeared; the declaration is then delivered or filed as in ordinary cases.

The defendants may plead not guilty; see *Vid. Ent. 211. Lit. Ent. 296. Hans. Ent. 4. 1 And. 158;* or they may plead that they took one of the robbers upon a fresh suit, 1 *Vent. 118. see 27 El. c. 13. Dy. 370 a. 2 Leon. 12,* either within 40 days after the robbery, 2 *Saund. 375 (n. 3),* or within 40 days after the publication of the notice in the Gazette, 8 *G. 2. c. 16. § 3. Bul. N. P. 187,* or indeed at any time before the commencement of the action; 1 *Sid. 11. Co. Ent. 438. 439;* or that the robbery was committed on the Lord's day. See 29 *C. 2. c. 7. § 5. See Comyns, 345. 1 Str. 406.*

Although this action is in form *qui tam* (see 2 *Saund. 374 (n. 1). Moor, 64. Andr. 119*), yet as no part of the damages go to the king, the words "who as well for our lord the king as for the plaintiff" need not be inserted in the joining of issue or the *venire facias.* *Cro. Car. 336.*

Also, as this is not a penal action, it is within the statutes of jeofails, and is also amendable even after issue joined, in the same manner as any other civil action. 3 *Lev. 347. Andr. 115. Hardw. 409.*

The party robbed may be a witness; 2 *Ro. Abr. 686;* so may a hundredor. 8 *G. 2. c. 16. § 15.*

The damages cannot exceed 200*l.*, unless it be proved that the party robbed was in company with one other person at least, at the time of the robbery, and that the truth of the robbery be attested by both. 22 *G. 2. c. 24.* The plaintiff in this action is entitled to costs if he recover; 2 *Saund. 378 b;* and these costs are not included in the 200*l.* above mentioned.

The execution is by *feri facias* against the inhabitants of the hundred generally, directed to the sheriff of the county in which such hundred is situate, and indorsed thus: "The within damages are to be levied according to the statutes. 8 *G. 2. c. 16. & 22 G. 2. c. 46.*" See the form of the writ, 10 *Went. 324.* When this writ is delivered to the sheriff, instead of levying the amount on any of the inhabitants of the hundred, he shall cause the same to be produced to two justices of the peace residing in or near the hundred, who shall thereupon cause a taxation and assessment to be made, levied, and collected, in the manner prescribed by *stat. 27 El.* [that is, to rate each town, parish, village, hamlet, and liberty within the hundred, towards a contribution to the sum to be levied; and after such taxation made, each constable, &c. shall assess every inhabitant and dweller in such town, &c. within their several limits respectively, towards the payment of such taxation; and if such inhabitant, &c. refuse to pay the amount of his share, it shall be

levied of his goods. 27 *El. c. 13. § 5.*] in which taxation shall be included not only the amount of the damages and costs recovered, but also the high constable's just and necessary expenses in defending the action, ~~to be ascertained upon oath.~~ Within 10 days after these sums are levied and collected, they shall be paid over to the sheriff, for the use of the plaintiff and high constable. 8 *G. 2. c. 16. § 4.* See as to the sheriff's return to this writ, 13 *East, 544.*

This mode of executing the judgment, has since been extended to all actions against the hundred, generally; and in other cases, where the action is brought against an inhabitant, the expenses of such inhabitant in defending the action shall be levied and paid to him, in the same manner as those of the high constable are directed to be levied and paid by the above statute. 22 *G. 2. c. 46. § 34.*

[On the riot act.] By the riot act, 1 *G. 1. st. 2. c. 5. § 6*, if any church or chapel, or any place of worship registered according to *stat. 1 W. & M. sess. 1. c. 18*, or any dwelling-house, barn, stable, or other outhouse, shall be demolished or pulled down, wholly or in part, by any persons unlawfully, riotously, and tumultuously assembled, the person damnified thereby may maintain an action against the hundred for the amount thereof, in any of the courts at Westminster. As to the cases in which this action is maintainable, see 2 *Saund. 377 c.—378 b.*

The action must be brought against two or more of the inhabitants of the hundred; unless the damage be done in some city or town which is a county of itself, or is not within a hundred, in which case the action is to be brought against two or more of the inhabitants of such city, &c. If the damage be done to a church, chapel, &c. the action is to be brought in the name of the rector, vicar, or curate, in trust for applying the damages to be recovered in the rebuilding or repairing of the same. 1 *G. 1. st. 2. c. 5. § 6.* In other cases it is brought in the name of the party grieved only; and not *qui tam*, as on the statutes of hue and cry. 2 *Saund. 378 d.*

As the action in this case is to be brought against any two of the inhabitants, it may be commenced either by original or bill, as in ordinary cases. 2 *Saund. 377 b.*

If the plaintiff obtain judgment, he may sue out a *feri facias* against the defendants, and it shall be executed in the manner mentioned *ante*, p. 101, by virtue of *stat. 8 G. 2. c. 16. § 4*, and 22 *G. 2. c. 46. § 34.* See the form of the *feri facias*, 10 *Went. 35.*

The plaintiff is entitled to costs in this action, as well as in actions on the statutes of hue and cry. *Cowp. 485. 2 Wils. 91.*

[On the black act.] By the black act, 9 *G. 1. c. 22. § 7*, the inhabitants of every hundred shall make satisfaction and amends to all and every person and persons, their executors, &c. for the damages they shall have sustained by the killing or maiming of any cattle, &c. cutting down or destroying any trees, or setting fire to any house, barn, or outhouse; hovel, cock, mow, or stack of corn;

straw, hay, or wood, which shall be committed or done within such hundred, by any offender or offenders against this act; and the party so sustaining damage may maintain his action against the inhabitants of the said hundred for the amount of the same, and may recover damages to the extent of 200*l*.

Previously to any action being brought, the plaintiff shall, by himself or servant, within two days after the damage done, give notice of the same to some of the inhabitants of some "town, village, or hamlet," near the place where the damage was committed. 9 *G. 1. c. 22. § 8*. If the notice be given to the inhabitant of a parish, the court will intend the parish to be a vill, and the notice of course to be sufficient; but if it be proved that the parish consists of several villis, the defendants will be entitled to a verdict. 8 *East, 173*.

Also within four days after such notice, the plaintiff shall give in the examination of himself or servant upon oath, before a justice of peace of the county, residing in or near the said hundred, stating whether he knows any of the persons who committed the act from which the damage has arisen as above mentioned; and if he do, he shall be bound in a recognizance to prosecute. 9 *G. 1. c. 22. § 8*. This examination is a condition precedent to the party maintaining any action, whether he or his servant know the offenders or not. 3 *East, 400*. The oath also must be positive; and therefore where the party swore that he had *good reason to suspect* that *A.* and *B.* did the fact, it was deemed insufficient; 2 *Str. 1247*; so, where the oath was that he *suspected* the fact to have been done by some person to him unknown, it was holden to be insufficient. 3 *East, 400*.

If any of the offenders be apprehended and convicted within six months after the offence committed, the hundred shall not be liable. 9 *G. 1. c. 22. § 9*. It may be better therefore not to commence the action until after the expiration of that time.

The mode of proceeding in this action is by original, summons, and *distringas*, as in the action on the statutes of hue and cry. The writ, however, must be in the name of the party grieved, and not *qui tam*. 2 *Saund. 378 d*.

As to the declaration, see 2 *Saund. 378 d e*. The defendants may plead not guilty; or that one of the offenders was convicted within the six months, or before action brought. *Vide supra*. If the plaintiff recover, he shall have his costs, as in ordinary cases; although the damages and costs together exceed 200*l*. 1 *T. R. 71*. So the defendant shall have costs, if the plaintiff be nonsuit, &c. as in ordinary cases. 3 *Bur. 1723*. The execution is by *feri facias*, and executed as in the action on the statutes of hue and cry. See *ante*, p. 101.

On other statutes.] There are several other statutes, which give an action against the hundred to the party grieved; but the mode of proceeding under them, is the same as upon one or other of the

statutes above mentioned, respectively. The following distinction, however, should be attended to: when the statute gives the action against the inhabitants of the hundred generally, as in the statutes of hue and cry, and the black act, the action must be by original, summons, and *distringas*; but if it direct the action to be brought against individuals, as in the riot act, against two or more inhabitants of the hundred, the action may be either by original or bill, as in ordinary cases.

CHAPTER III.

Actions by and against Attornies and Officers of the Court.

SECT. 1.

Actions by Attornies and Officers.

ATTORNIES and officers of this court, have the right of suing here by attachment of privilege; and having brought the defendant before the court by this writ, they may declare against him, and proceed in the action, as in ordinary cases. The amount of the cause of action is immaterial, attornies and officers, when plaintiffs, not being within the statutes relating to courts of conscience, 7 *East*, 46. 50. *Doug.* 313. 382. 2 *Wils.* 42, provided they sue as attornies or officers, that is, by attachment of privilege. See 1 *B. & P.* 629. 2 *Id.* 29.

But if an attorney sue as executor or administrator; 1 *L. Raym.* 533. 12 *Mod.* 316; or sue jointly with others who are not privileged, 1 *Vent.* 298, even jointly with his wife in right of his wife; 2 *L. Raym.* 1398. *Bro. Abr. bille*, pl. 2; or if he have left off practice: see *Vol.* 1. p. 21. 17: in these cases he is not entitled to privilege; and must sue, not by attachment of privilege, but by original or bill, in the same manner as persons not privileged. If he sue by attachment of privilege, where he is not entitled to do so, it will be error. 2 *L. Raym.* 1398. But, on the other hand, where he is entitled to sue by attachment of privilege, he may waive his right, if he wish, and sue in the ordinary way, by original or bill, and may conduct his suit either in person or by attorney. 7 *T. R.* 35.

Attornies and officers have also the privilege of being sued by bill only, in the court to which they belong, and of not being holden to bail; and as this privilege may be inconsistent with that of suing by attachment of privilege in cases where both the plaintiff and defendant are attornies or officers, the following distinction has been established: If both plaintiff and defendant be attornies or officers of this court, the defendant's privilege prevails, and he must be sued by bill, and not holden to bail; 6 *T. R.* 524. 8 *Id.* 395. 2 *Str.* 837. 1141; but if the defendant be an attorney of another court, the plaintiff's privilege prevails, and he may sue him here by attachment of privilege. 1 *W. Bl.* 19. 2 *Id.* 1325. The latter part of this distinction extends also to other cases of privilege; as, where an attorney of this court has a

cause of action against a resident member of either university, he may sue him here by attachment of privilege, notwithstanding such member's privilege of being sued in the university courts. 1 *L. Raym.* 342.

An attorney, by being a prisoner, is not thereby precluded from suing by attachment of privilege. 7 *T. R.* 671. *Vol. 1. p. 19.* Where the action is for costs, a bill must have been furnished to the client a month previously to the attachment being sued out; *Vol. 1. p. 28*; and a copy of the bill must be kept, in order to be given in evidence at the trial. *Vol. 1. p. 149.*

Attachment of privilege.] The attachment of privilege is a judicial writ, commanding the sheriff to attach the defendant, so that he have him at Westminster on a day certain, to answer the plaintiff of a plea of trespass on the case, or debt, &c. as the form of the action may be; see 2 *Wils.* 392; or, in bailable actions, it may be, and usually is, made out in trespass, with an *ac etiam*, in the same manner as a bill of Middlesex. It is tested and returnable in the same manner as a *latitat*, and requires no particular number of days between the teste and return. See *Vol. 1. p. 310.* In nonbailable actions, a notice to appear is added at the foot of the copy served, in the manner directed *Vol. 1. p. 301.*

In order to sue out this writ, make out a *præcipe* for it, and engross the writ itself on a 5s. stamped parchment; see the form of the *præcipe* in nonbailable actions, *Tidd, Forms*, 116. § 3.—of the attachment, *Id.* 116. § 4.—of *præcipe* for an attachment in bailable actions, *Id.* 116. § 5.—of the attachment, *Id.* 116. § 6.—of an attachment into a county palatine, *Id.* 117. § 8. 10 *Went.* 239. and see 10 *Went.* 279. Take these to the signer of the writs, and he will sign the attachment; pay nothing. Get it sealed; pay 7d. Besides the *præcipe*, you must also, in bailable actions, file with the signer of the writs, the affidavit to hold to bail (see *Vol. 1. p. 51*), which may be sworn before him. *Vol. 1. p. 57.* The *præcipe* is required by *R. H.* 20. G. 2; and if the writ be sued out without it, the court, it seems, will set aside the proceedings with costs. 2 *W. Bl.* 919.

In bailable actions, indorse the attachment thus: "*Bail by affidavit for £* ;" but it is not necessary to indorse the attorney's name, the *stat.* 2 G. 2. c. 23. § 22, which requires such indorsement, extending only to cases where the attorney sues for another person. 4 *T. R.* 275. Get a warrant on the attachment at the sheriff's office, and give it to your officer, who will thereupon execute the writ in the manner mentioned *Vol. 1. p. 68.*

In nonbailable actions, make a copy of the attachment, and write at the foot of it a notice to appear, as directed *Vol. 1. p. 301*; and let this copy be served personally upon the defendant, as directed *ante*, p. 302, as to the *capias*.

Bail is put in, &c. (see *Vol. 1. p. 79—93*), or common bail filed (see *Vol. 1. p. 314*), as in ordinary cases.

Declaration, &c.] The time within which the plaintiff must declare, is the same as in ordinary cases by bill. See *Vol. 1. p. 105—108. Copy your declaration on Ad. stamped paper, indorse on it the notice to plead, and deliver or file it as directed Vol. 1. p. 109—111. See the form of the commencement of the declaration, Tidd, Forms, 118. § 10. 2 Sellon, 10. 2 Went. 175. 179. 229. 3 Id. 61. 437. 5 Id. 145. 314. 8 Id. 286. 10 Id. 373.* The plaintiff, in transitory actions, may lay the venue in Middlesex, and it cannot afterwards be changed upon the usual application by the defendant, as in ordinary cases. 4 *Bur.* 2027. 3 *T. R.* 573.

The time limited for pleading, and all the remaining proceedings in the action, are the same as in ordinary cases by bill.

SECT. 2. Actions against Attornies and Officers.

ATTORNIES and officers of this court, must be sued here by bill, *Bro. Abr. bille, p. 29. Doug.* 313, and cannot be holden to bail. *Vol. 1. p. 41.* But the clerks of the officers of the court are not, it seems, entitled to this privilege. 3 *Salk.* 283. In some instances, attornies, as defendants, are subject to the jurisdiction of courts of conscience, by the express provision of the statutes regulating such courts; as in Westminster (24 *G. 2. c. 42. § 1. and see Doug.* 381), London (*see 39 & 40 G. 3. ch. civ. § 10*), and the Tower Hamlets (19 *G. 3. c. 68. § 24*), when they reside within such jurisdictions, respectively. Therefore for debts within the cognizance of these courts, attornies residing within their jurisdiction must be sued there, and not in the courts of which they are attornies. But the statutes above specified, are the only ones, I believe, upon the subject, which include attornies; therefore in all other cases, the attorney must be sued in the court of which he is an officer, and not elsewhere, however trifling the cause of action may be. See *Doug.* 381. 2 *Wils.* 42.

If an attorney or officer of this court be arrested upon mesne process, issuing hence, the court upon motion will discharge him, upon filing common bail; but if he be an attorney or officer of another court, his only remedy is by suing out a writ of privilege, and pleading it in abatement. *Vol. 1. p. 41. and see 1 L. Raym.* 702. 336. 1 *Salk.* 194. 328, 2 *Salk.* 545, 2 *L. Raym.* 898. 6 *T. R.* 524. As to the mode of suing out a writ of privilege, and obtaining a supersedeas thereon where the arrest is under process from an inferior court, see *Vol. 1. p. 41.*

But where the proceedings against an attorney or officer are at the suit of the king, 2 *Ro. Abr.* 274. (not being merely a *qui tam* action, *Barnes*, 48. but see 1 *L. Raym.* 27, 1 *Salk.* 30); or if he be sued in *auter droit*, as executor or administrator, &c.; 1 *L. Raym.* 533. 12 *Mod.* 316. 2 *Sid.* 157. *Latch.* 190. *Hob.* 177. *Godb.* 10. *Dy.* 24; or if he be sued jointly with his wife; 1 *Taunt.* 254.

Dy. 377, or with any other person not privileged; *2 Salk. 544. 1 Vent. 298. Dy. 277. 2 Ro. Abr. 274. 1 Str. 610*; or if he have left off practice, *2 Wils. 232. 4 Bur. 2109. 1 B. & P. 4. 7 T. R. 25*, or have not taken out his certificate; *7 T. R. 25, 26*: in all these cases he loses his privilege of being sued by bill as an attorney or officer; but may be proceeded against by original or bill, and holden to bail if necessary, as in ordinary cases. *Vol. 1. p. 41*. Also, if the plaintiff be an attorney or officer of this court, and the defendant an attorney or officer of another court, the plaintiff may sue him here by attachment of privilege; but if both plaintiff and defendant be attornies or officers of this court, the latter must be sued by bill. *Ante, p. 105*. Also, if an attorney or officer of this or any other court, be in the actual custody of the marshal, he must be proceeded against in every respect as a prisoner, and has no privilege in this respect as an attorney or officer. *1 Str. 191*.

An attorney or officer, however, may waive this privilege of being sued by bill; and he is considered as doing so, by appearing to an action commenced in any other manner, if he be an attorney or officer of this court; or by not pleading his privilege, if he be an attorney or officer of any other court. *See 2 W. Bl. 1088. 1 Id. 231. Barnes, 53. Carth. 377. 1 L. Raym. 135. 1 Salk. 1*.

The bill.] The bill is a complaint in writing, in form the same as a declaration in actions by bill, (*see Vol. 1. p. 312.*) excepting that instead of concluding "*and therefore he brings his suit,*" it is "*and therefore he prays relief.*" It is engrossed on 4d. stamped parchment (*see 1 M. & S. 709*) and filed with the clerk of the declarations; *see the form, Tidd, Forms, 118. § 11.—119. § 13 a. 1 Went. 203, 204. 2 Id. 179. 3 Id. 318. 5 Id. 244. 314. 316. 8 Id. 375. 10 Id. 373*. Although it describe the defendant as present in court, yet it may be, and frequently is, filed in vacation; *5 T. R. 173*; in which case it must be intituled of the preceding term; or, if the cause of action have accrued in vacation, it may be prefaced by a special memorandum, stating the day of filing it. *5 T. R. 325. 2 Saund. 1 a. See 7 T. R. 474. Peake, 209. and see the form of the memorandum, Tidd, Forms, 118. § 13. 2 Saund. 1 a.*

Having engrossed your bill, as above directed, make out a copy of it on 4d. stamped paper, and file the bill, together with a memorandum of your warrant to sue (if the plaintiff be not an attorney) with the clerk of the declarations; pay 4d. or 8d. if the bill be intituled of a preceding term. Indorse on the copy the following notice to plead, "*This is a true copy of a bill filed against you as of this present _____ term; and unless you plead thereto in four days from the date hereof, judgment will be signed against you by default. Dated,*" &c. You are not to charge for the copy. Serve this copy on the defendant, by leaving it for him at his chambers or place of abode, or it seems by delivering it to his known agent, if he will re-

ceive it; 2 *Sellon*, 11. *Tidd*, 308; or, it is said by sticking it up in the master's office, if the defendant reside within ten miles of London or Westminster, and his name be not entered in the book kept in the master's office. *Tidd*, 309. see *Vol.* 1. 18, 19. Care must be taken that the bill is filed, before the copy is delivered; otherwise the court will set aside the proceedings. *Tidd*, 309.

It may be necessary to observe that an attorney or officer has not the privilege of changing the venue to Westminster, when laid in any other county, 3 *T. R.* 573. 4 *Bur.* 2027, unless upon the usual affidavit, as in ordinary cases. See *Bk.* 4, *Pt.* 1, *Ch.* 6. See 2 *Str.* 1049.

Plea, &c.] If the copy of the bill be delivered four days exclusive before the end of the term, the defendant is obliged to plead within the four days, whatever may be the distance of his residence from London; 3 *T. R.* 369. 2 *Salk.* 517; but if the copy be not delivered within that time, the defendant may plead at any time within the four first days of the following term; *R. E.* 5 *A. r.* 3. (a); and the notice must be indorsed on the copy of the bill, accordingly.

Enter a rule to plead, and demand a plea, as in ordinary cases; and if the defendant do not plead within the time limited for that purpose, sign judgment, and proceed to execute a writ of enquiry, if necessary. But if he plead, make up the issue, and proceed in the action, as in ordinary cases, by bill.

Execution may be by *ca. sa.*, *fi. fa.*, or *elegit*, as in ordinary cases.

Proceedings by and against Prisoners.

SECT. 1.

Proceedings against Prisoners in the Custody of the Marshal.

It has been already observed (*Vol. 1. p. 307*) that in all cases where the defendant is in the actual custody of the marshal, the mode of proceeding is by filing a bill against him with the clerk of the declarations, and serving him with a copy of it. Even if a person having privilege of parliament be in custody in the King's Bench prison, it is not necessary to proceed against him by original, or by original bill and summons, but he may be proceeded against by bill, as above mentioned. *5 T. R. 361. ante, p. 92.* And in this way also, may a creditor proceed against his debtor who happens to be within the walls of the prison, although not there by compulsion. *3 T. R. 392. Vol. 1. p. 70. and see 3 M. & S. 144.* If the action, however, had been commenced by original, before the defendant came into the custody of the marshal, the plaintiff may still proceed against him in the ordinary way, by delivering a declaration by original, in the manner directed *Vol. 1. p. 109*, without being under the necessity of filing a bill as in other cases. *4 East, 17.* And in all nonbailable actions, you may proceed against a prisoner in the custody of the marshal, either by filing a bill against him as above directed, (which, however, I believe is not usual) or by serving him with process in the ordinary way as if he were at large. *See 1 T. R. 192. Vol. 1. p. 313. 301.*

But if the defendant be in custody on a criminal account, leave of the court, or of a judge in vacation, must first be obtained, before he can be charged with a civil action, *1 Salk. 354. 1 Wils. 217. 2 L. Raym. 1572, 2 Str. 873. 1 W. Bl. 30,* (which rule includes prisoners for contempts, *Prac. Reg. 325*, but not persons in custody under attachments for the nonpayment of costs, *4 T. R. 316*, or the like); and such leave is usually given, if it be not inconsistent with the terms of a conditional pardon already granted to the prisoner. *Fost. 61. 2 L. Raym. 848.*

It may be necessary here generally to premise, that when the defendant is in custody, all papers, notices, &c. which do not ordinarily require personal service, may be delivered for him to the turnkey of the prison. *1 Str. 248.*

In a former part of this work (*Vol. 1. p. 92*), it was mentioned that the defendant, although a prisoner, may put in and justify bail, at any time before final judgment; and the mode of doing so, is there particularly stated. In such a case, the proceedings in the action subsequently to the defendant's discharge, are no longer governed by the rules laid down in this or the next section, but are the same as in ordinary cases where the defendant is at large.

The bill, &c.] The bill is a complaint in writing, in the form of a declaration by bill. If filed in term, it is intituled of that term; if in vacation, it is intituled of the preceding term; and in the latter case, if the cause of action have accrued since the term, the bill may be prefaced by a special memorandum, stating the day of filing it, as mentioned *ante*, p. 108. *Engross your bill on 4d. stamped parchment; see the form, Tidd, Forms, 122. § 7, 8; and make out a copy on 4d. stamped paper, written on one side only, 12 East, 294, and indorse thereon a notice to plead. File the bill with the clerk of the declarations, and deliver the copy to the turnkey of the prison; pay 1s. See 1 Str. 474. 2 W. Bl. 786.*

If the defendant be in custody at the plaintiff's suit, and for the same cause of action for which the bill is intended to be filed, the bill must be filed and the copy delivered before the end of the term next after the defendant's commitment or surrender in discharge of his bail, and notice given thereof; otherwise the defendant shall be discharged out of custody by writ of *supersedeas*. *R. H. 25 G. 3. T. 2 G. 1 & (a)*. If the defendant escape, and be retaken, it seems the retaking will be deemed a render within the meaning of the above rule, and the plaintiff has until the end of the term next after it to file his bill. *See Barnes, 382. and see R. T. 6 A.* But if the defendant have been removed by *habeas* from the custody of the sheriff, and committed to the custody of the marshal, the plaintiff in that case must file his bill within the same time as if the defendant still continued in the sheriff's custody, namely, before the end of the term next after the return of the writ upon which he was arrested. *R. H. 26 G. 3. See the next section.* So, if the defendant be removed from the Fleet by *habeas*, it is deemed but a continuance of the same imprisonment, and the time limited for filing the bill is reckoned from the original commitment, &c. *1 Bur. 439.* Lastly, where the defendant is in custody upon joint process against him and another, and the other has not been arrested; as the plaintiff cannot declare until the other defendant have been brought in or outlawed, he may obtain time accordingly for that purpose upon application to the court, or to a judge at chambers, upon shewing that he is using due diligence in proceeding to outlaw the defendant who is at large; *Vol. 1. p. 108. Barnes, 401; 396. 2 Sellon, 30. 2 W. Bl. 759;* but in no other case will the court grant a further time to declare, where the defendant is in custody. Care must be taken that the bill is actually filed, before the copy is delivered to the

prisoner or turnkey; otherwise the defendant will be entitled to his discharge. 4 *East*, 15.

But if a prisoner in custody of the marshal, be removed by *habeas* to the Fleet, before you have filed a bill against him, you can proceed no further in this court, unless you first bring him again into the custody of the marshal by a *habeas corpus ad respondendum*. 5 *T. R.* 35. 2 *Str.* 1153. *Barnes*, 402. And therefore, in order to save the expense of a *habeas*, it is usual, in such a case, to commence the action against the prisoner in the court of Common Pleas.

If you wish to sue the defendant for a different cause of action from that for which you have him in custody, or if a stranger wish to sue him,—prepare your bill and copy, as above directed, and file the bill with the clerk of the declarations. Make an affidavit of the debt; see *Vol. 1. p. 51*; and take it, together with the copy of the bill, to the clerk of the rules, who will file the affidavit, and indorse on the copy of the bill the amount of the debt stated in the affidavit. *R. E.* 15 *G. 2. r. 3.* See *Barnes*, 75. Then deliver this copy of the bill to the turnkey, as above directed. This may be done either in term or vacation; 8 *T. R.* 643. 2 *Bur.* 1052; and there is of course no time limited for filing the bill, &c. in this instance, as there is where the defendant is proceeded against for the same cause of action for which he is in custody.

Plea.] If the copy of the bill be delivered 4 days exclusive before the end of the term, the defendant must plead within 4 days, a rule to plead being given, and a plea demanded as in ordinary cases; see *Vol. 1. p. 115, 116, 120*; otherwise the plaintiff may sign judgment. But if it be not delivered before that time, then the defendant shall plead within the 4 first days of the following term, if the copy of the bill be delivered before the essoign day. *R. E.* 5 *W. & M. r. 3. (a 3).* See 3 *Bur.* 1452.

Trial, &c.] After delivery of the copy of the bill, as above mentioned, the plaintiff must proceed to trial, or (in case of judgment by default, demurrer, or issue upon *nul tiel record*, see 4 *East*, 350,) to final judgment, within 3 terms, if by the course of the court he can do so, of which 3 terms the term wherein such copy was delivered shall be one; or if the defendant, after declaration, be rendered in discharge of his bail, then within 3 terms after such render and notice thereof given, the term of the render and notice being deemed one; otherwise the defendant shall be discharged by *supersedeas*. *R. H.* 26 *G. 3. T. 2. G. 1 and (a).* see 4 *T. R.* 664. But where two prisoners were sued jointly, and one of them pleaded to issue, and the other allowed judgment to go by default, and the jury who tried the issue against the one, assessed the damages against the other; the court held it sufficient that the plaintiff had proceeded to trial against the one who pleaded to issue, within the three terms, although he had not proceeded to final judgment against the other within that time. 13 *East*, 167.

Notice of trial or enquiry may be delivered to the turnkey for the defendant. 1 Str. 248.

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Execution.] After such trial or final judgment, as above mentioned, or after a render in discharge of bail subsequent to such trial or judgment, the plaintiff must charge the defendant in execution within two terms after such trial, judgment, or render and notice thereof given, respectively, of which two terms the term of the trial, judgment, or render, shall be deemed one; unless a writ of error be pending, or an injunction obtained, and then within two terms inclusive after the writ of error shall be determined or the injunction dissolved: otherwise the defendant shall be discharged by *supersedeas*. *R. H.* 26 G. 3. T. 2 G. 1. 8 (a. 3. 8 b.) T. 9 W. 3. and see 3 Bur. 1787. 2 Wils. 380. 4 East, 350. If the cause be tried at any of the sittings in term, the plaintiff has only the following term to charge the defendant in execution; but if in vacation or at the assizes, he has the two following terms allowed him for that purpose. See 5 East, 349. So, if the defendant be rendered in term, the plaintiff has but the following term to charge him in execution; but if in vacation, he is allowed the two following terms for that purpose. 6 T. R. 776. Where one of two defendants brought a writ of error in the Exchequer chamber, it was ruled that the plaintiff could not charge the other in execution, until the transcript was remitted to this court. 2 T. R. 737. Vol. 1. p. 242. Bringing an action on the judgment within the two terms, is not equivalent to charging the defendant in execution; and consequently, although charged with such action, the defendant will be entitled to a *supersedeas*. *Willes*, 531, *Barnes*, 390. 2 Str. 943.

The mode of charging the defendant in execution, where he still remains in the custody of the marshal, is thus: Enter the proceedings on the roll, and carry in, docket and file it, as directed Vol. 1. p. 206. 134; or if it already have been carried in, get the clerk of the treasury to enter the judgment; pay him 2s. Then get a rule from the clerk of the rules, requiring the marshal to acknowledge the defendant in his custody; see the form, *Tidd, Forms*, 125. § 1; pay him 7s. 6d.; take the rule to the marshal's office, and he will write the acknowledgment on it; pay him 10s. 6d. Next make out a committitur piece on unstamped parchment; see the form, *Tidd, Forms*, 125. § 2, and file it with the clerk of the judgments; pay him 2s. And lastly, (although not essentially necessary, *MS. East*, 1819) enter the committitur in the marshal's book, which is kept in the judgment office; pay 6d.; you will see the form of the entry there. The marshal's acknowledgment must be of the same term the defendant is charged in execution; otherwise the defendant will be entitled to a *supersedeas*. 1 T. R. 464. The committitur piece must be filed with the clerk of the judgments on or before the last day of the term in which the prisoner is to be charged in execution; and the clerk of the judgments must enter the committitur on the roll within 4 days after the end of the same term (Sunday being reckoned, unless it be the last of the four):

otherwise the defendant shall be entitled to his discharge. *R. E. 41 G. 3. r. 2. 10 East, 46. and see 2 Str. 1226.* If the commitment be erroneous, the plaintiff must give the defendant notice of his having abandoned it, before he can enter a second, rectifying the mistake. *1 T. R. 227.*

If a prisoner in custody of the marshal, after being charged with a declaration in this court, be removed to the Fleet, the plaintiff must proceed against him in this court to final judgment; and then have him brought up by *habeas corpus ad satisfaciendum*, in order to charge him in execution, *R. T. 2 G. 1. (b).*, within the time above limited for that purpose. Enter the proceedings on the roll, carry it in and docket it, as above directed. Next, sue out the *habeas*, as directed post, *Bk. 4. Pt. 1. Ch. 3*; indorse on it the number of the judgment roll; and leave it with the clerk of the papers at the Fleet prison; pay him 9s. 2d. Get the clerk of the treasury to attend with the roll; pay him 2s. Then, upon the return day of the *habeas*, attend in court, and the defendant will be brought up, charged in execution, and committed to the custody of the marshal. If, instead of proceeding thus, the plaintiff were to proceed to execution, as if the defendant were still in custody of the marshal, such proceeding would be void, and the defendant would be entitled to his discharge by *supersedeas*. *2 Str. 1153.*

As to warrants of attorney by prisoners, see ante, p. 13.

SECT. 2.

Proceedings against Prisoners in Custody of the Sheriff.

IF a defendant be in custody of the sheriff, (that is, if he be in custody of the officer who arrested him, or of any other officer of the sheriff, or if confined in the county gaol,) upon process issuing from this court, the plaintiff may declare against him as being in such custody; *4 & 5 W. & M. c. 21*; or he may remove him into the custody of the marshal, by a *habeas corpus cum causa*, and proceed against him, as directed in the last Section; and which was the only way of proceeding previously to the above statute. This latter mode, however, is never adopted by the plaintiff, on account of the additional expense; but it is the constant practice of defendants to have themselves so removed, at their own expense, as will be mentioned in a subsequent part of the work. See post, *Bk. 4, Pt. 1. Ch. 3.*

It is necessary to premise, that this Section relates merely to proceedings in bailable actions; in nonbailable actions, you may serve the defendant with process, file common bail for him, deliver your declaration, and proceed, in the ordinary way, as if he were at large. *1 T. R. 192. and see Vol. 1. 313. 301.*

The defendant may put in and justify bail at any time before final judgment, and be discharged; in which case the subsequent proceedings in the action must be the same as in ordinary cases. See ante, p. 111. *Vol. 1. p. 92.*

Process.] If the action be at the suit of the same plaintiff on whose account the defendant was arrested, but for a different cause of action, or if at the suit of a different plaintiff, the first step to be taken is to sue out *habere corpus* against the defendant, as in ordinary cases, and lodge it in the sheriff's office. *Pay 2s. 6d.* If the defendant be in custody on a criminal account, it will be necessary to obtain the leave of the court, or of a judge in vacation, before you sue out process against him. *Ante, p. 110.*

The Bill, &c.] Engrass your bill on 4d. stamped parchment. See the form, where the defendant is in custody of the sheriff, *Tidd, Forms, 123. § 9. 5 Went. 161. 362. 10 Id. 385.*—or in the custody of the sheriff of a county palatine, *Tidd, Forms, 123. § 10.*—or in the custody of the officer of a particular franchise, *Id. § 11.*—or where one defendant is in the custody of the sheriff, and another in the custody of the marshal, *Id. 124. § 12. 10 Went. 385.* Make three copies of it. File the bill with the clerk of the declarations, as directed *ante, p. 111. 108.* Deliver one of the copies (with a notice to plead indorsed on it: *vide infra*) to the defendant, or to the gaoler or keeper of the gaol or prison in which he is confined, 4 & 5 *W. & M. c. 21. see 1 T. R. 191,* who must forthwith deliver the same to his prisoner, under pain of an attachment; *R. E. 5 W. & M. r. 3. § 7; pay 1s. Make an affidavit of the delivery; see the form, Tidd, Forms, 124. § 13. 10 Went. 229. and see R. E. 5 W. & M. r. 3. § 2. and (a); and make a copy thereof on a 2s. 6d. stamp. Annex the remaining two copies of the bill to this affidavit and copy respectively, and take them to the clerk of the rules, who will file the affidavit and copy of the bill annexed to it, and will give you back the third copy and copy of the affidavit, with a rule to appear and plead indorsed thereon; pay him 5s.* This mode of proceeding, however, must be understood as having reference to cases only where the defendant is in custody upon a *latitat* or the like; for if you have proceeded against him by original and *copias*, you may deliver your declaration and proceed as in ordinary cases, as directed *Vol. 1, p. 109, &c.* without being obliged to file a bill against him as above mentioned. 2 *Sellon, 27.*

In no instance (as has been already mentioned, *Vol. 1. p. 105*) can the plaintiff declare, before the return of the process upon which the defendant is detained. *R. E. 5 W. & M. r. 3. § 1.* But he must declare within the term next after that in which the process is returnable, 4 & 5 *W. & M. c. 21. R. H. 26 G. 3. and see 6 T. R. 547. 1 B. & P. 535. 2 W. Bl. 1242. 3 Bur. 1448,* and file the affidavit of service with the clerk of the rules, as above directed, before the first day of the term next after the delivery of the declaration, *R. H. 26 G. 3,* otherwise the prisoner shall be discharged out of custody by writ of *supersedeas*. If the defendant be in the sheriff's custody by virtue of an escape warrant, and not upon process at the suit of the plaintiff, the plaintiff, it seems, has until the end of the second term after the retaking of the defendant, to declare against him. *R. T. 6 A.*

If the prisoner be removed by *habeas* to the Fleet, before you have filed your bill, you must then either commence your action against him in the Common Pleas, or remove him into the custody of the marshal by a writ of *habeas corpus ad respondendum*, and file your bill against him in this court, as directed *ante*, p. 112. 5 T. R. 35. See *ante*, p. 112.

Plea, &c.] After you have obtained the rule to appear and plead from the clerk of the rules as above mentioned, and have served a copy of it on the prisoner, or delivered it to the gaoler or turnkey for him; if he do not appear and plead within 4 days exclusive after service (the time for pleading having expired), you may sign judgment "in such manner as if the prisoner had appeared and refused to answer or plead to the declaration." 4 & 5 W. & M. c. 21. No demand of a plea is necessary. 6 T. R. 524. † T. R. 591.

The time for pleading is regulated by R. E. 5 W. & M. r. 3, thus :

Upon process returnable the first day of Easter or Michaelmas terms, if a copy of the declaration be delivered before "one month after Easter," or "the morrow of All Souls," and an affidavit thereof made and filed, and the defendant doth not appear within 10 days after Easter and Michaelmas terms 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 may imparl until the next term; unless the action be in London or Middlesex, and the defendant be in prison within 40 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 having been given, judgment may be entered against him as aforesaid.

If the copy of the declaration be delivered on or after "one month after Easter," or "the morrow of All Souls," or in Hilary or Trinity terms, and thereupon the plaintiff give rules to appear and answer; then if the defendant appear two days before the essoign day of the next term, he shall imparl until the said next term; but if he do not appear within that time, judgment may be given against him.

And lastly, if the writ be returnable in any term, and a copy of the declaration have been delivered before the essoign day of the next term, the plaintiff in such next term may give rules to appear and answer; and if the defendant do not appear and plead, upon the expiration of the rules, judgment shall be given against him.

If the prisoner plead before the time here limited for that purpose, he must give the plaintiff notice of his having done so; 4 T. R. 664. 5 T. R. 473; otherwise the plaintiff may sign judgment as for want of a plea. 8 T. R. 596.

Trial, &c.] The plaintiff must proceed to trial, or (in case of

judgment by default, demurrer, or issue upon *nul tiel record*) to final judgment, within three terms after the delivery of the declaration, *R. H. 26 G. 3*, in the same manner as in actions against prisoners in the custody of the marshal. See *ante*, p. 112. The other proceedings to judgment inclusive, are the same as in ordinary cases.

Execution.] The plaintiff must charge the defendant in execution within two terms after the trial or final judgment above mentioned, *R. H. 26 G. 3*, in the same manner as in actions against prisoners in the custody of the marshal. See *ante*, p. 113.

The mode of charging the defendant in execution, is thus: Enter the proceedings on the roll, and carry in, docket and file it, as directed *Vol. 1. p. 206, 134*; or if it have been already carried in, get the clerk of the treasury to enter the judgment; pay him 2s. Then sue out a *ca. sa.*, as directed *Vol. 1. p. 278*; take it to the sheriff's office and obtain a warrant on it; pay 2s. 6d.; and lastly, lodge the warrant with the gaoler of the prison in which the defendant is detained. See *Barnes, 389*. The charging in execution is then complete.

As to the mode of removing prisoners from one custody to another, by writ of *habeas corpus*, see *post*, *Bk. 4, Pt. 1, Ch. 3*.

SECT. 3.

Proceedings, &c. by Prisoners.

It may perhaps be necessary to premise, that in the prison of the King's Bench, which is more immediately the prison of this court, prisoners charged with civil actions merely, (see *2 Str. 817, 1 Id. 413*) may have the benefit of the rules of the prison, upon entering into a bond with two sufficient sureties, as a security to the marshal against escape, and upon paying the marshal a certain per centage upon the amount of the debts for which they are detained. These rules are certain limits beyond the walls of the prison, within which prisoners, who have found sureties, &c. as above mentioned, may have leave to reside. They extend "from *Great Cumber Court*, in the parish of *St. George the Martyr*, in the county of *Surry*, along the north side of *Great Suffolk Street*, as far as the *Star Brewhouse*; and from thence along the north-west side of *Gilbert's Lane* to the *Blackfriars Road*, and across the said road along the north-west side of *Webber Street*, to the *Half-way House*; and from thence along the western side of *Barron's Buildings* and *St. George's Row*, to the *Westminster Road*; and then across the said road, and along the western side of *St. George's Mall*, and from the pastry cook's at the west end thereof, directly across to the lamp-post on the foot-path near the watch-house facing the *Dog and Duck*, and along the said foot-path from the said lamp-post, to another lamp-post on the eastern side of the

said road facing *Keys's Nursery*; and then along the whole of the said road leading by *Prospect Place* to the *Elephant and Castle*; and from thence along the eastern side of *Nowington Causeway* to *Great Cumber Court* aforesaid." R. E. 35 G. 3. The following places, however, within the above limits, are excepted; namely, "all taverns, victualling houses, alehouses, wine vaults, houses or places licensed to sell gin or other spirituous liquors, and all places licensed for public entertainments." *Id.* By a subsequent rule, E. T. 36 G. 3, the parish church of *St. George the Martyr*, within the borough of *Southwark*, and the adjoining church-yard, are to be deemed within the rules. And by the above rule, E. 35 G. 3, it is also ordered that the rules shall include "the house of correction for the county of *Surry*, the new gaol, *Southwark*, and the gaol then building for the county of *Surry*, and the highways (exclusive of the houses on each side thereof) leading from the *King's Bench* prison to the said gaols respectively." These rules are considered to all intents as the prison itself; and if the prisoner break them, that is, if he go beyond the limits above described, the marshal is answerable to the plaintiff, as for an escape, in precisely the same manner as if the defendant had escaped from the prison; and the prisoner is thereby not only deprived of the privilege of residing within the rules in future, R. , but also, it seems, from a case lately tried at the *Surry* assizes, is liable to an indictment as for a breach of prison. See as to escape, where the prisoner is in custody upon *meine process*, Vol. 1. p. 77; and where the prisoner is in custody in execution, Vol. 1. p. 280.

Besides the liberty of residing within the rules, above mentioned, the prisoner may in term time have a day rule, (that is, a permission from the court to go beyond the rules of the prison, for the purpose of transacting his business), upon application to the marshal, and signing a petition to the court, for that purpose (see 1 *Str.* 503. R. M. 28 C. 2.), and upon paying some trifling fee to the clerk of the day rules. The petition is afterwards read in court, and the prayer of it granted of course; but the rule (that is, a certificate of the court's having granted the prisoner a day rule, and which serves as a protection to him from arrest, &c.) is in fact given to the prisoner in the morning, and probably before the petition is even presented; for it has been holden that where the court grant the prayer of the petition, it has a retrospective effect, and warrants the day rules given under it, at whatever time in the morning they may have been granted. 9 *East*, 151. See 2 *L. Raym.* 927. *contra.* Prisoners within the walls of the prison, may also have day rules during term, upon satisfying the marshal that they will return to the prison before 9 o'clock the same evening; it being ordered by R. H. 45 G. 3, and R. E. 30 G. 3, that every prisoner having a day rule, shall return within the walls or rules of the prison, at or before 9 o'clock in the evening of the day for which such rule shall be granted. 6 *East*, 2. 3 7. R. 584. Formerly a prisoner could have only three day rules in each term;

R. E. 30 G. 3; but at present the number is not limited. R. H. 45 G. 3.

By stat. 32 G. 2. c. 28. § 11, all prisoners in custody of the marshall, sheriff, &c. may in term time petition the court, out of which the process under which they are imprisoned issued, or under whose jurisdiction the prison in which they are confined is, or in vacation may petition one of the judges of such court, or a judge of assise, complaining of any exaction or extortion by any gaoler or other person employed in the keeping, &c. of the prison in which they are confined, or of any other abuse whatsoever committed or done by them in their respective offices; and the court or judge shall hear and determine the same in a summary way, and make such order for redressing the abuses complained of, and for punishing the officer, &c. and for making reparation to the parties injured, as they shall think just, together with the costs of such complaint; and such order may be enforced by attachment or otherwise, as other orders of the court.

The remainder of this Section shall be confined to the consideration of the different modes by which a prisoner may be discharged from his imprisonment; and they shall be treated of in the following order:

1. *Discharge by Supersedeas.*
2. *Discharge under the Insolvent Acts.*
3. *Discharge by other Means.*

1. *Discharge of a Prisoner by Supersedeas.*

[*In what cases.*] If a declaration be not delivered to a prisoner in due time, by the plaintiff at whose suit he is in custody, the defendant may be discharged out of custody by *supersedeas*, upon filing common bail or entering a common appearance. R. H. 26 G. 3. *As to the time limited for declaring, see ante, p. 111, 115.* But if the defendant be in custody upon joint process against him and another, and the other have not been arrested, this, it seems, will be a sufficient cause for refusing the *supersedeas*, provided it appear that the plaintiff is using due diligence to outlaw the other defendant; for until the other defendant be arrested or outlawed, the plaintiff cannot declare against the one who is in custody. However, in such a case, the plaintiff regularly should obtain time to declare, as directed *Vol. 1. p. 108. See ante, p. 111.* Also, a prisoner who is supersedeable for want of filing a bill against him in due time, waives his right to a *supersedeas* by afterwards pleading. 1 *East, 77.*

If the copy of the bill be delivered to the prisoner, before the bill itself is filed, the defendant will be entitled to his discharge. 4 *East, 16. Ante, p. 111.* Also, where the defendant is in custody of the sheriff, if the affidavit of delivery of the declaration be not

filed before the first day of the term next after such delivery, the defendant is supersedeable. *R. H.* 86 G. 3. *Ante*, p. 115.

If the plaintiff do not proceed to trial, or (in cases of judgment by default, demurrer, or issue upon *nul tiel record*) to final judgment, in due time, the defendant may be discharged by *supersedeas*, upon filing common bail or entering a common appearance. *R. H.* 36 G. 3. *As to the time limited for proceeding to trial, &c.* see *ante*, p. 112. 116. But if the plaintiff's not having proceeded in due time, have arisen from the default of the court, as by the court's deferring to give judgment on a demurrer, *Barnes*, 383, or from the default of the defendant, by his neglecting to plead in time, or the like,—or from the assizes at which the cause was to be tried not occurring within the time limited for the plaintiff's proceeding to trial: *Barnes*, 383: in these and the like cases a *supersedeas* will not be granted. Also, where two prisoners were sued jointly, and one of them pleaded to issue, and the other allowed judgment to go by default; and the jury who tried the issue against the one, assessed the damages against the other: the court held it sufficient that the plaintiff proceeded to trial within three terms against the one who pleaded to issue, although he had not proceeded to final judgment within the same time against the other who allowed judgment to go by default; and they accordingly refused to discharge the latter by *supersedeas*. 13 *East*, 167.

If the plaintiff do not charge the defendant in execution in due time, the latter may be discharged out of custody by *supersedeas*, upon filing common bail or entering a common appearance. *R. H.* 26 G. 3. *As to the time within which the defendant should be charged in execution, see ante*, p. 113. 117. But if the defendant hinder the plaintiff from proceeding, by bringing a writ of error or obtaining an injunction, he shall not be entitled to a *supersedeas* if the plaintiff proceed in due time after the writ of error has been determined or the injunction dissolved. *Ante*, p. 113. Or if one of several defendants bring a writ of error, the plaintiff is not bound to proceed against the others until the time limited after the writ of error has been determined. 2 *T. R.* 737. *See Vol.* 1. p. 242. So, where the assignees of a bankrupt were prevented from charging the defendant in execution, by the plea put in to their *scire facias*, the court refused a *supersedeas*. 2 *Wils.* 378.

If at any time pending the action, or before the defendant is charged in execution, there be a treaty or agreement for a settlement or compromise of the matters in dispute, no laches shall be imputed to the plaintiff, nor shall the defendant be entitled to his discharge for want of prosecution, pending such treaty, &c.; 5 *Wils.* 455. 2 *W. Bl.* 918. 4 *Bur.* 2063; provided such treaty or agreement be in writing, signed by the defendant or his attorney or some other person duly authorized by him, and it be therein expressed that proceedings are stayed at the defendant's request. *R. H.* 26 G. 3.

It is a general maxim, that a prisoner once supersedeable, is always so; that is, if for instance he be supersedeable because a

declaration has not been delivered to him in due time, the delivery of a declaration afterwards will not prevent him from being discharged on account of the previous default. There is one exception, however, to this rule, namely, that if the defendant be once charged in execution, he cannot afterwards take advantage of any preceding default of the plaintiff, provided he had an opportunity, previously to his being charged in execution, of applying for his *supersedeas*. 1 T. R. 591. It may be necessary to add, that where a defendant is supersedeable, the plaintiff cannot prevent his discharge by discontinuing the present action, and lodging a fresh detainer against him for the same cause of action; but for a different cause of action, for which the defendant can be holden to bail, perhaps he may. See 2 Bur. 1048. but see 1 H. Bl. 251. Nor can the plaintiff, after the defendant's discharge, again hold him to bail for the same cause of action. Vol. 1. p. 46.

How sued out.] The rule H. 26 G. 3. states that the defendant shall be discharged in the several cases above mentioned, by *supersedeas* or otherwise, according to the course of the court, upon filing common bail; unless upon notice given to the plaintiff's attorney, good cause be shewn to the contrary. The mode therefore of procuring the defendant's discharge in the several cases above mentioned, is as follows:

If the defendant be in the custody of the marshal, and he is to be discharged upon the ground of the plaintiff's not having declared against him in due time, get a copy of causes from the clerk of the papers at the prison; then take out a summons, requiring the plaintiff's attorney to attend before a judge to shew cause why the defendant should not be discharged, &c.; and serve it upon the plaintiff's attorney or agent. If the plaintiff's attorney consent to an order, get the consent indorsed on the summons, and the judge will make an order accordingly; or if the plaintiff's attorney shew cause, but the cause be not deemed sufficient, the judge will make a like order; or if the attorney do not attend, then, after waiting an hour, make an affidavit of the service of the summons and of your attendance, (see the form, Tidd, Forms, 127. § 6.) and the judge will make the order. In town causes this order is absolute in the first instance; but in country causes, it is usually but an order nisi, (Tidd, 295) unless cause be shewn within a week or such other reasonable time as the judge shall think reasonable, and which will afterwards be made absolute if no cause be shewn. Upon the order being made, serve a copy of it upon the plaintiff's attorney; file common bail, as directed Vol. 1. p. 314, if the action be by bill; or enter an appearance with the filacer, as directed Vol. 1. p. 300, if the action be by original; and get a certificate from the clerk of the common halls or filacer, of your having done so; pay 1s. Then take this certificate and order to the marshal's office, and the prisoner will thereupon be discharged without a *supersedeas*, upon payment of his fees.

But if the defendant be in custody of the sheriff, &c. and he is to be discharged upon the ground above mentioned, get from the gaoler a certificate of the causes the defendant is charged with; see

the form, *Tidd, Forms*, 126. § 4; and make an affidavit of the gaoler's having signed the same; see the form, *Tidd, Forms*, 126. § 5. Then take out a summons and obtain an order as is above directed. Write out the supersedeas on a 5s. stamped parchment; see the form, *Tidd, Forms*, 127. § 8. 128. § 9; and take it, together with the præcipe (see the form, *Tidd, Forms*, 127. § 7), and the certificate of the clerk of the common baills above mentioned, if the action be by bill, to the signer of the writs, who will sign the supersedeas; pay him 1s. 8d.; get it sealed, pay 7d. But if the action be by original, enter a common appearance with the filacer, and he will make out the supersedeas; get it sealed. And lastly, leave the writ with the gaoler of the prison, who will thereupon discharge the defendant upon payment of his fees. See 6 T. R. 754.

If the ground for discharging the defendant be that no bill was filed, or that the copy of the bill was delivered before the bill itself was filed, get a certificate from the clerk of the declarations that no bill was filed against the defendant in his office, or that a bill was filed on such a day. Then take out a summons, and proceed as above directed.

If the ground for discharging the defendant be that the plaintiff has not proceeded to trial or execution within due time, proceed as above mentioned to the attendance upon the summons; and if the plaintiff's attorney or agent do not attend, serve him with a second, and afterwards with a third summons, and attend them respectively, as above directed; and if upon the third summons he do not attend, or if he shew cause but the cause be insufficient, or if he indorse a consent upon the summons as above mentioned, the judge will make an order for the defendant's discharge. Then proceed by filing common bail, &c. as above directed. See the form of a supersedeas for not proceeding to trial, *Tidd, Forms*, 128. § 10. 130. § 14.—the like directed to the warden of the Fleet, *Tidd, Forms*, 129. § 11.—of supersedeas for not charging the defendant in execution, *Tidd, Forms*, 130. § 12.

The effect of it.] If the defendant be discharged by supersedeas, for want of proceedings before judgment, this does not prevent the plaintiff, after he has obtained judgment, from suing out a *ca. sa.*, and taking the defendant in execution; but if he be superseded for not having been charged in execution, he can never afterwards be arrested on the same judgment. R. T. 2 G. 1. (c). *Earnes*, 376. 7 *East*, 330. In no case, however, can the defendant be again holden to bail for the same cause of action for which he has been superseded, whether superseded for want of proceedings before or after judgment; *Val.* 1. p. 46; not even in an action on the judgment; *Hardw.* 244; but after judgment obtained in such latter action, the defendant may be taken in execution. *Cowp.* 72. 2 *W. Bl.* 982. And a supersedeas even after judgment, cannot be pleaded in bar of such an action. 1 T. R. 273. After the supersedeas has been granted, but before the defendant is actually discharged, any other person may file a

bill and deliver a declaration against him, as a prisoner still in custody; 2 Bur. 1048; or perhaps the same plaintiff may deliver a declaration against him for a different, although not for the same, cause of action, but see 1 H. Bl. 251.

2. Discharge of a Prisoner under the Insolvent Acts.

By stat. 48 G. 3. c. 123. § 1, all persons in execution upon any judgment, in whatsoever court the same may have been obtained, for any debt or damages not exceeding the sum of 20*l.* exclusive of costs, and who shall have lain in prison for the space of twelve successive calendar months next before the time of their application, shall, upon application for that purpose in term time, made to some one of his Majesty's courts at Westminster, to the satisfaction of such court, be forthwith discharged out of custody as to such execution, by the rule or order of such court. The rule granted in such a case, is it seems a rule nisi. See 7 Taunt. 37. 467. See also the general insolvent acts; and see 4 Taunt. 460. 854. 6 *Id.* 493. 7 *Id.* 179. The insolvent act, however, intended to be particularly treated of in this place, is that usually termed the "Lords' Act."

Proceedings under the Lords' Act.] Any prisoner in execution for a sum not exceeding 300*l.* being desirous of giving up his estate and effects in satisfaction of his debts, may, before the end of the term next after he is charged in execution (see 4 T. R. 367. 2 Bur. 747. 3 *Id.* 1809. 1 B. & P. 423), exhibit a petition in the court whence the process issued upon which he was taken or charged in execution, or to the court into which he shall be removed by *habeas corpus* or charged in custody (see 1 Taunt. 64. 1 B. & P. 92), stating the cause of his imprisonment, and setting forth a true account of all the real or personal estate which he or any person in trust for him was entitled to, at the time of his petitioning and also at the time of his first imprisonment, and of all incumbrances and charges (if any) affecting the same, and likewise a just and true account of all securities, deeds, evidences, writings, &c. concerning the same and the names and places of abode of the witnesses to such deeds, &c. 32 G. 2. c. 28. § 13. 26 G. 3. c. 44. 33 G. 3. c. 5. 39 G. 3. c. 50. If he omit to take the benefit of the act within the time above limited, and shall have remained in prison by the space of one year, and shall make it appear to the court that his neglect arose from ignorance or mistake, he shall be allowed the benefit of the act in the same manner as if he had applied within the limited time; 26 G. 3. c. 44. § 5; which statute has been holden to extend to cases where the defendant has omitted to take the benefit of the act in time, owing to the misconduct of his agent, 4 T. R. 231, or to his ignorance of the plaintiff's place of abode. 13 East, 190.

Persons committed on attachments for nonpayment of money

awarded by arbitrators, or for nonpayment of costs, and persons committed upon writs of *excommunicato capiendo* or other process for costs in the ecclesiastical courts, are declared to be within the meaning of the above statutes. 26 G. 3. c. 44. § 3. 33 G. 3. c. 5. § 4. *see* 10 East, 408. 11 Id. 231. So, one in execution on a *quo warranto* information, may have the benefit of the act. 4 T. R. 809. Also, where a defendant was convicted in this court on an indictment, and the master of the crown office upon reference awarded him to pay so much as costs, and so much as compensation to the prosecutor; the court held that he was entitled to the benefit of the act as to these sums. 13 East, 190. *See* 4 Bur. 2142. The defendant in a *qui tam* action, however, is not so entitled; 3 Bur. 1322, 1 W. Bl. 372; nor are crown debtors, 26 G. 3. c. 44. § 7, or persons who have before taken the benefit of other insolvent acts. 32 G. 2. c. 28. § 24. *See* 1 Wils. 85. 1 B. & P. 336. 2 Smith, 24, 25. 3 Id. 51. 7 East, 84.

In order to take the benefit of these acts, get a copy of causes from the clerk of the papers of the prison or gaoler; and if the prisoner be not in the King's Bench prison, there must be an affidavit of having seen the gaoler sign the certificate; *see* the form of the affidavit, Tidd, Forms, 411. § 112. 2 Sellon, 355. Then writes out a schedule of all the real and personal estate, debts, &c. of the prisoner, as above mentioned; *see* the form, Tidd, Forms, 408. § 108. 2 Sellon, 354. This schedule must include every thing that the prisoner could sell for his own benefit; 3 T. R. 681; but not property which is not legally the subject of sale, such as the half pay of an officer, 3 T. R. 681. and *see* 4 T. R. 248, or offices which are not assignable. *Lofti*, 436. *see* Id. 349. Next, write out the petition; *see* the form, Tidd, Forms, 410. § 11. 2 Sellon, 354.

You are next to write out a notice to each of the creditors at whose suit the defendant is in execution, stating the defendant's intention to petition; *see* the form, Tidd, Forms, 407. § 107. 2 Sellon, 353; and at the foot of it write a copy of the schedule above mentioned. This notice and schedule must be signed by the prisoner in the presence of a witness, who must make affidavit thereof; *see* the form, Tidd, Forms, 409. § 109. 2 Sellon, 355. Fourteen days at least (*see* 4 Bur. 2525. 2 Id. 747) before the petition is to be exhibited, one of these notices must be served on each and every creditor at whose suit the prisoner is in execution, or upon their executors or administrators, or left for them at their usual place of abode; or, in case any creditor cannot be met with, then and not otherwise the notice may be given to or left for his attorney or agent last employed in the action. 32 G. 2. c. 28. § 13. Make an affidavit of the service; *see* the form, Tidd, Forms, 409. § 110. 2 Sellon, 355; and annex it and the other affidavit as to the signature, to a copy of the notice. Blank forms of the notices, petition, schedule, and affidavits, may be had at the office of the clerk of the rules. They do not require to be stamped. The affidavits may be sworn, if in town, before a judge; if in the country, before a commis-

To your petition, annex the copy of causes, and the affidavit of the gaoler's signature when necessary; also the schedule, and the notice and affidavits above mentioned. Take these to the clerk of the rules, who will draw up a rule directing the prisoner to be brought up, and the creditors to appear, on a day therein mentioned; pay him 2s. 6d. Serve a copy of the rule upon each of the creditors and upon the marshal or gaoler; make an affidavit of the service, (see the form, Tidd, Forms, 411. § 113. 2 Sellon, 356), and annex it to the original rule. If the prisoner be in custody above 20 miles from Westminster Hall, he is to be brought up to the assizes; and the copies of the rule must, in such a case, be served at least 14 days before the commission day. 32 G. 2. c. 28. § 15.

If the prisoner is to be brought up to this court, it must be on some Monday or Thursday during term, R. H. 37 G. 3, at half past nine o'clock in the morning; if to the assizes, he is usually brought up on the last day, after the other business of the assizes is finished. If to be brought up here, the clerk of the rules will bring the petition and affidavits into court; if to the assizes, you must previously apply to the clerk of the rules for the petition, &c. who will give them to you upon your furnishing him with copies; then deliver them to the clerk of assize, or other officer of the court. When the insolvent appears in court, the petition and affidavits are to be read; and if the creditors or their attorneys be present, or, in their absence, upon your producing the rule and affidavit of service already mentioned, the court are to examine into the matter of the petition in a summary way, and hear what shall be alleged on either side for or against the discharge of the insolvent; and if there be no opposition, or if the court judge that the insolvent is entitled to the benefit of the act, then, after he has been sworn to the truth of his schedule, they shall order him to be discharged, upon his executing an assignment of his effects, (which is done by a short indorsement on the back of the petition), unless the creditor object to his discharge, as is hereinafter mentioned. 32 G. 2. c. 28. § 13. All objections to the schedule, for insufficiency in point of form, must be made when the insolvent is brought up this first time; *Id.*; for if he be remanded, and brought up a second time, the creditor is allowed to object to the schedule, in point of substance only. *Barnes*, 379.

If any creditor be not satisfied of the truth of the insolvent's oath, and shall either personally, or (upon proof that he cannot personally attend) by his attorney, desire further time to inform himself concerning it, the court may remand the prisoner, and order him again to be brought up some day within the first week of the next following term, or sooner, if the court shall think fit. 32 G. 2. c. 28. § 13. See 3 *Bur.* 1393. And if at such second day, such creditor do not appear either personally, or by his attorney, or if he appear and shall be unable to discover any effects omitted in the schedule, the court shall make a rule to discharge the insolvent, upon his executing an assignment as above mentioned; unless the creditor insist on his being detained, and agree

in writing to pay him 3s. 6d. per week, or, if more than one creditor, then 2s. per week each, as long as the defendant shall remain in execution at their suit; 32 G. 2. c. 28. § 13. 37 G. 3. c. 85. § 3, 4; in which case the prisoner must be remanded to prison, there to continue in execution.

The agreement in writing in this case, is a kind of promissory note; see the form, *Tidd, Forms*, 412. § 114. It need not be stamped. 7 T. R. 670. The weekly sum must be therein made payable every *Monday*, otherwise the note will be void. 1 *Doug.* 68, 69. It must be made for the payment of 3s. 6d. weekly, unless there be two or more actions at the suit of different plaintiffs, who desire to detain the insolvent; in which case each note is to be for the weekly sum of 2s. only. If one plaintiff, or one set of plaintiffs, have him in execution in two or more actions, one note for 3s. 6d. weekly, is sufficient. *Tidd*, 955. n. The note must be signed by the plaintiff, if in England; or if not in England, it may in that case be signed by his attorney; 32 G. 2. c. 28. § 13; and it must be signed by all the plaintiffs in the cause, 7 T. R. 156. see *Id.* 176. 8 *Id.* 325, unless they be partners. 8 T. R. 25. If the opposing creditors be a corporation aggregate, the note may be under the corporate seal. 1 *New Rep.* 306. It must be delivered to the insolvent in open court before the crier has made the third proclamation, otherwise the insolvent is not bound to receive it; *MS. E.* 1814; it must be tendered by the attorney, if signed by him; but if signed by the creditor, it must be tendered either by himself personally, or, if he cannot attend, then by his attorney, upon the attorney's making affidavit of the creditor's having signed, and that he witnessed it; and which affidavit must be correctly intituled in the cause. 2 *Smith*, 393.

We have seen that the court, at the desire of a creditor, may order the insolvent to be remanded, and brought up a second time. But in no case will they order him to be brought up a third time, either at the request of a creditor, *Barnes*, 370, or upon the application of the insolvent. Also, if the court refuse to discharge the prisoner, he can never afterwards, under any circumstances, be brought up again, in order to obtain the benefit of the act, 1 *H. Bl.* 101. see 8 *East*, 180. 2 *Str.* 1116, even although the creditors desire it. 1 *B. & P.* 143.

If a creditor wish, he may, at any time before the prisoner has taken the benefit of the act, file interrogatories for his examination. 33 G. 3. c. 5. § 5. They are to be filed with the clerk of the rules, who will thereupon draw up a rule for the examination of the insolvent, and deliver the interrogatories to the master. The insolvent is then to be sworn in court, and the master afterwards examines him upon the interrogatories; and his examination, being signed by him, is delivered together with the interrogatories to the clerk of the rules, and read by him in court when the insolvent is brought up on a subsequent day for the purpose of being discharged. *R. E.* 36 G. 3. r. 1.

The weekly sum already mentioned, must be paid regularly

every Monday, 32 G. 2. c. 28. § 3, before the gates of the prison are finally closed for the night. Where it was given to the turnkey of the felons' side of the prison, after 10 o'clock at night, the court held that it was not sufficient; first, because it was paid after the gates of the prison were closed for the night; and secondly, because it should have been paid to the turnkey of the debtors' side of the prison, a payment to the turnkey of the felons' side being no payment to a debtor. 5 T. R. 36. The money is always delivered to the turnkey. See 1 New Rep. 111. Where a French half crown formed part of the money paid, the court in one case held it to be a good payment, the turnkey having made no objection to it at the time he received it; 5 T. R. 37. n.; but in a recent case, where a French 6d. was given in part of the 3s. 6d., the court of Common Pleas discharged the defendant. 7 Taunt. 7. If any default be made in the payment, the prisoner, upon application to the court in term time or to a judge in vacation, may by order of the court or judge be discharged out of custody, upon executing an assignment of his estate and effects. 32 G. 2. c. 28. § 13. The judge's order in this case is final. 1 Doug. 68, 69.

Under the compulsive clause.] If a person, committed or charged in execution for a sum not exceeding 300l. exclusive of costs, shall not, within three months after being so committed or charged, make satisfaction for the same; any of his creditors, upon giving him 20 days' notice in writing of his intention, may require him to give in a true account in writing, and signed by him, of all his real and personal estate, and of all incumbrances affecting the same. 32 G. 2. c. 28. § 16, 17. 26 G. 3. c. 44. § 2. 38 G. 3. c. 5. § 3. See the form of the notice, Tidd, Forms, 412. § 115. If the prisoner be in execution under any process from one of the courts at Westminster, or removed by *habeas corpus* to, or charged in execution in, the prison of such court, the creditor may require the prisoner to give in the account above mentioned to such court, within the first seven days of the term next after the expiration of the 20 days' notice; or, if the prisoner be charged in execution in a prison belonging to any other court of record, then to such court, at the second court to be held after the expiration of the said 20 days; or if the prisoner be in execution in any county or other gaol more than 20 miles distant from Westminster Hall or the court out of which the process issued, then he is to give in the account aforesaid upon oath, at the assizes or great sessions of the county to which the prison belongs, which shall be holden next after the expiration of the said 20 days' notice. 32 G. 2. c. 28. § 16, 17. The notice of course must be framed accordingly.

The creditor must next give a similar 20 days' notice to the other creditors, at whose suit the prisoner is "detained or charged in custody." This notice must be given to the creditors themselves if they can be met with; if not, to the attorney or attorneys last employed by them in their actions, &c. against the prisoner.

32 G. 2. c. 28. § 16, 17. See the form of the notice, *Tidd, Forms*, 413. § 116.

The creditor must also give a like notice to the sheriff or gaoler in whose custody the prisoner is detained, of his intention to have the prisoner brought up, and requiring the sheriff, &c. to bring up the prisoner accordingly; which notice must be given 20 days at least before the time appointed for bringing up the prisoner. And thereupon the sheriff, &c. shall, at the costs of such creditor, cause the prisoner to be brought up to the court aforesaid, as by the notice he shall be required, together with a copy of causes of his detainer. 32 G. 2. c. 28. § 16, 17.

Previously to the prisoner's being brought up, the creditor should prepare his petition; see the form, *Tidd, Forms*, 414. § 117; and have affidavits made as to the delivery of the several notices above mentioned.

When the prisoner is brought up, he shall, after the petition and affidavits are put in, deliver in open court upon oath, "a full true and just account, disclosure, and discovery in writing, of the whole of his real and personal estate, and of all books, papers, writings, and securities relating thereto, and of all incumbrances then affecting the same, and the respective times when made, to the best of his knowledge and belief, (other than and except the necessary wearing apparel and bedding of such prisoner and his family, and the necessary tools or instruments of his trade or calling, not exceeding the value of 10*l.* in the whole); which account shall be subscribed with the proper name or mark of the prisoner." 32 G. 2. c. 28. § 16, 17.

When the prisoner shall have delivered in the account aforesaid, his estate and effects shall be assigned by him (by a short assignment on the back of the account above mentioned) to such person as the court shall direct, in trust for the petitioning creditor, and for such other of the creditors as will, before the assignment, by a memorandum in writing and signed by them, consent to the prisoner's being discharged out of custody, and agree to accept a proportionable dividend of the estate with the petitioning creditor; and if any surplus remain, after the payment of the debts due to the petitioning creditor and to the creditors who have consented to the prisoner's discharge, as aforesaid, and of all reasonable expenses in getting in the effects, it shall be paid over to the prisoner, or to his executor or administrator. 32 G. 2. c. 28. § 17. No stamp is requisite for the assignment. *Id.*

Upon the assignment, &c. being made to the satisfaction of the court, the prisoner shall be discharged as to all actions against him by the petitioning creditor, and by such creditors as shall have signed the consent aforesaid. 32 G. 2. c. 28. § 17. No stamp is requisite for any rule or order made for any such discharge. *Id.*

[Subsequent proceedings against insolvents.] By a discharge under the Lords' act, the debtor's person is for ever freed from arrest for the same debt; see *Cowp.* 22, 23. n. 2 *W. Bl.* 992. 1217. 1 *Doug.*

97. 2 *Id.* 669. 1 *Str.* 529; even if he subsequently promise payment, he cannot be arrested or holden to bail on such subsequent promise. *M.S. M.* 1814. 3 *M. & S.* 595. *Vol.* 1. p. 45. See 2 *Camp.* 443. *but see 1 Doug.* 101. *on 2 W. Bl.* 724. 7 *T. R.* 305. and see 4 *T. R.* 825. 3 *B. & P.* 394. The judgment, however, remains in force; and execution may at any time be sued out against the debtor's "lands, tenements, rents, or hereditaments, goods, or chattels," other than and except his wearing apparel, tools, &c. to the amount of 10*l.* as before mentioned. 32 *G. 2. c.* 28. § 20. As to the mode of proceeding in such a case, see *ante*, p. 84. and *post*, *Ch.* 7. § 2.

3. Discharge of Prisoners by other Means.

A prisoner shall be discharged, upon putting in and perfecting bail, at any time before judgment. See *Vol.* 1. p. 92.

A prisoner shall also be discharged, when the action is abated, discontinued, or decided in his favour. So, if the prisoner settle or compromise the debt with the plaintiff, the plaintiff (or more properly his attorney) shall give the defendant a discharge in writing; and upon this being lodged with the marshal or gaoler, the prisoner shall be discharged. See *Vol.* 1. p. 278, 279.

Also, in a case where the wife of a prisoner became administratrix to the plaintiff, the court ordered the defendant to be discharged; 8 *T. R.* 407; and the court of Common Pleas have gone so far as to discharge a prisoner in execution, after the plaintiff's death, upon service of a rule nisi upon the next of kin, and no cause shewn, it appearing that the next of kin did not intend to administer. 2 *New Rep.* 240.

CHAPTER V.

Actions by and against Executors or Administrators.

SECT. 1.

Actions by Executors or Administrators.

Limitation of action.] If the time limited by statute, have not expired before the death of the testator or intestate, the executor or administrator may bring the action at any time within a year after the death; *Bul. N. P.* 150; or, if the time limited, have not expired within the year after the death, at any time before the expiration of such limited time. And if the executor bring an action, and die, before judgment, his executor may bring a fresh action within a reasonable time afterwards. *Id.* See *Cowp.* 738.

Process, &c.] An executor or administrator, we have seen (*Vol. 1. p. 52*), may swear to the debt according to his belief; he is not obliged to swear positively to it, as he would otherwise be if he were not suing in *auter droit*. It is not necessary, also, that he should negative a tender to his testator or intestate. *Vol. 1. p. 56.* See the form of an affidavit to hold to bail, by an executor or administrator, *Tidd, Forms*, 87. § 55.—89. § 56.

Although an executor be an attorney or officer of the court, yet he cannot, as executor, sue by attachment of privilege, but must sue by original or bill as in ordinary cases. *Ante*, p. 105. See the form of an *ac etiam* at the suit of an executor, *Tidd, Forms*, 26. § 29.—the like at the suit of an administrator, *Id.* § 30.

Declaration, &c.] The plaintiff cannot declare as executor, &c. upon process sued out in his own right; nor can he declare in his own right, upon process sued out as executor. *Vol. 1. p. 59, 60.* The declaration is filed or delivered, in the same manner as in ordinary cases.

The subsequent proceedings, together with the verdict, *postea*, judgment, and execution, are also the same as in ordinary cases. See the form of a *fi. fa.*, *Tidd, Forms*, 327. § 3, 4.—of an *elegit*, *Id.* 371. § 74 a. As to *scire facias* by an executor, &c. to revive a judgment obtained by his testator, &c. see *ante*, p. 78—82.

Costs.] If the verdict be for the plaintiff, he is of course entitled to costs, as in ordinary cases. But if the verdict be given for the

defendant, the plaintiff in such case is not liable to costs, 1 *L. Raym.* 486. 1 *H. Bl.* 528. 1 *B & P.* 445. 1 *Taunt.* 322, unless the cause of action accrued after the testator's or intestate's death, 7 *T. R.* 358. 10 *East*, 293. 5 *T. R.* 234. 1 *L. Raym.* 436, and the plaintiff might have brought the action in his own right. 5 *T. R.* 234. 4 *T. R.* 277. 2 *East*, 395, 398. 2 *B. & P.* 255.

The plaintiff also is not liable to the costs of a nonsuit, unless the action were such that he might have brought it in his own right; 2 *Taunt.* 116. 4 *T. R.* 277. 1 *Salk.* 207. 2 *Str.* 1106. 1 *Salk.* 314, 2 *L. Raym.* 865; nor to costs on judgment as in case of a nonsuit. 2 *H. Bl.* 277. 4 *Bur.* 1928. But he is liable to the costs of a *nonpros*; 6 *T. R.* 654. 3 *Bur.* 1584; and to costs upon a discontinuance, 2 *New Rep.* 72, or for not proceeding to trial according to notice, 1 *H. Bl.* 217. 3 *Bur.* 1585, if he have knowingly brought a wrong action, or been guilty of wilful default; 1 *W. Bl.* 451, 3 *Bur.* 1451; otherwise not. 4 *Bur.* 1927.

SECT. 2.

Actions against Executors or Administrators.

EXECUTORS and administrators are not within the statutes by which courts of conscience have been established; *Doug.* 263. 5 *T. R.* 535; and consequently they may be sued in this court, however trifling the cause of action may be. Also, it may be necessary to remark, if the defendant be an attorney or officer of the court, yet he is not entitled to his usual privileges, when thus sued as an executor, &c. *Ante*, p. 107.

Process, &c.] Executors or administrators cannot be holden to bail, unless in cases where they have promised to pay the debts of their testator or intestate, or (under a judge's order) when they have been guilty of a *devastavit*. *Vol. 1. p. 45.* See the form of the affidavit in this latter case, *Tidd, Forms*, 84. § 46.

The declaration is filed or delivered as in ordinary cases.

Plea, &c.] If the defendant allow judgment to go by default, or expressly confess the action, this is deemed a confession of assets, and he will be estopped from denying it afterwards in an action on the judgment suggesting a *devastavit*. 1 *Wils.* 258. but see *Hob.* 178. He should therefore take care to plead regularly to the action, unless he wish to acknowledge assets.

If he plead the general issue or specially, the plea is delivered or filed, as in ordinary cases. The plea of *plene administravit*, or *ne unques executor*, &c. when pleaded singly, must be delivered to the plaintiff's attorney, and not filed; nor need they be signed by counsel. *Vol. 1. p. 122.* But if the defendant plead the general issue and *plene administravit*, or any other double plea, he must

of course file them with the clerk of the papers, as directed *Vol. I. p. 123*. If the declaration be intitled generally of the term, although not filed, &c. or the action commenced until after the first day of it, and the defendant wish, under the plea of *plene administravit*, to give in evidence an administration of assets upon the first or other day of the term previous to the commencement of the action, he should move the court that the plaintiff be obliged to intitle his declaration specially of the day when filed or delivered, *Hardw. 141*, or he may give in proof, at the trial, the time at which the action was really commenced. *1 Sid. 432*.

If the defendant plead *plene administravit*, or *plene administravit præter*, alone, the plaintiff in his replication may either deny it; or he may confess it, and pray judgment of assets *in futuro* upon the former plea; or, upon the latter, take judgment presently of the assets acknowledged to be in the hands of the defendant, and of assets *in futuro* for the residue. In the latter case, the plaintiff may sign judgment of assets *quando acciderint*, &c. (after executing a writ of enquiry, when necessary, *see ante*, p. 7); and when assets afterwards come to the hands of the executor, he may proceed against him by *scire facias*, as directed *ante*, p. 85. But if the defendant plead one of the pleas above mentioned, and also the general issue or other plea, if the plaintiff deny both in his replication, the issue is then made up and the parties proceed in the ordinary way; or if the plaintiff add (as he must) the *similiter* to the general issue, and confess the plea of *plene administravit*, &c. and pray judgment of assets *in futuro*, &c. as above mentioned, then, after entering the replication in the issue, enter an award of the *venire* in this form. "*But because it is uncertain whether the said J. S. will be convicted upon the said issue above joined between the parties aforesaid, therefore let judgment be thereupon stayed until the trial and determination of the said issue; and in order to try the said issue, let a jury thereupon come,*" &c. [or by original, "*it is commanded to the sheriff that he cause to come,*" &c.] as in ordinary cases. In this latter case, if the plaintiff have a verdict, judgment *quando*, &c. is signed, and he proceeds afterwards by *scire facias*, as is above mentioned.

If after pleading and before trial, judgments be recovered against the defendant by other creditors, it seems he may plead that matter *puis darrein continuance*. *5 Taunt. 665*.

The verdict is in the affirmative or negative of the issue, as in ordinary cases. *See the form of the postea for plaintiff upon the plea of non assumpsit, Tidd, Forms, 238. § 10.—the like, upon the plea of plene administravit, Id. § 11.*

Judgment.] The ordinary judgment against an executor or administrator is, that the debt, damages, and costs, or the damages and costs, shall be levied *de bonis testatoris* in the hands of the defendant, if he have so much thereof in his hands to be administered; and if not, then the costs to be levied *de bonis propriis*. *1 Saund. 336, and see 1 Salk. 312, 2 L. Raym. 870. See a*

form of this judgment, *Tidd, Forms*, 300. § 42. and see *Id.* 302. § 45, a judgment against an executor, where the jury found assets to the amount of part of the debt, and the judgment is for the residue *de bonis testatoris quando acciderint*; and see 1 *Saund.* 336 a. 2 *Id.* 216, 217. 220 (n.) and see other forms of judgments against executors and administrators, *Tidd, Forms*, 273. § 18—20. 282. § 25—28.

If an executor plead judgments obtained against himself, and any one or more of them be avoided by the defendant's pleading, the plaintiff shall have judgment against the executor *de bonis propriis*. 1 *Saund.* 337 a (n.). But if he had pleaded judgments obtained against the testator, and that he had not sufficient to satisfy them or any of them; if any one or more of the judgments be avoided, still there ought not to be a general judgment against the executor, or at least not until so many of the judgments are avoided as to leave assets in the executor's hands. *Id.* but see several cases cited there to the contrary.

If the defendant plead *ne unques executor* or administrator, and it be found against him, the judgment is *de bonis testatoris si &c. et si non, &c. de bonis propriis*. *Bro. Executors*, 34. 1 *Ro. Abr.* 930. C. pl. 2. 8. 933. pl. 15. *Co. Ent.* 145. b. *Cro. Jac.* 648. 672. *Went. Ex.* 184—186. 2 *Towns.* 69. pl. 33. 1 *Saund.* 336. b.

In an action against an executor or administrator, suggesting a *devastavit*, the judgment against the defendant shall be *de bonis propriis*. 1 *Saund.* 336. c. (n. 1.) But where the action is brought against the executor of an executor, suggesting a *devastavit* by the former executor, the judgment against the defendant will be *de bonis testatoris*. 1 *Saund.* 219. e. (n.).

Where an executor or administrator is charged as assignee, the judgment is of course *de bonis propriis*. 1 *Salk.* 309, 1 *L. Raym.* 553.

As to the judgment of assets, *quando, &c.* it has already been sufficiently treated of, *ante*, p. 132. See the form in *assumpsit*, *Tidd, Forms*, 274. § 19.—the like after judgment debts shall be satisfied, *Id.* 275. § 19. a.—the like in debt, *Id.* 283. § 26.—of judgment of assets acknowledged in part, and of assets in futuro for the residue, on plea of *plene administravit præter in assumpsit*, *Id.* 276. § 20.—the like in debt, *Id.* 283. § 27.—of judgment in *assumpsit*, of assets in futuro as against one of two executors who pleaded *plene administravit*, and judgment *de bonis testatoris* against the other executor who allowed judgment to go by default, *Id.* 277. § 20. a.—the like in debt against three executors, where one pleaded *plene administravit præter*, another *plene administravit*, and the third let judgment go by default. *Id.* 284. § 28.

The judgment on demurrer, on issue of *nul tiel record*, by confession or *nil dicil*, is interlocutory or final, as in other cases. If interlocutory, it is the same as in ordinary cases; after which follow the award of the enquiry, return, and final judgment, as stated *ante*, p. 26. The final judgment is the same as that upon verdict above mentioned. See the form of judgment in *assumpsit*.

upon a cognovit by an executor or administrator, *Tidd, Forms, 273. § 18.*—the like in debt on bond, *Id. 282. § 25.* and see the form of judgment by *nil dicit, Id. 257. § 8.*

Costs.] If there be a verdict for the defendant, he is entitled to costs as in ordinary cases. So, if one of several issues be found for him,—as if he plead the general issue and *plene administravit*, and issue be taken on both, and the issue on *plene administravit* be found for him, and the other issue against him,—he is entitled to costs. 1 *Barn. & Ald. 254.*

If the defendant plead *plene administravit*, or *plene administravit proter*, only, and the plaintiff take judgment of assets *in futuro*, the defendant is not liable to costs; but if he also have pleaded the general issue, and have thus forced the plaintiff to go to trial, the plaintiff, if he have a verdict on the general issue, will be entitled to costs, although he confessed the *plene administravit* and prayed judgment of assets *in futuro*. 12 *East, 232.* In a more recent case, however, under the same circumstances, but where the plaintiff neglected to pray judgment of assets *in futuro*, the court of Common Pleas held that the defendant was entitled to the *postea* and his costs. 4 *Taunt, 135.*

If an executor or administrator plead a false plea, he is liable to costs, it seems, *de bonis propriis*. See 3 *Bur. 1368, 1 W. Bl. 400.* In all other cases where an executor is liable to costs, they are to be levied *de bonis propriis*, if there be not goods sufficient of the testator to satisfy them. *Ante, p. 132.*

[*Execution.*] The usual writ of execution against an executor or administrator, is a *feri facias de bonis testatoris* or *intestatoris*; see the form, *Tidd, Forms, 328. § 6. 332. § 11.*—the like, upon a judgment against the testator or intestate. *Id. 328. § 5.* But if the sheriff return to this writ *nulla bona testatoris nec propria*, and a *devastavit*, (see the form of such a return, *Tidd, Forms, 340. § 36.*), the plaintiff may immediately sue out a *feri facias de bonis propriis*, (*Doct. Plac. 169.* and see the form, *Tidd, Forms, 355. § 57, 58.*), or an *elegit* (1 *Cromp. 346. 3 Bl. Com. 414.*), or a *capias ad satisfaciendum* (2 *H. 6, 12. Bro. Executors, 12.*), against the property or person of the executor or administrator, in as full a manner as in an action against him in his own right. See the form of the *ca. sa.* *Tidd, Forms, 403. § 103, 104.* and see a form of the entry of a return of *devastavit* to a *feri facias*, award of *fi. fa. de bonis propriis*, return of part levied, and award of *ca. sa.* for residue, *Tidd, Forms, 404. § 105.* and see *Rast. 323. b. 326. a. pl. 6.*

You cannot, however, sue out these writs of execution against the property or person of the executor or administrator, upon a judgment *de bonis testatoris* (which is the only one here intended), unless the sheriff have returned a *devastavit*. Therefore, if the sheriff return *nulla bona* merely, (see the form of such return, *Tidd, Forms, 340. § 35.*), the plaintiff, if he can prove a *devastavit*,

may either proceed by action of debt upon the judgment, suggesting a *devastavit*,—or he may sue out a *scire fieri* enquiry, commanding the sheriff that, in case there shall be no goods of the testator remaining in the hands of the executor, he shall summon a jury to enquire if the defendant have wasted the goods of the testator; and if a *devastavit* be found, that he shall warn the defendant that he be in court upon a day mentioned, to shew cause why the plaintiff should not have a *feri facias de bonis propriis* against him. See the form, *Tidd, Forms*, 463. § 47.—of the return to it, *Id.* 487. § 68.—and of the inquisition, *Id.* § 69. and see 1 *Saund.* 219. (n. 8.) 303. 2 *Str.* 631, 2 *L. Raym.* 1395. and see *Cliff.* 659—671; *Lil. Ent.* 664—666. The same notice must be given of executing a *scire fieri* enquiry, as in the case of a common writ of enquiry. 1 *Str.* 235. 625, 2 *L. Raym.* 1382. As no costs, however, are recoverable in this proceeding by *scire fieri* enquiry, unless the executor appear and plead to it, it is seldom adopted; but the usual remedy is by action of debt on the judgment, suggesting a *devastavit*, as above mentioned. 2 *Saund.* 219. a. See more particularly as to these two modes of proceeding, and what shall be evidence of a *devastavit*, 2 *Saund.* 219. (n. 8.)

The proceedings upon a writ of error by or against executors, will be found under the title "*Error*," in the first Volume. As to *scire facias* to revive a judgment against an executor or administrator, see *ante*, p. 78—82; and as to *scire facias*, upon a judgment of assets *quando*, &c. see *ante*, p. 85.

CHAPTER VI.

Actions against an Heir on the Bond of his Ancestor.

AN heir is compellable to pay the bond and judgment debts of his ancestor, to the extent of the assets which have come to him by descent. As to what is to be considered assets by descent, see 2 Saund. 8. d. &c. Even if he alien the property which has descended to him, before action brought, he is still liable to the extent of the value of the property so descended. 3 & 4 W. & M. c. 5. § 5. The debt is also so far considered the debt of the heir, that he is sued in the *debet* and *detinet*, and not in the *detinet* only.

Process, &c.] The defendant cannot be holden to bail; see Vol. 1. p. 45; and by B. M. 15 C. 2. r. 2, no clause of *ac etiam* shall be inserted in any writ or precept against him. Vol. 1. p. 309.

As to the declaration, see 2 Saund. 7. d. It is filed or delivered, as in ordinary cases.

Plea, &c.] If the defendant be under age at the time of the action, instead of pleading, he may pray that the parol may demur until he shall be of full age. See the form, 1 Went. 43. 2 Chitty, Plead.

But if the defendant plead, then, besides the defences which the ancestor might have set up to the action, he may plead that he is not heir; or that he has paid other bond or judgment creditors, to the full extent of the value of the lands descended, before the commencement of the action; 1 Str. 665; or that he retains, in order to pay judgment debts; or that he retains, to pay his own bond or judgment debt; or that he has nothing by descent; or that he has nothing by descent excepting a reversion expectant on the life of another, in which case the plaintiff may take judgment of assets *quando acciderint*, Dy. 373. b. Carth. 129. 2 L. Raym. 784. Lib. Plac. 208. pt. 218, and afterwards proceed by *scire facias* when the estate has come into possession, as directed *ante*, p. 85; but if the reversion were expectant on an estate for years, the defendant should confess assets in possession to the amount of the value of reversion. 2 Saund. 7. c. The defendant cannot plead that there is an executor, who has assets; for the obligee may, at his election, sue either the heir or executor. Bro. Abr. Assets per Discent, 33. Plowd. 439. b. Dy. 204. b. 3 Lev. 139. 2 Atk. 426. 1 P. Wms. 203. The plea of *riens per discent*, and most other pleas by an heir, we have seen (Vol. 1. p. 122), must be delivered to the plaintiff's attorney, and not filed with the clerk of the papers; nor need they be signed by counsel.

If the defendant do not plead *riens per descent*, or some plea denying the plaintiff's cause of action, he must confess the action, and shew the certainty of the assets; *Plowd.* 440. 2 *Ro. Abr.* 71. 1 *Str.* 665. *Rast. Ent.* 172. b. 173. a. *Lib. Plac.* 173. 174; for if issue be taken on the quantity of assets, and it be found that the heir has other lands by descent; 7 *Mod.* 44; or if the defendant plead a fact which he knows to be false, and it be found against him (as, when he pleads *riens per descent*, and it is found that he has received something, however small, or insufficient to discharge the debt): *Plowd.* 440. 2 *Leon.* 11. 2 *Ro. Abr.* 70. C. pl. 2. *Dy.* 149. *W. Jon.* 87: the plaintiff will be entitled to a general judgment and execution for the debt, damages, and costs against the defendant, in the same manner as if it were for his own debt. And the law is the same, where the heir pleads payment by a co-obligor, *Carth.* 93, *Comb.* 162; or pleads a bad plea. 2 *L. Raym.* 783, 1 *Salk.* 354. 7 *Mod.* 40. But in such cases, if the plea be honest and fair, and the defect arise merely from mispleading, the court will allow the defendant to amend it. 2 *Saund.* 72. b. The plea of *non est factum*, however, is an exception to the above rule; for if it be found false, still the judgment shall be of the lands descended, only. *Cra. Car.* 437.

If the defendant plead *riens per descent* at the time of the writ purchased or bill filed, the plaintiff may reply that the defendant had lands, &c. from his ancestor before the original writ purchased, &c.; and if issue be thereon joined, and found for the plaintiff, the jury shall then enquire of the value of the lands, &c. so descended, and the plaintiff shall have judgment of them. 3 & 4 *W. & M.* c. 5. § 6. But if the plaintiff have judgment by confession (without confessing the assets), or on demurrer or *nil dicit*, it shall be for the debt and damages, without any enquiry of the value of the lands descended. *Id.* and see *Carth.* 354, *Comb.* 344. 5 *Mod.* 119. 122, 123. 10 *Mod.* 18, 19. and see the form of the replication, 2 *Saund.* 8. a. Or, instead of replying in this manner, the plaintiff may take issue on the plea of *riens per descent*, and if he have a verdict, he may have a general judgment at common law, as above mentioned. *Barnes*, 444.

The issue is made up, and the subsequent proceedings to judgment are the same, as in ordinary cases.

Judgment.] If the defendant have pleaded *non est factum*, or have confessed the action and shewn with certainty the assets descended, the judgment is special, that the plaintiff recover his debt, damages and costs, to be levied of the lands descended; 2 *Saund.* 7. a. c. (n.) See the form, *Tidd, Forms*, 302. § 46; but if he have pleaded *riens per descent*, and it be found against him; or judgment be given against him on demurrer, or by default, *nil dicit*, or by confession (without shewing the assets in certain), or upon any other matter or ground whatsoever: the judgment may be general, in the same manner as if the action had been brought against the defendant for his own debt; 2 *Saund.* 7. ab. (n.); or

it may be special, as above mentioned, at the option of the plaintiff, if he think it more advantageous than the general judgment. *2 Saund. 7. c.* Also, if the plaintiff shew that the heir has already received profits from the estate to the amount of the debt, and the defendant do not deny it, he may have a general judgment, and execution presently. *Dg. 344. d.*

If the heir have aliened the lands previously to the suing out of the writ, he is expressly rendered liable for the specialty debts of his ancestor, to the amount of the lands aliened, by stat. 3 & 4 *W. & M. c. 5. § 5.* If in such a case he plead *riens per descent* at the time of the writ purchased, and the plaintiff reply assets before the writ purchased, the jury shall find the value of the lands, and the plaintiff can have judgment only to that extent, *3 & 4 W. & M. c. 14. § 6,* and not a general judgment against the heir as at common law; *Carth. 354, Comb. 344. 5 Mod. 119. 122, 123. 2 Saund. 8. (n.);* or the plaintiff, instead of replying according to the statute, may take issue on the plea of *riens per descent*, and, if found for him, may have judgment either general or special, as before mentioned. *Barnes, 444. 2 Saund. 8. a.* But although the defendant have not aliened the lands, the plaintiff may, if he wish, reply according to the statute, and have judgment accordingly; *2 Saund. 8. (n.);* and this, perhaps, would be the more fair and equitable mode of proceeding.

Execution.] We have just seen that the judgment for plaintiff is general or special. If it be general, the plaintiff may sue out a *feri facias, elegit, or ca. sa.,* as in ordinary cases, and as if the action were against the defendant in his own right. But if the judgment be special, that the debt be levied of the lands descended, the plaintiff in such a case must sue out a special writ in nature of an extent, commanding the sheriff to enquire by a jury of the lands descended, and to deliver them to the plaintiff, to hold until the debt, &c. be thereof fully levied. See the form, *Tidd, Forms, 390. § 86.* It seems, also, that the plaintiff, upon a general judgment, may have this special writ, if he prefer it to the general writs of execution, upon suggesting that the heir has particular lands by descent, and praying execution of the whole of them. *W. Jon. 87. 2 Ro. Abr. 71. 72. D. pl. 3. See the form of the writ in such a case, Tidd, Forms, 391. § 87.*

What has now been stated has of course reference only to actions against the heir; if the action were against the ancestor, and the judgment revived by *scire facias* against the heir and terretenants, the execution is by *elegit.* See *Vol. 1. p. 371.* As to *scire facias* to revive a judgment against an heir and terretenants, see *ante, p. 81;* and as to *scire facias* on a judgment of assets *quando, &c.* see *ante, p. 85.*

Action against devisee.] An action is maintainable against a devisee, and is proceeded in, in the same manner and under the same circumstances, as an action against an heir. See *3 & 4 W. & M. c. 14. § 2, 3, 7.*

CHAPTER VII.

Actions by and against Bankrupts or their Assignees.

SECT. I.

Actions by Bankrupts or their Assignees.

For any debt due to the bankrupt, and for injuries to his property, previous to his bankruptcy, the action must of course be commenced in the names of his assignees. But if the action be already commenced by the bankrupt before his bankruptcy, the assignees must proceed in his name to judgment, final (2 *Wils.* 372) or, it seems, interlocutory (1 *T. R.* 469), before they can make themselves parties to the record. So, if error be brought by or against a trader who afterwards becomes bankrupt pending the writ, the assignees must proceed in his name to judgment. *Vol.* 1. p. 217. 1 *T. R.* 463. The assignees, however, should sue out a *scire facias* to revive the judgment and make themselves parties to the record, before they sue out execution. *Ante*, p. 83.

Process, &c.] As to the affidavit to hold to bail by assignees of a bankrupt, see *Vol.* 1. p. 52. 55. and see the form, *Tidd, Forms*, 36. § 52—54.

The process, &c. are the same as in ordinary cases. See the form of an *ac etiam*, in an action by assignees, *Tidd, Forms*, 26. § 31.

Declaration, &c.] The declaration and other pleadings in the cause are filed or delivered as in ordinary cases.

In actions by assignees, "the commission of bankruptcy, and the proceedings of the commissioners under the same, shall be evidence to be received of the petitioning creditor's debt, and of the trading and bankruptcy of such bankrupt," unless the defendant "at or before the time of his pleading" shall give notice to such assignee that he intends to dispute such matters or any of them. 49 *G. 3. c.* 121. § 12. See 1 *Stark.* 328. Serving this notice on the attorney of the assignees, is sufficient; but a delivery of it to a maid servant at the house of the assignee, is not. 3 *Taunt.* 526. At the trial, the defendant may prove the service of the notice, before the plaintiff has entered upon his evidence. 2 *Camp.* 324.

Costs.] The costs are the same as in ordinary cases; excepting

that by 49 G. 3. c. 121. § 12, if the notice above mentioned be served, and the matters so disputed be proved or admitted at the trial, the judge may, if he see fit, grant a certificate thereof; and the assignee shall thereupon be entitled to such costs (to be taxed) as were occasioned by such notice, to be deducted from the costs, &c. of the other party, should he obtain a verdict.

SECT. 2.

Actions against Bankrupts or their Assignees.

As to proceedings against members of Parliament, subject to the bankrupt laws, *see ante*, p. 96.

Process, &c.] As to the cases in which a bankrupt can be holden to bail, and under what circumstances he is privileged from arrest, *see Vol. 1. p. 43. 70.* In actions against assignees, you must proceed by nonbailable process. If bail have been put in for a defendant, and he afterwards become a bankrupt and obtain his certificate before the bail are fixed, the bail will be thereby discharged; and an *exoneretur* may be entered on the bail-piece, upon application to the court, or to a judge in vacation. *Vol. 1. p. 282, 283.*

The declaration is of course filed or delivered, as in ordinary cases.

Plea, &c.] The general plea of bankruptcy need not be signed by counsel, and must be delivered to the plaintiff's attorney and not filed. *Vol. 1. p. 122.* But when the bankruptcy and certificate are pleaded specially, the plea must be signed by counsel, and filed with the clerk of the papers.

If one of several defendants plead bankruptcy, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others, 1 *Wils.* 89, whether the action be upon contract or in tort.

In actions against assignees, if the plaintiff intend to dispute the petitioning creditor's debt, the trading or bankruptcy, he must "before issue joined" give notice to the defendants of such his intention; otherwise the commission, and the proceedings of the commissioners under the same, shall be sufficient evidence of the facts above mentioned. 49 G. 3. c. 121. § 12. Service of this notice, at the time of delivering the issue, will not be sufficient. 4 *Camp.* 207.

The issue is made up, and the other proceedings to judgment are the same, as in ordinary cases.

Judgment.] The judgment is the same as in ordinary cases; with the following exception: if the action be against a trader, who, previously to the present bankruptcy, had been a bankrupt, or had taken the benefit of an insolvent act, or compounded with his cre-

tors, (in which case his future effects are liable, if he have not paid 15*s.* in the pound under the present commission, 5 *G. 2. c. 3.* § 9); if judgment be obtained against him before his certificate is signed and allowed, it is a general judgment as in ordinary cases; but if the judgment be obtained after the allowance of the certificate, it may be special against his future estate and effects, excepting "the tools of trade, necessary household goods and furniture, and necessary wearing apparel of such bankrupt, his wife and children." See 5 *G. 2. c. 3.* § 9. 1 *Doug.* 46. 2 *Saund.* 72 *g. 5 T. R.* 287. In the same manner, if a defendant before judgment take the benefit of the Lords' act, the judgment may be special against his future effects. See the form of such a judgment, *Tidd, Forms,* 279. § 21.

If the plaintiff obtain judgment previously to the bankruptcy of the defendant, such judgment ceases to be a lien upon the defendant's lands after the bankruptcy; for by 21 *J. 1. c. 19.* § 9, all the creditors of a bankrupt shall be equally paid, unless there be a mortgage. 1 *P. Wms.* 739.

Execution.] As to a *ca. sa.* against a bankrupt, and his privilege from arrest, see *Vol. 1. p. 277.* 70. 43. As to a *fi. fa.* see *Vol. 1. p. 269.* And as to an *elegit*, it is clear, from what has just now been said, that a judgment obtained even before the bankruptcy of a defendant, cannot be executed after it, upon lands in his seisin at the time of the bankruptcy. But if he had sold the lands previously to his bankruptcy and after the signing of the judgment, the plaintiff might still extend them under an *elegit*. *Tidd,* 835.

If the defendant have been twice a bankrupt, as above mentioned, and have not paid 15*s.* in the pound under his second commission; if the plaintiff know of any effects or lands belonging to him, he may seize them under a *fi. fa.* or *elegit*, and sell or extend them in satisfaction of his judgment; and the same, where the defendant has been discharged under the Lords' act. *Vide supra.* But in such cases, if the judgment be general, and not special against future effects, a special execution cannot be sued out against such future effects, without first suing out a *scire facias*. See *ante,* *p. 83.* Yet where a general execution was sued out in such a case, the court of Common Pleas refused to set it aside. 3 *B. & P.* 185. See the form of a *feri facias* against the goods, &c. of a defendant discharged under an insolvent act, and a *ca. sa.* for the costs of the *scire facias*, &c. *Tidd, Forms,* 335. § 23.

If a bankrupt be in custody in execution, and obtain his certificate, he may be discharged upon application to the court wherein judgment was obtained, or to a judge at chambers. 5 *G. 2. c. 30.* § 13. See 1 *T. R.* 361. and see *Vol. 1. p. 277.* 44. and the cases there cited. For this purpose, take out a summons before a judge, and after that (if not attended) a second and a third summons; and upon producing the certificate, and an affidavit that the debt accrued before the bankruptcy, and that the certificate had been

obtained without fraud, the judge will make an order for the defendant's discharge. And before the bankrupt has obtained his certificate, a creditor at whose suit he is in custody cannot prove his debt under the commission, until he have first relinquished his action against the debtor, and all benefit whatever from the same. 49 G. S. c. 124. § 14. and see 4 *Trust.* 631. 2 *Trust.* 181. Nor can a creditor, who has taken his debtor in execution, sue out a commission of bankrupt against him for the same debt. 8 *T. R.* 123. See 1 *B. & P.* 302.

CHAPTER VIII.

Actions by and against Infants.

SECT. 1.

Actions by Infants.

Process.] THE process is the same as in ordinary cases, and may be sued out in the name of the infant before any *prochein amy* or guardian is appointed.

Prochein amy, &c.] An infant cannot prosecute an action either in person or by attorney; and therefore it is that he cannot sue as an informer on a penal statute; *Say*, 50; for an informer must exhibit his suit in proper person, and prosecute it either in person or by attorney. 18 *El.* c. 5. But he may sue either by *prochein amy*, (*stat. Westm.* 1. c. 48. *Westm.* 2. c. 15), or by guardian; 2 *Inst.* 261; usually the former. If he sue by attorney, although this cannot now be assigned as error, 21 *J.* 1. c. 13. § 2. 4 & 5 *A.* c. 16. § 2, yet the defendant may plead it in abatement; 2 *Saund.* 213 (n. 5); or if he sue in person, perhaps it would be error. There is one exception, however, to this, namely, where several executors are plaintiffs, and one of them is an infant; in such a case all the plaintiffs may sue by attorney, and those who are of age may appoint the attorney for themselves and for the infant. 1 *Ro. Abr.* 288. pl. 3. *Cro. El.* 378. 2 *Saund.* 213 (n. 6). 2 *Str.* 783.

So, in ejectment, if the lessor of plaintiff be an infant, the defendant, after pleading, may move to stay proceedings, until a guardian be appointed for the infant, in order to answer costs, 2 *Str.* 694. 932. *Barnes*, 283, provided the plaintiff be not a real and substantial person. *Cowp.* 128.

If an infant sue by guardian, the guardian, it seems, must have a warrant; if by *prochein amy*, a warrant is unnecessary; but both guardian and *prochein amy* must be admitted by the court. *F. N. B.* 63 *J.* 2 *Inst.* 261; 3 *Mod.* 236. *Cro. Car.* 86. *Let the person intended as prochein amy or guardian, (being some friend of the infant, who is willing to prosecute the action for him), attend with the infant before a judge at chambers, who will accordingly make an order to the clerk of the rules to draw up the rule. Pay the judge's clerk 12s. Draw up the rule, with the clerk of the rules; pay 7s. 6d.; see the form of the rule, Tidd, Forms, 18. § 10. Annex a copy of it to your declaration, before you deliver it. The admission may be*

general, to prosecute all actions, &c. for the infant. 1 *Str.* 304. See the form of the rule in such a case, *Tidd, Forms*, 18. § 12. If the *prochein amy* or guardian and infant cannot attend, write out a petition on 2s. 6d. stamped paper, to be signed by the infant, praying to be admitted to prosecute, &c. by A. B.; see the form, *Tidd, Forms*, 16. § 7. 2 *Sellon*, 66; and at the foot of it, write a consent, to be signed by the *prochein amy*, &c.; see the form, *Tidd, Forms*, 17. § 8. 2 *Sellon*, 67; and lastly, make an affidavit of the signing of the petition and consent, on a 2s. 6d. stamp; see the form, *Tidd, Forms*, 17. § 9. 2 *Sellon*, 67. Let these be presented to the judge at chambers, who will thereupon grant his fiat or order, and you proceed to draw up the rule, &c. as is above mentioned.

The infant cannot afterwards remove his guardian, nor can he disavow the action of his *prochein amy*; *F. N. B.* 63. K; but he may have a writ out of chancery to remove him, or (which is more usual) he may make an application to this court for that purpose. *F. N. B.* 63. K. *Cro. Car.* 161. If the guardian or *prochein amy* be removed pending the suit, an entry thereof, it seems, should be made upon the roll. 4 *Taint.* 765.

Declaration, &c.] In the commencement of the declaration, it is stated that the plaintiff is an infant, and that he sues by A. B. who is admitted by the court to prosecute for him as his next friend, &c.; see the form, *Tidd, Forms*, 141. § 3. If it do not state that the *prochein amy* is admitted by the court, it is error; 1 *Lev.* 224; but if it be stated in the declaration, the want of an entry of it on the roll will not be error, 4 *Co.* 53. b. 54. a. 1 *Sid.* 173, and the court, if in fact there be such an admission, will allow it to be entered on the record at any time. *Cro. Car.* 96. *Hutton*, 92. 1 *Lev.* 224. The declaration in other respects is the same, and is delivered or filed as in ordinary cases. A copy of the rule of admission is delivered with it, as above directed; for until the rule be served, the defendant is not compellable to plead. 2 *Sellon*, 66.

The other proceedings in the cause are the same as in ordinary cases. The guardian (1 *Str.* 506) or *prochein amy* (2 *Id.* 1026), cannot be a witness. See 1 *Str.* 506.

Costs.] If the defendant be entitled to costs, he may proceed for them by attachment against the *prochein amy* or guardian; 1 *Str.* 548. *Barnes*, 128. *Ca. Pr. C. B.* 32; or it seems he may sue out execution, even a *ca. sa.*, against the infant himself, whether he have sued by *prochein amy*, &c. 2 *Str.* 1317, or not. 13 *East*, 6.

If the defendant wish to know the place of residence of the *prochein amy* or guardian, he may oblige the plaintiff to give him notice of it, by application to the court or to a judge at chambers, for that purpose; 1 *Wils.* 246; and if the *prochein amy* or guardian be not a responsible person, the court will order the appointment of some other in his stead. 2 *Str.* 708.

SECT. 2.

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 Actions against Infants.

Process, &c.] An infant should not be holden to bail for any debt or other matter, where the plea of infancy would be a legal bar to the action. If holden to bail, however, the court, it should seem, would not discharge him on filing common bail, but would put him to plead his infancy. 1 B. & P. 480. Vol. 1. p. 46.

An infant may be outlawed, if above the age of twelve years; Co. Lit. 123. a; or even under that age, if a female.

The declaration is of course the same, and is filed or delivered in the same manner, as in other cases.

Appearance, &c.] An infant can appear and defend by guardian only, and not in person or by attorney. Co. Lit. 135. b. 2 Inst. 261. 2 Str. 784. If he appear by attorney, (excepting in ejectment, 1 Str. 25) it is error; Vol. 1. p. 246. 1 Ro. Abr. 287. pl. 1. 2. 747. pl. 13. Cro. El. 569. Moor, 460. 2 Leon. 189. 8 Co. 58. b. 9 Co. 30. b. W. Jon. 423; and the same, where several defendants appear by attorney, and one of them is an infant, Cro. Jac. 289. 303. 1 Ro. Abr. 776. pl. 9. Allyn, 74. 1 Lev. 294. 1 L. Raym. 600, even although they be sued as executors. 2 Str. 783. See the form of an assignment of this for error, Tidd, Forms, 525. § 30.—and of replication thereto, Id. 526. § 31.—and as to the certiorari to certify the admission, see Lil. Ent. 555, &c. 2 L. Raym. 1476. 1 Wils. 85.

If the defendant appear by attorney, and the plaintiff happen to know that he is an infant, the court upon application will order the appearance to be set aside, and that the defendant appear by guardian. 7 Taunt. 488. Barnes, 418. And this, it seems, may be done at any time before judgment. See 3 Wils. 50. Barnes, 413.

Common bail cannot be filed for the defendant by the plaintiff; Tidd, 75; and therefore, when the defendant in nonbailable actions neglects to file common bail, &c., a judge, upon application and without summons, will make an order "That unless the infant appear within six days after personal service of the order, the plaintiff may assign John Doe for his guardian, and file common bail for the defendant;" and upon affidavit of the service of this order, and shewing the original, the judge will make the order absolute. An admission is then drawn up, &c. and common bail filed, &c. as in ordinary cases. 2 Sellon, 68. See 2 Str. 1076.

The guardian (being some friend of the infant, willing to defend the action for him) is appointed in the same manner as is mentioned in the last section. See the form of the rule, Tidd, Forms, 18. § 11.—the like, of a general admission to prosecute and defend all actions, &c. Id. 18. § 12. As to the removal of the guardian, see ante, p. 144.

If an attorney have undertaken to appear for an infant, he must appear for him by guardian. 1 Str. 445. 114. See Vol. 1. p. 29.

Before you deliver or file the plea, annex a copy of the rule for the admission of the guardian, to it. We have seen (*ante*, p. 136) that in an action against an infant on the bond of his ancestor, he may pray that the parol may demur until he shall be of age. But if judgment be given that the parol demur, and error be brought on that judgment, the defendant cannot plead his nonage in the court of error, and again pray the parol to demur. *Vol. 1. p. 233.*

The other proceedings are the same as in ordinary cases.

Costs.] An infant defendant is liable for costs, although a guardian have been appointed. *2 Str. 1217. Dy. 104.*

Execution, &c.] The infant may be arrested on a *ca. sa.* *Vol. 1. p. 276.* The execution in this and other respects is the same as in ordinary cases.

Upon error brought by or against an infant, he should have a *prochein amy* or guardian appointed, as above directed.

As to warrants of attorney by infants, *see ante*, p. 15.

CHAPTER IX.

Actions by and against Baron and Feme.

SECT. 1.

Actions by Baron and Feme.

THERE are but few peculiarities in actions by husband and wife; and these have been already incidentally noticed in the course of the work. If a wife sue alone, the defendant may plead the coverture in abatement; or the coverture may be assigned for error, upon a writ of error *coram nobis*. Vol. 1. p. 246. See the form of an affidavit by feme, in an action brought by baron and feme, Tidd, Forms, 85. § 50, 51.

The proceedings to judgment are the same as in other cases. As to *scire facias* upon the death of a feme covert plaintiff, or upon the marriage of feme sole plaintiff, see ante, p. 82; and as to warrants of attorney given to a feme sole, who marries before judgment, see ante, p. 14.

SECT. 2.

Actions against Baron and Feme.

Process, &c.] In what cases a feme covert may be arrested upon process against her solely, or against her and her baron jointly, see Vol. 1. p. 45, 46. And as to the service of nonbailable process upon baron and feme, see Vol. 1. p. 302.

If a feme covert be sued alone, she must appear in person; for she cannot appoint an attorney. Co. Lit. 135. 3 Taunt. 261. But if the husband and wife be sued jointly, they may appear by attorney; for the husband is capable of appointing an attorney for both. 2 Saund. 213. Vol. 1. p. 22.

Care should be taken not to bring an action against a feme covert, without making the baron also a party; otherwise she may plead her coverture in abatement or bar, according to circumstances; or the coverture may be assigned for error, upon a writ of error *coram nobis*. See Vol. 1. p. 246.

The other proceedings to judgment are the same as in ordinary cases. As to a writ of error by feme covert, see Vol. 1. p. 210. 243. 246; and as to the abatement of a writ of error, by the marriage of a feme sole, plaintiff or defendant, see Vol. 1. p. 216. As

to *scire facias* upon the marriage of a feme sole, defendant, *see ante*, p. 82. And as to warrants of attorney by a feme covert, or by a feme sole who marries before judgment, *see ante*, p. 15, 14.

Execution.] As to the cases in which property belonging to the wife may or may not be taken in execution for the debt of the husband, *see Vol. 1. p. 268.*

In actions against husband and wife, although a *ca. sa.*, if sued out, must be against both, yet if the wife be arrested on it, the court will order her to be discharged out of custody. *Vol. 1. p. 276. and see Cro. Car. 513.* But if the husband die before execution, and the action survive against the wife, she may be taken in execution, in the same manner as if the action were originally brought against her alone as a feme sole. 1 *Ro. Abr.* 890. 39 *H.* 6, 45. 46 *E.* 3, 23. 2 *Bac. Abr. Execution*, G. 4.

If an action be brought against a feme sole, and pending it she marry, it seems she may be taken on a *ca. sa.*, and the court will not discharge her. *Cro. Jac.* 323. 4 *East*, 521. The more regular mode of proceeding, however, in such a case, is, to sue out a *scire facias* in order to make the husband a party, and then to sue out execution against both.

CHAPTER X.

Actions by and against Idiots and Lunatics.

Idiots and lunatics may be holden to bail, and arrested, in the same manner and under the same circumstances as other persons; and the court will not discharge them out of custody on account of their insanity, 4 *T. R.* 121. 2 *T. R.* 390, even although the fact of their insanity have been established by a commission of lunacy, previously to the arrest. 2 *B. & P.* 362. *Vol. 1. p. 46.* Nor will the court allow an *exoneretur* to be entered on the bail-piece, merely on account of the insanity of the principal; 6 *T. R.* 133. *Vol. 1. p. 289;* but the bail must render him in their discharge. *Vol. 1. p. 284, 285.*

An idiot plaintiff must appear in person, and then any one who prays to be admitted as his friend, may sue for him; 4 *Co.* 124. See *Co. Lit.* 135. and *Vol. 1. p. 22;* if defendant, he must also appear in person, and any one who can make a better defence shall be allowed to defend for him. *Id.*

A lunatic sues and defends, in the same manner as other persons: if of age, either in person or by attorney; if under age, he must sue by *prochein amy* or guardian, and defend by guardian, as mentioned *ante*, p. 143. 145.

CHAPTER XI.

Actions against Justices of Peace, Constables, &c.

Limitation of action.] ACTIONS against justices of peace for any thing done by them in the execution of their office, or against constables, headboroughs, or other persons acting by their orders or in their aid, must be commenced within six calendar months after the cause of action has accrued. 24 G. 2. c. 44. § 8. *see 12 East, 67.* If the writ upon which the plaintiff declares, have not been sued out within the six months, proof must be given at the trial that it was regularly continued down from a writ sued out within that time. 14 *East, 491.*

Actions brought against officers of the excise or customs, for any thing done by them in the execution of their duty, shall be commenced within three months after the cause of action has accrued. 28 G. 3. c. 37. *See 2 East, 254. 2 H. Bl. 14.*

Notice of action, &c.] Before an action can be commenced against a justice of peace (*see 2 H. Bl. 214. 2 Wils. 275*), for any thing done by him in the execution of his duty, (*see 9 East, 364. Peak. 35*), the attorney or agent for the plaintiff must, one calendar month at least (*see 3 T. R. 623*) previously to his suing out any writ against any such justice, or causing him to be served with process, deliver to him a notice in writing of such intended writ, &c. or leave such notice at his usual place of abode (*see 4 T. R. 465*); in which notice the cause of action shall be clearly and explicitly stated (*see 7 T. R. 631. 2 Camp. 196*); and the name of such attorney or agent (*see 7 Taunt. 63*) and his place of abode (*see 3 B. & P. 551. 6 Esp. 138*) shall be indorsed (*see 7 T. R. 635, 3 B. & P. 553. n.*) thereon. 24 G. 2. c. 44. § 1. *See the form of the notice, Tidd, Forms, 1. § 1—3. 2 Sellon, 72.*

Before an action can be commenced against an officer of the excise or customs, or any person acting by his orders or in his aid (*see 2 Smith, 220. 4 T. R. 485. 553. 5 East, 122. 3 Taunt. 127*), for any thing done by him in the execution of his duty (*see 5 T. R. 1. 1 B. & P. 187*), the attorney or agent for the plaintiff must, one calendar month at least previously to his suing out any writ or process against such officer, deliver to him, or leave for him at his usual place of abode, a notice in writing, stating clearly and explicitly the cause of action, and the names and places of abode of the plaintiff and of the attorney or agent, respectively. 28 G. 3. c. 27. § 25. *and see 24 G. 3. s. 2. c. 47. § 35. See the form of the notice, Tidd, Forms, 5. § 4—6. 2 Sellon, 75.*

Also, where an action is intended to be brought against a constable or other officer (see 7 T. R. 270. *Bul. N. P.* 24. 2 *Wils.* 275), or any person acting by his order or in his aid, for any thing done by him in obedience to a warrant under the hand and seal of a justice of peace, (see 2 B. & P. 158, 3 *Esp.* 96. 226. 3 *Bur.* 1742. 5 *East*, 233. 2 *Esp.* 542 n. 1 *Str.* 446. 2 *M. & S.* 259), a demand in writing of the perusal and copy of such warrant, signed by the party demanding the same (or by his attorney, 2 B. & P. 42. See the form, *Tidd, Forms*, 7. § 7, 8. 2 *Sellon*, 73. *Imp. B. R.* 805, 806) must be made, or left at the usual place of abode of such constable or officer, by the plaintiff or his attorney or agent; and if the perusal and copy of the warrant be not granted within six days after being thus demanded, (or before the action has been commenced, 5 *East*, 445), the plaintiff may bring his action against the constable or other officer alone; but if such perusal and copy be granted, then if the plaintiff sue the constable, &c. without making the justice also a party, upon proof of the warrant at the trial, the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction in the justice who made the warrant. Or if the action be brought jointly against the justice and such constable, &c. then upon proof of the warrant, the jury shall find a verdict for such constable; but if they find a verdict also against the justice, he shall pay to the plaintiff as well his costs in the action, as also such costs as the plaintiff may have been obliged to pay to the other defendant. 24 G. 2. c. 44. § 6. It may be necessary to mention that this relates to actions of trespass and case only; and not to assumpsit, (*Bul. N. P.* 24,) replevin (6 *East*, 283), or the like.

Declaration.] The venue must be laid in the county in which the facts complained of were committed, in all actions of trespass, or on the case against justices of peace, mayors or bailiffs of cities or towns corporate, headboroughs, portreves, constables, tithingmen, churchwardens, &c., or other persons acting in their aid or by their command, 21 J. 1. c. 12. § 5, and in actions against officers of the customs, 24 G. 3. s. 2. c. 47. § 35, 39. and see 28 G. 3. c. 37. § 23, or excise, 23 G. 3. c. 70. § 34, or persons acting in their aid, for any thing done in execution of their respective offices. And the same in actions against all other persons holding a public employment, civil or military, in or out of this kingdom, having thereby authority to commit to safe custody; or if the fact be committed out of the kingdom, the plaintiff may lay the matter as having been done at Westminster, or in the county in which the defendant shall then reside. 42 G. 3. c. 85. § 6.

The declaration is in other respects the same as in ordinary cases.

Plea, &c.] In actions against justices of peace, constables, &c. officers of excise and customs, &c. and all other persons holding public employments and having authority to commit to safe custody, as above mentioned, for any thing done by them in execution

of their respective offices, the defendants are not bound to plead any matter of justification, &c. specially, but may give it in evidence under the general issue. *21 J. 1. c. 12. § 5. 42 G. 3. c. 85. § 6. 23 G. 3. c. 70. § 34. 24 G. 3. s. 2. c. 47. § 35, 39. 28 G. 3. c. 37. § 23. 7 J. 1. c. 5.*

Justices of peace (24 G. 2. c. 44. § 2, 4), and officers of the customs and excise (23 G. 3. c. 70. § 33. 24 G. 3. s. 2. c. 47. § 35. 28 G. 3. c. 37. § 28) may tender amends before action brought, and plead such tender together with the general issue or other plea, with the leave of the court; or if they have neglected to tender amends, or the tender be insufficient, they may pay money into court, and such proceedings are thereupon to be had as in ordinary cases. *See 2 W. Bl. 859. 6 Esp. 134. 1 H. Bl. 344.*

The plaintiff is bound, by the statutes above mentioned, to prove at the trial the service of the notice, otherwise the defendant shall be entitled to a verdict; and he is restricted in his proof by this notice, in the same manner as he is by a bill of particulars. *See 6 Esp. 134.*

As to damages in actions against justices of peace, *see Vol. 1. p. 198. and see 12 East, 67*; and in actions against officers of the excise or customs, *see Vol. 1. p. 197.*

If the plaintiff obtain a verdict, still, in actions against officers of the customs or excise, he shall not be entitled to costs; if the judge certify that there was probable cause for the seizure, &c.; 28 G. 3. c. 37. § 24; and in actions against justices of peace, he shall not be entitled to costs, unless it be stated in the declaration that the acts complained of were done maliciously, and without reasonable and probable cause; nor shall he be entitled to costs, if it be proved at the trial that he was guilty of the offence of which he was convicted, &c., and that he had undergone no greater punishment than was assigned by law for such offence. 43 G. 3. c. 141. *Vol. 1. p. 198.* But if, in actions against justices, constables, &c. the judge certify that the injury was wilfully and maliciously committed, it seems the plaintiff is entitled to double costs. 24 G. 2. c. 44. § 7.

The defendant, if he have a verdict, or if the plaintiff be nonsuit or discontinue the action, is entitled to double costs, in actions against justices, constables, &c.; 7 J. 1. c. 5; to treble costs, in actions against officers of customs or excise; 23 G. 3. c. 70. § 34. 24 G. 3. s. 2. c. 47. § 35, 39. 28 G. 3. c. 37. § 33; and to double costs, in actions against other persons holding public employment, civil or military, in or out of the kingdom, and having power to commit to safe custody. 42 G. 3. c. 85. § 6. In order to entitle an officer to double or treble costs under these statutes, if it do not appear upon the face of the record that the action was brought against him as such officer, for something done by him in the execution of his duty, he must obtain a certificate to that effect from the judge, at or after the trial. 7 T. R. 448. 1 Doug. 307, 308. n. 2 Str. 974. *and see 3 East, 92.*

Actions against Clergymen.

As to the temporary privilege from arrest, which clergymen enjoy under particular circumstances, see Vol. 1. p. 70. The only other peculiarity in the mode of proceeding against clergymen, is in the execution.

When the sheriff, to a common *feri facias*, returns *nulla bona*, and that the defendant is a beneficed clerk, not having any lay fee (see 1 Sid. 278. Dalt. 219. and see the form of this return, Tidd, Forms, 339. § 34), the plaintiff may sue out a *feri facias de bonis ecclesiasticis*, directed to the bishop of the diocese (see the form, Tidd, Forms, 349. § 51. 10 Went. 353), or to the archbishop, during the vacancy of the bishop's see (see the form, Tidd, Forms, 352. § 55), commanding him to make of the ecclesiastical goods and chattels belonging to the defendant, within his diocese, the sum therein mentioned. See 2 Bac. Abr. Execution, G. 6. 2 Mod. 258. It is tested and returnable, and must be sealed and indorsed, in the same manner as a common *feri facias*. See Vol. 1. p. 265, 266. Take this writ to the registrar of the diocese, who will thereupon issue a sequestration (which is in the nature of a warrant) directed to the churchwardens, requiring them to levy the debt of the tithes and other profits of the defendant's benefice; see the form, Tidd, Forms, 353. § 56. This sequestration must be published in the parish church, during divine service; and as it seems the writ has priority only from the time of this publication (1 Crompt. 359. Tidd, 921), it should be done without delay. Instead of directing this sequestration to the churchwardens, the plaintiff, upon giving security to the bishop, may have it directed to persons of his nomination. 3 Burn. Eccl. Law, 317. Tidd, 920.

If the entire debt be not levied in one diocese, the plaintiff, upon the return of the writ, may have a *testatum fi. fa. de bonis ecclesiasticis* into another diocese, for the residue; or he may have an *alias* into the same diocese. See Tidd, Forms, 351. § 54. and see the entry of *nulla bona* to a *fi. fa.*, and award of *fi. fa. de bonis ecclesiasticis*, Id. 350. § 52.

Or, instead of a *feri facias de bonis ecclesiasticis*, the plaintiff may sue out a writ of *sequestrari facias*, directed, tested, and returnable, &c. as the *feri facias*, commanding the bishop to enter into the rectory and parish church, and to take and sequester the same, and hold them, until of the rents, tithes, and profits thereof, and of the other ecclesiastical goods of the defendant, he have levied the plaintiff's debt. See the form, Tidd, Forms, 351. § 53. This writ is in the nature of a *levari facias*; the writ above mentioned, in the nature of a *feri facias*.

Actions by Paupers.

Who admitted to sue in formâ pauperis.] EVERY poor person, who may have cause of action, shall have writs according to the nature of his case, without paying for the sealing or writing the same; and the justices shall assign him counsel and attorneys, who, together with the officers of the court, shall act *gratis*. 11 H. 7. c. 12. The party applying, must swear that he is not worth 5*l.* excepting his wearing apparel, and the matter in question in the cause. *Lil. Pr. Reg.* 633. *R. H.* 3 & 4 *J. 2. r. 1 (a)*. It is discretionary with the court or chief justice to grant the indulgence of suing thus *in formâ pauperis*; they will not grant it, for instance, in an action for slander. It may be granted either at the commencement of the suit, or at any subsequent period of it; but if granted *pendente lite*, it has no retrospective effect. The privilege also extends only to the cause in which the admission has been granted; *Lil. Pr. Reg.* 633, and see *Hardw.* 311; it is confined to plaintiffs, and cannot be granted to a defendant. *Barnes*, 328. 16 *Vin. Abr.* 259. *pl. 4. Hardw.* 211. 253.

How admitted.] The party may be admitted, either upon motion in court, see *R. H.* 3 & 4 *J. 2. r. 1*, or (which is the mode usually adopted) upon petition to the chief justice. Write an affidavit to the effect above mentioned, on a 2*s.* 6*d.* stamp; see the form, *Tidd, Forms*, 15. § 4. 2 *Sellon*, 83; and have it sworn by the pauper, before a judge or commissioner. Write out a petition also on a 2*s.* 6*d.* stamp, and signed by the pauper, stating the cause of action, and praying to be admitted to sue *in formâ pauperis*, and that counsel and an attorney (naming them) may be assigned to him; see the form, *Tidd, Forms*, 16. § 5. 2 *Sellon*, 83; and at the foot of it, get counsel to subscribe his opinion shortly, that the plaintiff has good cause of action; see the form, *Tidd, Forms*, 16. § 6. 2 *Sellon*, 83. Annex the affidavit to the petition; take them to the chief justice's chambers, and his clerk will thereupon make out the order; pay him 2*s.* 6*d.* If moved for in court, annex the affidavit and opinion to the brief; and afterwards draw up the rule with the clerk of the rules. Take this rule or order to the different offices through which you pass the proceedings, in order to avoid any demand for fees; and annex a copy of it to the declaration, before you deliver or file it.

The proceedings in the cause are the same as in ordinary cases.

Effect of the admission.] After admission to sue in *forma pauperis*, the plaintiff shall be at liberty to carry on all the proceedings without stamps, 5 *W. & M. c. 21. § 14.* and without paying fees to the officers of the court, or to his counsel or attorney. But if he afterwards have judgment in the action, the counsel, attorney, and officers are entitled to their fees, at least to such fees as shall be allowed by the master in taxing the costs; for although they perform their several duties for the pauper gratuitously, his adversary should not be allowed to derive any advantage or benefit from that circumstance.

A pauper is entitled to costs, in all cases in which a defendant must pay them; but in no case is he obliged to pay costs. 1 *B. & P. 39. 3 Wils. 24.* By 23 *H. 8. c. 15. § 2,* he shall not pay costs, but shall suffer such other punishment as the court shall deem reasonable. The only punishment, however, which the court ever inflict, and this only in cases where the pauper has been guilty of very gross laches or other misbehaviour, (*See 2 Str. 878. 983. 6 East, 505. and see 2 Salk. 507. 8 Mod. 344,*) is to dispauper him; but when thus dispaupered, he is not liable for costs previously incurred. *Fortesc. 320. 1 Sid. 261.* The court have indeed stayed proceedings in a second action by a pauper, until the costs of a former nonsuit in an action for the same cause were paid; 2 *T. R. 511;* but there are instances in which they have refused even this. 2 *Str. 1121. 878. and see Id. 891. 3 Wils. 24.*

BOOK IV.

PART I.

INCIDENTS TO TRIAL BY JURY.

CHAPTER I.

Entry of Process upon the Roll, to save the Statute of Limitations.

Process.] SUE out a bill of Middlesex or latitat, &c. against the defendant, as in ordinary cases, within the time limited for bringing the action; take it to the sheriff's office, and get it returned "non est inventus." It is absolutely necessary that the writ be returned, 1 Lutw. 260, 1 L. Raym. 432. 1 Lutw. 279, 280. 3 B. & P. 330. 2 L. Raym. 883. 7 Mod. 5. 6 T. R. 617, even in the case of an attachment of privilege; Willes, 255. 3 B. & P. 330. See 1 Wils. 167 contra; for no writ can be continued, unless it be first returned and filed, see 1 Sid. 60. Comb. 346. 7 Mod. 50. 2 L. Raym. 806, the court, until that time, having no cognisance of the action, so as to enable them to award an alias, &c. If the plaintiff, however, declare within a year after suing out the first process, (provided he have not been nonprosd before that time), continuances are not necessary, and consequently the process need not be returned. 2 T. R. 112. 3 Id. 123. 7 Id. 6. 2 B. & P. 157.

Care must be taken that the writ or precept be actually sued out, before the time limited for bringing the action has expired; it is not sufficient that the writ bears teste before that time. 2 Bur. 950. 1 W. Bl. 215. The writ also should be such as the plaintiff would adopt, if he intended immediately to proceed in the action; thus, a *latitat* (2 Str. 736. 2 W. Bl. 925) or bill of Middlesex, in ordinary cases; an original writ, against members of parliament; 1 Lev. 111. 2 L. Raym. 1113; an attachment of privilege, by an attorney; 2 W. Bl. 1131; and in actions against attorneys or officers of the court, a bill may be filed either in term or vacation, 1 Doug. 313, and the plaintiff may declare thereon at any time afterwards. As to the mode of saving the statute in ejectment, see *ante*, p. 42, 43. 4 Bur. 2604. If there be an error

in the writ or process thus sued out, it is not very material, provided the process be thereby voidable only and not void; as where an attachment of privilege was returnable on a general return day, instead of a day certain, the court held it sufficient to support a continuance, and to save the statute of limitations. 2 *W. Bl.* 1131. *Willes*, 255. 3 *T. R.* 662.

Entry on the roll, &c.] Get a roll of the term in which the writ is returnable, and enter the writ upon it; see the form of entering a bill of Middlesex, with the return, and an award of alias, *Tidd, Forms*, 28. § 46. 2 *Sellon*, 345.—of entering a latitat, return, and award of alias and pluries, with continuances by *vicecomes non misit breve*, *Tidd, Forms*, 29. § 48. 10 *Went.* 403.—of entering an attachment of privilege, *Tidd, Forms*, 117. § 9.—of entering bill and process against a member of the House of Commons, *Id.* 43. § 9. This entry of the process is absolutely essential. 7 *Mod.* 5. 2 *L. Raym.* 883. 6 *T. R.* 617. 3 *B. & P.* 330.

Make out a docket paper; see the form, *Tidd, Forms*, 29. § 47. 2 *Sellon*, 345. Take the writ, roll and docket paper to the clerk of the judgments, and docket the entry, and he will mark the writ; pay him 2s. the entry, 3s. the docket. Then carry in the roll, as directed *Vol. 1. p. 134*; and file the writ with the *custos brevium*.

Entry of continuances.] Afterwards, when you have declared against the defendant, if he plead the statute of limitations, you must have continuances by *vicecomes non misit breve* entered on the roll, from term to term, down to the writ upon which you have declared; see the form, *Tidd, Forms*, 30. They are never entered until the plaintiff is going to reply to a plea of the statute of limitations; and indeed if entered at any time before the defendant rejoins to such a replication, it will be sufficient. See 6 *T. R.* 617, 257. 7 *Id.* 618. Care must be taken that the writ upon which the defendant is arrested or ultimately brought before the court, be of the same species with that originally sued out and entered on the roll, as above mentioned, and that the continuances correspond with both; where the defendant was arrested on an attachment of privilege, and it appeared that a bill of Middlesex had been entered on the roll, and regularly continued to the time the attachment was sued out, the court held that the attachment was no continuance of the bill of Middlesex, and therefore the action must be considered as having commenced only at the time the attachment was sued out. 3 *T. R.* 662. We have seen (*Vol. 1. p. 256*) that continuances of mesne process, and of writs of execution, differ materially in this respect.

CHAPTER II.

Outlawry.

SECT. 1.

Outlawry upon Mesne Process.

What and in what cases.] OUTLAWRY is a punishment inflicted by law, for a contempt in avoiding the execution of the process of the King's court: the party outlawed is to be imprisoned if he can be found; he forfeits his personal chattels presently, and his real chattels and the profits of his lands immediately upon office found; and he is incapacitated from suing in his own right, from serving on juries, &c. In civil actions, however, it is rather in the nature of process to compel the defendant to submit to the jurisdiction of the court: if outlawed upon mesne process, he may, upon putting in and perfecting bail or entering an appearance, reverse the outlawry as of course; if upon final process, he may reverse the outlawry, upon payment of the debt and costs.

Where a defendant therefore keeps out of the way in order to avoid an arrest, outlawry is the proceeding usually adopted to bring him before the court; and it is advisable, where it is intended to hold the defendant to bail, and he has property which can be taken under a special *capias utlagatum*. But in nonbailable actions, the proceeding by original, summons, and *distringas*, mentioned *Vol. 1. p. 297*, is preferable, being much less expensive and more expeditious.

Outlawry may be adopted against men above the age of twelve years, *Co. Lit. 128. a.*, and against women of any age; in which latter case the defendant is said to be "waived," not outlawed. *Id. 122. b.* It lies in all cases in which the plaintiff may proceed by *capias*; see *Vol. 1. p. 276, 277*; and if one of several defendants be arrested, and the others be abroad or out of the way, you cannot declare against the one arrested, until you have proceeded to outlawry against the others. *Vol. 1. p. 108. ante, p. 111. 119. 15 East, 1. 4 Taunt. 299.*

Writ and process.] The action must be commenced by original writ, otherwise process of outlawry will not lie, either upon mesne or final process. 1 *Leon. 329.* 1 *Sid. 281.* and see 1 *Str. 473.* Make out a *precipe*, as directed *Vol. 1. p. 58—62*; and take it to the *curator of the proper county, who will thereupon make out the*

original, and get it sealed. See as to the original, Vol. 1. p. 63—66. If you take the process to the curstitor at any time within the first seven days of the term, he will make the original returnable in the preceding term, which will expedite you materially. Care must be taken, however, that the original do not bear teste, before the cause of action accrued. Vol. 1. p. 65. It must be directed to the sheriff of the county, in which you intend that the defendant shall be outlawed; and it is usual in practice, when expedition is desirable, to outlaw the defendant in London, for he can be there exacted every fortnight, in other counties only every month. The original may be returned by the attorney, as a matter of course.

Take the original to the filacer of the proper county, together with a memorandum of your warrant to sue; (see Vol. 1. p. 24); and he will make out the *capias*, *alias*, and *pluries* at once for you; or you may prepare them yourself, and get him to sign them, as in ordinary cases. It is not absolutely necessary that an affidavit to hold to bail should be made and filed, until the defendant have been arrested; it may be better, however, to make it now, and file it with the filacer, as directed Vol. 1. p. 62. The *capias* must bear teste in term time on the *quarto die post* of the return of the original, must be returnable on a general return day, and have at least 15 days between the teste and return; the *alias* must bear teste on the *quarto die post* of the return of the *capias*, must be returnable on a general return day, and have at least 15 days between the teste and return; and the *pluries* must bear teste on the *quarto die post* of the return of the *alias*, must be returnable on a general return day, and have at least 15 days between the teste and return. When these writs have been made out, and you have got them sealed, you may return them yourself, *non est inventus*; then leave the *pluries* with the filacer, who (as he acts also as clerk of the exigents) will make out the *exigi facias*, and writ of proclamations.

Exigi facias, &c.] The *exigi facias* is a judicial writ, commanding the sheriff to demand the defendant from county court to county court, until he be outlawed; or, if he appear, then to take and have him before the king wheresoever, &c. to answer to the plaintiff of a plea, &c. See the form, Tidd, Forms, 47. § 6. It must be tested in term time on the *quarto die post* of the return of the *pluries capias*, must be returnable in the same or the following term on a general return day, and must have 15 days at least between the teste and return; and if possible, you should regulate the return day so that five hustings or county courts may be held between the teste and return of the writ, in order to save the expense of an *allocatur exigent*. Get this writ signed by the filacer, and sealed.

The writ of proclamations recites the *exigi facias*, and requires the sheriff to make three proclamations, in pursuance of *stat. 31 El. c. 3*; see the form, Tidd, Forms, 49. § 9. It should be directed to the sheriff of the county where the plaintiff resides; *31 El. c. 3*.

§ 1; but in practice it is usual to direct it to the same sheriff the *exigi facias* and other writs were directed to; if directed to a different sheriff, it is called a writ of foreign proclamation; see the form, *Tidd, Forms*, 50. § 10. It must be tested and returnable the same as the *exigi facias*. 31 *El. c. 3. § 1.* Get it signed by the filacer, and sealed. Unless this writ be regularly sued out and returned, according to the directions of the statute, the outlawry will be void. 31 *El. c. 3. § 1.* See 4 *T. R.* 521.

Take these writs to the officers of the sheriffs, to whom they are directed, respectively, and they will be executed. The *exigi facias* is executed, by exacting the defendant at five successive county courts, or in London at five successive hustings, unless before that time the defendant appear and put in bail, &c.; the writ of proclamations is executed by making three proclamations, one in the county court or hustings, one at the general quarter sessions, and the last, one month at least before the *quinto exactus*, on a Sunday immediately after divine service, at or near the usual door of the church or chapel of the town or parish where the defendant resided at the time of the awarding of the exigent. 31 *El. c. 3. § 1.*

If you find by the sheriff's return to the writ of *exigent*, that there have not been five county courts or hustings between the teste and return of it, sue out with the filacer another writ, called an "*allocatur exigent*;" (see the form, *Tidd, Forms*, 49. § 8), and leave it with the sheriff, as above directed, who will thereupon exact the defendant at the next and subsequent county courts or hustings, so as to make the number of county courts or hustings at which the defendant has been demanded upon both writs, five. If upon this writ the defendant be not demanded the requisite number of times, you may sue out another writ of *allocatur exigent*, and have it executed in the same manner.

The defendant must be exacted upon these several writs, at successive county courts or hustings; for if any county court or husting have intervened, the several writs of *exigent*, &c. already executed are without effect, and you must sue out an *exigi facias* and writ of proclamation *de novo*. 2 *Sellon*, 285. see *Plowd.* 371. 3 *Lev.* 245.

Appearance, &c.] If before the return of the *exigent* the defendant wish to appear voluntarily; then, in noubailable actions, let him enter an appearance with the filacer, of the term in which the *exigent* issued, as directed *Vol. 1. p. 300*, who will thereupon make out a supersedeas; pay him 8s.; or you may make out the supersedeas yourself, (see the form, *Tidd, Forms*, 52. § 13) upon getting a note of particulars of the *exigent* from the filacer, and get him to sign it. Get it sealed, pay 7d. Leave it at the sheriff's office, before the return of the *exigent*, and he will thereupon cease to execute the latter writ, and make a return to it accordingly; pay him 2s. 6d.; see the form of the return, *Tidd, Forms*, 52. § 14. If the action be bail-

able, the defendant must put in and perfect special bail (which is done as in ordinary cases), before the filacer can issue the *superseas*. 3 Bur. 1920.

If the defendant be arrested on the *exigent*, he must give bail to the sheriff as in ordinary cases, or remain in custody.

But if the defendant be not arrested on the *exigent*, nor appear voluntarily, as above mentioned, then, after being exacted five times and proclaimed thrice, he is outlawed. The writ of *exigent* is then returned, with the five exactions thereon stated with certainty as to time, place, &c. together with the judgment of outlawry by the coroner, or in London by the recorder; see the form of this return, *Tidd, Forms*, 48. § 7. and see 5 T. R. 202. 4 *Id.* 521. The writ of proclamations must also be returned; see the form of the return, *Tidd, Forms*, 51. § 11, 12. File the writ of proclamations with the *custas brevium*; and take the writ of *exigent* and return to the filacer, who, as clerk of the outlawries, will make out the *capias utlagatum*.

Capias utlagatum, &c.] The *capias utlagatum* is general or special; the former against the person only, the latter against the person, lands, and goods. The general writ of *capias utlagatum* commands the sheriff to take the defendant, so that he have him before the king on a general return day, wheresoever, &c. to do and receive what the court shall consider of him. See the form, *Tidd, Forms*, 52. § 15.—the like, into a county palatine, *Id.* 53. § 16. 10 *Went.* 284. Both this and the special writ may issue into any county, at the option of the plaintiff, without being *testatum* writs. 1 *Vent.* 33, *Gilb. C. B.* 17. *Tidd*, 133.

When the defendant has been arrested on the *capias utlagatum*, if the action be nonbailable, the sheriff shall discharge him, upon an attorney's undertaking in writing to appear for the defendant and reverse the outlawry. 4 & 5 *W. & M. c.* 18. § 4. Or if the action be bailable, the sheriff shall discharge him, upon his giving a bond, with two sufficient sureties, for double the sum for which special bail is required, conditioned for his appearance by attorney at the return of the writ, (or if given after the return, then for his appearance at some return in the following term, *Id.* § 5), to reverse the outlawry, and to do and perform such other things as shall be required by the said court; *Id.* § 4; which "other things" include putting in bail to a new action (see 1 *Barn. and Ald.* 131), pleading within a limited time, putting the plaintiff as nearly as possible in the same condition he would otherwise have been in, and the like. Or, the plaintiff may, if he will, instead of putting the defendant to reverse the outlawry, consent to his being discharged by *superseas*, upon his putting in and perfecting bail. See the form of the *superseas* in such a case, *Tidd, Forms*, 69. § 35.

The sheriff is bound to take the bond above mentioned, in bailable actions, whether there be any sum indorsed on the *capias utlagatum* or not. 3 Bur. 1482. The plaintiff, however, should, as soon as the defendant is arrested, make an affidavit of debt and

file it with the filacer (if he have not already done so), and should give a memorandum or copy of it to the officer in whose custody the defendant is.

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Special capias utlagatum, &c.] The special *capias utlagatum*, like the general writ, commands the sheriff to take the defendant; and thus far, it is executed, and the defendant is discharged upon an attorney's undertaking or upon giving a bond to the sheriff, in the same manner as when the writ is general. But the special writ also commands the sheriff to enquire by a jury of the defendant's goods and lands, to extend and appraise the same, and to take them into the king's hands and safely keep them, so that he may answer to the king for the value and issues of the same. See the form, *Tidd, Forms*, 53. § 17. Get it signed by the filacer, and sealed. As the enquiry and extent in this case, however, are merely to compel the appearance of the defendant; if he be arrested, and give the undertaking or bond above mentioned, before this part of the writ be executed, it would be a very harsh proceeding to enquire of and extend his property afterwards, and, I believe, is never done. But if he have not been arrested, or have not given the undertaking or bond above mentioned, or have not appeared or put in bail to the original action, the sheriff must summon a jury to enquire of the defendant's property, real and personal, in possession and in action, and to appraise the same; and you may subpoena witnesses before the inquest, to prove the defendant's interest in the property and its value. As soon as the inquest is taken, the sheriff takes possession of the property found by it, and returns the special *capias utlagatum*, annexing thereto the inquisition. See the form of the inquisition, *Tidd, Forms*, 54. § 19. The writ and return must be filed with the filacer, as clerk of the exigents, 3 *T. R.* 578, who will give you a transcript of it for the exchequer. As to the sheriff's right to poundage, upon executing this writ, see 2 *M. & S.* 294; and as to a landlord's right to his rent, where goods, &c. are thus taken on a *capias utlagatum*, see 7 *T. R.* 259.

If the defendant have not as yet appeared or put in bail, and there be no probability of his doing so, you may proceed to obtain satisfaction for your debt and costs out of the property thus seized. For this purpose, take the transcript the filacer has given you to your clerk in court in the Exchequer, who, after giving a rule for persons to come in and claim the property seized, will upon the expiration of that rule make out for you a *venditioni exponas*, commanding the sheriff to sell the goods, (see the form, *Tidd, Forms*, 56. § 20. —and the return to it, *Id.* 57. § 21), a *levari facias*, to levy the issues and profits of the freehold lands (see *Vol. 1. p. 275*), and a *scire facias*, to recover debts due to the defendant, (*Gill. C. B.* 16. 1 *Lutw.* 330. *Tidd*, 137) if necessary. Take these writs (or such of them as you may think proper to sue out) to the sheriff, who will thereupon sell the goods, levy the issues, or summon the parties on the *scire facias*, as thereby directed.

When the goods have been sold, &c. if the amount do not exceed the sum of 50*l.* move the court of Exchequer that it be paid to you, and an order will be granted accordingly. Your clerk in court will thereupon draw up the order, and also a subpoena requiring the sheriff to pay you the money; and the sheriff being served therewith, will pay you the amount mentioned in the return to the *venditioni exponas*, deducting his poundage.

But if the money in the sheriff's hands exceed the sum of 50*l.* then petition the lords of the treasury that it may be paid over to you, (see the form of the petition, 2 Sellon, 289. Tidd, Forms, 59. § 23), who will thereupon refer it to the solicitor of the treasury; (see the form of the reference, 2 Sellon, 290. Tidd, Forms, 60. § 24). Get a certificate of the proceedings upon the outlawry, from your clerk in court, (see the form, Tidd, Forms, 60. § 25); make an affidavit of the debt and costs, before a baron, (see the form, Tidd, Forms, 61. § 26); and leave these, together with your attorney's bill, and the *venditioni exponas* and return, before the solicitor of the treasury, who will thereupon make his report; (see the form, Tidd, Forms, 61. § 27). File this report with the clerk of the treasury; and a warrant will then be issued, directing the attorney-general to consent to an order; (see the form, *Id.* § 28); which being taken to the attorney-general, he will give his consent of course. Then move the court, and get the order and subpoena from your clerk in court, as above mentioned; and the sheriff, upon being served with the order, &c. will pay you the money. This proceeding usually costs from 20*l.* to 25*l.*

In the same manner, if your debt be considerable, and the chattel property not sufficient to satisfy it, you may obtain a lease or grant of the king's right to levy the issues of the defendant's freehold lands, by petition to the lords of the treasury. A warrant will thereupon be granted for the lease, and the lease be made out at the Pipe-office of the court of Exchequer. 2 Sellon, 290—292.

Declaration after outlawry.] If the defendant enter an appearance, or put in and perfect bail, before he is outlawed, as mentioned *ante*, p. 160, the plaintiff may declare against him as in ordinary cases in actions by original. But if he be once outlawed, the process hitherto sued out against him is determined, and you cannot declare upon it. *But see 4 Taunt. 691.* Upon reversing the outlawry, however, the defendant appears to a new action to be brought against him by the plaintiff for the same cause; and the plaintiff has until the end of the second term next after the reversal of the outlawry, to declare against him. 31 *El. c. 3. § 3.* If after that time the defendant refuse to receive a declaration, his bail are discharged, and the plaintiff will be obliged to sue out new process against him. If the plaintiff declare in time, he is not obliged to lay his venue in the county into which the original writ issued; but may lay it in any other county, at his pleasure. 3 *Lev. 245.*

Where there are two defendants, and one only has appeared or

is in custody, then after proceeding to outlawry against the other, you may declare against the one who has appeared, alone, stating the outlawry of the other in the commencement of your declaration. See 15 East, 1. 4 Taunt. 299. ante, p. 158. 119. 111. and Vol. 1. p. 108. and see 1 M. & S. 242.

SECT. 2.

Outlawry upon final Process.

IF the action were commenced by original, then if *non est inventus* be returned to the *ca. sa.*, you may (without suing out an *alias* or *pluries ca. sa.*) sue out an *exigi facias* as directed ante, p. 159; see the form, Tidd, Forms, 407. § 106; and upon the return thereof sue out a *copias utlagatum*, general or special, as directed ante, p. 161, 162. A writ of proclamations is not necessary. The *ca. sa.* in this case must have 15 days at least between the teste and return. 13 C. 2. st. 2. c. 2. § 6. Vol. 1. p. 259.

If the defendant be arrested on the *copias utlagatum*, he must remain in custody until he have reversed the outlawry. See 4 Bur. 2539, 2540. If his property have been taken under special *copias utlagatum*, you may proceed to get the produce of it paid over to you in satisfaction of your debt and costs, as directed ante, p. 162, 163.

SECT. 3.

Reversal, &c. of Outlawry.

THE defendant may be relieved from the outlawry, either by reversing it, or by obtaining the king's pardon.

There are two modes of reversing a judgment of outlawry: upon motion; or by writ of error *coram nobis*. The latter, however, is seldom or ever resorted to in practice, being much more expensive and dilatory than the former; for the court will now reverse an outlawry upon motion, for error in fact not appearing upon the record, (such as that the defendant was in prison, or beyond sea, at the time of the *exigent* awarded, 3 Taunt. 114. 4 Id. 691. 1 Barn. & Ald. 131) as well as for defects or errors in the proceeding apparent on the record.

Reversal upon motion.] The court, or a judge at chambers, will reverse the outlawry as a matter of course, upon condition that, in outlawry upon mesne process, the defendant put in and perfect bail, or enter a common appearance, to a new action, according as the action is bailable or otherwise: in outlawry upon final process, upon the defendant's satisfying the plaintiff his debt or damages; and in both cases upon payment of costs. See 14 East, 536. 4 Taunt. 691.

In nonbailable actions, the court order the defendant to enter a common appearance; in bailable actions, to put in and perfect bail. See 4 and 5 W. & M. c. 18. § 3. In this latter case, however, it is entirely in the discretion of the court, whether the recognizance be in the alternative, to pay the condemnation money or render the defendant; or absolute, for the payment of the condemnation money, as in the case of bail in error; 1 Barn. & Ald. 131; where the defendant was abroad at the suing out of the exigent, and it appeared that he had not gone abroad for the purpose of avoiding the process of the court, bail in the alternative merely was required. *Id.* and see 1 M. & S. 409. 8 East, 527. 12 East, 622. 624. To this, however, there is one exception, namely, where the defendant seeks to reverse the outlawry for want of proclamations; then before the allowance of the writ of error, or reversing the outlawry by plea or otherwise, he must put in bail, not only to appear and answer the plaintiff, but also to satisfy the condemnation, provided the plaintiff shall begin his suit before the end of two terms next after allowing the writ of error, or otherwise avoiding the outlawry; 31 Et. c. 3. § 3; in which case it is not at the discretion of the court to order the recognizance to be in the alternative. Formerly the defendant was obliged to appear in person, when he applied to reverse an outlawry; but now he may appear by attorney. 4 and 5 W. & M. c. 18. § 3.

In order to reverse the outlawry upon mesne process, in non-bailable actions, enter an appearance for the defendant, as directed Vol. 1. p. 300; and get a certificate from the filacer of your having done so. Get a copy of the exigent, and mark on it some common error (if no real error be in the proceedings) such as the want of addition, or that the defendant was in prison or out of the country at the time of issuing the exigent, or the like; and take these to a judge at chambers, and he will make an order for the reversal of the outlawry, upon payment of costs. Take the order to the filacer, who will thereupon enter the proceedings on the roll (if they have not already been entered by the plaintiff), and docket the same in his office. Then take the order and roll to the master, who will mark in the margin of the roll that the outlawry is reversed; after which you take the roll back to the filacer, who will mark the outlawry, reversed, in his book, and enter the reversal on the roll. See the form of the entry, Tidd, Forms, 66. § 33. You then take the roll, and file it in the treasury, as directed Vol. 1. p. 134. If the outlawry have been entered on the roll by the plaintiff's attorney, you must take the order to the master, who will thereupon attend at the treasury, and mark the roll; after which the filacer enters the reversal on the roll, and strikes the entry of the outlawry out of his book, as above mentioned. If the order be drawn up on payment of costs, the costs must of course be taxed and paid before the outlawry can be reversed.

In bailable actions, as soon as your bail have justified, or, if done at any time afterwards, then upon affidavit of the bail having justified, move the court to reverse the outlawry. Previously to making the motion, give the copy of the exigent, marked as above

mentioned, to the master, who will shew it to one of the judges at the time the motion is made. Then take the rule to the filacer, and proceed as above directed.

The defendant may also sue out a *supersedeas* with the filacer, upon which he shall be discharged out of custody, if taken on the *capias utlagatum*, or it will prevent the sheriff from executing a *capias utlagatum*, general or special, against him in the same cause, if not already executed. Or if his property be still in the sheriff's hands under a special *capias utlagatum*, and the produce of it not paid over to the plaintiff, see 2 Lev. 49. and see 5 Co. 90. Cro. El. 278, it shall be restored to him, by writ of *amoveas manus* or other proceeding in the court of Exchequer, for which he must apply to his clerk in court.

When the defendant is outlawed after judgment, he may reverse it upon application to a judge at chambers. As the condition of reversing it in this manner, however, is, the payment of the debt and costs to the plaintiff, you must first get him to enter satisfaction on the roll, before you can make the application. Get a certificate to that effect from the clerk of the treasury; and take it, together with a copy of the exigent marked as above mentioned, to a judge at chambers, who will thereupon make an order. Afterwards you proceed as above directed.

Reversal by writ of error.] Judgment of outlawry may be reversed by writ of error *coram nobis*, either for matter of law apparent upon the record, or for matter of fact not appearing upon it. See Vol. 1. p. 212. As to the mode of proceeding in this case, see Vol. 1. p. 243—249. and see the form of the writ of error, Tidd, Forms, 65. § 31. 2 Sellon, 302.—and of the assignment of errors, Tidd, Forms, 65. § 32. 2 Sellon, 303. Bail must be put in and perfected in the same cases and in the same manner, as where the outlawry is reversed upon motion, &c. If the judgment be reversed, the *supersedeas* is made out and signed by the clerk of the errors.

This mode of proceeding by writ of error, however, is very seldom adopted in practice; for the court will always afford relief upon motion, as already mentioned, if the defendant be willing to comply with those conditions upon which alone they will grant it, namely, entering an appearance or putting in and perfecting bail, where the outlawry was upon mesne process; or paying debt and costs, where the outlawry was upon final process. There may be cases, however, in which reversing an outlawry by writ of error may be advisable.

Costs.] The party reversing the outlawry, is in all cases obliged to pay the costs. See 1 M. & S. 409. 14 East, 536. 4 Taunt. 691. 1 Barn. & Ald. 131. But where it has appeared that the plaintiff proceeded to outlawry, merely for the purpose of harassing and oppressing the defendant,—as where it appeared that the defendant was actually in custody at the suit of the plaintiff for another cause of action, at the time of the exigent awarded, 2 Salk. 495, or where the defendant was constantly to be met with, and

might have been arrested or served with process, *T. Jon.* 211. *Comb.* 19. 12 *Mod.* 413. See *Barnes*, 320. 322,—the court have ordered the plaintiff to reverse the outlawry at his own expense, *Tidd*, 142. 2 *Sellon*, 297—299.

CHAPTER III.

Removal of Prisoners into the Custody of the Marshal.

PRISONERS in the custody of the sheriff, or in the prisons of inferior courts, may be removed into the custody of the marshal, by the writ of *habeas corpus ad faciendum et recipiendum* (usually called a *habeas corpus cum causâ*), or by the writ of *habeas corpus ad respondendum*, or the writ of *habeas corpus ad satisfaciendum*, according to circumstances.

Habeas corpus cum causâ.] If the defendant be in custody of the sheriff, or in the Fleet or other prison, under process of this court, he has a right to remove himself into the custody of the marshal, if he wish it, by this writ of *habeas corpus cum causâ*, even although he should also at the same time be detained upon process of the Common Pleas or other courts. Or if he be not in custody upon process of this court, but upon the process of some inferior court (not being the court of Common Pleas, Exchequer, or perhaps the courts of Wales or the counties palatine, see 2 *Doug.* 749. *Gilb. Exec.* 201.) only, he has a right to remove himself into the custody of the marshal by this writ, if he wish it, in which case the action commenced in the inferior court is also removed with him. See the next Chapter. Or he may remove himself by this writ, when he is in custody of the sheriff under process of the court of Common Pleas, Exchequer, &c. only, by previously getting one of his creditors to make an affidavit to hold him to bail, and thereupon suing out process in this court, and lodging it with the sheriff in whose custody he is. Or if he be in custody in the Fleet under process of the court of Common Pleas, Exchequer, &c. only, he may remove himself into the custody of the marshal, by getting a creditor to sue out a bailable writ against him in this court as above mentioned, putting in special bail to it, and then having himself brought up by *habeas corpus cum causâ* for the purpose of rendering in discharge of his bail.

The plaintiff also may remove the defendant from the custody of the sheriff, by this writ, in order to declare against him in the custody of the marshal; 3 *Bur.* 1875; which, however, never occurs in practice, (unless done at the desire of and to oblige the defendant), because the plaintiff may as well declare against the defendant in the custody of the sheriff, without removing him. See *ante*, p. 114.

By this writ also, a prisoner in the Fleet, or in the custody of the marshal, sheriff, &c. may be brought up, in order to be rendered by ~~his bail, in an action pending~~ in this court; Vol. 1. p. 285, 288; after which he will be committed to the custody of the marshal; unless he be in custody upon a criminal account, in which case the court usually remand him to the prison from whence he has been brought. See the cases cited Vol. 1. p. 285.

This writ may be sued out in term or vacation; but it must bear teste in term. It may be made returnable *immediatē*. En-gross it on a 5s. stamped parchment; see the form, Tidd, Forms, 120. § 2. & Sellon, 263; write out a *præcipe*; see the form, Tidd, Forms, 120. § 1. Take them to the signer of the writs, and get the writ signed; pay 6s. 8d. in term, 7s. 8d. in vacation; get it sealed, pay 7d. Take it to the office of the sheriff or officer in whose custody the defendant is, and he will have him brought up to the judge's chambers; pay him 9s. 4d. for the first action, and 2s. 4d. for each of the others (if any); and pay for taking him to the judge's chambers, 10s. 6d. in town, or 1s. per mile if at a distance from London. See 1 Str. 308. 2 Id. 814. If the officer, to whom the writ is directed, do not obey it, he will be liable to an attachment. When the prisoner is brought up to chambers, any of the judges who are then sitting (although the writ be returnable before the chief justice only) will commit him to the King's Bench prison, and he will be sent there in the custody of a tipstaff. If the writ be directed to the marshal, it remains with him, and is not returned to this court; 2 M. & S. 202; and the same, when directed to the warden of the Fleet. As to the mode of proceeding, where the defendant is brought up for the purpose of being rendered in discharge of his bail, see Vol. 1. p. 288. 286. 287.

[*Habeas corpus ad respondendum*.] If a defendant be in custody of the sheriff or marshal, upon process issuing out of this court, and be removed to the Fleet before declaration, the plaintiff we have seen (*ante*, p. 112) must either remove him back into the custody of the marshal by this writ of *habeas corpus ad respondendum*, in order to declare against him, or commence a new action against him in the Common Pleas.

Or if you wish to commence aailable action in this court against a prisoner in the Fleet, you may have him brought up to court for the purpose, by this writ. The court, however, have refused this writ, to bring up a prisoner in the house of correction, for the purpose of charging him with a declaration in this court, that prison being by statute under the cognizance of justices of peace only, and the keeper appointed by them. 9 East, 154. and see 1 Sulk. 351, 2 L. Raym. 789. 2 Str. 936. So they have refused it, to bring up a prisoner from the Marshalsea prison, where the plaintiff wished to charge him with a declaration in this court for the same cause of action for which he was already in custody. Cowp. 116.

This writ must be tested in term, and returnable in court on a

day certain. Sue it out in the same manner as the *habeas corpus cum causa*; vide *supra*; see the form of the writ, *Tidd, Forms*, 120. § 3, 4. 2 *Sellon*, 260. Make an affidavit to hold to bail, and prepare a bill and copy as directed *ante*, p. 111; file the bill with the clerk of the declarations, and file the affidavit with the clerk of the rules, and get the copy of the bill marked by him, as directed *ante*, p. 113. Then, when the defendant is brought up to court, give the copy of the bill to the master, and he will charge him with the action; after which he is committed to the custody of the marshal.

By *R. M.* 1654. § 7, when a *habeas corpus ad respondendum* is delivered to the officer to whom it is directed, it is a good cause of detainer, in the same manner as when a *capias* is lodged with the sheriff.

It has been holden that after a prisoner is removed into the custody of the marshal under this writ, he cannot be removed into any other custody, until he have answered to the action here. 1 *Salk.* 350.

Habeas corpus ad satisfaciendum.] If a defendant against whom you have a judgment in this court, be a prisoner in the Fleet or in the prison of any inferior court, you may have him brought up here by writ of *habeas corpus ad satisfaciendum*, in order to charge him in execution.

This writ must bear *teste in term*, and be returnable in court upon a day certain. Sue it out in the same manner as the *habeas corpus cum causa*; see *ante*, p. 168. See the form, *Tidd, Forms*, 121. § 5, 6. 2 *Sellon*, 262; indorse the number of the roll on it. Having made a duplicate of it, deliver the writ to the officer to whom it is directed, who will bring the prisoner up to court on the return day. When the prisoner is brought up, give the duplicate of the *habeas* to the judge's clerk, who will take it to the master; and the master will then mark the commitment on the duplicate, and give it to the tipstaff, in whose custody the prisoner is taken to the King's Bench prison; the *habeas* itself is filed in court. Pay the master 2s., the judge's clerk 4s., clerk of the papers 1s., deputy marshal 2s., and usher 6d.; and pay the tipstaff 10s. 6d. As to the mode of charging the defendant in execution, see *ante*, p. 113.

CHAPTER IV.

Removal of Causes from inferior Courts.

CAUSES from inferior courts, not being courts of record, may be removed into this court by writs of *pone*, *recordari facias loquelom*, or *occedas ad curiam*, according to circumstances; and from inferior courts of record, by *habeas corpus* or *certiorari*. But as causes depending in inferior courts not of record, are never in

practice removed into this court, excepting in replevin, it is merely necessary here shortly to refer to a former part of this volume, (p. 66), where the writs of *pone*, *recordari facias loquelam*, and *cedas ad curiam*, have been already noticed. The writ of *certiorari* also seldom occurs in practice in civil cases, and the reader is therefore referred to Mr. Tidd's Practice for an account of it. We shall accordingly confine our attention in this chapter, to the writ of *habeas corpus cum causa*, as being the one uniformly sued out, in order to remove causes into this court from inferior courts of record.

Habeas corpus, and in what cases.] It has been already observed that this writ of *habeas corpus cum causa*, when directed to inferior courts of record, removes not only the body of the prisoner, but also the several actions with which he is there charged, into this court, and the prisoner is thereupon committed to the custody of the marshal. *Ante*, p. 167. This writ, however, does not lie in all cases. In the first place, it lies only in cases where the defendant has been brought before the inferior court by process against his person, bailable or nonbailable. Secondly, it does not lie, where the debt or damages laid in the declaration in the court below do not amount to 5*l.*, if the steward or judge of such court be a barrister of three years standing; unless the action concern the freehold or inheritance, or title to lands, lease or rent; 21 J. 1. c. 23. § 4. 6. and see 1 Bur. 515; or if there be several causes, some under and others above 5*l.*, those only which are above 5*l.* shall be removed by the *habeas*. 12 G. 1. c. 29. § 3. And thirdly, it lies not in cases where the action is maintainable only in the inferior court; as for instance, where an action is brought in the courts in London for calling a woman a whore, *Carth.* 75, or against a feme covert as sole trader, 2 W. Bl. 1060, it cannot be removed by this or any other writ, unless by writ of error.

The writ is the same in every respect as is mentioned *ante*, p. 168, excepting that instead of being directed to the sheriff or gaoler, it is directed to the judge or steward of the inferior court. See the forms of directions, *Tidd, Forms*, 134. § 6—137. and see the form of the writ, *Tidd, Forms*, 120. § 2. Sue it out in the manner directed *ante*, p. 168. and leave it with the clerk of the papers or secondary of the inferior court. It must be delivered to the judge or officer of the inferior court, at latest before any of the jury are sworn; 43 El. c. 5; or before issue or demurrer joined, if such issue or demurrer be not joined within six weeks after the arrest or appearance of the defendant; 21 J. 1. c. 23. § 2; or before any one of the inquest are sworn, after a judgment by default: 2 Bur. 759: otherwise the writ shall not be received or allowed by such judge or officer, and the inferior court may proceed in the cause.

How obeyed.] In cases where the writ lies, it has the effect of suspending all proceedings in the actions against the defendant in

the inferior court, immediately upon its being delivered to the officer; 1 *Salk.* 352; and the writ must be obeyed without delay (see 4 *Bar.* 1875) by bringing up the defendant, (if in custody), see *ante*, p. 168, and by returning the causes with which he stands charged. The record itself, however, is not removed into this court, but remains in the court below. 1 *Salk.* 352. If under the particular circumstances of the case the writ does not lie, those circumstances must be stated specially in the return.

Bail.] If the defendant be in custody when the writ is delivered to the court below, he is removed by it into the custody of the marshal, as already mentioned, *ante*, p. 168; after which he may put in bail in the manner hereinafter directed, and be discharged. But if he be not in actual custody when the writ is returned, he must put in special bail, or file common bail, in this court, according as the action is bailable or nonbailable, if called upon to do so.

The defendant should not be admitted to bail by the court below, after the delivery of the writ; nor can he, whether in custody or not, put in bail in this court, until the writ be actually returned. *R. M.* 1651. *R. E.* 29 C. 2. *R. H.* 10 W. 3. If the defendant be not in custody, he may either put in bail voluntarily, or the plaintiff may compel him to do so by obtaining from one of the judge's clerks a rule for a *procedendo* unless the defendant put in bail within 4 days after notice thereof, if in term, or after 6 days if in vacation; see *R. M.* 1654. § 8. *R. H.* 10 W. 3. (a); pay 5s. 6d. in term, 4s. 6d. in vacation. There is no time limited for the plaintiff's obtaining this rule; he may do it at any time after the return of the writ. *Barnes*, 90.

Special bail is put in thus: *Engross the bail piece on a 2s. 6d. stamped parchment; see the form, Tidd, Forms, 138. § 7; and annex it to the habeas corpus and return. Take these to the judge's chambers, or to a commissioner in the country, and, having the bail with you, their recognizance will be taken as in ordinary cases by bill; see Vol. 1. p. 81. 90. see the form of the recognizance, Tidd, Forms, 138. § 8. Give notice to the plaintiff's attorney, as in ordinary cases, of bail being put in; see the form, Tidd, Forms, 138. § 9. and see Vol. 1. p. 82.*

The plaintiff is allowed 28 days after service of the notice of bail, to except to them; and if he do not except to them within that time, the defendant's attorney shall file the bail piece within 4 days afterwards. *R. M.* 16 C. 2. But if he intend to except to them, then let him (as above directed) get another rule for a *procedendo*, unless bail be perfected within 4 days after service of the rule; *R. M.* 16 C. 2. (c.); and serve a copy of it on the defendant's attorney. See 1 *Salk.* 97.

When the defendant is served with this rule, if there remain four days of the term, the notice of justification, or of adding and justifying, must be given, as in ordinary cases, and the bail must justify, within the four days, otherwise the plaintiff may sue out

a *procedendo*; or if there be not 4 days remaining of the term, then notice of justification, or of adding and justifying, must be given within 4 days after the service of the rule, and the bail must justify on the first day of the following term, otherwise a *procedendo* may be sued out. 2 *Sellon*, 272. *see Vol. 1. p. 84.* The bail justify as in ordinary cases. *See the form of the notice of justification, Tidd, Forms, 139. § 10. As to the liability of the bail, see R. H. 2 I. 2. (a). Tidd, 337. 2 Sellon, 273.* It may be necessary to mention here, that by putting in bail in this court, the bail in the court below (if any were given) are discharged; even although the bail below (by the custom of the court) were liable absolutely, to pay the condemnation money and costs, and the bail in this court liable in the alternative merely, to pay or render. *MS. M. 1814. 3 M. and S. 328.*

In nonbailable actions, you file common bail thus: *Engross the bail piece, and annex it to the habeas and return, as above directed: file the same at the judge's chambers, and give notice to the plaintiff's attorney of your having done so.* 2 *Sellon*, 271. In cases, however, where the cause of action does not amount to 10*l.*, the defendant, before he can even remove the cause from the court below, must enter into a recognizance there, with two sufficient sureties, in double the sum due, for the payment of the debt and costs, in case judgment shall pass against him. 19 *G. 3. c. 70. § 6.*

Procedendo.] If the defendant do not put in bail within the time limited by the rule for that purpose, the plaintiff upon application to the judge's clerk may have a writ of *procedendo* directed to the inferior court, commanding them to proceed in the action. Yet if bail be put in after the expiration of the rule, and before the *procedendo* sued out, it seems the *procedendo* cannot be sued out afterwards. So, if the defendant render himself after the expiration of the rule, the *procedendo* cannot afterwards be sued out. 16 *East*, 357. *and see 5 East*, 533.

So, if the defendant do not justify his bail within the time limited by the rule for better bail, the plaintiff may sue out a *procedendo*. *Ante*, p. 171. Also, if the court below state in their return to the *habeas* circumstances, from which the court judge that the writ ought not to have issued, a *procedendo* will be awarded. *See Carth. 75. 2 W. Bl. 1060. 1 Salk. 352. 6 T. R. 760. and see 1 Str. 527.*

After the cause has thus been remanded, it can never afterwards be removed before final judgment. 21 *J. 1. c. 23. § 3.* Even where the plaintiff, after the cause was thus remanded, recovered in the court below, and then sued the bail below upon their recognizance, who removed the proceedings into this court by *habeas*, the court upon application awarded a *procedendo*. 6 *T. R. 365.*

The writ must be engrossed on a 5s. stamped parchment; see the form, Tidd, Forms, 139. § 11. 2 Sellon, 276. Get it signed by the signer of the writs, pay 5s. 8d.; and sealed, pay 7d. Take it to the

secondary of the inferior court; and the cause will then be proceeded in, from the stage in which it was at the time the *habeas* was served. www.libtool.com.cn

Proceedings after removal.] After the cause has been removed into this court, the plaintiff may proceed in the action or not, at his discretion; there is no means of compelling him to do so. 3 *M. and S.* 93. If he do proceed, he must begin *de novo*, by declaring against the defendant as in the custody of the marshal, whatever may have been the stage in which the cause was in the inferior court at the time it was removed. *R. M.* 16 C. 2 (c). 1 *Salk.* 352. And the plaintiff must declare within the second term inclusive after bail has been put in and perfected, otherwise the cause will be out of court, and the defendant need not receive the declaration; *Barnes*, 90. 1 *Str.* 631; but he cannot *nonpro*s the plaintiff. *R. M.* 16 C. 2 (c). 1 *T. R.* 372. The plaintiff, however, cannot declare before bail is put in. There is no objection to the plaintiff's declaring in a different form of action from that which he commenced in the court below, provided it be for the same cause of action, 1 *Wils.* 277, and not for a larger amount, 3 *Salk.* 55.

The time for pleading is the same as in ordinary cases; see *Vol.* 1. p. 112; but no imparlance is allowed. 6 *T. R.* 752. The subsequent proceedings are the same as in ordinary cases.

If the plaintiff have judgment, he shall be entitled to and allowed the costs of the proceedings in the inferior court. *R. M.* 1654. § 22.

CHAPTER V.

Claim of Conusance.

In what cases.] INFERIOR courts of record (2 *Inst.* 140. *Co. Lit.* 117 b.) having a grant of "conusance of pleas," with or without exclusive words, may claim conusance, if an action for a cause within their conusance be brought in this court. See 2 *Bac. Abr. Courts*, D. 3. 1 *Sellon*, 257. *Hardr.* 509, 510. *Carth.* 11. 354. But conusance shall not be allowed, when the franchise claiming it cannot give a remedy, and when consequently there would be a failure of justice; 1 *Ro. Abr.* 489; as in *quare impedit* (44 *E. 3.* 29 b. 26 *E. 3.* 79. *Co. Lit.* 134.) replevin (38 *E. 3.* 31. 2 *Inst.* 140. *Bro. Conusance*, 4, 23), waste (1 *H. 4.* 5), or attain (1 *Dy.* 202. *Keilw.* 210. *Co. Lit.* 294); nor shall it be allowed after the cause has been removed from the inferior court by writ of error, (50 *Ass.* 9), or where the corporation or lord to whom the franchise was granted, are themselves parties, (*Burd.* 88. pl. 134. *Hob.* 87), or in *quo*

servants informations, (*Keble*. 88—90); nor shall it be allowed, where the defendant is a stranger not having any property within the franchise (*22 Ass.* 83), or where the action here is against an heir on the bond of his ancestor, and he hath no assets within the jurisdiction of the inferior court; (*Cro. Jac.* 502, *2 Ro. Rep.* 48); nor shall it be allowed, where the plaintiff is an attorney or officer of this court, and consequently privileged to sue here (*Lit. Rep.* 40. 304. *3 Leon.* 149. *1 L. Raym.* 342. *ante*, p. 105). The defendant's being in the custody of the marshal, however, does not oust the inferior court of its jurisdiction. *Bro. Conusance*, 50. *Carth.* 12. *1 L. Raym.* 135.

As to the species of actions in which conusance is allowed, it depends entirely upon the charter by which the franchise has been granted: the universities have conusance in personal actions only; *see Lit. Rep.* 252. *Cro. Car.* 87, 88. *15 East*, 634. *11 East*, 543; in other cases the conusance is usually confined to local actions; *4 Inst.* 213. *Tidd*, 568; but in all cases, the actions, in which it is claimed, must be such as were in *esse* at the time of the charter, and not subsequently created by statute. *14 H. 4*, 20, *see 22 E. 4*, 23. *2 Bac. Abr. Courts*, D. 3.

When to be made.] Conusance must be claimed before the defendant has pleaded, *Barnes*, 346; and even before imparlance; *Willes*, 233; and in cases where the cause of action appears in the writ, as in trespass or *assumpsit* by original, it must be claimed upon the return day of the writ. *2 Wils.* 406. 413. *5 Bur.* 2820; *See 12 East*, 12.

How made.] The claim must be entered on a roll; *2 Str.* 810. *2 Wils.* 409. *See the form of the entry*, *12 East*, 15; and if the franchise were immemorial, and not founded upon any express charter, a former allowance of it in this court or in Eyre must be stated. *1 L. Raym.* 427; *1 Salk.* 183. *9 Co.* 27 b, 28 a. Such allowance, or, in the case of an express charter or private statute, then the charter itself or an exemplification of it under the great seal (*see Vol. 1. p. 141*), or an exemplification (*see 1 W. Bl.* 454), or copy (*see Vol. 1. p. 139*), of the private statute, must be produced in court. Also, where the claim is made by one of the universities, a certificate of the chancellor of such university that the defendant is a resident member, and also an affidavit to the same effect, must be produced. *2 Str.* 810. *2 Wils.* 312.

The claim is exhibited in court, and a motion is made that it be allowed. Then, upon the claim and the other documents above mentioned being read, the court grant a rule upon the plaintiff to shew cause why the conusance should not be allowed; and upon cause shewn or default made, the court make the rule absolute or discharge it, as in ordinary cases. *See 12 East*, 12. *see 2 Wils.* 409. *Comb.* 119.

Conusance may be claimed by the bailiff of the franchise (*Bro. Conusance*, 36. 50), or by the chancellor, vice chancellor (*11 East*,

MS), or even the deputy of the vice-chancellor, of either of the universities; *Hardr.* 505; if made by attorney, the letter of attorney must be produced in court and filed. 1 *Std.* 103, 1 *Lea.* 87. and see 11 *East*, 543. 12 *East*, 19. 15.

If consuance be allowed, a transcript of the record is sent to the inferior court; but the record itself remains here; and if the plaintiff afterwards cannot have justice done him in the court below, he may have a re-summons upon the record remaining in this court. 1 *Sellon*, 257. *Tidd*, 570.

CHAPTER VI

Change of Venue.

How and in what cases, by the defendant.] LOCAL actions must be brought in the county in which the cause of action arose; transitory actions, either in the county where the cause of action arose, or in any other county, at the option of the plaintiff. But if the plaintiff bring a transitory action in any other county than that in which the cause of action arose, the defendant, upon application to the court, founded upon an affidavit "that the plaintiff's cause of action (if any) arose in the county of B, and not in the county of A" (where the action is brought) "or elsewhere out of the said county of B," can have the venue changed to the county where the cause of action really arose. See the form of the affidavit, *Tidd, Forms*, 171. § 1. The motion is a motion of course, and is absolute in the first instance. See the form of the rule, *Tidd, Forms*, 171. § 2. and see *R. T.* 49 G. 3. 11 *East*, 273. Draw up the rule with the clerk of the rules; pay 6s. 6d.; and serve a copy of it on the plaintiff's attorney, who will thereupon alter the declaration. In vacation you may obtain a judge's order to the same effect: Get a motion paper signed by counsel; and take it, together with the order and affidavit, to the clerk of the rules, who will thereupon draw up the rule. If the action be by original, the defendant must undertake not to bring error for want of an original. 2 *Sellon*, 252. This application may be made at any time before the expiration of eight days after the declaration has been filed or delivered, if there be eight days remaining of the term; 1 *Str.* 211; but if there be not eight days, it may then be made in the vacation or term following. *R. M.* 1654. § 5. But in all cases it must be made before the defendant has pleaded; 2 *Str.* 854; see 1 *Taunt.* 58; unless under very particular circumstances; see 1 *T. R.* 781. 3 *Bur.* 1564; and it cannot be made after time has been obtained to plead, upon terms of pleading issuably, rejoining gratis, and taking short notice of trial. *Comp.* 511. 7 *T. R.* 698. and see *Say.* 297.

If the cause of action be such, that the above affidavit cannot be made, the court will not order the venue to be changed, unless under very particular circumstances, or by the consent of parties. Therefore if the cause of action have arisen in two counties, as in an action for a libel published in two or more counties, 1 *T. R.* 571, or written in one and published in another county, 1 *T. R.* 647, the court will not change the venue; see 2 *Saund.* 5. c. 6 *Taunt.* 565. 6 *T. R.* 363; but where the libel was written and published in one county, 3 *T. R.* 306, or written here and published in Germany, 3 *T. R.* 652. but see 4 *East*, 495, the court allowed the venue to be changed to the county where the libel was written. In an action for criminal conversation, the court have allowed the venue to be changed, upon the above affidavit. 10 *East*, 32. So, in all actions upon contracts not under seal, *Say.* 7. 2 *Str.* 1180. 2 *T. R.* 275; with the exception of actions on bills of exchange and promissory notes; 1 *T. R.* 571. 5 *Taunt.* 576; but not in debt on specialty, 2 *Str.* 878. 1 *Sid.* 87. 7 *Taunt.* 306, in debt on award, 2 *B. & P.* 355, or in covenant. Yet in covenant, where a view was necessary, the court allowed the venue to be changed to the county in which the premises were situate. 8 *East*, 268. There are some other cases also in which the court will not allow the venue to be changed, unless upon very special grounds; as, in actions for *scandalum magnatum*, 2 *L. Raym.* 1418, 2 *Salk.* 668. 2 *Str.* 807, actions against carriers, 2 *Salk.* 670, and actions for escapes or false returns. 2 *Salk.* 669, 670. Also, where one defendant has allowed judgment to go by default, it may be doubtful if the court would change the venue at the instance of the other defendant who had pleaded; for it might be imposing a hardship upon the former, to have damages assessed by a jury of a different county, without his assent. See 4 *M. & S.* 233. 5 *Taunt.* 631.

Sergeants at law, barristers, attorneys, and officers of the court, have the privilege of laying their venue in Middlesex; and the court will not allow the defendant to change it, even upon the usual affidavit; 4 *Bur.* 2027. 2 *Show.* 242. 176. 2 *Str.* 823. 2 *L. Raym.* 1253, 2 *Salk.* 670; provided they sue in their own right, and not jointly with others. See *ante*, p. 105. But if they lay the venue in any other county, they have no privilege in retaining it; 7 *Taunt.* 146; nor can they as defendants have the venue changed to Middlesex, without the usual affidavit. 3 *T. R.* 573. 4 *Bur.* 2028.

But where a transitory action is brought in the county in which the cause of action arose, the court will never change the venue, unless a fair and impartial trial cannot be had in the county where it is already laid, see 2 *Str.* 874. *Cowp.* 510. 3 *Bur.* 1335. 1564. 1 *Wils.* 298, or under other very special circumstances, see 1 *T. R.* 782. 8 *East*, 268, or with the consent of parties. 1 *Wils.* 298. In local actions, when an impartial trial cannot be had in the county where the action is brought, instead of moving to change

the venue, it is more usual to apply for leave to enter a suggestion upon the issue, in order to have a trial in the adjoining county, as directed *Vol. 1. p. 129. See 3 Bur. 1330. 1 Wils. 77.*

Into what counties.] When the venue is changed upon the common affidavit, it is always changed to the county in which the cause of action arose; when changed because a fair and impartial trial cannot be had in the county in which it is laid, it is usually changed to the next adjoining county; when changed for any other special cause, it is changed into such county as the circumstances of the case suggest. It may be changed to Chester, *2 L. Raym. 1412. 1 Wils. 222*, Durham, or Lancaster, and the record sent down by *mittimus*; but in these cases, if the action be by original, the party applying must undertake not to assign error for want of an original. *1 Sellon, 251. 1 Taunt. 120. 432.* And therefore, where one defendant suffers judgment by default, the other cannot change the venue to a county palatine, because the court cannot prevent the former from assigning error for want of an original. *5 Taunt. 87. 631.* So, when some of several defendants appear separately, and offer to give this undertaking, the court it seems will not change the venue into a county palatine, unless the others also give a similar undertaking. *4 M. & S. 233. see 7 Taunt. 466.* The venue may also be changed to a Welch county; *6 East, 355*; and if it be desired afterwards to have the cause tried in the next English county, it may be done by a suggestion upon the issue, as directed *Vol. 1. p. 129. see 2 W. Bl. 962.* In Michaelmas or Hilary term, however, the court will not change the venue to a county where there are no spring assizes; *see 1 Wils. 138. 2 Str. 1180. Barnes, 490. 7 Taunt. 385*, unless with the consent of parties.

How and in what cases brought back.] The plaintiff, however, may retain the venue in the county in which he has already laid it, by undertaking to give material evidence of some matter in issue, arising in such county. The application in this case is to discharge the rule to change the venue, and is made as directed *ante, p. 175*, as to the latter rule. *See the form of the rule, Tidd, Forms, 171. § 3.* The application should in strictness be made before the venue has been altered in the issue under the rule to change the venue; *1 Cromp. 114*; yet the court have allowed it, even after the cause had been down to trial, and been made a *remant*. *Coup. 409. see 2 Str. 858.* In practice, however, it is usual to apply for this rule, as soon as the rule to change the venue has been served.

If the plaintiff fail in doing that which he has undertaken, namely, to give material evidence at the trial of some matter in issue arising in the county where the venue is laid, he shall be nonsuit. *2 W. Bl. 1031. see 2 T. R. 281.* But it will be sufficient if, for instance, it be proved that the deed upon which the action is founded was enrolled within the county; *Peake, Ev.*

213; or, in an action by the assignees of a bankrupt, to prove that the commission issued and the bankruptcy was declared, in the county; 2 *M. & S.* 36. see 1 *New Rep.* 310, *contra*; or, it seems, to prove that the (cause of) action arose abroad; 1 *H. Bl.* 280; or, in an action in Middlesex, to prove a payment of money into court, even although the money were paid in after the rule to retain the venue was obtained. 2 *T. R.* 275. But the undertaking in this case must be understood to have reference only to the evidence necessary to support the declaration; and therefore if the defendant confess and avoid the whole cause of action, or plead a tender to the whole declaration, the plaintiff will not be bound to produce at the trial the material evidence he undertook to give. 1 *Taunt.* 518. and see 3 *Taunt.* 86.

The court will, however, under very special circumstances, discharge the rule to change the venue, without the undertaking above mentioned. Thus, when a fair and impartial trial cannot be had in the county to which it has been changed, *Coup.* 510. 4 *Bur.* 2447, or if the affidavit upon which the venue was changed be defective, *Tidd*, 546. 3 *T. R.* 495, or the like, the court will discharge the rule to change the venue, without any undertaking. In all other cases, however, such undertaking will not be dispensed with, even although it be shewn that the affidavit upon which the venue was changed is false. 6 *East*, 433, 1 *Taunt.* 259. 3 *Id.* 464. 7 *Id.* 178. but see 7 *T. R.* 205.

In what cases changed by plaintiff.] In transitory actions, the plaintiff may lay his venue where he will; but if from circumstances he should afterwards desire to change it, he may obtain leave to amend his declaration, by altering the venue; 2 *Str.* 1162. 4 *East*, 433. 435; and this even after plea pleaded and issue joined, *Barnes*, 12. but see *Id.* 19, or even after the venue has been changed on the usual affidavit. 2 *Str.* 1202. In local actions, upon satisfying the court that a fair and impartial trial cannot be had in the county where the action is laid, the plaintiff may have leave to enter a suggestion upon the issue to that effect, and have the cause tried in the next adjoining county. See *Vol. 1.* p. 129.

CHAPTER VII.

Striking out Counts, &c.

If the declaration contain any unnecessary counts, which may be productive of any great additional expense to the defendant, the court, upon his application, will order them to be struck out; and, if such counts appear to have been introduced for the purpose

of vexation or the like, the court will order the plaintiff to pay the costs of the application. 1 *Sellon*, 239. That such counts are superfluous, however, must appear either from the declaration itself or from the bill of particulars. In an action by an attorney, where the declaration contained two counts for work and labour by him as an attorney, and two counts for work and labour generally, the court of Common Pleas ordered two of these counts to be struck out as superfluous; 1 *New Rep.* 289. and see *Hardw.* 129; yet this is a very common mode of declaring, and I doubt if this court would consider one or two common counts, as in this case, however superfluous, of sufficient consequence to be the subject of such an application. But if the several counts of a declaration contain really distinct causes of action, (as where a declaration on a penal statute contained 480 counts for different penalties, *Tidd*, 553. and see *3 Smith*, 113), the court of course cannot order any of them to be expunged.

Or, if any part of a count be superfluous, such as unnecessary recitals, statements of title, descriptions of property, or the like, if the superfluous matter be of any length, the court upon application will in like manner order it to be struck out. 1 *Sellon*, 239. *Tidd*, 553. *Comp.* 665, 727. In an action against 46 defendants, the court ordered the word "defendants" to be substituted for the names of the several defendants in the declaration, in all the places where they occurred excepting the first. 4 *New Rep.* 280.

So, if a declaration unnecessarily contain indecent or scandalous language, the court upon application will refer it to the master, and direct him, if he report against it, to tax exemplary costs. 2 *Wilk.* 20. *Imp. B. R.* 224.

The rule granted in these cases is either that the declaration be referred to the master, (upon whose report the court will afterwards decide), or a rule upon the plaintiff to shew cause why the superfluous matter should not be struck out. It is seldom referred to the master, unless in the case of scandal and impertinence, or where the superfluous matter is so mixed up in the declaration as not to be easily separated and distinguished or pointed out with distinctness to the attention of the court. The motion should be made before plea pleaded, and, in strictness, before the defendant has obtained time to plead. *Hardw.* 129.

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CHAPTER VIII.

Consolidating Actions.

In ordinary cases.] If two actions be brought by the same plaintiff, at the same time, against the same defendant, for causes of action which may be joined, and the defendant be holden to bail in both, the court will compel the plaintiff to consolidate them, and to pay the costs of the application. 2 T. R. 639. *see* 1 Smith, 423. On a rule to shew cause why the proceedings in 37 actions of ejection brought against the occupiers of so many houses in Sackville-street, should not be stayed, and abide the event of a special verdict in another action upon the same title, Lord Kenyon said it was a scandalous proceeding; that all the causes depended on the same title, and ought to be tried by the same record; rule absolute. 2 Sellon, 144. *and see* Barnes, 176. *but see* 2 Str. 1149, *contra*. So, three declarations against different persons for the same assault, were ordered to be consolidated; *Prac. Reg.* 151; but in another and similar case, the application was refused. 1 Str. 420. It is a matter of discretion, however, with the court to order such actions to be consolidated; and they will always do so, if it appear that the actions were brought separately, for the purpose of vexation or oppression.

In actions upon policies of insurance.] Where several actions are brought upon the same policy, the court, upon application of the defendants and with the consent of the plaintiff, will grant a rule to stay the proceedings in all the actions but one, the defendants undertaking to be bound by the verdict in such action, and to pay the amount of their several subscriptions and costs if the plaintiff should recover; together with such other terms as the court may think proper to impose upon them. *Parke, Introd.* Or if the plaintiff refuse his consent, the court will then grant imparlances in all the actions but one, until that one have been determined; *Parke, Introd.*; and if determined in favour of the plaintiff, the other defendants may (if necessary) obtain a stay of proceedings in their several actions, upon payment of the amount of their subscriptions and costs.

The application is made to the court in term time, or to a judge in vacation. There must be separate rules, or summons and orders, in each action. After verdict for plaintiff, (if the actions have been consolidated by order) *move to make the order or orders a rule or rules of court; then move for a rule nisi for judgment, in the defended action, and also that judgment may be entered in the*

several other actions which were consolidated, and that the plaintiff be at liberty to sue out execution thereon; and if afterwards made absolute, sign judgment, tax your costs and sue out execution, (according to the terms of the rule,) as in other cases.

CHAPTER IX.

Payment of Money into Court:

WHEN a person is satisfied that he is indebted to another, but disputes the amount claimed of him, then, before action brought, he may tender to his creditor the sum which he thinks he really owes, or after action brought he may pay that sum into court, and let the plaintiff afterwards proceed in his action at his peril. But if neither the existence of the debt nor the amount claimed be controverted, the defendant should apply to stay the proceedings, upon payment of debt and costs, as directed in the next chapter. The payment of money into court shall be first considered.

In what cases.] The general rule is "that where the sum demanded is a sum certain, or capable of being ascertained by mere computation, without leaving any other sort of discretion to be exercised by the jury," the defendant shall be at liberty to pay money into court. 2 Bur. 1120. Thus it is allowed in *assumpsit*; where the breach is the nonpayment of money, 2 Salk. 596, but not otherwise. 3 B. & P. 15. In actions against carriers indeed, where they have given a notice not to be accountable for goods beyond a certain amount, they are allowed to pay that amount into court; 1 H. Bl. 299 n.; but they will not be allowed to pay money into court, in *assumpsit* for injuring the plaintiff's goods. 2 B. & P. 234.

In debt on simple contract, the defendant may pay money into court; 1 H. Bl. 249; so, in debt for rent; 2 Salk. 596. *Pr. Reg.* 257; so in debt on a policy of insurance. 19 G. 2. c. 37. § 7. But in debt on record or specialty, he cannot; because in these cases the amount of the debt is ascertained, and cannot be varied from by the jury in their verdict; see 2 Str. 890; yet if the declaration contain two counts, the defendant may, upon payment of the debt demanded in one of them, have the proceedings stayed as to that count, and let the plaintiff proceed if he will upon the other. See the next chapter.

In covenant, where the breach assigned is the nonpayment of a sum of money, the defendant may pay money into court; 2 Salk. 596. 2 Bur. 1120. *Barnes*, 284. 282. 19 G. 2. c. 37. § 7; but not otherwise. 2 W. Bl. 837.

In actions of trespass, the defendant cannot pay money into court, 2 Str. 906, unless in actions against justices of peace, &c.; *vide infra*; nor can this be done, even in trespass for mesne profits; 2 Wils. 115; nor in case of 2 Str. 787. 906. 8 T. R. 47. 7 T. R. 335; nor in trover, replevin, or ejectment. Yet in trover, the court have in some cases allowed the defendant to bring into court the article for which the action was brought, and costs; so, in ejectment they allow the defendant, and in replevin the plaintiff, to bring into court the amount of the rent, for the non-payment of which the ejectment is brought, or the distress was made, respectively. As in these cases, however, the parties pay in, not a part merely, but the entire sum pretended to be due, it will be more convenient to defer the consideration of them to the next chapter, where we shall have to treat of the application to stay proceedings upon payment of debt and costs, generally.

In actions by executors or administrators, the defendant may pay money into court, as in ordinary cases. 2 Str. 796. see 2 Salk. 596. 3 Id. 105.

In actions against justices of peace, or against officers of the excise or customs, for any thing done by them in execution of their respective duties, if they have not made a tender, or if they conceive the amends tendered to be insufficient, they may have leave to pay into court such sum of money as they shall think fit; and the same proceedings shall be thereupon had, as in other cases of paying money into court. See *ante*, p. 152.

If the defendant pay money into court, in a case where he is not allowed to do so, the plaintiff, by taking it out, will thereby waive the irregularity, and the effect of it will then be the same as if it had been paid in on a mere money demand. 1 T. R. 710.

If there be two or more counts in a declaration, and one of them be for a money demand, the amount of which may be ascertained by mere computation, such as above described; the defendant may pay money into court upon that count. See 4 T. R. 579. So, in covenant, if several breaches be assigned, and one of them be the nonpayment of money, the defendant may pay money into court upon that breach. 2 W. Bl. 837. 2 Bur. 1120. Or if in such a case, the money intended to be paid in be the whole amount demanded for the rent, &c. the defendant may apply to stay the proceedings on that count, upon payment of the sum therein demanded and costs, and that the plaintiff be at liberty to proceed upon the other counts, if he should think fit; and the same in debt on record, specialty, or statute. See the next Chapter. But the court, it seems, will not allow a defendant to pay money into court upon some of the counts of a declaration, and demur to the rest; *Pr. Reg.* 256. 1 Sellon, 286; and the court of Common Pleas have refused to allow one of three defendants who alone appeared, (one of the others having suffered judgment by default, and the other being outlawed) to pay money into court, even although he offered to pay all the costs up to that time. 2 W. Bl. 1029.

When and how paid in.] Money may be paid into court at any time before plea pleaded, as a matter of course; or after plea, upon obtaining a judge's order for that purpose. 1 T. R. 710, 711. See 1 Taunt. 491. and Vol. 1. p. 123, 124. The motion is a motion of course. Get the motion paper signed by counsel; then pay the money into Hoares' bank in Fleet-street, and get a receipt for it; take this receipt to the signer of the writs, who will thereupon give you his receipt; pay him 2s. 4d. and also 2s. if the sum paid in be under 10l., or at the rate of 20s. per 100l. for any greater sum. R. H. 5 J. 1. Then take this receipt and the motion paper to the clerk of the rules, who will draw up the rule; pay him 8s.; see the form, Tidd, Forms, 172. § 1. Serve a copy of it on the plaintiff's attorney. If the application be not made in term or within seven days after it, or if made after plea pleaded, then get a judge's order to the clerk of the rules to draw up the rule, (which will be granted to you, as of course, without summons), and having obtained the receipt from the signer of the writs as above directed, take them, together with the motion paper, to the clerk of the rules, and draw up the rule.

Besides the money thus paid into court, the defendant (according to the terms of the rule) must pay costs, to be taxed by the master, if the plaintiff accept the money so paid in, and do not proceed in his action. In a recent case in this court, although it appeared that a certain sum had been offered to the plaintiff before declaration, and refused, yet the court would not allow the defendant to pay that sum of money into court after declaration, upon the terms of the plaintiff's being obliged to relinquish the costs of the declaration if he afterwards took the money out; they said that the defendant should have tendered the money, and pleaded the tender. 13 East, 551. see Pr. Reg. 258. 5 Taunt. 840. but see 2 Taunt. 208. 283. But where the conduct of the plaintiff appeared to have been extremely oppressive, and that the defendant was willing and offered to pay the money before action brought, the court upon application of the defendant (after he had paid the money into court) ordered that so much of the rule as obliged him to pay costs should be discharged. 1 Bur. 578.

If the defendant find that he has not paid a sufficient sum of money into court, the court probably might be induced, under very special circumstances, to allow him to pay money in a second time upon payment of costs. But see Barnes, 282. Pr. Reg. 263. 252.

Effect of it.] By paying money into court, the defendant impliedly acknowledges that the contract or other cause of action is as described in the declaration; 5 Bur. 2640. 1 Esp. 347. see 13 East, 202. 2 Stark. 103. 7 Taunt. 450; and the only remaining question to be determined is the amount of the damages. Therefore where the plaintiff declared upon a general undertaking by the defendant to carry goods for hire, and the defendant paid *St.* into court, it was holden that the defendant could not give in evidence that the contract was that he should not be answerable for goods

lost to a greater value than *5l.*, unless entered and paid for accordingly; although if no money had been paid into court, the plaintiff must have been nonsuited on such evidence. *2 East*, 128. If money be paid into court in an action on a bill of exchange, there is no necessity to prove the defendant's handwriting; *2 H. Bl.* 374. *see 3 Comp.* 40; if in an action of covenant, the execution of the deed is admitted. *2 Camp.* 375. But it is not such an admission as precludes the defendant from taking an objection to the legality of the contract, in order to prevent the plaintiff from recovering beyond the sum paid in; *1 T. R.* 464; and if the declaration contain a legal and an illegal demand, the money paid in shall be applied to the legal demand only; *1 B. & P.* 264; so, in an action on a policy of insurance, the court under particular circumstances, allowed the defendant to give evidence of fraud, notwithstanding he had paid money into court. *3 B. & P.* 556. *and see 2 M. & S.* 106. *9 East*, 325. *1 Camp.* 557. It is a conclusive admission, however, of plaintiff's right to sue, *5 Esp.* 19, and of his right to the character in which he sues. *2 Camp.* 441. But it is no admission of the plaintiff's right of action, beyond the sum paid into court. *2 Esp.* 482. n. *2 Camp.* 341.

If the plaintiff take the money out of court, and it amount to less than the sum stated in the affidavit to hold to bail, the plaintiff does not thereby subject himself to an action for a malicious arrest. *3 Esp.* 34. *see 5 Esp.* 69. *but see 2 New Rep.* 76.

The plaintiff may be nonsuit after payment of money into court; *2 Esp.* 482. n. 607. *Vol. 1. p.* 188. *and see 3 Esp.* 106; but it is doubtful whether the defendant can demur to evidence, after it. *1 H. Bl.* 93.

After the payment of money into court, the defendant can never afterwards take it out, even although it was paid in by mistake. *2 B. & P.* 392. *2 T. R.* 645. *see 2 Smith*, 49. *Barnes*, 279. 281. 284. Yet the court, it should seem, if the plaintiff failed in his action, and the money had not been already taken out of court by him, would impound it to answer the defendant's costs. *See Barnes*, 280.

Proceedings after it.] Where money has been paid into court, the plaintiff may in all cases take it out, and then either accept it in satisfaction of his debt, or may proceed in the action, at his option. *See 2 Salk.* 597. The only question is as to his right to costs. If he accept of the money paid in, in satisfaction of his debt, he is entitled to costs to the time of paying it in. Even if he proceed in the action, after the money has been paid in, he may still, at any time before trial, accept the sum so paid in, in satisfaction of his debt, and be entitled to costs to the time of paying the money into court, upon allowing the defendant his subsequent costs. *1 T. R.* 629. 710. *Willes*, 191. But if he proceed to trial, and a verdict be given against him (*4 T. R.* 10. *but see 2 B. & P.* 56. *3 Id.* 556. *2 Tourn.* 361. *4 Id.* 196), or a juror be withdrawn, (*3 T. R.* 657), or he be nonsuit; or even if the defendant obtain judgment

as in case of a nonsuit (2 *M. & S.* 335. 6 *Taunt.* 158. *but see* 8 *T. R.* 408. 486): he will not be entitled to costs to the time of paying the money into court. And where several actions on a policy of insurance were consolidated after money paid into court by the several defendants, and the plaintiff was nonsuited in the action which was brought to trial, the court held that he was not entitled to costs in any of the actions, up to the time of paying the money into court. 7 *T. R.* 372. *see* 2 *Taunt.* 361. 5 *Id.* 607. It may be necessary to observe, however, that if the money have been paid in on one count only of the declaration, the plaintiff (if he accept of the money so paid in) will be entitled to the costs of that count only, and not of the others. 4 *T. R.* 579. 2 *Taunt.* 266.

If the plaintiff proceed to trial, and do not prove a debt or damages beyond the amount of the sum paid into court, he shall (upon the defendant's producing the rule, 3 *Camp.* 41.) be nonsuit or have a verdict against him, and be liable to costs as in other cases. 1 *T. R.* 710. 4 *T. R.* 10. 1 *Saund.* 33. c.

But if he wish to discontinue the action before trial, having proceeded in it after the money was paid in, let him move for a rule to shew cause, why the master should not be directed to tax the costs of the plaintiff to the time of paying the money into court, and the defendant's costs from that time to the time of making the present application, and why the defendant should not pay the balance to the plaintiff. 1 *T. R.* 629.

Or if he wish to accept the money paid into court, in satisfaction of his debt, without proceeding in the action, let him first take the money out of court thus: *Get a copy of the rule at the rule office; and take it to the signer of the writs, who will thereupon pay you the money. Then get an appointment from the master, on the copy of the rule, to tax costs, and serve the same on the defendant's attorney. R. M. 31 G. 3. Attend accordingly before the master, and have the costs taxed; and if the defendant do not pay them, immediately proceed in the action, 1 Str. 1220, and at the trial you will be entitled to a verdict for nominal damages, and to the costs of the action as in other cases. See 1 Camp. 558. n.* If the plaintiff take the money out of court, and do not serve the appointment as above mentioned on the defendant's attorney, it is to be considered that the plaintiff intends to proceed in the action, to recover a larger sum than that paid into court. *R. M. 31 G. 3.*

Payment of money into court, upon a plea of tender.] If you intend to plead a tender, pay the money tendered into court, in the manner directed ante, p. 183, and get a receipt for it, in the margin of the plea, from the signer of the writs.

After paying money into court on a plea of tender, the defendant can never take it out, even although he have a verdict. 2 *Str.* 1027. But the plaintiff may take it out, whether he confess or deny the tender in his replication. 1 *B. & P.* 333.

If the defendant plead a tender, without paying the money into court, the plea may be treated as a nullity. *Vol. 1. p. 120.*

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CHAPTER X.

Staying Proceedings.

Upon payment of debt and costs.] WHERE the defendant is willing to acknowledge the cause of action, but not the alleged amount of the debt or damages, we have seen that the mode of proceeding to be adopted by him is, either to allow judgment to pass against him by default, and have the damages ascertained by an inquest or upon a reference to the master, *see ante*, p. 8. 19. 30, or by paying the sum actually due into court. *See the last Chapter.* But if he dispute neither the cause of action, nor the amount of the debt or damages as stated in the declaration, he may move to stay the proceedings upon payment of debt and costs. It may be laid down as a general rule, that the defendant will be allowed to stay proceedings upon payment of debt and costs, in all cases where at common law he may pay money into court. *See ante*, p. 181.

Thus, in assumpsit for a money demand, the defendant may have the proceedings stayed upon payment of the sum demanded and costs. *See 5 Taunt.* 840. Where several actions are brought against the acceptor, indorsers, &c., of a bill of exchange, any of the parties, after judgment obtained in the action against him, may prevent execution from being sued out thereon, upon payment of the debt and costs; and before judgment, the drawer or indorser of a bill of exchange, or the indorser of a promissory note, may stay the proceedings in the action against him, upon payment of the debt and the costs in that action; but the acceptor of a bill of exchange, or the drawer of a promissory note, cannot obtain a stay of proceedings before judgment, excepting upon the terms of paying not only the debt and costs in the action against him, but also the costs in all the other actions against the indorsers, &c. 4 *T. R.* 691.

In debt on simple contract, the proceedings may be stayed upon payment of debt and costs. So, in debt for rent. *Hardw.* 173. So in debt on bond in a penal sum, conditioned for the payment of a less sum, the defendant may bring into court the principal and interest, (*see 7 T. R.* 124), and also such costs as have been expended in any suit in law or equity concerning the same (*see 1 Str.* 696); which shall be deemed and taken to be in full satisfaction and discharge of the said bond. 4 & 5 *A. c.* 16. § 13. *see 3 Bur.* 1373, 2 *T. R.* 388. So, in debt on bond conditioned for the payment of an annuity, or of money by instalments, the defendant may obtain a stay of proceedings, upon payment of the arrears and costs, provided he give the plaintiff judgment in the action as a security for the future payments, 2 *Str.* 957. 814. 3 *Bur.* 1370. but not otherwise; 1 *Barn. & Ald.* 214. 2 *Taunt.* 387, *see 4 Taunt.*

227; but where the bond was conditioned for the payment of a sum in gross, and by a subsequent agreement that sum was to be paid by instalments, the court would not stay proceedings on the bond upon payment of the instalment, but required the defendant to pay in the whole sum mentioned in the condition of the bond, with costs; 3 *Bur.* 1374; and the same, where it was expressly stated in the bond that the whole sum should become due, upon default made in the payment of any one instalment. 2 *W. Bl.* 958. In these cases, the application is for a rule to shew cause, why it should not be referred to the master to compute the principal and interest due upon the bond, and why upon payment of such sum with costs to be taxed, &c., the proceedings in the action should not be stayed. So, in debt on bond conditioned to perform covenants, or for the performance of any specific act, the defendant may obtain a stay of proceedings, upon payment of the penalty of the bond and costs. *Ante*, p. 23. So, in debt on bond conditioned for the payment of mortgage money, or for the performance of covenants in a mortgage deed, where no suit for foreclosure or redemption is depending, a payment to the mortgagee, or, in case of his refusal, a payment into court, of principal and interest due on the mortgage, and costs, shall be deemed to be in full satisfaction of the mortgage, and the court shall discharge the mortgagor of and from the same accordingly. 7 *G. 2. c. 20.* § 1. and see 7 *T. R.* 187. 8 *Id.* 326. 1 *Wils.* 80. As to staying proceedings in debt on bail bond, see *Vol. 1. p.* 102. So, in debt on judgment, the court will stay proceedings upon payment of the sum recovered by the judgment and costs. See 2 *W. Bl.* 785. and see *Vol. 1. p.* 281, 282, as to staying proceedings against bail upon their recognizance. So, in debt on statute for a penalty, the proceedings may be stayed upon payment of the penalty and costs; 2 *Str.* 1217. 2 *W. Bl.* 1052. and see 1 *Bur.* 431; or if the action be for several penalties, the defendant may have the proceedings upon one or more of the counts stayed, upon paying into court the penalties claimed in such counts, and allowing the plaintiff to proceed upon the other counts if he wish it. In covenant, where the breach assigned is the nonpayment of money, proceedings may be stayed upon payment of the amount claimed and costs.

In trespass and case, the court will not stay the proceedings, upon payment of a sum of money and costs; not even in the action of trespass for mesne profits; because the damages in these cases cannot be ascertained without the intervention of a jury, See 2 *Str.* 906. 7 *T. R.* 335. 2 *Wils.* 115. Yet in one case, under particular circumstances, the court ordered the proceedings to be stayed in an action of trespass, upon the defendant's restoring the goods seized, or paying the full value of them, with costs; 7 *T. R.* 53; but this is a very rare instance. In trespass and case, therefore, if you cannot deny the cause of action, you should allow judgment to go by default, and let the damages be ascertained upon a writ of enquiry.

In trover for money, the court will allow the money claimed by

the declaration to be paid into court, and let the plaintiff afterwards proceed in the action at his peril; 1 *Str.* 142; or they will stay the proceedings perhaps upon payment of such sum with interest, and costs, if there be no circumstances in the case calculated to enhance the damages beyond the mere interest. So, in trover for a specific chattel, when the chattel is of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, the court will allow such chattel to be brought into court, or will order it to be delivered to the plaintiff, and let him afterwards proceed in the action at his peril as to costs, in the same manner as upon payment of money into court; 3 *Bur.* 1364. *Ca. Pr. C. B.* 59. *see Say.* 80. 120. 2 *Str.* 822. 1191. 1 *Wils.* 23; or perhaps they would grant a rule calling upon the plaintiff to shew cause why, upon delivery to him of the goods in question, and upon payment of costs, all proceedings in the action should not be stayed. *Ca. Pr. C. B.* 130.

In replevin of a distress for rent, the plaintiff may have leave to pay the rent claimed into court; 2 *Salk.* 597. 1 *H. Bl.* 24; or, upon application of the defendant, the court will stay the proceedings, upon payment of the costs of the action and the costs of replevying, and upon giving up the replevin bond, if no special damage be stated in the declaration. 3 *M. & S.* 525.

In ejectment for nonpayment of rent, if the tenant or his assignee (or the mortgagee of the term; 3 *Taunt.* 402) shall, at any time before trial (or at any time before execution, after a judgment against the casual ejector, 2 *Str.* 900) pay or tender to the landlord, or pay into court, all the arrears of rent and costs, all further proceedings shall cease. 4 *G. 2. c.* 28. § 4. The application is to the court in term time, or to a judge at chambers in vacation; *see the form of the rule, Tidd, Forms,* 692. § 47. If the lessor of the plaintiff, however, have any other title to the premises, than that arising from the nonpayment of rent, he is not prevented by this rule from proceeding in the action upon such title. So, in ejectment by mortgagee, where no suit in equity for foreclosure or redemption is depending, if the person, having a right to redeem, shall, at any time pending the action (*see* 4 *Taunt.* 887), pay to the mortgagee, or, in case of his refusal, pay into court, the principal and interest due on the mortgage, with costs, it shall be deemed and taken to be in full satisfaction of the mortgage, and the court shall discharge the mortgagor of and from the same accordingly, and order a reconveyance, &c. 7 *G. 2. c.* 20. § 1. This however does not extend to cases where the right of redemption is controverted, or the money due is not adjusted; nor shall it prejudice any subsequent mortgage. *Id.* § 3. *see* 2 *W. Bl.* 726. *Barnes,* 182. 177. 176. 2 *Str.* 1107. 1 *Id.* 413. 7 *T. R.* 185. 8 *T. R.* 326. The application for this purpose may be made to the court in term time, or to a judge in vacation.

Where there are two or more counts in a declaration, and any one of them be for a demand of a sum certain, such as is above described, the defendant may obtain a stay of proceedings as to

that count upon payment of the sum of money therein demanded; and the plaintiff may proceed on the other counts if he wish it. But if he do not proceed on the other counts, the defendant, by the terms of the rule or order, must also pay him the costs of the action as far as it has proceeded.

In ordinary cases, the proceedings may be stayed, upon application to a judge at chambers; see the form of the summons, *Tidd, Forms*, 151. § 1.—and of the order thereon, *Id.* § 2; or by application to the court in term time, in which case the rule is absolute in the first instance. In other cases, you must apply for a rule to shew cause. As soon as you have obtained the rule absolute or order, get an appointment on it from the master, and serve a copy of the rule or order with appointment on the plaintiff's attorney or agent; then get the costs taxed, and pay them without delay. If the rule or order be drawn up, that upon payment of debt and costs within a certain time the proceedings be stayed; if the debt and costs be not paid within the time so limited, the plaintiff should proceed in the action; for the rule being conditional he cannot thereupon obtain an attachment. 11 *East*, 319. 2 *Str.* 1220. and see *Id.* 699. and see 1 *Camp.* 559. n. 7 *East*, 536.

[In second actions for the same cause.] Upon the application of a defendant in ejectment, the court will stay the proceedings until the costs of a former action be paid; 4 *East*, 585. 1 *Str.* 548. 554. see *Barnes*, 180; although the first action were not between the present parties, but by the father of the present lessor of plaintiff against the present defendant's father, 8 *T. R.* 645. and see 4 *East*, 585. 2 *W. Bl.* 1180, and even although the present action be not for the same lands, provided it be upon the same title. 6 *T. R.* 740. And it is not material, in this respect, whether the former action were in this or another court. 1 *Str.* 548. 554. 2 *W. Bl.* 1158. 1 *Salk.* 255. But if the lessor of plaintiff, upon discovering a material mistake, before trial, abandon that ejectment and bring another; 2 *Str.* 681. 1099. 1121; or abandon his suit in one court and bring a new action in another: 1 *T. R.* 491: the court will not stay proceedings until the costs of the former action be paid, particularly if the proceedings do not appear to be vexatious. Also, where a defendant in a former ejectment, after being evicted, brings another ejectment for the same premises, the court will stay the proceedings until he pay the costs of the former action, 6 *T. R.* 223, whether such action were in this or in another court. 3 *B. & P.* 22. Besides the costs of the former ejectment, the court will in some cases also oblige the party to pay the costs of the action for mesne profits; 4 *East*, 585; but in no case will they oblige him to pay the damages in such action, however vexatious the proceedings of the present lessors of plaintiff may have been. 15 *East*, 233. Besides the cases above mentioned, the court have stayed the proceedings in a second ejectment, until the special verdict in the former one should be determined. 2 *Str.* 1105. So, where the defendant, after verdict against him, brought a writ of

error, and pending the writ, brought a new ejectment to recover the same premises, the court stayed proceedings in the new action until he quitted possession of the tenants returned to the lessor of plaintiff in the former action. 1 *Salk.* 258.

And not only in ejectment, but also in other actions, the court will stay proceedings, until the costs of a former action for the same cause be paid, 2 *T. R.* 511. n. 2 *W. Bl.* 741, 3 *Wils.* 149. see 2 *Str.* 878, provided both actions were by and against the same parties. *Cowp.* 322. Also, where an action was stayed in this court by a consolidation rule, and the plaintiff therefore discontinued it, and commenced another action in the Common Pleas for the same cause; that court stayed the proceedings, until after trial of the cause in this court with which the former action had been consolidated. 1 *Taunt.* 565. But the court have refused to stay proceedings against a defendant, until the debt and costs recovered by him in a former action against the present plaintiff, should be paid. 1 *H. Bl.* 10.

The court have also, in some few instances, under peculiar circumstances, and where the proceedings were evidently vexatious, stayed the proceedings in a second action, after a recovery for the same cause in a former one. But this is very rare; and the court usually refuse to interfere in this summary way, but put the defendant to plead the former recovery. *Cowp.* 744, 2 *T. R.* 512, and see 2 *T. R.* 712.

In trifling actions.] It is deemed beneath the dignity of this court to take conusance of pleas under 40s.; besides it is prohibited by *stat. 6 Ed. 1. c. 8.* Therefore if it appear, either upon the face of the declaration, 3 *Bur.* 1592, or by the plaintiff's acknowledgment, 4 *T. R.* 495. and see 2 *New Rep.* 84. 2 *W. Bl.* 754; or even from the defendant's affidavit, if not denied by the plaintiff, 5 *T. R.* 64. but see 3 *Bur.* 1592. 2 *L. Raym.* 1304, that the sum for which the action is brought is really less than 40s., the court upon application will stay the proceedings. The rule of course is a rule *nisi*, unless perhaps where the cause of action appears from the pleadings to be under 40s.; and it may, it seems, be applied for at any time before trial. See 4 *T. R.* 495.

Also, if a suit be commenced in this court, for a cause of action within the conusance of the court of requests of the district or place where the parties reside, the court will in general stay the proceedings upon application. In all cases where there are prohibitory clauses in the statutes by which the jurisdiction of the inferior court is created, as in the Westminster and Tower Hamlets' acts, the application should be made before plea pleaded; in other cases, before issue joined, *MS. M.* 1814, although there are instances of the court entertaining the motion after verdict or judgment by default. *Vide post, Ch. 30.*

In actions, pending error.] As to staying proceedings in an action upon a judgment pending error, see *Vol. 1. p. 220.* As to

staying execution upon the original judgment, pending error, see also *Vol. 1. p. 218—221*. And as to staying proceedings against bail upon their recognizance, pending error in the action against the principal, see *Vol. 1. p. 219, 220, 282*.

[*In other cases.*] In all suits by a common informer, within *stat. 21 J. 1. c. 4.* (*See Vol. 1. p. 3*), commenced in this court, the proceedings will be stayed upon application. See *1 Str. 415. and see 2 T. R. 274. 3 T. R. 363*. So if an action on a penal statute be brought in this court, when the proper mode of proceeding is by information and conviction before a justice of peace, the court will stay the proceedings. Actions for penalties on the lottery acts, must be brought in the court of exchequer, in the name of the attorney general; *36 G. 3. c. 104. § 38*; if commenced in this court, the proceedings will be stayed. And the same, as to actions for penalties on the stamp acts. See *44 G. 3. c. 98. § 10. and see 26 G. 3. c. 77. § 13, as to penal actions for offences against the laws of excise or customs*. In an action on *stat. 2 G. 2. c. 24*, for bribery at an election, the court stayed the proceedings because the plaintiff had been guilty of a wilful delay in prosecuting the action; *3 T. R. 5*; and, even after verdict, they have stayed proceedings, upon the clause of discovery. *4 Bur. 2287*.

In an action on a promissory note, the court granted a rule to shew cause why the proceedings should not be stayed, upon an affidavit that the note had been obtained without consideration; and that fact not being afterwards contradicted upon shewing cause, the court made the rule absolute. *Tidd, 461*.

Where a prisoner in execution for 200*l.* sued his plaintiff for 11*l.* and held him to bail, the court of Common Pleas stayed the proceedings, upon the latter's acknowledging satisfaction, to the extent of the 11*l.* and 5*l.* to answer costs, on the judgment for 200*l.* which he had obtained against the former. *1 Taunt. 226. and see Vol. 1. p. 296*. So, if an action be commenced for a matter which had been set off and allowed in a former action between the same parties, the court it seems would stay the proceedings. See *1 Camp. 252. and Vol. 1, p. 194*.

If an action be brought pending a reference, or otherwise contrary to good faith, the court will stay the proceedings. *Tidd, 461*. Also, if an attorney bring an action, without the plaintiff's authority, the court it seems will set aside the proceedings. *4 T. R. 577. see Vol. 1. p. 23*. But where an attorney brought an action for a wife, in her husband's name, (the wife living apart from her husband), without authority from the latter, the court refused to stay the proceedings, although the husband joined the defendants in the application. *9 East, 471*. And in other cases, as where a *cestui que trust* brings an action in the name of his trustee, or in the case of joint-tenants or joint-contractors, where one is obliged to use the other's name in a suit, the court will not stay proceedings, upon the application even of the trustee, &c., excepting perhaps

temporarily until such trustee, &c. be indemnified against the costs of a nonsuit, or verdict against him.

In an action for money won at play, the court refused to stay the proceedings until after the trial of an indictment against the parties for a cheat. 2 *Salk.* 649. So, after verdict and judgment, the court refused to stay proceedings, until after the trial of an indictment for perjury then pending against the plaintiff's witnesses. 4 *M. & S.* 140. *see also Lofft*, 436.

The court have also refused to stay proceedings upon the ground that the plaintiffs, after verdict, had become alien enemies. 9 *East*, 321.

CHAPTER XI.

Security for Costs.

In what cases.] If the plaintiff reside abroad, 1 *T. R.* 267, or even in Ireland, 1 *T. R.* 362, or Scotland, 6 *Taunt.* 379, the court upon application will stay the proceedings, until he give security for costs. Where there are several plaintiffs, however, if any one of them reside in this country, the court will not stay the proceedings. 1 *East*, 431. The practice of this court and of the Common Pleas, differ in some respects upon this subject; *see* 1 *H. Bl.* 106. 2 *H. Bl.* 118. 383. 1 *B. & P.* 96. 2 *B. & P.* 236. 1 *Taunt.* 18. 64. 2 *Id.* 253. 7 *Taunt.* 307; and even the present practice of this court, as above stated, is different from what it was formerly. *See* 2 *Str.* 1206. 1 *Wils.* 266. 4 *Bur.* 2105. 2 *Id.* 1026. *Cowp.* 158.

Also, if the plaintiff be servant to a foreign ambassador at this court, protected by *stat. 7 A. c. 12* (*see Vol. 1. p. 39, 40*), it should seem that a court of common law, upon application, would oblige him to find security for costs, in the same manner and for the same reasons that he would be obliged to give such security if plaintiff in a court of equity; 2 *P. Wms.* 452, 1 *Eq. Ca. Abr.* 350. *Moseley*, 175. *see Tidd*, 470. *contra*; for the ambassador and his suite, by a fiction of the *jus gentium*, are considered as still resident in the state from which they have been sent, and are not amenable to process in the country in which they actually reside.

In ejectment, if the lessor of the plaintiff be an infant, the court upon application will stay the proceedings, until security be given for costs, 1 *Wils.* 130. 2 *Str.* 932, or his guardian undertake for the payment of them, *Cowp.* 128, or some real and responsible person be named as plaintiff. 2 *Str.* 694. So, if the lessor of the plaintiff reside abroad, 2 *Bur.* 1177, or die pending the action, 3 *Str.* 1056, the court will stay the proceedings in like manner,

until such security be given. But where a similar application was made, upon the ground of the lessor of the plaintiff having privilege of parliament, it was refused. 1 Str. 479. See the form of the rule for staying proceedings in ejectment, until security be given for costs, *Tidd, Forms*, 692. § 46.—the like, until a guardian be appointed for an infant lessor to answer costs, *Id.* § 45. The defendant may also, if necessary, either by motion or summons, compel the plaintiff's attorney to disclose the place of residence of the lessor of the plaintiff: or if the attorney refuse to do so, the proceedings will be stayed until security be given for costs. 1 Str. 681. Vol. 1. p. 21. No application, however, for this purpose, will be entertained after verdict. Vol. 1. p. 21. Also, if the nominal plaintiff in the ejectment, be made plaintiff in the action for mesne profits, the court will stay the proceedings in this latter action, until security be given for costs. *Say*, 78.

The court, however, will not require security for costs, merely because the plaintiff is insolvent, even in a *qui tam* action; *Cowp.* 24. 2 H. R. 27; nor will they require an uncertificated bankrupt to give such security, 1 East, 431. 2 New Rep. 352. 2 Taunt. 61. 6 Id. 123, unless the action be brought for the benefit of the assignees. 7 T. R. 296. But if a plaintiff be convicted of felony, and under sentence of transportation, the court will stay the proceedings until he give security for costs. 1 Barn. & Ald. 159.

Where a *cestui que trust* brings an action in the name of his trustee, or where one joint-tenant or joint-contractor uses the other's name in bringing a joint action, the court would probably, upon application of the trustee or other joint-tenant or joint-contractor, stay the proceedings in the action, until the party bringing it, should indemnify such trustee, &c. as to costs, in case of a nonsuit or verdict against him.

How obtained.] The defendant should first apply to the plaintiff's attorney, for this security for costs; 3 M. & S. 283; and if it be refused, he may give notice of the motion, (see the form, *Tidd, Forms*, 149. § 4. *Imp. B. R.* 223), and move the court accordingly. If it be not intended, however, that the rule should be a stay of proceedings, but merely a rule upon the plaintiff requiring him to give security for costs, a previous application to the plaintiff's attorney will, it seems, be unnecessary, 1 Barn. & Ald. 331, as also the notice of motion.

It will be too late, after notice of trial given, to make this motion, if the defendant had an opportunity of making an earlier application. 5 East, 338. see 6 T. R. 597. 2 H. Bl. 593. 3 Taunt. 273. n. 272. It cannot, however, be made, until after bail have been put in, 4 T. R. 697, and justified. *MS. M.* 1814. But if there be two or more defendants, and one of them put in bail, he may require the plaintiff to give security for costs, without putting in bail for the others. 6 T. R. 496.

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CHAPTER XII.

Oyer of Deeds, &c.

In what cases.] In all cases where a deed, &c. is pleaded with a profert, either by the plaintiff or defendant, the other party may have oyer of it (provided the profert have been necessary, 2 *Salk.* 497) and may then set it forth in his plea, if he will. Unless there have been a profert, however, oyer cannot be prayed, and therefore if a deed be pleaded without profert, the other party should demur specially for the want of it, particularly if it be essential to his plea, &c. that the deed should be set forth. In debt on bond conditioned to perform covenants in an indenture, the defendant cannot crave oyer of the indenture, the bond alone in such a case being pleaded with a profert; but he must himself set forth the indenture with a profert, if it be necessary to his plea, and the plaintiff may have oyer of it. 1 *Saund.* 8. 2 *Salk.* 498. 2 *Saund.* 405 (n. 1.) 409 (n. 2.) 1 *Sid.* 50. 97. 425. 1 *Vent.* 37. *Alleyn.* 72. *Carth.* 5.

Oyer is generally craved, where it is essentially necessary that the deed, &c. pleaded, should be set forth, before the party craving oyer can plead. So, if any part of a deed be omitted in a declaration, &c. which ought to be stated, or if the deed be erroneously stated, the other party should set forth the deed upon oyer, and demur. *Hutt.* 33. 1 *Str.* 227. 1 *Saund.* 317. n. 2. 2 *Id.* 366 a. It is usually craved of bonds and other specialties; sometimes, of letters of administration; 2 *Wils.* 413; and it has been allowed of policies of insurance. *Hardw.* 243. It cannot, however, be craved of an original writ; *R. T.* 19 G. 3. 1 *Doug.* 227. [2 *Wils.* 394. *Barnes.* 340; nor of private acts of parliament; 2 *Doug.* 477; nor of letters patent, or other records. 1 *T. R.* 149. If a record of the same court, however, be pleaded, we have seen (*ante*, p. 38) that the opposite party may demand a note in writing of the term and number of the roll on which such matter of record is entered or filed.

The party craving oyer, is not bound to plead without it, in cases where it is properly demandable. 2 *Str.* 1186, 1 *Wils.* 16. If it be craved, where it is not demandable, the other party may treat the demand of oyer as a nullity; and sign judgment; but if, instead of doing so, he grant the oyer, the party who craved it may consider and treat the whole instrument as part of the other's plea. 2 *Doug.* 476, 477. *Carth.* 513. 6 *Mod.* 27, 237. 1 *Saund.* 317. (n. 2). See 3 *T. R.* 153. n.

When, by whom, and how demandable.] Oyer cannot be demanded, after the term in which the deed, &c. is pleaded; 5 *Co.*

74 b. 2 *Lutw.* 1644. 2 *Lev.* 142. *Freem.* 400. 1 *T. R.* 149; and consequently not after an imparlance to another term. *Bro. Abr. Oyer*, 14. 6 *Mod.* 28. *Gillb. C. B.* 184. but see 2 *L. Raym.* 970. It must be demanded, however, before the time for pleading has expired; 2 *Wils.* 413. *Barnes*, 268. *Tidd*, 521, 522; or, if made afterwards, it may be treated as a nullity, and the other party may sign judgment. *Barnes*, 326. and see 2 *B. & P.* 379.

Oyer, though it seems upon the pleadings to be granted by the court, is in fact demanded and granted by the attornies. The demand is made by a note in writing; see the form of a demand by the defendant, *Tidd, Forms*, 168. § 1. 1 *Sellon*, 264—by the plaintiff, *Tidd, Forms*, 168. § 2. 1 *Sellon*, 264. If the deed, &c. be in the hands of a third person, the court upon application will oblige him to give oyer of it, and produce it if necessary. 2 *Str.* 1198. 1 *Sellon*, 262.

When and how granted.] The plaintiff is not bound to grant oyer within any limited time after it has been demanded. But it is generally his interest to grant it without delay; for the defendant, we have seen (*Vol. 1. p. 115*), is entitled to as many pleading days after the oyer has been given, as he had yet unexpired at the time of demanding it. But if the plaintiff demand oyer, the defendant must grant it within two days, exclusive of that on which it is demanded, Sunday not being reckoned if it be the last of the two; 2 *T. R.* 40; otherwise the plaintiff may sign judgment as for want of a plea. 6 *Mod.* 122.

As soon as oyer is craved, make out a copy of the deed, including the names of the witnesses by whom it was attested, *Willes*, 288. and see 6 *Mod.* 237, and deliver it to the opposite attorney, 2 *T. R.* 40, who must pay for it at the rate of 4d. per sheet. *R. T.* 5 & 6 *G. 2.* (b).

Refusal of oyer.] To refuse oyer when it ought to be granted, is error. 6 *Mod.* 128. 2 *Str.* 1186, 1 *Wils.* 16. In order to bring error, the party insisting upon oyer must enter his prayer upon record; and this being in the nature of a plea, the other party may either counterplead or demur to it, and the court will thereupon give judgment; 6 *Mod.* 28. 2 *Salk.* 498. 2 *L. Raym.* 969, 970; upon which judgment, the writ of error may be brought. Error, however, does not lie, for granting oyer where it is not demandable. 1 *Saund.* 9 b. 2 *Id.* 46 b.

Proceedings after oyer.] After oyer is granted, it is optional with the party whether he set it forth in his plea or not. 2 *Str.* 1241. If, however, he undertake to set it forth, and do not set forth the whole deed, or if he misrecite it, the plaintiff may either sign judgment as for want of a plea, 4 *T. R.* 370, or he may pray that the deed be enrolled, and thereupon have it truly enrolled, and demur. *Com. Dig. Pleader*, P. 1. and see 4 *T. R.* 370 n. But this must be understood as extending to cases only where the whole of the

deed relates to the matter of action; for if it contain other matters besides those which are to be performed by the party craving oyer, it seems to be unnecessary to set out the irrelevant matter, but it is sufficient for him to set out *verbatim* the whole of the matters which relate to him; 4 *T. R.* 370. 1 *Saund.* 317. (n. 2); otherwise in some cases the record would run to an immoderate length. 1 *Saund.* 317. (n. 2). and see 1 *Saund.* 9. 52. 6 *Mod.* 237.

If the party craving oyer of a deed, do not afterwards set it forth in his plea, the other party, in his replication, &c., may (if he wish to have it set out) pray that the deed be enrolled, and then set it forth, or at least such parts of it as relate to the matter in dispute, *Com. Dig. Pleader, P. 1.*

CHAPTER XIII.

Copies of written Instruments not under Seal.

WHERE a *plaintiff* declares upon a written instrument not under seal, or where the action is founded upon such an instrument, the defendant may have a copy of it, by taking out a summons before a judge at chambers, who will thereupon make an order that a copy of the instrument in question be forthwith delivered to the defendant or his attorney, and that all proceedings in the action be stayed in the mean time. *Tidd, 524. Imp. B. R. 286. and see 2 Taun.* 114. This is analogous to oyer of deeds, &c. Also, in policy causes, a judge at chambers will make an order for the assured to produce to the underwriters, upon affidavit, all papers in his possession relative to the matters in issue. 1 *Camp.* 562. In other cases, the court have even ordered the plaintiff to produce his books at the trial; 2 *Str.* 1130. but see 2 *T. R.* 683; and Lord Mansfield is said to have laid it down as a rule, that whenever a defendant would be entitled to a discovery, he should have it here, without going into equity. *Tidd, 524.* The court, however, will not at present interfere to this extent, see 2 *T. R.* 683, unless perhaps in insurance causes, as above mentioned; but if it appear that a discovery is necessary to the defence, they will give the defendant a further time to plead, to enable him in the mean time to obtain the discovery by a bill in equity. 2 *T. R.* 683.

Also, where the *defendant* is possessed of any written instrument, of which it is material that the plaintiff should have inspection, the court in some cases, under particular circumstances, will order that the plaintiff may have leave to inspect it; that the defendant shall give him a copy of it at his (the plaintiff's) expense; and that the defendant shall produce it at the trial, if called upon

to do so. See *Barnes*, 439. *Tidd*, 525. 1 *Taunt.* 386. 4 *Id.* 157. 666. 6 *Id.* 302. The court of Common Pleas have, however, refused to a plaintiff in replevin, inspection of a deed in the avowant's possession, which conveyed to the avowant the reversion of the demised premises. 6 *Taunt.* 283. Under a judge's order to produce papers and give copies, that court have also holden that it is sufficient to give extracts of such parts of letters as are relevant to the subject, and ordered the party, in whose possession they were, to make affidavit to that effect. 1 *Taunt.* 167.

As to the inspection of corporation books, and the books of public companies, see *Vol.* 1. p. 144, 145. and see 3 *T. R.* 303. 579. 8 *T. R.* 590. 1 *T. R.* 689. 32 *G. 3. c.* 58. § 4. *Cowp.* 192. 1 *W. Bl.* 37. 59. 351. 2 *Id.* 877, 3 *Wils.* 398. 2 *Str.* 1223. 1210; as to the inspection of other books and instruments not strictly private, see 2 *Str.* 1005. 717. 1 *L. Raym.* 705. 337. 2 *W. Bl.* 850. 1 *Id.* 27. 2 *Str.* 954. 1242. 2 *L. Raym.* 927. 4 *T. R.* 691; and as to the inspection of court rolls, see *Vol.* 1. p. 144. 2 *W. Bl.* 1030. 1061. 7 *T. R.* 746.

CHAPTER XIV.

Particulars of Demand.

In what cases.] IN all actions in which the plaintiff declares generally, without specifying the particulars of his cause of action, a judge upon application will order him to give the defendant the particulars in writing, and that all proceedings be stayed in the mean time. Thus, in actions for work and labour, goods sold and delivered, and the like, the defendant may call for the particulars of the demand. So, in debt on bond conditioned for the performance of covenants, or to indemnify, or the like, the defendant may call for a particular of the breaches for which he is sued. *Tidd*, 526. So, in an action by vendee against vendor, where it was stated in the declaration that the abstract of title delivered, was "insufficient, defective and objectionable," the court obliged the plaintiff to give a particular of all objections to the abstract arising upon matters of fact. 3 *B. & P.* 246. So, in an action by vendee to recover back his deposit, because the conditions of the sale had not been complied with, the defendant may have a particular of the grounds on which the plaintiff seeks to recover. 1 *Camp.* 293. But wherever the particulars of the cause of action are fully specified in the declaration, as in actions on the case, special *assumpsits*, or the like, any further particulars would of course be unnecessary.

In ejectment, if the defendant have any doubt as to the lands, &c. for which the ejectment is brought, he may oblige the plaintiff

to give him a bill of particulars; 7 *T. R.* 332. n.; or, where the ejectment is brought for a forfeiture, the court upon application will rule the lessor of the plaintiff to give the defendant a particular of the covenants and breaches, &c. on which he means to insist that the defendant has forfeited his term, and that he shall not be allowed to give evidence at the trial of any thing not contained in those particulars. 6 *T. R.* 597. *ante*, p. 49.

Also, where the defendant pleads or gives notice of set off, the plaintiff may obtain a particular of the set off, in the same cases a defendant would be entitled to it, if the matter so set off were declared upon; and if the defendant, in such a case, do not deliver a bill of particulars within the time limited in the judge's order for that purpose, he will not be allowed to give evidence of his set off, at the trial. Also, in ejectment, the plaintiff, at any time before trial, may oblige the defendant to give him a bill of particulars of the premises for which he intends to defend the action, if they have not already been specified in the consent rule. *R. T.* 15 *C.* 2. r. 1. *ante*, p. 48, 49.

How obtained.] In ordinary cases, a bill of particulars is obtained, by taking out a judge's summons for that purpose; see the form of it, *Tidd, Forms*, 168. § 3. By the defendant, this is usually done before plea pleaded; although it is discretionary with the judge to make an order at any time before the trial, whether the application be made by the defendant or plaintiff. It seems, however, that a defendant cannot demand a bill of particulars, till after appearance. 1 *B. & P.* 378. If good cause be not shewn against it, at the time specified in the summons, the judge will make an order that the plaintiff's attorney or agent shall deliver to the defendant's attorney or agent the particulars required, and that in the mean time all further proceedings in the cause be stayed; or, if the particulars be required by the plaintiff, the order requires them to be delivered within a certain time, otherwise that the defendant shall not be allowed to give evidence of them at the trial. See the form of the order, upon summons by the defendant, *Tidd, Forms*, 168. § 4.—the like in ejectment, *Id.* 691. § 42.

The party thus ordered to give a bill of particulars, should make it out forthwith, and deliver it to the opposite attorney. See the form, *Tidd, Forms*, 169. § 4. a.—170. § 4. d.—the like in ejectment, by plaintiff, *Id.* 691. § 43.—the like by defendant, *Id.* 691. § 44. If money have been paid on account, the bill of particulars should specify it, and state the balance for which the plaintiff seeks to recover; 1 *Esp.* 280. see 2 *Esp.* 602; stating the debtor side of the account only, would be considered a contempt, for which the attorney would probably be ordered to pay the costs of both parties. 2 *Camp.* 410. So, delivering a particular, as general as the declaration, would probably be deemed a contempt of the order, and subject the attorney to costs. See 1 *Tantt.* 353. There is no objection, however, when an account has been already delivered, to refer to it generally in the bill of particulars, without restating the

items of it. *Peake*, 172. If the bill of particulars be incorrect, the party who delivered it, may have leave to amend it; or if not sufficiently explicit, the other party may take out a summons and obtain an order for further particulars. *Tidd*, 528. see 1 *Camp.* 69 n. 2 *Taunt.* 224. 4 *Taunt.* 189. 1 *Stark.* 224. After the delivery of the bill of particulars, the defendant has the same time to plead as he had when the summons for it was attendable. 13 *East*, 508. see 2 *New Rep.* 361. 2 *B. & P.* 363.

Afterwards, at the trial, upon production of the order for the bill of particulars, and proof of the delivery of the bill, the party who delivered it will be confined in his proof to the items therein contained. Thus, where the bill of particulars stated the plaintiff's demand to be for goods sold and delivered to the defendant, the plaintiff was not allowed at the trial to give evidence of goods sold by the defendant as agent for the plaintiff. 2 *B. & P.* 243, 3 *Esp.* 168. So, where the particular was of a promissory note only, and when the note was produced at the trial it was found to be written on an improper stamp, the court held that the defendant was precluded from resorting to his money counts; 4 *Esp.* 7. 1 *Taunt.* 353; but under such a particular, after proving the note at the trial, the plaintiff may recover interest on it. 4 *Esp.* 147. Where the plaintiff's particular stated various sums of money due by the defendant, but some of which were in fact owing from the defendant and his partner, and not from the defendant alone, and the defendant pleaded the nonjoinder in abatement; the plaintiff was not allowed to give evidence of those due from the defendant solely, because they were not distinguished from the others in the bill of particulars. 1 *Esp.* 452. 2 *Sellon*, 339. As the object, however, of this strictness is, that the opposite party may know what will be attempted to be proved against him at the trial, and may prepare his evidence accordingly, a mistake in the particular, not calculated to deceive or mislead him, will not be deemed material. Thus, an error in the date of one of the items in a bill of particulars, was holden to be immaterial, because it could not have misled the defendant. 2 *Taunt.* 224. So, where a payment made on account of the defendant to A, was stated in the particular to have been made to B, Lord Ellenborough said he should hold it to be immaterial, unless the defendant would make affidavit that he was misled by the particular. 1 *Camp.* 69 n. So, where in debt for rent, the plaintiff in his particular described the premises as being in a different parish from that in which they were really situate, the court held the mistake to be immaterial, as the defendant could not have been misled by it. 3 *M. & S.* 380. Also, although the plaintiff is confined in his proof to the items contained in his bill of particular, yet if it appear from the defendant's evidence that he is entitled to recover for items not included in the bill, he shall recover for such items. 1 *Camp.* 68. see 3 *Taunt.* 285. 2 *B. & P.* 243.

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CHAPTER XV.

Compounding penal Actions.

In what cases.] In all actions by common informers for penalties upon any statute, the court upon application may give the plaintiff leave to compound with the defendant. 18 *El. c. 5. § 3, 6.* It is entirely in the discretion of the court, however, to grant this leave or not. See 5 *T. R. 98. 1 Wils. 79. 130. 1 Str. 167. 1 W. Bl. 449. 2 Id. 1157. 1 B. & P. 51. 2 Smith, 195.*

No composition can be made, unless by the order and consent of the court in which the suit is pending, under pain of 10*l.*, of standing once in the pillory, and of being ever afterwards disabled from suing in any popular action. 18 *El. c. 5. § 3.* See 1 *Barn. & Ald. 282. 8 East, 378. 1 Taunt. 103.*

How.] No composition can be made before the defendant has pleaded. 18 *El. c. 5. § 3.* And the court will seldom allow of it after verdict, unless circumstances be stated to them upon the part of the defendant, which entitle him to such an indulgence. 1 *B. & P. 18. 5 T. R. 98. and see 1 Str. 167.*

The motion for this purpose is grounded on an affidavit, stating shortly the substance of the declaration and plea, and the sum for which the parties have agreed to compound the action; see the form, *Tidd, Forms, 154. § 5.* A brief must also be given to counsel for the other party, to consent to a rule being made. If the court grant the rule, it is absolute in the first instance. You must then pay the king's half of the composition to the master of the crown office; *R. M. 7 G. 3;* and see 4 *Bur. 1929. 2 Taunt. 213. 5 Id. 268;* and take his receipt for the money to the clerk of the rules, who will thereupon draw up the rule. Serve a copy of the rule on the opposite attorney. The rule must express that the defendant doth thereby undertake to pay the sum for which he has leave to compound the action; *R. E. 33 G. 3. r. 2;* and if he do not afterwards pay it, the court upon application will grant an attachment against him. 5 *T. R. 257.*

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CHAPTER XVI

Setting aside Proceedings for Irregularity.

How.] PROCEEDINGS when irregular are set aside, upon application to the court in term time. The motion must be founded upon an affidavit stating the irregularity complained of; and if the irregularity be in any process or notice, a copy of such process or notice, should be annexed to the affidavit. If the court be satisfied from the affidavit that the proceedings are irregular, they will grant a rule *nisi*; and afterwards, if sufficient cause be not shewn against it, they will make the rule absolute. *See the form of notice of motion to set aside the proceedings for irregularity, Tidd, Forms, 148. § 3.—the like, to set aside interlocutory judgment, &c. for irregularity, Id. 149. § 6.—the like to set aside judgment and execution for irregularity, and that the money levied be restored, Id. 150. § 7.—and of notice to the sheriff to retain the money levied, Id. § 8.* The rule *nisi* when obtained, suspends the proceedings for all purposes, until the rule be disposed of; 4 *T. R.* 176; and therefore the time for putting in bail, for pleading, or the like, remains the same after the rule is discharged, as it was when it was granted. *Id.*

The motion must be made the first opportunity after the irregularity has taken place, and before any further proceedings have been had in the cause by the party complaining of it. 3 *T. R.* 7. 10. 2 *Taunt.* 243. and see 5 *T. R.* 464. 5 *Taunt.* 330. 6 *Id.* 115. 191. Thus, an irregularity in the affidavit to hold to bail, must be taken advantage of before bail has been perfected, 1 *East*, 81. 1 *B. & P.* 132. see 2 *Str.* 1077, or even put in, 1 *East*, 330. 6 *Taunt.* 185, and before plea, 7 *T. R.* 376. n., or judgment by default and notice of executing a writ of enquiry; 8 *T. R.* 77; in process, before appearance, 1 *B. & P.* 250. 1 *Str.* 155, or before the declaration has been taken out of the office; 1 *H. Bl.* 222. 2 *Str.* 1072; in an appearance by plaintiff for the defendant, before judgment by default; *Pr. Reg.* 32; in notice of declaration, before plea, or even before taking out a summons to stay proceedings on the bail bond; 1 *B. & P.* 342; in the plea roll, before the defendant has accepted the issue. 3 *Bur.* 1686. 1 *W. Bl.* 525. And the rule is the same as to prisoners; 1 *T. R.* 191; a prisoner who is supersedeable for not being declared against in time, waives the irregularity by afterwards pleading. 1 *East*, 77. *ante*, p. 119. What has here been said, however, must be understood only of proceedings which are merely irregular; for if a proceeding be defective and void, the defect is not waived by any subsequent proceeding of the defendant. Therefore, where the maker and indorser of a

note were holden to bail in the one affidavit, the defect was holden not to be waived by putting in bail. *5 T. R. 254. Vol. 1. p. 54, 55.*

If the rule be made absolute, it is always with costs, unless some very strong grounds be shewn to the court for ordering it otherwise; so, if discharged, it is understood to be discharged with costs, unless the court give special directions to the contrary. *R. M. 37 G. 3, 7 T. R. 82.*

In what cases.] The particular cases in which proceedings are usually set aside for irregularity, have been already noticed in the course of the work; we shall here, however, again notice some of them, and attempt to deduce from them a few general rules.

If any necessary proceeding have been omitted by the plaintiff, his next subsequent proceeding may be set aside for irregularity. Thus, if the defendant be arrested upon bailable process, and there have been no affidavit to hold to bail, the arrest will be set aside for irregularity, that is, the defendant will be discharged upon common bail, or, if he have given a bail bond, such bail bond will be ordered to be delivered up to be cancelled. *See Vol. 1. p. 58.* So, if plaintiff sign judgment for want of a plea, without having given a rule to plead, or demanded a plea when necessary, the court will set aside the judgment. *See ante, p. 11. and Vol. 1. p. 115—117.* So, if the plaintiff proceed to trial, without having given notice of trial to the defendant, the court will set aside the verdict (if for plaintiff), and grant a new trial. *See Bul. N. P. 327. 4 T. R. 552.* So, if the plaintiff sign judgment upon a *cognovit*, without filing common bail for the defendant, the court will set aside the judgment. *See 7 T. R. 206.*

If any necessary proceeding on the part of the plaintiff, be not had within the time limited for it, or be had before the time appointed for it, by the practice of the court, it may be set aside for irregularity. Thus, if process be served after it is returnable, the court will set aside the service for irregularity. *See 1 H. Bl. 222.* So, if bailable process, or a *ca. sa.* be executed after the return day, the court will discharge the defendant. *See Vol. 1. p. 71. 260.* So, if a *fi. fa.* be executed after the return day, the court will set aside the execution, and order the money levied to be paid to the defendant. So, if process be served or writs executed on a Sunday, the court will set aside the service or execution. *See Vol. 1. p. 71.* So, if the plaintiff file common bail for the defendant, after the time limited for that purpose by statute, the court will set aside the proceedings for irregularity. *2 T. R. 719. see 7 Id. 206.* So, if judgment be signed for want of a plea, before the time for pleading, the rule to plead, and 24 hours after demand of a plea, have severally expired, the court will set aside the judgment. *See Vol. 1. p. 120.* So, if final judgment be signed before the expiration of the rule for judgment, the court will set it aside for irregularity.

So, if any necessary proceeding be informal, or not done in the manner prescribed by the practice of the court, it may be set aside for irregularity. Thus, if the affidavit to hold to bail comprise two

distinct causes of action which cannot be joined, 6 *T. R.* 688. 5 *Bur.* 2690. 4 *T. R.* 288. 697. 5 *T. R.* 254. *Vol. 1. p. 54, 55,* or be otherwise informal or defective in any material part, see *Vol. 1. p. 51* ~~455, the court will discharge~~ the defendant on filing common bail, or order the bail bond to be delivered up to be cancelled if he have given one. *Vol. 1. p. 58.* So, if a judicial writ be tested out of term, *Vol. 1. p. 258. 310.* 5 *Bur.* 2586, or returnable out of term, or on a day certain in actions by original, or on a general return day in actions by bill, see *Vol. 1. p. 259. 308,* or be misdirected, *Vol. 1. p. 63, 64,* or if the name of either party be omitted in it, *Andr.* 16, or if the attorney's name be indorsed on it without his authority, 1 *Bur.* 20. See *Vol. 1. p. 18,* or if there be a material variance between the first writ and the *alias*, 3 *T. R.* 660, or between the copy of process, and the notice to appear subscribed to it, 2 *B. & P.* 38, or if there be any other material defect in it, the court will set it aside for irregularity, and order the defendant to be discharged, or the goods seized under the writ, or the produce of them, to be returned to the defendant, as the case may require. So, if the declaration be at the suit of two plaintiffs, and the writ at the suit of one; or if the writ be against two defendants, and the declaration against one only: the court will set aside the proceedings for irregularity. *Vol. 1. p. 60.* So, if in an action against two, the recognizance of bail be drawn up as in an action against one only, the court will set aside the proceedings against the bail for irregularity. 1 *M. & S.* 199.

And lastly, if any proceedings are had, which are not warranted by the particular circumstances of the case, according to the practice of the court, or for which there is no foundation: as where an attachment is sued out against the sheriff, or proceedings had against the bail, after the defendant has been rendered, and notice of render given to the plaintiff's attorney; or where judgment for want of a plea, is signed after plea pleaded; or where the writ of execution is not warranted by the judgment, 1 *Vent.* 259. *Vol. 1. p. 257,* or the like: the court will set aside the proceedings for irregularity.

As to setting aside proceedings against the sheriff for irregularity, see *Vol. 1. p. 98, 99;* the like, as to proceedings upon the bail bond, *Id. p. 102;* and the like, as to execution sued out pending error, *Id. p. 219, 220.*

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CHAPTER XVII.

Judgment of Nonpros.

JUDGMENT of *nonpros* is a final judgment for costs only, signed by the defendant, whenever the plaintiff, in any stage of the cause, neglects to prosecute his suit within the time limited by the rules of the court for that purpose.

For not declaring.] In actions by bill, if an appearance be entered for the defendant by attorney, of the term in which the process is returnable, the plaintiff must declare in chief before the end of the term next after that of which the appearance was entered; otherwise the defendant may have judgment of *nonpros* against him, and be entitled to costs. 13 C. 2. st. 2. c. 2. § 3. And where an appearance was entered after the essoign day of Hilary term and before the first day in full term, as of the previous term in which the writ was returnable, (which may be done), the court held that a *nonpros* signed, for the plaintiff's not having declared in Hilary term, was regular. 6 East, 314. The plaintiff, however, is not bound to declare, pending a treaty between him and the defendant, 3 Wils. 455, or pending an injunction; nor can the defendant sign judgment of *nonpros*, if he have not appeared as of the term in which the writ was returnable. Also, if the plaintiff do not declare within the time above mentioned, and the defendant do not take advantage of his neglect by signing judgment of *nonpros*, he may afterwards declare at any time within a year after the return of the process, and a *nonpros* subsequently signed would be irregular. 2 T. R. 112. 3 Id. 123. 5 Id. 95. See the form of entering the judgment, upon common process, Tidd, Forms, 307. § 51. 10 Went. 433.—upon bailable process, Tidd, Forms, 309. § 53. 10 Went. 427. 434.—the like when the defendant was discharged out of custody upon filing common bail, Tidd, Forms, 309. § 53. a.—the like in a county palatine. Id. 309. § 54. 10 Went. 434.—the like in *debt qui tam*, Tidd, Forms, 310. § 56. If the action be against several defendants, the plaintiff must be nonprosred by all or none, 1 Doug. 169 n., even in trespass; unless the plaintiff have actually declared against some of them, or have taken out a rule for time to declare against some of them, in which case the others may sign judgment of *nonpros*. 2 T. R. 257. Also, where several defendants are entitled to sign judgment of *nonpros*, they can sign but one judgment, although they have appeared severally by separate attorneys. 4 Bur. 2418. 1 Comyns, 74. 2 Salk. 455.

In actions by original, the plaintiff has until the end of the term

next after that in which the writ was returnable, to declare in chief; and if he fail to do so, the defendant may sign judgment of *nonpros* at any time before the essoign day of the following term, but not afterwards. *Vol. 1, p. 107. See the form of entering the judgment, Tidd, Forms, 308. § 52. 10 Went. 429.*

If the defendant be taken or appear voluntarily on the *exigi facias*, the plaintiff must declare against him within the usual time limited upon process by original; otherwise the defendant may sign judgment of *nonpros*. *See the form of entering the judgment, Tidd, Forms, 310. § 55.* But if the defendant be outlawed, and afterwards come in and reverse the outlawry, although the plaintiff must declare against him (if at all) within two terms after the reversal, yet the defendant cannot sign judgment of *nonpros*, if the plaintiff fail to do so. *See ante, p. 163.*

If the plaintiff in replevin do not declare before four days after the service of the rule to declare, and 24 hours after a declaration has been demanded (where a demand is necessary), have severally expired, the defendant may sign judgment of *nonpros*. *See as to this judgment, ante, p. 68, 69.* So, if he do not declare upon a writ of second deliverance, within the time limited for that purpose, the defendant may sign judgment of *nonpros*. *See ante, p. 68, 69.*

Where a cause is removed from an inferior court by writ of *habeas corpus cum causa*, the plaintiff (if he declare at all in this court) must declare before the end of the term next after that in which bail is put in; but judgment of *nonpros* cannot be signed, if he fail to do so. *Ante, p. 173.*

For not replying, &c.] If the plaintiff do not reply, surrejoin, *surrebut*, &c. within the time limited for that purpose after service of the rule, or specified in an order for further time, the defendant may sign judgment of *nonpros*. *See the form of entry, for not replying, Tidd, Forms, 310. § 61. 10 Went. 432.* Where there are several defendants, and the plaintiff have declared against them jointly, he must be nonprossed as to all or none, even although they may have severed in their pleading. *1 Doug. 169.*

In replevin, after the defendant has avowed, he may rule the plaintiff to plead, in the same manner as he is ruled to reply in other actions; and if the plaintiff neglect to plead within the time limited by the rule, the defendant may sign judgment of *nonpros*. *See as to this judgment, ante, p. 70.*

For not entering the issue.] If the plaintiff do not bring in the record before the expiration of the rule to enter the issue, the defendant may sign judgment of *nonpros*. *Vol. 1, p. 133. see the form of entering the judgment, Tidd, Forms, 311. § 62. 10 Went. 433.* If the roll, however, be brought in at any time before judgment is actually signed, it will be sufficient; and a judgment signed afterwards will be irregular. *1 T. R. 16.*

The judgment in this case must be signed as of the term in which the rule to enter the issue was given; otherwise, if the cause stand over to another term, without farther proceedings, a

new rule must be given before the defendant can sign judgment. 1 M. & S. 478.

In error.] If the plaintiff in error, after being ruled to transcribe, do not pay the transcript money, the defendant may sign judgment of nonpros. Vol. 1. p. 226. and see *Id.* p. 250.

In error from this court to the court of Exchequer Chamber, if the plaintiff do not allege diminution before the expiration of the rule requiring him to do so, the defendant may sign judgment of nonpros. Vol. 1. p. 238.

So, if the plaintiff in error do not assign errors, within the time limited for that purpose, the defendant may sign judgment of nonpros. Vol. 1. p. 227. 239. 244. 252. See the form of the judgment for not assigning errors, in the King's Bench, Tidd, Forms, 559. § 78.—the like, after a return of scire feci to a scire facias quare executionem non, *Id.* p. 560, § 79.—the like, after two nihilis returned, *Id.* 562. § 80.—in error from this court to the Exchequer Chamber, *Id.* 562. § 81.—the like, in error to the Lords, *Id.* 563. § 82.—and see an entry of the proceedings in the house of Lords, after a nonpros for not assigning errors, and remittitur to the King's Bench, *Id.* 574.

In error from this court to the court of Exchequer Chamber, if the plaintiff do not procure the certiorari to be returned within the time limited in the rule for that purpose, the defendant may sign judgment of nonpros. Vol. 1. p. 239.

And lastly, when the want of an original writ is assigned for error, and the defendant has obtained from the master of the rolls an order to the cursitors to issue the writ, if, upon serving a copy of the petition and order on the opposite attorney and tendering to him the costs of his proceedings in error, he accept such costs, the defendant may sign judgment of nonpros. Vol. 1. p. 231.

How signed.] Make an incipitur on a roll of the term the judgment is to be signed, and also on a 10s. stamped judgment paper. See the forms above referred to. Take them to the clerk of the judgments, who will sign the judgment; pay him 3s. If the nonpros be signed for not declaring, the clerk of the judgments taxes the costs at 60s.; in all other cases you must get the costs taxed by the master, who will mark the same upon the judgment paper. After judgment signed and costs taxed you may proceed to sue out execution.

Also, in error *coram nobis*, and in all cases of error to this court, after the record has been removed here, judgment of nonpros is signed as above directed; but in all other instances of nonpros in error, the judgment is signed by the clerk of the errors, who will also tax the costs.

In what cases set aside.] If the judgment be regular, it is discretionary with the court to set it aside, upon payment of costs, in order to let in a trial of the merits. They have refused to set it aside in an action by a common informer. 1 Bur. 401.

But if the judgment be irregular, the court will in all cases set it aside with costs; and if an action or other proceedings be had upon such a judgment, one rule is all that is requisite in order to

set aside such proceedings, as well as the judgment. 4 T. R. 688.

Costs and execution.] The plaintiff is liable to costs (even although he sue as executor, 3 Bur. 1585. 6 T. R. 654), in all cases, 23 H. 8, c. 15. 8 El. c. 2. 13 C. 2. st. 2. c. 2; 4 J. 1. c. 4. 1 T. R. 373, excepting upon a *nonpro*s for not transcribing, in error. 7 East, 110. Vol. 1, p. 226. For these costs, the defendant may either sue out execution, by *ca. sa.* or *fieri facias*, 1 Wils. 316, or he may proceed by debt on the judgment. See the form of a *fi. fa.* upon *nonpro*s for not declaring on bill of Middlesex or *latitat*, Tidd, Forms, 337. § 25. 10 Went. 272.—the like by original, Tidd, Forms, 338. § 26.—the like for not replying, *Id.* 338. § 27. 10 Went. 287. 289. 324.—the like, for not surrejoing, Tidd, Forms, 338. § 28. 10 Went. 243.—the like, for not entering the issue, Tidd, Forms, 338. § 29.—and see the form of a *ca. sa.* 10 Went. 281. 290. 301, 302, 303, 304. 308. see also the form of a *fi. fa.* after a *nonpro*s in error, Tidd, Forms, 576. § 95. 579. § 98.—of *ca. sa.* *Id.* 580. § 99. 10 Went. 301. 308. 310.

Proceedings after it.] After being *nonpro*sed, the plaintiff may commence a new action against the defendant, for the same cause; and he may again hold the defendant to bail, if the action be bailable. 1 Str. 439. Vol. 1. p. 47.

CHAPTER XVIII.

Discontinuance.

What, &c.] It is unnecessary, in a work of this nature, to treat particularly of the subject of discontinuance; it is sufficient to know that it never can be the subject of objection *pendente placito*; Cro. Jac. 211; that after verdict, it is cured by the statute of Jeofails, 32 H. 8. c. 30; see 6 T. R. 255. 1 Wils. 40. 1 Salk. 177, 3 Salk. 131. 1 Doug. 115; and after judgment by default, by stat. 4 A. c. 16. See as to continuances of process, ante, p. 157. Process is continued by *vicecomes non misit breve*; see the form, Tidd, Forms, 196. § 32. 34; after declaration and before issue joined, the proceedings are continued by *imparlance*; see Vol. 1. p. 113, 114. 128; after issue joined and before verdict, by *vicecomes non misit breve*; see the form, Tidd, Forms, 196. § 32. 34; after judgment by default, and before execution of a writ of enquiry, by *vicecomes non misit breve*; see the form, Tidd, Forms, 258. § 9. a; after demurrer and before judgment, by *curia advisari vult*; see the form, Tidd, Forms, 194. § 26. 287. § 32. a; after issue joined upon *nul tiel record*, by *curia advisari, &c.*; see the form, Tidd, Forms, 194. § 24; after verdict and before judgment,

in actions tried at the assizes, and in cases of special verdicts, by *curia advisari vult*; see the form, Vol. 1. p. 204, 205. *Tidd, Forms*, 238. § 39; after joinder in error and before judgment, also by *curia advisari vult*; see the form, *Tidd, Forms*, 551. § 69. 557. § 76. 573. § 92. These continuances are never entered, until the plea roll is made up. 1 *Salk.* 179, 2 *L. Raym.* 872. 2 *Wils.* 203. see 7 *T. R.* 618.

Rule to discontinue.] If the plaintiff find that he has misconceived his action, or that for some defect in the pleadings or other reason he will not be able to maintain it, he may obtain a rule for leave to discontinue. This indulgence however is granted only to plaintiffs; even an avowant in replevin cannot have it. 1 *Str.* 112. It is granted always upon payment of costs, see 8 *El. c. 2.* § 2. *Comb.* 299, excepting in actions by executors or administrators; and even executors or administrators must pay costs upon a discontinuance, if they have knowingly brought a wrong action. *ante*, p. 131. Where the defendant is a justice of peace (see *ante*, p. 152), if the plaintiff discontinue, it must be upon payment of double costs. See 2 *Str.* 974. and see, as to actions against officers of excise and customs, and other officers, *ante*, p. 152.

How obtained.] This rule may be had at any time after the commencement of the action, and before trial or writ of enquiry. The court may probably grant it as matter of especial favour, even after a special verdict; 1 *Salk.* 178; but they will not do so in a hard action, *Hardw.* 200, 201, or to give the plaintiff an opportunity to adduce fresh proof in contradiction to the verdict. 2 *W. Bl.* 815. Nor will they ever grant it after a general verdict, 1 *Lev.* 48. 1 *Salk.* 178, or after a writ of enquiry executed and returned, *Carth.* 86, 1 *Show.* 63, unless with the defendant's consent. The court however have allowed the plaintiff to discontinue, upon payment of costs, after a demurrer argued and allowed, where there was a mistake in the plaintiff's pleading; 2 *Lev.* 124. 209. 1 *Lev.* 192, 1 *Saund.* 23. 1 *Lev.* 298. 3 *Id.* 440. 1 *Str.* 76. 116. 1 *Lev.* 191, 1 *Saund.* 39. see 1 *Salk.* 179. *Barnes*, 169; but the court now usually give the party leave to amend, upon payment of costs. 2 *Saund.* 73. (n. 1).

Before argument on demurrer, verdict or execution of a writ of enquiry, this is a mere side-bar rule, and may be had as a matter of course from the clerk of the rules; pay him 6s. 6d.; see the form, *Tidd, Forms*, 176. § 3; in other cases, it is obtained upon application to the court, and is but a rule nisi, which you must afterwards proceed to make absolute in the ordinary way. As soon as you have obtained the side-bar rule or rule absolute, take it to the master, and get an appointment on it to tax the costs. Serve a copy of the rule and appointment on the defendant's attorney; and attend at the time appointed, and the master will tax the costs. These costs should be paid forthwith; for until paid, the action is not discontinued. 3 *M. & S.* 153. *MS. T.* 1814. 6 *T. R.* 765. The

plaintiff, however, is not liable to an attachment for the nonpayment of them. 7 T. R. 6.

When discharged.] When a plaintiff, merely because he did not like the bail in the first action, discontinued, and held the defendant again to bail in the second action; the court considered this conduct unwarrantable, and discharged the side-bar rule, thereby leaving the first bail still liable on their recognizance. 4 Bur. 2503. Yet, in another case, where it appeared clearly that the bail in the first action had forsworn themselves, and were in fact worth nothing, the court held that the plaintiff was justified in holding the defendant to bail in a second action for the same cause, even before he had discontinued the first; for had he discontinued, it is very probable the defendant would have absconded. 2 Str. 1216. Vol. 1. p. 47.

New action.] After the costs have been taxed and paid, 3 M. & S. 153. MS. T. 1814, the plaintiff may commence a new action for the same cause, and may again hold the defendant to bail. 2 Str. 1209. Vol. 1. p. 46. Or if the first action were upon common nonbailable process, the plaintiff may hold the defendant to bail for the same cause (if bailable), even before the first action is discontinued. 6 T. R. 616. Vol. 1. p. 47.

CHAPTER XIX.

Cassetur Billa vel Breve.

WHEN the defendant pleads sufficient matter in abatement, and the plaintiff cannot deny it, the latter may either obtain leave to amend his declaration, if that will answer his purpose, and which will be granted upon payment of costs; or he may at once enter on the roll a judgment that the writ or bill be quashed, in order that he may be enabled to commence a new action. If he adopt the latter mode, let him get a roll of the term the declaration is delivered, and enter the declaration and plea on it, as in ordinary cases, and lastly the cassetur; see the form, Tidd, Forms, 316. § 69. Docket it with the clerk of the judgments, as in ordinary cases, and get it marked by him; pay him 4d. per sheet; after which, take the roll to the clerk of the treasury, who will file the same in the treasury of the court. Leave of the court is not necessary in order to make this entry; nor is the plaintiff obliged to pay costs. Pr. Reg. 6. Tidd, 623.

After entering a cassetur billa, the plaintiff may deliver another declaration by the by for the same cause of action, at any time

within the term in which the writ was returnable; 5 T. R. 634. Vol. 1. p. 108; but if that time have elapsed, he must sue out new process, if he wish to recommence his action.

As to quashing a writ of error; see Vol. 1. p. 215.

CHAPTER XX.

Putting off the Trial.

In what cases.] THE court will in general, when a material witness for either party is absent, allow the trial to be put off, either to another day of the same sittings, or to another sitting in the same term, or to another term, or even for a longer period under particular circumstances. See *Barnes*, 440. They have put off a trial, until a commission should go to examine a material witness abroad who refused to attend, and until the deposition should be certified. 1 *W. Bl.* 512. *cited.* They have refused it, however, in another case, where it did not appear that there was any likelihood of the witness's return; 1 *W. Bl.* 515; and the same, where the witness did not go abroad until after notice of trial was given, and he might consequently have been served with a *subpoena* in sufficient time; *Barnes*, 442; and they will also it seems refuse it, if the party applying have conducted himself unfairly, or have been the cause of any improper delay. 1 *B. & P.* 33. They have also refused it, upon the application of the plaintiff, in a penal action; *Tidd*, 699; and in another case, where the evidence of the absent witness was intended to sustain a defence not favoured by the court. 1 *B. & P.* 454. And a judge at *nisi prius* has refused to put off a trial, to give the plaintiff an opportunity to amend his declaration, by omitting the profert. 1 *Stark.* 74.

There are also other grounds, upon which the court will put off a trial, besides that above mentioned of the absence of a material witness. Where the defendant's attorney was so ill that he could not attend, the court upon application put off the trial. *Sayer*, 63. So, where a libel was published immediately before the assizes, with an intent to influence the jury, the court upon application put off the trial. 1 *Bur.* 499—510. Also, where three actions were brought against three several defendants, for different parts they had taken in the same transaction, in one of which issue was joined on a demurrer, and issues in fact in the other two, the court, upon application of the defendants, put off the trials of the issues in fact, until the demurrer should first be argued, as the point of law involved in it was the foundation of the plaintiff's right to damages in the other two actions. 13 *East*, 27. They have, however,

refused to put off a trial, until a suit concerning the same matter in the ecclesiastical court should be determined; 2 *Salk.* 649. 646; and they have refused it also, where the application was made merely because counsel were not prepared. 3 *Bur.* 1319. Where the defendant was arrested as he was coming to court to attend his cause, the judge at *nisi prius* refused to put off the trial on that account, unless upon payment of costs. 1 *Camp.* 229.

And lastly, the court or a judge at *nisi prius* will put off the trial of an issue out of Chancery, for the same reasons and under the same circumstances as in ordinary actions. 4 *Camp.* 163.

Application.] The application, in term time, should be made to the court for a rule *nisi*; in vacation, to a judge at chambers; and should, it seems, be made at least two days before the day of trial. See *Barnes*, 437, 438. 442. 444. 3 *Taunt.* 315. Or if the grounds of the application have occurred or become known to the party so recently, that he cannot make it in the manner now mentioned, he may apply to the judge at *nisi prius*, who will accordingly put off the trial to some other day in the same sittings, if satisfied as to the sufficiency of the grounds stated for the application; but if the party desire to have it put off to another sitting, the only mode of doing it at *nisi prius* is by withdrawing the record. 3 *Camp.* 333. See 1 *Taunt.* 565. 2 *Taunt.* 221. It may be necessary to add, that a judge sitting at *nisi prius* at Westminster, cannot make an order in a cause to be tried in London. 3 *Camp.* 41.

It is usual to give notice of the intended application; see *Hardw.* 128; it may have the effect of preventing the opposite party from incurring the expense of bringing up his witnesses, if he do not intend to oppose the application; or if he do oppose it, it affords him an opportunity of shewing cause against it in the first instance. See the form of the notice, *Tidd, Forms*, 205. § 17. 1 *Sellon*, 421.

The application must be founded on an affidavit stating the grounds upon which it is made. If made on account of the absence of a material witness, the affidavit in ordinary cases states the time issue was joined, the time for which notice of trial was given, the absence of the witness, and that the party cannot safely proceed to trial without him, the endeavours which have been made to find him, and the time at which he is expected to return; see the form, *Tidd, Forms*, 205. § 18. 1 *Sellon*, 421; but if the witness be abroad, or if, from the nature of the application, it may be suspected that it is made merely for the purpose of delay, the above general form will not be sufficient, but the affidavit must state the cause of action, and the evidence expected from the witness, in order that the court may judge if it be material, and must state circumstances from which the court may infer the probability of the witness's return within a reasonable time. See 3 *Bur.* 1519, 1 *W. Bl.* 510. 436. In all other cases, the affidavit merely states the facts on which the application is grounded. Formerly, it seems; this affidavit must have been made by the party himself; *Barnes*,

437 ; but the affidavit of the attorney in the cause has since been deemed sufficient, *Peake*, 97, and even the affidavit of the attorney's clerk, if it state that he is particularly acquainted with the circumstances of the cause, and has the management of it. 1 *H. Bl.* 637.

When the trial is thus put off, it is usually upon the terms of paying any costs the opposite party may have thereby been put to ; and when the plaintiff sued as a pauper, and the defendant had the trial put off, upon undertaking to pay the costs of the day, the court of Common Pleas granted an attachment against the defendant for the non-payment of these costs. 1 *B. & P.* 39.

CHAPTER XXI.

Trial by Proviso.

In what cases.] IN all cases where the plaintiff, after issue joined, does not proceed to trial, where by the course and practice of the court he might have done so, the defendant may, if he wish, have the action tried by proviso ; that is, he may give the plaintiff notice of trial, make up the *nisi prius* record, carry it down and enter it with the marshal, and proceed in the trial as in ordinary cases. This, however, can be done only in cases where the plaintiff has been guilty of some laches or default after issue joined ; except in replevin, prohibition, *quare impedit*, 2 *Salk.* 652, and error in fact, 2 *Saund.* 336 a. in which cases both parties being actors, the defendant may make up the *nisi prius* record, and thereupon proceed to trial, although no laches or default be imputable to the plaintiff. The court have also allowed a defendant to carry down the record of an issue, directed by the court of Chancery, to trial by proviso, upon it being suggested to them that the plaintiff wished to delay the cause. 4 *T. R.* 767.

As the delay and expense attending the trial by proviso, however, are material objections to this mode of proceeding, it is seldom adopted, unless in cases where the defendant is particularly anxious that the cause should be finally settled by verdict, and in some other cases particularly specified in the next Chapter ; in other cases, the defendant usually moves for judgment as in case of a nonsuit, in preference to proceeding to trial by proviso.

How.] The defendant, before he can proceed to trial by proviso, must rule the plaintiff to enter the issue, as directed *Vol. 1. p. 133* ; and if the issue be not entered by the plaintiff within the time limited by the rule, the defendant may either sign judgment *of nonpros*, or he may himself enter the issue. *Vol. 1. p. 133, 134.*

After the issue has been thus entered, either by the plaintiff or defendant, if the plaintiff, in causes in London or Middlesex, make default in trying his issue, or in country causes, do not proceed to trial at the next assizes, the defendant may afterwards proceed to trial by proviso. *R. M. 4 A. (c.)* For this purpose, get a rule from the master for a trial by proviso, on the back of the issue; see the form, *Tidd, Forms*, 203. § 12; enter it with the clerk of the rules; pay 3s.; and serve a copy of it on the plaintiff's attorney or agent. This rule is absolutely necessary; 2 *Str.* 1055; although if obtained at any time before the trial, it will be sufficient. 1 *T. R.* 695. It is not necessary, however, in replevin, prohibition, *quare impedit*, 2 *Salk.* 652, or error in fact, 2 *Saund.* 355. 2 *Lev.* 5, for the reasons above mentioned; although it seems to be the practice in such cases to insert the clause of proviso in the jury process. 3 *T. R.* 661. 1 *W. Bl.* 375.

The defendant must give the plaintiff the same notice of trial, that the plaintiff is obliged to give him in ordinary cases. See *Vol. 1. p. 135.*

The jury process is the same as in ordinary cases; excepting that in the *distringas*, after the words "many defaults," you insert this clause: "Provided always, that if two writs shall come to you thereupon, then you execute and return one of them only; and have there," &c. If the plaintiff or defendant had before sued out jury process, but did not proceed to trial, the defendant may have a *venire de novo*, as mentioned *Vol. 1. p. 160.*

If both the plaintiff and the defendant happen to carry down the record at the same time, the trial shall be by the plaintiff's record, if he enter it with the marshal; but if he omit to do so, the defendant may proceed upon the record brought down by him, *R. M. 4 A. (c.)* But although the plaintiff have entered his record with the marshal, yet if he have not given a sufficient notice of trial, his entry will be of no effect; the defendant in that case may proceed to trial upon the record he has taken down, and if the plaintiff do not appear to it, he must be nonsuit. 1 *Barn. & Ald.* 253. And in all cases where the defendant proceeds upon his record, if the issue happen to be on the plaintiff, who is therefore to begin first, but does not appear, the defendant must not enter upon his proof and take a verdict; but the proper course is to call the plaintiff and nonsuit him. 1 *Wils.* 300. *Barnes*, 458. 2 *Saund.* 336 b. If, instead of doing so, he take a verdict, the court will set it aside.

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CHAPTER XXII.

Judgment as in Case of a Nonsuit.

In what cases.] WHERE issue is joined, and the plaintiff shall neglect to bring such issue to trial, according to the course and practice of the court, then, upon motion in open court, (due notice being first given thereof,) the judges shall give the same judgment for the defendant as in cases of nonsuit; unless upon just cause and reasonable terms they shall allow a further time for the trial of such issue; and if the plaintiff neglect to try the issue within the time so allowed, the court shall give such judgment as aforesaid. 14 G. 2. c. 17. § 1. This statute does not extend to replevin, 3 T. R. 661. 5 Id. 400, nor, it should seem, to prohibition, *quare impedit*, or error in fact; for in all these cases, the defendant may himself take down the record without a proviso. *Ante*, p. 213. Nor does it extend of course to any case where the plaintiff could not be nonsuit, if he had proceeded to trial; therefore, where one defendant pleads, and the other allows judgment to go by default, there cannot be judgment as in case of a nonsuit; 1 Bur. 358. *see* Vol. 1. p. 188; but where there are several issues in law and in fact, and the defendants have judgment on the issues in law, if the plaintiff do not proceed on the issues in fact, the defendant shall have judgment as in case of a nonsuit; for the plaintiff in such a case might have been nonsuit, had he proceeded to trial. 10 East, 366. The statute extends to *qui tam* actions; 1 East, 554. 1 Wils. 325; and to actions by executors or administrators, but without costs. *Willes*, 316. *Vide infra*. And in all cases within the statute, if the plaintiff once comply with it, by taking down the issue for trial, although he be nonsuit, and the nonsuit be afterwards set aside, 1 T. R. 492. *see* 2 Camp. 408, or although he have a verdict, and a new trial be afterwards granted, 1 H. Bl. 101, or although the cause be made a remanet, and the plaintiff afterwards withdraw the record, 3 T. R. 1, the defendant can never afterwards have judgment as in case of a nonsuit, for any subsequent laches upon the part of the plaintiff in not bringing the cause to trial; but if he wish to dispose of the action, he must take it down for trial by proviso. But where the cause is not made a remanet, but the plaintiff, instead of allowing it to be tried, withdraws the record, the defendant may have judgment as in case of a nonsuit. 1 East, 346.

When and how obtained.] The defendant is not entitled to judg-

ment as in case of a nonsuit, by the above statute, until the plaintiff have failed to bring on the cause to trial within the time allowed him for that purpose by the practice of the court. By the practice of this court, the plaintiff is in no case obliged to give notice of trial, until the term after that in which issue is joined; *Vol. 1. p. 136. 2 T. R. 734; and see R. H. 15 & 16 C. 2. r. 2. R. H. 20 & 21 C. 2;* and consequently no motion can be made for judgment as in case of a nonsuit, until the third term inclusive after issue joined, unless the plaintiff have in fact given notice of trial previously, and not proceeded to trial in pursuance of such notice. *4 T. R. 557. 2 New Rep. 397.* In country causes, if the issue be joined in an issuable term, and no notice of trial given for the next assizes, the defendant cannot move for judgment as in case of a nonsuit, until after the plaintiff has failed to bring down the cause for trial at the second assizes. Also, before the defendant can have judgment as in case of a nonsuit, the issue must be entered upon record; and the plaintiff, we have seen (*Vol. 1. p. 133*), cannot be ruled to enter the issue in country causes, until the term after it is joined; nor in town causes, until the term after it is joined, unless notice of trial have been given.

In order to obtain judgment as in case of a nonsuit, *first, rule the plaintiff to enter the issue, as directed Vol. 1. p. 133; and if it be not entered before the expiration of the time limited for that purpose by the rule, you may sign judgment of nonpros. But if entered, then make an affidavit of the state of the cause and the plaintiff's default; see the form, Tidd, Forms, 204. § 14; and if the motion be made in the next term after issue is joined, the affidavit must state that notice of trial was given, and that the plaintiff had not proceeded to trial in pursuance of his notice. Give a motion paper with this affidavit to counsel, to move for a rule nisi; and before the motion is made, you must get the clerk of the treasury to bring the roll into court; or if you are at Westminster before the sitting of the court, the clerk of the papers will mark the roll in the treasury "Read." 1 Sellon, 366. Draw up your rule with the clerk of the rules; see the form, Tidd, Forms, 204. § 15; pay 8s. 6d.; serve a copy of it on the plaintiff's attorney or agent, and make an affidavit of the service. And afterwards, on the day after that appointed by the rule, give a motion paper to counsel, to move to make the rule absolute upon this affidavit of service. The statute requires that notice be given of the motion; vide supra, and see the form of the notice, Tidd, Forms, 204. § 13. Such notice is seldom given in this court; the service of the rule nisi being deemed a sufficient notice of the motion, within the meaning of the statute. Lofft, 265. Also, the general rule, so often noticed in the course of this work, which requires a term's notice of proceeding, where no proceedings have been had in the cause within 4 terms, does not extend to motions for judgment as in case of a nonsuit. 5 T. R. 634. 2 W. Bl. 1223.*

The court, however, instead of making the rule absolute, may "upon just cause and reasonable terms," allow a further time for the trial of the issue. *Vide supra.* As to the "reasonable terms"

here mentioned, the court usually discharge the rule upon the plaintiff's undertaking peremptorily to try the cause at the next sittings or assizes, or, if it appear that he cannot (from the peculiar circumstances of the case) bring on the trial at that time, at some subsequent sittings or assizes; see 7 T. R. 178. 1 Taunt. 118; but where the justice of the case requires it, the court will add to this such other terms as they may think reasonable. Besides the undertaking here mentioned, however, the plaintiff must shew to the court "just cause" for his not having proceeded to trial; and the excuse must be such as to satisfy the court that the plaintiff's not having proceeded to trial arose not from any wish upon his part to delay the trial of the issue unnecessarily, or for the purpose of vexation, or from any other improper motive, but from necessity or from some other just cause; but see 1 East, 554. The absence of a material witness is sufficient cause; see Barnes, 316; and where the plaintiff in a *qui tam* action withdrew the record, because his principal witness refused to give evidence for fear of subjecting himself to a penalty for the same transaction, the court allowed it to be a sufficient excuse; although it appeared that the time limited for bringing any action against the witness would not expire for three terms, and that the plaintiff could not proceed to trial until after the expiration of that time. 7 T. R. 178. So, the insolvency of the defendant after action brought, 2 Doug. 671, and even the insolvency of the plaintiff, after issue joined, Tidd, 696, have been deemed sufficient excuses; and the court have even allowed it to be a sufficient excuse, that the attorney was not enabled to prepare briefs for counsel, on account of the plaintiff's absence. 1 East, 554. The court are in general more strict in this respect, where notice of trial has been given, than in other cases. If a rule *nisi* for judgment, as in case of a nonsuit, be discharged on an affidavit of an excuse which is false in fact, the court will not afterwards open the matter upon disproof of the contents of such affidavit; although had they seen reason to doubt the truth of it at the time of shewing cause, they would have suspended their judgment until the matter were examined into. 3 T. R. 405. It is usual for the plaintiff's counsel to shew his affidavit to the counsel for the defendant; and if the latter be satisfied with the excuse stated in the affidavit, he may consent to the rule being discharged, upon the peremptory undertaking above mentioned; the briefs may be indorsed accordingly, and handed to the clerk of the rules.

The rule for judgment as in case of a nonsuit, is either discharged upon the peremptory undertaking above mentioned, or made absolute. If made absolute, let the defendant draw up the rule with the clerk of the rules; pay 7s. 6d.; and get it stamped with a 10s. stamp. Then bespeak the roll of the clerk of the treasury, in order that the master may mark the costs; pay him 1s. 6d. and 5s. 10d. more in vacation. Judgment being signed, you may sue out execution. Executors or administrators, however, are not liable to costs on this judgment. *Ante*, p. 214. See the form of

the judgment, *Tidd, Forms*, 313. § 63—64.—of a *fi. fa. m. it*, *Id.* 339. § 3.—of a *ca. sa.* 10 *Went.* 309.

If the rule be discharged upon a peremptory undertaking, and the plaintiff afterwards neglect to proceed to trial in pursuance of such undertaking, let the defendant's attorney make an affidavit of the fact; see the form, *Tidd, Forms*, 205. § 16; and give this with a motion paper to counsel, to move for judgment as in case of a nonsuit, for not proceeding to trial in pursuance of a peremptory undertaking; and the court will thereupon grant a rule absolute in the first instance. See *Say*. 74. *Barnes*, 315. Then sign judgment, as above directed, and sue out execution.

CHAPTER XXIII.

Costs for not proceeding to Trial.

In what cases.] IF the plaintiff give notice of trial, and neither countermand his notice (see 2 *Str.* 849), nor proceed to trial in pursuance of it, the defendant, upon affidavit of attendance and necessary expenses, shall be entitled to his costs, to be taxed by the master; *R. M.* 1654. § 18, and see *R. M.* 4 *A.* (c); even although he have prevented the plaintiff from entering his cause for trial, by entering a *ne recipiatur* with the marshal. *Pr. Reg.* 406. In like manner, the plaintiff is entitled to costs, if the defendant do not proceed to a trial by proviso, after giving notice to that effect; 2 *Str.* 797; and if both parties give notice of trial, and neither of them countermand their notice, or proceed to trial in pursuance of it, each of them is entitled to costs from the other. *Pr. Reg.* 405. See 4 *Taunt.* 591. 7 *Id.* 476. Also, if the plaintiff do not proceed to execute his writ of enquiry in pursuance of his notice, or countermand it in time, the defendant will be entitled to his costs, in the same manner as for not proceeding to trial. *Ante*, p. 25. 1 *Str.* 317. 2 *Str.* 728.

The defendant, however, cannot move for costs for not proceeding to trial, and judgment as in case of a nonsuit, at the same time, 1 *B. & P.* 38. 1 *Sellon*, 372, because the judgment of nonsuit includes these costs; nor can he, it seems, move for these costs, after moving for judgment as in case of a nonsuit, *Hullock, Costs*, 404. *Tidd*, 689. 2 *W. Bl.* 1093, at least if the rule for judgment as in case of a nonsuit have been made absolute, for the reason just now mentioned. But after moving for costs for not proceeding to trial, the defendant, it should seem, may move for judgment as in case of a nonsuit. *Tidd*, 689.

If the plaintiff be an executor, he is liable for those costs for not proceeding to trial, in the same manner as if he were suing in his own right. *Ante*, p. 131.

How obtained.] Let the defendant's attorney make an affidavit, stating when the action was commenced, issue joined, and notice of trial given, and that the plaintiff did not proceed to trial or countermand the notice. See the form, *Tidd, Forms*, 202. § 9. Give this affidavit, with a motion paper, to counsel, to move for costs for not proceeding to trial in pursuance of notice, and the court will thereupon grant a rule absolute in the first instance. Draw up the rule with the clerk of the rules; see the form, *Tidd, Forms*, 203. § 10; and get an appointment on it from the master. Serve a copy of the rule and appointment on the plaintiff's attorney; and afterwards attend before the master, and have the costs taxed. Then let the defendant or his attorney serve a copy of the rule and allocatur on the plaintiff himself personally, and demand the costs; and if not paid, let the defendant and his attorney make an affidavit of the demand and refusal, (see the form, *Tidd, Forms*, 203. § 11. 1 *Sellon*, 414. (a), and see 3 *T. R.* 351. 2 *Wils.* 227), and move thereon for an attachment. This rule for the attachment is absolute in the first instance. Draw it up with the clerk of the rules, and take it to one of the clerks in the Crown Office, who will thereupon make out the attachment; pay him 18s. 6d. Take the writ to the sheriff's office, and obtain a warrant thereon; pay 2s. 6d.; and give the warrant to your officer to execute; see one guinea.

By *R. M.* 1654. § 18, above mentioned, the defendant is entitled to costs if the plaintiff do not proceed to trial in pursuance of his notice, unless the plaintiff have countermanded his notice, or "shew cause to be allowed in the court in excuse of such costs." And the court of Common Pleas refused the rule, where the plaintiff was prevented from going to trial by an accident which happened to a material witness. *Barnes*, 133. As the rule, however, is absolute in the first instance, the only way of bringing the matter of excuse under the consideration of the court, is by moving to discharge the rule.

CHAPTER XXIV.

Nolle Prosequi.

A **NOLLE PROSEQUI** is a partial forbearance by the plaintiff to proceed any further, either in the suit altogether, or as to some part of it, or as to some of the defendants; but if entered as to part of the suit only, or as to some of the defendants, he is at liberty to proceed as to the rest. 1 *Saund.* 207 b.

To the whole declaration.] If the plaintiff misconceive his action, or have made a mistake as to the party sued, (as where he

sues a feme covert, and she pleads coverture in bar; 3 T. R. 511; or where he discovers that the defendant is an infant, and the action is not for necessaries; or the like) he may enter a *nolle prosequi* as to the whole cause of action.

To some of several counts.] Where the defendant pleads one plea to the whole declaration, and that plea happens to be a complete bar to one or more of the counts, but not to others, the plaintiff may enter a *nolle prosequi* as to the counts to which the plea is a bar. Thus, where *assumpsit* is brought for goods sold, &c. and upon an account stated, and infancy is pleaded to the whole of the declaration, the plaintiff may enter a *nolle prosequi* as to the count upon an account stated, (no action upon an account stated lying against an infant), and reply to the other counts. 1 Saund. 207 b.

But where there is a *demurrer* to a whole declaration, the plaintiff will not be allowed to rectify his error, by entering a *nolle prosequi* as to some of the counts: 4 T. R. 360. 1 Saund. 207 b.: thus, where there was a *demurrer* to a declaration against two defendants, because one of them was not named in one of the counts, the court held that the plaintiff could not enter a *nolle prosequi* as to that count, and proceed on the others. 4 T. R. 360. So, where there was a *demurrer* to a declaration for a misjoinder of counts, the court held that the plaintiff could not rectify his mistake by entering a *nolle prosequi* as to some of the counts. 1 H. Bl. 108.

But if the defendant demur or plead separately to several counts, the plaintiff may enter a *nolle prosequi* as to some of the counts, and proceed to trial or argument on the others. 1 Saund. 207 a. 203. 339. 2 Ro. Abr. 101. G. pl. 1. 2 Leon. 177. Hob. 180. 1 B. & P. 157. 6 Taunt. 444. Clift. 425. pl. 14. Lil. Ent. 446. 55. If the defendant plead to one count and demur to another, the plaintiff, if he have judgment on the *demurrer*, and be content to take damages upon that judgment only, may execute a writ of enquiry as to it, or, in case of a bill of exchange or the like, may have it referred to the master, and may enter a *nolle prosequi* as to the issue in fact. Ante, p. 37.

To part of a count.] The plaintiff may enter a *nolle prosequi* as to part of a count. Thus, in trespass, where the plaintiff declares that the defendant took and carried away the plaintiff's hay, grass, and corn, he may enter a *nolle prosequi* as to the hay and grass, and proceed for the taking of the corn. 1 Saund. 207 b.

As to some of several defendants.] In actions upon contracts against several defendants, if the defendants join in their pleas, the plaintiff cannot enter a *nolle prosequi* as to any one of them, without releasing the others; 1 Wils. 90. 1 Saund. 207 (n.); but if they sever in their pleas, and one of them plead bankruptcy, *ne unques executor*, or any other matter in his personal discharge,

although he plead also to the action of the writ, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others. 1 *Wils.* 89. 1 *Doug.* 169. 2 *M. & S.* 444. See 3 *Esp.* 76. 5 *Id.* 47.

In actions *ex delicto*, the plaintiff may enter a *nolle prosequi* as to some of the defendants, and proceed against the others, at any time before final judgment, even although they all join in the same plea, and be found jointly guilty. 1 *L. Raym.* 597. 1 *Wils.* 306. *Hob.* 70. 2 *Salk.* 455, 456, 457. 3 *Id.* 244, 245. And *a fortiori*, he may do so, where the defendants plead severally; *Cro. Car.* 239. 243. 2 *Ro. Abr.* 100, pl. 5. *Carth.* 19. *Moor.* 624. 2 *Leon.* 177. *11ft.* 424, pl. 13. 2 *Salk.* 457; or where they plead jointly, but their plea in its nature is several; as where in ejectment against several, who jointly plead not guilty, the plaintiff may, even at the assizes, enter a *nolle prosequi* as to one or more of the defendants, and proceed against the rest. 1 *L. Raym.* 716. 12 *Mod.* 651. Also, if the jury, in an action of trespass, sever the damages, where they should not, the plaintiff may take judgment *de melioribus damnis* against one of the defendants, and enter a *nolle prosequi* as to the other. *Fol.* 1. p. 195.

How entered.] If entered before issue joined, the plaintiff inserts it at the commencement of his replication, &c. and it consequently appears upon the roll when it is made up; but if after issue joined, it is sufficient if it be entered at the time of entering the final judgment. 1 *Str.* 532. See the form of the entry of *nolle prosequi* to the whole declaration, 1 *Went.* 68.—the like, to a particular count, *Tidd, Forms*, 316. § 68.—the like, with replications to the other counts, 3 *Went.* 96. 100. and see 9 *Id.* 179.—judgment by *nil dicit* as to one count, and *nolle prosequi* as to two others, after plea, in debt on statute, *Tidd, Forms*, 270. § 12 c.—*nolle prosequi* as to one of several defendants, *Id.* 316. § 67.

Costs.] Where a *nolle prosequi* is entered as to the whole declaration, the defendant is entitled to costs, in the same manner as upon a discontinuance. 3 *T. R.* 511. And where entered as to some of several counts, the plaintiff is not entitled to costs as to these counts, although he have a verdict on the others. 16 *East*, 129.

Retrazit.] A *retrazit* is very similar to a *nolle prosequi* to the whole declaration; excepting that the former is a bar to any future action for the same cause, the latter is not; the former is also made in person in open court when the trial is called on, the latter is made by a mere entry on the roll out of court.

As a *retrazit* is very unusual in practice, it is unnecessary to consider it further in this place. See the form of the entry on the roll, 2 *Sellon*, 338.

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CHAPTER XXV.

Remittitur Damna.

IN ejectment, if the plaintiff have judgment by confession or default, it is usual for him to remit the damages, and to pray the writ of possession merely. See the form of judgment for plaintiff by *nil dicit* in ejectment, with a remittitur damna, Tidd, Forms, 684. § 31. 685. § 32.—the like by *cognovit* after issue joined, with a remittitur damna, Id. 696. § 55.—the like as to an undivided part of the premises in one count, with a remittitur damna, and a *nolle prosequi* as to the residue. Id. 698. § 56 a.

In replevin, of a distress for "rent, customs, services or damage feasant," where the defendant signs judgment of *nonpros* for want of a plea in bar, (see ante, p. 70), he usually remits the damages, sooner than be at the expense of a writ of enquiry, and takes his judgment for a return merely. See the form of such judgment and remittitur, Tidd, Forms, 629. § 47.

Where the jury give greater damages than the plaintiff has declared for, it may be rectified by entering a remittitur for the excess; *Yelu*. 45. 2 *Str*. 1110. 1171. *Vol*. 1. p. 197; or if the plaintiff have signed judgment for the greater sum, the court will give him leave to amend it, by entering a remittitur for the excess, even in a subsequent term, and after error brought. *MS. M*. 1814. See 2 *Str*. 1110. 1 *H. Bl*. 643. If the plaintiff, however, demand in his declaration more than by his own shewing is due, and there be a special demurrer for this cause, he cannot rectify the mistake by entering a remittitur for the surplus; 1 *Saund*. 285 n. 5; but if the declaration be not demurred to, it seems he may, 1 *Ro. Abr*. 784. *R. pl*. 2. 785. *S. pl*. 1. *Dy*. 369 b. *pl*. 56. *T. Raym*. 395. 5 *Mod*. 213, 214, 215. 1 *Vent*. 49. *Curth*. 437. *Com. Dig. Pleader*, C. 48, unless the sum demanded depend upon some deed or other instrument, where the debt or duty to be recovered appears certain and entire upon the face of it, as in debt or covenant to pay 20*l*., in which case a demand of more than appears due is bad, and cannot be aided by the entry of a remittitur. 1 *Saund*. 285 a. See 2 *Str*. 1171. But if the sum to be recovered may be more or less, by matter extrinsic, as in debt or avowry for rent, if more be demanded than is due, the excess may be remitted; 2 *Salk*. 659, 7 *Mod*. 87, 2 *L. Raym*. 814. 1 *L. Raym*. 317; so, where the debt or duty is composed of several parcels, a demand of more than is due may be aided by a remittitur. *Cro. Jac*. 499. 2 *L. Raym*. 815, 7 *Mod*. 88.

In an action against several defendants, if the jury sever the

damages by mistake, the plaintiff, by entering a *remittitur* as to the lesser damages, may have judgment for the greater damages against all the defendants. *Vol. 1. p. 195.*

See the form of a judgment on cognovit as to part, with a remittitur as to the residue, Tidd, Forms, 281. § 24.—of return of writ of enquiry, and remittitur of part of the damages, Id. 256. § 6.—of judgment on demurrer as to one count, with a remittitur damna as to the others. Id. 289. § 32 b.

CHAPTER XXVI.

New Trial.

IF any error in the proceedings appear upon the face of the record, the party injured by it has his remedy by demurrer, motion in arrest of judgment, or writ of error, according to circumstances. But if any defect of judgment happen from causes wholly extrinsic, arising from matter foreign to or dehors the record, the only remedy the party injured by it has, (if we except the writ of attaind, long since obsolete, and the writ of error *coram nobis* in some few cases), is by application to the court for a new trial.

In what cases.] The court must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case, before they will grant a new trial. *3 Bl. Com. 392. See 6 T. R. 638.*

If the judge misdirect the jury, *2 Salk. 649. 2 Wils. 269, 273,* even in a penal action, *4 T. R. 753. 1 Camp. 450. 5 T. R. 19;* it is in general a good ground for a new trial; unless the court be satisfied that justice has been done between the parties, notwithstanding the misdirection. *2 T. R. 4. see 1 B. & P. 338. 5 T. R. 20. 6 Taunt. 336.* So, if the sheriff or his deputy misdirect the inquest, the court, upon application, will set aside the execution of the writ of enquiry, *2 Str. 1259,* unless it appear that substantial justice has been done between the parties. So, if a judge improperly nonsuit the plaintiff, a new trial will in general be granted; *5 Bur. 2612. 4 Id. 1986. 3 Wils. 146. 338;* but the court of Common Pleas have refused it where it was not desired upon the part of the plaintiff at the trial that the cause should go to the jury; *1 Taunt. 10. see 4 Taunt. 779;* and in another case, where the plaintiff had elected to be nonsuit, because the judge directed the jury to give only nominal damages. *3 Taunt. 229.* Also, if a judge at the trial, or a sheriff upon the execution of a writ of enquiry, admit improper evidence, *Barnes, 448,* or reject evidence which ought to be admitted, *2 W. Bl. 1105,* by which means the result of the trial or enquiry has been different from what it otherwise would have been, the

court will in general grant a new trial, or set aside the execution of the writ of enquiry. But the court have refused to grant a new trial upon the ground of the improper rejection of evidence, where that evidence went to prove merely a fact which had already been proved by other means; 3 *East*, 451. 11 *East*, 311; and the court of Common Pleas refused a new trial for the improper admission of evidence, where there appeared to be sufficient evidence to support the verdict, independently of the evidence so admitted. 1 *Taunt.* 12. Also, where a bill of exceptions has been tendered, the court will never grant a new trial upon the same point of law, unless the party consent to waive his bill of exceptions. 2 *W. Bl.* 929. *Cowp.* 161.

Where the undersheriff who returned the panel, was attorney for the party for whom the verdict was found, the court granted a new trial. *Cowp.* 112. *but see* 1 *Smith*, 304. Also, if a juror have been sworn upon the jury by a wrong surname (particularly where he was not the person summoned or intended to be sworn), a new trial will be granted. *Willes*, 484. *Barnes*, 453. 454. 1 *Str.* 629, 2 *L. Raym.* 1410. *Vol. 1. p. 182.* It is discretionary, however, with the court, to grant a new trial in such a case or not; and they will not do so, unless the mistake as to the juror have been productive of some injustice. 12 *East*, 229. They have set aside the execution of a writ of enquiry, however, where the persons composing the inquest were prisoners for debt, and taken out of custody for the purpose of serving on the inquest; and the court said that if the sheriff had been made a party to the rule, they would have obliged him to pay the costs. 4 *T. R.* 473. If the jury find a verdict contrary to evidence, the court will in general grant a new trial, 1 *Bur.* 390, particularly if the justice of the case require it. 1 *M. & S.* 576. But if the verdict be such as the justice and equity of the case required, although it be contrary to evidence, yet the court will not disturb it. 4 *T. R.* 468. 3 *Wils.* 273. 2 *Id.* 362. 302. 2 *W. Bl.* 1221. 4 *Bur.* 956. *Cowp.* 597. So, if a verdict be found for the defendant against evidence, in a vexatious or hard action; or for the plaintiff, after an unconscionable defence set up by the defendant: a new trial will not be granted. 1 *Bur.* 11. 54. 3 *Id.* 1306. 2 *Salk.* 653. 644. 648. Nor will the court grant it in any other cases of strict right or *summum jus*, where the rigorous exaction of extreme legal justice would be hardly reconcileable to conscience. Also, where evidence has been given on both sides, the court will seldom grant a new trial, unless the evidence against the verdict very strongly preponderate. 2 *Str.* 1142. 3 *Wils.* 63. 47. 1 *Id.* 22. *see* 3 *Id.* 38. Yet in a question relating to real property, where the inheritance would be for ever bound by the verdict, the court of Common Pleas granted a new trial, although the case had been left to the jury upon conflicting evidence. 3 *Taunt.* 91. *see* *Id.* 232. For excessive damages, the court will grant a new trial of course, or set aside the execution of a writ of enquiry, in all cases where the damages may be ascertained by mere calculation; *see* 1 *Taunt.* 491; and in

other cases of actions *ex contractu*, if it appear clearly that the damages are excessive. But in actions *ex delicto*, such as actions for criminal conversation, 4 *T. R.* 651. 1 *Bur.* 609. *see* 6 *T. R.* 444, seduction, 11 *East*, 23. 13 *Wils.* 18, battery, 5 *T. R.* 257. 2 *Wils.* 252, false imprisonment, 2 *Wils.* 205. 160. 244, or other personal torts, 2 *W. Bl.* 999. *Cowp.* 230, malicious prosecution, 2 *W. Bl.* 1327, *Cowp.* 37, slander, 2 *Salk.* 644, or the like, *see* 2 *T. R.* 166, a new trial is seldom granted on this account, unless the damages be outrageous, 2 *W. Bl.* 942. 1327. 7 *T. R.* 529, or the court be satisfied that the jury acted under the influence of undue motives, or of gross error or misconception; 6 *T. R.* 244; and the same, as to the execution of writs of enquiry. 3 *Bur.* 1845. 3 *Wils.* 61. 63. 11 *East.* 93. On the other hand, a new trial will not be granted, nor the execution of a writ of enquiry set aside, on account of the smallness of the damages, 2 *Str.* 940. 1051. 2 *Doug.* 509, 510, unless it have arisen from some mistake in point of law, either upon the part of the court, 2 *Str.* 1259. 2 *Doug.* 510, or of the jury, 1 *Str.* 425, or from some unfair practice upon the part of the defendant, 2 *Salk.* 647. *see* 1 *Str.* 515. Also, the court will not grant a new trial, where the value of the matter in dispute, or the amount of damages to which the plaintiff would be fairly entitled, is too inconsiderable to merit a second examination. 2 *W. Bl.* 851. 1 *Bur.* 11. 664. 1 *Taunt.* 495. *MS. E.* 1814. *and see* 2 *T. R.* 113. After payment of money into court, 5 *Bur.* 2639, and after the service of the allowance of a writ of error, by a defendant, *Tidd*, 805, the court have also refused to grant a new trial, deeming these acts acknowledgments of the truth of the case as stated in the declaration. In penal actions, if there be a verdict for plaintiff, the court will grant a new trial in the like cases as in other actions; but if the jury have found a verdict for the defendant, a new trial is never granted, 10 *East*, 268. 2 *Str.* 1238. 1 *Wils.* 17. 3 *Id.* 59, unless for the mistake or misdirection of the judge, 1 *Camp.* 450, 10 *East*, 268. 4 *T. R.* 753. 5 *T. R.* 19. For the misconduct of the jury, also, the court will in general grant a new trial, if the misconduct be such as to satisfy the court that the verdict has been determined on, without that grave and serious deliberation, that right exercise of judgment, and that total absence of all partiality, so necessary to the proper execution of the important duties of jurymen: thus, if the jurors eat or drink at the expense of the party for whom they afterwards find a verdict; or if they determine their verdict by lots; *Vol. 1. p.* 175; or if they or any of them have previously declared that the plaintiff should never have a verdict; 2 *Salk.* 645. 2 *Comyns*, 601; or the like: the court will set aside the verdict, and grant a new trial.

A new trial has been granted on account of the non-attendance of a material witness; 2 *Salk.* 645; and the court have granted it without costs, where a material witness for the defendant was kept out of the way by the contrivance of the plaintiff, to prevent him from being served with a *subpœna*. *Bul. N. P.* 328. The

court have also granted a new trial, where it appeared clearly that the plaintiff's case was a mere fiction supported by perjury, which the defendant could not at the time of the trial be prepared to answer. 3 *Bur.* 1771. The court, however, will not in general be satisfied with the mere affidavit of the party making the application, contradicting the witnesses on the other side; 4 *Taunt.* 640. but see 1 *B. & P.* 427; the witnesses must be indicted, or some other satisfactory proof must be offered to the court, of the perjury. Even where the witnesses were indicted, we have seen (*ante*, p. 192) that the court in a recent case refused to stay execution until the indictment should be tried. 4 *M. & S.* 140. If a witness, however, make a mistake in his evidence, by reason of which a verdict was given against the party who called him, the court will not grant a new trial on this account, even although the mistake be explained to them by the affidavit of the witness himself. *Say.* 27. Also, an objection to the competency of witnesses, discovered after the trial, is not of itself a sufficient ground for a new trial; although it may have some weight with the court, where the party applying appears to have merited. 1 *T. R.* 717.

If the party, for whom a verdict is afterwards given, deliver to the jury after they have left the bar, evidence which has not been shewn to the court, a new trial will be granted. *Vol.* 1. p. 175. So, if he have laboured the jury, or used improper influence with them to induce them to give a verdict in his favour, a new trial will be granted; but merely desiring a juror to attend at the trial of the cause, is no ground for a new trial. 1 *Str.* 643. So, where by a fraudulent trick upon the part of the defendant, the plaintiff's counsel were taken by surprise, and the defendant thereby obtained a verdict, the court granted a new trial. *MS. E.* 1814. See 1 *Bur.* 352. 1 *W. Bl.* 298. 5 *Taunt.* 277. Where a new trial was applied for, on account of a variance between the issue delivered and the *nisi prius* record, the court refused it. 2 *Wils.* 243. But in an action on a replevin bond, where the plaintiff was nonsuit because of a variance between the replevin bond and the record, the court of Common Pleas gave them leave to amend, upon payment of costs, and ordered a new trial. 3 *Taunt.* 81. If the plaintiff have given no notice of trial or an insufficient notice, the court will grant a new trial; 2 *Salk.* 646; so, if no notice of executing a writ of enquiry, or an insufficient notice, be given, the court will set aside the execution of the writ. *Barnes*, 233. But these irregularities are waived, by the defendant appearing and making defence. 2 *Salk.* 646. *Barnes*, 233. The court have granted a new trial, where a verdict has been obtained against a party, on account of the absence of his counsel; 2 *Salk.* 645; but such instances are very rare. Where a cause was called on, and tried as an undefended cause in consequence of the defendant's attorney neglecting to deliver his briefs, the court of Common Pleas indeed granted a new trial, but ordered the defendant's attorney to pay the costs as between attorney and client, out of his own pocket. 3 *Taunt.* 484. A new trial will seldom be granted,

where a verdict has been given against a party, or a plaintiff has been nonsuit, for want of evidence which might have been produced at the trial, 1 *Wils.* 98. 3 *Salk.* 361. see 2 *Salk.* 647. 2 *W. Bl.* 802, unless the verdict be manifestly against the justice and equity of the case. 5 *Bur.* 2631. But if new evidence have been discovered after the trial, the court will grant a new trial upon payment of costs, if it be necessary in order to do justice between the parties. Where the defendant was sued as executor, and was absent from the kingdom at the time the action was brought, the court of Common Pleas granted a new trial, upon the discovery of evidence after verdict for the plaintiff, although such evidence was in the possession of the defendant's attorney at the time of the trial, but not known by him to be so. 2 *W. Bl.* 955. The court, however, will not grant a new trial, to let the party into a defence of which he was apprised at the first trial. 2 *T. R.* 113. see 1 *T. R.* 84.

When a verdict is taken subject to the opinion of the court on a special case, and the special case turn out to be so defectively stated that the court cannot give judgment upon it, a new trial will be granted. 1 *Str.* 300. and see 3 *T. R.* 507 n. *Vol.* 1. p. 193.

Where a Welch cause was tried in Monmouthshire instead of Hereford, the court refused to set aside the verdict on that account, as the notice of trial was for Monmouthshire, and the defendant did not object to it; besides the objection appeared upon the record, and therefore, if well founded, the party had another remedy. 11 *East.* 370.

If the jury at the second trial find for the party against whom the former verdict was given, the court, if the case be doubtful, or the second verdict do not accord with the justice of the case, may be induced under circumstances to grant a third trial. It is entirely in the discretion of the court, however, to do so or not; for the losing party, in such a case, is not entitled to it by any rule or practice of the court; 2 *W. Bl.* 963; and they have accordingly refused it, where the second verdict was satisfactory. *Id.* It is also in the discretion of the court to grant a third trial after two concurring verdicts. 4 *Bur.* 2108. But this is seldom done; and the court have refused to grant it, after a new trial for excessive damages, and the same damages given by the second verdict; 2 *Salk.* 649. 2 *Str.* 692; and the same, where the two concurring verdicts were for the defendant, even although the judge, before whom the second trial was had, expressed himself dissatisfied with the verdict. 3 *Taunt.* 232.

Where there are several issues, and a verdict on one of them is found against evidence, the court cannot grant a new trial as to that issue only, but must grant it as to all the issues, if they grant it at all. *Bul. N. P.* 326. but see 4 *Taunt.* 555. And the issue thus found against evidence must be a material issue, to induce the court to grant the new trial. *Bul. N. P.* 326.

In ejectment, where the verdict is for the defendant, the court

will seldom grant a new trial, because the plaintiff may, if he will, bring a new action; but otherwise, if found for the plaintiff, and the circumstances of the case in other respects warrant them in granting it. 4 *Bur.* 2224. 2 *Id.* 1244, 1 *W. Bl.* 348. see 2 *Str.* 1105. As to new trials, in cases of issues out of courts of equity, see *Vol.* 1. p. 317. and see 4 *M. & S.* 195.

How obtained.] A new trial is obtained upon motion to the court from which the *venire* issued; and, upon proper grounds being stated for it, the court will grant a rule to shew cause. Afterwards upon shewing cause, if the grounds upon which the rule was granted still seem sufficient, and either appear upon the face of the judge's report or be substantiated by affidavit, and no sufficient cause be shewn against it, the court will make the rule absolute. When the action is against several defendants, the application should be made on the behalf of all of them; and therefore where one defendant is found guilty and the other acquitted, it was holden that the former could not have a new trial. 2 *Str.* 814. but see 6 *T. R.* 638. and see 4 *Taunt.* 802, 803. So, in trespass against several, where the verdict was contrary to evidence as to one of them, a new trial was refused. 3 *Salk.* 362.

The motion for the rule *nisi* must be made before the expiration of the rule for judgment; 1 *Doug.* 171. 5 *T. R.* 436. *Lofft.* 230. see *Vol.* 1. p. 200; unless under particular circumstances, 1 *Doug.* 171, in which case the court may, in their discretion, allow a new trial to be moved for at any time before judgment has been actually signed. 2 *Doug.* 797, 798. and see 5 *T. R.* 436. Nor can it in general be moved for, after motion in arrest of judgment; 2 *Salk.* 647. but see *Bul. N. P.* 326; nor after error brought by the party making the application. *Tidd.* 805. but see 1 *B. & P.* 149. *n. contra.*

When the court have granted the rule *nisi*, draw it up with the clerk of the rules; pay 7s. 6d.; and serve a copy of it upon the attorney or agent of the opposite party. Then, before the time of shewing cause, if the action were tried in London or Middlesex, deliver a note in writing at the house or chambers of the lord chief justice, "specifying the name of the cause, and the time and place where the same was tried, together with the nature of the motion;" *R. M.* 40 G. 3; and if tried by any of the puisne judges, some intimation should be given to his clerk, of the rule *nisi* having been granted, at least the evening before the case is to be argued. If the cause were tried in any other county, by a judge of this court, mention to his clerk that the rule *nisi* has been granted, and the judge will take care to have his minutes of evidence in court when the case is called on; if tried by a judge of another court, serve a copy of the rule *nisi* on his clerk, who will thereupon deliver the judge's report of the trial to the junior puisne judge of this court. Deliver to your counsel one of the briefs in the original cause, together with such further instructions and observations as you may think fit; you may learn from the paper of causes at the office of the clerk of the rules, the day the case will be

argued. When it is called on, the judge who tried the cause, or, if it were tried by a judge of another court, the junior puisne judge, will read his report of the trial; after which, the counsel on the opposite side show cause against the rule, the counsel for the party who moved for the rule nisi speak in support of it, and the court then state their opinion, and either discharge the rule or make it absolute. If the court make it absolute, they may do so upon terms, if necessary; such as, that witnesses infirm or going beyond sea, may be examined upon interrogatories; that certain deeds, books, papers, &c. may be produced at the trial; that certain facts, not intended to be litigated, may be admitted; or that the party may make discovery of certain facts upon oath, in order to prevent the necessity of having recourse to a court of equity for it.

If made absolute, draw up the rule with the clerk of the rules; pay 7s. 6d.; and serve a copy on the plaintiff's attorney or agent; or, if made absolute upon payment of costs, get an appointment on the rule from the master, and serve a copy of the rule and appointment. Get the costs taxed, and pay them without delay; otherwise the opposite party may move to discharge the rule for a new trial, and that he may be at liberty to sign judgment. Where a plaintiff, after setting aside a nonsuit upon payment of costs, proceeded to a second trial without paying these costs, and obtained a verdict, the court set aside the verdict, and gave the defendant leave to sign his judgment in the original action unless the costs should be paid within ten days. 13 East, 185. see *Hullock*, 401.

If the rule be discharged, sign judgment and tax your costs, as in ordinary cases.

Costs.] It is entirely in the discretion of the court, whether they will oblige the party applying for a new trial to pay costs, as a condition precedent to his proceeding to a second trial. Upon setting aside a nonsuit, or a verdict for misdirection of the judge, the court grant a new trial usually without costs. 3 Wils. 146. *Cowp.* 297. 485. 3 T. R. 553. 4 Id. 359. *Hullock*, 388.

Where the verdict was set aside for the misconduct of the jury, the court ordered the costs to abide the event of the second trial; 1 Str. 642; if set aside, because the verdict was contrary to law, or to the opinion or direction of the judge, a new trial is granted usually without costs; *Hullock*, 387. *Cowp.* 808. 1 W. Bl. 670. 3 T. R. 551; but if, because the verdict was contrary to evidence, or because of excessive damages, the new trial is usually granted upon payment of costs. 12 Mod. 370. 1 Bur. 12. 993. 2 Id. 665.

If a party have obtained a verdict by trick, the court will grant a new trial without costs, or, perhaps, in very gross cases, they will oblige him to pay the costs. 1 Bur. 352. see *Hullock*, 391. So, where a new trial was granted because the plaintiff had a material witness for the defendant concealed in his house, and prevented him from being served with a subpoena, it was granted without costs. *Bul. N. P.* 328.

If the rule be silent as to costs, the costs of the first trial are never allowed, whatever may be the event of the second. *Hullock*, 391. *Doug.* 483, 430, 437. 3 *T. R.* 507. 6 *Id.* 71. see 6 *T. R.* 144. 10 *East*, 416. 9 *East*, 325. Where the costs are ordered to abide the event of the second trial, if the same party succeed in both trials, he shall have the costs of the first; but otherwise the costs of the first shall not be allowed. 8 *T. R.* 619.

If a new trial be granted upon a ground not opened at the first trial, it will be upon payment of costs. 1 *T. R.* 20.

The new trial.] The former *nisi prius* record will answer, unless the *postea* have been indorsed upon it, in which case you must make out a new *nisi prius* record; if you use the former record, the *jurata* must be altered, in the same manner as when the cause is made a *remanet*. See *Vol. 1. p. 164.* and see 1 *L. Raym.* 510, *Carth.* 498. Give notice of trial, sue out jury process, and enter your cause for trial, as in ordinary cases.

The second verdict only appears upon the *postea*. Also, upon the judgment roll, no notice is taken of the first verdict, but the record proceeds as if the second verdict was the only one which was given. 2 *Saund.* 253. a. (n. 8).

If the plaintiff do not proceed to the second trial, the defendant may carry down the record by proviso; but he cannot do so, until after the next term or assizes from that in which the new trial was granted. 5 *Taunt.* 577.

Venire de novo.] This is the old common law mode of proceeding to a second trial, and differs materially from the granting a new trial, inasmuch as the *venire de novo* is awarded for some defect appearing upon the face of the record, a new trial is granted for matter entirely extrinsic. But a *venire de novo* is not awarded for every defect appearing upon the face of the record, but for a defective finding in the verdict only. 7 *T. R.* 52. 1 *Wils.* 55. See 5 *Bur.* 2661. 1 *Doug.* 377. *Vol. 1. p. 190. 192. 195.* 2 *Doug.* 730. 2 *Wils.* 144. And it cannot be granted by a court of error, 2 *Doug.* 732. n. 1 *T. R.* 151, unless in error to this court, upon a bill of exceptions in the court of Great Sessions in Wales. 2 *T. R.* 125. 2 *Doug.* 732. n. Where the verdict, however, can be amended, a *venire de novo* is never awarded.

Where a *venire de novo* is awarded, the party succeeding at the second trial is not allowed the costs of the first. 6 *T. R.* 131. 1 *East*, 111. *Hullock*, 391, 392.

Judgment nonobstante veredicto.] Where the defence put upon the record is not a legal defence to the action in point of substance, and the defendant obtains a verdict, the court upon motion will give the plaintiff leave to sign judgment notwithstanding the verdict, provided the merits of the case be very clear. The judgment so signed is an interlocutory judgment; after which a writ of enquiry must be sued out and executed, and final judgment

signed, as in ordinary cases; or if the damages be not material, as if the action have been brought to try a right or custom, or the like, the court will set aside the verdict, and enter a verdict for the plaintiff with nominal damages. 2 T. R. 758. 6 Co. 59. b. The motion is for a rule to shew cause; which is afterwards made absolute or discharged, in the usual way.

CHAPTER XXVII.

Amendment.

SECT. 1.

Amendment, &c. generally.

AT any time before judgment, in ordinary cases, the proceedings may be amended by a judge at chambers, upon summons calling upon the opposite attorney to shew cause why the party applying should not have leave to amend; in other cases the amendment may be obtained by application to the court; see the form of the rule, *Imp. B. R.* 299. Also, the judge at *nisi prius*, upon application, may allow the record of *nisi prius* to be amended, and may order the clerk of *nisi prius* to amend it *instanter*, 1 *Camp.* 57, provided the defect be not in a material allegation, of which the party must have been apprised, and which he might have had amended, before trial, 1 *Stark.* 74, and provided also the judge who tries the cause be a judge of the court in which the record was made up. See 3 *Taunt.* 81.

After judgment and before error brought, a judge at chambers will not in general entertain the application, but it should be made to the court; the rule is a rule *nisi*, which is afterwards made absolute or discharged, as in ordinary cases. After error brought upon a judgment of this court, the application for leave to amend must of course be made here, because the record always remains here, a transcript only being sent to the court of error; 2 *Str.* 837. *Tidd*, 652. and see *Cro. Jac.* 429. 628. 2 *Ro. Rep.* 471. 1 *Ro. Abr.* 209; but after error to this court, the application may be made either here or in the inferior court. *Poph.* 102. 1 *Doug.* 114, 115, 116. 2 *Str.* 1182. *Tidd*, 652. 8 *Co.* 162. a. 2 *Ro. Rep.* 471. *Hardr.* 505. and see 1 *Salk.* 49.

The court or judge, upon granting leave to amend, may oblige the party applying to submit to such equitable terms as may be

necessary to prevent the opposite party from being prejudiced by the amendment. 2 *Bur.* 756. and see 1 *Salk.* 47. 517. 3 *Salk.* 31. 1 *Wils.* 7. 76. 223. If the amendment be made at the trial, it is without payment of costs; in other cases it is allowed usually upon payment of costs, particularly if the error or mistake have arisen from the default of the party, and not from the misprision of any of the officers of the court. But if the amendment be made after error brought, it is usually upon payment of costs of the proceedings in error, provided the plaintiff proceed no further in his writ of error after notice of the amendment. *Barnes*, 17. 2 *L. Raym.* 897. 3 *Lev.* 361. see 4 *Taunt.* 588.

After a party has once amended on a demurrer, the court of Common Pleas will not allow him to amend again on a second demurrer; 2 *H. Bl.* 561; and the rule is the same in this court.

[What amendable at common law.] It may be necessary to premise that amendments in all cases are entirely in the discretion of the court, and are allowed only in furtherance of justice. See 7 *T. R.* 699. At common law, the court may amend in all cases, whilst the proceedings are in paper, that is, until judgment signed, and during the term in which it is signed; for until then the proceedings are considered as only in *feri*, and consequently subject to the control of the court. 2 *Bur.* 756. *Say.* 285. 3 *Bl. Com.* 407. 1 *Salk.* 47. 2 *Salk.* 566. 3 *Salk.* 31. And there is no difference in this respect between penal and other actions; 1 *Doug.* 114; and the court will accordingly permit the plaintiff in a penal action to amend, even after the time limited for bringing another action, provided there have been no unnecessary delay upon his part, and that the amendment required do not introduce any new cause of action. 6 *T. R.* 543. 7 *Id.* 55. see 2 *T. R.* 707. 6 *Id.* 171. 8 *Id.* 30. 4 *Id.* 159. 1 *Doug.* 114. *Ante*, p. 101. 2 *Bur.* 1098. 5 *Id.* 2833. see 6 *Taunt.* 19. After the term of which judgment is signed, the pleadings, &c. cannot be amended at common law, but by virtue of the statutes of amendments only. *Co. Lit.* 260. see 2 *Str.* 1011.

After demurrer, general or special, it is usual to give the other party leave to amend; 2 *Str.* 846. 954. 1 *Wils.* 226; see 4 *T. R.* 360; and it has been given even after demurrer argued, but before judgment, where the justice of the case required it. 2 *Doug.* 620. 2 *Str.* 954. *Say.* 316, 317. 4 *T. R.* 690. 6 *T. R.* 173. *Barnes*, 155. 3 *Wils.* 295. 1 *East*, 391, but see 1 *L. Raym.* 668, 1 *Salk.* 50. The court, however, have refused this to a plaintiff in a *qui tam* action, 4 *T. R.* 459. 228. in an action against bail, *Say.* 117, and in hard actions; 1 *H. Bl.* 37; and to a defendant, after the plaintiff had lost a trial. *Hardw.* 171. The party demurring, also, has been allowed to strike out a *similiter* which was entered in the issue by mistake. 2 *L. Raym.* 1137. Also, under particular circumstances, the court have allowed a party to withdraw his demurrer, and plead *de novo*, even after argument. *Ante*, p. 35. 1 *Doug.* 385. 452. 2 *Bur.* 756. What has been

now mentioned holds good also where there are several issues in law and in fact, even after argument of the issues in law, but before the trial of the issues in fact; but if the issue in fact be tried first, and **contingent damages assessed** as to the demurrer, the court, it seems, will not in that case allow either of an amendment, or of the demurrer being withdrawn. 1 *Bur.* 322.

[*What amendable by statute.*] No process shall be annulled or discontinued, for the misprision of the clerks in writing one syllable or letter [or word, 8 *Co.* 157 *a.*] too much or too little; but as soon as the mistake is perceived, it shall be amended in due form. 14 *Ed.* 3. *st.* 1. *c.* 6. And the justices before whom the record is made, or shall be depending by way of error or otherwise, may amend the same as well after as before judgment, in the same manner as they might have done by the above statute before judgment. 9 *Ed.* 5. *st.* 1. *c.* 4. Neither of these statutes, however, extend to process of outlawry. 4 *H.* 6. *c.* 3.

So, the court may amend whatever to them seemeth to be the misprision of the clerks, in any record, process, word, plea, warrant of attorney, writ, panel, or return, which may for the time be before them, so that no judgment shall be reversed by reason of such misprision. 8 *H.* 6. *c.* 12. *see* 1 *T. R.* 783. 151. *Willes*, 125. So, they may amend for the misprision of the clerks, and also of other officers such as sheriffs, coroners, &c., defects in any record, process, or return before them by way of error or otherwise, in writing a letter or syllable too much or too little. 8 *H.* 6. *c.* 15. In all these cases, there must be something to amend by.

[*What aided at common law.*] When there is any defect, imperfection, or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give the verdict, or the jury would have given it; such defect, imperfection, or omission is cured by verdict at common law, or, in the phrase often used upon the occasion, such defect is not a *jeofail* after verdict. 1 *Saund.* 228. *see* *Cro. Jac.* 44. *Cro. Car.* 497. 2 *Show.* 233. *T. Raym.* 487. *Hob.* 78. *Carth.* 304. 389. 1 *Mod.* 292. 1 *Lev.* 308. 1 *Vent.* 109. 1 *Sid.* 218. 423. 1 *Salk.* 130. 363. 365. *Comyns*, 116. 6 *Mod.* 302. 2 *L. Raym.* 1214. 1060. *Holt*, 567. 1 *Wils.* 1. 255. 2 *Id.* 5. 3 *Id.* 275. 7 *Bro. P. C.* 555. *Cowp.* 825. *Doug.* 658. 4 *Bur.* 2020. 2 *Id.* 1159. 1 *T. R.* 141, 145. 545. 3 *T. R.* 25. 147. 4 *T. R.* 472. 7 *T. R.* 518. 523. 2 *B. & P.* 259. 267.

Mistakes and defects in proceedings are also often aided by the acts of the opposite party. Thus, where a declaration is defective in point of form, the defect is frequently cured by the defendant in his plea admitting that which was omitted or defectively stated in the declaration; for by admitting it, he waives all objection

to the omission or defective statement. This subject shall be noticed in detail, in the next section.

What aided by the statutes of jeofails.] After verdict, the want of a warrant of attorney, the want of an original writ or bill, or any defects in form therein, mistakes and omissions in pleadings, misjoining of issue, discontinuance, discontinuance, misawarding of jury process, and the omission of a *copiatum* or *misericordia* in a judgment, are aided by the several statutes 32 *H. 8. c. 30*, 18 *El. c. 14*, 21 *J. 1. c. 13*, and 16 & 17 *C. 2. c. 8*; see *Bul. N. P. 322*, 323; and the same defects are now aided after judgment by confession, *nil dicit*, or *non sum informatus*, by *stat. 4 & 5 A. c. 16. § 2*, "so as there be an original writ or bill and warrants of attorney duly filed." Also, all defects in writs, original or judicial, or bills, are aided after verdict by *stat. 5 G. 1. c. 13*. These several statutes shall be more particularly noticed in the next section.

Of these, the statute 32 *H. 8. c. 30*. extends to penal actions; 9 *Str. 1227*. 1 *Doug. 115*; but there is a proviso in the others that they shall not extend to criminal proceedings, nor to any writ, bill, action, or information upon any popular or penal statutes, other than such as concern the customs and subsidies of tonnage and poundage. See 16 & 17 *C. 2. c. 8. 1 Str. 62. Coup. 382. 3 Salk. 130. 3 Lev. 347. Andr. 115. Hardw. 409*.

Although in some of these statutes the court are directed to amend the defect, yet an actual amendment is never made, but the benefit of the acts is attained by the court's overlooking the exception. 3 *Bl. Com. 407*. And for this reason, if error be brought for any defect aided by these statutes, no costs are given to the plaintiff in error, even although the amendment be made; for the court might have given judgment on the writ of error, without making the amendment, in the same manner as if the amendment had been actually made. *Hardw. 314*.

SECT. 2.

Amendment, &c. in particular Cases.

Warrant of attorney.] THE want of a warrant of attorney is aided after verdict, by 18 *El. c. 14*, (and see 32 *H. 8. c. 30*), although not perhaps after judgment by default. See 4 & 5 *A. c. 16*. and 1 *Wils. 85*. If, however, error be brought for want of a warrant of attorney, after judgment by default, the opposite attorney should file his warrant, and have it returned on the *certiorari*. *Vol. 1. p. 230*. and see 1 *Str. 136*.

Also, any mistake or defect which can be attributed to the misprision of the clerks, may be amended even after error brought, by 8 *H. 6. c. 12*. Thus, the court allowed of amendment in the sur-

name of the attorney, and in the addition, in order to make the warrant correspond with the declaration. 1 *Doug.* 114, 115.

If a plaintiff under age appear by attorney, in personal actions or ejectment, ~~it is aided (after verdict by)~~ 21 *J. 1. c. 13*, and after judgment by confession, *nū dicit* or *non sum informatus*, by 4 & 5 *A. c. 16. § 2*.

Original writ or bill.] If an original writ be defective, through any misprision of the clerks, it may be amended: 8 *H. 6. c. 12*, 8 *Co. 159*, *Barnes*, 10. 16. 22: if the defect arise from a mere variance between the original and the *præcipe*, caused by the mistake of the cursitor or his clerk, the cursitor will set it right as a matter of course, and rascal the writ; 3 *Att. 599*; but if the defect have originated in any other manner, you may get the writ amended upon petition to the master of the rolls, as directed *Vol. 1. p. 231. see 7 T. R. 299, 300*.

A bill upon the file may also be amended, at any time before plea pleaded, as of course; or afterwards, upon application to the court for that purpose. *R. M. 10 G. 2. r. 2. (b)*. Thus, a plaintiff has been allowed to insert a special memorandum in his bill filed, even after error brought, upon payment of costs. 7 *T. R. 474. but see 1 L. Raym. 324*. But the court have refused to allow an amendment to be made in the bill, as to the name of the defendant, after a misnomer pleaded in abatement, where the amendment was not warranted by the process upon which the defendant was brought before the court. 3 *L. Raym. 859, 2 Salk. 235, 1 Salk. 50*.

Every defect in form in an original, the want of pledges or of the sheriff's name being returned on it, or the want of pledges upon a bill, are aided after verdict by *stat. 16 & 17 C. 2. c. 8*, and after judgment by confession or default by *stat. 4 & 5 A. c. 16. § 2*; and all variance between them and the declaration, is aided after verdict by *stat. 21 J. 1. c. 13*, and after judgment by confession or default by 4 & 5 *A. c. 16. § 2*. Also, after verdict, every defect in form or substance in an original writ or bill, and all variance between them and the declaration or other proceedings, are aided by 5 *G. 1. c. 13. See 1 Saund. 318*. And lastly, the want of an original [or bill] is aided after verdict, by 18 *El. c. 14*; but not after judgment by confession or default, nor after judgment upon demurrer or *nul tiel record*. *See Vol. 1. p. 229, 230*. As to defects in plaints levied in inferior courts, *see 1 Wils. 180*; and see further as to the amendment of bills, and how far they are aided by the statutes of jeofails, *post, p. 265. 237. "Declaration."*

Process.] Process is amendable for misprision of the clerk, at any time, by 14 *Ed. 3. st. 1. c. 6*, 9 *H. 5. st. 1. c. 4*, 8 *H. 6. c. 12*, and 8 *H. 6. c. 15*, provided there be something to amend by. *See 1 T. R. 782, 783*. Thus, a *capias ad respondendum* may be amended in the names of the parties, 7 *T. R. 299. 2 Smith, 392*, in the teste, 1 *H. Bl. 291. 1 B. & P. 642*, in the return, 5 *Trent.*

853, and the like, if the bail are not to be prejudiced by the amendment. *Vol. 1. p. 67. 66.* So, the court will amend a bill of Middlesex or *latitat*, if any material mistake be made in it; as where it was "to answer the plaintiff in a plea of debt," (instead of trespass, with an *ac etiam* in debt), the court allowed it to be amended. *1 W. Bl. 462. see Vol. 1. p. 309.* So, where there was a mistake in the return of a bill of Middlesex, the court allowed it to be amended. *5 East, 291. and see 1 T. R. 782.*

After verdict, every defect in a judicial writ, in substance or in form, or variance between it and the declaration or other proceedings, is aided by *5 G. 1. c. 13.* So, miscontinuance, discontinuance, or misconveyance of process, is aided after verdict by *32 H. 8. c. 30,* and after judgment by confession or default by *4 & 5 A. c. 16. § 2,* even in penal actions. *6 T. R. 255.*

If the defendant or his attorney take the declaration out of the office, he thereby waives all irregularities and defects in the process, service of process, or appearance. *2 Str. 1072. Hardw. 242.* Or, if process be merely irregular, the irregularity is waived by the defendant's entering an appearance or filing common bail, *3 T. R. 611. 1 Str. 155. 2 Wils. 393,* but not by the plaintiff's entering or filing it for him. *3 T. R. 611. Barnes, 406. Vol. 1. p. 304. and see Vol. 1. p. 59, 60.*

It may, perhaps, be necessary to add, that defects in meane process can never be the subject of a writ of error.

Appearance.] Where the plaintiff's attorney by mistake entered an appearance for the defendant by a wrong name, the court upon application ordered the filacer to amend the appearance, the defendant being correctly named in the writ. *3 Wils. 49. see 1 Str. 39. 114. 445.*

The court have refused to amend the bail-piece in a bailable action, unless with the consent of the bail; *1 Barnard. 214;* and the court of Common Pleas have refused it, upon the application of the bail to the sheriff, after an action against them upon the bail bond and *comperuit ad diem* pleaded. *5 Taunt. 814. but see 1 B. & P. 31.* That court have also refused to allow an amendment of the sum in a bail piece in error, even with the consent of the bail, the effect of the amendment being merely that, if allowed, the writ of error would be a *supersedeas* of execution. *5 Taunt. 320.*

The court of Common Pleas have also ordered the recognizance of bail to be amended, where the application was made on the part of the bail; *4 Taunt. 875;* but they have refused to do so, where the bail had not assented to it. *1 B. & P. 481. Barnes, 59. 3 Taunt. 263; but see 1 Taunt. 221.*

Declaration.] The declaration may be amended, at common law, in the title, *1 East, 138. 1 Wils. 78, 242. 2 Wils. 256. Hardw. 141. and see 1 Str. 638,* in the venue, *ante, p. 178,* in the parties' names, *see 1 L. Raym. 116. but see 2 Id. 771,* and in the body of the declaration, in form, *2 Str. 1162,* or substance; *2 Bur.*

1098. 1 *Wils.* 7; and this even in penal actions, 1 *Wils.* 256. 2 *Bur.* 1098, provided the amendment do not introduce any new substantive cause of action, or new charge against the defendant. 6 *T. R.* 544. 7 *T. R.* 55. But in other actions, the court will allow the defendant to add even a new count, upon payment of costs. *Tidd*, 644. see 2 *Str.* 890. 6 *Taunt.* 300. but see 7 *T. R.* 698. 1 *Wils.* 149. 223. *Say.* 234. Also, where a jury gave more damages than were laid in the declaration, the court, upon application of the plaintiff, granted a new trial, and gave him leave to amend the declaration by increasing the damages. 7 *T. R.* 132. But where a verdict was taken for the damages laid in the declaration, subject to an award, the court refused to allow the plaintiff to amend his declaration by increasing the damages, although it appeared from the affidavit that a larger sum would probably be proved before the arbitrator. 1 *M. & S.* 675. The court have entertained the application for an amendment in these respects, even after a plea in abatement for the mistake sought to be amended, 1 *Str.* 11. 3 *M. & S.* 450. 7 *T. R.* 698, or after issue joined, 2 *Str.* 890, or the record taken down for trial, and withdrawn, 5 *Bur.* 2833. 6 *T. R.* 543, and even after verdict, under particular circumstances. 2 *Str.* 1151. 1 *L. Raym.* 116. see 2 *Wils.* 147. *Cowp.* 841. They have allowed it also after issue joined on *nul tiel record*; 1 *East*, 113; they have also set aside a nonsuit, and allowed the declaration to be amended as to the error for which the plaintiff was nonsuit; 3 *Taunt.* 81; and set aside a verdict for plaintiff, upon his application, and amended the declaration by increasing the damages. 7 *T. R.* 132. Before plea, the declaration may be amended without costs, excepting the costs of the application: after a general issue and before entry, if amended in substance, the plaintiff must pay costs, or give an imparlance; or if amended in form, it may be without paying costs or giving an imparlance: but after a special plea or demurrer, it can be amended only upon the terms of paying costs, and the plaintiff has not the option of giving an imparlance. *R. M.* 10 G. 2. (b). and see *R. M.* 1654. § 13. As to the time for pleading after an amendment of the declaration, see *Vol.* 1. p. 115. A declaration in ejectment may be amended as well after as before plea pleaded, in the same manner as declarations in other actions. Thus, leave has been given to amend the declaration in the venue; *Imp. C. B.* 636; in the demise; 4 *Bur.* 2447. 2 *Id.* 1162. 1 *Id.* 665. 3 *Wils.* 274. see 1 *Salk.* 48; in the term stated in the demise; 2 *Str.* 1272. 2 *W. Bl.* 940. and see *Cowp.* 841; in the parcels; *Pr. Reg.* 16; in the entry and ouster; 2 *Str.* 607; and in the notice at the foot of it, in the time of appearance, 7 *T. R.* 469, and in the name subscribed to it. 3 *T. R.* 351.

If there be any defect in the declaration arising from the misprision of the clerks, it may be amended at any time, by leave of the court. 8 *H. 6. c.* 12. see 1 *Doug.* 116. 4 *Taunt.* 588. It may be amended by the bill on the file; and for this purpose the court will, if necessary, allow a new bill to be filed in order to amend by. 1 *Str.* 883. 2 *Id.* 1162.

Having stated what defects in a declaration are amendable, we shall now see what are aided, either at common law, or under the statutes of jeofails. A declaration is aided at common law, after verdict, where there is any defect, imperfection or omission in it, whether in substance or in form, for which the defendant might have demurred, but the facts so defectively stated or omitted are such as must necessarily have been proved at the trial in order to entitle the party to the verdict he has obtained. *Ante*, p. 232. Thus where (before *stat. 4 & 5 A. c. 16. § 9*, which rendered attornment unnecessary) an action was brought for rent by the bargainee of a reversion, and the declaration omitted to allege attornment of the tenant, and upon *nil debet* pleaded there was a verdict for the plaintiff, the omission was holden to be cured by verdict; 2 *Show.* 233, 234. 2 *Doug.* 683; but it would have been a fatal objection after judgment by default. 1 *Str.* 98. So, if the grant of a reversion or incorporeal hereditament be pleaded, and it is not alleged to have been by deed, or a feoffment be pleaded without livery, yet if the grant or feoffment be put in issue, and found by the jury, the omission is cured by the verdict; *Hut.* 54. 1 *T. R.* 145; but it would be fatal after judgment by default. So, if a promise depend upon the performance of a condition precedent, and such performance be not alleged in the declaration, the omission is cured by verdict, but is fatal after judgment by default. 2 *Bur.* 899. So, in an action for a malicious prosecution, if the declaration do not allege that the prosecution is at an end, it is fatal upon demurrer or after judgment by default, *Hob.* 267. 10 *Mod.* 209, 210. 1 *Doug.* 205. 2 *T. R.* 225, but is cured by verdict. 1 *Saund.* 228. c. But if the plaintiff, in his declaration, either state a defective title, or totally omit to state any title or cause of action whatever, a verdict will not cure the defect, either at common law or under the statutes of jeofails. 2 *Doug.* 683. 658. 628. n. 2 *Bur.* 1159. 3 *Id.* 1728. 3 *Wils.* 275. 1 *T. R.* 141—146. 4 *T. R.* 472. and see 1 *Salk.* 37, 1 *L. Raym.* 634. *Bul. N. P.* 320, 321. Thus, in an action on a bill of exchange against the indorser, where a demand upon and refusal by the acceptor was not alleged in the declaration, the omission was not cured by verdict. 2 *Doug.* 679. So, in an action against an heir upon the bond of his ancestor, if the declaration omit to state that the ancestor in his bond bound himself and his heirs, the omission is not cured by verdict. 2 *Saund.* 136, 137. a. Surplusage, however, does not vitiate, after verdict. *Bul. N. P.* 321. *Cro. Jac.* 94.

The following defects in a declaration are cured after verdict by the statutes of jeofails, and after judgment by confession or default by 4 & 5 *A. c. 16. § 2*: misleading, insufficient pleading or jeofail, or other default or negligence of the parties, their counsellors or attorneys; 32 *H. 8. c. 30*; lack of averment of any life, so as the person be proved to be alive; 21 *J. 1. c. 13*; want of form in any count, declaration, plaint, bill, suit, or demand; 18 *El. c. 14*. see 1 *L. Raym.* 211; want of profert, or the omission of *vi et armis* or *contra pacem*; mistaking the christian name or surname

of either party, sums, day, month, or year, in any bill, declaration, or pleading, being right in the writ, plaint, roll, or record preceding, or in the same roll or record wherein the same is committed, to which the party might have demurred and shewn the same for cause; or the want of *prout patet per recordum*; or the want of a right venue, so as the cause were tried by a jury of the proper county where the action is laid (and which is holden to aid the defect of a mistrial of a local action in a wrong county. 7 T. R. 583. 2 L. Raym. 1212. *Willes*, 431. and see 3 T. R. 387. 1 *Saund.* 247); or any other matters of the like nature, not being against the right of the matter in suit, nor whereby the issue or trial are altered. 16 & 17 C. 2. c. 8. see 1 *Saund.* 247. a. and the cases there cited; also 1 *Saund.* 241. b. 228. a. 2 *Saund.* 7. a. 1 L. Raym. 698. 2 *Id.* 1513. 1391. 2 *Wils.* 142. *Willes*, 5. But in no case is a declaration aided by these statutes, where the plaintiff either states a defective title, or totally omits to state any title or cause of action, in it. *Supra*. A variance in point of form, between the declaration and the original or bill, is aided after verdict by 21 J. 1. c. 13; and after judgment by confession or default, by 4 A. c. 16. § 2. Also, after verdict, all variance between the declaration and the original or bill, whether in form or in substance, is aided by 5 G. 1. c. 13.

Particulars of demand.] If a bill of particulars be incorrect, the party who delivered it, may have leave to amend it; or if not sufficiently explicit, the other party may take out a summons and obtain an order for further particulars. *Ante*, p. 199.

Plea, replication, &c.] Pleas, replications, and subsequent pleadings, may be amended at common law, whilst they are in paper, by leave of the court, upon payment of costs. *Ante*, p. 231. 1 *Wils.* 76. They have allowed a plea of a judgment by an executor, to be amended in the sum for which the judgment was recovered, although the application was not made until nearly three years after issue joined. 1 *H. Bl.* 328. They have allowed a replication to be amended, after the cause had been carried down to trial and made a *remanet*; *Say*. 285; and where a replication to a sham plea was defective, the plaintiff had leave to amend, without payment of costs, after demurrer argued. 1 *East*, 369. Even after verdict, the court have allowed of an amendment, by inserting the *similiter* after the replication, instead of an &c.; *Cowp.* 407; and in a recent case in the court of Common Pleas, where the plaintiff had omitted to reply to one of the defendant's pleas, and the defendant added the *similiter* as if the plaintiff had replied, the court allowed the plaintiff to amend by inserting the replication, after verdict, upon payment of costs of the application, the merits of the case having been tried upon the other issues. 5 *Taunt.* 164. and see 1 *New Rep.* 28. 5 *Taunt.* 765. 2 *Saund.* 319. The court, however, have refused to allow a declaration to be amended after a nonsuit; 5 *Bar.* 2692; and after a verdict set aside, in an action against an exe-

cutor. 2 Str. 1002. Nor will the court in general allow the replication to be amended, in hard actions, particularly after demurrer argued; and, on the other hand, they will not amend a plea in abatement. *Pr. Reg.* 21. 1 *Sellon*, 275. As to withdrawing pleas or replications, and pleading or replying *de novo*, see *Vol. 1. p. 123, 124, 125, 126.*

Also, the pleadings may be amended at any time, as to defects which, in the opinion of the court, have originated from the misprision of the clerks. 8 *H. 6. c. 12.* They may be amended by the draft under counsel's hand, 2 *Str.* 846. *Cro. El.* 258, or by the paper book. 8 *Co.* 161 *b.* 1 *Salk.* 50. 88. *Tidd*, 651.

Pleas, replications, &c. are aided at common law, after verdict for the party who pleaded them, in the same cases as declarations, namely, where the matter defectively stated or omitted (not amounting to a defective title or the omission of title), is such as must necessarily have been proved at the trial, in order to entitle the party pleading to the verdict he has obtained. See *ante*, p. 232. 237. *Bul. N. P.* 321. But where there is a defect, omission, or imperfection, though in form only, in some collateral parts of the pleading, that were not in issue between the parties, so that there can be no room to presume that the defect or omission has been supplied by proof, a verdict will not cure it at common law. 1 *Saund.* 228. *a.* although in some cases it would, under the statutes of jeofails. Thus, where a replication should have averred that the cattle were *levant et couchant* on the plaintiff's land, and issue was taken on a prescription only, a verdict in favour of the prescription was holden not to aid the omission of this averment, at common law; *Cro. Jac.* 44; although it would now be aided by the statutes of jeofails. Also, where a plea confesses the action, but does not sufficiently avoid it, the plaintiff, we have seen (*ante*, p. 229), may move for judgment *non obstante veredicto*.

In pleas, replications, &c. the following defects are aided after verdict by the statutes of jeofails, and after judgment by confession or default by 4 & 5 *A. c.* 16. § 2: mispleading, lack of colour, insufficient pleading or jeofail, or other default or negligence of the parties, their counsellors or attornies; 32 *H. 8. c.* 30; lack of averment of any life, so as the person be proved to be alive; 21 *J. 1. c.* 13; want of profert, or mistaking the christian name of surname of either party, suns, day, month, or year, in any pleading, being right in any writ, plaist, roll, or record preceding, or in the same roll or record wherein the same is committed, to which the other party might have demurred, and have shewn the same for cause; want of the averment of "*hoc paratus est verificare*," or of "*hoc paratus est verificare per recordum*," or for not alleging "*prout patet per recordum*;" or any other matters of the like nature, not being against the right of the matter of the suit, nor whereby the issue or trial are altered. 16 & 17 *C. 2. c.* 8.

[*Notice of set off.*] The court of Common Pleas have refused to allow a notice of set off to be amended; *Barnes*, 294; it may be

doubted, however, if this court would not allow of the amendment, in all cases where they would allow of a plea of set off to be amended; at all events they would in such cases allow the plaintiff to withdraw his general issue, and plead it again with a new notice of set off, as mentioned *Vol. 1. p. 124.*

Demurrer.] A demurrer cannot be amended, without the consent of the opposite party. *Say. 46.*

Writ of enquiry.] Defects or errors in a writ of enquiry, may be amended by the award of it on the roll. *4 East, 173. Hardw. 314. 1 Str. 684. Barnes, 15.* Where the writ and inquisition were lost, the court ordered new ones to be made out according to the sheriff's notes, and that the costs before taxed should be indorsed by the master. *2 Str. 1077.* The want of a writ of enquiry, however, is said to be aided by the statutes of jeofails. *2 L. Raym. 1397. 2 Str. 878. see ante, p. 19.*

Issue.] The misjoining of issue, or an issue otherwise informal, is aided after verdict, by *32 H. 8. c. 30; 2 Saund. 319. Bul. N. P. 321. 2 Str. 973;* so are miscontinuance and discontinuance, by *32 H. 8. c. 30. see Vol. 1. p. 230. 6 T. R. 255. 2 Saund. 1. c. 7 T. R. 618. 2 Str. 734, 2 L. Raym. 1441. 2 Wils. 203. 1 Ro. Rep. 161. Cro. Jac. 528. Bul. N. P. 323.* The want of a *similiter* is also aided by it, or is at least amendable under *stat. 8 H. 6. c. 12; Cowp. 407. see 1 Str. 641. contra;* and even where the plaintiff added the *similiter* to a rejoinder concluding with a verification, instead of taking issue and concluding to the country, the court allowed the record to be amended after verdict. *1 New Rep. 28. and see 5 Taunt. 164. ante, p. 238.* Also, if the *similiter* be added in the name of the defendant, instead of the plaintiff, or the contrary, it is aided after verdict by the above statute, *1 Str. 551. 3 Bur. 1793. Cro. Jac. 67. Bul. N. P. 320,* or may be amended. *3 Salk. 31.*

If the issue vary from the declaration, accepting the issue will be a waiver of all objection on that account. *2 Str. 1131. see 3 Bur. 1682.* If it vary from the record of *nisi prius*, the objection should be made at the trial, otherwise the court will deem it aided by verdict, or will amend the *nisi prius* record by the roll; *2 Wils. 160;* and if in such a case the *nisi prius* record agree with the declaration delivered, a variance between it and the issue is not material, even although the objection be made at the trial. *2 Str. 1131.*

An immaterial issue is not aided either at common law or by statute; *Bul. N. P. 321;* but the court in such a case usually grant a repleader. See upon this subject, *2 Saund. 319. b. 2 Salk. 579.*

The court we have seen will allow the issue roll to be amended, even after verdict, if the amendment do not alter the substance of the issues between the parties. *Ante, p. 238. Cowp. 407. 1 New Rep. 28. 5 Taunt. 164.* They will also allow of an

amendment, by the insertion of a special memorandum of the term in which plaintiff filed his bill, even after error brought. 7 T. R. 474. see 1 L. Raym. 689. 924. 1 Str. 638. Vol. 1. p. 127, 128. And where there was a mistake in the title of the issue, the court allowed the plaintiff to deliver a new issue properly intituled. Barnes, 18.

Jury process.] The court may amend the jury process, at any time, for defects arising from the misprision of the clerks, by 8 H. 6. c. 12. See 2 Salk. 454, 2 L. Raym. 1143. 2 Str. 1214. 1 Id. 136. but see 1 Salk. 48, 1 L. Raym. 511. 1 Salk. 51, 2 L. Raym. 1061. The *distringas* may be amended by the *venire*; and the *venire*, by the award of it on the roll.

If jury process be awarded to a wrong officer, upon an insufficient suggestion; or if the *visne* be in some part misawarded, or sued out of more or fewer places than it ought to be, so as some one place be rightly named; or if any of the jury who tried the issue be misnamed either in the surname (see 12 East, 229. Vol. 1. p. 182) or addition, in the jury process or return thereto, so as it be proved that it was the same man who was meant to be returned; or if there be no return to the said process, so as the panel of the jurors' names be returned and annexed to it (see 3 G. 2. c. 25. § 8. Vol. 1. p. 157, 158); or if the returning officer's name be not to the return, so as it be proved that the writ was returned by the returning officer: all these several defects are aided after verdict by 21 J. 1. c. 13. See Cro. El. 259. Cro. Car. 338. Bul. N. P. 320. 324. Also, by 5 G. 1. c. 13, every defect or fault in judicial writs, and every variance between them and the other proceedings, is aided after verdict; and as this statute relates to judicial writs generally, it seemingly includes jury process. See Barnes, 5. And lastly, the want of a *venire*, is aided after verdict. Cro. El. 259. Bul. N. P. 320.

Nisi prius record.] The court may amend the record of *nisi prius*, at any time, for a defect arising from misprision of the clerks. 8 H. 6. c. 12. 8 H. 6. c. 15. see 3 Taunt. 81. It may be amended by the issue roll. 1 Salk. 48, 1 L. Raym. 94. 511. Where the issue in ejectment was against seven defendants, and the *nisi prius* record, by mistake, against five only, the court amended the *nisi prius* record, after verdict, by adding the names of the remaining two defendants. 1 L. Raym. 94, 1 Salk. 48. But where the mistake was in the *jurata*, the day of *nisi prius* therein not having been altered after the cause was made a *remanet*, and the subsequent trial appeared of course to have been had after the day of *nisi prius*, the court of Common Pleas held the trial to be *coram non judice*, and refused to amend the *jurata* and *distringas*, but awarded a *venire de novo*. 2 Wils. 144. see 1 Salk. 48, 1 L. Raym. 511. but see Barnes, 5 contra. For variance between the *nisi prius* record and the issue, the objection must be made at the time of the trial, for the court will not set aside the verdict for such a cause;

2 *Wils.* 160. *but see Barnes*, 476. 1 *Str.* 641; and a variance in this respect is wholly immaterial, if the *nisi prius* record agree with the declaration delivered. 2 *Str.* 1131. Where the record and *postea* were lost, the court ordered a new one to be made out from the issue roll and from the associate's notes. 2 *Str.* 1264.

The record may be amended by leave of the judge at *nisi prius*, even after the cause is called on, 1 *Comp.* 57, provided the alteration proposed be not matter of material allegation, 1 *Stark.* 74, and it appear probable that the attorney was not aware of the defect in time to have it remedied upon application to a judge at chambers. It can be amended, however, only by a judge of the court where the record was made up. *See 3 Taunt.* 81.

Verdict.] The court have no authority to amend or alter the verdict actually found by the jury, in point of substance; *see 1 H. Bl.* 78; for that would be rendering the jury liable to an attain, for a verdict which they never gave. The only exception to this is, in the case of mayhem, where the court, upon inspection of the plaintiff, may increase the damages given by the jury. *Vol. 1. p. 198.* But the court have refused to do this in other actions, even where the jurymen joined in an affidavit, stating their intention to have given such increased damages, and that they conceived their verdict was calculated to give them. 2 *T. R.* 281. The proper time for explanations of this kind, is at the trial. *Id.*

But when a mistake is made in recording the verdict, the court may amend it by the judges' notes, 2 *Str.* 1197, 1 *Wils.* 33. 3 *T. R.* 749, or by the notes of the clerk of assize or associate, 1 *Salk.* 47. 51, at any time before judgment by the common law, 2 *Doug.* 730, or after final judgment and even after error brought, 3 *T. R.* 749. 659. 4 *M. & S.* 94. *MS. E.* 1815, the mistake, in such a case, arising from the misprision of the clerk. Thus, when the associate, imagining the action to be debt instead of covenant, entered *ld.* damages instead of 174*l.*, the court allowed it to be amended by the judge's notes; *Bul. N. P.* 320; and the same, where the associate marked wrong damages. 1 *Wils.* 33. So, where the defendant pleaded the general issue and the statute of limitations, and a verdict was found for the plaintiff on the first issue, but no notice taken of the last; the court allowed it to be amended, even after error for this defect, and joinder in error, on payment of costs. 3 *T. R.* 659. So, where there were several counts in a declaration, some of which were bad, and by mistake a general verdict on all the counts was entered, although evidence had been given upon the good counts only; the court allowed the *postea* to be amended by the judge's notes. 1 *Doug.* 376. *and see 2 Id.* 746. And where, in such a case, it appeared from the judge's notes that the jury calculated the damages on evidence applicable to the good counts only, the court amended the *postea*, although it appeared that evidence had been given applicable to the bad counts also. 1 *B. & P.* 329. *Vol. 1. p. 195, 196.* The court, however, have refused to entertain an application for entering the verdict upon

particular counts, according to the evidence on the judge's notes, after a lapse of eight years, and after judgment had been reversed in error for a defect in one of the counts. 1 *Barn. & Ald.* 161. And in a penal action, where the jury found a verdict for one penalty, on evidence equally applicable to each of two counts, and the plaintiff applied it to one of the counts which was subsequently found to be bad, the court would not afterwards allow him to enter it up on the other. 3 *T. R.* 448. After verdict in ejectment for a messuage and tenement, the court (pending a rule to arrest the judgment) gave leave to amend, by entering the verdict for the messuage only, without obliging the lessor of the plaintiff to release the damages. 8 *East*, 357.

The party, also, may in some cases, by his own act, remedy the mistake of the jury in giving their verdict. Thus, in a joint action against two, if the jury sever the damages by mistake, the plaintiff may cure the defect by taking judgment *de melioribus damnis* against one, and entering a *nolle prosequi* as to the other; *Carth.* 19. 6 *T. R.* 199, 200. 1 *Wils.* 306; or, by entering a *remittitur* as to the lesser damages, he may have judgment for the greater damages against both. *Cro. Car.* 192. 1 *Wils.* 30. Or, if the jury give greater damages than are laid in the declaration, the court, even after judgment, and error brought on that account, will allow the plaintiff to remedy the defect by entering a *remittitur* for the excess. 4 *M. & S.* 94. *MS. E.* 1815. 1 *H. Bl.* 643. So, if the jury in replevin, find according to stat. 17 *C. 2. c. 7. § 2*, but, instead of finding the amount of the rent in arrear and the value of the goods distrained, find damages to the amount of the rent claimed in the consuance, the defendant may remedy the defect by obtaining leave of the court to enter his judgment for a return as at common law, or the court will allow him to amend his judgment if already entered as according to stat. 17 *C. 2. c. 7. § 2*; 3 *T. R.* 349. *Carth.* 362. 1 *Lev.* 255. and see 4 *T. R.* 509. *ante*, p. 72.

A special verdict may be amended by the judge's notes, 3 *B. & P.* 343, by the minutes taken by the clerk of assize, 1 *Salk.* 47. *But.* *N. P.* 320, by the notes of counsel, or even by an affidavit of what was proved at the trial. 1 *Str.* 514. see 2 *Salk.* 462, 1 *L. Raym.* 335. 1 *Salk.* 276, 3 *Id.* 157, 2 *L. Raym.* 1036. So, if a special case be mistated, the parties may have leave to amend it. 1 *Bur.* 617. *Vol. 1. p.* 193. For what defects in a verdict, the court will award a *venire de novo*, see *ante*, p. 229.

Where the record of *nisi prius*, with the *postea* indorsed on it, was lost, the court ordered a new one to be made out from the issue roll and from the associate's notes. 2 *Str.* 1264.

Judgment.] The judgment is amendable at common law, in substance or in form, at any time during the term of which it is signed; and after that time, even after error brought, and *in nullo est erratum* pleaded, 4 *M. & S.* 94. *Barnes*, 7, it is amendable for misprision of the clerk, by 8 *H. 6. c. 12*, and 8 *H. 6. c. 15*. see 2 *Str.* 682. 1 *L. Raym.* 68. 6 *T. R.* 1. 3 *M. & S.* 591. Where a judg-

ment *de bonis propriis* was entered against an executor, instead of judgment *de bonis testatoris*, the court ordered it to be amended, 5 *Bur.* 2790. 1 *Doug.* 115, even after error brought. 1 *T. R.* 783. and see 3 *M. & S.* 591. So, where the judgment was "should recover" instead of "do recover," it was allowed to be amended, after error brought. 2 *Str.* 1132. 1156. So, where in debt on bond, judgment was entered by mistake for the penalty as damages, the court allowed it to be amended after error brought. *MS. E.* 1814. So, where the defendant was found not guilty as to part, and there was no judgment for him as to that part, the court allowed the record to be amended by the verdict. 2 *Str.* 786. So, where a verdict was given for more damages than were laid in the declaration, and judgment entered accordingly, the court allowed the judgment to be amended and a *remittitur* entered for the excess, after error brought. 4 *M. & S.* 94. They have refused, however, to amend a judgment entered up on a warrant of attorney, as to the names of the defendants, though the warrant of attorney was correct in that respect, and the judgment might have been amended by it. 2 *Str.* 1209, 1 *Wils.* 61. So, where a joint judgment was entered upon several *scire facias* against bail, the court held that it was not amendable after the term of which it was entered. 1 *L. Raym.* 182. 547. And the court of Common Pleas have refused to amend a judgment against an executor, where the amendment would be to his prejudice. 5 *Taunt.* 554. 6 *Taunt.* 45. The judgment may be amended by the verdict, 2 *Str.* 786, or by the judgment paper. 1 *Salk.* 50, 2 *L. Raym.* 895.

After verdict or judgment by confession (and after judgment by default, by 4 & 5 *A. c.* 16. § 2), the want of a *misericordia* or *capiatur*, or the entry of one for the other (see 1 *Str.* 313), or the entry of "*ideo concessum est per curiam*" for "*ideo consideratum est per curiam*," or the increased costs after verdict or after nonsuit in replevin not being entered to be at the request of the party for whom judgment is given, (see 2 *Str.* 869), or the costs in any action not being entered to be by consent of the plaintiff; these, and "all other matters of the like nature," not being against the right of the matter of the suit, nor whereby the trial or issue are altered, are aided by 16 & 17 *C. c.* 8. See *Vol. 1. p.* 202.

Where the judgment roll was lost, the court allowed it to be supplied by a new entry. 2 *Bur.* 722. 2 *Str.* 833.

[*Scire facias.*] It should seem that the court have a power of amending a *scire facias*, for any misprision of the clerks, by stat. 8 *H. 6. c.* 12, already mentioned, that statute expressly including "writs" generally. See *ante, p.* 232. They have accordingly allowed a *scire facias* to revive a judgment, and the declaration thereon, to be amended; 9 *East*, 316. see 2 *B. & P.* 275, and the cases there cited, and see 1 *Ro. Abr.* 199. 797. 6 *Mod.* 68. but see 6 *Mod.* 263. 310. 1 *Str.* 401. 1 *Salk.* 52, 2 *L. Raym.* 1057; and where the *scire facias* is an original proceeding, it may be amended in all cases where an amendment of an original writ

would be allowed. 6 *Mod.* 268. 10 *Mod.* 258. 354. 1 *Str.* 43. 6 *Bac. Abr. Sci. Fa. D.* But the court have refused to allow a *scire facias* on a recognizance of bail to be amended, in order that the bail might have a further time to render their principal. 2 *Str.* 1165. 8 *Mod.* 305. 2 *New Rep.* 103. 3 *B. & P.* 321. but see *Barnes*, 4. 2 *B. & P.* 275. In this case, therefore, and in all other cases where leave to amend will not be granted, the plaintiff, if *not tuel record* be pleaded, should move to quash the writ.

If the defendant plead to the *scire facias*, and the plaintiff proceed to trial, after verdict all defects in form are aided by 18 *El. c.* 14, and defects both in form and substance, by 5 *G. 1. c.* 13; and the defects aided after verdict by 18 *El. c.* 14, are now aided after judgment by confession or default, by 4 & 5 *A. c.* 16. § 2. See 6 *Bac. Abr. Sci. Fa. D.*

Writ of error, &c.] A writ of error was not amendable at common law. 1 *Salk.* 49, 1 *L. Raym.* 564. 71. But now, by 5 *G. 1. c.* 13, 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 respective courts where such writs of error shall be made returnable. Therefore, where a writ of error was brought jointly with one who should not have been joined, the court allowed the writ to be amended by striking out his name. 2 *Str.* 892, *Fitzg.* 201, 1 *Barnard.* 405. 421, *Coup.* 425. 2 *W. Bl.* 1067. So, a mistake in the name of one of the parties has been amended; 2 *Smith.* 259; in another case the writ was amended by adding parties; 2 *Str.* 682. but see 1 *Str.* 606. 2 *L. Raym.* 1403. 1532. 1 *Id.* 71. *Carth.* 8. 2 *Str.* 1110. 8 *T. R.* 302; and in another, by altering even the description of the form of action. 5 *Taunt.* 82. But where the writ is returnable before judgment is given, this is a fault which cannot be amended. 2 *Str.* 807, 2 *L. Raym.* 1531, 1 *Barnard.* 62, 65. 2 *Str.* 834. 891. 2 *L. Raym.* 1179. and see *Vol.* 1. p. 209.

The amendment in this case is now allowed, as a matter of course, without costs; 2 *Str.* 902, 2 *L. Raym.* 1587, *Fitzg.* 268; but if the rule be also to amend the assignment of errors, it is upon payment of costs. *Fitz.* 268. According to the statute, the writ is to be amended by the court in which it is returnable; yet this seems to be only in cases where the original record, and not a transcript merely, is removed into such court; and therefore upon a writ of error from the King's Bench to the Exchequer Chamber, it was holden that the writ should be amended in the court of King's Bench, where the original record lay. 2 *Str.* 837. 869. Upon amending a writ of error, new bail must be put in to the amended writ, in the court below. 2 *W. Bl.* 1067.

If the court give the defendant in error leave to amend the original record, after the plaintiff has transcribed, they will also order the same amendment to be made in the transcript. See 4 *M. & S.* 94. Or if there be any error in the transcript, arising from the misprision of the clerk, the court will order the master to

amend it, and order the record below to be produced before him for the purpose of his making the amendment by it. 1 *Wils.* 337. *see Id.* 309. And where the clerk of the errors below amended the transcript himself in such a case, without any order from the court to that effect, and after the defect in the transcript had been assigned for error, this court refused to order the transcript to be restored to the state in which it was when the plaintiff assigned his errors. 1 *M. & S.* 232.

As to the amendment of an assignment of errors, *see* 2 *Mod.* 304. *Fitg.* 268.

Execution.] Writs of execution may be amended for a misprision of the clerks, by 8 *H. 6. c.* 12; and the court have accordingly allowed them to be amended in the return, 2 *W. Bl.* 836. 2 *B. & P.* 336. 5 *Taunt.* 606, the names of the parties, 4 *Taunt.* 322, the sum recovered by the judgment, 2 *T. R.* 737, and the like, *see* 6 *T. R.* 450, even after they have been executed. So, if a *fi. fa.* or *ca. sa.* be directed to the sheriff of another county, instead of a *testatum*, the plaintiff, upon suing out such a *fi. fa.* or *ca. sa.* as would warrant the former one if it had been a *testatum*, getting it returned, and entering the writ, return, and the award of the *testatum* on the roll, may have leave to amend the former writ by inserting the *testatum* clause, &c. upon payment of costs. 3 *T. R.* 657. 1 *H. Bl.* 541. and *see* 1 *W. Bl.* 694. The writ may be amended by the award of execution on the roll, 2 *B. & P.* 336, (and for this purpose the entry of the award of it on the roll must be made, and the roll produced in court at the time the motion is made, *see Vol. 1. p.* 266), or by the record of the judgment. *Barnes*, 10.

The court, however, refused to allow an amendment of a *fi. fa.* where the defendant had become bankrupt before sale of the goods taken in execution under the writ, because the amendment would prejudice the rights of third persons, namely, the assignees and the other creditors. 4 *M. & S.* 329.

It may, perhaps, be necessary to add, that the statutes of jeofails do not extend to writs of execution.

Rules of Court.] If a rule or order of the court be drawn up wrong by mistake, the court, upon application, will order it to be corrected. *Tidd*, 452,

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CHAPTER XXVIII.

Arrest of Judgment.

In what cases.] THE court, upon application, will arrest the judgment, for any matter intrinsic, appearing upon the face of the record, amounting to a defect not amendable or aided at common law or by statute, and for which a writ of error would lie. As to the defects which are amendable or aided, at common law and by statute, see the last Chapter. After judgment upon a demurrer, however, you cannot move in arrest of judgment; but you may, after judgment by default. 1 *Str.* 425.

Motion, &c.] The motion in arrest of judgment should in strictness be made before the rule for judgment has expired; see *Vol. 1. p. 200*; and if the day in bank be the last day of the term, the motion should be made on that day. It may be made, however, it seems, on any day before judgment is actually signed. 2 *Doug.* 745. Where there were several issues in law and in fact, and the issues in fact were tried first, the court held that the defendant could not move in arrest of judgment, until after the demurrers had been determined. *Andr.* 282. It may be made, however, after a rule for a new trial has been discharged; 2 *Doug.* 745; and in this case, after you have obtained the rule *nisi* for a new trial, you should ask leave of the court to move in arrest of judgment in case your rule for a new trial should be discharged. *Imp. B. R.* 438.

If motion be arrested, each party pays his own costs. *Cowp.* 407.

 CHAPTER XXIX.

Costs.

At common law, neither the plaintiff nor the defendant were entitled to costs. In all actions, however, in which damages were recoverable, the plaintiff, if he had a verdict, was in effect allowed his costs; for the jury always computed them in the damages. But the defendant was wholly without remedy for any expenses he had been put to, if he had a verdict or the plaintiff were nonsuit; the amercement, to which the plaintiff was subject in such a case *pro falso clamore suo*, going entirely to the king.

This, however, has since been remedied by statute. By *stat. Gloucester* (6 Ed. 1.) c. 1, the plaintiff, in all actions in which he recovers damages, shall also recover against the defendant his costs of suit; which statute extends to all cases in which single damages have been given by a subsequent statute, 1 T. R. 73, and also to cases where an action is given to a party grieved, 7 T. R. 268. *Willes*, 440. 1 *Salk.* 206. 2 *Bac. Abr. Costs*, E. 3, but not to *qui tam* actions by a common informer. 1 *Salk.* 206. *and vide post*. And as to defendants, they are also now entitled to costs if they have a verdict, or if the plaintiff be nonsuit after appearance, in all actions in which the plaintiff would be entitled to costs if he recovered. 4 J. 1. c. 3. 23 H. 8. c. 15.

But the statute of *Gloucester*, giving costs to the plaintiff in all cases where he recovered damages, as above mentioned, was found to have the effect of encouraging suits for very trifling causes; and the legislature, therefore, were obliged to interfere, and have in some measure remedied the evil, by enacting that if the plaintiff, in certain cases, recover less than 40s. damages, he shall be entitled to no more costs than damages. The statutes making this provision, shall be mentioned particularly in the course of the present Chapter.

Having made these few observations upon the subject of costs, generally, we shall now consider it, more particularly, under the following heads:—

Verdict for plaintiff.] The general rule, established by the statute of *Gloucester*, as above mentioned, is, that the plaintiff is entitled to his costs, in all cases where he recovers damages. To this, however, there are some exceptions; and first, by 43 *El.* c. 6, § 2, if in a personal action, not being for any title or interest in lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall be certified by the judge before whom it shall be tried that the debt or damages to be recovered therein do not amount to 40s. the plaintiff shall have no more costs than damages. See *Hullock*, 19—27. 2 *Str.* 1232, 1 *Wils.* 93. *Say.* 260. 3 T. R. 87. The certificate in this case may be granted at any time after the trial. 3 T. R. 38 *n.* *Say. Costs*, 18.

In *assumpsit* and *covenant*, therefore, the plaintiff, if he have a verdict, is in all cases entitled to costs, unless the damages be under 40s.; and even in that case, unless the judge certify under 43 *El.* c. 6, as above mentioned. And the same in debt on simple contract, and in debt on specialty, unless the debt and damages be under 40s. and the judge certify. But in debt on a penal statute by a common informer, the plaintiff is not entitled to costs in any case, unless expressly given by the statute creating the penalty. 2 *Bac. Abr. Costs*, E. 3. *Bul. N. P.* 333. 1 *Salk.* 206. *Hullock*, 212. *and see* 2 T. R. 154. *stat.* 8 & 9 W. 3. c. 11. 1 H. Bl. 107. And in debt on judgment, the plaintiff shall not be entitled to any costs of suit, unless the court in which such action shall be brought, or some judge of the same court, shall otherwise order; 43 G. 3. c. 46. § 4. *see* 5 *Taunt.* 264; which statute, however, extends

only to actions brought upon judgments obtained by plaintiffs, and not to such as are brought upon judgments of nonsuit or the like. 14 *East*, 343.

In trespass, also, the general rule is that the plaintiff, if he have a verdict, shall have his costs of suit, however trifling the damages may be. This rule, however, is considerably narrowed by the following statutes:—By 22 & 23 C. 2. c. 9. in all actions of trespass, assault and battery, and other personal actions, wherein the judge at the trial shall not certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved, or that the freehold or title of the land was chiefly in question, if the jury find damages under 40s. the plaintiff shall recover no more costs than damages. This statute extends only to actions for assault and battery, and to such personal actions as relate to the freehold or to things fixed to the freehold, that is, to cases where the freehold may by presumption come in question. *Bul. N. P.* 329. see 6 *T. R.* 281. . 1 *Str.* 645. 577. 633. 3 *Bur.* 1282. 2 *Doug.* 780. 2 *L. Raym.* 1444, 2 *Str.* 726. 1 *L. Raym.* 556. 1 *Taunt.* 357. It does not extend, therefore, to trespass *de bonis asportatis*; 1 *Salk.* 207. 2 *Str.* 1130. see 1 *Esp.* 255. 1 *Str.* 634. 635. 2 *Vent.* 215; nor to trespass *de bonis asportatis*, with a count for a trespass to the freehold, if the plaintiff have a verdict on both counts, *Cormyn's Rep.* 19, or on the *asportavit* count only; 1 *Freem.* 394; nor to trespass for breaking the plaintiff's close, and impounding his cattle; 3 *Mod.* 39. see 1 *Salk.* 207. 1 *Str.* 534. 551. and see *Id.* 192; nor to trespass and assault upon, and criminal conversation with, the plaintiff's wife; 3 *Wils.* 319, 2 *W. Bl.* 854; nor to assault and false imprisonment. See 1 *Str.* 645. 2 *New Rep.* 471. But in an action for assault and battery, and tearing the plaintiff's clothes, if the plaintiff have a verdict for less than 40s. he shall have no more costs than damages, unless the judge certify; because the tearing of the clothes is a mere consequence of the battery, and not a substantive cause of action. 1 *T. R.* 655. 5 *T. R.* 482. 1 *H. Bl.* 291. Even in cases clearly within the statute, however, if the defendant plead a justification, the plaintiff shall have full costs, although the verdict be for less than 40s. 6 *T. R.* 562. 7 *T. R.* 659. 1 *East*, 350. 2 *H. Bl.* 2. 342. see 7 *East*, 325. 3 *T. R.* 391. 1 *Taunt.* 16. 4 *Taunt.* 98. And it was formerly holden that if a view were granted in the cause, it had the same effect; 2 *Salk.* 665, 1 *L. Raym.* 76; but in a late case, it has been determined otherwise. 11 *East*, 184. But although a particular case be not within the statute, (as, for instance, an action for assault and false imprisonment, 2 *New Rep.* 471), yet if it be within the *stat.* 43 *El. c.* 6. above mentioned, the plaintiff may be deprived of costs, by the judge granting a certificate under that statute. See further upon the construction of this statute, 2 *Bac. Abr. Costs*, B. 1. *Hullock*, 34—34. *Bul. N. P.* 329, 330. It may be necessary to add, that it does not extend to inquisitions upon writs of enquiry, in any case. *Bul. N. P.* 329. The certificate, if granted at all, must be granted at the trial; it cannot be

granted afterwards. 2 Wils. 21. 1 Doug. 307. but see 1 T. R. 636.

But by 8 & 9 W. 3. c. 11, if the judge certify that the trespass was wilful and malicious, the plaintiff shall have his full costs, although the verdict be for less than 40s. See *Hullock*, 94—99. Where the trespass has been committed after notice, the judge usually certifies under this act; see 6 T. R. 11; but it is perfectly discretionary with him to do so or not; 3 East, 495; and he will not certify, if it appear that the trespass was committed for the purpose of asserting a disputed right. *Id.* The certificate, in this case, it seems, may be granted out of court. 1 T. R. 636. *sed vide supra.*

And lastly, if any inferior tradesman, apprentice, or other dissolute person, shall presume to hawk, hunt, fish, or fowl, and shall be found guilty of trespass in coming upon other men's land for that purpose, the plaintiff in such action shall recover his full costs of suit, although the damages be under 40s. 4 & 5 W. & M. c. 2. § 10. See 2 Wils. 70. 2 W. Bl. 900. *Hullock*, 84—93.

In actions on the case for torts, the plaintiff is entitled to his full costs of suit in all cases, however trifling the damages may be, unless the judge certify under the stat. 43 El. c. 6; see 3 East, 296. 1 Taunt. 400; excepting in actions for "slandorous words," in which, by 21 J. 1. c. 16, if the damages found be under 40s. the plaintiff shall recover no more costs than damages. This statute, however, extends only to such words as are actionable of themselves. 2 W. Bl. 1062. 3 Bur. 1688. 2 H. Bl. 531. *Willes*, 438. 1 Salk. 206. 2 L. Raym. 831. 1588. see 2 Bac. Abr. Costs, B. 2. *Hullock*, 27—34.

In actions on statutes, by parties grieved, the plaintiff, if he have a verdict, is entitled to costs, as in other cases. 1 Salk. 206. *ante*, p. 248.

Where the cause is made a *remanet*, the costs incurred in bringing up witnesses, attendances, &c. are allowed to the party ultimately prevailing; and the same, where a cause goes off upon any other occasion, without the fault or contrivance of the parties, and is afterwards brought to trial. 5 Buss. 2693. As to the costs of a special jury, see Vol. 1. p. 158.

[*Verdict for defendant.*] In all cases in which a plaintiff would be entitled to costs, if he recovered, the defendant shall have his costs, if a verdict be found for him. 4 J. 1. c. 3. see also 23 H. 8. c. 15. 3 Bur. 1723. 2 Bac. Abr. Costs, D. *Hullock*, 121—134. *Cro. El.* 465. Also, in actions upon penal statutes, by common informers, the defendant is entitled to his costs, if he have a verdict. 18 El. c. 5. *Hullock*, 214—220. see 1 Salk. 30. *Cowp.* 366. 1 Wils. 139. 2 Str. 1103.

If in trespass, assault, false imprisonment, or ejection, there be several defendants, and one of them be acquitted, the person so acquitted shall recover his costs, in the like manner as if a verdict had been given against the plaintiff, unless the judge shall im-

diately after the trial, in open court, certify upon the record that there was a reasonable cause for making such person a defendant 8 & 9 W. 3. c. 11. see 3 Camp. 35. *Hullock*, 140—144. This statute, however, does not extend to replevin, 3 Bur. 1284, 1 W. Bl. 355, or to trespass on the case for a tort, 2 Str. 1005, or trover, *Barnes*, 139; and in all cases not within this statute, if the plaintiff proceed to trial against several defendants, and obtain a verdict against any one of them, the others will not be entitled to costs. But if some only of several defendants proceed to trial, the others having suffered judgment by default, and those who proceed to trial obtain a verdict, the defendants who obtain a verdict in such a case are entitled to their costs, under the above statute of 4 J. 1. c. 3, although the plaintiff have his judgment and costs against the others who suffered judgment by default. 2 H. Bl. 28. In cases within the act, if the defendants have pleaded jointly, only 40s. costs are allowed to the defendant acquitted. 2 M. & S. 172.

And lastly, if the plaintiff do not recover the amount of the sum for which he held the defendant to bail, the court, upon motion, shall direct that the defendant be allowed his costs, if it be made appear by affidavit, to the satisfaction of the court, that the plaintiff had not any "reasonable or probable cause" for holding the defendant to bail in such amount as aforesaid; and if the court make a rule or order to this effect, the plaintiff shall thereupon be disabled from suing out execution, excepting for the excess of the sum recovered by him, above the costs taxed for the defendant; or if the costs taxed for the defendant exceed the sum recovered by the plaintiff, the defendant may have execution for the excess. 43 G. 3. c. 46. § 3. see 1 *Smith*, 428. 521: 2 *Id.* 261. 667.

Nonsuit and nonpros.] If after appearance of the defendant, the plaintiff be nonsuit, the defendant shall have judgment to recover his costs, in all actions in which the plaintiff would be entitled to costs if he recovered, 4 J. 1. c. 3. see 3 Bur. 1720. 1 Str. 300. *Cowp.* 407, and also in penal actions by common informers. 18 *El. c. 5.* see *Cowp.* 366. *Willes*, 392. 440.

Upon judgment of *nonpros*, the defendant is entitled to costs in all cases, *ante*, p. 207, even in actions by common informers upon penal statutes. 18 *El. c. 5.* 1 *Wils.* 177.

Judgment by default.] The plaintiff is entitled to his full costs, upon judgment by default, in all cases where he would be entitled to damages if he obtained a verdict, by the *stat. Gloucester* already mentioned; and this, although the damages given by the inquest upon the writ of enquiry be less than 40s.; for the statutes upon that subject extend to damages given by a jury only, and not to those given by an inquest. See *ante*, p. 249. If there be two defendants, however, one of whom pleads, and the other suffers judgment by default, if the plea pleaded be a complete bar to the action as against both defendants, it seems the plaintiff cannot have his

costs against the defendant who suffered judgment by default. *Hullock*, 143.

Demurrer, &c.—If either plaintiff or defendant have judgment upon demurrer, he shall be entitled to costs, and may have execution for the same by *ca. sa.*, *fiery facias*, or *elegit*. 8 & 9 W. 3. c. 11. § 2. This statute, however, does not extend to demurrers in abatement, nor to actions where the plaintiff would not be entitled to damages if he had a verdict. *Hullock*, 145, 146.

As to costs in error, see *Vol. 1. p. 241, 236. Hullock*, 280—299. 2 *Bac. Abr. Costs*, G.; and as to costs upon a bill of exceptions, see *Vol. 1. p. 187. 5 East*, 49. 1 *B. & P.* 32.

Where there are several issues.] Where there are two counts in the declaration, and the defendant pleads to one, and suffers judgment by default as to the other, if the plaintiff have judgment on the issue, he is of course entitled to costs upon both counts; but if the defendant obtain a verdict upon the issue, he will be entitled to costs upon that count, although the plaintiff must have his costs upon the other. 3 *T. R.* 654. and see 8 *T. R.* 467. But if issues in fact be joined upon both counts, and one be found for the plaintiff and the other found for the defendant, the plaintiff shall have his costs upon the count found for him, but the defendant is not entitled to any costs. 2 *Doug.* 677. 5 *East*, 261, 262. 2 *B. & P.* 330. see 6 *T. R.* 599. 3 *Taunt.* 406. Where a declaration, however, consisted of one count only, and the defendant justified as to part, the plaintiff new assigned without taking issue on the special plea, and obtained a verdict, the court held that he was entitled to the costs of all the pleadings. 1 *T. R.* 636. And lastly, if there be two counts, and issue in law be joined on one, and issue in fact on the other, if the defendant succeed upon the demurrer, and the plaintiff upon the issue in fact, the plaintiff shall have his costs on the issue in fact, but the defendant shall not have his costs on the issue in law; 2 *Bur.* 1232. and see 5 *East*, 263, 264.

Secondly, as to double pleas:—By 4 & 5 *A. c.* 16. § 4, 5, any defendant, or plaintiff in replevin, may, with leave of the court, plead as many several matters as he shall think necessary for his defence, provided that if any such matter shall, upon demurrer joined, be judged insufficient, costs shall be given at the discretion of the court, (see 2 *T. R.* 391); or if a verdict shall be found upon any issue in the said cause for the plaintiff, or defendant in replevin, costs shall also be given in like manner, unless the judge who tried the said issue shall certify that the said defendant or plaintiff in replevin had a probable cause to plead such matter. See *Bul. N. P.* 334, 335. *Hullock*, 99—119. Where the defendant pleads several pleas in bar, each going to the whole declaration, if he succeed upon any one sufficient plea, he must have judgment upon the whole declaration, although the plaintiff succeed upon the other pleas, because by his plea he has shewn that the plaintiff had no sufficient cause of action against him; and in such a case he is entitled to his

costs of the issue upon which he has succeeded. See 1 T. R. 266. But if the plaintiff also succeed, either upon demurrer or by verdict, upon any of the other pleas, he shall have his costs of the issue or issues upon which he has so succeeded, to be deducted from the defendant's costs, unless the judge certify that the defendant had probable cause for pleading those pleas upon which the plaintiff has succeeded; 2 T. R. 391. *Barnes*, 1411. *Hullock*, 100—108. but see 11 *East*, 263; and the same as to a defendant or avowant in replevin. 2 T. R. 235. And the costs in these cases are not merely the costs of the pleadings which form the issues upon which the plaintiff or avowant has succeeded, but also the costs of the trial. 2 *H. Bl.* 435. 2 *B. & P.* 368. The statute, however, does not operate so as to give full costs to the plaintiff in the case of double pleading, where the damages are under 40s. and the judge certifies under the *stat.* 43 *El. c.* 6, before mentioned, *Say*, 260; even although all the issues be found for him. 7 *East*, 583. The certificate mentioned by the *stat. of Ann.* may be given out of court.

It is right to add, that the general rule above laid down seems to be contradicted in some degree by the following cases:—To trespass, the defendant pleaded, 1st, the general issue; and, 2dly, a special plea, to which the plaintiff replied a prescriptive right, and issue was thereupon joined. There was a verdict for plaintiff with 1s. damages on the general issue, and for the defendant on the second issue; but the latter going to the whole cause of action, the court held that the plaintiff was not entitled to costs. 11 *East*, 263. The other case above alluded to was thus:—To an action for criminal conversation, the defendant pleaded the general issue and the *stat.* of limitations, and succeeded upon a demurrer to the latter plea, but the plaintiff had a verdict on the general issue; the court held that the defendant was entitled to his costs on the demurrer, but that neither party should have costs of the issue in fact. 2 *Bur.* 753. but see 2 T. R. 391. and see 5 *Taunt.* 594.

Plea in abatement]. If there be a verdict for the plaintiff upon a plea in abatement, as the judgment in that case is peremptory, *quod recuperet*, he is of course entitled to costs as in other cases; or if he be nonsuit, the defendant will be entitled to costs. *Ca. Pr. C. B.* 35. But if the plaintiff have judgment on demurrer or *nisi* record (*Semb.*) or the defendant have judgment on demurrer, (see 1 *Salk.* 194, 2 *L. Raym.* 992. 336) or verdict, (see 6 T. R. 524), neither is entitled to costs. See *ante*, p. 3. 10 *Mod.* 88.

Feigned issues.] If a feigned issue be ordered by a court of equity, the costs are entirely in the discretion of that court, and are not in any case awarded by the court of law; but if ordered by a court of law, the costs of the issue invariably follow the verdict. *Vol.* 1. p. 317. See 2 *Bac. Abr. Costs*, H. *Hullock*, 330—338. *Peake*, 69.

Ejectment.] The plaintiff in ejectment is entitled to costs in the same manner as in other actions, for he recovers damages in it, and it is consequently within the meaning of the statute of Gloucester already mentioned. For the same reason, also, the defendant is entitled to his costs, under *stat. 4 J. 1. c. 3.* See *ante*, p. 250. If the plaintiff, however, be nonsuit, by reason of the defendant's not confessing lease, entry and ouster, at the trial, so far from the defendant's being entitled to costs, he must pay costs to the plaintiff, under the consent rule. *Ante*, p. 51, 52.

Replevin.] The plaintiff in replevin is entitled to costs by the statute of Gloucester, and the defendant or avowant, by 7 H. 8. c. 4. § 3. 21 H. 8. c. 19. § 3. 4 J. 1. c. 3. 17 C. 2. c. 7. § 2. Also, in replevin for a distress for rent, relief, heriot, or other service, the defendant, avowing or making consuance, shall have double costs of suit, if the plaintiff be nonsuit, discontinue his action, or have judgment against him. 11 G. 2. c. 19. § 22. See *ante*, p. 73. and see 2 L. Raym. 788. Willes, 429. 1 Taunt. 210. 10 East, 2. 2 Bac. Abr. Costs, F. Hullock, 269—280. If the plaintiff be nonprossed, the defendant shall have his costs, as in other cases. See 1 T. R. 372.

If there be two defendants in replevin, and one of them be acquitted, he is not entitled to costs; 1 W. Bl. 355. 3 Bur. 1284; for replevin is not within *stat. 8 & 9 W. 3. c. 11*, before mentioned. As to costs upon double pleading, see *ante*, p. 252. 2 Doug. 709. n. 2 T. R. 235, and as to costs in error, see 2 Doug. 709. n. 10 East, 2. Vol. 1. p. 241, 242.

Scire facias.] If the plaintiff, in *scire facias*, have judgment, or award of execution, after plea pleaded or demurrer joined, he shall be entitled to costs; or if the plaintiff be nonsuit, discontinue, or if a verdict pass against him, the defendant shall be entitled to costs. 8 & 9 W. 3. c. 11. § 3. But the plaintiff is not entitled to costs until after plea pleaded; not even after a plea in abatement. 1 Str. 638. 2 Saund. 72. n. The statute also does not extend to charge executors or administrators with costs. 1 Str. 188. 1 Lil. P. R. 475; nor does it extend to a *scire facias* to repeal a patent; 7 T. R. 367; but costs are payable under the 8th section of the statute, in a *scire facias* suggesting breaches, after judgment by default in debt on bond conditioned to perform covenants. 11 East, 387. See *ante*, p. 84, 29, 30.

Actions by and against particular persons.] As to the payment of costs out of the issues returned upon writs of *distringas*, in actions against peers or members of parliament, see *ante*, p. 94. 96.

As to costs in actions against hundredors, upon the statutes of hue and cry, see *ante*, p. 101. and 1 T. R. 72; upon the riot act, *ante*, p. 102; upon the black act, *ante*, p. 103.

As to costs in proceedings against bail, see Vol. 1. p. 281, 282; 287. 101, 102, 103.

As to costs in actions, by or against executors or administrators, *see ante*, p. 130, 131, 134, 135, 216. Vol. 1. p. 242. and *see* 2 *Bac. Abr. Costs*, E. 1. *Hullock*, 185—212. *Bul. N. P.* 331.

As to costs in actions by the assignees of a bankrupt, *see ante*, p. 139.

As to costs in actions by or against infants, *see ante*, p. 144, 146. *Hullock*, 229—232.

As to costs in actions by paupers, *see ante*, p. 155. and *see* *Hullock*, 221—229. 3 *Bac. Abr. Costs*, E. 4.

And as to costs in actions against justices of peace, constables, officers of excise or customs, &c. *see ante*, p. 152. and *Bul. N. P.* 332. 2 *Bac. Abr. Costs*, E. 2. *Hullock*, 233—267.

Interlocutory proceedings.] As to costs upon reversing an outlawry, *see ante*, p. 166. and *see* *Hullock*, 608—611.

As to costs, after the removal of causes from inferior courts, *see ante*, p. 173.

As to costs, upon the payment of money into court, *see ante*, p. 163, 184, 185. *Hullock*, 349—367.

As to costs upon staying proceedings, *see ante*, p. 186—192.

As to costs upon setting aside proceedings for irregularity, *see ante*, p. 202.

As to costs upon a discontinuance, *see ante*, p. 208.

As to costs, upon entering a *cassetur billa vel breve*, *see ante*, p. 209.

As to costs, upon putting off the trial, *see ante*, p. 212.

As to costs upon judgment as in case of a nonsuit being obtained, *see ante*, p. 216. They are of course the same as upon a nonsuit. *See ante*, p. 251.

As to costs for not proceeding to trial, *see ante*, p. 217.

As to costs upon entering a *nolle prosequi*, *see ante*, p. 220.

As to costs upon a new trial being granted, *see ante*, p. 228, 229. *Hullock*, 386—401. and *see* 2 *New Rep.* 382. 1 *East*, 111; and as to the costs upon a *venire de novo* being awarded, *see ante*, p. 229.

As to costs, upon amendment, *see ante*, p. 231. and *see* *Hullock*, 340—348.

And as to costs upon judgment being arrested, *see ante*, p. 247.

Double and treble costs.] Only single costs were allowed by the statute of Gloucester; but double and treble costs have since, in some cases been given expressly by statute. Also, where a statute gives double or treble damages, where damages were before recoverable, the plaintiff shall also have double or treble costs. 2 *Bac. Abr. Costs*, C. *Bul. N. P.* 334. And in all cases, not only the costs given by the jury, shall be doubled or trebled, but also the costs *de incrementa*. 2 *Str.* 1048.

By double or treble costs, however, are meant, not double or treble the single costs; but double costs consist of the single costs, and half of the single costs; and treble costs, of the single costs,

half of the single costs, and half of that half. *Hullock*, 484. and see *Id.* 479—483.

Remedy, &c. for costs.] [As to an attorney's remedy for costs, see *Vol.* 1. p. 32. And as to the taxation of costs, see *Vol.* 1. p. 200. 30—32.

CHAPTER XXX.

Entry of Suggestions upon the Roll.

As to the awarding of the venire.] If the sheriff be interested in the event of the cause, or related by blood or affinity to either of the parties, a suggestion to this effect may be entered on the issue, immediately before the award of the venire; and the venire is then awarded to the other sheriff, if there be two, 1 *Salk.* 152, or if there be but one, then to the coroner; *Fortesc. de laud.* L. L. c. 25. *Co. Lit.* 158; or if the coroner be interested, &c. then to two persons appointed by the court, called *Elizors*. *Id.* *Barnes*, 465. See the form of a suggestion that one of the sheriffs is a party to suit, and award of the venire to the other, *Tidd, Forms*, 190. § 14.—the like where there is but one sheriff, and award of the venire to the coroner, *Id.* 191. § 16.—of suggestion by the East India company, plaintiffs, that one of the sheriffs is interested as a proprietor of stock, and award of venire to the other. *Id.* 190. § 15.—of suggestion that the sheriff is next of kin to the defendant, and award of venire to the coroner, *Id.* 191. § 17.—of suggestion that the sheriffs and coroner are interested, and award of venire to *elizers*, *Id.* 191. § 18. Any matter may be thus suggested, which would be a good principal challenge to the array of the jury. See upon this subject, *Vol.* 1. p. 181, 182.

In local actions, where a fair and impartial trial cannot be had in the county where the venue is laid, the court, upon a proper case being stated to them by affidavit, will upon motion grant leave to enter such a suggestion upon the issue, with a *nient dedire*, in order to have a trial in the next adjoining county; 3 *Bur.* 1333. 1 *T. R.* 369; and it seems to be immaterial whether the next adjoining county be a county palatine, or not. 7 *T. R.* 735. The affidavits upon which such an application is founded, should specify the facts from which it is to be inferred that a fair trial cannot be had in the county where the venue is laid. 3 *Bur.* 1333. See the form of the suggestion, and award of venire into the adjoining county, *Tidd, Forms*, 192. § 19. In transitory actions, it is more usual to move for leave to change the venue. See *ante*,

p. 176, 177. Also, in actions transitory or local, depending in any of the courts at Westminster, where the venue is laid in the county of any city or town corporate in England, (with the exception of London, Westminster, Bristol, Chester, and the borough of Southwark), the court, upon the application of either party, may, if they think proper, award the venire, &c. to the sheriff of the county next adjoining to the county of such city or town corporate, in order that the action may be there tried. 38 G. 3. c. 52. § 1 and 10. See the form of the suggestion in such a case, and award of the venire into the adjoining county, *Tidd, Forms*, 192. § 19. a.

Where the venue is laid in Wales, Berwick-upon-Tweed, or other place where the king's writ of venire does not run, then upon a suggestion that the issue ought to be tried in the next adjoining English county, the venire is awarded to the sheriff of such county accordingly: thus, where the venue is laid in North Wales, the venire upon suggestion may be awarded to the county of Salop; in South Wales, to the county of Hereford; 2 M. & S. 270. and see 11 East, 370. 2 Bur. 855; in Berwick-upon-Tweed, to the county of Northumberland; 2 W. Bl. 1036; and the like. See also 2 Salk. 651. and see the form of the suggestion and award of venire, where the venue is laid in Wales, *Tidd, Forms*, 193. § 20.—the like, where the venue is laid in Berwick-upon-Tweed, *Id.* 193. § 21. But in all personal actions, where the venue is laid in a Welsh county, and the issue tried in the adjoining English county, if the plaintiff obtain a verdict for a sum under 10*l.*, the judge shall certify on the back of the record of *nisi prius*, that the defendant, when served with process, was resident in Wales, if such fact appear in evidence; and upon such fact being suggested on the judgment roll, a judgment of nonsuit may be entered, and the plaintiff shall pay the defendant his costs, unless the judge also certify that the freehold or title to the land mentioned in the declaration was chiefly in question, or that the cause was proper to be tried in such English county. 13 G. 3. c. 51. § 1. And the same in all transitory actions arising in Wales, if the venue be laid in an English county. *Id.* § 2. see 6 T. R. 500. 1 Esp. 463. 1 New Rep. 267. See the form of the suggestion and judgment of nonsuit, *Tidd, Forms*, 315. § 64.

In all cases, where either party would suggest any special matter, as to the awarding of the venire out of the common course, a copy should be given to the opposite party, and he should be allowed a reasonable time to consider of it, before a *nient dedire* is entered. 1 Str. 235.

Of breaches, in debt on bond.] In all cases within the *stat.* 8 & 9 W. 3. c. 11. § 8. (see *ante*, p. 27, 28), where the defendant, in an action of debt on bond for the performance of covenants, &c. suffers judgment by default, the plaintiff must suggest upon the roll such breaches as he complains of, if the breaches have not already been assigned in the declaration. *Ante*, p. 27. See the form

of the suggestion, 1 Saund. 58. b. Tidd, Forms, 266. § 12. 267. § 12 a.; and as to the mode of proceeding thereon, see ante, p. 28. The same suggestion is also necessary, where the plaintiff in such an action has judgment on demurrer; ante, p. 29. So, if the defendant, instead of setting forth the condition of the bond upon oyer, and pleading performance, plead any other plea which cannot lead to an issue upon the breaches, but upon which the plaintiff, if he recovers, must have judgment *quod recuperet*, as if he plead a judgment recovered or the like; if in such a case the plaintiff have judgment, he must suggest breaches, and sue out and execute a writ of enquiry, in the same manner as upon a judgment by default. 14 East, 401, ante, p. 29, 30. Or, if the defendant, in such a case, plead *non est factum*, the plaintiff, in making up the issue, immediately after entering the plea, suggests the breaches, and then enters the award of the venire; 8 T. R. 255. 1 Esp. 277; or if the issue have been already delivered without the suggestion, the plaintiff should take out a summons before a judge, for the defendant to shew cause why a suggestion of breaches should not be entered on the record; and if no cause shewn, he may deliver a fresh issue, including the suggestions; 8 T. R. 255. and see Vol. 1. p. 132; or if, through inadvertence, the suggestion be not entered before the trial, and the plaintiff obtain judgment upon the plea of *non est factum*, it seems that it may be entered on the roll afterwards, and a writ of enquiry executed, in the same manner as where the defendant allows judgment to go by default. 2 Saund. 187. b.

And lastly, if, after the first inquisition or trial, the defendant in such cases be guilty of any further breaches, the plaintiff, in order to obtain damages for them, must sue out a *scire facias* on the judgment, and thereupon suggest the further breaches, and so proceed to judgment, as directed ante, p. 30. 84. See the form of the *scire facias* and suggestion, Tidd, Forms, 459. § 45. a. 46. 46. a.

[Of the death of parties.] Where there are two or more plaintiffs or defendants, and one or more of them die, if the cause of action survive to or against the survivors, the action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of or against the survivors. 8 & 9 W. 3. c. 11. § 7. The death, in this case, if it occur before issue joined, is suggested at the commencement of the next pleading, and of course appears upon the face of the issue when made up. But if it happen after issue joined, it seems that it is not necessary that it should be suggested upon the *nisi prius* record; if suggested upon the issue roll, it will be sufficient. 1 Bur. 363. Even after motion to set aside proceedings for irregularity, because one of two plaintiffs died before interlocutory judgment, and the suit proceeded to execution in the names of both, the court allowed the surviving plaintiff to suggest the death of the other on the roll, and to amend the *ca. sa.*, without payment of costs. 5 T. R. 577.

See the form of a suggestion in the commencement of a declaration, by a surviving plaintiff, of the death of the other plaintiff after original sued out and before declaration, Tidd, Forms, 187. § 11.—the like, in the commencement of a plea, of the death of one of the plaintiffs between declaration and plea, *Id.* 188. § 11. b.—the like, of the death of one of the defendants between declaration and plea, *Id.* 188. § 12.—the like, in the commencement of a replication, of the death of one of the plaintiffs between plea and replication, *Id.* 188. § 13.—the like, in the commencement of a surrejoinder, of the death of one of the defendants between rejoinder and surrejoinder, 10 Went. 404. See also the form of a suggestion of the death of one of several plaintiffs or defendants, after issue joined and before trial, Tidd, Forms, 197. § 35.—the like, of the death of one of several defendants, after declaration and before judgment by default, *Id.* 254. § 4.—the like, of the death of one of the plaintiffs, after judgment by default, and before the return of the writ of enquiry, *Id.* 256. § 7.—and the like, of the death of one of the defendants, after verdict and before judgment, *Id.* 299. § 41.

If the death happen after final judgment, then, upon suggesting the death upon the roll, you may sue out execution by or against the survivor; 2 *L. Raym.* 808. and see 1 *Salk.* 319, 1 *Show.* 404; or you may sue out execution in the names of all, but it can be executed as against the survivor only. 2 *Saund.* 50. k. 72. k. o. *Ante*, p. 81, 82. *Vol.* 1. p. 257. 269. The lands, however, of a deceased defendant are still liable in satisfaction of the judgment, although he leave others of the defendants surviving him; for the judgment survives as to the personalty only, and not as to the realty; *Vol.* 1. p. 273; and, therefore, if the plaintiff wish to sue out an *elegit* against the lands of a deceased defendant, as well as against the survivor, he may have a *scire facias* against such survivor and the heir and terretenants of the deceased, to have execution against the lands and goods of the former, and the lands of the latter. *Ante*, p. 82.

If one of several defendants in error die, upon suggesting the death upon the roll, you may proceed against the survivors. *Vol.* 1. p. 216. See a form of the suggestion, *Lill. Ent.* 217.

For costs.] If an action be brought in this court for a cause of action which might have been sued for in the court of requests or court of conscience of any city, borough or town, there is usually a clause in the statute creating the jurisdiction of the inferior court, by which it is provided, that if the plaintiff here recover any sum within the limits of the cognizance of the inferior court, he shall not be entitled to costs; or if the defendant have a verdict, he shall be entitled to double costs. It would be impossible in a work of this description to enumerate the provisions of this nature in all the statutes which establish courts of conscience; all that is here intended is to state some general principles, which the courts seem to have established upon the subject, and which are applicable to all these courts of conscience, unless expressly

controlled by the words of the statute creating their jurisdiction, or by necessary implication.

If the statute creating the court of conscience contain a prohibitory clause, declaring that no action shall be brought elsewhere for the causes of action therein mentioned, the statute in such a case may be offered as a defence upon the general issue, 1 *East*, 352, or it may be pleaded. 3 *T. R.* 452. But if the defendant omit to take advantage of the statute in either of these ways, the court will not, after verdict, either allow a suggestion of the defendant's residing within the jurisdiction of the inferior court to be entered on the roll, nor will they stay the proceedings. 3 *T. R.* 452. On the other hand, where the statute contains no such prohibitory clause, it cannot be pleaded; but the mode of taking advantage of it is, by the defendant's moving, after verdict or execution of writ of enquiry, and before final judgment, (upon affidavit stating his residence within the inferior jurisdiction, that he is liable to be warned or summoned to the inferior court, together with such other circumstances as may be necessary to bring him within the statute; see the form, *Tidd, Forms*, 323. § 1, 1. a.), for leave to enter a suggestion to that effect upon the record; 2 *H. Bl.* 352. 2 *Wils.* 68. 2 *M. & S.* 348. See 4 *M. & S.* 171. 3 *T. R.* 139; or he may move the court to stay the proceedings, upon payment of the sum recovered, without costs. 8 *East*, 239. The motion for leave to enter a suggestion, is for a rule to shew cause why the plaintiff should not bring the *postea* into court and file the plea roll, so that the defendant may enter a suggestion thereon, &c. and that all proceedings be stayed in the mean time. Draw up the rule with the clerk of the rules, and serve a copy upon the plaintiff's attorney, at the same time shewing him the original; and then proceed to make the rule absolute upon affidavit of service. As soon as it is made absolute, get the suggestion drawn by counsel, (see the form of a suggestion upon the *Middlesex act*, *Tidd, Forms*, 320. § 75.—the like, upon the *Southwark act*, *Id.* 320. § 75. a.); indorse it upon the *nisi prius* record, and get the clerk of the treasury to enter it upon the roll. If the statute give the defendant costs, give notice to the plaintiff's attorney of the time of taxing them; bespeak the roll of the clerk of the treasury, and attend before the master with the *postea*, who will thereupon tax the costs, and mark them upon the *postea* and roll. This suggestion, it seems, may be traversed or demurred to by the plaintiff. 1 *New Rep.* 157. *Andr.* 380. 2 *H. Bl.* 354. and see 2 *Str.* 1120.

The courts of conscience are in general restrained to debts or other demands certain, capable of being ascertained by mere computation. 5 *T. R.* 529. 1 *M. & S.* 393. See 2 *B. & P.* 588. 29. 5 *East*, 194. 7 *East*, 292. 13 *East*, 161. 1 *B. & P.* 223. 1 *Doug.* 224. Consequently in all other cases, as for instance in an action on the case for negligence in driving a carriage, 1 *Tausst.* 396, or in a special action of assumpsit for the breach of an agreement, 5 *T. R.* 529. see 1 *M. & S.* 393, or the like, the defendant cannot plead the statute, nor will the court allow him to enter a sug-

gestion upon the record, however trifling the damages may be. It is in general necessary, also, in order to sue in these courts of conscience, that the cause of action have arisen, and the defendant reside, within the jurisdiction; 2 *H. Bl.* 29. 6 *T. R.* 175. 1 *B. & P.* 76; but this depends entirely upon the wording of the statute in each particular case. See 8 *T. R.* 235. 2 *H. Bl.* 220. 5 *T. R.* 529. 3 *T. R.* 535. 6 *T. R.* 242. 3 *B. & P.* 617. and see 1 *New Rep.* 153. 8 *East*, 336. 15 *East*, 647. 16 *East*, 147. 2 *Taunt.* 196. 4 *Taunt.* 150. 5 *Taunt.* 648. And it is the amount of debt or damages found by the jury, and not as laid in the declaration, which is to determine whether it might have been sued for in the inferior court or not; 6 *Taunt.* 452. *Say.* 273; and although reduced below the limited sum by a payment in part, 8 *East*, 98. 347. 1 *Taunt.* 60. see 14 *East*, 344. 1 *B. & P.* 223, or by the plea of infancy or other defence set up to the action, 14 *East*, 301, it is within the statute; but otherwise, if reduced by a set off, 2 *Str.* 1191. 3 *Wils.* 48, or tender. 2 *Doug.* 448.

Executors and administrators, as defendants, are not within any of these statutes; 1 *Doug.* 263. see *Id.* 246; nor attorneys, either as plaintiffs or defendants, unless specially named therein; 1 *Doug.* 380. 7 *East*, 47. *Ante*, p. 105. 107; but assignees of a bankrupt are. 1 *B. & P.* 11.

In all personal actions where the venue is laid in a Welsh county, and the issue tried in the adjoining English county, if the plaintiff obtain a verdict for less than 10*l.* the judge shall certify on the back of the record of *nisi prius* that the defendant, when served with process, was resident in Wales, if such fact appear in evidence; and upon such fact being suggested on the judgment roll, a judgment of nonsuit may be entered, and the plaintiff shall pay the defendant his costs, unless the judge also certify that the freehold or title to the land mentioned in the declaration was chiefly in question, or that the cause was proper to be tried in such English county. 13 *G. 3. c.* 51. § 1. And the same in all transitory actions arising in Wales, if the venue be laid in an English county, *Id.* § 2. In the taxation of costs for the defendant, in this case, the master shall allow the plaintiff the sum given him by the verdict, out of the defendant's costs. *Id.* See the form of the suggestion, and judgment of nonsuit, *Tidd, Forms*, 315. § 64. and see 6 *T. R.* 500. 1 *New Rep.* 267.

If a defendant be entitled to double or treble costs on a verdict for him, because sued for something done by virtue of his office of justice of peace, constable, officer of excise or customs, &c. (see *ante*, p. 152), if it do not appear upon the face of the record that the action was brought against him as such officer, for something done by him in the execution of his duty, then, upon obtaining a certificate to that effect from the judge, at or after the trial, 7 *T. R.* 448. 1 *Doug.* 307. 308. n. 2 *Str.* 974. and see 3 *East*, 92, or, in case of a nonsuit or nonpros, upon his making an affidavit of the fact, the court will allow him to enter a suggestion of it upon the record. *Hardw.* 125. *Ca. Pr. C. B.* 16. And the same

in all other cases where the defendant is entitled to double or treble costs. See 9 East, 322.

And lastly, where the plaintiff does not recover the amount for which he has holden the defendant to bail, the defendant shall be entitled to costs, if upon motion for that purpose, and upon hearing the parties by affidavit, it shall appear to the court that there was no reasonable or probable cause for holding the defendant to bail for that amount. 43 G. 3. c. 46. § 3. see 10 East, 525. 1 Taunt. 60. 4 Taunt. 191. Where the plaintiff held the defendant to bail for 50*l.*, and afterwards, upon 20*l.* being paid into court, he took it out, and proceeded no further in the action, the court held that it did not come within meaning of this act. 13 East, 90. See the form of the suggestion in this case, Todd, Forms, 321. § 75. b.

CHAPTER XXXI.

Death, Bankruptcy, &c. of Parties.

Death of parties.] BEFORE we consider the effect the death of a party has upon a suit, it will be necessary to ascertain what actions survive to or against their executors or administrators.

Actio personalis moritur cum personâ is a rule that admits of many exceptions. All such personal actions as are founded upon any obligation, contract, debt, covenant, or any other duty to be performed, survive, and do not die with the person, but may be brought by or against the personal representatives of the deceased parties. Latch. 168. Cro. Car. 540. Cowp. 375. Account did not lie at common law, for or against an executor, &c.; but it is given to executors by stat. Westm. 2*d.* (13 Ed. 1.) st. 1. c. 23, and against executors by 4 & 5 A. c. 16. § 27. So, debt on simple contract does not lie against executors; 9 Co. 27. Cro. El. 600. Cowp. 375; but debt for rent, and assumpsit upon the simple contract of the testator, do. 9 Co. 87. b. Plowd. 180.

So, replevin or detinue will lie for or against executors, where the goods taken away continue still in specie in the hands of the wrong doer, or of his executor; W. Jon. 173; or, if they be consumed, then an action for money had and received, to recover the value. Cowp. 377. So, where the goods of a testator have been carried away in his life time, the executor may afterwards maintain trespass against the wrong doers; 4 Ed. 3. c. 7; and the same as to administrators, 31 Ed. 3. c. 11, and executors of executors. 25 Ed. 3. c. 5. These statutes are construed as giving the same remedies to executors, &c. for injuries to the *personal*

estate, that the deceased might have had; *Latch.* 168; so that they may have trespass or trover, 5 *Co.* 27. a. *W. Jon.* 174, action for a false return, 4 *Mod.* 403, action for an escape, 2 *L. Raym.* 973, action for removing goods taken in execution, before the landlord (the testator) was paid a year's rent, 1 *Str.* 212, or any other action of the like kind, for injuries done to the personal estate of the testator in his life time. See also *Cro. El.* 377. 1 *Vent.* 187. *W. Jon.* 174. 2 *L. Raym.* 974. But these statutes do not extend to injuries done to the person or to the freehold of the testator; and therefore an executor shall not have an action for assault and battery, false imprisonment, slander, deceit, diverting a watercourse, obstructing lights, cutting trees, or other actions of the like kind. *W. Jon.* 174. *Latch.* 168. 1 *Vent.* 187.

But an executor cannot be sued, where the cause of action is founded upon any malfeasance or misfeasance, or where it is a tort, or arose *ex delicto*; such as trespass for taking goods, &c. trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, escape, and many other cases of the like kind, where the declaration imputes a tort done to the person or property of the plaintiff by the deceased, and the plea must be not guilty. *W. Jon.* 174. *Latch.* 167, 168. *T. Raym.* 57. *Palm.* 330. *Cro. Car.* 540. 1 *L. Raym.* 433, 434. *Cowp.* 375. Yet if the plaintiff's goods were taken away by the testator, and still continue in specie in the hands of the executor, replevin or detinue will lie against the executor; *W. Jon.* 173, 174; or, if they be consumed, then an action for money had and received, to recover the value. *Cowp.* 377.

[*Death before verdict or judgment by default.*] If a sole plaintiff or defendant die before verdict or judgment by default, the action abates, and the plaintiff or his executor is obliged to commence a new action against the defendant or his executor, provided the cause of action survive to or against the executor. See 2 *Wils.* 83. 1 *Wils.* 315.

But where there are several plaintiffs or defendants, and some of them die, if the cause of action survive to or against the others, the action does not abate; but the death being suggested upon the roll, the action proceeds by or against the survivors. *Ante*, p. 258.

[*Death after verdict and before final judgment.*] If a sole plaintiff or defendant die after verdict and before final judgment, the action is not thereby abated, provided it be such as could originally be brought by or against the executor; but final judgment is signed as if the party were alive, and then revived by *scire factus* by or against the executor, &c. *Ante*, p. 78. see 4 *Taunt.* 702. 1 *Taunt.* 385.

So, if one of several plaintiffs or defendants die after verdict and before judgment, the action does not abate; but the death

being suggested on the roll, judgment is entered by or against the survivors, and execution sued out accordingly. *Ante*, p. 258.

Death between interlocutory and final judgment.] If a sole plaintiff or defendant die after judgment by default and before final judgment, the action shall not abate, if it be such as might originally be prosecuted by or against the executors; (*see 4 Tunt. 884*); but the judgment may be revived by *scire facias*, and the parties may thereupon proceed to final judgment. *Ante*, p. 79. And the court in such a case have referred it to the master to compute principal and interest on a bill of exchange, during the same term in which the plaintiff died, without a *scire facias*; because the final judgment would be signed as of the same term, and, having relation to the first day of it, would appear to have been signed before the plaintiff's death. 1 *M. & S.* 229.

So, if one of several plaintiffs or defendants die after judgment by default and before final judgment, the action does not abate; but the death being suggested on the roll, the action proceeds by or against the survivors. *Ante*, p. 258. *see 1 M. & S.* 242.

Death after final judgment.] If a sole plaintiff or defendant die after final judgment and before execution, the action is not thereby abated; but the judgment must be revived by *scire facias* by or against the executors, &c. *Ante*, p. 79—81. *and see ante*, p. 129.

But where there are several plaintiffs or defendants, and some of them die after final judgment and before execution, execution may be sued out by or against the survivors, in the names of all; or, upon suggesting the death upon the roll, execution may be sued out by or against the survivors by name; or, where it is desired to have execution by *elegit* of the lands of a deceased defendant, the judgment may be revived by *scire facias* against his heir and terretenants, and against the surviving defendants, and an *elegit* thereupon sued out against the lands of the deceased, and the lands and goods of the survivors. *Ante*, p. 259. 82.

Death after a writ of error.] The death of a plaintiff in error, before errors assigned, abates the writ; but if it happen after the assignment of errors, it does not. *Vol. 1. p. 216.* The death of a defendant in error, however, in no case abates the writ; but the death being suggested on the roll, the writ proceeds against the survivor; or if all the defendants die, the executors or administrators may be made parties by the *scire facias ad audiendum errores.* *Vol. 1. p. 216.*

Death of defendant, how far a discharge of his bail.] If the principal die at any time before the return of the *ca. sa.*, the bail are thereby discharged; but if he have not been arrested on the *ca. sa.*, and die after it is returnable, the bail are fixed. *Vol. 1. p. 282.* This, however, has reference only to bail to the action; bail in

error are liable, notwithstanding the death of their principal. See also *Vol. 1. p. 102*, in what cases the death of the defendant is a discharge of the bail to the sheriff.

Bankruptcy of parties.] If a plaintiff, pending the action, become bankrupt, his assignees, if they continue the action, must proceed in it in the bankrupt's name to final judgment, or, in case of error brought, to affirmance of the judgment, and then revive it by *scire facias*. *Ante, p. 83. 139.* But if a person become a bankrupt before he commences his action, the action must afterwards be commenced and prosecuted in the names of his assignees. *Ante. p. 139.*

If a defendant become a bankrupt, and obtain his certificate before his bail are fixed, the bail are thereby discharged; *Vol. 1. p. 282, 283*; and the same as to bail to the sheriff. *Id. p. 102.* And if a bankrupt be in custody in execution, and obtain his certificate, he may be discharged upon application to the court wherein judgment was obtained, or to a judge at chambers. *5 G. 2. c. 30. § 13. see ante, p. 141.* Also, before the bankrupt has obtained his certificate, a creditor at whose suit he is in custody cannot prove his debt under the commission, until he have first relinquished his action against the debtor, and all benefit whatever from the same. *49 G. 3. c. 124. §. 1.* and see *4 Taunt. 631. 2 Taunt. 181.* Nor can a creditor, who has taken his debtor in execution, sue out a commission of bankrupt against him for the same debt. *8 T. R. 123. see 1 B. & P. 302.*

Marriage of feme plaintiff or defendant.] If a feme sole, plaintiff, obtain judgment, and marry before execution, a *scire facias* must be sued out in order to make the husband a party to the judgment. *Ante, p. 82.* So, if a feme sole, defendant, after judgment against her, marry before execution, a *scire facias* will be necessary, in order to make the husband a party to the judgment. *Id.* But if a feme sole, plaintiff in error, marry pending the writ, the writ is thereby wholly abated. *Vol. 1. p. 216.*

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CHAPTER XXXII.

Motions and Rules.

SECT. 1.

Rules granted upon Motion by Counsel.

RULES granted upon motion by counsel, are granted either on the plea side, or on the crown side, of the court. Rules for attachments, are the only rules granted on the crown side, which have any relation to a civil suit; and shall be considered in a subsequent part of the work, where we shall have to treat of attachment generally. Rules granted upon the plea side, upon motion by counsel, may be classed under the following heads: 1st, Those which are granted upon the motion paper being merely signed by counsel, without any motion being actually made in court; 2dly, Those, which are considered so much as a matter of course, that the grounds of the motion are not particularized by counsel, and where in some instances counsel may hand the motion paper to the clerk of the rules without making the motion *viva voce*; and 3dly, Those which are granted, upon the grounds of the motion being particularized by counsel.

The first class of rules, namely, those which are granted upon the mere signature of counsel, are absolute in the first instance, and may be obtained thus: *get the motion-paper signed by counsel; take it to the office of the clerk of the rules, and draw up the rule; and serve a copy of the rule upon the opposite attorney.*

The remaining two classes of rules, are either absolute in the first instance, or rules to shew cause. If absolute in the first instance, they are obtained thus: *let an affidavit be made of the facts necessary to support the application, (see post, Ch. 34), annex it to the motion-paper, and indorse the latter correctly as to the nature of the rule required. Then give the motion-paper and affidavit to counsel, who, after signing it, will either give it to the clerk of the rules, or move it in court, according to the nature of the motion. The motion-paper and affidavit, however, must be handed in to the clerk of the rules, whether the rule be granted or refused. If the rule be granted, call in the evening at the office of the clerk of the rules, and draw up the rule, and serve a copy of it upon the attorney or agent of the opposite party. As to the service of rules, generally, see Vol. 1. p. 19, 20. The affidavit upon which the motion is founded, must*

be made before the rule is moved for, and produced in court at the time of making the motion, otherwise the rule shall not be drawn up, or, if drawn up, shall be of no force or effect. *R. H. 36 G. 3. See 2 Salk. 461.*

If the rule required be a rule *nisi* only, give the motion-paper, with the affidavit annexed, to counsel, who will move it accordingly; and if granted, draw up the rule with the clerk of the rules, and serve a copy of it, as above directed. If there be any irregularity in the service, it will be waived by the party's afterwards appearing and shewing cause against the rule. *Tidd, 445.* The rule thus granted, requires the opposite party to shew cause upon some day certain in term, usually three or four days or more (according to the distance of the opposite party's residence) after it is drawn up; but where the rule is obtained the day before the last day of term, and the transaction to which it relates took place in town, it may be drawn up for the last day of term, and may be made absolute at the rising of the court on that day. A rule *nisi* for setting aside an award, however, should not be drawn up for the last day of term, for by *R. M. 36 G. 3*, counsel cannot be heard to shew cause against it on that day; also, if a rule *nisi* be moved for on the last day of term, it will not operate as a stay of proceedings, nor will the court allow the rule to be worded so as to give it such an operation, unless perhaps under very special circumstances. If the rule operate as a stay of proceedings, it suspends them for all purposes until the rule be discharged; *4 T. R. 176*; and if any proceedings, directly or collaterally, be had in the cause, in the mean time, the court upon application will set them aside. If the rule be drawn up wrong by mistake, the court will order it to be corrected. *Aute, p. 246.*

Previously to moving for a rule *nisi*, a notice of the intended motion is sometimes given to the opposite party, particularly where it is desired that the rule should operate as a stay of proceedings, or that time and expense may be saved by affording the adverse party an opportunity of shewing cause against it in the first instance, or where the object is to induce the court to disallow the costs of proceedings had after such notice and before motion. *Tidd, 441. see 1 Wils. 30. See the form of a notice of motion to shew cause why the bail bond and proceedings thereon should not be set aside, Tidd, Forms, 148. § 1.—the like, to set aside proceedings for irregularity, Id. § 3.—the like, to stay proceedings until security be given for costs, Id. 149. § 4.—the like, for the master to compute principal and interest on a bond, Id. 149. § 5.—the like, to set aside interlocutory judgment for irregularity, Id. § 6.—the like to set aside judgment and execution for irregularity, and that the money levied be restored, Id. 150. § 7; and see also the form of a notice to the sheriff to retain the money levied. Id. § 8.*

Upon the day appointed by the rule, the opposite party must shew cause against it, unless by consent it stand over until another day in the same term. Either party, however, if not prepared to support or shew cause against the rule, may move that it be en-

larged to a future day in the same or the next term. But it is not by any means of course that the court should thus enlarge a rule; sufficient grounds must be stated to induce them to do so: *M.S. E. 1814*: if the application be made by the party who obtained the rule, the court usually grant it where it is in his own delay; but not, where it would have the effect of detaining the opposite party in custody, nor in other cases without consent or some evident necessity: if moved for by the opposite party, the court will frequently enlarge it upon terms, or, if the rule were not served in time to give the party an opportunity of shewing cause against it, he may demand that the rule be enlarged as a matter of right. *Tidd*, 447, 448. *see* 1 *Smith*, 199. If it be enlarged to a subsequent term, it is set down in the peremptory paper, and called on in its order; *see* *Vol. 1. p. 36*; but if it be enlarged or stand over to another day in the same term, either party may bring it on, upon the day so appointed, by moving to discharge the rule or make it absolute.

In order to shew cause against a rule *nisi*, get an office copy of the rule, and of the affidavit upon which it was granted; and give them, together with an affidavit when necessary, and a brief, to counsel. Upon the day appointed for shewing cause, or usually the day after, your counsel will shew cause accordingly; and the counsel for the party who obtained the rule, will then be heard in reply; also, if cause be shewn in the first instance, the counsel who moved for the rule *nisi* is in like manner entitled to the reply. Although the court will seldom hear more than one counsel upon moving for a rule *nisi*, yet upon shewing cause, the number is not limited; and if there be two or more counsel on either side, they are heard in the order of their precedence. After the argument is concluded, the court deliver their opinion, and make the rule absolute or discharge it accordingly.

If no cause be shewn on the day appointed, counsel may move on the following day to make the rule absolute on an affidavit of service; *see the form of the affidavit, Tidd, Forms, 411. § 113*; and if cause be not then shewn, the court will grant a rule making the former rule absolute. Draw up this latter rule with the clerk of the rules, and serve a copy of it upon the opposite attorney or agent.

The costs of the application are wholly in the discretion of the court. If the rule be made absolute, and it was not originally drawn up with costs, the court will seldom allow the party succeeding the costs of the application; but, on the contrary, will order him, in some cases, where the application is merely to the favour of the court, to pay costs, as a condition of their making the rule absolute. If the rule be drawn up with costs, the prevailing party is of course entitled to them, upon the rule being made absolute, unless the court order it otherwise. But where the rule is discharged, if the court be of opinion that there were no grounds for the application, they uniformly order the party who made it to pay the costs. If, however, nothing be directed in the rule as to costs, they are considered as abiding the event of the cause; ex-

cept where the rule *nisi* is to set aside proceedings for irregularity, in which case the rule must be understood to be discharged with costs, although it contain no special direction upon that subject. *R. M.* 37 G. 3.

There is an old rule of court, *H. 3 J.* 1, by which it is ordered that if a cause be moved in court in the presence of counsel of both parties, and the court shall thereupon make an order; no person shall afterwards cause the same to be moved contrary to such rule or order, under pain of an attachment; and the counsel, knowingly making such motion, shall not be heard here in any cause during the same term. If, however, the rule have been made absolute too soon, or either party have been taken by surprise, the court will open the rule, upon application.

Whether the court grant the rule *nisi* or not, or make it absolute or discharge it, the affidavits on both sides must be filed with the clerk of the rules, as has been already mentioned: those sworn in town are to be filed *after* they are used; and those sworn before a commissioner in the country, *before* they are used; and office copies must be procured of the latter, in order to be read in court. See *post*, *Ch.* 34.

The following is an enumeration of the rules usually granted in the course of a suit, upon motion by counsel, classed under the different heads mentioned at the beginning of the present chapter.

1. *Where the Motion-paper requires only the Signature of Counsel.*

In the following cases, the rules are drawn up by the clerk of the rules, upon your producing the motion-paper signed by counsel. These rules are all absolute in the first instance.

1. Rule that defendant be at liberty to plead several matters. *D. Vol.* 1. p. 123.
2. — the like in replevin. *P. D. ante*, p. 71.
3. — that defendant abide by his plea, or plead another on the morrow. *P. Vol.* 1. p. 124.
4. — that defendant be at liberty to pay money into court. *D. Vol.* 1. p. 122. *ante*, p. 183.
5. — for a *concilium*. *P. D. Vol.* 1. p. 191. 245, 249. 254. *ante*, p. 35.
6. — for a special jury. *P. D. Vol.* 1. p. 158.
7. — for a view in trespass. *P. D. Vol.* 1. p. 159.
8. — for a *scire facias* to revive a judgment, more than 10 and less than 15 years old. *P. D. ante*, p. 88.
9. — that the landlord be admitted defendant, instead of the tenant, in ejectment. *D. ante*, p. 50.
10. — for judgment against the casual ejector. *P. ante*, p. 45. 55. 58.

Note. The letters *P. D.* annexed to the different rules above mentioned, and hereafter in the course of this chapter, signify that the rule is granted upon a motion by the plaintiff or de-

defendant; and where both letters are used, they signify that the motion may be made by either party.

2. Where the Motion must be made in Court, but it is sufficient if Counsel give the Motion-paper to the Clerk of the Rules.

In the following instances, where the rules required are always granted by the court as a matter of course, it is not necessary that counsel should actually make the motion *visa voce* in court; but, upon signing the motion-paper, he may at once give it to the clerk of the rules. Call at the rule office in the evening, and draw up the rule; then serve a copy of it on the opposite attorney or agent.

1. Rule that money deposited with the sheriff instead of bail, be paid over to the plaintiff, no bail having been put in. *Nisi. P. Vol. 1. p. 76.*
2. — that money deposited with the sheriff instead of bail, be paid over to the defendant, bail having been put in and justified. *Nisi. D. Vol. 1. p. 76.*
3. — upon motion to justify bail. *Abs. D. Vol. 1. p. 89. 86.*
4. — the like as to bail in error. *Abs. P. Vol. 1. p. 225. 250.*
5. — peremptory, to declare. *Abs. D. Vol. 1. p. 107.*
6. — to change the venue. *Abs. D. ante, p. 175.*
7. — to discharge the rule for changing the venue. *Abs. P. ante, p. 177.*
8. — to refer it to the master to compute principal and interest on a bill of exchange. *Nisi. P. ante, p. 20. 30.*
9. — to have witnesses examined upon interrogatories. (*Consent*). *P. D. Vol. 1. p. 153.*
10. — for costs, for not proceeding to trial or enquiry. *Abs. D. ante, p. 218.*
11. — for judgment as in case of a nonsuit. *Nisi. D. ante, p. 215.*
12. — the like, after a peremptory undertaking. *Abs. D. ante, p. 217.*
13. — that the defendant have leave to enter a suggestion on the roll, to entitle him to costs under the courts of conscience acts. *Nisi. D. ante, p. 260.*
14. — the like, to entitle the defendant to judgment of nonsuit, under the Welsh judicature act. *Nisi. D. ante, p. 261.*
15. — the like, to entitle the defendant to double or treble costs. *Nisi. D. ante, p. 261.*

Note. In the three last instances, if the defendant be not clearly entitled to the costs, or if there be any thing irregular or doubtful as to the time of making the motion, or the like, the substance of the affidavit upon which the motion is grounded should be stated to the court.

16. — for judgment against defendants in several actions upon policies of insurance, who have entered into a consolidation rule. *Nisi. P. ante, p. 180.*

17. Rule for a *scire facias* to revive a judgment upwards of 15 years standing. *Nisi. ante*, p. 88.
18. — to make judge's order or order of *nisi prius* a rule of court. *Abs. P. D. post.*
19. — to make a submission to arbitration a rule of court. *Abs. P. D. post.*
20. — to enlarge the time for making an award. (*Consent*). *P. D. post.*
21. — to make a rule absolute upon affidavit of service, in cases of course, where cause is never shewn. *P. D. ante*, p. 268.

Notes. Where any of the above rules are to be drawn up by consent, the clerk of the rules must be furnished, by each of the parties, with a motion-paper signed by counsel, before he can draw up the rule.

3. *Where the Motion is made in Court, but the Grounds of it not particularised.*

In the following instances, the rules are not granted wholly of course; for which reason counsel are obliged to state shortly to the court the grounds of the motion.

1. Rule that an attorney deliver up writings, &c. where there is no cause in court. *Nisi. Vol. 1. p. 20.*
2. — that plaintiff be at liberty to sue out a *distringas* in non-bailable actions by original. *Nisi. P. Vol. 1. p. 299.*
3. — to increase issues upon a *distringas*. *Abs. P. ante*, p. 93. 98.
4. — for a *habeas corpus ad respondendum*, in order to charge a prisoner, in custody on a criminal account, with a declaration. *Nisi. P. ante*, p. 110. If the prisoner, however, be in the custody of the marshal, the motion, it should seem, may be for a rule to shew cause why the plaintiff should not be at liberty to file a bill against him with the clerk of the declarations, and to deliver a copy thereof either to the defendant himself or to the turnkey of the prison for him.
5. — for leave to compound penal actions. (*Consent*). *ante*, p. 200.
6. — that defendant abide by his plea, or plead another *instanter*. *Abs. P. Vol. 1. p. 124.*
7. — for a general special imparlance. *Abs. D. ante*, p. 2. *Vol. 1. p. 113, 114.*
8. — that defendant be at liberty to withdraw the general issue, and plead *de novo* with notice of set off. *Abs. D. Vol. 1. p. 123, 124.*
9. — the like, and to plead *de novo*, upon paying money into court. *Abs. D. Vol. 1. p. 123, 124.*
10. — for leave to inspect and take copies of books, court rolls, &c. and to have them produced at the trial. *Nisi. P. D.*

Vol. 1. p. 144, 145. If the motion, however, be made upon behalf of a copyholder, for an inspection of the court rolls of the manor, counsel's signature to the motion-paper will it seems be sufficient. 3 T. R. 141. see 7 T. R. 746.

11. Rule for leave to enter up judgment on an old warrant of attorney. *Abs. P. ante*, p. 15, 16, 17. If the warrant of attorney be 20 years old or upwards, the rule granted is a rule nisi only. *Ante*, p. 16.
12. — to discharge an insolvent debtor, under *stat.* 48 G. 3. c. 123. § 1. *Nisi. D. ante*, p. 123.
13. — to make a rule absolute upon affidavit of service, no cause being shewn. *P. D.*
14. Motion for judgment on demurrer, when not argued. *Abs. P. D. ante*, p. 35.
15. — for judgment on writ of error, when not argued. *Abs. P. D. Vol. 1. p. 246.*

4. *Where the Motion is made in Court, and the Grounds of it particularized.*

In the following instances, the rules are not by any means granted of course; but the court, upon a full statement of the grounds of the motion, as appearing from the affidavits, will grant or refuse the rule nisi, at their discretion.

1. Rule that the defendant may be discharged out of custody, on filing common bail. *Nisi. D. Vol. 1. p. 40. 39, 44. 68, 69, 70. 72. 57.*
2. — that the bail bond may be delivered up to be cancelled. *Nisi. D. Vol. 1. p. 68.*
3. — for further time to justify. *Abs. D. Vol. 1. p. 88.*
4. — that an outlawry be reversed. *Abs. D. ante*, p. 165.
5. — that service of declaration in ejection, on the tenant's son or daughter, &c. on the premises, may be deemed good service. *Nisi. P. ante*, p. 44.
6. — that superfluous counts be struck out of the declaration. *Nisi. D. ante*, p. 178, 179.
7. — to consolidate actions, not being on a policy of insurance. *Nisi. D. ante*, p. 180.
8. — that claim of conusance be allowed. *Nisi. Ante*, p. 174.
9. — for time to declare, under special circumstances. *Nisi. P. ante*, p. 111. *Vol. 1. p. 108.*
10. — for leave to withdraw the general issue, and plead specially. *Abs. D. Vol. 1. p. 123.*
11. — for leave to withdraw a special plea, and plead specially. *Abs. D. Vol. 1. p. 124.*
12. — for leave to add a plea. *Abs. D. Vol. 1. p. 124.*
13. — for a view in actions other than trespass. *P. D. Vol. 1. p. 159.* This rule is sometimes absolute in the first instance, sometimes only a rule to shew cause,

14. Rule that a writ of enquiry may be executed before a judge. *Nisi. P. D. ante, p. 23.*
15. — for a trial at bar. *Nisi. P. D. Vol. 1. p. 165, 166.*
16. — for a trial in an adjoining county. *Nisi. P. D. Vol. 1. p. 129.*
17. — to put off the trial. *Nisi. P. D. ante, p. 211.* But when the application is made at *nisi prius*, the order is of course absolute in the first instance.
18. — to stay proceedings in replevin, upon payment of rent, &c. *Nisi. P. ante, p. 188.*
19. — to stay proceedings in ejectment, upon payment of rent or mortgage money. *Nisi. D. ante, p. 188. 58.*
20. — to stay proceedings upon payment of debt and costs, &c. in other than ordinary cases. *Nisi. D. ante, p. 189. 187.*
21. — to stay proceedings in second actions, until the costs of a former action be paid. *Nisi. D. ante, p. 189.*
22. — to stay proceedings in actions under 40s. *Nisi. D. ante, p. 190.*
23. — to stay proceedings in actions pending error. *Nisi. D. ante, p. 190. Vol. 1. p. 218—221. 282.*
24. — to stay proceedings in other cases. *Nisi. D. see ante, p. 191.*
25. — to stay proceedings until security be given for costs. *Nisi. D. ante, p. 193. 49.*
26. — to stay proceedings in actions upon bail bonds, upon terms. *Nisi. D. Vol. 1. p. 102.*
27. — to set aside a regular *nonpros*, upon terms. *Nisi. P. ante, p. 206.*
28. — to set aside a regular judgment by default, upon terms. *Nisi. D. ante, p. 11.*
29. — to set aside proceedings for irregularity. *Nisi. D. P. ante, p. 201. 11.*
30. — to set aside verdict or nonsuit, and to have a new trial. *Nisi. P. D. ante, p. 227.*
31. — to set aside the execution of a writ of enquiry. *Nisi. P. D. ante, p. 227.*
32. — for judgment *non obstante veredicto*. *Nisi. P. ante, p. 229, 230.*
33. — for leave to amend, after judgment. *Nisi. P. D. ante, p. 230.*
34. — to arrest the judgment. *Nisi. P. D. ante, p. 247.*
35. — for leave to discontinue, after verdict. *Nisi. P. D. ante, p. 247.*
36. — for leave to enter up judgment *nunc pro tunc*. *Nisi. P. D.*
37. — for leave to enter a suggestion on the roll, to entitle the defendant to costs on account of plaintiff's not having recovered the amount for which the defendant was holden to bail. *Nisi. D. ante, p. 262.*

38. Rule for plaintiff's costs of suit, in an action on a judgment. *Nisi. P. ante, p. 248.*
39. — for leave to take out execution in ejectment, after the landlord has failed in his defence. *Nisi. P. ante, p. 50.*
40. — for leave to take out execution pending error. *Nisi. P. D. Vol. 1. p. 231. see ante, p. 53.*
41. — that the master may review his taxation, *Nisi. P. D.*
42. — to set aside an annuity. *Nisi.*
43. — that securities be delivered up to be cancelled. *Nisi. See ante, p. 14, 15.*
44. — to set aside an award. *Nisi. P. D. post.* This motion cannot be made on the last day of term.
45. — to set aside a judge's order. *Nisi. P. D. post.*
46. — that an attorney may pay costs, &c. for negligence, &c. *Nisi. Vol. 1. p. 27.*
47. — to make a rule absolute, where cause is shewn. *P. D.*

 SECT. 2.

Rules granted without Motion by Counsel.

Rule obtained upon a judge's fiat.] THE following rules are obtained in this manner:—

1. That an infant be admitted to sue by *prochein amy* or guardian. *Ante, p. 143.*
2. That an infant be admitted to defend by guardian. *Ante, p. 145. See also ante, p. 183.*

When you have obtained the judge's *fiat*, take it to the office of the clerk of the rules, and he will thereupon draw up the rule.

Rule obtained from the clerk of the rules, upon the master's allowance.] The only rule obtained in this manner is the rule for allowance of a writ of error *coram nobis*. *See Vol. 1. p. 243.*

Rules obtained from the clerk of the rules, upon a præcipe.] The following are the only rules obtained in this manner:—

1. Rule to plead. *Vol. 1. p. 115.*
2. The like, in actions against prisoners in custody of the sheriff. *Ante, p. 116.*
3. The like, in *scire facias*. *Ante, p. 90.*
4. Rule to avow in replevin. *Ante, p. 70.*
5. Rule to appear to a *scire facias*. *Ante, p. 88, 89.*
6. Rule for judgment on *postea*. *Vol. 1. p. 199.*
7. The like, in ejectment. *Ante, p. 52.*
8. The like, after writ of enquiry executed. *Ante, p. 26.*
9. The like, on *scire facias*. *Ante, p. 90.*

10. The like, on *scire facias quare executionem non* in error. *Vol. 1. p. 252.*
11. The like, in error. *Vol. 1. p. 246. 254.*
12. The like, on demurrer. *Ante, p. 36.*
13. The like, on *nul tiel record.* *Ante, p. 39.*
14. Rule to bring up insolvent debtor under the Lords' act. *Ante, p. 125.*

In these cases you make out a *præcipe* or memorandum of the rule you want; take it to the clerk of the rules, and he will draw up the rule.

Side-bar rules.] These rules were formerly moved for by the attornies, at the side-bar in court; but they may now be had of the clerk of the rules, upon a *præcipe* or memorandum in the manner above mentioned. If obtained irregularly, the court, upon application, will grant a rule to shew cause why they should not be discharged; which rule may afterwards be made absolute in the ordinary way, if no sufficient cause be shewn.

The following is a list of the side-bar rules:—

1. Rule that the sheriff return the writ. *Vol. 1. p. 93. 95. 262.*
2. — that the sheriff bring in the body. *Vol. 1. p. 96.*
3. — for time to declare, or for further time. *Vol. 1. p. 107, 108.*
4. — for special imparlance. *Ante, p. 2.*
5. — for leave to discontinue before verdict, &c. *Ante, p. 208.*
6. — to be present at the taxing of costs. *Vol. 1. p. 201.*
7. — for a *scire facias* to revive a judgment more than seven years old, and not ten. *Ante, p. 88.*
8. — for the marshal to acknowledge the defendant in his custody. *Ante, p. 113.*
9. Consent rule in ejectionment. *Ante, p. 47.*

Rules obtained from the master.] The following are the rules obtained directly from the master:—

1. Rule to declare, in replevin. *Ante, p. 68.*
2. — to plead, in replevin. *Ante, p. 70.*
3. — to reply. *Vol. 1. p. 125.*
4. — the like in ejectionment. *Ante, p. 48.*
5. — to rejoin, surrejoin, &c. *Vol. 1. p. 125.*
6. — to enter the issue. *Vol. 1. p. 133. Ante, p. 32. 212: 215.*
7. — the like, on demurrer. *Ante, p. 34.*
8. — to join in demurrer. *Ante, p. 32.*
9. — that the defendant produce the record on *nul tiel record.* *Ante, p. 39, 41.*
10. — for trial by proviso. *Ante, p. 213.*
11. — to assign errors. *Vol. 1. p. 244.*
12. — to return the *certiorari*, in error to this court. *Vol. 1. p. 245. 253.*
13. — to appear and plead, in error, *Vol. 1. p. 253. 247. 245.*

Rule obtained from the clerk of the papers.] The only rule given by the clerk of the papers, is, the rule to return the paper book; and which he gives in the margin of the paper book itself. See Vol. 1. p. 130. *Ante*, p. 33.

Rules obtained from the clerk of the errors.] The following rules may be obtained from the clerk of the errors, as of course, upon application:—

1. Rule for better bail. Vol. 1. p. 224. 249.
2. — to certify the record. Vol. 1. p. 226. 238. 250.
3. — to allege diminution. Vol. 1. p. 238.
4. — to assign errors. Vol. 1. p. 244. 252.
5. — to return the *certiorari*, in error to the exchequer chamber. Vol. 1. p. 239.

*Rule obtained from the filacer.—*The only rule obtained from the filacer is the rule to appear in replevin. *Ante*, p. 67.

CHAPTER XXXIII.

Summons and Orders.

Summons.] WHEN, in the progress of a suit, it becomes necessary to obtain the order of the court relative to any of the proceedings, we have seen in the last chapter that the parties may apply for it in term time by motion to the court. But in vacation, or in term time in all matters of minor importance, the same effect may be had by obtaining the order of a judge at chambers.

To obtain a judge's order, you must first summon the attorney or agent of the opposite party before a judge; for which purpose, make a memorandum of the order required, and take it to the judge's clerk at the chambers in Serjeants' Inn, who will thereupon make out the summons. Make a copy of this summons, and let the person who is to serve it examine it with the original, that he may be able to swear to the service if it afterwards become necessary to do so; then, serve the copy on the attorney or agent of the opposite party. If the opposite attorney or agent be an attorney of this court, the summons may be served, by leaving a copy at the place mentioned in the book at the master's office (see Vol. 1. p. 18), with any person resident at or belonging to such place; and if such attorney have not entered his name and place of abode, &c. in the said book,

then fixing up the copy in the master's office shall be deemed a sufficient service. *R. H.* 8 G. 3. It must be served before ten o'clock at night, otherwise the service will be void. *R. M.* 41 G. 3.

A summons is a stay of proceedings only from the time at which it is attendable, and not from the time of service. *Vol. 1. p. 118.*
2 W. Bl. 954. *2 New Rep.* 169. *6 Taunt.* 240.

The following are the most usual cases in which a summons is taken out, for the purpose of obtaining a judge's order:—

1. Summons for an attorney to deliver up writings, &c. *Vol. 1. p. 20.*
2. ——— for changing the attorney in the cause. *Vol. 1. p. 25.*
3. ——— to oblige an attorney to deliver his bill. *Vol. 1. p. 30.*
4. ——— that an attorney's bill be referred to be taxed. *Vol. 1. p. 30, 31.*
5. ——— to discharge a seaman or soldier arrested. *Vol. 1. p. 42.*
6. ——— to discharge a certificated bankrupt. *Vol. 1. p. 44. Ante, p. 141.*
7. ——— to discharge defendant, on filing common bail. *Vol. 1. p. 57, 68, 69.*
8. ——— for time to put in bail. *Vol. 1. p. 81.*
9. ——— for time to add bail. *Vol. 1. p. 84.*
10. ——— for time to justify. *Vol. 1. p. 88.*
11. ——— to stay proceedings upon bail bond. *Vol. 1. p. 102.*
12. ——— for time to declare. *Vol. 1. p. 108.*
13. ——— for further time to plead. *Vol. 1. p. 118.*
14. ——— to produce books, papers, &c. at the trial. *Vol. 1. p. 150.*
15. ——— for leave to enter suggestions on the issue, where by mistake the issue has been delivered without them. *Ante, p. 30.*
16. ——— to refer it to the master to compute principal and interest on a bill of exchange. *Ante, p. 31.*
17. ——— for leave to charge a prisoner in custody on a criminal account, with a civil action. *Ante, p. 110.*
18. ——— to discharge a prisoner upon supersedeas. *Ante, p. 121, 122.*
19. ——— to reverse an outlawry in nonbailable actions. *Ante, p. 165, 166.*
20. ——— to consolidate actions upon policies of insurance. *Ante, p. 180.*
21. ——— to stay proceedings upon payment of debt and costs. *Ante, p. 189.*
22. ——— for copies of written instruments. *Ante, p. 196.*
23. ——— for particulars of demand, set off, &c. *Ante, p. 198, 48, 49.*

24. Summons to put off the trial. *Ante*, p. 211.

25. ————— for leave to amend. *Ante*, p. 230.

Proceedings thereon.] When the opposite attorney is served with the copy of the summons, if he have no cause to shew, he may indorse upon the summons his consent to an order being made; it is optional with him, however, whether he do so or not. If he indorse his consent, you may immediately take the summons so indorsed to the judge's chambers, and the clerk will make out the order as a matter of course. Then serve the order on the opposite attorney. Unless the order be actually drawn up and served, the other party may proceed as if no summons had been taken out, although he have indorsed his consent as above mentioned. 4 *Taunt.* 253. *Vide infra*.

If the opposite attorney or agent do not consent to an order, attend at the judge's chambers at the hour appointed by the summons, and wait there half an hour; *R. T.* 35 *G.* 3; and if the opposite attorney or agent, or some person for him, do not attend within that time, then take out a second summons, and serve him with a copy of it as at first; and if he do not attend within the half hour after the time appointed by such second summons, take out a third summons, and serve him with a copy of it, as before; and if he do not attend within the half hour, as before, then, upon affidavit of the several summons' and attendances, (see the form, *Tidd, Forms*, 127. § 6) the judge's clerk will make out the order required, and give it to you. Then serve the order on the opposite attorney or agent. In some cases, however, the summons is granted peremptory in the first instance, and a second and third summons are not required.

But if the opposite attorney or agent attend upon any of these summons', you will be called in before the judge in your turn, and upon your stating the grounds of the application, and the opposite attorney shewing cause against it, the judge either grants or refuses the order, as he thinks fit. If he grant the order, it must be drawn up and served, otherwise the opposite party will not be bound to notice it. 7 *East*, 542. see 5 *Taunt.* 850. In ordinary cases, the attorneys attend before the judge, and support the application or shew cause against it; but in cases of difficulty, they usually attend with counsel. As to the hours at which the judges attend at chambers, see *Vol.* 1. p. 6.

Order.] The order, made as above mentioned, is in effect as binding and imperative as a rule of court; and it may in like manner be enforced by attachment, by previously moving to make it a rule of court.

If the party, however, against whom an order has been made, be dissatisfied with it, if made in term he may immediately apply to the court to have it set aside; or if made in vacation, he may apply to the court in the following term to have, not only the order set aside, but also all other proceedings which have been

had under it; by which means he obtains the opinion of the court upon the propriety or validity of the order, and it is set aside or confirmed accordingly.

Besides the orders granted upon summons, in the instances before mentioned, there are some cases where a judge at chambers will make an order without summons; such as,

1. Order that plaintiff be at liberty to enter up judgment on a warrant of attorney more than one and less than ten years old. *Ante*, p. 17, 16.
2. ——— that defendant may be holden to bail, in trover, &c. *Vol. 1. p. 51. Ante*, p. 59.
3. ——— that unless an infant defendant appear, John Doe may be assigned as his guardian, and common bail be filed for him. *Ante*, p. 145.

There are also other cases in which the judge's order merely requires the clerk of the rules to draw up a rule of court, where such rule becomes necessary in vacation. *See ante*, p. 23. 31. *After you obtain the order, in these cases, get a motion paper signed by counsel; and upon your taking these to the clerk of the rules, he will draw up the rule.*

CHAPTER XXXIV.

Affidavits.

THE only parts of an affidavit, upon which it will be necessary here to offer any observations, are, the title, the deponent's addition, and the jurat. As to the body of an affidavit, it must necessarily vary according to the circumstances of each case. If there be any rules relating to it in particular cases, they will be found under their respective heads in some preceding part of this work. But the only general rule which can be laid down is, that the affidavit set forth all the facts and circumstances necessary to be stated in each particular case, explicitly and with certainty; and that where a deponent swears to any fact as within his own knowledge, he must swear directly and positively. When the affidavit is made by one person only, it begins thus: "*A. B. of ———, gentleman, maketh oath and saith that,*" &c.; but when made by more than one person, then thus: "*A. B. of ———, gentleman, and C. D. of ———, esquire, severally make oath and say; and first this deponent A. B. for himself saith, that,*" &c. "*And this deponent C. D. for himself saith, that,*" &c.; and if there be any facts to which both of them can swear, then "*And these several deponents A. B. and C. D. say, that,*" &c.

Title.] If there be a cause in court, all affidavits made use of in the progress of it must be entitled correctly in the court (3 *M. & S.* 157. 13 *East*, 189. 1 *B. & P.* 271) and cause, stating the christian names as well as the surnames of the parties; 7 *T. R.* 661. *see* 6 *Taunt.* 286. 5 *Taunt.* 333; otherwise the court will not allow them to be read, even although the adverse party be willing to waive the objection. 2 *T. R.* 664. An affidavit to support a rule *nisi* for staying proceedings on a bail bond, should of course be intituled in the action against the bail; 1 *B. & P.* 337; but if proceedings against bail be founded upon a judgment irregularly obtained by the plaintiff, only one application is necessary to set aside the irregular judgment and the proceedings against the bail, and the affidavits in such a case may be intituled in the original action; 4 *T. R.* 688, 689; so, if a judgment be obtained irregularly, and an action be brought on such judgment, the proceedings in the second action and the judgment may be set aside by one rule, and the affidavits be intituled in the original action. *Id.* Upon an application for a rule that an attorney pay over a sum of money received by him in a particular cause, the affidavits must be intituled in the cause in which the money was received. *MS. E.* 1814. But where there is as yet no cause in court, the affidavits should not be intituled; otherwise the court probably would not allow them to be made use of. Thus, an affidavit to hold to bail must not be intituled, or if intituled it cannot be read; *R. T.* 37 *G.* 3; because as yet there is no cause in court. Where a submission to arbitration is made a rule of court, and no action is pending, the affidavits in support of an application to set aside the award, or for an attachment for not performing it, need not be intituled; 5 *East*, 21. 3 *T. R.* 601; but otherwise, where a cause is referred under an order of *nisi prius*. The proceedings upon an attachment in a civil suit being upon the civil side of the court until the attachment is actually awarded, the affidavits in applying for the rule *nisi* (3 *T. R.* 253), and in shewing cause against it (12 *East*, 165), must be intituled in the action; but after the rule is made absolute, all future affidavits (as upon an application to set aside the attachment, or the like) must be intituled "*The King v. The party attached.*" 7 *T. R.* 439. 527. 12 *East*, 165.

Deponent's addition.] The affidavit must state the true place of abode, and the true addition of the person making it; *R. M.* 15 *C.* 2; otherwise the court will not allow it to be used, or, in the case of an affidavit to hold to bail, will discharge the defendant on common bail. 1 *East*, 18. But where a deponent described himself as of "the city of London, merchant," it was holden to be sufficient. 3 *M. & S.* 165. And where a foreigner who had come to this country merely for temporary purposes, described himself as of his place of residence abroad, it was deemed sufficient. 3 *East*, 154. So, where a clerk described himself of the office where he did business during the day, although he slept elsewhere at night; 1 *M. & S.* 103; and where a person lately dis-

charged from prison, but who slept there at night, described himself as late of that prison; 11 *East*, 528; the court held these to be sufficient descriptions of the deponent's place of abode, within the meaning of the rule of court above mentioned. But a deponent cannot describe himself as *late* of a place where he has ceased to reside, when he actually resides at another place at the time of making the affidavit. 11 *East*, 529.

As to the addition: the true addition of the deponent's degree or mystery must be inserted; merchant, 3 *M. & S.* 165, and manufacturer, 3 *B. & P.* 550, have been considered sufficient.

Jurat.] The jurat is written at the foot of the affidavit, to the left of the page, in this form: "*Sworn at ———, this ——— day of ———, 1819, before me.*" But if the affidavit be made by two or more persons, their names must be written in the jurat; *R. M.* 37 *G. 3. r. 1*; and the form in that case will be thus: "*The above named deponents, A. B. and C. D. were sworn at ———, this ——— day of ———, 1819, before me.*" If the affidavit be sworn before a commissioner of the court, by a person who from his signature appears to be illiterate, such commissioner shall certify in the jurat that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same; and that the party wrote his signature in the presence of the commissioner. *R. E.* 51 *G. 3.* Also, if sworn before a commissioner, it is absolutely necessary that the jurat state the place where the affidavit was sworn; *MS. E.* 1814. 3 *M. & S.* 493. see 1 *M. & S.* 302. and *Vol. 1. p. 56*; and it should appear that the person before whom it is sworn is a commissioner of this court; 13 *East*, 189; although, perhaps, this would not be considered material, if the affidavit be intitled "*In the King's Bench,*" and the commissioner be in fact a commissioner of the court. See 7 *T. R.* 455.

If there be any interlineation or erasure in the jurat, the affidavit cannot be read or made any use of. *R. M.* 37 *G. 3.*

Defects, when aided.] Defects in affidavits are very rarely aided. In the case of affidavits to hold to bail, defects are waived in general by the appearance of the defendant; *Vol. 1. p. 58*; but they cannot in any case be remedied by a supplementary affidavit, *Id.*, excepting in the case of an affidavit of service of declaration in ejectment. *Ante, p. 45.* Where a motion for a rule *nisi* is made, upon certain affidavits, the party will not be allowed to make use of any other affidavits when cause is shewn, at least without the leave of the court, unless such additional affidavits be merely confirmatory of what was already sworn when the rule *nisi* was made. 2 *Salk.* 461.

Before whom to be sworn.] Affidavits, intended to be used in the course of any proceedings in this court, must be sworn either in court, or before one of the judges sitting at *nisi prius*, 4 *T. R.* 285,
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or at chambers; or before a commissioner of the court authorized to take affidavits by *stat. 29 C. 2. c. 5*; see *2 Sulk. 461*; or, in the case of an affidavit to hold to bail, before the officer who issues the process, or his deputy. *12 G. 1. c. 29. Vol. 1. p. 57*. When made before a commissioner, if he be also the attorney of the party for whom it is made, it cannot be read, *3 T. R. 403. see 3 M. & S. 154. 5 Taunt. 89*, unless it be an affidavit to hold to bail; *R. E. 15 G. 2. r. 2*; but an affidavit may be taken before the clerk of the attorney in the cause, if such clerk be empowered to take affidavits at all. *8 T. R. 638*. If an affidavit, intended to be used in this court, be sworn before a judge in Ireland or Scotland, the judge's signature to the jurat must be verified by an affidavit made in this country; but if sworn before any other person, or before any judge or other officer in a foreign country, not only his signature to the jurat, but also his authority to administer oaths and take affidavits, must be verified in like manner. See *1 M. & S. 302. 8 East, 364. 7 T. R. 251. 2 H. Bl. 275*.

Where an application to the court is to be founded on an affidavit, such affidavit must be sworn and produced in court, before the rule shall be drawn up. *R. H. 36 G. 3. r. 1*.

[When to be filed.] Affidavits to hold to bail are filed at the time you sue out the process. See *Vol. 1. p. 62*. In all other cases, if the affidavit be sworn in town, they must be filed with the clerk of the rules, as soon as used, in order that they may be given in evidence, if necessary, on an indictment for perjury; *7 T. R. 315*; but if sworn before a commissioner, they must be first filed with the clerk of the rules, and then copies taken of them for the purpose of being used in court. *29 C. 2. c. 5. R. M. 9 G. 2*.

Also, in all cases where a special time is limited in any rule, before which time an affidavit is required to be filed, no affidavit filed after that time shall be made use of in court or before the master, unless it shall appear to the satisfaction of the court that the filing of such affidavit, within the time limited, was prevented by inevitable accident. *R. M. 36 G. 3*.

PART II.

ARBITRATION.

SECT. 1.

The Reference.

Where there is a cause in court.] WHERE the matter intended to be submitted to arbitration is also the subject of an action pending in this court; if the defendant have been holden to bail, it is usual to wait until the cause shall be called on at *nisi prius*, and then take a verdict for the damages stated in the declaration, subject to the award of the person to whom the cause is to be referred; otherwise the reference to arbitration would be a discharge of the bail. 2 *Saund.* 72. b. Vol. 1. p. 289. But if the defendant have not been holden to bail, then the cause may be referred, at any time before trial, by rule of court; or, when the cause is called on, by order of *nisi prius*, with or without a verdict being taken, as the parties shall judge proper. Where an attorney agreed to refer a cause at *nisi prius*, without the consent or knowledge of his client, the court refused to set aside the rule of reference on that account, even although the application for that purpose was made previously to any proceedings being had before the arbitrator. 3 *Taunt.* 486.

If the cause be referred at *nisi prius*, the junior counsel for both parties fix upon the arbitrator, indorse their briefs accordingly, and hand them in to the clerk of *nisi prius* or associate, in order that he may draw up the order of *nisi prius* from them. But if the cause is to be referred before trial, then let each party get a motion paper to that effect signed by counsel; take them to the clerk of the rules, and draw up the rule. Or, by the attorneys on both sides signing a consent, they may thereupon obtain a judge's order to the same effect. After obtaining the rule or order, you proceed as is directed in the next section.

It may be necessary to mention in this place, that the arbitrator cannot (as far as relates to the action referred) award the payment of a greater sum than is laid as damages in the declaration; nor will the court, after a verdict taken as above mentioned, allow the declaration to be amended, so as to enlarge these damages, even upon affidavit that a greater debt can be proved before the arbitrator. 1 *M. & S.* 675.

[Where there is no cause in court.] Matters in difference between parties, which are not the subject of any action pending at the time, may be referred to arbitration in any of the three following ways:—1st, By mutual bonds or other deed or written agreement of submission, merely; 2dly, By such bonds, deed or agreement, containing also the parties' assent that such submission shall be made a rule of court; 9 & 10 W. S. c. 15. § 1; and, 3dly, By parol agreement; in which case, however, the submission cannot be made a rule of court, even although the parties consent to it. 7 T. R. 1.

The submission should be executed by the parties themselves, and not by their attorneys, unless by virtue of a power of attorney. And where a person signed a submission as attorney for another, without a power expressly authorizing him to do so, and the arbitrator awarded that the attorney should pay a sum of money, the court held that the attorney should perform the award, and that his principal was not bound by the submission. 1 L. Raym. 246, 1 Salk. 70. Also, where two persons bound themselves jointly and severally to perform an award, and the arbitrator awarded a sum to be paid by each, the court held that both were jointly liable for each of the sums so awarded. 7 T. R. 352. see Barnes, 55.

The submission, in order that it may be made a rule of court under stat. 9 & 10 W. S. c. 15. § 1, must be of some controversy or suit, "for which there is no other remedy but by personal action or suit in equity." Therefore, the court have refused to make a submission a rule of court, where part of the matter agreed to be referred (namely, an assault) had been made the subject of an indictment. 8 T. R. 530. but see 7 Taunt. 422. So, where a debt submitted arose out of an illegal transaction, the court of Common Pleas set aside that part of the award which directed payment of it. 2 B. & P. 371. Also, it has been holden that the right of real property cannot pass by mere award; 1 Ro. Abr. 242. 1 L. Raym. 115; but it is clear that a conveyance, or release of land may be awarded. 3 Bl. Com. 16. The submission should distinctly specify the matter of controversy submitted; or, if stated generally, it should be "of all matters in difference between the parties." Where an action is pending, it may be "of all matters in dispute in the cause between the parties," or "of all matters in dispute between the parties in the cause;" 3 T. R. 626; the former confining the submission to the matter of the suit then pending; 2 T. R. 644; the latter extending it to all matters in difference; and the costs being to abide the event, makes no difference, *Id.* 645. It has been holden that a reference of "all matters, in difference between the parties," does not preclude one of the parties from afterwards suing for a cause of action subsisting at the time of the reference, if such matter were not laid before the arbitrator; 4 T. R. 146; but in a late case, where the reference was "of all actions and causes of action between the parties," and after the award made, the party thereby ordered to pay a sum of money, wished to deduct from it a sum due to him by the opposite party, and which had not been

under the consideration of the arbitrators, the court held that he could not do so; for the rule of reference was large enough to include that transaction, and it should have been discussed before the arbitrator. 15 *East*, 213, and see 1 *Str.* 646. A submission to arbitration by an executor or administrator, is not of itself an admission of assets; 5 *T. R.* 6; but it impliedly includes in it a submission of the question whether the executor have assets; and if the arbitrator award that he shall pay a sum of money, this is virtually an award that he has assets to that amount, and he must pay it. 7 *T. R.* 453.

The clause of consent in the submission, that it shall be made a rule of court, may be to this effect: That the parties do thereby "consent and agree that this their submission to the arbitration or umpirage above-mentioned, shall be made a rule of his Majesty's court of King's Bench at Westminster, pursuant to the statute in such case made and provided." Where this clause mentioned only "the court," without stating which, the court of Common Pleas allowed the submission to be made a rule of that court. 2 *B. & P.* 444. And where the consent was, that the "award" (instead of the "submission") should be made a rule of court, the court held the mistake to be immaterial. 3 *East*, 603. see 2 *Str.* 1178. *contra*. Also, where the clause was conditional, thus: "And if the obligor shall consent that this submission be made a rule of court, that then," &c.; the court held it to be sufficient. 1 *L. Raym.* 674, 1 *Salk.* 72.

After entering into the submission, and consenting that it shall be made a rule of court, either party may revoke his submission by deed, at any time before the making of the award, and before the submission has actually been made a rule of court; and he is not afterwards liable to an attachment for a nonperformance of the award, particularly if the arbitrator have notice of the revocation before the award is made. 7 *East*, 608. 5 *Taunt.* 452. The bond of submission, however, becomes forfeited by such revocation, and the obligee may immediately sue upon it.

A parol submission, we have seen, cannot be made a rule of court. *Ante*, p. 11. 7 *T. R.* 1.

SECT. 2.

The Award, &c.

Proceedings upon the reference.] IT is usual to have those persons sworn, who are intended to give evidence before the arbitrator. For this purpose, if the cause be referred at *nisi prius*, and the witnesses be in court, let each attorney set down the names of his witnesses, together with the name of the cause, upon a piece of paper, and give it to the crier of the court, who will thereupon

swear the witnesses; pay the crier 2s. for each witness. In other cases make the like memorandum, stating also whether the persons to be sworn are parties in the cause or only witnesses; take it to the judge's chambers, or to the court at Westminster, and the judge's clerk will have the witnesses sworn, and give you a memorandum to that effect, signed by the judge; pay 2s. for each witness. If the witnesses or parties, however, be not sworn, yet if no objection on that account be made before the arbitrator, the court will not set aside the award. 1 B. & P. 91.

The next step is, to obtain an appointment from the arbitrator. If the cause have been referred at *nisi prius*, get the order of *nisi prius* from the associate, if the cause were tried at the assizes; or from the clerk of *nisi prius*, if it were tried in London or Middlesex. Then get an appointment in writing from the arbitrator, as to the time and place the parties and their witnesses are to attend before him; and make a copy of the order of *nisi prius* and appointment, and serve it on the opposite attorney; it is usual, also, at the same time to inform him if you purpose attending by counsel. If the cause were referred by rule of court, draw up the rule with the clerk of the rules, as already mentioned; get an appointment from the arbitrator; and serve a copy of the rule and appointment, as above directed. In all other cases, a notice of the time and place appointed by the arbitrator will be sufficient. Care must be taken that it be ordered by the rule that all proceedings in the cause be stayed; otherwise the reference will be no stay of proceedings. 2 L. Raym. 789.

Each party is next to furnish the arbitrator with a state of his case, and a list of the witnesses he intends to produce. If briefs have been made out, and the arbitrator be a gentleman of the profession, this is usually done by delivering to him one of the briefs on each side.

At the time appointed, the arbitrator hears the parties, or their counsel or attorneys, and hears the evidence, in the same order as at a trial at *nisi prius*. He then proceeds to make his award.

Award.] The award is engrossed on 35s. stamped paper, and signed by the arbitrator in the presence of a witness. If it contain, however, 30 common law sheets or upwards (of 72 words each), it requires an additional stamp of 25s. for every 15 sheets above the first fifteen. 55 G. 3. c. 184. see 6 Taunt. 171. It is usual to make out the award on stamped paper for the party in whose favour it is made, and to give copies merely, upon unstamped paper, to the others; unless the latter require originals signed and stamped as above mentioned. Where a cause was referred to three arbitrators, with a power to them or any two of them to make an award, an award made by two of them was holden good, it appearing that the third had notice of the meetings, &c. Willes, 215. When the award is made, the arbitrator gives notice to the attorneys of the parties that it is ready, and that each of them may have his part on the day therein specified, on payment of the expenses. After the

award is delivered, 8 *East*, 54, or after notice given by the arbitrator of its being ready for delivery, 6 *East*, 309, no mistake in it, in the calculation of figures, or in the sum awarded, can be corrected.

Time for making it enlarged.] If it be necessary that the time limited for making the award should be enlarged, the arbitrator may enlarge it as a matter of course, if a power be given him for that purpose in the submission or order; but notice should be given to the parties of his having done so. 1 *Marshal Rep.* 66. The mode of enlarging the time in this case, however, depends entirely on the terms of the submission or order. See 1 *M. & S.* 1. 15 *East*, 97. 1 *Taunt.* 509. 4 *Id.* 658. But if no such power be given, the consent of the parties on both sides must be obtained, before the time can be enlarged. If the cause were referred at *nisi prius* or by a judge's order, or if the submission contain a clause of assent that it be made a rule of court, the time is enlarged thus: *Movè to make the order or submission a rule of court; draw up the rule with the clerk of the rules, and serve a copy of it on the opposite attorney; get motion papers (to enlarge the time for making the award) signed by the counsel of each party, and take them to the clerk of the rules, who will thereupon draw up the rule; then get another appointment on the rule from the arbitrator, and serve a copy of this rule and appointment on the opposite attorney.* Where the cause is referred under a rule of court, get the motion papers signed by counsel, draw up the rule, and serve a copy of the rule and appointment, as above directed. In all other cases, a consent in writing by the parties will be sufficient. See 5 *East*, 189.

Umpire.] Where a matter is referred to two or more arbitrators, it is usual to provide in the submission that if the arbitrators shall not agree upon their award before a time therein specified, an umpire shall be appointed, by whose award the parties shall abide. This umpire is either named in the submission, (which is much the preferable mode) or the arbitrators are therein given a power to appoint one generally. In the latter case, the arbitrators may appoint the umpire at any time before or after the time limited for them to make their award, provided it be before the time limited for the umpire to make his umpirage; 15 *East*, 556. 3 *M. & S.* 559; and they may do so, even before they have themselves entered upon an examination of the matter referred to them. 2 *L. Raym.* 644. but see 1 *L. Raym.* 222, 1 *Salk.* 70. Where the umpire was chosen by lot, the court held that the award was not bad on that account. 16 *East*, 51.

Although the office of arbitrator is determined by the appointment of the umpire, 1 *L. Raym.* 222, 1 *Salk.* 70. and see 1 *L. Raym.* 671, 1 *Salk.* 71. 2 *Saund.* 133. a., yet if the arbitrators appoint an umpire who refuses to act, they may afterwards appoint another; see 11 *East*, 367; or if they join with the umpire in his umpirage, it is only surplusage, and will not vitiate the instrument.

4 *Taunt.* 232. 1 *W. Bl.* 463, and see generally 2 *Saund.* 133. (n. 7.)

Costs.] Where there is no cause in court, the award as to costs depends entirely upon the terms of the submission; if the submission give the arbitrator no authority as to costs, he cannot award them. See *Willes*, 64. But where authority is given to him upon that subject, he may order either party to pay the costs, or each to pay a moiety, unless the submission require that the costs abide the event; or if the award be silent as to costs, each party must pay his own costs, and the costs of the reference equally.

Where there is a cause in court, the award, as to the costs of the reference, depends upon the terms of the rule or order under which the cause is referred, in the same manner as where there is no cause in court, as above mentioned; and if the rule or order give the arbitrator no authority as to costs, he cannot award them. *Willes*, 64. 7 *Taunt.* 213. see 1 *Taunt.* 165. But if by the rule or order of reference, the costs (generally) are to abide the event, this includes the costs of the reference as well as the costs of the cause, according to the practice of this court; 9 *East*, 436; although the rule is otherwise in the court of Common Pleas. 1 *B. & P.* 34. see 1 *H. B. L.* 223. *Willes*, 64. Where the arbitrator awarded the costs of the reference, but did not specify the sum, the court of Common Pleas also held that it might be ascertained by the prothonotary; 4 *Taunt.* 658; and in other cases, where the sum was specified, that court held that it was examinable by the officer of the court, who might reduce it if he thought it exorbitant. 5 *Taunt.* 342. 3 *Id.* 461. If each party be ordered to pay a moiety of the costs of the reference, one of them may pay the entire sum, in order to get the award from the arbitrator; and he may afterwards have the same remedy against the other if he refuse to repay his moiety, as he would have for the nonperformance of any other part of the award. 1 *B. & P.* 93.

But as to the costs of the action, the arbitrator may order either party to pay them, without any express authority being given to him upon that subject by the rule or order of reference. 2 *T. R.* 644. If by such rule or order, however, the costs are to abide the event, the arbitrator cannot exercise any discretion in the awarding of them; but the party, who would have been entitled to costs if the action had proceeded, shall be entitled to them under the award; and to the same amount, and under the same circumstances; and therefore if the defendant, from the amount of the damages awarded, would have been entitled to enter a suggestion on the roll, under the courts of conscience acts, if a verdict for the same amount had been given, he shall be entitled to costs under the award; or where a plaintiff in trespass would be entitled only to as much costs as damages, he shall have no more under the award. 3 *T. R.* 138, 139. See upon this subject generally, *Hullock*, 417—432.

Lastly, as to the taxation of the costs awarded: If the arbitrator have not awarded a gross sum for costs, but costs generally, with or without any express direction as to their being taxed by the master,—move to make the order or submission a rule of court; draw up the rule with the clerk of the rules, and get an appointment at the foot of it from the master; serve a copy of the rule and appointment on the opposite attorney; and at the time appointed attend before the master, who will tax the costs and mark them on the rule.

Arbitrator's authority, how determined.] The arbitrator, as soon as he has made his award, is *functus officio*, and cannot afterwards alter it in any material part. *Ante*, p. 287. So, if he do not make his award within the time limited by the rule, order, or submission, or within the enlarged time (if the time have been enlarged), any award made by him afterwards will be void. By the appointment of an umpire, *ante*, p. 287, or by an express revocation of the submission, *ante*, p. 285, or by an implied revocation of it, (as by the marriage of a feme sole, party, 5 *East*, 266, or the death of a party, 1 *Marshall Rep.* 366, after the submission, and before the award made,) the authority of the arbitrator is determined.

SECT. 3.

Setting aside the Award.

In what cases.] It may be necessary to premise that the court will not enter into an examination of the merits, upon an application to set aside an award, 2 *Bur.* 701. 1 *Str.* 301, unless it appear manifestly from the merits that the arbitrators have acted dishonestly or corruptly; 1 *Saund.* 327. *d.*; for the parties having chosen to substitute the decision of an arbitrator for that of a judge and jury, must abide by his determination in matters of law as well as of fact. But, with this exception, every ground for relief against an award, in a court of equity, is equally available in a court of common law. 3 *Bur.* 1259. The following are the most usual defects, for which an award may be set aside.

If the award do not pursue the submission in every material point, the court will set it aside. 1 *Str.* 116. As where an arbitrator awarded payment of a debt, which did not accrue until after the parties had entered into the submission, the court set aside the award; 8 *T. R.* 571; but the court will not presume that fact; it must be proved. *Id.* So, where several matters are submitted, and the arbitrator omits to decide on one or more of them; 7 *East*, 80. *Willes*, 268. but see 1 *Taunt.* 549; or where all matters in difference are submitted, and the arbitrator omits to decide as to some one matter which has been pointed out to him; 16 *East*, 58; the

court will set aside the award. But no other matters in difference than those decided on, will be intended by the court, unless they have been made known to the arbitrator before he made his award. 8 *East*, 445. see 15 *East*, 213. Also, if the arbitrator decide upon more matters than were submitted to him, the award will be bad; as if, by the terms of the submission, he have to determine the boundaries of certain lands, and he enter into the question of title, and decide upon it; or the like. See 3 *Taunt.* 378. But where, upon a submission of all matters in difference, by partners, the arbitrator awarded that the partnership should be dissolved, it was holden good. 1 *W. Bl.* 475. So, where a debtor paid his creditor a sum of money, and the creditor commenced an action against him upon a further claim, and they submitted all matters in difference to arbitration; the court held that the arbitrator in his award might order the plaintiff to repay a part of the sum which the defendant had paid him, it appearing to have been paid in a mistake. 2 *T. R.* 645. And where the question submitted was, whether *A.* or *B.* had the right to the tithes of certain lands, an award of undivided moieties to both was holden good. 3 *Taunt.* 426. If an award, however, be made in favour of a person who is a stranger to the submission, it will be bad, unless it be for the advantage of one who is a party to it; 1 *L. Raym.* 123. *Cro. El.* 4. 5 *Co.* 78. *Cro. EL.* 758. 1 *Salk.* 74. 11 *East*, 188. 8 *East*, 445. and see 1 *Ro. Abr.* 249. *pl.* 15; and the same, of course, if made against a stranger. So, if the award be not made and delivered, or be ready for delivery, by the time limited in the submission, and according to the terms of it, or within the enlarged time (if the arbitrator had authority to enlarge it), any award made afterwards will be bad. See 1 *L. Raym.* 115. 247, 1 *Salk.* 69, 3 *Salk.* 45. 4 *East*, 584. 6 *East*, 310. *ante*, *p.* 289.

If there be any uncertainty in a material part of the award, at least if it do not contain certainty to a common intent, 1 *Bur.* 274, it is bad. See 2 *Str.* 1024. But when an award ordered that the defendant should do one or other of two things, in the alternative, it was holden that the award was good, if either of the things were capable of being performed. 1 *Taunt.* 549. So, where a sum of money was ordered to be paid within a certain time from the date of the award, and the award bore no date, it was holden to be sufficiently certain. 1 *Salk.* 76, 2 *L. Raym.* 1076. So, where a bond was ordered to be delivered up to be cancelled, within a certain time from the date of the said bond, without stating the date, it was considered sufficient. 2 *L. Raym.* 1141. So, in the common cases of costs, where their amount is not ascertained by the award, still this circumstance does not render the award bad for uncertainty; the maxim in these and the like cases being, "*Id certum est quod certum reddi potest.*"

The award must be a final settlement of the matters referred; otherwise it will be bad. See 2 *Str.* 1024. Therefore where the plaintiff was ordered to pay the plaintiff a sum of money, unless within 21 days (which would be after the time limited for making

the award) he should exonerate himself by affidavit from certain payments, &c., in which case he was to pay a less sum; the award was holden bad. 7 *T. R.* 73. So, where the award was that the defendant should beg the plaintiff's pardon, in such manner and place as the plaintiff should appoint, it was holden bad; for the manner and place, which were the most material circumstances, were yet to be determined. 1 *Salk.* 71. But where the parties bound themselves to abide by the opinion of counsel on the construction of a statute, and the counsel gave his opinion in favour of one of the parties; it was holden that this opinion was final and conclusive, notwithstanding it also recommended that the printed statute should be compared with the parliament roll, before the matter should be settled. 1 *M. & S.* 105. So an award that one of the parties should pay a sum of money to the other, on a future day, in full of all demands, is sufficiently final; 2 *L. Raym.* 961. 1 *Lev.* 188; and an award that one should give the other his promissory note for a certain sum, is good, being the same as awarding payment at a future day. 2 *Str.* 1082. So, where the award was, that an action pending between the parties should be discontinued, and that each should pay his own costs, it was considered sufficiently final, being in effect an award of a *stet processus*. 9 *East*, 497.

If one part of an award be inconsistent with another, it will be bad. As, where the arbitrator awarded that *A.* should pay *B.* 100*l.* and both should give general releases; and that at a subsequent time *B.* should pay *A.* 20*l.*: the award was holden bad. *Willes*, 66. see 4 *Taunt.* 632. So, if the award be ineffective, as if upon a submission for a partition between tenants in common, the arbitrator award their several portions, but omit to order deeds of conveyance to be executed, so as to vest the several allotments in their respective owners; the award is bad. *Willes*, 248. Also, if the arbitrator award any of the parties to do an act which is illegal, the award is bad. See 5 *Taunt.* 454.

Where the award was written on a wrong stamp, the court refused to set it aside upon that account; although such a circumstance would be a good answer to any application made to enforce it. 7 *T. R.* 95. If there have been any irregularity in the proceedings, however,—as if no notice of the meeting were given to the party against whom the award was made, or the like,—the court will set aside the award. 1 *Salk.* 71.

If the arbitrator have been guilty of any gross misconduct in the course of the proceedings, the court will set aside the award. See 2 *Bur.* 701. 1 *Salk.* 71. 8 *East*, 344. 9 and 10 *W. 3. c. 15. § 3.* Where an arbitrator refused to receive evidence, the court set aside the award. See 2 *L. Raym.* 857. 1 *Salk.* 73. But where the arbitrator, after closing the examination, refused to call another meeting, and made his award; the court refused to set aside the award, although the defendant's attorney swore that he was in possession of evidence which would have repelled that upon which the award was founded. 1 *Marshal*, 404. So, where the umpire re-

ceived the evidence from the arbitrators, without examining the witnesses, the court held that the award was not bad on that account, if the umpire had not been requested to examine them. 4 *T. R.* 589. So where one of the defendant's witnesses was examined by the arbitrator, after the evidence on both sides was closed, and the plaintiff's attorney gone; although upon this second examination he gave a different evidence from what he had given before, and the arbitrator's decision was influenced by it; yet the court held that this circumstance would not affect the award, unless it were brought about by the management of the defendant's attorney. 1 *B. & P.* 175. If the arbitrator make a mistake in point of law, and it do not appear upon the face of the award, the court will not set aside the award upon a mere suggestion of the mistake, or upon affidavits of the facts; 13 *East*, 357. 1 *Taunt.* 48; but if the mistake appear upon the face of the award, or even upon the face of another paper delivered with it (3 *East*, 18), the award will be set aside.

If an award be good in part, the performance of that part which is good may be enforced, provided it be perfectly distinct from, and independent of, that part which is bad. *Willes*, 64. 253. 2 *Wils.* 293. 8 *East*, 445. 13.

How.] Where no action is pending, and where the submission does not contain a clause of assent that it shall be made a rule of court, the award cannot be set aside by any application to this court; but if the party grieved cannot avail himself of the defects in it by pleading, where an action is brought against him upon the bond, &c. his only remedy is by application to a court of equity. But where an action is pending, or where the submission contains the clause above mentioned, the award may be set aside upon application to the court.

Where the submission contains the clause of assent above mentioned, this application must be made before the last day of the term next after the award is made; 9 & 10 *W. S. c.* 15. § 2; even an application that the award be referred back to the same arbitrator to reconsider it, on the ground that he had not sufficient materials before him when he made it, must be made within that time. 2 *T. R.* 781. Also, it cannot be made on the last day of term; *Cowp.* 23; nor will the court, after the time above mentioned, entertain a motion to set aside an award, for any defect whatever, 7 *T. R.* 73, even although such defect appear upon the face of the award. 1 *East*, 276. This statute, however, does not extend to awards, where the reference has been by order of *nisi prius*, 8 *East*, 466. 2 *Bur.* 701, nor to other cases where an action is pending; 6 *Taunt.* 111; yet the court will not in such cases entertain the motion after any considerable lapse of time; 6 *Taunt.* 111; and if a verdict have been taken, the application must of course be made before the expiration of the rule for judgment, 3 *B. & P.* 244, in the same manner as the motion in arrest of judgment or for a new trial.

First move to make the order or submission a rule of court; and then, within the time above mentioned, get counsel to move for a rule to shew cause why the award should not be set aside, upon an affidavit of the facts necessary to sustain the objections intended to be made; but if it be intended to object to the award, merely for defects appearing upon the face of it, an affidavit will be unnecessary. As to the title of the affidavits in this case, see *ante*, p. 280. It may be necessary to observe that cause cannot be shewn against this rule on the last day of the term, but the rule must be made preemptry for the following term. *R. M. 36 G. 3. r. 4.*

SECT. 4.

Enforcing Performance of the Award.

Where there is no cause in court.] WHERE there is no cause in court, we have seen that the submission to arbitration is by bond, deed or other written instrument, containing a clause of consent that the submission should be made a rule of court; or by bond, deed, or other written instrument, not containing such clause of assent; or by parol.

In the two latter casès, in which the submission cannot be made a rule of court, the only means of enforcing a performance of the award is by action. If the submission be by bond, the prevailing party may have an action of debt on the bond; if by other deed, he may have covenant; if by instrument not under seal, or by parol, he may have assumpsit on the submission; or in any of these cases, if the award be for a sum of money merely, he may have debt on the award. See 2 *Saund.* 62. b. 2 *L. Raym.* 1040. *Peake*, 227. 1 *Esp.* 194. 377. 8 *T. R.* 571. 15 *East*, 209. 100. Debt on an award, however, will not lie against an executor or administrator, where the submission was by the testator or intestate. But in order to take advantage of this, the defendant must demur to the declaration; *Cro. El.* 557. 600. 2 *Ro. Abr.* 107. *C. pl.* 3; for if, instead of demurring, he plead this matter to the action, and a verdict be found against him, he cannot take advantage of it afterwards, either in arrest of judgment or by writ of error. 10 *H.* 6, 25 a. *Plowd.* 182 a. *Vaugh.* 97. *Cro. Jac.* 47. *Yelv.* 55. 1 *Sid.* 333. It may be necessary to observe that no objection for matter extrinsic, not appearing upon the face of the award, can be pleaded in these actions, or be given in evidence under the general issue; 1 *Saund.* 337 a. (n. 3). 8 *East*, 344; the party's only remedy in such a case is by bill in equity. But if the award be bad on the face of it, the defendant may set it out on oyer, and demur.

But where the submission contains the clause of assent above mentioned, the prevailing party has an option of enforcing a performance of the award, either by action as above directed, see

Hardw. 106. 1 *B. & P.* 81, or by attachment. 9 & 10 *W. S.* c. 15. § 1. *Willes*, 292 n. 1 *Salk.* 72. 1 *L. Raym.* 674. In order to proceed by attachment, let an affidavit be made of the due execution of the bond or other instrument of submission, by the subscribing witness; see the form, *Tidd, Forms*, 229. § 3; annex the bond, &c. to it, and give it to counsel, with a motion paper, to move to make the submission a rule of court. This is a motion of course, and is absolute in the first instance. Draw up the rule with the clerk of the rules, and (if costs be awarded) get an appointment on it from the master; serve a copy of the rule and appointment on the opposite attorney; and at the time appointed, attend before the master, who will tax the costs, and mark them on the rule.

When you have got the costs taxed, if the party who has to perform the award do not do so within the time thereby limited, (if any be limited), make a copy of the rule and allocatur, and of the award, and let the person to whom the money or other thing is awarded, after examining the copies with the originals, serve the copies upon the other party personally (1 *B. & P.* 394. 5 *Taunt.* 813), shewing him at the same time the originals; and let him then demand the money or other thing awarded. If it be inconvenient for the party himself to make the demand personally, he may depute his attorney or any other person to do it for him, by a letter of attorney; a copy of which must be served with the copies of the rule and award, and the original shewn at the same time.

If upon such demand, the opposite party do not pay the money, &c. in compliance with the award, then let an affidavit be made of the demand and refusal, (see the form, *Tidd, Forms*, 230. § 5. 231. § 6), and an affidavit of the due execution of the award (see the form, *Tidd, Forms*, 229. § 4), and also of the execution of the letter of attorney; and upon these affidavits, let counsel move for a rule nisi for an attachment for the nonperformance of the award. Draw up the rule with the clerk of the rules, and serve a copy of it, at the same time shewing the original. Make an affidavit of the service, and give it with a brief to counsel, to move to make the rule absolute. If made absolute, draw up the rule with the clerk of the rules, and take it to the crown office, to one of the clerks in court, who will thereupon make out the attachment; pay him 18s. 6d. Take it to the sheriff's office, and get a warrant on it; give the warrant to your officer, who will thereupon arrest the party; pay him 1 guinea for the caption.

In shewing cause against the rule for the attachment, the other party may impeach the award for any defect appearing upon the face of it, although the time limited for applying to set aside the award may have elapsed; 7 *T. R.* 73; but not for matter extrinsic. 6 *T. R.* 161. But the court will in no case grant an attachment against a peer, 7 *T. R.* 171, or member of the house of commons; 7 *T. R.* 448; nor against an administrator or executor, where the submission was made by the intestate or testator, *Willes*, 315. Nor will the court grant an attachment, pending a rule for setting

aside the award; *Willes*, 215; nor pending an action on the same award; nor will they allow the plaintiff to waive the action, in order to apply for the attachment. 1 *B. & P.* 81. The court, however, have granted an attachment, pending a foreign attachment in London upon the same award. 4 *T. R.* 313 n.

Where the award itself was lost, the court, upon affidavit of that fact, granted an attachment on a copy of it. 1 *Str.* 526. and see 3 *Taunt.* 45.

Where a party filed a bill in equity to set aside an award, after entering into a rule of this court to abide by it, the court held it to be a contempt, and granted an attachment against him; but they afterwards discharged him without fine, rather than set a small one for so high an offence. 3 *Bur.* 1256. 1 *W. Bl.* 311. and see 1 *Salk.* 73.

Where there is a cause in court.] If no verdict have been taken, the mode of proceeding is by attachment or action, in the manner above mentioned. But if a verdict were taken, the plaintiff may proceed either by attachment or action, as above directed, or he may enter up judgment upon the verdict and sue out execution; and the defendant (if the award be made in his favour) may proceed by attachment or action.

In order to proceed to judgment on the verdict, enter a rule for judgment with the clerk of the rules, as in ordinary cases; 4 *East*, 310; move to make the order of nisi prius a rule of court, and draw up the rule as before directed; and the marshal or associate will thereupon give you the nisi prius record. Enter the postea on it for the amount of the sum awarded; 1 *East*, 401. 1 *B. & P.* 480. 3 *Id.* 244. 4 *East*, 310. 5 *East*, 199, 143, 144. 1 *Taunt.* 151; get it stamped with a 10s. stamp, and marked by the clerk of the postea; then take it, together with the rule and award, and the papers in the cause, to the master, who will thereupon tax the costs and sign judgment. It is not necessary that the defendant in this case should be served with a copy of the award; nor is it necessary to obtain leave of the court to sign judgment. 1 *East*, 401. 1 *B. & P.* 480. 3 *Id.* 244. Where the award was lost, the court, upon an affidavit stating that fact, and stating the substance of the award, allowed the plaintiff to sign his judgment. 3 *Taunt.* 45.

After signing judgment, you may sue out execution, as in ordinary cases. If the award state any particular time at which the money is to be paid, execution should not be sued out, nor indeed in strictness, perhaps, should judgment be signed, before that time have elapsed. 4 *Taunt.* 319.

PART III.

ATTACHMENT.

In what cases.] If a person, upon being served with the process of the court, use contemptuous expressions of such process or of the court itself; the court, upon affidavit of the fact, will grant an attachment against him: 2 *Hawk. c. 22. § 36*: if of the court, the rule is granted absolute in the first instance; if of the process, it is a rule nisi only. 2 *Hawk. c. 22. § 36. 1 Str. 185. 1 Salk. 84. B. T. 17 G. 3. Soy. 47. 6 Mod. 43. 2 Str. 1068. Say. 114.*

If the sheriff return a rescue, the court will grant an attachment against the rescuers, absolute in the first instance; *Say. 121. 4 Bur. 2129. 1 Str. 531. 2 Salk. 586*; for, the sheriff's return in this case being in the nature of a conviction, and not traversable, (the only remedy for the party, if he be not guilty, being by action against the sheriff for his false return, *Hardw. 112*), it would be useless to grant a rule nisi. See 2 *Hawk. c. 22. § 34.*

The court have a power of punishing attorneys and other officers of this court, by attachment, for misbehaviour in the exercise of their profession. Thus, if an attorney sue or defend an action, without authority, particularly if he do so from any improper motive; or if a person, who is not an attorney, sue or defend an action for another, with or without authority: the court will punish him by attachment. 2 *Hawk. c. 22. § 6—9*. So, if a person put an attorney's name to process, without his authority, the court will grant an attachment against him, and will also set aside the proceedings; 1 *Bur. 20. see 5 Bur. 2660. Vol. 1. p. 18*; or if an attorney allow an unqualified person to act in his name, or shall in any manner act as agent for such person, the court, upon application and affidavit of the facts, may order the attorney to be struck off the roll, and may commit such unqualified person to the prison of the court, for any time not exceeding one year. 22 *G. 2. c. 46. § 11. Vol. 1. p. 18*. Also, where an attorney and his articulated clerk joined in the affidavit of execution of the articles, and the clerk swore to the service under them, and was consequently admitted an attorney; but, it appearing afterwards that the articles were merely collusive, the pretended clerk being in fact an apprentice to a hatter, and his affidavit of service under the articles false, the court ordered the clerk to be struck off the roll, and granted an attachment against the attorney for the collusion. 2 *W. Bl. 991*. If an attorney refuse to deliver up to his client, writings or money received by him in the course of his professional business, the court

may punish him by attachment; but they seldom grant an attachment in such a case, without first making a rule upon the attorney to deliver up the writings, &c., and if that rule be not obeyed, the attachment then issues for the contempt. 2 Hawk. c. 22. § 10. So, if an attorney be guilty of fraud or malpractice in his profession, the court will punish him by attachment. See Vol. 1. p. 27. 2 Hawk. c. 22. § 10, 11.

If the sheriff do not obey the rule to return the writ or bring in the body, the court will grant an attachment against him, absolute in the first instance. Vol. 1. p. 96—99. So, in other cases, for not executing writs, or for executing them in an oppressive manner, or for not executing them effectually, &c. the court will punish the sheriff or his officers by attachment. 2 Hawk. c. 22. § 2—5. see 2 Str. 1089. Vol. 1. p. 262. So, where an attachment against the sheriff was directed to the coroner, and the latter was ruled to bring in the body, the court granted an attachment against him, absolute in the first instance, for not obeying the rule. 2 W. Bl. 911. 1218. The sheriff, however, is not liable to an attachment, for not taking a bond in replevin; but the defendant, if damnified, may have his remedy against him by action. 2 T. R. 617. ante, p. 64. As to the cases, in which the court will punish the judges of inferior courts, justices of peace, gaolers, &c. by attachment, see 2 Hawk. c. 22. § 25—32. 1 W. Bl. 432.

If any person wilfully disobey the process of the court, he is punishable by attachment. Thus, if a witness, regularly served with a subpoena, do not attend at the trial, the court, upon an affidavit stating a personal service of the subpoena ticket a reasonable time before the trial, and payment or tender of his reasonable expenses to the witness, will grant an attachment against him. Vol. 1. p. 152. 2 Hawk. c. 22. § 34.

For disobedience of any rule of court, or of any judge's order or order of nisi prius made a rule of court, the party guilty of it is punishable by attachment, if the rule or a copy of it have been personally served upon him. 2 Hawk. c. 22. § 37. see 2 W. Bl. 892. Thus, the nonperformance of an award, if made under a rule of court, or if the submission, order of nisi prius, or judge's order, be made a rule of court, is punishable by attachment. Ante, p. 293—295.

Where a person is ordered by a rule of court to pay costs, and a copy of the rule, with the master's allocatur thereon, is personally served on him, and a demand made of the costs by the person to whom they are payable according to the terms of the rule, or by some person deputed by him by letter of attorney (see ante, p. 218); if he do not pay the costs, when thus demanded, the court will grant an attachment against him, absolute in the first instance. R. T. 17 G. 3. see Cowp. 136. 3 T. R. 512. Where a plaintiff, however, obtains a rule to discontinue, upon payment of costs, he is not punishable by attachment if he do not pay them. 7 T. R. 6. So, if a defendant pay money into court, and do not afterwards pay the costs, no attachment will be granted against him for the

nonpayment of them, but the plaintiff in such a case should proceed in the action. 2 *Str.* 1220. *Pr. Reg.* 259. *see ante*, p. 185. So, if he obtain a rule or order to stay proceedings upon payment of debt and costs, he cannot be punished by attachment, if he do not afterwards pay the debt and costs; but the plaintiff should proceed in his action. *Ante*, p. 189. But, upon obtaining leave to compound a penal action, the rule must express that the defendant doth thereby undertake to pay the sum for which he has leave to compound the action; *R. E.* 33 *G. 3. r. 2*; and if he do not afterwards pay it, the court upon application will award an attachment against him. 5 *T. R.* 257.

If any person abuse the process of the court, he is punishable for it by attachment. As where execution was sued out without a judgment to warrant it; *Hobart*, 264. *Fortesc.* 267; where a woman sued an appeal of the death of her husband, knowing at the same time that her husband was alive; 8 *H. 4.* 7. 2 *Hawk. c. 22.* § 39; where a *latitat* was sued out, merely for the purpose of bringing a defendant within the jurisdiction of an inferior court, in order to sue him there; 2 *Hawk. c. 22.* § 40; where the plaintiff, after bringing an action in one court, commenced an action in another, for the same debt, and against the same defendant; 14 *H. 7.* 6, 6. 6 *Co.* 60. *Sav.* 14. 2 *Hawk. c. 22.* § 41. *and see Id.* § 42; or where a person sued out bailable process and thereupon arrested a witness, for the purpose of preventing him from giving evidence before an arbitrator; 2 *W. Bl.* 1110; or the like. So if a person forge the process of the court, or alter or fill it up after it has been sealed; or if he obtain judgment in ejectment, by an affidavit of service of the declaration on one who was procured to personate the tenant; in these and the like cases the court will punish the person so offending, by attachment. 2 *Hawk. c. 22.* § 43. The court have also granted an attachment against a person for sending inflammatory papers to the jurors summoned upon a certain trial, and for preventing some of them from attending by sending them notice that the trial was put off. 3 *Bur.* 1564. And in another case they granted an attachment against a man for threatening a prosecutor with danger of his life, because he had prosecuted another for some offence. 1 *Wils.* 75.

As to contempts committed in the face of the court, there is of course no necessity for an attachment, that being merely a process to bring the defendant before the court; but he may be instantly apprehended and imprisoned at the discretion of the judges, without any other proof or examination. See as to the punishment of jurors for misconduct, 2 *Hawk. c. 22.* § 14—24.

It may be necessary to add, that the court will not grant an attachment against peers or members of parliament, for the nonperformance of an award, nonpayment of costs, or the like; 7 *T. R.* 171. 448; but for very gross contempts, such as rescous, disobedience of the king's writs, or the like, they will. 2 *Hawk. c. 22.* § 33. 1 *Bur.* 634. *Say.* 50.

The attachment.] The application for an attachment must be founded on an affidavit of the facts necessary to constitute the contempt; (see as to the title of affidavits, in cases of attachment generally, ante, p. 280); excepting in the case of a rescue, where the sheriff's return of the rescue is deemed sufficient. The court thereupon grant either a rule for the attachment absolute in the first instance, or a rule to shew cause why the attachment should not issue: for nonpayment of costs on the master's *allocatur*, or against the sheriff for not obeying the rule to return the writ or bring in the body, or for a contempt of the court in the execution of process of the court, the rule is absolute in the first instance; *R. T. 17 G. 3*; in all other cases, it is a rule *nisi* only. If a rule *nisi* merely, it cannot be moved for on the last day of term; *3 Smith, 118*; but if absolute in the first instance, it may. See *Vol. 1. p. 37. 12 East, 591.*

If the rule be granted, draw it up with the clerk of the rules; and (if a rule *nisi*) serve a copy of it personally on the defendant, at the same time shewing him the original rule; or if it appear from circumstances that the defendant keeps out of the way, for the purpose of avoiding a personal service of the rule, the court upon an affidavit of these circumstances, (and which are usually stated at the time the rule *nisi* is moved for) will order that leaving it for him at his last and most usual place of abode, shall be deemed good service. *MS. M. 1814.* Then make an affidavit of service, and give it with a brief to counsel, to move to make the rule absolute. If the rule be made absolute, draw it up with the clerk of the rules; take the rule to one of the clerks in court, at the crown office, who will thereupon make out the attachment; pay 18s. 6d.; see the form, *Tidd, Forms, 111. § 15.*—and of the indorsement, *Id. 112. § 15. e*; although a judicial writ, it must be returnable on a general return day, and not on a day certain, whether the action from which it originated were by original or by bill. *1 Str. 624.* Take the attachment to the sheriff's office, if it be directed to him, and obtain a warrant on it; give the warrant to your officer, who will thereupon arrest the defendant; pay him one guinea for the caption. The sheriff is not entitled to poundage: *2 East, 411.* It may be necessary to mention that the defendant cannot be arrested on a Sunday; *1 T. R. 265, 266. but see Willes, 459. 1 Atk. 55*; nor can even the rule *nisi* be served on a Sunday. *8 T. R. 86.*

If the sheriff or other officer to whom this writ is directed, do not return it when necessary, you may rule him to do so. If he return *non est inventus*, you may sue out an *alias* in the manner above directed; and if he return *non est inventus* to the *alias*, then get a certificate to that effect from your clerk in court, and take it to a judge's chambers and obtain a warrant thereon, upon which the party may be arrested in any county.

When the defendant is arrested upon this writ or warrant, he is brought into court or before a judge at chambers, and sworn to answer interrogatories; he is then committed, unless, with the leave

of the court or judge, he enter into a recognizance, with sureties, for his appearance in court from day to day, to answer interrogatories concerning such matters as may be objected against him. Or the defendant may appear voluntarily, and be sworn and enter into the recognizance, as above mentioned. Serve a notice on the opposite attorney that the defendant will appear in court, or before a judge at chambers, on a certain day, in order to enter into a recognizance, and be sworn to answer all such interrogatories as shall be exhibited against him, stating the names and additions of the bail, as in ordinary cases. This notice should be given 24 hours at least previously to the defendant's being brought up, if the bail reside in town; or two days or more, if they reside elsewhere, according to the distance. Then get a rule from the clerk of the rules on the crown side, to bring up the defendant, if he be in the custody of the marshal; but if in the custody of the sheriff, it seems a writ of *habeas corpus* will be necessary. *Imp. C. B.* 570. When brought up, the bail justify, and the recognizance is taken, as in ordinary cases. It is entirely discretionary with the court or judge whether they will allow the defendant to be bailed or not; and in very gross cases, or where the defendant appears evidently guilty, they usually refuse it. *2 Hawk. c. 22. § 1.*

Interrogatories, &c.] Upon the defendant's being bailed or committed, the court, upon application, will grant a rule that unless the prosecutor exhibit interrogatories against him in the Crown Office, within four days, the defendant shall be discharged. Draw up the rule with the clerk of the rules on the crown side, and serve a copy of it on the prosecutor or his attorney; and if the interrogatories be not exhibited within the time limited by the rule, the defendant may move to be discharged out of custody, or (if he be out on bail) that his recognizance be discharged. The prosecutor, however, may exhibit his interrogatories at any time before the motion is actually made. *2 Hawk. c. 22. § 1.*

These interrogatories must be exhibited in all cases, excepting the case of an attachment for nonpayment of money, which is in the nature of a civil execution; but in all other cases the interrogatories alone contain the charge against the defendant, the attachment being but process to bring him in to answer to the charge when exhibited. Therefore the defendant cannot come in and confess the contempt, before the interrogatories are filed; for until they are filed, there is no charge in court against him to which he can plead. *4 Bur. 2105, 1 W. Bl. 637.* The case of an attachment for a rescue, indeed, depends upon different grounds; for there the sheriff's return of the rescue is in itself a conviction, and not traversable. *4 Bur. 2129, 1 W. Bl. 640.* Yet even in that case, it is the invariable practice of the court to put the defendant to answer interrogatories, unless the prosecutor consent to his confessing the contempt without them. *5 T. R. 362.*

Engross these interrogatories on stamped parchment, and get them signed by counsel; R. M. 34 G. 3; see the form, 10 West.

404. File them with the examiner, who will make out a copy on Ad. stamped paper for the defendant. If the defendant be in custody of the marshal, get a rule from the clerk of the rules on the crown side to have him brought up before the examiner to be examined; get an appointment on it from the examiner; and serve copies of the rule and appointment on the marshal and on the defendant. If in custody of the sheriff, the defendant, I think, must be brought up by habeas corpus. If out on bail, however, it is merely necessary to get an appointment from the examiner, and serve a notice of it upon the defendant or his attorney; or if the defendant desire the examination, he may get the appointment, and attend to be examined at the time so appointed. The examiner thereupon examines the defendant upon the interrogatories; and will afterwards make out copies of the examination for the parties upon Ad. stamped paper; pay him 11d. per sheet, including stamps. If the defendant, upon being brought up, refuse to answer to the interrogatories, he shall be recommitted; or if out on bail, and he do not attend to be examined, his recognizance may be estreated, or the court may again attach him for this second contempt, and punish him at their discretion.

When he has been examined, the prosecutor then moves that the examination, &c. be referred to the master; which is a motion of course. Draw up the rule with the clerk of the rules on the crown side; get an appointment upon it from the master, and serve a copy of the rule and appointment on the opposite attorney. Let each attorney then attend before the master, together with their clerks in court, and counsel, if thought necessary, and the master will hear the statements and arguments on both sides. After which, when you learn that the master is ready, move the court for his report; a notice of which motion should be given to the defendant, as he must attend personally in court at the time the master makes his report. It may be necessary to observe, that this motion cannot be made on the last day of term, without the permission of the court, or under very special circumstances. 1 W. Bl. 311. If the defendant have cleared himself of his contempt in his answer, the master will report accordingly, and the court will thereupon order him to be discharged out of custody, or, if he be out on bail, will order his recognizance to be discharged; but he is still liable to an indictment for perjury, if his answer be false. 6 Mod. 73. see 2 Hawk. c. 22. § 1. 3 Bur. 1257. But if sufficient be confessed by the answer to prove him guilty of the contempt, the master accordingly reports him in contempt; and the court give judgment of fine, or imprisonment, or both, and sometimes of corporal punishment, Cro. Car. 146. 1 Wils. 22, at their discretion, in the same manner as upon a conviction for a misdemeanor at common law. The court, however, if they think fit, may waive the giving of judgment, and order the recognizance to be discharged; 3 Bur. 1256, 1 W. Bl. 311; or the attorney-general may consent that the defendant continue at large, upon his recognizance to appear, under a rule of court, at some future time. 2 Bur. 797. If

judgment be not given during the same term, the cause will be set down in the peremptory paper with those motions appointed to come on peremptorily in the ensuing term. *R. H. 34 G. 3.*

If the defendant clear himself of his contempt and be discharged, he is not in strictness entitled to costs; yet if it clearly appear to the court that the prosecutor must have known his complaint to be ill founded and vexatious, they will order him to pay costs to the defendant. *3 Bur. 1329.*

As the business on the crown side of this court is conducted by the clerks in court, the attornies on either side have little to do in the proceedings upon an attachment; but each employs a clerk in court, who conducts the proceedings for him.

In the case of an attachment for the nonpayment of money or nonperformance of an award, or the like, the attachment being in the nature of a civil execution, interrogatories are never filed, but the party is detained in custody until he pays the money or performs the award. Yet in cases where the rule for the attachment is absolute in the first instance, if the defendant wish to dispute the fact of the contempt, he may rule his adversary to exhibit interrogatories as above mentioned.

As to the proceedings upon an attachment against the sheriff, see *Vol. 1. p. 98.*

APPENDIX.

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It has been thought necessary to notice, in an appendix, the following rule of court and cases, which have been published or decided since this work went to press.

See Vol. 1. p. 99. 103. No rule shall be drawn up for setting aside an attachment regularly obtained against a sheriff for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail bond, unless the application for such rule shall (if made on the part of the original defendant) be grounded upon an affidavit of merits, or (if made on the part of the sheriff, or bail, or any officer of the sheriff) be grounded upon an affidavit, shewing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff, (as the case may be), at his or their own expense, and for his or their only indemnity, and without collusion with the original defendant. *R. M. 59 G. 3.*

Vol. 1. p. 220. After judgment against a prisoner, and a *habeas corpus* sued out for the purpose of bringing him up, to be charged in execution, he sued out, and obtained an allowance of a writ of error; held that he could not, after that, be charged in execution, but should be remanded to his former custody. *1 Barn. & Ald. 676.*

Vol. 1. p. 287, 288. Upon a render, it is not necessary, in order to discharge the sheriff, that an affidavit of the service of the notice of render should be filed at the judge's chambers; or that a certificate of the render and commitment should be lodged with the master; or that an entry of the *committitur* should be made in the marshal's book, kept in the office of the clerk of the judgments. *R. v. The sheriff of Middlesex, in the case of Phillips v. Dore. MS. E. 1819.* The last is not necessary in any case; the two former are necessary, merely for the purpose of procuring an *exoneretur* upon the bail-piece.

Vol. 1. p. 290. Sunday is not reckoned one of the four days a *ca. sa.* against the principal must lie in the office, in order to charge the bail, even although it be not the last day of the four. *1 Barn. & Ald. 528.*

Vol. 2. p. 247. After judgment upon demurrer, (whether the demurrer have been argued, *1 Str. 426*, or not, *6 Taunt. 650*), the court will not entertain a motion in arrest of judgment: because, if the demurrer were argued, the court have already declared their opinion upon the points of law which would form the subject of the objections in arrest of judgment; and if not argued, it has arisen from the laches of the party himself, who might have availed himself of any errors in the record, had he proceeded to argument.

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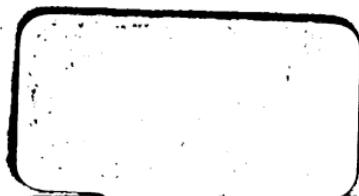
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